

	<b>WORKPLACE INVESTIGATIONS</b>	<b>Document No:</b>	<b>HR-PRO-016</b>
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	<b>Authorising Officer: Business Manager, General Secretariat</b>		

## 1. Purpose

This procedure outlines the general process to be used in carrying out workplace investigations.

## 2. Scope

This procedure applies to all ACBC agencies. This procedure does not cover investigation of safety incidents. For safety incidents refer to [WHS-PRO-018: Reporting and Investigating Incidents and Hazards](#).

## 3. Related Documents

[ACBC Conditions of Employment](#)

[ACBC Privacy Policy](#)

[WHS-PRO-018 Reporting and Investigating Incidents and Hazards](#)

[WHS-PRO-006 WHS Issue Resolution](#)

[WHS-PRO-019 Notification of Incidents to Workplace Authorities](#)

## 4. Definitions

### Workplace Investigation

A workplace investigation is a systematic process for establishing the facts and circumstances surrounding a allegation or complaint made regarding a workplace or worker and using the information obtained to take timely and appropriate action.

### Decision Maker

The Decision Maker is the person who appoints the investigator, receives and considers the investigation report and decides what action is appropriate in light of the investigation report. At the ACBC, the Decision Maker is most likely to be an Agency Head or a Bishop.

### Investigator

An investigator is an appropriately qualified person appointed by the Decision Maker to investigate a workplace issue and make recommendations arising from the investigation. The investigator may be appointed from within an agency or appointed externally.

### Terms of Reference (TOR)

Terms of reference set out the core people and components of the workplace investigation, as well as the boundaries and methods to be utilised. Without solid terms of reference, an employer's well-meaning attempt to gather information and fix a workplace problem can fail, or cause further issues. As well as establishing an understanding of what is required and by when, TOR create an excellent framework for the more detailed investigation plan. TOR can prevent such pitfalls as misunderstandings, unintended breaches of privacy, and negative effects on relationships.

### Complainant

The complainant is the person who made an allegation or complaint.

### Respondent

The respondent is the person against whom an allegation or complaint has been made.

## 5. Responsibilities

### Workers

Any worker can make a complaint or an allegation. However, consideration should be given to the many other means of resolving an issue before taking this step.

### **Supervisors**

Supervisors are required to take appropriate action when a complaint is received. This may include:

- Taking action to resolve the issue (if there is a significant safety issue, immediate action must be taken)
- discussing the complaint with their supervisor/Agency Head
- Obtaining advice from the Office for Employment Relations (OER)
- Obtaining advice from the HR function in their Agency

### **Agency heads**

Agency Heads are responsible for:

- Determining whether a formal investigation should be carried out (in consultation with the supervisor/OER or the HR function in their Agency).
- Appointing an investigator in consultation with the OER/HR Function in their Agency
- If they are the Decision Maker, receiving the investigation report and any assessment or recommendations from the investigator, as sought under the TOR of the investigation.
- If they are the Decision Maker, approving any actions to be taken in response to the investigation report which may deal with findings, recommendations, or further investigation.

### **Investigator**

The investigator is responsible for:

- Planning and carrying out the investigation
- Collecting the relevant information
- Evaluating the evidence
- Making any assessment or recommendations as sought under the TOR
- Writing the investigation report

### **Office for Employment Relations**

The Office for Employment Relations (or HR Function in an Agency) is responsible for:

- Assisting the Decision Maker and others in implementing this process
- Providing advice on the appointment of internal and external investigators
- Assisting the Decision Maker in drafting the TOR
- Providing advice on the process for conducting workplace investigations
- Providing advice on possible courses of action

### **Decision Maker**

- Appointing the Investigator
- Drafting the TOR for the Investigation
- Considering findings made by the investigator
- Determining appropriate actions arising from the investigation

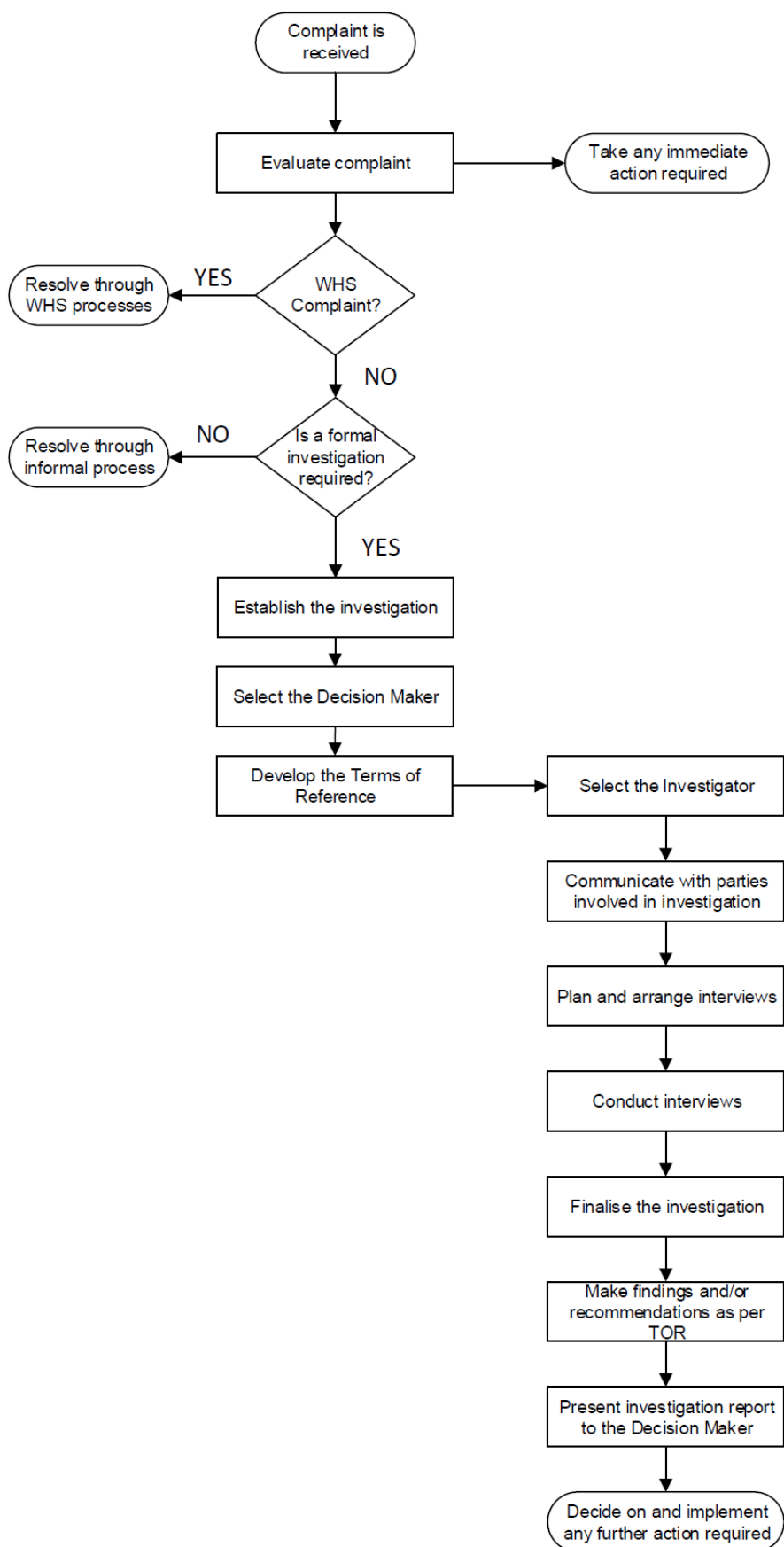
## **6. Process**

In general, the process for conducting a workplace investigation will be triggered by the receipt of a allegation, complaint or grievance. In most cases the complaint or grievance is likely to be made to a supervisor, agency head, the HR function in an agency or the Officer for Employment Relations.

The Office for Employment Relations/HR Function in an agency is responsible for managing the process for conducting a workplace investigation, even though they may not be conducting the workplace investigation themselves.

It is not advisable for an ACBC worker to conduct a workplace investigation without the appropriate training or an understanding of legal, risks and other issues involved.

The general process for conducting a workplace investigation will be as follows:



## 7. Evaluation

When an allegation or complaint is made it must be evaluated. All allegations/complaints received should receive a response, but not all allegations/complaints will need to be investigated. This will depend on the nature of the allegation/complaint. If a matter is serious and urgent it may require an immediate investigation. In other cases less formal avenues for resolution may be available. There may be some immediate actions that should be attended to before any investigation commences.

### Evaluating an allegation/ complaint

When an allegation or complaint is received, it should be evaluated or assessed to determine:

- How to handle it? (formally or informally; through the grievance process; through the WHS issue resolution process; through some other process)
- Who should handle it? (A supervisor or agency head; Office for Employment Relations; external body etc.)
- Who needs to be informed? (immediate supervisor? colleagues? etc.) Care must be taken to only inform those who need to know (to avoid allegations of defamation and maintain privacy and confidentiality).
- What immediate response or action (if any) is required (e.g. preservation of incident area; standing aside personnel etc.)

### Immediate issues to consider

- **Legal Professional Privilege**

Before commencing a process check with the Office for Employment Relations for advice on whether the process should be established under the protection of legal professional privilege. Refer to Appendix A (3) for an explanation of legal professional privilege.

- **Preserving Evidence**

Depending on the type of complaint action may be needed to preserve camera footage/ surveillance, computer hard drives, building access records, telephone, email and internet logs, access to confidential information, access codes etc. Legislation may prescribe how some of this information can be accessed, collected and retained.

- **Criminal Matters**

If there is an allegation where the matter may be one that is criminal in nature (e.g. assault, child pornography or suspected paedophilia etc.), the matter must be reported to the Police as soon as possible. The Police will carry out their process which may include a police investigation. It is important to allow Police to carry out their investigation first to ensure that any evidence that may exist can be collected without the possibility of it being tainted. The Police can advise on whether a workplace investigation can proceed prior to or in parallel with a Police investigation. If the allegation is a criminal matter seek advice from the Office for Employment Relations.

- **Complaints regarding workplace health and safety matters**

In certain instances a safety matter may have to be reported to the appropriate authority. (See [WHS-PRO- 019 Notification of Incidents to Workplace Authorities](#). Complaints regarding Workplace health and safety matters will be processed according to the Australian Catholic Bishops Conference's work health and safety procedures. If the matter raised is a health and safety incident or hazard refer to [WHS-PRO-018 Reporting and Investigating Incidents and Hazards](#). If the issue raised is a work health and safety issue refer to [WHS-PRO-006 WHS Issue Resolution](#).

## 8. Is a formal investigation required?

Not every allegation/complaint requires a formal investigation. Sometimes the formality and public nature of a formal investigation can be counterproductive in resolving an issue. Often allegations/complaints arise from problems with communication or misunderstandings which can be resolved by a discussion between the parties. Other forms of dispute resolution such as mediation or a discussion facilitated by an independent person may be more effective.

Generally, a workplace investigation must be conducted if:

- There is an allegation of serious misconduct (e.g. theft, assault etc. Refer to [HR-PRO-013](#))
- There is a safety incident. For investigation of safety incidents refer to ([WHS-PRO-018](#))

In deciding whether a formal investigation is necessary, it is useful to consider:

- The complainant's expectations – it may not always be possible or reasonable to accommodate the complainant's expectations
- Is there sufficient connection between the allegations and the person's employment to require consideration of the allegation/complaint?
- How serious is the allegation/complaint? Is it an allegation of misconduct either against the ACBC or an agency (e.g. theft) or is it a complaint about an individual (e.g. bullying), or is it more in the nature of a minor workplace conflict that can be resolved through a different means. Is the allegation/complaint part of a pattern of behavior?
- Is it a complaint of inappropriate treatment where there is a significant difference in authority between the complainant and the respondent? If so, an informal process might operate unfairly to the person with less authority, and a formal investigation may be a better course of action.
- Does it seem that the facts are likely to be in dispute, or is it a situation where the facts are clear and that this is more a case of finding a solution to the situation?
- Evaluate the likely reactions of the parties involved. Is it likely that they can demonstrate respect, understanding, good faith and are likely to be able to work together towards positive outcomes?
- Is there a possibility that the allegation/complaint may lead to further disciplinary procedures including the termination of employment?
- Has litigation been threatened or initiated? If so, a formal investigation is likely to be more appropriate as it will provide a sound basis to defend litigation.

**Note: Investigation documents can be disclosed.** Unless the investigation proceeds under legal professional privilege and that privilege is maintained, all of the documents produced during the investigation (e.g. witness statements, notes, draft reports etc.) are likely to be relevant to and could be disclosed in future legal proceedings, and also potentially disclosed to an external authority (e.g. WHS authority).

## 9. Standing aside a worker while an investigation proceeds

Standing a worker aside means taking the worker away from their normal duties, without loss of pay until the matter is resolved. In some cases it will be appropriate to stand aside a worker against whom a complaint has been made. In some cases it may be necessary to remove the complainant from the workplace. The decision to remove the complainant needs to be based on considerations of their health and well-being, and not because they have made a complaint, as this may be viewed as victimization.

In deciding whether a worker should be stood aside, consider:

- The nature and seriousness of the allegation/complaint. The more serious the allegation, the more likely that standing aside the worker would be appropriate.
- How strong does the allegation appear to be? Is there a reasonable basis for believing that a worker may be disciplined?
- Will the agency or workplace harmony be affected if the worker is/is not stood aside?
- Is there a risk of further harm (physical or psychological) to anyone if the worker is not stood aside?
- Can an investigation proceed effectively if the worker against whom an allegation has been made is still in the workplace? Is intimidation or interference with witnesses a genuine possibility?
- Is there an alternative to removing the worker from the workplace? E.g. changed lines of communication, assigning the worker to different duties, moving the worker to a different area etc.)
- If the worker is covered by an award, follow any processes regarding standing aside a worker required by the award.

Sometimes workers will need to have an explanation of why a colleague is not at work or is at a different work location. Be mindful of the way in which workers are informed so as not to divulge confidential information.

## 10. Anonymous Complaints

Sometimes complaints are made anonymously. Do not ignore these complaints. Treat each complaint seriously. In some cases there is a legislative requirement to take action – i.e. WHS complaints and bullying & harassment allegations must be addressed. In other cases there may be some action that can be taken. Consider whether:

- Any discreet enquiries can be made to verify the allegation (e.g. if there is an allegation of fraud, enquiries can be made confidentially)
- Is the allegation/complaint coherent, and is there a “ring of truth” about them? i.e. have previous complaints of a similar nature been received?

Err on the side of at least some action if possible. Anonymous complaints which are not actioned may resurface at a later date. Keep written records of any attempts made at addressing the complaint and any actions taken.

If the allegations are too vague to be understood, or appear to be malicious or of no substance, it may be reasonable to take no further action on the complaint. Keep written records of the steps taken to reach this decision.

## **11. Reluctant Complainants**

Usually reluctant complainants want action but do not want to be visible. In most cases there will be a need to proceed on allegations irrespective of the worker's stated position e.g. a complaint of bullying, harassment or sexual harassment

Inform the worker that the complaint must be dealt with appropriately, including by investigation, if it is required. Discuss the proposed approach with the complainant and encourage them to cooperate and assist. Offer the use of ACBC's Employment Assistance Program (if appropriate).

In most cases total confidentiality cannot be guaranteed. However, information should only be given to those who have a right to know, such as those who are directly involved. Those who are given information should be made aware of the requirement to keep the information confidential and not to approach others involved in the investigation or to discuss matters under investigation with others involved.

Keep written records of the steps taken to address the complaint.

## **12. Establishing an Investigation**

Before commencing an investigation, it is important to be clear on the purpose of the investigation and how the findings are likely to be used. For example:

- If the outcome of an investigation is likely to lead to disciplinary action, there is a possibility that the report may be considered by the Fair Work Commission, and the investigator may be required to give evidence.
- If the allegations involve discrimination or harassment, the investigation report may eventually be disclosable in Equal Employment Opportunity proceedings.
- If the investigation involves a workplace health and safety issue, a workplace health and safety inspector may have a right to call for the report.

In some cases the Decision Maker may require the investigator to provide a full suite of recommendations for action, including remedial action. If so, then this requirement should be made clear in the terms of reference (TOR) for the investigation. In other cases the investigator may only be required to make findings related to factual issues, so that the Decision Maker is totally responsible for making any decision as to the outcome. In this case the TOR should specifically state that the investigator is not to make recommendations.

It is also important to check any industrial instrument for any specific obligations in relation to the investigation process.

## **13. The Decision Maker**

The Decision Maker will generally be the Agency Head or a Bishop (Chairman of a Bishops Commission) that oversees the Agency or Office as long as:

- There are no close personal relationships between the Decision Maker and any other stake holders
- There is no reasonable perception of bias or conflict of interest

The Decision Maker will appoint the investigator and develop the Terms of Reference (TOR), with assistance from the Office for Employment Relations or the senior HR Function in an Agency.

## 14. Terms of Reference (TOR)

The TOR will give direction to the investigator on what the investigator is required to achieve. The TOR should be worded in a way that avoids any inference of bias or suggests a particular outcome. Typically the TOR will include:

### **What the investigator is required to do including:**

- The scope of the investigation – the circumstances and issues to be investigated
- Reporting requirements – progress reports, final report. Define who the report is to be addressed to and who is likely to have access to the report.
- Findings or recommendations or both? This investigator may be asked to take statements only; or to take statements and reach findings of fact or to do this as well as make recommendations.

### **The investigator's authority**

- What categories of information will be made to the investigator
- What authority the investigator has to contact and interview people

### **The investigator's obligations**

- Acting fairly, without bias (including disclosing any potential conflict of interest)
- Giving those who are implicated in the investigation a full opportunity to participate and provide any information to the investigation.

### **Any limitations placed on the investigator**

- This should include whether the investigator is asked to make findings or recommendations

## 15. Selecting an Investigator

The investigator will generally be appointed by the Decision Maker. The investigator must be given a letter detailing the terms of reference (TOR) of the investigation. There is a formal requirement for the investigator to act fairly, and without bias, and to provide natural justice.

When selecting an investigator the following factors must be considered:

- The investigator must be appropriately trained and experienced.
- Ideally, the investigator must not have had any prior involvement in the matters under investigation. Be careful of the prospect of actual or perceived bias. Either may undermine the validity of the investigation
- The need for objectivity and perceived independence
- The ability of the investigator to remain neutral
- The skills required of a good investigator – good listening skills, objectivity and common sense are a good start.
- The capacity to devote the time required.
- The suitability of the investigator in respect to experience and integrity. i.e. the outcome of the investigation will be accepted and respected by the parties being investigated

A consideration of the above should help the Agency Head decide whether an internal or an external investigator is required. The Office for Employment Relations should be consulted when appointing an investigator.

In addition to the TOR the investigator must be given the following:

- A description of the nature and source of the complaint or grievance
- Details of the allegation(s) as confirmed by the complainant, including any documents or other information provided by the complainant to support their complaint
- Any correspondence with the complainant or other stakeholders
- Copies of relevant documents such as employment contracts, position descriptions, training records etc.
- A description of the processes so far i.e. any investigation or management of the complaint prior to it being referred to the investigator. Sometimes a timeline of events would be helpful
- Any statements created so far
- The outcomes being sought by the complainant (if known and relevant to what the investigator is being asked to do)
- Information about any issues of particular sensitivity (cultural, interpersonal etc.)

## 16. Communication to stakeholders

The Office for Employment Relations or senior HR Function will advise relevant stakeholders of the process and request their cooperation. This can be done verbally, but must be followed up in writing (via email or letter). The communication should:

- Advise that an investigation has commenced
- Ask for full cooperation with the investigation
- The name of the investigator
- Give some indication of how and when they might be contacted by the investigator
- Emphasise the need for confidentiality and discretion
- Advise that they can contact the Office for Employment Relations/senior HR Function if they have any concerns or issues
- Define victimization and caution that it will be dealt with severely.

## 17. Managing the Investigation

Once the investigation has been established, the investigator's role is to investigate the complaint following the TOR. This will involve:

- A thorough understanding of the TOR and issues to be resolved
- Planning the investigation (documents required, order of interviews etc.)
- Proceeding in a fair way, providing natural justice to all stakeholders
- Preparing statement and records, with appropriate attention to confidentiality

## 18. Fact finding and interviewing

The primary purpose of an investigation is to find facts. Usually this will involve interviewing people to find out what actually happened.

**Plan the order of interviews:** In most cases, the complainant should be interviewed first to gain an understanding of the nature of the complaint and clearly identify the allegations which will form the basis of the allegation. If there are witnesses, then the witnesses should be interviewed next. The witnesses should be interviewed separately. The respondent is then asked to respond to the complaint.

**Identify the questions to be asked of each witness:** As the investigation progresses, and the investigator identifies the issues involved, the investigator should plan the questions to be asked, keeping in mind that the purpose is to find out what happened on the balance of probabilities (refer to Appendix A). When formulating questions remember that witnesses should only be advised of matters relevant to their involvement. Never ask a witness to speculate.

**Anticipate any questions that you may be asked:** Anticipate and prepare consistent responses.

**Consider any relevant objective material:** e.g. documents, emails, photos, phone records etc. before commencing interviews. The investigator may need to present this material to a particular interviewee and ask them to respond to it.

**Make sure all witnesses have been interviewed:** The major stakeholders should be asked whether they wish to nominate any other witnesses who may be able to corroborate their story.

## 19. Arranging Interviews

Prior to conducting an interview, a letter stating the allegation(s) must be sent to the respondent. The Workplace Investigations Letter of Allegations ([HR019](#)) can be used as a template.

Before interviewing, the investigator should notify each interviewee of:

- The purpose of the interview
- The date, time and place of the meeting
- Who will be attending
- Explain the process to the interviewee.
- Explain confidentiality (Note: Do not guarantee confidentiality)
- Give the interviewee the opportunity to have a support person present.
- Explain the roles, including the role of the support person



### **The role of a support person**

- The support person must not be someone who is implicated or likely to be a witness
- The role of the support person is not to control the process or to provide responses on behalf of the interviewee. The role of the support person is to provide support and when necessary, advice. It should be made clear at the outset of the interview that if the support person refuses to accept this protocol, the interview will be terminated.
- Natural justice must be provided at each stage of the investigation process. The interview stage is not the time for a respondent to answer allegations. At this stage the interview is a fact-finding exercise, and not the time for a respondent to respond, nor is it a disciplinary process.

## **20. Conducting Interviews**

The aim of the interviews is to obtain as much information as possible about the specific allegations of the incident such as dates, times, exact words, witness names, locations etc. This will allow the investigator to “test” the information with others being interviewed. This will also help the employer to clearly put the specifics of the allegation to the respondent.

### **During the interview:**

- Explain the purpose of the interview and the role of the interviewer
- Take notes and explain that the interviewee will be given a copy of the record and asked to sign and return the record to the investigator. When taking notes, make sure that the date, time location and name(s) of attendees are noted.
- Explain how the information gained will be used i.e. that information will be used to report to the Decision Maker, and that information may be used in disciplinary procedures, a review of procedures etc.
- Make the interviewee aware that they are required to answer truthfully and to the best of their knowledge, and explain that failure to do so may be viewed very seriously and could lead to disciplinary action
- Ensure that the interviewee and their support person are fully aware of, and understand their responsibilities in relation to confidentiality, defamation, victimisation and vexatious complaints
- Use open questions to get background and interviewee’s version (See Appendix B)
- Use closed questions to clarify and test (refer to Appendix A: How to Ask Questions)
- Do not ask leading questions (See Appendix B).
- Show empathy not sympathy
- Observe body language and eye contact (as 70% of communication is non-verbal)

The Workplace Investigation Interview Preparation Sheet ([HR020](#)) can be used to prepare for an interview.

## **21. How to provide natural justice**

Natural justice is required at the investigation stage and subsequently if disciplinary proceedings are commenced.

Natural justice requires stakeholders, especially those who might be implicated by adverse findings, to be treated fairly in the process and to be provided with:

- A full understanding of the nature of the allegations made and the types of factual findings which the investigator has to make
- A proper opportunity to provide any information which the person can provide in relation to those matters

Natural justice requires that before adverse findings are made, all relevant witnesses should be interviewed and all relevant lines of enquiry followed. To ensure this, employees who may potentially be the subject of adverse findings have to be given an opportunity to suggest other witnesses or lines of enquiry to the investigator and the investigator should make sure that these lines of investigation are pursued.

A delayed investigation can sometimes be seen as a denial of natural justice as the passage of time could make it impossible for parties involved to remember critical facts.

### **At the end of the interview**

- Ask the interviewee if there is anything else that may be of relevance
- Explain the next steps in the process
- Ask the interviewee to sign off the interview notes (this can be done at a later stage when the notes are typed up).
- If appropriate, reiterate the interviewee's access to EAP (if interviewee is an employee or a volunteer)
- Make the interviewee aware that there is a possibility that they may have to be interviewed again
- Remind the interviewee to keep the interview and information provided confidential to avoid allegations of contamination of evidence or conspiracies

## **22. Documentation**

It is extremely important for the investigator to keep good records of documents created or collated as part of the investigation. If the investigation is conducted under legal professional privilege, then investigation notes will also be privileged. Privilege can be lost if documents are not properly created and controlled during the investigation process. The investigator should liaise with the Office for Employment Relations/Senior HR Function to obtain advice on who may be provided with or shown copies of documents.

## **23. Confidentiality**

To preserve the integrity of the investigation process and to ensure that the outcome of the investigation is not prejudiced, it is important that all participants involved maintain confidentiality. They should not speak about allegations, the complaint or investigation to anyone who is not directly involved. Failure to do so may give rise to allegations of defamation by a respondent.

The investigator will be required to keep various people within the Agency/ACBC informed about the allegations and the progress of the investigation. Information will need to be provided to the complainant, the respondent and witnesses to enable them to respond.

## **24. Communication during investigation**

It is important to maintain communication with stakeholders during the investigation process to inform them of the stage of the investigation, so that those who are involved do not lose faith in the process.

## **25. Finalising the investigation**

The stage of the investigation is to reach a conclusion about the facts (what actually occurred). The Decision Maker can then make a decision on the basis of those findings of facts. All of this can be challenged in a Court or Tribunal, however they will be free to reach their own conclusions.

## **26. Balance of probabilities test**

Where there is a conflict of interest, an investigator will rarely be totally certain of what has happened. However, their task requires definitive findings of fact and the investigator has to reach a conclusion even if there is a possibility the conclusion may be incorrect. The test that the investigator should apply, which Courts and Tribunals will also apply in a civil proceeding, is the "balance of probabilities test". This test requires an investigator, having weighed all of the competing evidence to decide which version of events is more probable than not, to be what actually happened.

In reaching a conclusion as to whether a particular conduct occurred, the investigator should take into account:

- The seriousness of the allegation
- The likelihood of the conduct occurring based on the evidence; and
- The gravity of the consequences flowing from a particular finding

This means that where very serious allegations are made (e.g. criminal conduct) an investigator may need to be "reasonably satisfied" to a higher degree of certainty before reaching a conclusion that the allegation is made out. i.e. the more serious the allegation, the higher the degree of probability required to prove the case. This is known as the "*Briginshaw test*".

### **How to deal with conflicting evidence**

Where there is conflicting information, it may be useful to set out competing evidence and see where a complainants (or a respondents) version of facts is either corroborated or not corroborated. The Workplace Investigations Drawing Conclusions Form ([HR021](#)) may be used to assist in this process.

Working through the investigation in a methodical way will assist the investigator in demonstrating that:

- All the evidence required has been gathered to make a considered finding in relation to each allegation
- The investigator has considered all evidence in relation to each allegation including:
  - The complainants version of events
  - The respondents version of events
  - Witnesses' version of events
  - Any documentary evidence
- The investigator has made a sound decision in relation to which version of events should be accepted, and why, including a consideration of the credibility of witnesses.

## **27. Writing the Investigation Report**

The following guidelines should be observed when writing the investigation report. Refer to Workplace Investigations Report Form ([HR022](#)).

The investigation report should contain:

- The TOR of the investigation in full
- A summary of the key conclusions
- A summary of the investigation process, including a description of each allegation and the material collected in respect of each allegation.
- Findings made on the balance of probabilities with brief supporting reasons for each conclusion
- Recommendations – these are only to be made if specified in the TOR
- Annexures including copies of materials collected and produced (e.g. statements and records of interviews etc.)

## **28. Making a decision**

When the investigation has been completed, the Decision Maker will be required to come to a conclusion on what may have occurred and what action may be required to be taken in the light of the outcome of the investigation.

Before making a decision, the Decision Maker should read the report and consider whether:

- The investigator has carried out the TOR and that all relevant questions have been answered
- The process was carried out in a reasonable and effective way and that all areas of enquiry were followed up
- The conclusions appear to be valid, or are there any logical errors in the conclusions reached

A Decision Maker who rejects the investigators report without good reason may be exposing the organisation to legal risk. E.g. a disappointed complainant may take external action; the organisation may be criticised for not accepting the conclusions; if an employee is dismissed despite the outcome of an investigation, there is a risk of an unfair dismissal proceeding.

### **Deciding the appropriate outcome**

The appropriate outcome will depend on the nature of the investigation and the findings made. The Decision Maker should approach this in a flexible way with a view to reaching a sound and practical conclusion to the issue that led to the investigation.

There could be a range of outcomes from an investigation, for example:

- The allegation may not be made out. In this case, the respondent should be exonerated and reasonable steps taken to ensure that the respondent's reputation and ability to work at the workplace is not damaged
- A conclusion that the complaint or aspects of it are unsubstantiated, but there is no need for further action (for example, because the parties involved have "moved on" in one way or another)
- A process of facilitated mediation between the parties involved, directed by the conclusions reached in the investigation
- Disciplinary action, including counselling, warnings or a dismissal. Consult with the Office for Employment Relations if contemplating a dismissal

- Amendments to policies, procedures or systems of work to ensure that the event is not likely to happen again
- A program of training for a workgroup or the whole organisation
- Legal proceedings for the recovery of assets or money stolen from the organisation

If the decision is to take disciplinary action, the standard process for disciplinary action must be taken ([HR-PRO-012](#), [HR-PRO-013](#)). Check agreements and awards to see whether there are any specific requirements for disciplinary action.

In some cases where an investigation has reached a conclusion that none of the allegations can be substantiated, it may be appropriate for the Decision Maker to put in place strategies which, without making or suggesting any adverse finding, guard against the possibility of a similar event recurring.

## **29. Vexatious allegations**

If the complaint or allegation is found to be false or vexatious the complainant may be disciplined. The fact that a complaint has not been substantiated does not in itself lead to any decision that it is vexatious. It would only be appropriate to deem an allegation as being vexatious if there is overwhelming evidence to support this.

## **30. Finalising the process and communicating with stakeholders**

When all decisions have been made, the Decision Maker should close out the process by:

- Communicating the outcomes in an appropriate way
- Ensuring that the documents relevant to the investigation and decisions are retained

It would be appropriate to inform the complainant and respondent with a summary of the outcome of the investigation and the action taken in response to the outcomes.

The respondent does not have the right to a copy of the investigation report, as the report may contain material that is confidential and may contain issues related to the reputation of the ACBC and its agencies. The privacy of participants must also be protected. Seek advice from the Office for Employment Relations.

Following communication of the decision, anticipate reactions and have a plan to assist workers to progress.

Consider whether the parties involved can be returned to their previous position or work at the same location.

Be sensitive to the complainant's position, particularly if there remains a likelihood that the conduct may have taken place (although it was not able to be substantiated)

Communication with stakeholders should emphasise the finality of the process and that the Decision Maker considers the matter to be at an end.

## **31. Victimisation**

The Agency will need to take all reasonably practical action to ensure that all parties are protected against any form of victimisation.

## **32. Records**

Written complaints

Diary notes

Communications

Workplace Investigation Action Plan form ([HR018](#))

Workplace Investigations Letter of Allegations ([HR019](#))

Workplace Investigation Interview Preparation Sheet ([HR020](#))

Workplace Investigations Drawing Conclusions Form ([HR021](#))

Workplace Investigations Report Form ([HR022](#))

These records are to be maintained in a secure location. Access to them is by permission of the Agency Head or HR function.

Records are to be retained in accordance with the relevant state or commonwealth legislation.

## **Appendix A: Legal Considerations**

### **1. Privacy**

The Privacy Act 1988 (Cth) protects against the misuse of personal information. Employee records are exempt, but there are some exemptions (e.g. Health Records Act 2001 (Vic)). Seek advice from the Office for Employment Relations if worker records need to be used.

### **2. Surveillance (Video, telephone, recording)**

Some states and Territories have legislation governing surveillance (e.g. Workplace Surveillance Act 2005 (NSW), Invasion of Privacy Act 1971 (Qld.) etc.). Seek advice from the Office for Employment Relations if considering using surveillance.

### **3. Legal Professional Privilege**

Legal professional privilege is a privilege which in certain circumstances allows a communication (including written communication) to be kept confidential between a organization (or individual) and its legal representative. If a document is privileged it is not required to be provided to third parties. Eg:

- Courts, commissions, Tribunals;
- Regulators who may also be investigating (e.g. Worksafe);
- The other party in any legal proceedings; and
- Through Freedom of Information (for public sectors employees)

In the context of an investigation, this may mean that documents prepared during an investigation (notes, statements, investigation report etc.) do not have to be handed over to other interested parties. There are some exceptions to this (e.g. Workers compensation legislation in some jurisdiction requires investigation reports to be disclosed).

Legal professional privilege applies to communications between a client and a legal advisor where the dominant purpose of the communication is to:

- Enable the client to obtain, or the legal advisor to give legal advice; or
- Be used in litigation that is actually taking place or was contemplated when the communications occurred.

If neither of these apply, then the communication is not privileged.

For privilege to be attached, legal advice must be obtained before any documents are prepared.

Legal professional privilege can be lost if it is waived either deliberately or inadvertently. Once waived, it cannot be reattached. This can happen when:

- Documents are circulated outside the organization
- Documents are sent to people within an organization for purposes other than to gain legal advice (e.g. for a disciplinary process)
- Part of a privileged document is disclosed
- The legal advice is referenced in communications with persons outside the organization

If unsure about disclosure of a document or communication seek legal advice through the Office for Employment Relations.

### **4. Defamation**

The law of defamation is used to protect someone's reputation. Defamation occurs where someone hurts the reputation of another by spreading false information about them. Therefore any statement adverse to somebody which is "published" to another person is technically defamatory. So, the making of a complaint itself is technically "defamation". Workers have been known occasionally to commence proceedings. No legal consequences should follow in relation to a publication of defamatory material if:

- It was published to someone who had an interest in knowing the truth (e.g. an employer or investigator)
- It was published in good faith (believing it to be true and not for a malicious purpose)

There are also a number of protections available to a person who makes a valid public interest disclosure under Whistleblowers legislation.

- Protection from liability – a person is not liable civilly (including for defamation), criminally or under an administrative process for making a public interest disclosure regardless of any obligation of confidentiality.
- Protection from reprisal – a person must not cause or attempt to conspire to cause detriment to another person because anybody has made or may make a public interest disclosure.

## **Appendix B: How to Ask Questions**

### **Open questions:**

- Encourage people to talk more expansively
- e.g. “tell me about.....” , please describe.....”, “what happened....”
- Open questions are useful early in an interview to get the interviewee’s version of events and when introducing a new topic in the interview.

### **Closed questions:**

- Limit the options which are available to the interviewee.
- e.g. “Did you...” “your name is...” usually a “yes” or “no” answer.
- Can be useful at the start of an interview to confirm personal details.
- Can be used at the end of an interview to test interviewee’s version of events and your understanding of them.

### **Follow on questions:**

- Used to “dig deeper” into interviewee’s responses.
- e.g. “You said he was bullying you. What do you mean by ‘bullying’?”
- Follow on questions are useful to probe an interviewee’s words from a previous question.

### **Loaded questions:**

- Loaded questions have built in assumptions regarding the subject matter being investigated.
- E.g. “Did that make you feel terrible?”
- Loaded questions can be useful when testing and verifying an interviewee’s version of events later on in the interview process. They should be avoided at the outset on an interview.

### **Bridging questions:**

- These can be used to introduce a new topic or subject matter to the interview.
- Bridging questions can be useful when an interviewee has nothing further to say on a topic and/or if the interview is not progressing.

### **Double-barrelled questions:**

- Avoid double-barrelled questions e.g. “Who were you with and when?”

### **Hypothetical questions:**

- These should NEVER be used. They are not useful, and can prejudice the investigation.

### **Leading questions:**

- These are usually closed questions which lead the interviewee to agree with the interviewer.
- e.g. “You were at the party until 11.00pm, weren’t you?”
- Leading questions can be valuable to interviewers to test and verify an interviewee’s version of events once they have established that version. They can also be used to put inconsistent versions of events to interviewees. They should not be used too early in the interview as they may imply bias and a lack of impartiality on the part of the interviewer.