REPORT OF THE
INTEGRITY COMMISSION

No. 3 of 2017

An own-motion investigation into the management of misconduct in the Tasmanian public sector

INTEGRITY COMMISSION

The objectives of the Integrity Commission are to –

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania;
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

This report and further information
about the Commission can be found on the website

www.integrity.tas.gov.au

GPO Box 822,
Hobart
Tasmania 7001

Phone: 1300 720 289
Email: integritycommission@integrity.tas.gov.au

ISSN: 2204-5910 (online)
ISSN: 2204-5902 (print)

OWN-MOTION INVESTIGATION REPORT

An own-motion investigation into the management of misconduct in the Tasmanian public sector

December 2017

Contents

Glossary

Allegation: A specific claim of misconduct. One complaint, file or matter may contain multiple allegations.

Commission: Integrity Commission.

Complaint: A statement alleging misconduct. A complaint, which is also referred to in this report as a file or a matter, may contain multiple allegations.

Complainant: A person who has made a complaint or raised a suspicion about misconduct. Also known as a 'source'. Where the word 'complainant' is used, it indicates that the person is complaining about the alleged conduct, not just reporting it.

Councillor: As defined in section 3 of the *Local Government Act 1993* (Tas), councillor means 'a person elected to a council and includes the Lord Mayor, Deputy Lord Mayor, mayor, deputy mayor and alderman'.

Decision maker: A person authorised or delegated with the power to make decisions about misconduct matters, including whether to commence an investigation, whether misconduct has occurred, and outcomes for the respondent.

File: In this report, the word 'file' is used to represent a public authority's records in regard to one particular complaint or matter. A file may contain multiple allegations.

IC Act: *Integrity Commission Act 2009* (Tas).

Matter: In this report, the word 'matter' is used to refer to a complaint of misconduct, and is used in a similar manner to the word 'complaint' and 'file'. A matter may contain multiple allegations.

Misconduct: As defined in section 4 of the *Integrity Commission Act 2009* (Tas), misconduct means:

> *(a) conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –*
>
> *(i) a breach of a code of conduct applicable to the public officer; or*
>
> *(ii) the performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper; or*
>
> *(iii) a misuse of information or material acquired in or in connection with the performance of the public officer's functions or exercise of the public officer's powers; or*
>
> *(iv) a misuse of public resources in connection with the performance of the public officer's functions or the exercise of the public officer's powers; or*
>
> *(b) conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer –*

but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament;

Organisation: A 'public authority', as defined in section 5 of the *Integrity Commission Act 2009* (Tas).

PID Act: *Public Interest Disclosures Act 2002* (Tas).

Protected disclosure: As defined in section 14 of the *Public Interest Disclosures Act 2002* (Tas).

Public interest disclosure: As determined under the *Public Interest Disclosures Act 2002* (Tas).

Principal officer**:** As defined in section 4 of the *Integrity Commission Act 2009* (Tas).

Public authority: As defined in section 5 of the *Integrity Commission Act 2009* (Tas).

Public sector organisation: A 'public authority', as defined in section 5 of the *Integrity Commission Act 2009* (Tas).

Public officer: As defined in section 4 of the *Integrity Commission Act 2009* (Tas).

Respondent: A person against whom one or more allegations of misconduct have been made.

Serious misconduct: As defined in section 4 of the *Integrity Commission Act 2009* (Tas), serious misconduct means:

misconduct by any public officer that could, if proved, be –

(a) a crime or an offence of a serious nature; or

(b) misconduct providing reasonable grounds for terminating the public officer's appointment;

Source: A person who has made a complaint or raised a suspicion about misconduct. Also referred to as the 'complainant', although not all sources want to 'complain' about the alleged conduct.

Executive summary

This is a report about an own-motion investigation by the Integrity Commission (the Commission) into the policies, practices and procedures of Tasmanian public sector organisations in managing misconduct allegations. It is the first public sector wide survey of this nature. The survey has found areas of good practice, and those where improvements are needed to ensure that consistent, effective management of misconduct occurs.

Under section 3(3)(b) of the *Integrity Commission Act 2009* (Tas), one of the ways in which the Commission is to achieve its principal objectives is by 'assisting public authorities [to] deal with misconduct'. The aim of this investigation was to gain an understanding of the capacity of public sector organisations to deal with misconduct, so that effective resources and training could be developed to support improved standards.

To achieve this aim, the Commission chose to look at a cross-section of organisations in its jurisdiction. This included five state service agencies, five local government councils, and two other bodies. The organisations were selected so as to provide a representative snapshot across the state. The Commission is grateful for the active participation and cooperation of these organisations.

The investigation involved:

- requiring each organisation to respond to a questionnaire about its policies and practices;
- reviewing their misconduct records over a one year period – each file was subject to a series of 78 survey questions (see *Appendix A – Survey scope, objectives & criteria*);
- conducting extensive research into good practice and case law across Australia; and
- producing good practice material for the use of all Tasmanian public sector organisations (see *Appendix C – Model preliminary assessment process* and *Appendix D – Guide to managing misconduct in the Tasmanian public sector*).

The Commission engaged with contact officers in each organisation at various stages of the investigation. This included meetings to discuss the investigation in the early stages, sending the survey questions out for comment, preliminary feedback meetings, and asking for feedback on the good practice material. The Commission also invited a number of other bodies to provide feedback on the good practice material.

The investigation has significantly enhanced the Commission's understanding of how misconduct is handled in Tasmania. It provides an essential foundation for the Commission and the public sector to work on improvements.

The Commission has made three recommendations and five good practice suggestions as part of this investigation. Additionally, it has produced an extensive good practice guide, and will be undertaking associated training, to assist Tasmanian public sector organisations.

Recommendation no. 1

It is recommended to the Premier that amendments be made to the *State Service Act 2000* (Tas) to specifically allow Tasmanian State Service agencies to make disciplinary findings after an employee has left a particular agency or the State Service, in a manner similar to that set out in *Public Service Act 2008* (Qld) ss 187A, 188A and 188AB.

This is reflective of the fact that all Tasmanian State Service employees are employed by the same Employer.

Recommendation no. 2

It is recommended to the State Archivist that it be made a requirement under *Archives Act 1983* (Tas) guidelines that public authorities keep a written record of the proceedings and action taken in respect of any allegation or suspicion of serious misconduct committed by a public officer.

This is to include all serious misconduct matters, including those that do not proceed to investigation and those that are not substantiated.

These records should be kept for seven years.

Recommendation no. 3

It is recommended to the State Archivist that it be made a requirement under *Archives Act 1983* (Tas) guidelines that public authorities maintain an appropriately confidential register of all alleged and suspected misconduct committed by public officers.

This is to include all misconduct matters, including those that do not proceed to investigation and those that are not substantiated. These records should be kept for two years.

It is suggested that this register should include:

- references for easy location of related files;
- date the matter was received;
- the respondent's name;
- a description of the alleged misconduct;
- how the matter was dealt with (e.g. investigation, mediation, performance management);
- outcomes; and
- the date the matter was finalised.

Good practice suggestion no. 1

It is suggested that all Tasmanian public authorities make it clear that it is the responsibility of all public officers to report, address and record misconduct and other unacceptable behaviour by public officers in a fair, timely and effective way.

This could be set out in, for example, legislation or regulations, the code of conduct, or policy.

Good practice suggestion no. 2

It is suggested that all Tasmanian public authorities have:

- clear avenues for both internal and external persons to report allegations and suspicions of misconduct; and
- basic procedures in place for handling and recording allegations and suspicions of misconduct in the first instance (e.g. lines of reporting) – this may be in a standalone procedure or incorporated into an existing procedure.

Good practice suggestion no. 3

It is suggested that all Tasmanian public authorities make the connection between misconduct-related documents and policies simple and clear.

This includes the connection between legislation, industrial instruments, and policies and procedures relevant to:

- fraud and corruption;
- grievances;
- misconduct;
- discipline;
- workplace behaviour;
- bullying;
- discrimination and harassment; and
- whistle-blowers.

This will enable employees to more easily identify which policy applies in which situation.

Good practice suggestion no. 4

It is suggested that all Tasmanian public authorities develop guidelines and endorse a standard disclosure statement for use in recruitment.

This statement should require potential public officers to disclose:

- if they have been dismissed from a public authority in the last 10 years as the result of a misconduct investigation;
- if they were the subject of a misconduct or other disciplinary investigation when they left their last employer; and
- the status of any such investigation.

Good practice suggestion no. 5

It is suggested that all Tasmanian public authorities adopt a policy that allows:

- referees for former or current employees to, where the matter may be relevant to the work related qualities required for the job, share with a prospective employer misconduct-related findings, or the existence of a declaration that the employee left before findings were made; and
- misconduct findings to be taken into account during employment processes, with the weight placed on those findings to diminish over time.

Introduction

Background

[1] The Integrity Commission (the Commission) has an oversight role in relation to alleged misconduct, and there are specific mechanisms in the *Integrity Commission Act 2009* (Tas) (*IC Act*) that allow it to perform that role. In particular, after referral of a complaint to an organisation, the Commission may require a report from, or monitor or audit the action taken by, that organisation.[1]

[2] Through its auditing and monitoring of referred complaints, the Commission became aware of inconsistencies and deficiencies in the capacity of public sector organisations to deal with information and reports suggestive of misconduct. Public officers had also reported to the Commission their own concerns about capacity in this area.

[3] Under s 3(2) of the *IC Act*, the three objectives of the Commission are to:

> *(a) improve the standard of conduct, propriety and ethics in public authorities in Tasmania; and*
>
> *(b) enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and*
>
> *(c) enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.*

[4] One of the ways in which the Commission is to achieve these objectives is by 'assisting public authorities [to] deal with misconduct'.[2]

Determination to conduct an own-motion investigation

[5] On 24 September 2015, the then chief executive officer (CEO) of the Commission determined to commence an own-motion investigation, in accordance with section 45(1)(d) of the *IC Act*,

> *into the policies, practices or procedures, or the failure of those policies, practices or procedures, of public authorities in relation to:*
>
> - *how information suggestive of misconduct; and*
> - *how adequately investigations into misconduct,*
>
> *are dealt with.*

Jurisdiction

[6] It is a principal objective of the Commission to appropriately investigate and deal with allegations of misconduct. In the performance of its functions and exercise of its powers, the Commission may inform itself of any matter in such a manner as it thinks fit. In this matter, the Commission's jurisdiction was invoked on delegation from the

[1] *Integrity Commission Act 2009* (Tas) ss 35(6), 39(2), 58(4).
[2] *Integrity Commission Act 2009* (Tas) s 3(3)(b).

Board to the CEO to undertake policy, practice and procedure own-motion investigations.

[7] An own motion-investigation is defined in section 45 of the *IC Act* to include an investigation of misconduct or policies, practices or procedures, or the failure of those policies, practices or procedures, within public authorities or by public officers. During any investigation, the investigator may make any investigations he or she considers appropriate, may conduct the investigation in any lawful manner he or she considers appropriate, and may obtain information from any persons in any lawful manner he or she considers appropriate: section 46 of the *IC Act*.

[8] The conduct of the investigation was carried out in accordance with section 47 of the *IC Act*.

Aim

[9] The aim of the own-motion investigation was to:

i) gain an understanding of the capacity of public authorities to:
   - deal with information suggestive of misconduct; and
   - undertake investigations into misconduct; and

ii) improve the ability of public authorities to undertake misconduct investigations.

Scope

[10] The Commission has a broad jurisdiction across Tasmanian public sector organisations. As part of the investigation, it wanted to capture a snapshot of capacity across these organisations. It decided that 12 organisations would be sufficient to achieve this, and that this would include:

- five state service agencies, including three government departments and two state authorities;
- five local government councils, which would be chosen from across the state, and would include a mixture of metropolitan and regional councils; and
- two other bodies representative of the diverse range of public authorities that fall within the Commission's jurisdiction.

[11] Each organisation was chosen on the basis of criteria designed to enable the Commission to achieve a balanced picture, including:

- the organisation has a large number of employees that have contact with the public;
- the Commission receives a relatively high number of complaints against the organisation;
- the Commission is aware that misconduct is handled particularly well or particularly poorly in the organisation;
- the Commission is aware that policies are particularly good or particularly poor in the organisation;
- the Commission was not familiar with the organisation's policies and practices;

- investigations in other states suggested that this may be a problem area for this particular type of organisation; and/or
- employees of the organisation had expressed the need for guidance in this area.

Conduct of the investigation

[12] The process followed by the Commission in this investigation was, in rough chronological order:

1. notifying the principal officer of each organisation about the investigation, and requesting the appointment of a contact officer;
2. sending an *IC Act* section 47 notice questionnaire to each organisation, asking about its policies and practices;
3. holding voluntary meetings with contact officers to discuss the investigation;
4. issuing to each organisation an *IC Act* section 47 notice to produce misconduct records;
5. researching good practice handling of alleged misconduct;
6. drafting of survey instrument (see *Appendix A – Survey scope, objectives & criteria*), which was sent out to the contact officers for comment;
7. conducting a survey of records produced, using the survey instrument;
8. holding voluntary preliminary feedback meetings with contact officers;
9. drafting good practice material, which was sent out to contact officers and a range of other bodies for comment (see *Appendix C – Model preliminary assessment process* and *Appendix D – Guide to managing misconduct in the Tasmanian public sector*); and
10. holding voluntary meetings with contact officers to get their feedback on the good practice material.

Coercive powers and confidentiality

[13] As part of the investigation, the Commission issued 26 coercive notices to produce information or records, pursuant to sections 47(1)(a) and 47(1)(c) of the *IC Act*.[3] The Commission issued coercive notices rather than requests to ensure a (timely) response from organisations, and to ensure that there were no legal barriers to the supply of what were, in some cases, personnel records.

[14] The notices were issued subject to confidentiality under section 98 of the *IC Act* to protect the reputations of the 12 organisations while the investigation was ongoing, and due to the personal nature of the records which the organisations were required to supply.

[3] The Commission did not undertake any coercive interviews under s 47(1)(b) of the *Integrity Commission Act 2009* (Tas) as part of this investigation.

[15] The Commission acknowledges that at times this confidentiality was frustrating and inconvenient for the 12 organisations. The Commission lifted confidentiality earlier than it normally would in an investigation for reasons of practicality.

Engagement

[16] The Commission's aim in this investigation was to improve capacity, and it was decided that maximising engagement – as far as resources would allow – would be the best way to progress.

[17] Ideally, the Commission would have liked to spend more time with contact officers, and to have discussed their individual files and circumstances in more detail. However, due to resourcing issues, the investigation was delayed from its intended one year timeframe to two years. The Commission needed to balance the potential benefits of more contact against completing the investigation, and delivering the good practice resources, as soon as possible.

The survey

[18] The Commission required, by way of coercive notice, each organisation to produce all records held about alleged misconduct that had been finalised in the 2014–15 financial year. For reasons of practicality, the timeframe for matters handled entirely within one section of one of the public authorities was the 2015 calendar year. The Commission did not require the production of records, information and material relating to resolution of complaints and allegations by an external body.

[19] The Commission is appreciative of the lengths to which some organisations went to supply their records.

[20] A total of 120 files that were within scope were produced by the 12 organisations. Of those files, 48 were subjected – or intended to be subjected – to some kind of formal investigation. Seventy-two matters did not proceed to investigation. An additional 31 out of scope files were supplied by the organisations; 10 of these were surveyed by the Commission.[4]

[21] In addition to this report, the Commission has supplied each organisation with more specific verbal and written feedback about its policies, practices and procedures.

The good practice material

[22] The material in the last two appendices of this report is based on good practice materials and case law from around Australia. It also draws on information supplied by the 12 organisations subject to this investigation. This includes identified good practice policies and procedures, verbal feedback, and the outcomes of the Commission's survey.

[23] *Appendix D – Guide to managing misconduct in the Tasmanian public sector* is designed to be a thorough, chronological guide on handling and investigating

[4] These ten files have not been reported on in this report, but where necessary feedback has been given to the relevant organisation.

allegations of misconduct. The guide is Tasmania specific, but generic enough to cover all Tasmanian public sector organisations.

[24] The Commission will be happy to accept ongoing feedback on the guide, and intends to review it at regular intervals to ensure it remains current. The guide should set the basic principles and good practice standards for public sector organisations to use in dealing with alleged misconduct in Tasmania.

[25] Most of the 12 organisations provided the Commission with feedback about the material, and the Commission is grateful for their time and engagement. The Commission is also grateful for the time and engagement of other bodies that were asked to provide feedback on the good practice material, including:

- Equal Opportunity Tasmania;
- Local Government Division;
- Ombudsman Tasmania;
- State Service Management Office;
- Tasmania Police; and
- Tasmanian Archives and Heritage Office.

Procedural fairness and submissions

[26] In accordance with s 46(1)(c) of the *IC Act*, the investigator 'must observe the rules of procedural fairness' in undertaking the investigation. The investigator's report made no adverse comment about any individual. It therefore was not necessary to provide a copy of the investigator's report to any person for the purposes of procedural fairness.

[27] In accordance with s 56(1)(a) of the *IC Act*, the Commission's CEO sent the investigator's report out for comment to the principal officers of the 12 organisations subject to the investigation. As persons with a 'special interest' in the report, in accordance with s 56(1)(c) of the *IC Act*, the CEO also invited the State Archivist and the Head of the State Service to comment on the report.

[28] Formal submissions were received from two of the 12 public authorities subject to the investigation. Submissions were also received from the State Archivist and the Head of the State Service.

[29] The Commission made some changes to the final version of the report on the basis of the submissions.

Board determination

[30] On 9 November 2017, the Board of the Integrity Commission met to consider the report of the investigation. The Board resolved to adopt the report's recommendations, and to provide written notice of its determination and refer the report to the:

- principal officer of each of the 12 public authorities subject to the investigation;
- Premier; and
- State Archivist.

[31] The Board has required each of the persons to whom a recommendation has been addressed to notify the Board within three months of the date of its determination of their actions in relation to the report, in particular in relation to the recommendations addressed to them.

Identification of organisations

[32] The Commission has decided not to name the 12 organisations subject to this investigation.[5]

[33] The Commission is confident that the outcomes of this investigation would have been similar regardless of which 12 public sector organisations had been surveyed.

[34] By releasing this report, the Commission is seeking to inform the public sector and the wider Tasmanian community about this important issue. This is done with a view to taking a measure, and then setting the public sector on a path to further improvements.

[35] The focus should now be on working towards improvements in the whole of the public sector, not just in the 12 organisations that were subject to this investigation. The Commission believes that anonymising the organisations is one way to achieve this aim.

Structure of this report

[36] This report is divided into three sections that accord with the three chronological stages of dealing with misconduct. The guide to managing misconduct is similarly divided. The three stages are:

1. handling of the initial allegation or suspicion, and deciding whether to investigate;
2. investigating misconduct; and
3. ensuring that the outcomes of the process are adequate and appropriate for all parties, including the complainant, the respondent and the organisation.

[37] At a number of stages in the report, the Commission has highlighted particularly important or difficult issues. These are:

- responsibility to take action and to have good processes in place;
- external investigators;
- timeliness;
- dealing with serious misconduct effectively; and
- record keeping.

[5] Although it should be noted that Tasmania Police was **not** one of the organisations subject to the investigation.

Adequacy of policy and practice when misconduct is initially alleged or suspected

[38] Misconduct allegations may arise in a number of ways. They may be submitted in the form of a complaint or report. This can be anonymous, from an employee, a member of the public or client, or from another organisation. Misconduct allegations may also arise through the suspicions of colleagues.

[39] The Commission examined the adequacy of public sector policy and practice in the initial stages of managing alleged misconduct, including in regard to:

- handling of the initial allegation or suspicion; and
- deciding whether to investigate.

[40] All 120 in scope files – both investigated and non-investigated – produced by the organisations subject to the investigation were relevant to this part of the survey.

Handling of the initial allegation or suspicion

Policies and procedures for reporting alleged or suspected misconduct

[41] Whether they are about misconduct or not, the making of complaints should be facilitated by public sector organisations.

[42] Stakeholders in a complaint process may include the public, the complainant/source, the organisation and its employees, and the respondent. It is in the interests of all stakeholders for complaints to be handled efficiently in the first instance. It is also important for the process to maximise personal and organisational learning opportunities. It is hard for these things to happen if there are no obvious avenues for people to make complaints or raise suspicions.

[43] Similarly, organisations should have at least a basic policy on handling allegations and suspicions of misconduct in the first instance. If there is no such policy, there is a greater risk that misconduct will not be dealt with adequately or consistently.

Findings

[44] Many of the organisations had avenues for members of the public to submit feedback through a website. The websites did not usually refer to misconduct.

[45] For internal sources, most organisations had grievance policies and all of them had *Public Interest Disclosures Act 2002* (Tas) (*PID Act*) policies. However, misconduct may or may not overlap with the type of conduct that would be contained in a grievance or *PID Act* disclosure. Most of the grievance policies did not mention misconduct.

[46] All of the organisations had fraud and corruption control policies, but not all misconduct amounts to fraud or corruption.

[47] Most of the organisations did not have any specific policies or procedures in place for handling alleged or suspected misconduct in the first instance.

Whistle-blowers

[48] As required under the *PID Act*, all 12 organisations had policies in place for handling disclosures from 'whistle-blowers'. However, there was no awareness that any internally-raised matter – if it fits the relevant definition – may be a disclosure under the *PID Act*. To date, it appears that organisations have presumed it to be the responsibility of the discloser to declare that they are making a disclosure under the *PID Act*. In fact there is no requirement for the discloser to cite the *PID Act*.

[49] There was no evidence that organisations were routinely checking internal misconduct complaints to determine if they were *PID Act* disclosures. The organisations also did not have clear links between misconduct policies and procedures and *PID Act* policies and procedures.

[50] The practical difficulties of applying the *PID Act* are a contributing factor to this situation. These difficulties are exacerbated by the lack of correlation between the definition of 'misconduct' in the *IC Act* and the definition of 'improper conduct' in the *PID Act*.[6]

Initial compliance with governing legislation and relevant policies

[51] Legislation and policies applicable to the initial stages of misconduct management vary between organisations. For instance, in the State Service, parts of *Employment Direction No. 5 – Procedures for the investigation and determination of whether an employee has breached the code of conduct* (ED5) are relevant to the initial handling of misconduct allegations. Examples in other organisations include grievance policies and industrial instruments. In some organisations, there was no relevant governing legislation or policies.

Findings

[52] Where records were sufficient for the Commission to make a determination, the handling of the vast majority of matters in the first instance complied with governing legislation and relevant policies.

[53] Where there was a lack of compliance, in most cases it was because of a failure to:

- consider whether the matter may have fallen under the fraud and corruption control policy; or
- recognise that the matter should have gone straight to consideration for a disciplinary investigation.

[6] The Commission has explained this in more detail in Integrity Commission, Submission to Independent Review, *Integrity Commission Act Review*, March 2016, 60 [242] <http://www.integrity.tas.gov.au/reports_and_publications/reviews>.

Taking necessary immediate action

[54] When allegations or suspicions are first raised, it may be necessary for the organisation to take immediate action. This may include, for example:

- ensuring the safety of employees and the public;
- securing evidence;
- suspending, standing down or reassigning one or more employees;
- contacting the police or another external body; and/or
- offering support.

Findings

[55] The Commission identified that immediate action should have been taken in at least a third of the files surveyed. The necessary action was taken in the majority of those files. Actions that were not taken, but should have been, included not:

- considering temporarily reassigning employees to manage the possible effects on the workplace;
- temporarily removing an employee who allegedly posed a risk to the workplace; and
- immediately securing evidence in relation to allegations of theft.

[56] There were a number of files in which records were insufficient to determine whether immediate action was necessary and/or if it was taken.

Contacting external bodies, including the police

[57] Public sector organisations are able to seek advice from, and report matters to, a number of external bodies about alleged misconduct.

[58] In some circumstances, there are mandatory reporting requirements for certain personnel – such as when a person under the age of 18 years has been abused or is at risk of harm, or in relation to certain types of work health and safety incidents.

[59] The survey results indicated that organisations do not always consider whether they should report alleged misconduct to external bodies. This was primarily in relation to reporting matters to the police, for instance in relation to alleged assault and theft.

[60] Two files provided to the Commission by two different organisations raised particular concerns about possible criminal acts committed by the public officers involved. The matters had not been reported to the police by the organisations. The Commission discussed these files with prosecuting authorities. It was determined that neither of the two matters would be pursued.

[61] In regard to alleged theft, it appeared that relevant public sector organisations were not aware of their obligations under *Treasurer's Instruction No. 301 – Reporting Procedures in Cases of Illegal Entry and/or Damage to or loss of Property or Money*. That Instruction states that heads of agencies '**must** ensure that all losses that are caused, or suspected to have been caused, by theft, fraud, misappropriation or other criminal act, are reported to the police' (emphasis added).

[62] The Commission also identified that Tasmania lacked a clear process for matters to be referred to the police by public sector organisations, and that this may be hindering reporting.[7] The Commission has worked with Tasmania Police to develop a basic process for such referrals; it is set out in *Appendix D – Guide to managing misconduct in the Tasmanian public sector*.

Appropriate overall handling of initial allegations and suspicions

[63] For each file surveyed, the Commission looked at whether – overall – it had been handled in an appropriate manner in the initial stages. This assessment took into account all of the above issues, including compliance, taking immediate action, and timeliness. It also allowed scope for issues that did not fall within those criteria.

Findings

[64] There were insufficient records to make a determination in 44 of the 120 files surveyed. Of the remaining files, the Commission found that the majority had been handled appropriately in the first instance.

[65] An example of inappropriate handling of a matter in the first instance involved serious allegations of unauthorised access to and release of information. The allegations had been referred to the organisation by the police. Instead of performing covert database checks to determine if and what information had been accessed, the organisation immediately put the allegations to the respondent. The respondent resigned before a disciplinary investigation commenced. It did not appear from the file that the organisation had ever checked the database to find out what, if any, private information had been released or altered by the respondent.

Deciding whether to investigate

Making sufficient preliminary inquiries

[66] When allegations or suspicions first arise, a person with an appropriate level of authority should assess the matter and determine the best way to proceed. The Commission refers to this process as a 'preliminary assessment'. The aim of this process is to quickly assess:

- whether there are reasonable grounds to suspect misconduct; and
- the most appropriate way to handle the matter.

[67] The preliminary assessment might decide, for example, that the appropriate way to deal with the matter is not through a disciplinary investigation. It may also decide that the matter does not amount to alleged misconduct, and so is better dealt with another way e.g. through the grievance process.

[68] The preliminary assessment should be confidential, and should not involve the respondent. It may, however, involve asking further questions of the source, and confidentially collecting other relevant information.

[7] For example, see the Australian Federal Police government referral process set out at <https://www.afp.gov.au/what-we-do/referrals-investigation-services-government/referrals>.

[69] The Commission has designed a model preliminary assessment process for the use of public sector organisations. It can be found at *Appendix C – Model preliminary assessment process*.

Findings

[70] For many files – nearly half – records were insufficient to determine if adequate preliminary inquiries had been undertaken.

[71] Overall, adequate preliminary inquiries were undertaken in the majority of the remaining files. However, consistent issues did emerge across files. This included failing to immediately recognise the potential seriousness of matters and to deal with them accordingly. At times, this involved going straight to the respondent with a potentially criminal allegation. One matter that contained allegations of nepotism was referred straight to the respondent, with the comment that 'I trust that relevant … processes have been used for these appointments and your explanation will suffice'.

[72] Conversely, there were a number of matters that were put straight into investigation without any preliminary inquiries, despite the strength of the allegations being unknown.

[73] In one file, the respondent was allowed to dictate that the matter be handled as a disciplinary investigation rather than a grievance.

Policies and procedures for responding to and investigating allegations and suspicions of misconduct

[74] Each organisation should have a policy on how to respond to and investigate allegations and suspicions of misconduct. This may be set out in any number of documents, including legislation or regulations, industrial instruments, directions, standards, policies, guidelines or procedures.

[75] Where there are overarching requirements – for instance in legislation – it is likely the organisation will need some more detailed policy to fill in the gaps. This is to ensure, at the organisational level, consistency and clarity. The organisation's policy may be principles based, but it should be clear enough to ensure that matters are handled consistently. It also needs to be clear how related policies – such as disciplinary and grievance – interact.

[76] In the Tasmanian State Service, the overarching misconduct framework is set out in the *State Service Act 2000* (Tas). There is also a State Service wide direction (ED5) about how alleged misconduct must be handled. For councils and some other organisations, the overarching framework is set out in industrial instruments. Other organisations do not have any such framework.

Findings

[77] Overall, three organisations were found to have adequate policy or guidelines on responding to and investigating misconduct during the 2014–15 financial year. Six organisations were found to have some kind of limited policy or guidelines in place. Three organisations had no policy or guidelines in place beyond that contained in the overarching framework.

[78] Some organisations had some very good misconduct-related policies, either already in place or in draft form.

Compliance with governing legislation and relevant policies during the preliminary assessment stage

[79] As explained above, legislation and policies applicable to misconduct management vary between organisations.

Findings

[80] There were few instances of non-compliance identified at this stage. Where they were identified, they tended to be relatively benign instances of non-compliance. Examples included not complying with timeframes, and failing to provide the respondent with an explanation of the investigation process in writing.

[81] In a number of matters, records were too poor to identify if the organisation had complied with governing legislation and relevant policies. There were also some files that appeared to have been handled in an ad hoc manner outside of policy.

The correct decision maker

[82] It is important that someone with adequate authority make the decision on whether alleged misconduct is to be investigated. This means that there should be clear lines of reporting within each organisation. The decision should be accountable, defensible and documented.

Findings

[83] In nearly two thirds of relevant files, there were insufficient records to determine who made the decision on whether to investigate. Most of the files with sufficient records were investigated files.

[84] None of the organisations had a clear policy on who may make a determination **not to** investigate alleged misconduct.

[85] However, in half the organisations only certain persons have the authorisation to decide to investigate alleged misconduct. There were two investigated matters from these organisations in which the person who made the decision was documented, but it was not clear if they were authorised to make that decision. There were also four files in which it was unclear who made the decision to investigate. This meant that the Commission was not able to determine if the decision was made by an authorised person.

Making the appropriate decision on whether to investigate

[86] There are many factors that should be taken into account in determining whether to conduct an investigation into alleged misconduct. Investigations can be time-consuming, difficult for stakeholders, and expensive. They should not be undertaken lightly, and when they are they should be proportionate to the nature of the alleged conduct.

[87] Public sector organisations do, however, have a duty to ensure that alleged misconduct is adequately dealt with. On many occasions this will require an investigation of some kind.

Findings

[88] In many files – all of them non-investigated – records were insufficient for the Commission to determine whether the correct decision had been made about whether to investigate. That is, there was not enough information about the matter for the Commission to independently determine whether it warranted investigation. The files did not contain any documentation about why the decision had been made not to investigate.

[89] Of the remainder of the files, the appropriate decision had been made in the majority. Nearly all files in which the Commission assessed that the wrong decision had likely been made were non-investigated files. There was only one file in which the decision to investigate may have been inappropriate.

[90] One file involved minor allegations against a councillor that had been put through the formal standards panel process.[8] Given the minor nature of the allegations, it was found that – although the right process was followed – under a different framework it would have been better for the allegations to be dealt with in another (less expensive) way.

The Tasmanian State Service and Employment Direction No. 5

[91] Under the Tasmanian State Service-wide direction ED5, the head of each agency **must** undertake an investigation whenever they 'have reasonable grounds to believe that a breach of the Code [of Conduct] may have occurred'.

[92] Setting aside the reasonableness of this approach, there were a number of non-investigated files which should probably have been investigated under ED5. In one agency in particular, there were a number of non-investigated matters that appeared to be similar to investigated matters. It was unclear why some matters had been investigated, and some had not.

[93] In regard to the reasonableness of the ED5 approach, it should be understood that the obligation to investigate under ED5 technically applies even where there is no need for an 'investigation', such as if:

- the alleged breach was minor, for instance swearing in the workplace;
- the employee readily admitted to the alleged breach; or
- there was incontrovertible evidence of the alleged breach – such as drug test results or video footage.

[94] While ED5 requires a particular approach in the Tasmanian State Service, in practice there is wide variation among other public sector organisations. In the Commission's view, it is beneficial for organisations to have the capacity to adopt a flexible approach to handling misconduct.

[8] This process is now obsolete.

[95] The Commission is aware that ED5 is currently under review by the State Service Management Office. The Commission has already had some input into that process. As a matter of principle, the Commission is of the opinion that the new version of ED5 should, among other things:

- allow the heads of Tasmanian State Service agencies to deal with alleged misconduct in a variety of ways, including by allowing minor alleged misconduct to be dealt with at a lower level; and allowing certain more serious matters to proceed to finalisation without an 'investigation' – for instance if the employee admits to the conduct;

- removing the requirement that full copies of all witness evidence be given to the respondent; and

- allowing Tasmanian State Service agencies to use and rely on Integrity Commission reports, information, evidence and material when dealing with alleged misconduct.[9]

[9] As discussed in more detail in Integrity Commission, Submission to Independent Review, *Integrity Commission Act Review*, March 2016, 59–61 <http://www.integrity.tas.gov.au/reports_and_publications/reviews>.

Responsibility to take action and to have good processes in place

Responsibility to take action

[96] The main purpose of managing misconduct is to protect employees, the public, public monies, and public sector organisations. It is the responsibility of every public sector organisation to ensure that alleged and suspected misconduct is dealt with adequately.

[97] A failure to take action can be detrimental to any – or all – stakeholders. It may also be seen as approval of the conduct, and can result in a poor workplace culture.[10]

[98] A failure to act or adequately manage an employee's conduct was evident in a number of files surveyed by the Commission. In some files, apparently interpersonal issues or lower level misconduct was not dealt with adequately for a number of years, eventually resulting in misconduct matters that involved multiple bodies such as Equal Opportunity Tasmania and the Tasmanian Industrial Commission. In some matters, the persons involved eventually left the organisation, sometimes with financial settlements. These were expensive exercises.

[99] The Commission also found that, in general, organisations did not recognise and deal with a failure to report alleged misconduct as misconduct. For instance, one file involved an alleged assault on a member of the public by an employee that was caught on camera. Another employee of the organisation and two employees from another public sector organisation were present at the time. None of them reported the conduct, which was identified by chance at a later date. The organisation did not take any action in relation to the employee who had apparently witnessed the alleged misconduct and not taken any action.

[100] In some Australian jurisdictions (including the Commonwealth),[11] public officers are under a duty to report alleged misconduct committed by colleagues. This is not the case in most Tasmanian public sector organisations, with one exception being Tasmania Police.[12]

Responsibility to have good processes in place

[101] It is more likely that there will be a failure to act where policies and practices are poor. If policies and/or practices are poor, it may also allow a respondent to avoid responsibility for their actions. They may 'denounce the investigation and the organisation',[13] or claim they were unaware of policies and procedures relevant to the alleged misconduct. There was evidence of this in some of the files surveyed by the Commission.

[10] *Torres v Commissioner of Police* [2017] NSWIRComm 1001; *Noel Cannan v Nyrstar Hobart Pty Ltd* [2014] FWC 5072.
[11] Australian Public Service Commissioner's Directions 2016 cl 14(f).
[12] Tasmania Police, *Tasmania Police Manual* (January 2016) [13.1.1].
[13] Independent Broad-based Anti-Corruption Commission, Victorian Ombudsman, *Investigations guide – A guide to conducting internal investigations into misconduct* (June 2016) 42.

[102] It is therefore important that processes are clear and easy to follow, and that the workplace culture encourages them to be applied. Policies should be publicly available.

[103] In regard to misconduct investigations, if the process followed by an organisation is clear, rational and transparent, all stakeholders are more likely to accept the outcome. The organisation's culture should encourage the reporting of alleged misconduct, and employees should be aware that the process will be fair and that they will supported.

[104] There are a number of good resources available to public sector organisations wanting to improve their misconduct practices, policies and processes.[14] Public sector organisations should also work together to share knowledge and experience in this field.

[14] For example, see Independent Broad-based Anti-Corruption Commission, *Guidelines for protected disclosure welfare management* (October 2016) which contains guidance on, among other things, how to encourage staff to make disclosures; Australian Government Australian Public Service Commission, *Handling Misconduct – A human resource manager's guide* (June 2015), which contains guidance on good practice policy and procedure; Rose Bryant-Smith, Grevis Beard and Lisa Klug, *Effective Workplace Investigations* (Worklogic Pty Ltd, 2016), which has a checklist of what to include in a complaint handling policy; Government of South Australia Office for the Public Sector, *Commissioner for Public Sector Employment Guideline: Management of unsatisfactory performance (including misconduct)* (undated) <https://publicsector.sa.gov.au/wp-content/uploads/20141001-Guideline-Management-of-unsatisfactory-performance-including-misconduct.pdf>; Ombudsman Western Australia, *Guidelines: Exercise of discretion in administrative decision-making* (October 2009). See also n 26, n 28.

Good practice suggestion no. 1

It is suggested that all Tasmanian public authorities make it clear that it is the responsibility of all public officers to report, address and record misconduct and other unacceptable behaviour by public officers in a fair, timely and effective way.

This could be set out in, for example, legislation or regulations, the code of conduct, or policy.

Good practice suggestion no. 2

It is suggested that all Tasmanian public authorities have:

- clear avenues for both internal and external persons to report allegations and suspicions of misconduct; and
- basic procedures in place for handling and recording allegations and suspicions of misconduct in the first instance (e.g. lines of reporting) – this may be in a standalone procedure or incorporated into an existing procedure.

Good practice suggestion no. 3

It is suggested that all Tasmanian public authorities make the connection between misconduct-related documents and policies simple and clear.

This includes the connection between legislation, industrial instruments, and policies and procedures relevant to:

- fraud and corruption;
- grievances;
- misconduct;
- discipline;
- workplace behaviour;
- bullying;
- discrimination and harassment; and
- whistle-blowers.

This will enable employees to more easily identify which policy applies in which situation.

Capacity to manage investigations into misconduct

[105] Not all allegations of misconduct are – or should be – investigated. The Commission received a total of 46 matters that were both within the scope of the survey and were intended to be subject to an investigation under the oversight of the organisation.[15] There was one organisation that reported that it had no investigated matters within the scope of the survey.

[106] Of the 46 matters, seven were completed early due to the resignation of the respondent. In one of those files no progress was made on the investigation before the resignation. In the other six matters, some progress was made on the investigation before the respondent resigned.[16] There was also one matter in which the respondent admitted to the conduct at the start of the investigation, and so findings were made against them, although no actual 'investigation' was undertaken.

[107] Excluding the two matters in which there was no full or partial investigation, a total of 44 matters were examined by the Commission in regard to the capacity of public organisations to manage investigation into misconduct, including:

- starting the investigation; and
- undertaking the investigation.

Starting the investigation

Defining the allegations

[108] In order to focus the investigation and to meet procedural fairness requirements, it is necessary for all misconduct allegations to be sufficiently defined. This is known as having sufficiently 'particularised' allegations.

[109] Each allegation should be a factual allegation about one act or failure to act. There should be a sufficient level of detail for the act to be proven or disproven, and to allow the respondent to respond.

[110] Each factual allegation should be an act of alleged misconduct. This means it should be linked to a breach of some kind of standard, such as a code of conduct or an internal policy.

[111] Failure to follow this process makes it more difficult to:

- undertake a thorough and focused, evidence-based investigation;

[15] There were two additional matters that were investigated under the Local Government Association of Tasmania standards panel process, which is now obsolete. In accordance with that process, the council in question did not oversight these investigations and they have not been included in the files reported on in this section of the report.

[16] In one of these six matters, although it appeared some steps had been taken, very little documentation was supplied by the organisation. It was not possible for the Commission to tell exactly how far it had progressed before the resignation.

- make misconduct findings and impose sanctions if necessary; and
- defend the process, the findings and the sanctions if they are challenged.

[112] The allegations may change as the matter progresses, although this process should be tightly managed.

Findings

[113] In about a third of the investigated files, the allegations were not sufficiently defined.

[114] Two of these matters were of sufficient simplicity that they did not get to the stage where it was necessary to define the allegations. In the majority of the files, however, there appeared to be no reason for the failure to define the allegations. In some files, the allegations were defined at the end of the investigation, not at the start of the investigation.

The terms of reference

[115] The terms of reference set out what the investigator is to investigate. They generally include a scope and aim or purpose, as well as the defined allegations. Often the terms of reference are the 'instrument of appointment' for the investigator (see below).

[116] Having a document that adequately sets out the investigation's terms of reference is very important. If the terms of reference are poor, it is unlikely that the investigation outcomes will be adequate. The investigation may not have the correct focus, and it may not comply with key legal and procedural requirements.

Findings

[117] Fourteen of the relevant investigated matters lacked a terms of reference document. In some files, a copy of the written complaint or the letter sent to the respondent at the start of the investigation was the closest document to a terms of reference available. Other files lacked any kind of 'terms of reference' documentation. For instance, in one file about sexual harassment/assault allegations, the only documentation was a one page memo to the respondent listing the outcomes of the matter. There was no documentation about what happened in the matter before or during the investigation.

[118] Additionally, three files with a terms of reference document did not flag with the investigator the potentially criminal nature of the allegations. This is despite, in one of those files, the terms of reference specifically stating that the respondent was alleged to have 'physically assaulted' someone under their care.

Appointing a competent investigator

[119] Investigations into alleged misconduct are not easy, and it does take specialised skills and training to do them well. There are a number of specific qualifications that can be obtained for this purpose. Generic skills such as attention to detail and good communication are also required.

[120] It is also important that the investigator not have a conflict of interest. This means that they should not have a personal interest in the outcome of the investigation. The more serious the allegations, the more stringently this requirement should be applied.

Findings

[121] In a number of files, the lack of records made it difficult to determine if the investigator was sufficiently qualified or whether they had a conflict of interest. However, in most files, it seemed clear that the investigator had the skills to undertake the investigation, and as far as the Commission was able to ascertain there were no conflicts of interest.

[122] In only one file did it appear – due to the standard of the documented aspects of the investigation – that the investigator did not have the requisite skills to undertake the investigation. This was also the only file in which it was identified that the investigator had a conflict of interest. The conflict was due to the investigator previously having a role in managing the behaviour of the respondent that was under investigation. They were also a witness to one of the allegations under investigation.

Appointing an investigator in writing and in accordance with legislative and policy requirements

[123] In some organisations, there are mandatory requirements on the appointment of investigators. However, regardless of requirements, it is good practice to appoint investigators in writing. The appointment should set out the authority and powers of the investigator, among other matters important to the investigation. The investigator's written 'instrument of appointment' is often the terms of reference for the investigation (see above).

Findings

[124] About a third of the investigated files lacked substantive evidence of the investigator being appointed in writing. In a number of files this appeared to be due to poor record keeping, rather than an actual failure to make the appointment in writing.

[125] Some of the files in which it was clear that there had been no written appointment were from organisations in which there was no requirement to do so.

[126] The Commission also noted that it did not appear to be common practice to set out the investigator's authority and powers in the instrument of appointment.

Planning an investigation

[127] It is good practice for the investigator to make and use an investigation plan. Planning an investigation helps the investigator to stay on track and to avoid common pitfalls. A good plan will help to identify the resources and evidence necessary to complete the investigation in a professional and timely manner.

Findings

[128] Only one of the relevant files contained an investigation plan. This particular file had been handled in a near textbook good practice manner by the organisation concerned. This included:

- early and effective contact with the police, and not halting the investigation while police investigated;
- taking great care to monitor and ensure the respondent's welfare; and

- after the investigation was completed, engaging a company to perform a review of the matter's handling.

[129] In all other files (from both that organisation and others), it was not clear if the lack of a plan was due to poor record keeping, or an actual failure to plan investigations. Particularly for externally investigated matters, it may have been that investigation plans were simply not retained by the organisations.

Undertaking the investigation

Collecting all evidence that should and could be collected

[130] In all investigations, the investigator should endeavor to collect enough evidence to make logical and defensible findings of fact.

[131] To an extent, the nature of the allegations will dictate the amount of evidence collected, and the effort that is invested into collecting that evidence. The more serious the allegations, the more thorough the evidence collection should be. More serious allegations would normally necessitate, for example, interviewing the respondent and the source, rather than requesting written responses.

[132] Sometimes it is not possible to obtain relevant evidence. Attempts to obtain that evidence and the reasons for its unavailability should be documented in the investigation report.

Findings

[133] In half of the relevant files, the investigator had collected all evidence that should and could reasonably be collected. In three files, there were insufficient records to determine if all necessary evidence had been collected.

[134] The most common type of evidence that was not obtained – but that should (and apparently could) have been – in the remaining files was:

- evidence from the source and/or the person who was allegedly aggrieved; and
- witness evidence.

[135] Other examples were a failure to obtain closed circuit television footage, and a failure to obtain organisational records.

Adequately recording all evidence

[136] For the purposes of internal and external accountability, the investigator should adequately record all evidence received. For instance, interviews should either be audio recorded, or be detailed in a written record which the interviewee has, ideally, agreed is true and accurate.

Findings

[137] In just over half of the files, evidence had – for the most part – been adequately recorded.

[138] There were several different ways in which the evidence had not been adequately recorded across the remaining files.

[139] There were a number of files in which the only evidential records were summaries in the investigation report. Some of these files seemed to lack evidential records that should have been present. For example, there were references to the respondent's written response to the allegations, but no copy of that response was in the file provided to the Commission.

[140] However, in most of these files it seemed apparent that there was no primary record of the evidence in question.

[141] There were also files in which an investigation did apparently occur, but which lacked any documentation about that investigation.

Giving the respondent a reasonable opportunity to respond to the specific allegations

[142] For the purposes of procedural fairness, it is essential to give the respondent a reasonable opportunity to respond to the allegations before any findings are made.

[143] The meaning of 'reasonable opportunity' will vary with the nature of the allegations. Generally, it will mean giving the respondent an opportunity to respond to the allegations either in writing or at interview. The allegations as given to the respondent should be sufficiently defined to allow them to respond.

Findings

[144] As one of the most basic aspects of misconduct investigations, it was heartening that nearly all files complied with this requirement. The majority of files had enough records to indicate that the respondent had been given a reasonable opportunity to respond to the specific allegations.

[145] In two files, there were insufficient records to determine if this requirement had been met.

[146] In another two files, the Commission assessed that – because of the potential serious outcomes – respondents who were asked to make submissions in writing should have been given an opportunity to be interviewed.

[147] There were also two matters which were not investigated or subjected to a procedural fairness process, but in which there were disciplinary outcomes for the respondents. These matters have not been included as 'investigated' in this section of the report. However, feedback has been given to the organisation that, no matter how incontrovertible the evidence, it is at least necessary to apply procedural fairness before adverse findings and outcomes are made.

Collecting irrelevant evidence

[148] The investigator should not waste time and resources collecting material that is irrelevant to the matter under investigation. It is a requirement of procedural fairness that irrelevant evidence not be taken into account in making findings.

Findings

[149] In the majority of matters, the investigator did not collect irrelevant evidence. There were some files that lacked sufficient records to make a determination.

[150] There was one file in which irrelevant evidence had been collected and taken into account in making findings. There was also one matter in which irrelevant 'background' information was contained in the investigation report.

Adequately documenting the investigation process

[151] As with evidential records, it is essential for the purposes of internal and external accountability that the investigator adequately document the investigation process.

[152] In particular, the outsourcing of an investigation does not alleviate an organisation from its responsibility to ensure that adequate records are kept. There are specific record keeping requirements in regard to outsourced government business that apply to all public sector organisations.[17]

[153] Recording of the investigation process is generally done in the investigation report, but this may (and sometimes should) be supported by other documents such as a running sheet, copies of emails, and records of evidence collected.

[154] To find that a file was 'adequately documented', the Commission needed to be able to see what happened during the investigation and why. There also needed to be copies or records of evidence obtained during the investigation.

Findings

[155] In nearly half of the 44 files, the Commission found that, overall, the investigation process had not been adequately documented. In some files, this may have been due to poor record keeping on the part of the organisation. That is, the records may have existed, but they had either been destroyed or lost, or were simply not supplied to the Commission.

[156] Examples of comments made by those surveying the files in response to this question included:

> *There were a sum total of 4 records in this file, and none were from the investigation. I am drawing most of the information [about the matter] from the letter to the [respondent].*
>
> *…*
>
> *There are no records of the investigation at all, there is not even an investigation report.*
>
> *…*
>
> *Not documented at all.*

[17] Tasmanian Archive and Heritage Office, *State Records Guideline No 10 – Outsourcing of Government Business - Recordkeeping Issues* (27 May 2015).

Being alert to additional allegations that arise during the course of the investigation

[157] The investigator should be alert to additional allegations of misconduct that may arise during the investigation. These may be additional allegations against the respondent, or they may be allegations against another person. One issue that commonly emerges during investigations is the failure of a colleague to report the alleged misconduct. The respondent may also make counter-allegations.

[158] If new allegations emerge, the investigator should raise them with the person oversighting the investigation and they should be reported to the decision maker. The decision maker should then determine if the allegations should be incorporated into the investigation.

Findings

[159] In a few files, there were insufficient records to determine if additional allegations had emerged during the course of the investigation. Where records were sufficient and where additional allegations had emerged, in just over half of those files the new allegations had been noted to some extent.

[160] Examples of potential additional allegations that emerged but were not noted at all by the investigator and/or the organisation included bullying allegations, minor theft, and more serious criminal allegations.

[161] In some files, the additional allegations were noted; however, they did not appear to be actioned in any way. For example, one investigation involved allegations of harassment, inappropriate conduct, and victimisation made by one employee against a more senior employee. The complainant employee seemed to be certain the allegations would be supported by other employees at the start of the investigation. However, the witnesses refused to speak and/or refused to support the allegations. It appeared that the investigator recognised that there were deeper issues at play. After the investigation had ended, the partner of one of the witnesses reported that the respondent had visited the witness at home during the investigation, and coerced them into not supporting the allegations. It did not appear that any action was taken by the organisation in response to this.

Maintaining confidentiality

[162] The handling of alleged misconduct should be as discreet and confidential as possible. Maintaining confidentiality protects:

- employees, the work unit and the organisation;
- the reputation of the respondent from unproven allegations and gossip;
- the source and witnesses from victimisation and pressure; and
- the integrity of the investigation – broad knowledge of the allegations can affect witness recollections and the reliability of evidence.

[163] Although confidentiality should be maintained as far as possible, it cannot – and should not – be guaranteed. The progress of a matter cannot be known, and there are a number of ways in which an organisation may be compelled to share information. For instance, procedural fairness requirements may require information to be shared.

External scrutiny may also come about through court processes, right to information requests, and review from external bodies such as the Ombudsman, the Integrity Commission, or an industrial commission.

Findings

[164] In a number of files there were insufficient records for the Commission to determine whether confidentiality had been considered or enforced.

[165] Where records were sufficient, there were some files in which clear steps had been taken to preserve and maintain confidentiality. This included telling the respondent not to speak to colleagues about the matter.

[166] There were also a number of files in which steps should have been taken to preserve confidentiality, but in which there was no evidence of that happening. In some files, there was only evidence of limited steps being taken to maintain confidentiality. The Commission was concerned that confidentiality may have been breached in some matters.

Offering adequate support to the respondent

[167] Being investigated for alleged misconduct can be difficult. Organisations should have real support options – such as referral to an employee assistance program or welfare officer – in place before contacting the respondent. The respondent should be allowed to bring a suitably independent person to any meetings about the matter. Where an employee has been suspended, they may need special support structures in place when they return to work.

Findings

[168] Generally, where relevant, support was offered to the respondent. This was usually in the form of information about the employee assistance program. In one matter in particular, it was noted that the organisation had a counsellor on call at the time they informed the respondent of the allegations.

[169] In a few files there were no records of support being offered. There were a number of files in which it was apparent that the respondent had been offered support at the end of the investigation, but there was no record of that offer being made at the start of the investigation. It is possible that, in some files, this was due to a lack of record keeping rather than an actual failure to offer the respondent support.

Offering adequate support to the source and/or witnesses

[170] Where necessary, support should also be offered to the source and witnesses. This is especially the case if the organisation had a duty of care to the source when the alleged misconduct occurred.

Findings

[171] In the majority of matters where it appeared the source and/or a witness may have needed support, records were insufficient to determine if support had been offered.

[172] In a further six matters, there was a record of a person being offered support. In six other matters, it seemed apparent that no support had been given where it was apparently needed.

[173] Instances where there was no support offered, or no evidence of support being offered, included to persons against whom serious misconduct was alleged to have been committed, such as assault. In two matters, there was no record of that person being contacted by the organisation at all.

External investigators

[174] Just over a third of the 44 investigated matters had been outsourced to an external investigator. There are a range of reasons that matters may be outsourced, including lack of capacity or ability to independently investigate internally. Some organisations outsource investigations as a matter of course, others on a case-by-case basis.

[175] Where matters are outsourced, the organisation still has to set adequate terms of reference and oversight the investigator. There are also record keeping obligations on organisations when they outsource investigations.[18] However, the Commission found that in most externally investigated matters the only record of the investigation held by the organisation was the investigation report – this usually had copies of evidence attached, but not always.

[176] External investigations are expensive, but it was not necessarily the case that externally investigated matters were handled better overall than internally investigated matters. In some matters, it appeared that the organisation had not obtained value for money. Timeliness issues with the investigation itself were more common in externally investigated matters than internally investigated matters.

[177] In some externally investigated matters, the deficiencies were obvious. For instance, in one file that involved allegations of improper use of a work vehicle, the investigator did not appear to have requested – and was not supplied with – a copy of the vehicle's logbook. This was a key piece of evidence. It was difficult to see how valid findings could have been made without it.

[178] In other matters the issues were more complex. In at least one matter, the external investigator appeared to be working toward an outcome that they thought would be 'easiest' for the organisation. This matter involved allegations of bullying, with the investigator finding that 'there appears to be sufficient evidence to substantiate [the complainant's] claims of feeling harassed and bullied in the workplace over an extended period of time', and that the issues had been known about for several years. However, the investigator then went on to recommend that the 'evidence doesn't support the possibility' of disciplinary action. The outcome of the matter was a bullying workshop for the workplace in question; the main respondent did not attend the workshop.

[179] Although the path of not taking disciplinary action in this case may ostensibly have been easier for the organisation in the short term, allowing these kinds of situations to continue is by no means easier in the long term.

[18] Tasmanian Archive and Heritage Office, *State Records Guideline No 10 – Outsourcing of Government Business - Recordkeeping Issues* (27 May 2015).

Ability to ensure that outcomes are adequate and appropriate

[180] Regardless of whether a matter is investigated, it is important that the outcomes be adequate and appropriate for all parties, including the respondent, the source (where relevant), and the organisation. As part of the survey, for relevant investigated matters, the Commission looked at:

- reporting on the investigation;
- making findings; and
- outcomes for the respondent.

[181] For all 120 files, the Commission also looked at outcomes for the organisation.

Reporting on the investigation

[182] Forty-four matters were relevant to this part of the survey.

Reporting on the investigation

[183] The end product of an investigation is generally an investigation report. This is usually written by the investigator. It is used to set out the findings of fact, and explain why they have been made. The report should be as short as possible, while still referring to all evidence relevant to each allegation.

[184] Depending on an organisation's processes, the investigator may or may not make findings or recommendations in the report. In general, the Commission considers that better practice is for the investigator to make findings of fact and recommendations about organisational issues. Misconduct findings and disciplinary outcomes should generally be made by the decision maker, not the investigator.

Findings

[185] Nearly all of the 44 relevant files contained an investigation report of some kind. However, in four files there was no record of how – or even if – the investigator had reported on the investigation. There were also six files from one organisation in which it was clear that an investigation report had been prepared, but it had not been supplied to the Commission.

Assessing the evidence

[186] However the investigator reports on their investigation, it is essential that they analyse the evidence. The section of the report that analyses the evidence is the most important, and the hardest, part of the report to write. It is hard to defend findings and outcomes without a written assessment of the evidence.

[187] The investigator should weigh up the evidence relevant to each allegation. They should explain why they have placed greater weight on some evidence over other evidence, and why they have made the findings they did. The rationale should be

logical and clear, even to external parties. They should discuss any disputed facts, and set out their reasons for preferring one version over another.

Findings

[188] Excluding the 10 files in which there was no investigation report for the Commission to review, 13 of the 34 remaining reports did not analyse or assess the evidence. The analysis in some of the other 21 files was excellent, and in some of the files it was rudimentary.

[189] Most of the files that did not analyse the evidence were from one organisation, in which it was the intentional practice for the investigator not to analyse the evidence. This was done with the aim of the investigation being as unbiased as possible.

[190] While the Commission understands this perspective, in its opinion the better practice is for the investigator to make findings of fact. The investigator in this case was certainly competent to do that. Being the person who had spoken to all witnesses, the Commission also considered that they were best placed to do it, and that it would likely have assisted the decision maker to have the investigator's analysis in writing. If the decision maker disagreed with the investigator's findings, it would still be open for them to do that at a later stage.

Covering the investigation's terms of reference

[191] The investigation report should cover the terms of reference set by the organisation, including any additional allegations identified during the investigation. It may also discuss out of scope matters, but it should not make findings about them.

[192] Disciplinary investigations are inquisitorial and it is important that the investigator not have an adversarial mindset about proving or disproving the allegations. The report should be focused on uncovering the facts of the matter as set out in the terms of reference.

Findings

[193] Ten files had to be excluded from this analysis as there was no investigation report to review. Another 14 files were excluded because the investigation lacked a terms of reference.

[194] In the remaining 20 files, all reports adequately covered the investigation's terms of reference. Two of the reports in particular were noted by the surveyor to be 'excellent' and 'very thorough'.

Making findings

[195] Forty-four matters were relevant to this part of the survey.

Making findings of fact on the balance of probabilities

[196] For each factual allegation, a finding should be made about whether it is substantiated. This is to be done on the relevant 'standard of proof', which is an objective test applied to the evidence to make a finding. This process is generally documented in the

investigation report, although either the investigator or the decision maker may make these findings.

[197] Disciplinary investigations are administrative investigations, which means the findings need to be made on the civil standard of proof. The civil standard of proof is 'on the balance of probabilities'. This is a lower standard of proof than the criminal standard of proof, which is 'beyond reasonable doubt'. On the balance of probabilities means that the person making the finding should have reasonable satisfaction that the alleged act is more likely than not to have occurred. This should be on the basis of logically probative evidence.[19]

Findings

[198] Of the 21 files in which the investigator made findings of fact, five of them contained one or more finding that appeared to be weighted toward the respondent for no apparent reason, and thus did not appear to be made on the balance of probabilities. In the remainder of these 21 files it appeared that all findings had been made on the balance of probabilities.[20]

[199] In 20 files, the decision maker made the findings of fact. In 17 of those files the findings appeared to have been made on the balance of probabilities. In three files, it appeared that one or more finding had not been made on the balance of probabilities. Without any apparent reason, two appeared to have been weighted toward the respondent, and one appeared to have been weighted against the respondent.

[200] Of the remaining three files, two contained no rationale for the findings and it was not possible to tell if they had been made on the balance of probabilities. In the final file there did not appear to be any findings made.

Stating findings clearly and in accordance with policies

[201] The Commission looked at whether each finding was clearly stated, and – if relevant – it accorded with the organisation's governance framework and policies.

Findings

[202] In 37 of the 44 matters, the findings were stated clearly and – where relevant – accorded with the organisation's governance framework and policies. In a number of matters, however, the factual allegations were never directly linked to any particular violation of policy. That is, it was never clearly explained how the factual allegations could have amounted to misconduct.

[203] In the remaining seven matters, the Commission found that the findings had not been stated clearly. These seven files came from five organisations. Examples of issues with clarity in these files as expressed by the surveyors include:

[19] Administrative Review Council, *Best-practice guide 3 – Decision Making: Evidence, Facts and Findings* (August 2007); *Briginshaw v Briginshaw* [1938] HCA 34; Independent Broad-based Anti-Corruption Commission, Victorian Ombudsman, *Investigations guide – A guide to conducting internal investigations into misconduct* (June 2016).

[20] This had to be surmised in a number of matters as there was no investigation report.

It appears that the findings have been sustained, but there is no discussion of that at all. The [decision maker] simply jumps to giving the [respondent] a show cause notice. There is no mention of findings …

…

There do not appear to actually be findings. The memo simply states what the complainant alleged, and what the [respondent] alleged.

Ensuring the decision maker does not have a conflict of interest

[204] It is essential that the decision maker in each matter not have a perceived, actual or potential conflict of interest.

Findings

[205] Of the 43 matters relevant to this issue,[21] in 34 of them it did not appear that the decision maker had a conflict of interest. In nine files, there were insufficient records for the Commission to make a determination on this issue.

[21] One file is excluded because the respondent resigned between the investigation report being produced and the decision maker making misconduct findings (the investigator had made findings of fact).

Timeliness

[206] Timeliness in handling alleged misconduct is important for the sake of all parties involved. However, sometimes due process means that matters take longer to resolve than would be ideal.

[207] Where it is avoidable, lack of timeliness may negatively impact on the welfare of the respondent, and is frustrating for the source (in serious matters, it also has the potential to negatively impact on their welfare). In terms of the organisation itself, the potential negative impacts are manifold:

- wasted time and (human) resources;
- poor public perceptions for externally raised complaints;
- negative impacts on employees, which in turn causes them to have negative perceptions of the organisation; and
- less reliable outcomes – records may be lost or destroyed, and memories are less dependable.

[208] The Commission looked at the timely handling of alleged misconduct at two main stages as set out below. The Commission did take into account any legislative or policy restrictions on the ability of the organisation to handle the matter in a timely manner. Allowances were also made for other factors, including consultation with and reporting to external bodies such as the police; and following internal reporting lines and preparing briefings for senior executives.

[209] In general, the surveyed organisations handled matters in a relatively timely manner, with two organisations performing particularly well in this area.

[210] Where present, the more serious timeliness issues tended to be in early stages of the handling of matter, at the stage of deciding whether to investigate. There were also a number of files in which there were lengthy unexplained delays after the investigation was completed.

Handling of the initial allegations, and making a decision on whether to investigate

[211] Ideally, getting the matter to the right person, undertaking a preliminary assessment, and making a decision on whether to investigate should take no longer than three weeks.

[212] Where records were sufficient to make a determination, the majority of matters were handled in a timely manner at this stage. There were a number of files, however, which sat at this stage for well over a month, with no reason for the delay apparent from the documentation.

Undertaking an investigation

[213] This stage should ideally take less than three months for a simple investigation, and between three and 12 months for a more complex investigation.

[214] In most of the relevant files, the investigation had been undertaken in a timely manner.

Outcomes for the respondent

[215] Forty-one matters were relevant to this part of the survey.

Giving the respondent sufficient advice about the findings and outcomes

[216] Where a disciplinary investigation has been undertaken, and the respondent is aware of that investigation, the findings of the investigation should be communicated to the respondent in writing. This should be done even if no adverse findings have been made.

[217] Where there are outcomes for the respondent, such as sanctions, these should also be communicated in writing. The respondent should be told the reason for each outcome.

[218] If the respondent is given an opportunity to respond to intended findings and/or sanctions, the final decision should be communicated to them in writing.

Findings

[219] In 38 of the 41 files, the respondent appeared to have been made aware of the findings. In two files there did not appear to be any findings, or there was a lack of clarity about the findings. In the remaining file, after being given the investigation report, the decision maker decided to deal with the matter outside the misconduct process for that organisation.

[220] The question of whether sufficient advice was given to the respondent about the outcomes was relevant to 28 files. That is, in 28 files there appeared to be some kind of outcome for the respondent. This excluded a number of files in which the respondent left the organisation after being given a notice to 'show cause' why their employment should not be terminated. In one matter the respondent was allowed to retire instead of having their employment terminated.

[221] In 26 of the 28 files, the respondent appeared to have been given sufficient advice about the outcomes of the matter. Of the remaining two files, there was one in which the organisation issued a notice to show cause why disciplinary action should not be taken, but there was no record of the subsequent final decision. In the final file it was unclear what the outcomes (if any) were.

Taking appropriate action

[222] Where there were outcomes for the respondent, the Commission looked at whether those outcomes were appropriate. It is important that outcomes are fair, and proportionate to the nature of the conduct. This is 'substantive fairness', as opposed to the 'procedural fairness' discussed earlier.

[223] It is also important that outcomes clearly demonstrate – to the respondent and others – that the organisation will not tolerate misconduct.

Findings

[224] In 28 files there appeared to be some kind of outcome for the respondent. This included both sanctions and professional development and other measures. Twenty-three of these 28 files contained sustained misconduct findings.

[225] The Commission assessed that the outcome was appropriate in 17 of these 28 files.

[226] In one of the remaining 11 files, it was unclear what the final outcome was, so the Commission was unable to assess whether it was appropriate. Of the other ten files:

- in four files, the Commission assessed that the evidence collected in the investigation (or supplied to the Commission) was not sufficient to support making a final decision;
- in five files, the Commission assessed that – on the basis of the material in the file – the action taken appeared too lenient on the respondent; and
- in one file, the Commission assessed that – on the basis of the material in the file – the action taken appeared too severe.

[227] An example of leniency was a file in which the respondent had committed a number of similar breaches in recent years. Despite this, the outcome of the matter was essentially the same as past matters – a formal warning and a letter. The Commission assessed that, given the past similar transgressions, this matter should have been escalated in terms of outcome.

Advising of review rights

[228] Where sustained misconduct findings are made, respondents generally have the right to apply for review of that decision. This may be an internal process, or it may be external through a body such as an industrial commission. Where relevant, the respondent should be advised of these review rights at the end of the process.

[229] Although the Commission did not examine the files to see if complainants had been advised of their review rights, this issue is also relevant in that context. That is, where there is an aggrieved person, they should be advised of where they can take the matter if they are not satisfied with the outcome. This may be internal in the organisation, for instance through a grievance process. It may also be external through a body such as the Ombudsman Tasmania, the Integrity Commission, or Equal Opportunity Tasmania.

Findings

[230] There was one or more sustained misconduct finding in 26 of the relevant investigated matters.[22] In three of those files, the respondent left the organisation prior to the matter being finalised.

[231] In 16 of the remaining 23 files, the respondent was advised of their review rights.

[232] In six of the remaining files, it did not appear that the respondent was advised of review rights – although it was also unclear if there were review rights in the organisations in question. In the final file, there was no evidence of final correspondence with the respondent, so it was not clear if they had been advised of review rights.

[22] There was one additional file in which it was unclear what the findings were; it has not been included in these figures.

[233] A total of 120 matters within scope were supplied to the Commission by the 12 organisations. Forty-eight of those matters were investigated – or intended to be investigated – in some way. The remaining 72 matters were not investigated.

[234] Of the 72 matters that were not investigated, in five matters the respondent resigned before a decision to investigate was made. In one of those matters, the resignation was made on the understanding that the (admittedly very minor in terms of potential criminality) matter would not be referred to the police.

[235] The 48 investigated matters included seven files in which the respondent left the organisation prior to the conclusion of the matter. This included:

- one matter in which the respondent was on leave when the organisation determined to conduct an investigation, and never returned to work;
- one matter in which the respondent resigned mid-way through the investigation, before giving evidence;
- one matter in which the investigation appeared to get to some unspecified point – no documentation was supplied – before the respondent took a redundancy;
- three matters in which the respondent resigned when given a notice asking them to 'show cause' why their employment should not be terminated (in one of these matters, the subsequent resignation was on negotiated terms); and
- one matter in which the investigation was completed, appealed by the respondent to an industrial commission and upheld on the proviso that the organisation undertake further investigation, and the respondent resigned just after the second stage of the investigation commenced.

[236] The Commission is aware of cases outside of this investigation in which persons accused of misconduct resigned and then successfully applied for a different job in either the same or another public sector organisation. In such cases, especially where the resignation was submitted before the matter concluded, the new employer may be unaware of, or unable to take into account, the context in which the person resigned their previous employment.

[237] In other Australian jurisdictions, public sector organisations may:

- make findings after the employee has left the organisation;[23]
- place a declaration that the person resigned during a misconduct investigation on the person's personnel file;
- in the public service, take over an investigation commenced by a previous public service employer, or make findings on the basis of an investigation undertaken by the previous public service employer; and/or

[23] This would still involve providing the person with procedural fairness. In the event they refused to give evidence, findings may still be made. See Victorian Ombudsman, *Report on issues in public sector employment* (November 2013) 15 [43].

- take into account previous misconduct investigations and findings during employment processes.[24]

[238] In *Appendix D – Guide to managing misconduct in the Tasmanian public sector,* the Commission has suggested that Tasmanian public sector organisations should take a similar approach, where there is a public interest in doing so.

[239] It is the Commission's understanding that there is nothing generally prohibiting these steps being taken in Tasmanian public sector organisations. It is particularly noted that sch 1 cl 2(1)(i) of the *Personal Information Protection Act 2004* (Tas)[25] allows the disclosure of personal information if it

> *is to be used as employee information in relation to –*
>
> *(i) the suitability of the individual for appointment; or*
>
> *(ii) the suitability of the individual for employment held by the individual.*

[24] For example, see *Crime and Corruption Act 2001* (Qld) s 219IA; *Public Service Act 2008* (Qld) ss 187A, 188A, 188AB; Australian Government Australian Public Service Commission, *Handling Misconduct – A human resource manager's guide* (June 2015) 76; Victorian Ombudsman, *Report on issues in public sector employment* (November 2013) 15 [43]; Government of Western Australia Public Sector Commission, *Commissioner's Instruction No. 4: Discipline – former employees* (8 November 2012). South Australia is in the process of implementing a 'misconduct register' to 'prevent public sector workers moving between departments despite questionable backgrounds', see Andrew Hough, ''Misconduct' register to check work backgrounds of potential public servants', *The Advertiser* (online), 24 May 2017; Independent Commissioner Against Corruption South Australia, *Annual Report 2016-2017* (September 2017) 12. There is also guidance on how to avoid ''recycling' employees with problematic discipline, complaint or criminal histories' on the website of the Independent Broad-based Anti-Corruption Commission, see Independent Broad-based Anti-Corruption Commission, *Recruitment and employment* (2017) <http://www.ibac.vic.gov.au/preventing-corruption/are-you-vulnerable-to-corruption/recruitment-and-employment>.

[25] For an interesting discussion about misunderstandings of privacy laws and how these have prevented agencies from sharing information more effectively in Victoria, see Victorian Ombudsman, *Report on issues in public sector employment* (November 2013) 19–20 [58]–[61].

Recommendation no. 1

It is recommended to the Premier that amendments be made to the *State Service Act 2000* (Tas) to specifically allow Tasmanian State Service agencies to make disciplinary findings after an employee has left a particular agency or the State Service, in a manner similar to that set out in *Public Service Act 2008* (Qld) ss 187A, 188A and 188AB.

This is reflective of the fact that all Tasmanian State Service employees are employed by the same Employer.

Good practice suggestion no. 4

It is suggested that all Tasmanian public authorities develop guidelines and endorse a standard disclosure statement for use in recruitment.

This statement should require potential public officers to disclose:

- if they have been dismissed from a public authority in the last 10 years as the result of a misconduct investigation;
- if they were the subject of a misconduct or other disciplinary investigation when they left their last employer; and
- the status of any such investigation.

Good practice suggestion no. 5

It is suggested that all Tasmanian public authorities adopt a policy that allows:

- referees for former or current employees to, where the matter may be relevant to the work related qualities required for the job, share with a prospective employer misconduct-related findings, or the existence of a declaration that the employee left before findings were made; and
- misconduct findings to be taken into account during employment processes, with the weight placed on those findings to diminish over time.

Outcomes for the organisation

[240] This part of the survey was relevant to all 120 matters.

Identifying potential systemic or organisational issues

[241] Organisations should be alert to possible broader systemic or organisational issues raised by complaints and misconduct matters. Misconduct complaints should be seen as a learning opportunity, both personally and organisationally.[26] Good complaint handling processes can help to resolve issues, and to enhance public and employee confidence in the organisation.

[242] When identified, broader issues should be reported to the appropriate areas (including the executive) and actioned.

Findings

[243] Most files did not raise any potential organisational issues, or lacked records sufficient for the Commission to identify if there may have been any issues.

[244] About a third of the files did contain evidence of one or more potential systemic or organisational issues. In more than half of those files, the organisation had identified the issue – although in a number of matters it did not appear that the identified issues had been pursued. There were also a number of matters which potentially raised issues, but in which those issues did not seem to have been recognised at any stage by the organisation.

[245] However, there were a number of examples of very good practice in regard to the identification of, and dealing with, organisational issues. One organisation in particular seemed to be adept at tackling external complaints in a non-defensive manner and taking steps to make improvements. At another organisation, the investigator of a matter which raised a multitude of organisational issues produced a separate report making recommendations about how to deal with them.

Appropriate interaction with the source

[246] Where there was a source (internal or external), the Commission looked at whether contact and interaction with that person was adequate.

[247] In general, if the matter is a complaint, contact with the complainant should include:

- acknowledging receipt of complaint;
- advice about the process that will be followed in dealing with the complaint;
- providing an opportunity for the complainant to be heard (give evidence);
- if there are delays, letting the complainant know that the matter is still under consideration at regular intervals; and

[26] For a discussion of this, see Richard Simmons and Carol Brennan, *Grumbles, gripes and grievances: The role of complaints in transforming public services* (Nesta, 2013) <http://www.nesta.org.uk/publications/grumbles-gripes-and-grievances>; NSW Ombudsman, *Discussion Paper: Complaint Handling in NSW Universities* (10 January 2004).

- advice about the outcomes of the matter, which should be balanced with the respondent's right to privacy.

[248] If the complainant is an aggrieved party, there may be obligations on the organisation to make amends.

Findings

[249] This issue was relevant to more than a third of the 120 files. In over a third of those files, records were insufficient to determine if interaction had been adequate. In the same number of files, it did not appear that contact with the complainant had been adequate. In less than a third of the files, it appeared that interaction had been adequate.

[250] There were a number of matters in which there appeared to be no contact at all with either the source or an allegedly aggrieved party. There were also some good practice examples of contact with complainants.

[251] Particularly in matters handled by Tasmanian State Service agencies, the Commission found that the complainant was at times excluded from the process. This may be, to a certain extent, due to the wording of ED5.

[252] In the Commission's view, in general there is room for improvement in the way public sector organisations deal with complainants in Tasmania. Poor complainant contact – be they internal or external – can, apart from anything else, result in poor perceptions of an organisation and the public sector as a whole.[27]

[253] Many organisations in Tasmania do not have a complaint handling policy, and this would be a good place to start work on improving practice.[28] Complaints should not be dealt with defensively. Rather, they should be seen as a key avenue for identifying organisational improvements.

[27] For a recent example, see Richard Baker, 'A Utopia moment in foreign affairs when life imitates art', *The Sydney Morning Herald* (online), 23 July 2017 <http://www.smh.com.au/national/a-utopia-moment-in-foreign-affairs-when-life-imitates-art-20170722-gxgj0w.html>.

[28] Good material to start with includes Standards Australia, *Australian/New Zealand Standard: Guidelines for complaint management in organizations* (AS/NZS 10002:2014); Ombudsman New South Wales, *Complaint Management Framework* (June 2015) <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/complaint-management-framework-june-2015>. See also n 14, n 26.

[254] Good record keeping is one of the primary responsibilities of all public officers:

> *Good records management is the foundation of government accountability—the integrity of government records directly influences public perception of the integrity of the government itself. Well managed records are also central to the government's ability to make informed decisions, efficiently and effectively provide goods and services, protect the community, and demonstrate delivery on its commitments.*[29]

[255] In regard to misconduct, good record keeping is central to ensuring that outcomes of alleged misconduct – both present and future – are accountable and effective. Misconduct can have a significant impact on people's lives, and it is imperative for all parties that allegations be taken seriously and properly recorded.

[256] The overwhelming finding of this investigation is that there is much room for improvement in record keeping about allegations of, and investigations into, misconduct among Tasmanian public sector organisations.

Record keeping within files

[257] Of the 120 files supplied, the record keeping was overall found to be inadequate in 99.

[258] In some files, there were so few records it was not possible to answer many of the survey questions. The allegations and who had made them were hard to discern in some matters. In others, presumably due to lack of records, it was not possible to tell why the organisation had handled two ostensibly similar matters differently.

[259] Common issues included missing records about what decisions were made and why (and by whom), and missing final signed versions of important correspondence. In some investigated matters, key evidence, correspondence and documents – such as the respondent's evidence and the investigation report – were not in the supplied file.

[260] It was impossible for the Commission to be assured that matters had been handled adequately in a number of instances. It is quite possible that some, or many, of the matters were handled better than it would appear on the basis of the records. However, without records, there is no proof that this was the case.

[261] By the same token, it is very difficult for anybody – internal or external – to identify areas in need of improvement in poorly maintained files (other than in regard to the record keeping itself).

[262] In New South Wales, 'the head of a government sector agency is to keep a written record of the proceedings and action taken in respect of any allegation of misconduct

[29] Victorian Auditor-General, *Managing Public Sector Records* (March 2017) 6.

by an employee of the agency'.[30] While there are similar rules in Tasmania,[31] the records that are required to be kept are not as broad.

[263] In Western Australia, state service agencies are required to keep a record of even small infractions and grievances so that they can be reported to the Public Sector Commission on an annual basis.[32]

Record keeping about files and allegations

[264] None of the organisations seemed to have mandatory lines of reporting or record keeping procedures in place for allegations and suspicions of misconduct. There was no register of misconduct matters that would have made it easier for the organisations to identify and supply the records requested by the Commission.

[265] It does seem unlikely that, among the at least 27,000 public officers employed across these 12 organisations, only 120 complaints of misconduct were made in a one year period. The Commission believes that, had better record keeping processes been in place, it would have received far more files to survey.

[266] In future, it may be mandatory for public sector organisations to notify the Commission of all alleged serious misconduct or misconduct committed by a 'designated public officer'.[33] Without at least having mandatory lines of reporting, this would be very difficult – if not impossible – for most public sector organisations.

[267] Maintaining a register of matters would help each organisation to:

- identify patterns and trends;
- identify multiple allegations against one employee or a group of employees over time;
- identify opportunities for organisational improvement;
- ensure consistency in processes;
- ensure consistency in outcomes; and
- ensure timeliness.

A comment on the recommendations

[268] The Commission's recommendations below would extend both the type of records that are required to be kept by Tasmanian public sector organisation, and the length of time for which those records are required to be kept.

---

[30] Ombudsman New South Wales, *Discussion Paper: The use of external investigators by NSW Government agencies* (July 2016) 11.
[31] Tasmanian Archive and Heritage Office, *Disposal Schedule for Common Administrative Functions – Disposal Authorisation No. 2157* (26 May 2014) 58 [05.11.00], 136–7 [12.09.00]–[12.10.00], 192–3 [16.06.00].
[32] Government of Western Australia, Corruption and Crime Commission, Public Sector Commission, *Notification of misconduct in Western Australia* (1 July 2015).
[33] The Hon William Cox AC, RFD, ED, QC, Report of the Independent Reviewer, *Independent Review of the Integrity Commission Act 2009*, May 2016, 35–38 [3.5.1]–[3.6.7] <http://www.integrity.tas.gov.au/reports_and_publications/reviews>; Tasmanian Government, Tasmanian Government Response, *Independent Review of the Integrity Commission Act 2009*, November 2016, 14 <http://www.integrity.tas.gov.au/reports_and_publications/reviews>. For a definition of 'designated public officers', see *Integrity Commission Act 2009* (Tas) s 6.

[269] The Commission has recommended an extension in the timeframe because, among other reasons, it is not usually possible (or preferable) for an organisation to rely on records that have been kept beyond the retention period recommended by the State Archivist.

[270] Misconduct allegations can come down to one person's version of events against another, and so it can be difficult to establish whether the alleged conduct occurred. Especially in the case of alleged serious misconduct, it is preferable that records of even unsubstantiated allegations be kept for a sufficient period of time. As discussed above, one reason for this is so that the organisation can see if, over time, a pattern of allegations emerges.

[271] Finally, the Commission does not consider that organisations should immediately destroy records of allegedly vexatious complaints, especially those that relate to serious misconduct. If the complaint is truly vexatious, keeping the record can assist in dealing with the complainant if they make more complaints. In any event, vexatious complaints are rare. Leaving the retention of complaint records at the discretion of the organisation can reduce future opportunities for organisational and personal improvement, and internal and external accountability.

Recommendation no. 2

It is recommended to the State Archivist that it be made a requirement under *Archives Act 1983* (Tas) guidelines that public authorities keep a written record of the proceedings and action taken in respect of any allegation or suspicion of serious misconduct committed by a public officer.

This is to include all serious misconduct matters, including those that do not proceed to investigation and those that are not substantiated.

These records should be kept for seven years.

Recommendation no. 3

It is recommended to the State Archivist that it be made a requirement under *Archives Act 1983* (Tas) guidelines that public authorities maintain an appropriately confidential register of all alleged and suspected misconduct committed by a public officer.

This is to include all misconduct matters, including those that do not proceed to investigation and those that are not substantiated. These records should be kept for two years.

It is suggested that this register should include:

- references for easy location of related files;
- date the matter was received;
- the respondent's name;
- a description of the alleged misconduct;
- how the matter was dealt with (e.g. investigation, mediation, performance management);
- outcomes; and
- the date the matter was finalised.

Concluding remarks

[272] One of the Integrity Commission's key functions is to assist public authorities to deal with allegations of misconduct. Through its work over the years, and as it developed its own knowledge and experience, the Commission became aware of inconsistencies and shortcomings in the capacity of public authorities to manage and investigate allegations of misconduct. This is what motivated the Commission to undertake this extensive two-year own-motion investigation.

[273] This investigation should be seen as a litmus test for the handling of public sector misconduct across the state. It does not discount the good practices that some organisations have already adopted, but aims to build on those too. The Commission, the public sector, and the Tasmanian public now have a good understanding of the standard of public sector management of alleged misconduct.

[274] While there is room for improvement, the Commission also identified instances of good – and in some cases very good – policies, practices and procedures. It was also pleasing that, during the investigation, several of the organisations informed the Commission that taking part in the process had alerted them to areas in need of improvement and that they had taken action accordingly.

[275] These examples demonstrate, in some cases, a solid basis of sound misconduct management, and that all Tasmanian public sector agencies are capable of taking their approach to the next level.

[276] The Commission urges all Tasmanian public sector organisations to review their policies and practices in this important area, and to start working toward making improvements. It is hoped that the good practice material included in this report will show all public sector authorities how they can start on that work.

[277] It is now the role of the Commission, principal officers, and employees with responsibility in this area to try and improve on the gaps that do exist. This will be for the benefit of all stakeholders, including employees, the public, public monies, and public authorities.

[278] The Commission intends to do more work in facilitating networks and developing further good practice resources. It is possible that the Commission will undertake a similar investigation in future, to gauge improvements. In the meantime, it will provide support and guidance where needed and to the extent that its resources will allow.

Appendix A – Survey scope, objectives & criteria

Scope

The scope of the survey is:

- records, information and material relating to allegations and complaints of misconduct about, against or relating to the persons who are under the Integrity Commission's jurisdiction and who are engaged to work in any capacity[34] in each of the 12 public authorities[35] subject to investigation MM15/0146 that were finalised/closed between 1 July 2014 and 30 June 2015, excluding:
    - matters that were handled entirely within [redacted]; and
    - records, information and material relating to resolution of complaints and allegations by an external body;

  and

- records, information and material relating to allegations and complaints of misconduct that were handled entirely within [redacted] and were about, against or relating to the persons who are under the Integrity Commission's jurisdiction and who are engaged to work in any capacity in the [redacted], excluding:
    - records, information and material relating to resolution of complaints and allegations by an external body.

Objectives

The objectives of the survey are to determine the:

A. adequacy of public authority practices when misconduct is alleged or suspected;
B. capacity of public authorities to manage investigations into misconduct; and
C. ability of public authorities to ensure that outcomes of alleged/suspected misconduct are adequate and appropriate.

Criteria

Foundation questions

1. Public authority
2. IC MM file reference (where applicable)
3. Public authority's ref no. for the matter (where applicable)
4. IC surveyor name
5. Is this a matter that was formally investigated (or in which a formal investigation was commenced)?

[34] The definition for these persons varies among the four different types of public authorities subject to MM15/0146.
[35] As defined in s 5 of the *Integrity Commission Act 2009* (Tas).

6. Is this a matter in which the authority intended to commence/commenced a formal investigation, but then had to halt the investigation for some reason?
7. Was the matter referred by another authority, or was another authority notified of, or involved in the resolution of, the allegation/suspicion?
8. Surveyor's general comments about the matter and how it was handled

Objective A: Determine the adequacy of public authority practices when misconduct is alleged or suspected

Handling of the initial allegation/suspicion

9. Date the allegation was made/suspicion first raised.
10. Was this an externally raised matter, or an internally raised matter?
11. What would the allegation/suspicion, if proved, have amounted to?
12. Does the authority have policies and procedures in place for reporting alleged or suspected misconduct?
13. Was the initial allegation/suspicion handled in accordance with the authority's governing legislation and relevant policies?
14. If necessary, did the authority take immediate action in relation to the allegation/suspicions?
15. Taking into account any legislative/policy restrictions, was the initial allegation/suspicion handled in a timely manner?
16. Overall, was the initial allegation/suspicion handled appropriately in the first instance?

Deciding whether to investigate

17. Were the preliminary inquiries undertaken by the authority sufficient to determine the most appropriate way to handle the allegation/suspicion?
18. Does the authority have adequate policy/guidelines on responding to and investigating allegations/suspicions of misconduct?
19. Has the authority's misconduct policy been correctly applied in this matter?
20. Who made the decision on whether to investigate the allegation/suspicion?
21. Was the person who made the decision whether to investigate the matter the most appropriate person to make that decision?
22. Taking into account any legislative/policy restrictions, did the authority make the appropriate decision on whether to investigate the allegation/suspicion?
23. Taking into account any legislative/policy restrictions, did the authority make the appropriate decision on whether to investigate in a timely manner?
24. If the matter was not formally investigated before being resolved, how was it resolved?

Objective B: Determine the capacity of public authorities to manage investigations into misconduct

Starting the investigation

25. Were the allegations under investigation sufficiently particularised?

26. Who appointed the investigator?
27. Date the investigator was appointed.
28. Who was the investigator?
29. Was the investigator internal or external to the public authority?
30. Does it appear that the investigator was suitably qualified/skilled/experienced?
31. For what reasons did the public authority choose the appointed investigator?
32. Was the investigator appointed in writing, and in accordance with legislative/policy requirements?
33. Did the investigator have a perceived, actual or potential conflict of interest?
34. Was there a terms of reference for the investigation?
35. Who set the terms of reference for the investigation?
36. Was there an investigation plan and was it fit for purpose?
37. Who wrote the investigation plan?

Undertaking the investigation

38. Taking into account the nature and severity of the matter, did the investigator contact all witnesses who should and could have been contacted?
39. Taking into account the nature and severity of the matter, did the investigator collect all evidence that should and could have been collected?
40. Was all evidence, including interviews, adequately recorded?
41. Did the investigator give the person/s under investigation an adequate opportunity to respond to the specific allegations?
42. Did the investigator collect evidence or contact witnesses that were irrelevant to the investigation?
43. Was the investigation process adequately documented?
44. Were steps taken to ensure confidentiality was maintained?
45. Did the authority offer adequate assistance, such as counselling, union referrals and management support to the person/s under investigation?
46. If necessary, did the authority offer adequate support to the complainant and/or witnesses?
47. Did the investigator consider and, if necessary, have included in the scope of the investigation, any allegations that arose during the course of the investigation?
48. Taking into account any policy or other restrictions, was the investigation undertaken in a timely manner?

Objective C: Determine the ability of public authorities to ensure that outcomes of alleged/suspected misconduct are adequate and appropriate

Reporting on the investigation

49. Date the investigator reported to the decision maker
50. Did the investigator prepare an investigation report?

51. Did the investigator analyse/assess the evidence?
52. Does the report adequately cover the investigation's terms of reference?
53. Did the investigator make any recommendations?
54. Did the investigator report to the decision maker (by way of report or otherwise) in a timely manner?

Findings

55. Did the investigator make findings?
56. If they made any, did it appear that the investigator made their findings on the balance of probabilities?
57. If they made findings, did it appear that the decision maker made their findings on the balance of probabilities?
58. Were the findings stated clearly and in accordance with the authority's policies?
59. Was the person/s under investigation advised of any intention to make an adverse finding, and given an opportunity to respond?
60. Was there one or more sustained misconduct findings?
61. Were the findings based on the evidence?
62. Did the decision maker (on findings) have a perceived, actual or potential conflict of interest?
63. Date the findings were finalised
64. Was the person/s under investigation advised of the findings?

Outcomes for person/s under investigation

65. Was the decision maker role for findings separated from the role of deciding outcomes for the person/s under investigation?
66. If yes, did the decision maker (on outcomes) have a perceived, actual or potential conflict of interest?
67. Date the person/s under investigation was notified of the (intended) outcomes.
68. Where relevant, date the person/s under investigation was notified of the final decision on outcomes.
69. Was the action taken appropriate?
70. Is there sufficient evidence to support the action taken?
71. Date the matter was finalised
72. Was the person/s under investigation given sufficient advice about the findings and outcomes of the matter?
73. Were there any unreasonable delays during the authority's investigation?
74. Was the person/s under investigation advised of any rights to review?

Outcomes for the public authority

75. Were potential systemic/organisational issues raised by the matter identified by the public authority?

76. Where relevant, does the interaction with the complainant appear to have been adequate?
77. Does the authority have adequate record keeping policies and procedures in relation to allegations/suspicions of misconduct?
78. Overall, was the record keeping in this matter adequate, and in accordance with internal requirements?

Appendix B – References

Articles, reports and policies

Administrative Review Council, *Best-practice guide 2 – Decision Making: Natural Justice* (August 2007)

Administrative Review Council, *Best-practice guide 3 – Decision Making: Evidence, Facts and Findings* (August 2007)

Ambulance Service of New South Wales, *Misconduct – Procedural Guidelines for Dealing with misconduct as a Disciplinary Matter and the Taking of Disciplinary Action* (October 2006)

Australian Bureau of Statistics, *Managing Breaches of the Code of Conduct* (23 July 2013)

Australian Federal Police, *The Case Categorisation & Prioritisation Model – Guidance for AFP Clients* (1 July 2016)

Australian Government Australian Public Service Commission Office of the Merit Protection Commissioner, *Procedures for inquiring into and determining breaches of the Code of Conduct by an APS employee or former APS employee* (1 August 2014)

Australian Government Australian Public Service Commission, *APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads* <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>

Australian Government Australian Public Service Commission, *Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants* (24 April 2008) <http://www.apsc.gov.au/publications-and-media/circulars-and-advices/2008/circular-20083>

Australian Government Australian Public Service Commission, *Commission Advice 2013/07: Legislative changes to procedures for handling misconduct* (2 May 2013)

Australian Government Australian Public Service Commission, *Handling Misconduct – A human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct* (2008)

Australian Government Australian Public Service Commission, *Handling Misconduct – A human resource manager's guide* (June 2015)

Australian Government Australian Research Council, *Staff Misconduct Policy & Guidelines* (2014)

Australian Government Australian Taxation Office, *Australian Government Investigations Standards* (5 November 2008) <https://www.ag.gov.au/RightsAndProtections/FOI/Pages/FreedomOfInformationDisclosureLog/AustralianGovernmentInvestigationStandards2011andAustralianGovernmentInvestigationsStandards2003.aspx>

Australian Government, *Australian Government Investigations Standards* (2011) <https://www.ag.gov.au/RightsAndProtections/FOI/Pages/FreedomOfInformationDisclosureL

og/AustralianGovernmentInvestigationStandards2011andAustralianGovernmentInvestigationsStandards2003.aspx>

Australian Human Rights Commission, *Profile of University Respondents – University: University of Tasmania* (2017) <http://www.utas.edu.au/neverok>

Australian Securities and Investments Commission, *Guidelines for managing allegations of misconduct against ASIC officers* (September 2015)

Australian Securities and Investments Commission, *How ASIC deals with reports of misconduct* (June 2014)

Avoid these five misconduct investigation pitfalls (24 September 2015) HR Daily <https://www.hrdaily.com.au/nl06_news_selected.php?selkey=3672>

Baker, Richard, 'A Utopia moment in foreign affairs when life imitates art', *The Sydney Morning Herald* (online), 23 July 2017 <http://www.smh.com.au/national/a-utopia-moment-in-foreign-affairs-when-life-imitates-art-20170722-gxgj0w.html>

Brewer, Martin, *Tips on investigating employee misconduct* (4 August 2009) HR Zone <https://www.hrzone.com/perform/business/tips-on-investigating-employee-misconduct>

Brown, A J, Nerisa Dozo and Peter Roberts, *Whistleblowing Processes & Procedures – An Australian & New Zealand Snapshot – Preliminary Results: Whistling While They Work 2 Survey of Organisational Processes & Procedures 2016* (November 2016)

Bryant-Smith, Rose, Grevis Beard and Lisa Klug, *Effective Workplace Investigations* (Worklogic Pty Ltd, 2016)

Clayton Utz, *Good decision-making for government* (Clayton Utz, 2006)

Commonwealth Ombudsman, *Complaint management by government agencies – An investigation into the management of complaints by Commonwealth and ACT government* (October 2014)

Commonwealth Ombudsman, *Fact sheet – Complaint handling: Outsourcing* (undated)

Commonwealth Ombudsman, *Fact sheet 6 – Complaint handling: Outsourcing* (April 2009)

Cooper, Adam, 'Ex-principal convicted, agrees to give evidence in schools rorts case', *The Age* (online), 9 August 2017 <http://www.theage.com.au/victoria/exprincipal-convicted-agrees-to-give-evidence-in-schools-rorts-case-20170809-gxsom7.html>

Corruption and Crime Commission, *Guidelines for Notification of Serious Misconduct for Principal Officers of Notifying Authorities* (1 July 2015)

Cox, The Hon William AC, RFD, ED, QC, Report of the Independent Reviewer, *Independent Review of the Integrity Commission Act 2009*, May 2016 <http://www.integrity.tas.gov.au/reports_and_publications/reviews>

Crime and Corruption Commission Queensland, *Confidential information – Unauthorised access, disclosure and the risks of corruption in the Queensland public sector* (November 2016)

Crime and Corruption Commission Queensland, *Corruption in focus – A guide to dealing with corrupt conduct in the Queensland public sector* (October 2014)

Crime and Corruption Commission Queensland, *How to respond to a confidential information incident in your agency – A six-step guide for managers and supervisors* (May 2016)

Crime and Misconduct Commission, *Crime and Misconduct Commission Annual Report 2013–14* (September 2014)

Don't get "tricky" with support person provisions (22 April 2014) HR daily <https://www.hrdaily.com.au/nl06_news_selected.php?selkey=2988>

Don't jump the gun with misconduct allegations (19 August 2015) HR Daily <https://www.hrdaily.com.au/nl06_news_selected.php?selkey=3619>

Employment New Zealand, *Misconduct and serious misconduct* (2015)

Fair Work Ombudsman, *Managing performance & warnings* (2010) <https://www.fairwork.gov.au/employee-entitlements/managing-performance-and-warnings>

Government of South Australia Office for the Public Sector, *Commissioner for Public Sector Employment Guideline: Management of unsatisfactory performance (including misconduct)* (undated) <https://publicsector.sa.gov.au/wp-content/uploads/20141001-Guideline-Management-of-unsatisfactory-performance-including-misconduct.pdf>

Government of South Australia Office for the Public Sector, *South Australian Public Sector Fraud and Corruption Control Policy* (22 January 2016)

Government of Western Australia Department of Health, *Disciplinary Investigation Report Writing Guide* (11 September 2013)

Government of Western Australia Department of Health, *Misconduct Policy* (September 2014)

Government of Western Australia Department of Health, *Misconduct Policy Explanatory Notes* (September 2014)

Government of Western Australia Department of Health, *Misconduct Policy Template Letters* (September 2014)

Government of Western Australia Public Sector Commission, *Commissioner's Instruction No. 3: Discipline – general* (8 November 2012)

Government of Western Australia Public Sector Commission, *Disciplinary investigations under Part 5 of the Public Sector Management Act 1994 – A guide for agencies* (2015)

Government of Western Australia Public Sector Commission, *Managing workplace behaviour – A guide for agencies* (2013)

Government of Western Australia, Corruption and Crime Commission, Public Sector Commission, *Notification of misconduct in Western Australia* (1 July 2015)

Hough, Andrew, ‘‘Misconduct’ register to check work backgrounds of potential public servants’, *The Advertiser* (online), 24 May 2017 <http://www.adelaidenow.com.au/news/south-australia/misconduct-register-to-check-work-backgrounds-of-potential-public-servants/news-story/7a5b4b3fa4446ac24aa2c0bb2ff0cc1e>

Independent Broad-based Anti-Corruption Commission, *Guidelines for making and handling protected disclosures* (October 2016)

Independent Broad-based Anti-Corruption Commission, *Guidelines for protected disclosure welfare management* (October 2016)

Independent Broad-based Anti-Corruption Commission, *Recruitment and employment* (2017) <http://www.ibac.vic.gov.au/preventing-corruption/are-you-vulnerable-to-corruption/recruitment-and-employment>

Independent Broad-based Anti-Corruption Commission, Victorian Ombudsman, *Investigations guide – A guide to conducting internal investigations into misconduct* (June 2016)

Independent Commission Against Corruption, *Fact finder – A guide to conducting internal investigations* (March 2012)

Independent Commissioner Against Corruption South Australia, *Annual Report 2016-2017* (September 2017)

Integrity Commission, Submission to Independent Review, *Integrity Commission Act Review*, March 2016 <http://www.integrity.tas.gov.au/reports_and_publications/reviews>

Interview language letting down workplace investigations (27 May 2014) HR Daily <https://www.hrdaily.com.au/nl06_news_selected.php?selkey=3032>

McMillan, John, ‘Natural justice: too much, too little or just right?’ (Paper presented at Australian Institute of Administrative Law, National Administrative Law Forum, Canberra, August 2007)

Nand, Janice, ‘Investigating misconduct - privilege and privacy’ in Sparke Helmore Lawyers, Workplace Matters (Issue 5, August 2014)

New South Wales Department of Education and Training, *Guidelines for the Management of Conduct and Performance (PD/2006/0335)* (4 August 2006)

No adverse action against HR manager who breached confidentiality (9 September 2014) HR Daily <https://www.hrdaily.com.au/nl06_news_selected.php?selkey=3181>

NSW Government Premier & Cabinet Division of Local Government, *Framework for Managing Councillor Misconduct Allegations* (February 2013)

NSW Government Public Service Commission, *Behaving Ethically – Scenario 11 – Investigating allegations of misconduct* (2013)

NSW Ombudsman, *Discussion Paper: Complaint Handling in NSW Universities* (10 January 2004)

NSW Ombudsman, *Investigating complaints – A manual for investigators* (June 2004)

NSW Ombudsman, *Managing information arising out of an investigation – Balancing openness and confidentiality* (May 2009)

Office of Police Integrity, *A Fair and Effective Victoria Police Discipline System* (October 2007)

Ombudsman New South Wales, *Child Protection Fact Sheet 2: How we assess an investigation* (March 2012)

Ombudsman New South Wales, *Child Protection Fact Sheet 4: Planning and conducting an investigation* (January 2014)

Ombudsman New South Wales, *Complaint Handling at Universities: Australasian Best Practices Guidelines* (January 2015)

Ombudsman New South Wales, *Complaint Management Framework* (June 2015) <https://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/complaint-management-framework-june-2015>

Ombudsman New South Wales, *Discussion Paper: The use of external investigators by NSW Government agencies* (July 2016)

Ombudsman New South Wales, *Public Sector Agencies Fact Sheet 9: Investigation of complaints* (March 2012)

Ombudsman New South Wales, *Reporting on progress and results of investigations* (February 2012)

Ombudsman NT, *Effective Complaints Management Self Audit Checklist* (September 2006)

Ombudsman SA, *An audit of state government agencies' complaint handling* (November 2014)

Ombudsman Western Australia, *Guidelines: Conducting administrative investigations* (May 2009)

Ombudsman Western Australia, *Guidelines: Exercise of discretion in administrative decision-making* (October 2009)

Ombudsman Western Australia, *Guidelines: Giving reasons for decisions* (July 2009)

Ombudsman Western Australia, *Guidelines: Good record keeping* (May 2009)

Ombudsman Western Australia, *Guidelines: Investigation of Complaints* (May 2009)

Ombudsman Western Australia, *Guidelines: Procedural fairness (natural justice)* (May 2009)

Owen, Michael, 'SA's ICAC head blasts lengthy paid public-sector suspensions', *The Australian* (online), 13 January 2017 <http://www.theaustralian.com.au/news/nation/sas-icac-head-blasts-lengthy-paid-publicsector-suspensions/news-story/3060b7e015ab80ad3eaea221ac95d1c9>

Pilcher, Hienee, 'Gympie council spent $55,000 targeting planning director', *Caboolture News* (online), 1 February 2016 <https://www.caboolturenews.com.au/news/gympie-regional-council-spent-about-55000-on-inter/2917368/>

Province of British Columbia BC Public Service Agency, *Investigations of Employee Misconduct* <http://www2.gov.bc.ca/gov/content/careers-myhr/managers-supervisors/employee-labour-relations/problems-with-employee/investigations>

Queensland Corrective Services, *Misconduct Investigation Manual* (24 March 2009)

Queensland Government Public Service Commission, *Commission Chief Executive Guideline 01/13: Discipline* (21 March 2013)

Queensland Ombudsman, *Complaints Management Project – Phase 1 Report* (December 2005)

Queensland Ombudsman, *Database elements for your Complaints Management System* (undated)

Queensland Ombudsman, *Effective Complaints Management Self Audit Checklist* (2006)

'Reinstatement where the employment relationship has irrevocably broken down: Andrea Walsh v Australian Taxation Office' (Express law, Australian Government Solicitor, 16 March 2005)

Sandhurst School Education Board, *Guidelines for employers regarding allegations of Misconduct and/or Incompetence* (June 2013)

Sandhurst School Education Board, *SSEB Policy Staff Misconduct and/or Incompetence* (June 2013)

Simmons, Richard and Carol Brennan, *Grumbles, gripes and grievances: The role of complaints in transforming public services* (Nesta, 2013) <http://www.nesta.org.uk/publications/grumbles-gripes-and-grievances>

State Government Victoria Department of Education & Training, *Human Resources: Guidelines for Managing Complaints, Misconduct and Unsatisfactory Performance in the VPS* (1 January 2015)

State Government Victoria Victorian Public Sector Commission, *Guide to Managing Poor Behaviour in the Workplace* (2016)

Tasmanian Government, Tasmanian Government Response, *Independent Review of the Integrity Commission Act 2009*, November 2016 <http://www.integrity.tas.gov.au/reports_and_publications/reviews>

Tasmania Police, *Tasmania Police Manual* (January 2016)

Tasmanian Audit Office, *Report of the Auditor-General No. 1 of 2015-16 – Absenteeism in the State Service* (July 2015)

The Integrity Coordinating Group, *Integrity in Decision Making – Proper Process* (June 2011)

The Integrity Coordinating Group, *Integrity in Decision Making – Proportionate Outcomes* (June 2011)

The University of Western Australia, *Human Resources – University Policy on: Managing Misconduct (Professional Employees) (UP07/260)* (6 August 2015) <http://www.hr.uwa.edu.au/policies/policies/management/misconduct>

Tobin, Andrew and Adele Garnett, *Misconduct investigations: our top tips* (undated) FindLaw Australia <http://www.findlaw.com.au/articles/5688/misconduct-investigations-our-top-tips.aspx>

Vermeesch, Paul, 'Misconduct in the Australian Public Service' (Legal Briefing Number 104, Australian Government Solicitor, 15 October 2014)

Victorian Auditor-General, *Managing Public Sector Records* (March 2017)

Victorian Ombudsman, *Good Practice Guide to Handling Complaints – Report and Guide* (September 2016)

Victorian Ombudsman, *Report on issues in public sector employment* (November 2013)

WorkSafe Tasmania, *How to prevent and respond to workplace BULLYING* (September 2016)

Cases

Alastair Paul Shepherd v Minister administering the State Service Act 2000/ Department of Justice [2015] Tasmanian Industrial Commission T14368 (18 February 2016)

Ashman v State of Tasmania [2001] TASSC 80

Briginshaw v Briginshaw [1938] HCA 34

Coutts v Close [2014] FCA 19

Heather Bilson v Mission Australia [2010] FWA 6297

Lance Camilleri v IBM Australia Limited [2014] FWC 5894

Noel Cannan v Nyrstar Hobart Pty Ltd [2014] FWC 5072

Pervan v Frawley [2011] TASSC 27

Rainbird v Bonde [2016] TASSC 10

Secretary, Department of Health and Human Services v Beveridge [2004] TASSC 9

State of Tasmania v Clifford [2011] TASSC 10

Susan Francis v Patrick Stevedores Holdings Pty Ltd [2014] FWC 7775

Tara Leah Cunningham v Downer EDI Mining Pty Limited [2015] FWC 318

Telstra Corporation Limited v Streeter [2008] AIRCFB 15

Torres v Commissioner of Police [2017] NSWIRComm 1001

Vega Vega v Hoyle & Ors [2015] QSC 111

Legislation

Anti-Discrimination Act 1998 (Tas)

Archives Act 1983 (Tas)

Corporations Act 2001 (Cth)

Criminal Code Act 1924 (Tas)

Integrity Commission Act 2009 (Tas)

Local Government Act 1993 (Tas)

Personal Information Protection Act 2004 (Tas)

Police Offences Act 1935 (Tas)

Privacy Act 1988 (Cth)

Public Interest Disclosures Act 2002 (Tas)

Right to Information Act 2009 (Tas)

State Service Act 2000 (Tas)

Other

Australian Public Service Commissioner's Directions 2016

Employment Direction No. 2 – State Service principles

Employment Direction No. 4 – Procedure for suspension of State Service employees with or without pay

Employment Direction No. 5 – Procedures for the investigation and determination of whether an employee has breached the code of conduct

Employment Direction No. 6 – Procedures for the investigation and determination of whether an employee is able to efficiently and effectively perform his/her duties

Fair Work Australia, *Victorian Public Service Workplace Determination 2012 (AG895510)* (23 July 2012)

Standards Australia, *Australian/New Zealand Standard: Guidelines for complaint management in organizations* (AS/NZS 10002:2014)

Tasmanian Archive and Heritage Office, *Disposal Schedule for Common Administrative Functions – Disposal Authorisation No. 2157* (26 May 2014)

Tasmanian Archive and Heritage Office, *State Records Guideline No 1 Records Management Principles: Overview* (4 June 2014)

Tasmanian Archive and Heritage Office, *State Records Guideline No 10 – Outsourcing of Government Business - Recordkeeping Issues* (27 May 2015)

Treasurer's Instruction No. 301 – Reporting Procedures in Cases of Illegal Entry and/or Damage to or loss of Property or Money

Government of Western Australia Public Sector Commission, *Commissioner's Instruction No. 4: Discipline – former employees* (8 November 2012)

Appendix C – Model preliminary assessment process

An editable version of this document can be obtained from the Integrity Commission.

Model process for preliminary assessments of alleged or suspected misconduct

Purpose

1. The purpose of a preliminary assessment (PA) is to quickly gather information about a matter that may involve misconduct.

2. The information gathered in a PA will be used to determine:

    a) whether there is a reasonable suspicion of misconduct and
    b) the most appropriate way/s to deal with the matter.

When to conduct a preliminary assessment

1. This process is to be used for any alleged or suspected misconduct that arises in [organisation]. This includes allegations of serious misconduct.

2. A PA is not an investigation. It is not designed to uncover the facts of a matter. A PA should not make findings or arrive at conclusions.

3. You should strive to meet the timeframes in this document. It is better for each step to take no longer than one week, and ideally not longer than three working days. However, there may be mitigating circumstances that mean it is not possible to meet these timeframes. Any delays may need to be documented and communicated to relevant parties.

Misconduct means conduct, or an attempt to engage in conduct, that is or involves:

- a breach of a code of conduct
- the performance of functions or the exercise of powers in a way that is dishonest or improper
- a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers or
- a misuse of public resources in connection with the performance of functions or the exercise of powers.

It may also be conduct, or an attempt to engage in conduct, that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer.

Serious misconduct is conduct that could, if proved, be a crime or an offence of a serious nature, or that could provide reasonable grounds for terminating employment.

Allegations or suspicions of misconduct could arise through:

- external, internal and anonymous complaints
- protected and/or public interest disclosures
- criminal allegations
- grievances and workplace safety issues that contain allegations of misconduct
- alleged fraud and corruption and
- alleged breaches of the Code of Conduct or policies and procedures.

Step 1: Initial handling

Where possible, to be completed in three working days of the allegation or suspicion of misconduct being reported to the [decision maker].

1. When allegations or suspicions that may involve alleged misconduct arise, they should be reported to [decision maker] as soon as practicable. If the allegations somehow involve [decision maker], the report should go to [secondary decision maker].

   Other than [decision maker], the alleged misconduct should be kept confidential.

2. If necessary, the [decision maker] should immediately take steps to ensure the safety of any person at risk.

3. The [decision maker] should then determine whether:

   - the matter is a whistle-blower complaint that needs to be dealt with under relevant legislation before it is dealt with as alleged misconduct
   - immediate action needs to be taken, for example contacting an external body such as the police and/or suspending the respondent
   - the matter involves alleged misconduct and
   - a formal PA should be undertaken (see *Step 2: Formal preliminary assessment process*).

   Case conferencing may be used to make this decision. It may not be necessary to conduct a formal PA if, for example, it is evident that the matter should go straight to investigation, or that it would be best dealt with in another way. The decision on what to do should be documented.

4. If the matter does not require a formal PA, the [decision maker] should move to *Step 3: Deciding what action to take.*

5. If the matter requires a formal PA, the [decision maker] should direct somebody else to undertake the PA ('the assessor') under *Step 2: Formal preliminary assessment process*.

   - The assessor should not have a conflict of interest.
   - The direction should be given in writing using *Attachment A – template for formal preliminary assessment direction*.

Step 2: Formal preliminary assessment process

Where possible, to be completed in three working days of receipt of the direction to complete a PA.

1. During the assessment, the assessor should:

   - maintain but not guarantee confidentiality
   - be alert to conflicts of interest and
   - not contact the respondent/s.

2. The first step taken should be to confidentially secure and store information that may be lost or destroyed.

Contacting the source

3. Contact the source if more information is required. Before contacting the source, prepare for the meeting and consider:

- what information is needed and what information the source may have
- asking how the source came by the information
- asking if they have any other relevant information or contacts and
- how to manage the source's expectations of the PA and any subsequent process used to address the matter.

4. At the meeting, tell the source:

   - the purpose of the PA – a fact finding exercise to help determine how to deal with the allegations
   - that any information they give may be used in evidence
   - that their information may be provided to others, including the respondent, if required e.g. for the purposes of procedural fairness and
   - that the matter is confidential – a formal direction to maintain confidentiality may be given to internal sources if necessary.

5. After the meeting, make a formal record of the meeting and the information given. If possible, obtain the source's agreement in writing that the record is true and correct.

6. If the source refuses to speak to the assessor, this should be noted in the report.

Collecting other information

7. Collect any and all other relevant information which can be obtained quickly and confidentially. There needs to be enough information for the [decision maker] to make an informed decision about how to deal with the matter.

   - Some sources of information are listed in *Attachment B – template for formal preliminary assessment report.*
   - You should not contact any witnesses (other than the source) or the respondent.

Writing the preliminary assessment report

8. Write a short report using *Attachment B – template for formal preliminary assessment report*. The report:

   - should be a maximum of five pages and
   - where possible, should be delivered to the [decision maker] within three working days of the assessor receiving the direction to conduct the assessment. This timeframe may be extended by the [decision maker] if required.

Step 3: Deciding what action to take

Where possible, to be completed in three working days of receipt of the formal PA report/decision not to conduct a formal PA.

1. The [decision maker] should use the information to [decide/recommend to the principal officer]:

   - whether there is a reasonable suspicion of misconduct and
   - what action/s to take – including whether to investigate the matter.

2. This decision may be made by:

   - subject to confidentiality, case conferencing and discussions with other staff and/or

- performing a risk assessment of the entire situation, including potential risks to the source, the respondent, other employees, the organisation, clients, and the community.

3. Examples of [decisions/recommendations] that may be made by the [decision maker] include one or more of the following:

    - proceeding to a formal misconduct investigation
    - contacting an external body for advice or to report the matter e.g. Tasmania Police, Integrity Commission, Ombudsman Tasmania, Equal Opportunity Tasmania, Department of Health and Human Services, [relevant professional body e.g. AHPRA, TRB], WorkSafe Tasmania
    - contacting the respondent for response
    - dealing with the matter by alternative dispute resolution, performance management etc.
    - dealing with the matter under the [fraud and corruption policy]
    - dealing with the matter under another policy e.g. [grievance policy], [bullying and harassment policy], [workplace health and safety policy]
    - stand down/suspension/reassignment of the respondent and/or other employees
    - welfare protection steps, including for the source, the respondent, and any other relevant person
    - taking action in regard to systemic or organisational issues raised by the matter
    - taking steps in regard to the potential for victimisation, rumors or office innuendo
    - blocking or restricting access to data
    - undertaking further inquiries
    - seeking further advice e.g. legal advice and/or
    - no further action is necessary.

Step 4: Documenting the decision and record keeping

1. Whether the [decision maker] decides to investigate or not, the decision needs to be accountable, defensible and documented. The decision should be documented – with reasons – and dated, signed and stored. [insert record keeping practices specific to your organisation here]

2. The source should confidentially be advised of the decision and the reasons for it. If relevant, they may be told where they can take the matter (e.g. an external body) if they are not satisfied with the decision.

3. If the matter involves alleged misconduct, it should be reported to [relevant area/person/email address] for recording on the register of misconduct allegations.

4. If the matter involves alleged fraud or corruption, it should be reported to [relevant area/person/email address] for recording on the fraud incident register.

5. The [decision maker] should ensure that any identified organisational improvements are reported to the necessary areas for action.

Authority			
Revision number:		Approved date:	
Approved by:		Next review date:	
Policy owner:			
Definitions:	**Assessor –** A person directed to conduct a preliminary assessment by the decision maker. **Case conferencing –** A meeting of relevant senior employees that discusses the matter and determines the best path forward. **Decision maker –** The person authorised/delegated to make a decision on how to handle allegations of misconduct. [*List specific person/people e.g. secretary, general manager AND/OR state that:* This can include a person authorised/delegated to make a decision on whether a matter goes to the [principal officer] for consideration.] **Misconduct –** See the first page of this procedure for a definition of misconduct and serious misconduct. **Preliminary assessment (PA) –** An assessment, conducted under this procedure, of possible alleged or suspected misconduct. **Respondent –** A person against whom there are allegations or suspicion of misconduct. **Source –** A person who has made a complaint or raised a suspicion about misconduct. Also known as a complainant.		
Related documents:	[List relevant policies/procedures specific to the organisation, including: • misconduct/disciplinary/behaviour • Code of Conduct • grievance • bullying, harassment and discrimination • fraud and corruption control • public interest disclosure • performance management.] Legislation: • [relevant governing legislation for the organisation, including relevant industrial relations legislation and industrial instruments] • *Criminal Code Act 1924* (Tas) • *Public Interest Disclosures Act 2002* (Tas) • *Archives Act 1983* (Tas) • *Personal Information Protection Act 2004* (Tas)/*Privacy Act 1988* (Cth).		

Attachment A – template for formal preliminary assessment direction

[security classification e.g. IN-CONFIDENCE]

[date]

[reference number or name, where applicable]

Direction to conduct formal preliminary assessment

1. I am directing you to undertake a preliminary assessment of:

   [explain the matter; if possible, give the assessor all relevant material and information, in an attachment if necessary]

2. You are to undertake the preliminary assessment in accordance with Step 2 of the *Model process for preliminary assessments of alleged or suspected misconduct*, a copy of which is attached/can be located at …

3. As far as possible, this matter is to remain confidential.

4. You are to report to me in writing within three working days of receiving this direction.

[name]

[title]

Attachment B – template for formal preliminary assessment report

[security classification e.g. IN-CONFIDENCE]

[date]

[reference number or name, where applicable]

Formal preliminary assessment report

This is a preliminary assessment report completed in compliance with the [organisation] *Model process for preliminary assessments of alleged or suspected misconduct*. This report is completed at the direction of [decision maker name and title], which was given on [date of direction to complete preliminary assessment].

Background

[Outline the nature of the allegations or suspicions, who it involves and who is likely to be a witness; include names, titles, dates and locations. List who is or is likely to be aware of the alleged misconduct e.g. media, police, members of the public.]

Actions taken

[Outline actions taken to date, including:

- *steps taken as part of the preliminary assessment*
- *management actions such as stand downs and welfare support*
- *contact with external bodies e.g. police and*
- *advice sought, both internally and externally.]*

Information collected

[List and explain the information collected during and before the preliminary assessment.

List and explain other possible sources of information, such as witnesses.

In collecting information, consider:

- *accessing records such as rosters and timesheets e.g. to verify if someone was at work on a particular date, or who approved a contract*
- *accessing other records such as CCTV footage, emails, personnel records, and phone logs*
- *obtaining the respondent's position description*
- *reviewing audit logs e.g. logs of who accessed records on an internal database*
- *obtaining policies, guidelines and procedures e.g. to verify what policy was applicable at a particular date*
- *obtaining internal documents such as meeting records, memorandums and file notes*
- *legislation and regulations and*
- *seeking advice e.g. human resources, legal or information technology.]*

Attachments

[Attach copies of all information collected to date. Where necessary, the documents should be marked 'IN-CONFIDENCE'.]

Appendix D – Guide to managing misconduct in the Tasmanian public sector

Guide to managing misconduct in the Tasmanian public sector

December 2017

INTEGRITY COMMISSION

This report and further information about the Commission can be found on the website

www.integrity.tas.gov.au

GPO Box 822
Hobart
Tasmania 7001

Phone: 1300 720 289
Email:
integritycommission@integrity.tas.gov.au

1 ABOUT THIS GUIDE

Explanation of this guide and fact sheets

This guide is composed of a series of fact sheets that together set out good practice on managing allegations of misconduct in the Tasmanian public sector.

The fact sheets can be used together as a whole of process guide. They can also be used individually where assistance is needed on a particular issue.

The fact sheets are divided into three sections to align with the three stages of dealing with misconduct. The three stages are:

1. handling of the initial allegation or suspicion, and deciding whether to investigate
2. investigating misconduct and
3. ensuring that the outcomes of the process are adequate and appropriate for all parties.

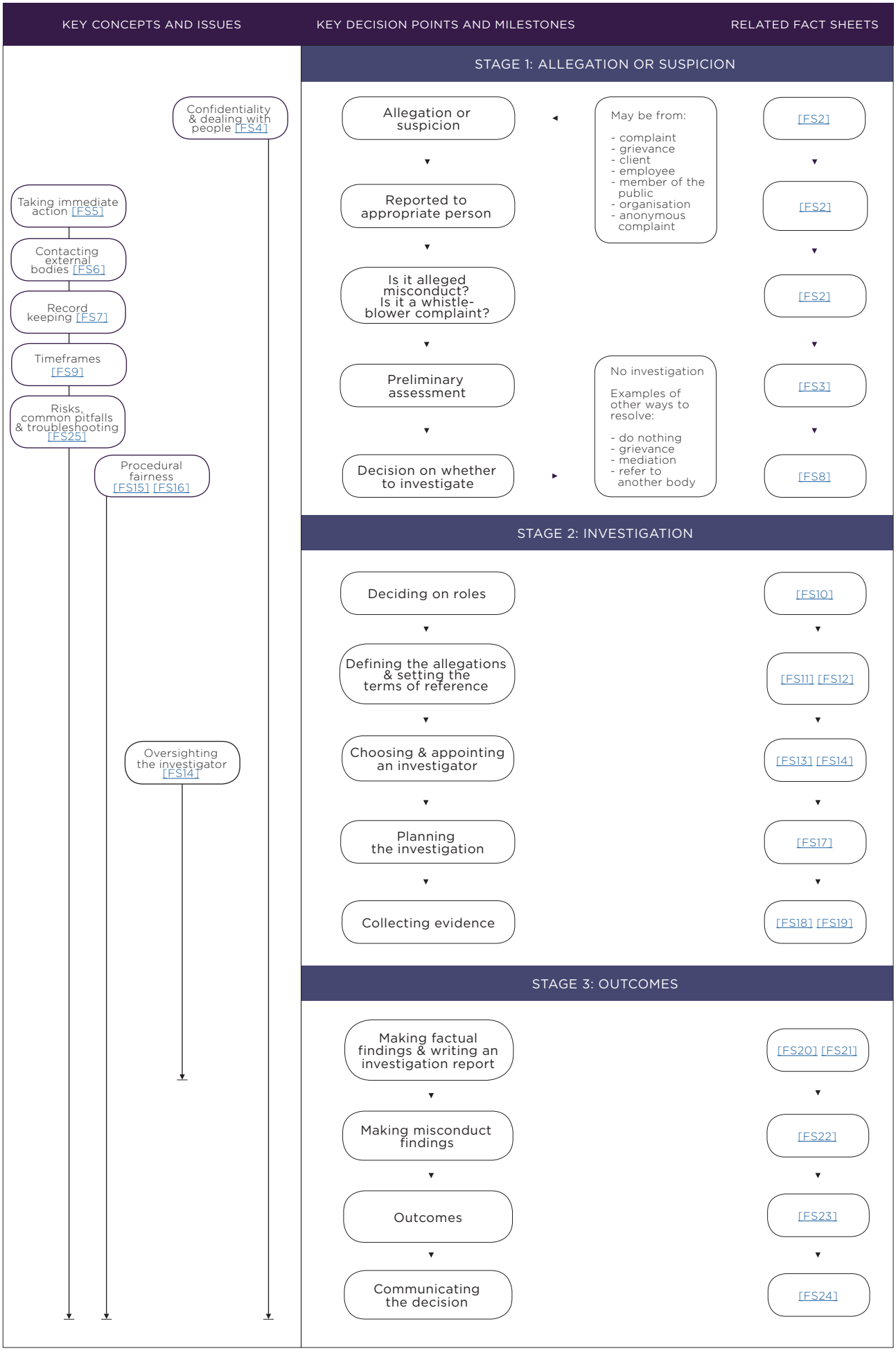
Although the fact sheets are in rough chronological order, some are relevant to the whole process. Where a topic is discussed in another fact sheet, this is indicated by the symbol [FS#], which will show the relevant fact sheet number.

Definitions of key words and a list of references with more detailed information are in [FS6].

Due to the broad application of the guide, it is generic in nature. If you are unsure whether particular aspects are applicable to your organisation, you should seek advice.

This guide is not focused on complaint handling or performance management.

List of fact sheets


KEY CONCEPTS AND ISSUES
KEY DECISION POINTS AND MILESTONES
RELATED FACT SHEETS
STAGE 1: ALLEGATION OR SUSPICION
Allegation or suspicion
May be from:
- complaint
- grievance
- client
- employee
- member of the public
- organisation
- anonymous complaint
[FS2]
Reported to appropriate person
[FS2]
Is it alleged misconduct? Is it a whistle-blower complaint?
[FS2]
Preliminary assessment
No investigation
Examples of other ways to resolve:
- do nothing
- grievance
- mediation
- refer to another body
[FS3]
Decision on whether to investigate
[FS8]
STAGE 2: INVESTIGATION
Deciding on roles
[FS10]
Defining the allegations & setting the terms of reference
[FS11] [FS12]
Choosing & appointing an investigator
[FS13] [FS14]
Planning the investigation
[FS17]
Collecting evidence
[FS18] [FS19]
STAGE 3: OUTCOMES
Making factual findings & writing an investigation report
[FS20] [FS21]
Making misconduct findings
[FS22]
Outcomes
[FS23]
Communicating the decision
[FS24]
Confidentiality & dealing with people [FS4]
Taking immediate action [FS5]
Contacting external bodies [FS6]
Record keeping [FS7]
Timeframes [FS9]
Risks, common pitfalls & troubleshooting [FS25]
Procedural fairness [FS15] [FS16]
Oversighting the investigator [FS14]

STAGE 1
ALLEGATION OR SUSPICION

Pay attention to these key risk areas:

- not dealing with similar allegations in a similar manner [FS8]
- putting serious allegations to the respondent too soon [FS3] [FS8] [FS16]
- not contacting external bodies [FS6]
- breaches of confidentiality [FS4]
- poor record keeping [FS7]
- delay [FS9]

Key concepts to keep in mind:

- procedural fairness [FS15] [FS16]
- timeliness [FS9]
- the public interest
- confidentiality [FS4]
- conflicts of interest [FS10] [FS25]

2

INITIAL HANDLING

The purpose of managing misconduct is to protect employees, the public, public monies, and public sector organisations.

Misconduct complaints can also be a learning opportunity, both personally and organisationally. Good complaint handling processes can help to resolve issues, and to enhance public confidence.

The frontline – facilitating misconduct allegations

Misconduct allegations may arise in a number of ways. They may be submitted in the form of a complaint or report. This can be from an employee, a member of the public or client, or through another organisation. Misconduct allegations may also arise through the suspicions of colleagues.

> An external source may mistakenly complain to you about another organisation.
>
> You should quickly inform the source of the correct place to direct their complaint. You could also ask their permission to forward it on for them.

Frontline workers who often receive complaints should be appropriately trained. This includes in the areas of communication, managing unreasonable complainant conduct, and stress management.

Employees and managers should take appropriate action when they receive a complaint or report, or witness or have a reasonable suspicion of misconduct.

Look to your organisation's policies or a senior employee if you are unsure of the correct process.

Unless required by legislation or policy, you should not require a source to put their allegations in writing. This is consistent with better practice complaint handling. The system should be flexible and accessible for complainants. You should also be aware that, under the *Public Interest Disclosures Act 2002 (Tas)*, disclosures can be made both orally and in writing.

Remember:

- failure to report misconduct may amount to misconduct
- anonymous complaints should be handled like any other complaint [FS3]
- the motivations of the complainant are irrelevant to whether misconduct has been committed [FS3]
- victimisation may amount to misconduct
- submission of a vexatious complaint may amount to misconduct and [FS3]
- a complainant may withdraw their complaint, but this does not necessarily negate your organisation's obligations to manage the subject matter of the complaint. [FS25]

You should try to obtain additional details if there is not enough information to proceed because, for example, the complaint is not in writing. If this is not possible, then you have no other option but to finalise the matter. [FS3] [FS8]

There is extensive material available online about good practice complaint handling, and a relevant Australian Standard (AS/NZS 10002:2014 Guidelines for complaint management in organizations). [FS4]

Is it alleged misconduct?

What is misconduct?

Generally, misconduct is behaviour that threatens or has a negative impact on the employment relationship. It is sometimes motivated by an improper purpose, and may include a blatant failure to perform a duty.

There may be specific definitions of misconduct that apply to your organisation.

Under the *Integrity Commission Act 2009* (Tas), **misconduct** means conduct, or an attempt to engage in conduct, that is or involves:

- a breach of a code of conduct
- the performance of functions or the exercise of powers in a way that is dishonest or improper
- a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers or
- a misuse of public resources in connection with the performance of functions or the exercise of powers.

It may also be conduct, or an attempt to engage in conduct, that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer.

Serious misconduct is misconduct that could, if proved, be a crime or an offence of a serious nature, or that could provide reasonable grounds for terminating employment. Examples include theft, fraud, assault, being intoxicated at work, and refusing to carry out a lawful and reasonable instruction that is consistent with the contract of employment.

> Fraud and corruption are types of misconduct. Not all misconduct amounts to fraud or corruption.

Distinguishing alleged misconduct from other matters

Alleged misconduct may be hard to distinguish from, and may overlap with, other matters such as:

- performance issues
- complaints
- grievances
- organisational issues
- criminal and other offences and
- whistleblower disclosures.

Because the above may overlap, there may be several policies that apply at the same time.

If you are unsure about whether a matter involves alleged misconduct, you should consult someone else in your organisation, such as a human resources manager or lawyer. Make sure the person you consult is not a person who is potentially involved in the matter.

You may also contact the Integrity Commission for advice. [FS6]

Is the source a whistle-blower?

If the matter is internally raised, you should consider whether the source is a 'whistle-blower' under relevant legislation and determine if there are particular ways in which you are obliged to handle the matter.

This should happen before you take any other concrete steps to deal with the matter. If the matter is a whistle-blower disclosure, this may affect whether and when you can deal with it under other potentially relevant legislation and policies. For example, it may take precedence over your complaint, disciplinary and suspension policies.

Relevant whistle-blower legislation includes, for organisations registered under the *Corporations Act 2001* (Cth), the provisions in ss 1317AA–1317AE of that Act.

The *Public Interest Disclosures Act 2002* (Tas) (PID Act) is the main piece of whistle-blower legislation that applies to all Tasmanian public sector organisations. All internal

complaints of alleged misconduct should be assessed to determine if they are a protected disclosure under the PID Act. Under the PID Act, disclosures can be made both orally and in writing.

Contractors can make disclosures about public bodies (not public officers) to the Ombudsman or the Integrity Commission.

Under section 7A of the PID Act, the Ombudsman or the Integrity Commission may choose to treat a member of the public as a contractor for the purposes of the PID Act. This decision may be made if it is in the public interest to do so.

If you think this may be warranted, or if a member of the public or a contractor wants to make a PID Act disclosure, you should refer them to Ombudsman Tasmania.

It is not necessary for the source to state that they are making a disclosure under the PID Act. It is up to each public body to determine if the matter relates to 'improper conduct' that is serious or significant and, if so, it is to be dealt with as a disclosure under the PID Act. The definition of improper conduct under the PID Act is different to the definition of misconduct under the *Integrity Commission Act 2009* (Tas).

If the matter does amount to a protected disclosure under the PID Act, there are strict processes that must be followed under that Act. The discloser will be protected under the PID Act, and where relevant you must comply with the confidentiality provisions in section 23 of the PID Act. Depending on your governance framework, you may need to seek advice on how PID Act porocesses impact on your ability to:

- suspend the employee against whom the disclosure was made and
- commence a disciplinary process.

You can find further detailed information in your organisation's public interest disclosure procedures, and on the Ombudsman Tasmania website. Every organisation has at least one PID officer, and you can contact them for advice. You can also contact Ombudsman Tasmania for advice. [FS6]

Local government

A PID Act disclosure about a councillor is to be made to the Ombudsman. This means that a person cannot make a PID Act disclosure about a councillor to a council.

However, a council employee may make a PID Act disclosure about another council employee to a council.

Grievances and performance issues

It may be hard to differentiate between alleged misconduct and grievances or performance issues.

A grievance usually involves interpersonal issues between two colleagues that do not necessarily involve any alleged misconduct. Performance issues relate to how an employee does their job.

Generally, if proved, misconduct allegations warrant sanction. This is not necessarily the case with grievances or normal performance issues.

However, both grievances and performance issues may amount to misconduct in some circumstances. For instance, if there have been repeated performance discussions without improvement, or if the failure in duty was blatant. Similarly, a grievance may involve allegations of discrimination, victimisation or harassment that do amount to alleged misconduct.

Once you have determined that the matter involves alleged misconduct, make sure that you adhere to any relevant legislation, industrial instruments, contracts of employment, policies and/or procedures. Make sure you document all actions and decisions. This will be important if any decisions or processes are challenged at a later date.

3

UNDERTAKING
A PRELIMINARY ASSESSMENT

It is likely that you will need to undertake a preliminary assessment before deciding whether to investigate or to resolve the alleged misconduct by some other means.

> It is very important that the preliminary assessment does not turn into an investigation. It is equally as important that the assessment process is completed quickly. Ideally, this will be within a few days of the matter being raised.

What does a preliminary assessment involve?

The purpose of a preliminary assessment is to quickly collect information so that someone in a position of authority can decide:

- whether there is a reasonable suspicion of misconduct and
- the most appropriate way to deal with the matter.

No conclusions should be reached at the preliminary assessment stage.

Taking a balanced approach

The Commission has a model for conducting a preliminary assessment, which includes a formal process. However, the preliminary assessment process does not need to be formal. A preliminary assessment does not require a terms of reference, or for the allegations to be defined.

In its simplest form, the process would involve one person performing a desktop assessment of the situation and deciding the best way to proceed.

The decision may also be made through 'case conferencing' (see below). A less formal preliminary assessment may be undertaken if, for example:

- the alleged misconduct was not serious, is unlikely to need an investigation, and would not warrant sanction
- you already have enough information to make a decision and/or
- there is clear evidence of the alleged misconduct, it is likely to require an investigation, and it would warrant sanction.

> In some organisations the preliminary assessment stage is mandated. For instance, under the *Local Government Act 1993* (Tas), the chairperson of the Code of Conduct Panel is to do an initial assessment of a code of conduct complaint to determine how it will be handled.

Where more information is needed before a decision can be made, a more rigorous, formal preliminary assessment may be undertaken. This process may include inquiries such as:

- accessing records such as rosters and timesheets e.g. to verify if someone was at work on a particular date, or who approved a contract
- accessing other records such as CCTV footage, emails, personnel records, and phone logs
- obtaining the position description of persons who may have committed misconduct
- reviewing audit logs e.g. logs of who accessed records on an internal database

- obtaining policies e.g. to verify what policy was applicable at a particular date
- determining whether the source has referred the matter to any other external complaint body and
- further questioning of a source – consider compiling a list of initial questions and contacting the source. This may include asking them how they came by the information, and if they have any other relevant information or contacts. [FS4] [FS19]

Avoid interviewing anyone other than the source at this stage, and keep inquiries confidential if possible.

Regardless of the process used, the decision made at the end of the preliminary assessment process should be documented. [FS8]

Roles

These general principles should be followed in a preliminary assessment:

- the person making the decision at the end of the preliminary assessment may be (but does not have to be) the same person as the 'decision maker' in an investigation [FS10]
- if the preliminary assessment does require inquiries to be made, it is better that these not be performed by the decision maker [FS10] and
- if possible, the preliminary assessment inquiries should not be undertaken by the person who subsequently investigates the matter. [FS13]

Getting too many people involved in the preliminary assessment may contaminate a future investigation with apprehended bias. This is especially the case if your organisation is small. To avoid this, make sure that you:

- strictly apply the 'need to know' principle [FS4]
- only involve people who really need to be involved at this stage
- keep the assessment as succinct as possible – only gather information that you really need to make the decision.

Timeframes and case conferencing

Timeframes should be short. Preliminary assessments should be completed within three working days.

It may help to hold a 'case conference' to speed up the process. This involves a meeting of knowledgeable employees – for instance the managers of human resources and legal – to discuss the matter and whether it should be investigated. This can be done before, during or after the preliminary assessment. The aim of a case conference is to determine the best path forward.

Anonymous complaints

You should not be biased against complaints from an anonymous source. There may be valid reasons the source wants to remain anonymous – often it is because they fear reprisals.

You should assess anonymous complaints to determine if there is enough information to proceed. [FS2]

If the complaint was referred by the Integrity Commission, it is possible that the Commission knows the source's identity. If you need to, you can contact the Commission to seek permission to access the source's identity. The Commission will seek the agreement of the source before providing their identity to any organisation.

Matters with an ulterior motive

Sometimes matters are raised by persons with an ulterior motive. Where this is the case, it does not mean that misconduct has not occurred. The motive of the source is not relevant to your assessment of whether there are reasonable grounds to suspect misconduct.

Ulterior motives may, however, affect the judgment of the source. You should carefully assess these matters to separate fact from opinion.

Regardless of their motives, sources may be upset or angry. You will need to extract reliable information from them without allowing their emotional state to overwhelm the situation. [FS19]

Sometimes complaints lack substance, or on very rare occasions may be malicious or vexatious. A vexatious complaint is one that is knowingly false. A complaint made in good faith – regardless of its substance – is not vexatious.

There is extensive guidance available online about managing unreasonable complainant conduct, including a lengthy manual published by the New South Wales Ombudsman.

The connection between the conduct and employment

Depending on your organisation, it may be a requirement that the conduct reach a certain threshold of connection with employment. Some public officers (such as police officers) are subject to their Code of Conduct at all times – whether on or off duty. Others, such as State Service employees, are only able to commit misconduct if it has some kind of relationship to their employment.

The necessary connection with employment can be difficult to determine and you may need to seek advice. Each case will be heavily reliant on the facts. For instance, if an employee has been convicted for drink driving, this may only have a sufficient connection to their employment if they are required to drive vehicles in their work role.

This is a particularly difficult and developing area in relation to social media posts connected to the workplace. In general, courts and tribunals seem to be leaning toward favouring a looser connection to the workplace in terms of social media. However, if this is an issue you should seek advice before making a decision.

Using the code of conduct to determine whether the conduct is connected to employment

Your code of conduct may indicate the scope of each provision. Common relevant phrases used in codes of conduct include: 'at all times', 'in the course of', and 'in connection with'. For instance, these provisions are taken from the Tasmanian State Service Code of Conduct:

> *An employee must **at all times** behave in a way that does not adversely affect the integrity and good reputation of the State Service.*
>
> *An employee must disclose, and take reasonable steps to avoid, any conflict of interest **in connection with** the employee's State Service employment.*
>
> *An employee must behave honestly and with integrity **in the course of** State Service employment.*

'At all times' may apply to situations in which the conduct, on the face of it, does not necessarily relate to the workplace. If there is, however, a genuine connection between the behaviour and the workplace then it may still amount to misconduct.

'In connection with' usually applies to behaviour that is somehow related to the workplace. 'In the course of' is usually where the behaviour is directly related to employment.

Example

Consider a teacher in the State Service who behaves inappropriately with students from a non-State Service school. This conduct would not be 'in the course of' employment, as it does not directly relate to the workplace.

At a stretch it could possibly be characterised as conduct 'in connection with' employment, depending on the facts of the situation.

However, depending on the facts, it may not be compliant with the State Service requirement that employees must 'at all times' behave in a way that does not adversely affect the integrity and good reputation of the State Service.

4

CONFIDENTIALITY & DEALING WITH PEOPLE

Confidentiality and the welfare of all parties should be a constant consideration in the handling of alleged or suspected misconduct.

Affected parties

There may be a number of persons involved in or affected by the matter. These people may include:

- the source
- witnesses
- the respondent/s and
- persons who work with those directly involved in the matter – if the matter is far reaching, it may have the potential to impact on an entire team or even the entire organisation.

You should ensure affected persons are offered appropriate support.

Be aware of the potential for gossip and office innuendo. Where these are possibilities, you should take appropriate measures to minimise or eliminate impacts on the workplace.

Confidentiality

The handling of alleged misconduct should be as discreet and confidential as possible.

Maintaining confidentiality protects:

- employees, the work unit and your organisation
- the reputation of the respondent from unproven allegations and gossip
- the source and witnesses from victimisation and pressure and
- the integrity of the investigation – broad knowledge of the allegations can affect witness recollections and the reliability of evidence.

How to maintain confidentiality

The need for confidentiality should be reinforced with every person.

If they are an employee, remind them that there may be ramifications if they breach confidentiality. You may be able to give them a direction to maintain confidentiality, or not to talk about it with particular colleagues.

> Apply the 'need to know' principle: a person should only be made aware of something if they need to know the information in order to perform a job or role.

If the respondent or the source wants to collect supporting information from colleagues they have been directed not to approach, they may only do this if the direction is varied by the employer. It is better for the investigator to approach nominated witnesses, rather than the respondent or the source. [FS18]

Tips for helping to ensure confidentiality include:

- minimising the number of people you talk to
- collecting material from photocopiers and printers immediately
- locking your computer when you are away from your desk
- maintaining a clean desk policy
- not discussing the matter in open plan workplaces and communal areas and
- being careful who you ask to assist, including in sending correspondence.

Do not guarantee confidentiality

Although you should tell people that you will maintain confidentiality as far as possible, do not guarantee confidentiality. You do not know what will happen to the matter in future. [FS18] [FS19]

Procedural fairness requirements may require information to be shared. External scrutiny may also come about through court processes, right to information requests, and review from external bodies such as the Ombudsman, the Integrity Commission, or an industrial commission. There are exemptions to your requirement to supply information in some of these situations. Most notable is section 36 of the *Right to Information Act 2009* (Tas), which provides some exemptions for disclosure under that Act of personal information about another person. If you are unsure, you should seek advice.

If a person refuses to participate because of your inability to absolutely guarantee confidentiality, you should think about the reasons for this. Consider whether they may fear intimidation or victimisation, and if so do what you can to resolve these issues. If they still refuse, you will need to do without their evidence.

Contacting the source

Contact with the source, whether they are internal or external, should comply with good practice complaint handling. Your organisation may have a complaint handling policy to guide your approach. There is also extensive material available online, and a relevant Australian Standard (AS/NZS 10002:2014 Guidelines for complaint management in organizations).

> In the case of internally-raised matters, you should also be aware of your responsibilities under relevant whistle-blower legislation. [FS2]

In general, if the matter is a complaint, points at which you should contact the complainant include:

- acknowledgement of receipt of complaint
- advice about the process that will be followed in dealing with the complaint
- providing an opportunity for the source to be heard (give evidence)
- if there are delays, letting the source know that the matter is still under consideration at regular intervals and
- general advice about the outcomes of the matter, which should be balanced with the respondent's right to privacy.

If necessary, you should offer the source support. You can also recognise their efforts in coming forward.

Other important considerations include:

- managing expectations from the beginning of the matter
- dealing with unreasonable complainant conduct appropriately – there is a lot of good practice material available online, including on the New South Wales Ombudsman website and
- informing the source that the information they give may be provided to others, including the respondent, and may be used as evidence. [FS18] [FS19]

Involvement in the process

You may ask the complainant what they want to get out of the process. If you ask them this, you may need to manage their expectations and talk about realistic outcomes.

The complainant can then be involved in the process and there may be outcomes for them, such as an apology. However, ultimately they should not drive the disciplinary process – it is your organisation's responsibility to take the necessary action. This may be hard for them to understand, and it may be worthwhile making this clear at the start of the process or in your complaint handling material. [FS23] [FS24]

If the complaint involves alleged bullying, harassment or discrimination, it is more appropriate for the complainant to be involved in resolution of the matter in some way. This may be, for example, through processes such as conciliation or mediation. This does not, however, alleviate your organisation's responsibility to take disciplinary action where warranted. If you need advice on these kinds of matters, you can contact Equal Opportunity Tasmania.

Contacting the respondent

It is important for you to perform some kind of preliminary assessment of the matter before you contact the respondent. [FS3]

It may have an adverse impact on the welfare of the respondent if they are informed at an early stage, before you are certain about how to deal with the matter. [FS16]

A decision about whether or not to conduct an investigation does not need to be put to the respondent for response.

Providing support and welfare management

Dealing with alleged misconduct can be a difficult process. Not just for the respondent, but also for the source, witnesses, and sometimes the investigator. You should have real support options in place before contacting the respondent. [FS16]

Where necessary, support should also be offered to the source and any witnesses. This is especially the case if your organisation had a duty of care to the source when the alleged misconduct occurred.

> As long as they are not involved in the matter, it is probable that the respondent's direct manager will need to be informed.
>
> They may be a good source of support for the respondent.

It may be necessary to appoint a welfare manager as a point of contact. This person can act as an intermediary between the person managing the allegations and the affected parties. A welfare manager provides a layer of separation and helps to prevent biased decision making.

Victimisation

Section 18(2) of the *Anti-Discrimination Act 1998* (Tas) states that victimisation 'takes place if a person subjects, or threatens to subject, another person or an associate of that other person to any detriment'.

Victimisation is likely to be a breach of your organisation's code of conduct or other organisational policies. There are also penalties for victimisation and for taking reprisal action against whistle-blowers under both the *Corporations Act 2001* (Cth) and the *Public Interest Disclosures Act 2002* (Tas). [FS2]

You should be actively monitoring for victimisation and take steps to prevent it happening if possible. If you believe someone is vulnerable, offer them support and tell them how to report any attempts at victimisation.

5

TAKING IMMEDIATE ACTION

When allegations or suspicions are raised, you may need to take immediate action. You may also need to take action during or after the preliminary assessment.

Types of action that may be necessary

Depending on the circumstances and the seriousness of the allegations, necessary immediate actions may include:

- reporting the allegations to the police or other external bodies [FS6]
- offering support to one or more affected parties [FS4]
- imposing a suspension or a stand down
- moving or altering the duties or physical location of involved parties in the short term
- blocking or restricting access to data
- ensuring the safety of others and
- securing evidence. [FS18]

Examples of matters that require a range of immediate actions

Alleged assault

An employee makes a complaint that a colleague assaulted a member of the public at a meeting during work time. Checks of CCTV as part of the preliminary assessment support the allegations. In this situation, you should consider:

- contacting the police
- identifying and capturing key evidence before it is lost e.g. CCTV, photographs of injuries
- arranging for the employee to be suspended
- providing support and obtaining evidence from the person who was allegedly assaulted and
- providing the employee with support when they are told about the allegations.

In this situation, you should seek consent from the police before you take any action that may alert the employee to the process.

Alleged misuse of information

An employee is accused of accessing a database without authorisation, and using the information obtained to gain financial advantages. Checks on databases as part of the preliminary assessment support the allegations. In this situation, you should consider:

- blocking the employee's access to information
- identifying and capturing key evidence before it is lost e.g. database logs, CCTV
- arranging for the employee to be suspended
- contacting the police and
- providing the employee with support when they are told about the allegations.

In this situation, you should seek consent from the police before you take any action that may alert the employee to the process.

Suspension, stand down and reassignment of duty

Depending on the type of alleged misconduct, you may need to stand down or suspend an employee before or during an investigation. You may also need to suspend an employee if

they are being investigated by an external body such as the police, the Ombudsman or the Integrity Commission.

Suspensions are most often required if people are at risk, the conduct is very serious, or it is ongoing.

You should consider reassignment before you consider suspension. Suspensions and stand downs are actions taken primarily:

- to protect people (including the respondent), effective workplace relations, or your organisation from harm
- to protect the public interest
- to protect the integrity of the investigation and/or
- if the alleged misconduct, if proved, may lead to dismissal.

You should take the possible length of the suspension into account when making a decision.

It is likely that your organisation will have mandatory procedures in place about how to suspend, stand down, or reassign an employee. It is important that you comply with these procedures.

Procedural fairness

Depending on the procedures applicable in your organisation, you may need to comply with procedural fairness principles when you suspend an employee.

This means giving them notice that you intend to suspend them, and asking them to 'show cause' why you should not do so. You should stand down or reassign the employee while you wait for their response.

In serious cases where there is an immediate risk, procedural fairness may not be required.

Make sure that you are consistent in your suspension decisions.

If the same or similar allegations are made against two employees, you should not suspend only one of them – unless you have a justifiable and documented reason for treating them differently.

When to suspend an employee

If there are grounds to suspend the employee, you should do so as soon as possible. This may be at the beginning of the process, or at a later point during the course of the investigation.

If the matter is a protected or public interest disclosure under the PID Act, this may impact on your ability to suspend the employee. [FS2]

Welfare management and public interest considerations

Suspensions, stand downs and reassignments at this stage of your response are not meant to be punitive. It is important that you make the respondent aware of this. You should not treat these actions like a sanction or a penalty.

For most people, being suspended on pay is a difficult situation. You should offer the employee appropriate support, and regularly review the suspension to ensure that it is still necessary.

Also keep in mind that the employee's suspension is funded by public money. There may be adverse publicity when employees are suspended on pay for long periods of time.

Suspension without pay is very tricky, if not impossible, to implement in practice under modern Australian industrial law. If you are considering this as an option, you should seek advice.

6

CONTACTING EXTERNAL BODIES

You may need to notify or consult with external bodies about allegations or suspicions of misconduct. Some organisations may also have an obligation to notify their insurer of certain matters.

Consider the nature of the allegations and any formal notification processes your organisation has in place. This may impact on whether the notification is a formal process, or a simple contact to ask for advice. You may be able to seek general advice without giving specifics.

It is important to consider notifications as early in the process as possible. Failure to notify an external body at an appropriate time may undermine the investigation and the outcomes.

In some cases, your notification may be valuable intelligence. You may not be aware of other information held by the body to which you are reporting the alleged misconduct.

Department of Health and Human Services

Mandatory notification requirements apply for certain legislated occupations when a person under the age of 18 years has been abused or is at risk of harm.

Equal Opportunity Tasmania

Most public sector organisations have a code of conduct or policy that states that employees must treat everyone with respect and without harassment, victimisation or discrimination. Allegations of misconduct may therefore involve matters that may also be the subject of a complaint under the *Anti-Discrimination Act 1998* (Tas).

Regardless of whether a complaint has been made to the Anti-Discrimination Commissioner, Equal Opportunity Tasmania (EOT) will be able provide general advice about whether the alleged behaviour may have a discriminatory component or otherwise may amount to a contravention of the *Anti-Discrimination Act*.

If a complaint is made to and accepted by the Anti-Discrimination Commissioner, it will be investigated by the Commissioner in any manner that is appropriate to the circumstances. This may include, for example, deferring consideration of the complaint until the internal handling of the matter has concluded. There are time limits on making a complaint to the EOT, and once a complaint has been lodged there are legally specified timeframes for addressing certain matters.

Privacy provisions under the *Anti-Discrimination Act* prevent EOT from providing information to an organisation about whether it has received a complaint. Therefore, your organisation should seek advice from the source about whether a complaint has also been made under the *Anti-Discrimination Act*.

Where the Anti-Discrimination Commissioner is handling a complaint against one of your employees, consideration should be given to ensuring that your organisation does not act in a way that may preference the respondent or seek to defend the behaviour in ways that could compromise the outcomes of the investigation. This may happen, for example, if one of the parties is indemnified or provided with legal assistance to defend the complaint and the other isn't.

Integrity Commission

The Integrity Commission is available for advice on managing alleged misconduct.

The Commission encourages all public sector organisations to notify it of alleged misconduct, particularly alleged serious misconduct. This does not trigger an Integrity Commission investigation. Rather, it provides valuable intelligence to help the Commission better understand misconduct risks in the Tasmanian public sector. It also enables the Commission to assist public sector organisations to respond to misconduct as it arises, and to improve their ethical framework. For more information, see Notifications by Public Authorities.

You can also seek advice on whether you should refer the matter to the Commission for investigation. The Commission has greater investigative powers than other organisations and is well placed to investigate particularly serious or complex misconduct.

Local Government Division (councils)

The Local Government Division (LGD) in the Department of Premier and Cabinet has jurisdiction over non-compliance with the *Local Government Act 1993* (Tas) by both councillors and, in some instances, council employees. This includes offences committed under provisions related to pecuniary interests, disclosure of confidential information, improper use of information, and misuse of office.

The LGD can investigate alleged non-compliance and pursue prosecutions with the appropriate authorities. Your council may investigate the alleged non-compliance with the *Local Government Act* to collect information and evidence, and then refer the material to the LGD. You can contact the LGD for advice on these matters, and further information is available on its website.

Ombudsman Tasmania

Contact the Ombudsman Tasmania for advice on protected and public interest disclosures under the *Public Interest Disclosures Act 2002* (Tas), and on handling external complaints.

The Ombudsman's jurisdiction extends to the administrative actions of public sector organisations. The Ombudsman also has special functions in relation to the *Personal Information Protection Act 2004* (Tas) and the *Right to Information Act 2009* (Tas). A complaint about a breach of the *Personal Information Protection Act* can be dealt with by the Ombudsman if the complainant has raised the matter with the organisation and is not satisfied with the response.

Professional regulatory bodies

Consider whether you have a duty to notify or consult with a professional regulatory body. Examples include the Australian Health Practitioner Regulation Agency, the Teachers Registration Board of Tasmania, and the Legal Profession Board of Tasmania.

State Service Management Office (Tasmanian State Service)

In the Tasmanian State Service, the Employer is the Minister administering the *State Service Act 2000* (Tas). The Employer has delegated specific powers relating to the management of misconduct to the Head of the State Service and Heads of Agency.

The State Service Management Office (SSMO) is part of the Department of Premier and Cabinet. SSMO provides advice to agencies on how to manage misconduct, including suspensions, in a manner that is consistent with employment law, the policy directions of the employer, and the intent of the *State Service Act 2000*.

The Employer has also determined through the delegation framework that the Director of SSMO must be consulted on all decisions to terminate employment in the State Service.

Tasmania Police

You should contact the police when the allegations are particularly serious and may involve conduct contrary to the *Criminal Code Act 1924* (Tas) or federal criminal laws, especially if the conduct is potentially ongoing.

In these circumstances, your organisation should contact police before notifying the person who is under suspicion. You may also consider contacting police for advice about offences that fall under legislation such as the *Police Offences Act 1935* (Tas).

Where a crime may have been committed, it is not the responsibility of your organisation to decide if the employee should be prosecuted. This responsibility lies with the appropriate authorities. There is no general offence for a failure to report a crime in Tasmania, but there are crimes relating to failures to report in particular circumstances, such as in regard to deaths and the treatment of children. If you are unsure, you should contact police for advice using the process outlined below.

Referral to the police does not negate any responsibilities your organisation has to deal with the matter internally.

> Depending on your organisation's governance framework, there may be certain matters you must report to the police.
>
> In the State Service, this includes – under Treasurer's Instruction No. 301 – all losses that are caused, or suspected to have been caused, by theft, fraud, misappropriation or other criminal act. There is no threshold on this reporting requirement.

Police referral process

If you are unsure if the matter warrants referral to police, you may seek advice through the office of the police commander of your police district. This can be done by contacting the administration sergeant for your district – the contact details are in the table below. If you are unsure about which police district you fall into, details can be found in the Department of Police, Fire and Emergency Management annual report.

Correspondence to the administration section of each district is managed on a week day basis. If you email rather than call, the intent of the correspondence should be made clear in the email. The email should provide basic details with key contacts. Tasmania Police will then allocate an appropriate person to make contact to obtain information so that advice can be provided.

Early contact and discussion at the lowest appropriate level is the preferred approach – often a telephone call can quickly confirm whether a formal referral is necessary. You will be able to discuss with police whether the matter may be criminal in nature, and whether it warrants referral.

If you are sure that your matter warrants a referral to police, you may formally refer it to your district commander's office, or else through your principal officer to the Commissioner of Police.

Southern District: *Hobart and surrounds*	Email: Southern.administration.sergeant@police.tas.gov.au Telephone: (03) 6173 2220
Northern District: *Launceston and surrounds*	Email: Northern.District.Administration@police.tas.gov.au Telephone: (03) 6777 3811
Western District: *Burnie, Devonport, Queenstown and surrounds*	Email: Western.District.Administration@police.tas.gov.au Telephone: (03) 6477 7207

What happens if police decide to investigate?

A police investigation does not remove any requirements for internal actions to be taken.

Moreover, there is no general requirement to halt a disciplinary investigation while a police investigation is undertaken. However, there may be industrial case law that applies to your particular type of organisation in this situation. You should seek advice if you have any doubts.

You should seek and take police advice on whether you can continue handling the matter internally. From a welfare perspective, it is generally better for the disciplinary investigation to continue.

Police may require you to halt your investigation if it could prejudice or interfere with the criminal investigation. Police may also tell you not to inform the respondent of the allegations. However, it is rare for police to request the halt of a disciplinary investigation.

If you are required to halt the handling of the matter, you should contact police at regular intervals to see if this is still necessary. It may be possible for you to continue when police have finished collecting evidence.

You should not stop your disciplinary investigation because police have decided not to investigate.

> In some situations, your organisation will be the 'complainant' in the criminal case. This is most likely to apply if an employee has been charged with theft from your organisation.
>
> In this situation, your organisation will need to be willing to act as the complainant for the charges to continue.

What happens if the respondent is prosecuted?

The processes and objectives of the criminal and disciplinary systems are different.

This means that the concept of 'double jeopardy' has no application in this situation.

You should not stop your handling of the matter because there has been a decision not to prosecute the employee, or because the prosecution fails. Similarly, you should not halt your handling of the matter because of a successful prosecution.

Examples of conduct that may amount to both misconduct and an offence	
theft assault driving under the influence bribery and the acceptance of gifts and benefits perverting the course of justice perjury fraud	omission to perform a duty extortion corruption making a false statement unauthorised access to and/or misuse of information inserting false information as data damaging computer data

Work health and safety & WorkSafe Tasmania

Consider if the matter involves a work health and safety issue and whether there are any mandatory reporting requirements.

At the time of writing, incidents with mandatory reporting requirements to WorkSafe Tasmania included:

- death
- serious injury or serious illness (requiring immediate hospitalisation or medical treatment) and
- dangerous incidents (for example a fire, explosion, infrastructure collapse, chemical spill or leak, electric shock).

7 RECORD KEEPING

As a public officer, good record keeping is one of your primary responsibilities.

Good record keeping is central to ensuring that outcomes of alleged misconduct – both present and future – are accountable and effective.

Remember that an external body, such as an industrial commission or a court, may need to view the records. They may also be subject to external scrutiny through Integrity Commission audits or other processes.

Register of alleged misconduct matters

Your organisation should have a centralised record keeping system for alleged misconduct. This should include not only the files themselves, but also a list of matters for ease of reference (i.e. a register). This may be a database or, more commonly, a spread sheet.

Managers need to ensure that allegations are centrally reported for recording on the register. This function will likely be performed by your organisation's human resources or legal unit.

All alleged misconduct matters should be recorded on the register. At a minimum, it should include all investigated matters.

Information that you should consider recording for each matter includes:

- a reference for easy location of the file
- date received
- respondent
- description of alleged misconduct
- how it was dealt with (e.g. investigation, mediation, performance management)
- outcomes and
- date finalised.

Recording matters in this way will help your organisation to:

- identify patterns and trends
- identify multiple allegations against one employee or a group of employees over time
- identify opportunities for organisational improvement
- ensure consistency in processes
- ensure consistency in outcomes and
- ensure timeliness.

Depending on the size of your organisation, the register should be monitored regularly. There should be upwards reporting on patterns, trends and opportunities for improvement. Your organisation may also use the information to collect statistics and report on its performance (e.g. on timeliness) in its annual report.

Your organisation may also periodically conduct an audit of the recorded matters to ensure it has complied with processes and procedures.

Managing a file

An external person should be able to pick up a misconduct file and see what happened and why. Key decisions – such as whether to investigate – should be recorded, as should the decision maker and the reason for the decision. A simple running sheet on the inner cover of the file may help to achieve this.

Archives Act 1983 (Tas)

Misconduct records must be kept and disposed of in accordance with the *Archives Act 1983* (Tas). At the time of writing, there were specific record keeping and disposal requirements about counselling and discipline, and about allegations of corruption.

For advice, you can contact the Tasmanian Archive and Heritage Office.

Matters that are not investigated

Where alleged misconduct is not investigated, you should document how the matter was resolved and the outcomes. You should also document why it did not proceed to investigation. [FS8]

Matters that are investigated

All actions taken as part of an investigation should be recorded. This includes recording the reason for taking (or not taking) action that is contrary to policy or practice. [FS8]

Good records become especially important if the process or outcome of the investigation is challenged.

It is particularly important to keep records of:

- who made the decision to investigate, and when and how that decision was made (including preliminary assessment material) [FS3] [FS8]
- signed final copies of all formal correspondence
- external bodies contacted and/or whether a complaint has also been made to an external body [FS6]
- the identity of the investigator and their instrument of appointment [FS14]
- the terms of reference for the investigation, including the allegations [FS12]
- the respondent's response to the allegations [FS16]
- evidence relied on to make findings [FS20]
- findings of fact and misconduct findings [FS20] [FS22]
- the analysis and reasoning for each finding [FS20] [FS21] and
- outcomes for the respondent – including sanctions, professional development measures and management actions. [FS23]

It may help for your organisation to develop a checklist of records that should be in each file.

Where an investigation is finalised early due to lack of evidence, conciliation or respondent resignation, this should be recorded. [FS25]

> Records of outcomes will be necessary if the respondent commits further acts of misconduct.
>
> Your organisation may need to rely on these records to take more severe action, including termination of employment.

For investigators

During the investigation, you should keep a running sheet. A running sheet is a chronological record of each step taken in the investigation. It should list all correspondence received and sent, and all contacts (including interviews and phone calls) made and received. If there is a delay, you should record it on the running sheet.

Running sheet records should include who did what action, and the date and time it occurred. Maintaining a running sheet electronically enables multiple people to access it, will assist with readability, and allows you to link it to electronic material.

Information received may also be recorded on the running sheet or separately. You should record who provided what to who, when they provided it, and the format in which it was provided.

You should make a record if you cannot complete a task identified in the investigation plan, or if you cannot obtain relevant evidence. For instance, if it is not possible to contact a relevant witness, you should record that you have tried to do so.

> If you are an investigator external to the organisation, you should supply copies of all your material to the organisation at the end of the investigation. This includes your investigation plan and running sheet.

Personnel files

Make sure you comply with the *Archives Act 1983* (Tas) in maintaining personnel files. For advice, you can contact the Tasmanian Archive and Heritage Office.

An employee should be aware of all records on their personnel file. If an allegation of misconduct results in a sanction, professional development measure or managerial action, this should be recorded on the employee's personnel file. The employee should be made aware of this.

Where there has been an investigation, investigation materials and records should be kept separately to the personnel file. However, they should be referenced in the personnel file. This is so that a person with the appropriate access permission can locate the records if needed.

If a matter is not investigated it does not need to be referenced in an employee's personnel file. The exception to this is where the employee has resigned before the start or end or the investigation. If possible, you should record this on their personnel file. As indicated in [FS25], this should usually be done only if the employee was aware of the matter, and in consideration of the potential seriousness of the matter. The employee should be told in writing:

- of the record and
- that if they successfully reapply for employment with your organisation, the matter may be pursued.

Confidentiality and records

It is important that all records be kept appropriately confidential. Where relevant, there should be restricted access. In some organisations this may be more difficult to achieve, but the importance of confidentiality to stakeholder satisfaction should not be underestimated. Maintaining the confidentiality of records should be given a high level of priority by public sector organisations. [FS4]

8

DECIDING WHETHER TO INVESTIGATE

Once you have collected material as part of the preliminary assessment, or decided that you do not need more information, you need to analyse what you have and decide whether there should be an investigation. Sometimes it will be obvious that there should or should not be an investigation. In some cases, however, there will be grey areas.

The decision should be made as quickly as possible. Ideally, this will be within three working days of having enough information to make an informed decision. [FS9]

Considerations

You need to undertake a risk assessment of the situation by considering risks to all affected parties – including the source, the respondent, other employees, your organisation, customers and clients, the tax or rate payer, and the public.

On the basis of the information you have, you may determine that the matter is:

- not related to misconduct and needs to be dealt with through other avenues e.g. performance management, or referral to an external body for investigation or consideration
- alleged misconduct that requires an investigation or
- alleged misconduct that does not require an investigation (if this is possible under your governing legislation and policies).

Responses to allegations should be proportionate to the nature of the allegations and the possible outcomes. Investigations are time and resource intensive. They can be difficult for all parties involved.

The extent of an investigation should also be proportionate to the allegations and possible outcomes. In general, it is best to proceed with as little formality as the situation and your governance framework permits.

There may be legislative provisions or policies that dictate whether an investigation is to occur.

For instance, in the State Service, under Employment Direction No. 5, a head of agency **must** undertake an investigation if they have reasonable grounds to believe that a breach of the Code of Conduct may have occurred. Technically, this could apply to any alleged breach, even a lower level breach.

Factors to consider when deciding whether to investigate
Severity of the matter – the more serious the matter, the more likely it will require an investigation.
Potential severity of the outcome for the respondent – the more serious the potential outcome, the higher the requirements for a thorough, evidence-based investigation.
Whether the allegations are easily proven or disproven – even serious misconduct, if easily proven and dealt with appropriately in terms of procedural fairness, may be resolved relatively quickly.
Complexity of the matter, and the potential for an investigation to uncover further misconduct.
When the alleged misconduct took place – if it is a matter that occurred some time ago, it may not be worthwhile, or even possible, to investigate it.
Apparent veracity of the allegations/ suspicions.

If the matter has already been dealt with or investigated.
Whether there is likely to be any evidence either substantiating or disproving the allegations.
Number of employees that may have been involved.
Whether there has there been a pattern of similar complaints.
Potential deterrent and education effects of an investigation, both for the respondent and generally across your organisation.
Whether a lack of action would negatively affect morale in the workplace.
If an investigation is necessary to clear the air.
Seniority of the respondent – relatively minor allegations should be taken more seriously if they are against a more senior employee.
Whether the alleged conduct would warrant a disciplinary sanction that could only be imposed after an investigation.
Past conduct of the respondent – for instance, it may be worthwhile escalating the seriousness of a matter if the employee has ignored previous warnings or if performance management efforts have had little effect.
Scale of any monetary amounts or benefits involved in the alleged misconduct.
Whether there are possible systemic issues at play that your organisation needs to deal with.
Public confidence – would a member of the public consider that the allegations required investigation.

Fairness in handling allegations: dealing with similar allegations in a similar manner

It is important that all employees view the handling of misconduct allegations as fair.

This includes not only within a single matter, but across matters dealt with by your organisation. Over time, as much as possible, your organisation should deal with like matters alike — both in terms of process, and in terms of outcomes.

The best way to ensure consistency is for your organisation to keep good records, including a register of misconduct allegations. [FS7]

Of course, there may be good reasons for your organisation not to deal with similar matters in a similar manner. Possible reasons include changes over time in good practice, or to your governing framework.

It may also be because of the particular circumstances of the case. For instance, an employee swearing at a customer for the first time would usually be handled very differently an employee who had been given repeated warnings not to swear at customers.

Contacting the respondent

You should not contact the respondent before or during the preliminary assessment. However, at the end of the assessment it may be decided that there is possibly a plausible explanation for the conduct. In this case, you may choose to put the matter to the respondent for response before deciding whether to conduct an investigation.

If you do this, it would usually be done in writing and you should make it clear to them that:

- the disciplinary process has not commenced
- you are merely attempting to ascertain the facts of a situation and
- anything they say can be taken into account in the event that a disciplinary process is undertaken.

You should not put the matter to the respondent at this stage if the matter may involve serious misconduct or criminal conduct, there is a risk of evidence being destroyed, or if there is a risk of victimisation.

Who decides whether to investigate

It is likely that your organisation has delegations relevant to disciplinary investigations. These are usually derived from legislation or industrial instruments.

It is important that the person who makes the decision has the authorisation to do so, and that this decision is set out in writing. The decision maker should not be the investigator. [FS10]

Managing the impact of an investigation on the workplace

If you decide to investigate, make sure you are alert to the potential impact of the investigation on the workplace.

For instance, it may cause additional absences or stress. You may need to develop internal and external communication strategies. Consider reminding staff of support avenues, for instance the employee assistance program.

Alternatives to investigating

Your preliminary assessment may reveal workplace issues that do need to be dealt with, but which do not require a misconduct investigation. It may also reveal conduct that falls short of misconduct, but which should be dealt with through professional development measures such as training.

Alleged misconduct that does not require an investigation – depending on your governing framework – may include:

- lower level misconduct, for instance swearing in the workplace
- self-reported non-serious misconduct
- alleged misconduct that is quickly proven or disproven and
- where the respondent has already made admissions.

Alternatives to investigation (which may also be the outcomes of an investigation) include:

- performance management such as a performance improvement plan
- mediation or conciliation
- an apology to the source, or some kind of amendment or reparation action
- referral to an external body
- training
- lawful direction
- advice and guidance and/or
- variation of duties.

It is important that your response, whatever it may be, is proportionate to the allegations.

Procedural fairness

If the matter involves lower level misconduct that does not require an investigation, you should consider the procedural fairness principles outlined in [FS15] and [FS16]. This will be most necessary if there are any outcomes that could be seen as 'adverse' to the respondent. Minor matters should be dealt with as informally as possible and you will not need to adhere to the formal steps outlined in later fact sheets. If you are unsure, you should seek advice.

Defensible decision making

If you decide not to investigate, this decision needs to be accountable, defensible and documented. [FS7]

Where relevant, you should confidentially advise the source of your decision and the reasons for it. You should also tell them how they can have your decision reviewed. This includes both internally if applicable, and by taking the matter to external organisations such as the Ombudsman, the Integrity Commission, or Equal Opportunity Tasmania.

Consider whether you should notify external bodies, such as the Integrity Commission, of your decision. [FS6]

9 TIMEFRAMES

Misconduct matters should be dealt with as quickly as possible. This is important for all parties. An unreasonable delay may result in the decision being overturned.

Lack of timeliness may negatively impact on the welfare of the respondent. It is also frustrating for the source. In serious matters, it also has the potential to negatively impact on their welfare. For your organisation, the potential negative impacts include:

- wasted time and (human) resources
- poor public perceptions for externally raised complaints
- negative impacts on employees, which in turn causes them to have negative perceptions of the organisation and
- less reliable outcomes, as records may be lost or destroyed, and memories become less dependable.

You should check if there are timeframes set in relevant industrial instruments, legislation, directions or policy. Your organisation may have indicative or mandatory timeframes for each stage of the misconduct process. It may also be a requirement, for example, for your organisation to commence or complete an investigation within a 'reasonable' timeframe.

If you are writing a misconduct policy, indicative timeframes – especially at the investigation stage – are generally to be preferred over mandatory timeframes. This is because the time taken to deal with a matter can vary greatly. It may also depend on external processes. For instance, you may be advised to suspend your investigation while the police investigate.

As a rough guide you should aim to meet the below timeframes.

Initial handling:	Three working days up to 1 week.
Preliminary assessment and decision on whether to investigate:	Up to 2 weeks (including approximately three working days for the preliminary assessment, and approximately three working days for the decision on whether to investigate).
Simple investigation:	Up to 3 months
More serious or complex investigation:	Between 3 to 12 months - ideally not longer than 6 months
Decision making and finalising the matter:	Ideally up to 2 months, depending on the seriousness and nature of the outcomes, and the number of parties involved

The sooner you can finalise things the better. However, this should not be at the expense of due process. Processes that are likely to extend timeframes include:

- collecting all relevant evidence
- getting the correct delegate approval
- procedural fairness and
- the availability of key persons such as the source, the respondent, witnesses, and the decision maker.

These are very important steps in the process, and should not be cut short for the sake of timeliness. Additional allegations or suspicions may emerge during the investigation process.

These also should not be ignored due to timeframe pressures.

If there are delays, you should communicate with the source and the respondent at regular intervals. This is to let them know that the matter is still under consideration. Some form of contact at least every month or two is best.

STAGE 2
INVESTIGATION

Pay attention to these key risk areas:

- poorly defined allegations [FS11]
- inadequate terms of reference [FS12]
- lack of planning [FS17]
- insufficient resources allocated to the investigation
- failure to provide procedural fairness [FS15] [FS16]
- investigator or decision maker bias or conflict of interest [FS25]
- investigator inexperience or lack of understanding [FS13]
- failure to consider additional allegations that arise during the investigation [FS12]
- loss of focus in the investigation
- failure to obtain all relevant evidence [FS20]
- investigator having an adversarial mindset about proving or disproving the allegations
- breaches of confidentiality [FS4]
- poor record keeping [FS7]
- delay [FS9]

Key concepts to keep in mind:

- procedural fairness [FS15] [FS16]
- timeliness [FS9]
- the public interest
- confidentiality [FS4]
- conflicts of interest [FS10] [FS25]

10

KEY DECISIONS & KEY ROLES

There are four key decisions to make when investigating misconduct:

- whether to conduct an investigation
- findings of fact
- misconduct findings
- outcomes (including sanctions).

After a decision is made to conduct an investigation, the other three decisions are made by either the **investigator** or the **decision maker**. It is likely that the decision maker will be the person who decided to conduct the investigation.

In general

It is better not to have a team of investigators or decision makers. Team decisions can be a problem if the decision is challenged. If case conferencing is used, one person should be responsible for the decision. [FS3]

Where relevant to your organisation, both the decision maker and the investigator (if internal) should be at least one level up in seniority to the most senior person subject to the investigation. This is to ensure that they are not biased toward, or threatened by, the respondent.

The decision maker

The decision maker should:

- set the terms of reference for the investigation (including defining the allegations) [FS11] [FS12]
- make misconduct findings [FS22] and
- decide on outcomes (including sanctions) [FS23].

The investigator and the decision maker should not be the same person. This is to help ensure that there is no apprehended bias in the final decision making process.

> The decision maker should not be involved in conducting the investigation. They also should not be the person appointed to supervise the investigator.

Who is the decision maker?

Legislation, regulations or industrial instruments usually specify the person with the authority to impose disciplinary sanctions. This will dictate who performs the role of decision maker.

The decision maker is often the most senior person in the organisation (the principal officer). In some cases it may be a delegate.

For instance, the *Police Service Act 2003* (Tas) gives the Commissioner of Police the power to take disciplinary action. The Commissioner has delegated this power for some actions.

At the University of Tasmania, the person with the power to take disciplinary action is set out in an industrial instrument. The decision maker's identity varies depending on the staff member under investigation.

Skills and experience required

The decision maker should be familiar with administrative law principles. This includes, for example, that a delegate cannot be told to make a particular decision.

It is preferable if the decision maker has investigative skills, experience or training.

The investigator

The investigator should:

- write the investigation plan [FS17]
- conduct the investigation
- write the investigation report [FS21] and
- make findings of fact. [FS20]

The investigator may also assist the decision maker to write the terms of reference, although this is not common practice.

Conflicts of interest

Both the investigator and the decision maker should be impartial and independent. They should not have been involved in the alleged misconduct.

All investigators should make a conflict of interest declaration before starting the investigation. This can be a simple written and signed declaration that they have no perceived, potential or actual conflicts of interest, similar to that completed during selection panel procedures.

Familiarity with the respondent does not usually amount to a conflict of interest. Each situation should be judged on a case by case basis.

If anybody involved in the investigation has a conflict, it should be documented and dealt with immediately. [FS25]

The Integrity Commission is available for advice on this issue. Conflict of interest resources are available on the Commission's website.

11

DEFINING THE ALLEGATIONS

The decision maker's first job is to define the allegations. This process will require you to decide on:

- the allegations of fact (**factual allegations**) and
- how each factual allegation amounted to an act of alleged misconduct (**misconduct allegations**).

In legal terms, properly defined allegations are those that have been sufficiently 'particularised'.

When to define the allegations

The allegations should be defined at the start of the investigation. This is so that they can be given to the investigator as part of the terms of reference. [FS12]

The allegations will also need to be put to the respondent at some stage during the investigation. [FS16]

Allegations can change, or new allegations may emerge as the investigation progresses. If this happens, the respondent must be given a chance to respond before any findings are made on the revised or new allegations. [FS12]

Defining the factual allegations

Allegations need to relate to acts that can be proven or disproven by evidence. They should not be allegations about character – for instance, that someone is a bully. Do not make broad allegations of poor behaviour. You need to link each allegation to a particular act, or failure to act.

The allegations need to be specific enough to allow the respondent to respond. However, they should not be so narrow that the investigation will need to be restarted if the facts turn out to be slightly different. For instance, the phrase 'on or about' should be used in relation to dates.

Example

This is a poorly defined factual allegation:

> *Allegation 1: Mary Watts behaved dishonestly and stole some money.*

This is a better defined version of the same matter:

> *Allegation 1: On or about 15 May 2016, Mary Watts took approximately $200 from the office petty cash to her home.*
>
> *Allegation 2: On or about 16 May 2016, Mary Watts fabricated a story to her manager to explain the approximately $200 missing from the office petty cash.*

Patterns of behaviour

Defining allegations can be particularly difficult where the matter involves a pattern of low level misconduct that together amounts to more serious conduct. The classic example of this is bullying.

Well-defined bullying allegations are set out as examples below. Do keep in mind that these have been simplified for the purposes of this document. In reality, each bullying-related allegation may require more explanation, and may be more lengthy and complex.

Where bullying is alleged, there is likely to be an extensive list of allegations rather than just a handful. If the allegations are numerous, and if it will not affect the potential outcomes, you may define and investigate just the most serious allegations.

Allegation 1: On or about 10 October 2016, Robert Jones humiliated Rosa Lee by discussing her recent performance review in front of other staff.

Allegation 2: On or about 20 October 2016, Robert Jones belittled Rosa Lee by telling her she was 'incompetent' in a raised voice in front of other staff.

Allegation 3: On or about 17 November 2016, at a staff morning tea, Robert Jones belittled Rosa Lee in front of other staff by mocking her cooking by using words to the effect of 'I wouldn't eat food you cooked if I was starving to death'.

Allegation 4: On or about 2 December 2016, Robert Jones denied Rosa Lee the opportunity to participate in the new roads project, despite allowing other staff with a similar level of qualification and experience to participate, and this action was unreasonable.

Allegation 5: On or about 15 December 2016, Robert Jones humiliated and abused Rosa Lee at the staff Christmas party by shouting in a raised voice that she was 'an incompetent cow' or words to that effect.

Defining the misconduct allegations

Each factual allegation needs to be related to a breach of the code of conduct, policy or law. The table below explains this process.

Complaint:	John Smith accepted a wide screen television as a gift from Company A on 15 May 2016. Mr Smith works at Government Department.
Information collected in the preliminary assessment: [FS3] [FS8]	• Government Department is a regulatory body that oversights Company A. • Mr Smith has not declared that he received a gift from Company A. • Company A has recently been approved to expand its operations. Mr Smith signed off on this approval. • Mr Smith is not allowed to accept gifts from Company A under clause 9 of Government Department's Gifts and Benefits Policy. • Potentially relevant clauses in Government Department's Code of Conduct include: Clause 5: *An employee who receives a gift in the course of his or her employment or in relation to his or her employment must declare that gift to the CEO.* Clause 7: *An employee must not make improper use of –* *(a) information gained in the course of his or her employment; or* *(b) the employee's duties, status, power or authority –* *in order to gain, or seek to gain, a gift, benefit or advantage for the employee or for any other person.* Clause 9: *An employee must disclose, and take reasonable steps to avoid, any conflict of interest in connection with the* employee's *employment.*
Factual allegations:	1. Mr Smith accepted a gift from Company A on or about 15 May 2016. 2. Mr Smith did not declare the gift he received on or about 15 May 2016 from Company A. 3. Mr Smith used his position as a regulator to gain a gift or benefit.

Fully defined misconduct allegations:	1. Mr Smith accepted a gift from Company A on or about 15 May 2016, which is a potential breach of Government Department Gifts and Benefits Policy clause 9, which states … 2. Mr Smith did not declare the gift he received on or about 15 May 2016 from Company A, which is a potential breach of Government Department Code of Conduct clause 5, which states … 3. Mr Smith used his position as a regulator to gain a gift or benefit, which is a potential breach of Government Department Code of Conduct clause 7, which states …

How to select the most appropriate misconduct allegation

It is likely that there will be a variety of ways to characterise each allegation as misconduct. For instance, allegation 3 above could also be:

- a failure to declare and manage a conflict of interest
- a failure to act with honesty and integrity and
- a number of criminal offences (i.e. a breach of the law), including bribery and extortion.

The most fitting characterisation will be determined on the basis of the facts established by the investigation.

Example of changing an allegation during the investigation

Take misconduct allegation 3 above as an example.

The investigation may uncover that Mr Smith did receive a gift from Company A, but that he did not ask for the gift and that he tried to give it back to the company. However, Mr Smith did not declare the gift, and did not discuss how it should be managed with his employer.

In this case, misconduct allegation 3 may be better characterised as a breach of Government Department Code of Conduct clause 9 – failure to declare and manage a conflict of interest. This would need to be put to Mr Smith before the final decision was made.

For a method of avoiding having to change allegations in this way, see below.

Example of defining alternative allegations at the start of the investigation

To avoid having to change the allegations during the investigation as above, it may be best to define multiple alternatives at the start of the investigation.

For instance, allegation 3 could be worded as follows:

> *Mr Smith used his position as a regulator to gain a gift or benefit, which is a potential breach of Breach of Government Department Code of Conduct clause 7, which states …*
> ***or in the alternative** is a potential failure to declare and manage a conflict of interest in breach of Government Department Code of Conduct clause 9, which states …*

The investigation may show that the first alternative was not supported by the evidence, but that the second alternative was supported by the evidence.

12

SETTING THE TERMS OF REFERENCE

Every investigation should have a 'terms of reference'.

Having adequate terms of reference is very important. If the terms of reference are poor, it is unlikely that the investigation outcomes will be adequate.

The difference between criminal and disciplinary matters

Before you write the terms of reference, you should consider the aim of a disciplinary investigation. Be alert to the fact that, unlike criminal matters in a court, no one party (e.g. the source, the organisation, the respondent) has to work to prove or disprove something.

Disciplinary investigations are inquisitorial. The aim is to uncover the facts, not to prove that something did or did not happen. It is not meant to be an adversarial process, and there is no presumption of innocence. This means that the respondent is not 'innocent until proven guilty'.

What are the terms of reference?

The 'terms of reference' set out what the investigator is to investigate. They should be included in the investigator's instrument of appointment.

The terms of reference should:

- include the fully defined allegations [FS11]
- be set out in writing and
- be approved by the decision maker. [FS10]

The terms of reference are usually determined by the decision maker. The decision maker may consult and work with others to set the terms of reference.

If you are an investigator and you have not been given any terms of reference, you should request some before you start investigating.

Formatting the terms of reference

The terms of reference should set out the key investigation deliverables, which usually includes a report. The report may or may not contain recommendations. [FS21]

A common way of setting out the terms of reference is to use a 'scope' and a 'purpose'. This would be followed by the allegations.

Scope

Generally, the scope will consist of a broad statement about the matter under investigation, and will set a time period or focus event. Taking as an example the alleged misconduct discussed in previous fact sheets, the scope could be:

> *Scope:*
> *All misconduct alleged to have been committed by John Smith while performing the role of regulator in 2016.*

Purpose

The purpose would then explain the matter in more detail. The purpose should also indicate whether the investigator is expected to make findings and recommendations. For example:

> *The purpose of the investigation is to:*
>
> *(a) gather information on and make findings of fact about whether, on the balance of probabilities, John Smith accepted gifts contrary to policy in 2016;*
>
> *(b) gather information on, and make findings of fact on the balance of probabilities about, the relationship*

between the alleged acceptance of gifts by John Smith and his approval of Company A's expanded operations in 2016;

(c) gather information and make recommendations for organisational improvements related to the above alleged misconduct; and

(d) produce a report about the above.

The investigator above has been tasked with making findings of fact about the alleged conduct. This means that it is not the investigator's role to make misconduct findings, or to recommend disciplinary outcomes. The investigator has also been tasked with investigating whether there is potential for organisational improvement.

One of the most important things to state in the terms of reference is whether the investigator is to make factual findings, misconduct findings, or any kind of recommendations.

All investigators should be asked to be alert to systemic or organisational issues. This may be one of the most important outcomes for your organisation. [FS23]

Allegations

After the purpose, the terms of reference would then set out the fully defined allegations. [FS11]

What if more allegations emerge during the investigation?

Be alert to additional allegations of misconduct that may emerge during the investigation. The terms of reference can include instructions on what to do if this happens.

Avoid making the scope and purpose of the terms of reference too specific. For instance, in purpose (a) above, it would be preferable not to mention a specific month.

That way, the purpose would not have to be revised if the investigator uncovered multiple gifts given over 2016. It would also give the investigator some scope to probe the allegations and consider if they were separate factual allegations that needed to be put to the respondent.

If new allegations emerge, the investigator should raise them with the person oversighting the investigation. They should then be put to the decision maker to determine if they should be incorporated into the terms of reference. [FS11]

If the new allegations are very different to the allegations already under investigation, they may need to be considered separately. For instance, if they were against a different employee it may be more appropriate to deal with them in a separate investigation.

If the decision maker includes the new allegations in the investigation, you should tell the respondent about the additional allegations. As with all the other allegations, the respondent must be given a chance to respond before any findings are made.

A failure to report misconduct may amount to misconduct.

This is a type of alleged misconduct that often arises during investigations.

Counter-allegations

You should be open to counter-allegations of misconduct.

If a respondent accuses someone else of misconduct that casts doubt on the misconduct allegations against the respondent, you should seriously consider revising the terms of reference. Alternatively, you may consider starting a separate investigation.

Failure to incorporate counter-allegations into an investigation has been held to be grossly unfair in certain circumstances. An example of this can be found in the Fair Work Commission case of *Susan Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775. In that case, the respondent had made serious counter-allegations against the complainant, which were corroborated by a witness, but which were ignored during the company's investigation.

13

CHOOSING AN INVESTIGATOR

The decision maker is normally the person who chooses the investigator. In some organisations, the investigator will be chosen by someone other than the decision maker. For instance, it may be someone in the human resources or legal unit.

Whoever makes the decision will have to decide whether to appoint an internal or external investigator.

General qualifications and skills required

There are several key things to look for in an investigator. You should make sure they have the skills and knowledge to complete the investigation. Your organisation and the person appointing the investigator will be held responsible if the investigator is not up to the task.

You will need to assess the complexity and seriousness of the investigation. For instance, a person who has never conducted an investigation should not investigate a matter that could result in dismissal.

In some investigations, the investigator will need specialist skills or knowledge. It may be necessary, for instance, for them to understand the respondent's role. Or it may be necessary for them to have specialist technical knowledge – for instance, about procurement. Alternatively, the investigator may work closely with others that have particular experience or expertise. [FS18]

Relevant formal qualifications include a:

- Certificate IV in Government (Investigation)
- Certificate IV in Government (Statutory Compliance) and
- Diploma of Government (Investigation).

All investigators should have professional awareness, training or experience in:	• procedural fairness • administrative law principles • administrative decision making • the basic rules of evidence • conflicts of interest • unconscious bias • interviewing • collecting, preservation, and analysis of evidence • confidentiality • evidence-based report writing and • relevant employment laws and policy.
They should also:	• be a good communicator • possess good analytical skills • be skilled at handling multiple stakeholders • have attention to detail • have good time management and • ideally, have some training in dealing with vulnerable people.

Deciding whether to hire an external investigator

Many organisations in Tasmania 'outsource' their investigations to external companies or individuals. Some organisations do this as a matter of course, others on a case-by-case basis.

Outsourcing can be a good choice in some circumstances. But you should make sure that the investigator has adequate qualifications and experience. Your organisation should get value for money. It is not necessarily the case that an external investigator will do a better job than an internal investigator. If you outsource an investigation, you should still have someone internal who is capable of oversighting the investigator.

> You will need to comply with relevant contract and procurement-related policies when hiring an external investigator.

Factors to consider in deciding whether to outsource an investigation are listed in the table below.

Who is under investigation:	If the respondent is very senior, it may be necessary to outsource. This is because of the potential for both actual and apprehended bias. If a number of employees are involved, it may be preferable to outsource the investigation to avoid any perceived or actual conflicts or bias.
The size of your organisation:	If your organisation is small, you may not have anyone qualified to undertake the investigation, or it may not be possible for anyone to undertake an unbiased investigation.
The nature of the investigation:	An internal investigator may be better placed to understand the technicalities of the alleged misconduct. Or, if your organisation is small, you may not have an independent internal employee with the required expertise and/or time.
Time:	Will it be quicker to outsource the investigation, or to do it internally? Keep in mind that someone in your organisation will still need to oversight the external investigator.
Money:	Is it going to be more expensive to outsource the investigation, or do it internally? Often external investigators are the more expensive option. Do you have a suitably qualified staff member who can be spared from other duties to do the investigation, or will this result in an unsustainable drain on your organisation?
Your organisation:	The investigator should have a good understanding of the legislative environment and governance framework of your organisation. It may not be possible to find an external investigator with this knowledge.

Internal investigators

You should ensure that an internal investigator has time to dedicate to the investigation.

Investigations take time and energy. Do not expect the investigator to fit the investigation in around their already busy role. Consider giving them a set number of days per week to dedicate to the investigation. Make sure you consider any large blocks of planned leave. Bear in mind that the investigation should be completed as quickly as possible.

Ideally, the investigator will not be the person who undertook the preliminary assessment. This is to help avoid apprehended bias. [FS3]

The investigator should not have previously been involved in managing or disciplining the respondent in relation to the conduct. Particularly where the allegations amount to serious misconduct, the investigator should not have been involved in managing or disciplining the respondent in relation to any conduct in the past. This is to avoid apprehended bias.

Conflicts of interest

Do not choose an investigator who was directly involved in the matter, or who is close to the respondent. [FS25]

For minor matters, it may be appropriate for the respondent's immediate supervisor to investigate. The more serious the matter, the more the investigator needs to be completely independent. Consider whether a member of the public would think the investigator had a conflict.

Even if the matter is minor, you should make sure that the investigator was not involved in the alleged misconduct. For example, if the allegation is about inappropriate use of emails, make sure that the investigator was not a recipient of one of the inappropriate emails.

> Where relevant to your organisation, the investigator should be more senior than the most senior person under investigation.
>
> If that is not possible, and there is a risk of apprehended bias, you should allocate a more senior person to assist the investigator. This person should sit in on the interviews with the more senior employees.

External investigators

Qualifications

Look closely at their qualifications and make sure they have all the necessary general skills listed above.

At a minimum, an external investigator should have an inquiry agents licence issued under the *Security and Investigations Act 2002* (Tas). For more information, see the Department of Justice website *Security Agent Licences*. In some public sector organisations, it is mandatory for external investigators to possess this licence.

> Rather than looking to a private company, consider seconding or hiring an employee from another organisation.

Experience

An external investigator should be able to tell you about their experience in employment-related investigations. Experience in Tasmania and in other organisations similar to your own will be particularly relevant.

You could quiz them about difficulties they have faced during investigations, how they dealt with them, and what the outcomes were. See if any of their investigations have been the subject of an appeal to an industrial commission. Find out what the outcomes of those decisions were, and review any comments about the investigation.

Make sure the investigator is capable of writing a clear, concise and evidence-based investigation report. You may wish to contact other organisations and see if they can vouch for the work of a particular company or person. Referee checks are crucial.

Record keeping and external investigators

You must comply with any record keeping requirements for outsourced matters established under the *Archives Act 1983* (Tas). At the time of writing, these were in *State Records Guideline No 10: Outsourcing of Government Business - Recordkeeping Issues*. You will need to consider these requirements very early in the process as part of the contract negotiation. [FS14]

Under the guideline, it is a requirement to keep records of the outsourcing process.

Additionally, at the end of the investigation, you should make sure that the investigator:

- returns any sensitive or private records and
- gives you all evidence, any investigation planning documents, running sheets, and interview notes and transcripts.

> Be careful about confidentiality before the contract is signed.

You should ensure that the records retained by your organisation clearly explain how the matter progressed and why each important decision was made. If the investigation report does not do this, you will need to keep primary documents such as transcripts and running sheets as well.

It is important that these records are retained in case the outcomes of the matter are challenged. It is also important for the purposes of internal and external accountability, and for the maintenance of corporate knowledge. The records should be stored with appropriate confidentiality restrictions. [FS7]

It is a good idea to specify in the investigator's contract that all relevant records are to be returned and that copies must be destroyed. You may allow the investigator to keep non-sensitive or de-identified material for their records.

14

APPOINTING AND OVERSIGHTING THE INVESTIGATOR

An investigation is only as good as its terms of reference, regardless of the skills of the investigator. All investigators should be given adequate instructions and oversight, and understand the required deliverables.

The results of a poor investigation may be overturned. A poor investigation may also result in complaints and internal issues for your organisation.

How to appoint the investigator: the instrument of appointment

The investigator should be appointed in writing, via an 'instrument of appointment'.

The instrument of appointment should set out:

- the terms of reference, including the fully defined allegations [FS12]
- the authority and powers of the investigator, including any necessary delegations
- any mandatory procedural steps, requirements and milestones
- reporting requirements
- record keeping, security, confidentiality and privacy requirements and
- deadlines.

The instrument should be signed by a person with appropriate authority under any relevant legislative or industrial instruments. This will often be the decision maker. [FS10]

> Setting deadlines for the investigator helps prevent unnecessary delays. Be open to extending deadlines if necessary

External investigators

The investigator should be clear on what support your organisation can provide. For instance:

- will you facilitate interviews and the collection of documentary evidence?
- will you provide administrative support?
- what should they do if any legal or technical issues come up – will your employees be available to give advice?

Consider incorporating all of this into their contract and/or their instrument of appointment.

You may specify in the contract that the investigator will deliver the investigation report to the required standard. The contract should also allow the investigation to be expanded if new allegations emerge.

Investigator authority and powers

The investigator's power to question people, request information and obtain evidence should be set out in their instrument of appointment. They can then rely on the instrument if their requests are denied or questioned.

The authority and powers of the investigator may influence the outcomes of the investigation. If legally possible for your organisation, you should delegate the investigator with the power to direct employees to answer reasonable questions or supply information. Failure to comply with such a direction would be misconduct.

If it is not possible to delegate the power to issue directions to the investigator, make sure the investigator is aware of the process they can follow if they need an authorised person to issue such a direction. [FS18]

All investigators should make a conflict of interest declaration before starting the investigation. [FS10]

It may also be helpful to give the investigator a written request from the decision maker asking for the full cooperation of employees.

If the investigator thinks that evidence may be destroyed, it may be appropriate to give them written approval to undertake a search in your organisation. It is better that this authorisation is done on a case-by-case basis. It should not be a power given to the investigator in their instrument of appointment.

Oversighting the investigator

General requirements

Whether they are internal or external, a suitably skilled person in your organisation should be assigned to oversight the investigator. This person should:

- monitor compliance with the terms of reference
- monitor compliance with the governance framework
- answer any questions from the investigator
- ensure the investigator is not working toward a preconceived outcome
- monitor compliance with administrative law and
- monitor timeframes and deadlines.

Some of these tasks will be performed during the investigation. Others will be checks performed when the investigation report is received (before it goes to the decision maker).

The person oversighting the investigation should not be the decision maker.

Internal investigators

The investigator should regularly report to an internal investigation supervisor on the progress of the investigation. The supervisor should be able to act as a mentor.

External investigators

Outsourcing an investigation does not reduce the responsibilities of your organisation. You should still provide adequate oversight to ensure the investigation stays on track. As the client, you need to ensure that you fully understand the requirements and deliverables of the investigation.

You need to have someone in your organisation with the capacity to oversight the external investigator. This person should provide oversight as listed above, as well as facilitate evidence-gathering, for example by supplying documentary evidence on request.

Although oversight is necessary, you should also ensure that the supervisor does not influence the external investigator. They should not direct or participate in the investigation. They should not, for example, tell the investigator what questions they should put to employees. This can result in the investigation outcomes being overturned.

15

PROCEDURAL FAIRNESS

Procedural fairness should be a primary consideration throughout the investigation process.

What is procedural fairness?

Procedural fairness is also known as natural justice. It is about fair procedures. It is not concerned with whether outcomes are fair (which is 'substantive fairness').

Procedural fairness requirements vary depending on the investigation. Your organisation may have specific procedural fairness requirements.

The general rule is that procedural fairness requirements increase along with the possible severity of the outcome. You should err on the side of giving too much procedural fairness rather than too little.

> Procedural fairness does not require that the respondent be given regular updates if it would hinder evidence gathering.

For the purposes of a disciplinary investigation, the most relevant procedural fairness rules are the:

- hearing rule – a right to a reasonable opportunity to be heard
- bias rule – a right for the decision not to be biased and
- evidence rule – a right for the decision to be based on evidence.

The hearing rule is the most prominent procedural fairness requirement, and is dealt with in detail in [FS16]. Information on the other two rules is set out below.

Other general procedural fairness principles include that:

- the process be conducted without unnecessary delay [FS9]
- adequate records be kept [FS7] and
- an employee may have a support person present during an interview. [FS19]

The bias rule

The general principles of the bias rule include that:

- the process should be free from actual or apprehended bias – apprehended bias is when a bias may be perceived, but is not necessarily present
- the investigator and the decision maker should not have an interest in the outcome – 'interest' includes both pecuniary (monetary) interests and non-pecuniary interests (family, friends, associates, enemies) – and
- the decision should be made in good faith.

The test is an objective one. In thinking about the bias rule, consider whether a reasonable member of the public who has access to all relevant information would think that the process was free from bias (or conflicts of interest).

One way to avoid apprehended bias is for the investigator and the decision maker roles to be undertaken by different people. [FS10]

Risk areas

Questions put to the respondent should not display partiality, prejudgment, predisposition or bias. You should ensure that you are not working toward a predetermined outcome. [FS19]

Ignoring or dismissing evidence without giving a good reason can be evidence of bias.

If you choose to put proposed adverse misconduct findings to the respondent, make sure that you have not prejudged the outcome. The Tasmanian Supreme Court case of *Rainbird v Bonde* [2016] TASSC 10 is relevant to this issue. [FS16]

The evidence rule

The general principles of the evidence rule are that:

- there should be evidence to support the decision
- reasonable inquiries should be undertaken before a decision is made
- the findings should be based on relevant evidence and
- irrelevant considerations or evidence should not be taken into account.

Risk areas

A failure to pursue new issues raised, submissions that cast doubt on evidence, or counter-allegations may be a breach of procedural fairness. [FS12]

Giving the respondent a reasonable opportunity to respond, and genuinely considering their submission, is one way to reduce the risk of breaching this rule. [FS16]

16

THE 'HEARING' RULE – TELLING THE RESPONDENT

Once the investigator has been selected, you should turn your mind to when and what to tell the respondent about the allegations.

Procedural fairness: the hearing rule

The hearing rule is the most prominent procedural fairness requirement. The general principles are that:

- all parties have a right to a reasonable opportunity to be heard (including the source)
- the respondent has a right to know the allegations against them in sufficient detail [FS11]
- the respondent has a right to respond to the allegations against them and
- the respondent has a right for their submission to be genuinely considered before the decision is made.

> The type of hearing needed will vary with the circumstances.

At what point does the right to be heard apply?

In dealing with the respondent, the hearing rule applies at several stages:

i. telling the respondent the allegations (before/during the investigation) and
ii. giving the respondent the opportunity to respond to the allegations (during the investigation) and
iii. giving the respondent a copy of the investigation report (after the investigation) or
iv. asking the respondent to respond to proposed adverse misconduct findings (after the investigation).

Stage (i): Telling the respondent the allegations

When to tell the respondent

In some organisations, it is mandatory to tell the respondent about the investigation as soon as the process starts.

If this is not the case in your organisation, you may choose to tell the respondent about the allegations at any stage before the end of the investigation.

Except in rare circumstances (see box below), the respondent should be made aware of the investigation and the allegations before the end of the investigation so that they can respond to the allegations (stage (ii)) before findings are made.

> You may start an investigation and it may quickly become obvious that there was no misconduct.
>
> In this case the investigation would wrap up and no adverse findings would be made.
>
> If the respondent did not already know about the matter, there would be no need to inform them of the allegations or the investigation.

In deciding when to inform the respondent you should consider whether:

- there is a requirement for the investigation to remain confidential (including on the advice of police) – this will especially be the case if the allegations are very serious, if there is a risk of victimisation, or if the matter is a protected or public interest disclosure [FS2] [FS7]
- informing the respondent may resolve the matter – in some situations, the respondent may be able to clear up the matter or may admit to the conduct, which would make the investigation a much simpler, cheaper and quicker process
- informing the respondent is likely to end the inappropriate conduct – although the investigation would likely need to continue, ending the conduct would be a positive outcome in a situation where allowing it to continue would not provide additional evidence, and/or could be seen as condoning the behaviour
- and for how long it will be possible for the investigation to remain confidential – it is better for the respondent to be told formally than to hear it through gossip or rumour and
- you need to take action such as restricting access to data or equipment, or suspending, standing down or varying the duties of the respondent during the investigation – in this case, it will not be possible for the investigation to remain confidential. [FS5]

What to tell the respondent

Regardless of when you tell the respondent, the allegations should be set out in writing for them. It is usually best that the respondent be informed of the investigation and the allegations at a meeting. The respondent should be given, in writing:

- the defined allegations
- information about the investigation process, including the name of the investigator and when the respondent is likely to be contacted
- copies or links to relevant policies and procedures
- information about their rights, including the right to be heard and the right to a support person at meetings
- where relevant, a caution against taking reprisal action or victimisation, and a direction to maintain confidentiality and/or not to speak to certain people about the matter
- the full range of sanctions that may apply under the disciplinary framework – avoid giving them a specific indicative sanction for the kind of misconduct that has been alleged
- information about accessing support, for instance through an employee assistance program and
- the name of the decision maker.

The respondent may want to talk about the matter at this meeting. You should avoid this if possible. Make it clear to them that they will have a right to be heard at a later date. The meeting should not turn into an interview.

> The respondent may want to admit to the conduct. They may be adamant that they are ready to respond to the allegations on the spot.
>
> If this is the case, make a written record of what they say, including that you offered them a meeting at a later date, and the presence of a support person. Have them sign the document as being a true and accurate record.
>
> Even if the respondent admits to the conduct, it is likely that you will have to complete some other procedural steps before you can finalise the matter.

Precautions

The appropriate bodies should be contacted and measures put in place before contacting the respondent if:

- the matter may involve serious misconduct [FS2]
- the matter may involve criminal conduct [FS6]
- the matter falls under whistle-blower legislation [FS2]
- there is a risk of evidence being destroyed or
- there is a risk of victimisation. [FS2]

Stage (ii): Giving the respondent the opportunity to respond to the allegations

Putting the allegations to the respondent for a response is a mandatory part of the procedural fairness process.

Make sure that you give the respondent sufficient time to consider and respond to the allegations. Seven days is generally enough time. More or less time may be needed depending on the circumstances. This would include the seriousness and complexity of the allegations, and whether you have asked the respondent to respond in writing or in person. More time is generally needed to prepare a written response.

> Regardless of when you inform them of the allegations, it is good practice to get the respondent's evidence after all other evidence has been gathered.
>
> This allows you to put all allegations to them at one hearing. [FS17]

If the respondent is to be interviewed, it may be better for their welfare to have less notice. About three days would usually be sufficient. This gives them time to arrange a support person if required, and collect any supporting documentation.

Be open to extending the response time on request.

Generally an opportunity to attend an interview is seen as fairer than a request that an employee respond in writing. If the allegations are very serious you should lean toward offering the respondent an opportunity to be interviewed.

The respondent may decline an interview and insist on responding in writing. Unless you have the ability to direct the person to answer questions, it is likely that you will have to comply with such a request. However, keep in mind that the right to be heard is a right to a reasonable opportunity to be heard. [FS18]

> The right to be heard is the right to a **reasonable opportunity** to be heard. This is an objective standard.
>
> You should not allow an employee to delay the investigation with unreasonable requests. They do not need to be given a 'perfect opportunity' to be heard.
>
> If the matter is serious, it may be reasonable for you to contact them and expect a response while they are on leave.

Stages (iii) and (iv): The respondent's final submission

Before they make their final submission, the respondent must be made aware of all adverse material that is 'relevant, credible and significant'. In simple investigations, it may be possible to do this as part of stage (ii) during the investigation.

It is more likely that you will need to take an additional step to ensure you have complied with this aspect of procedural fairness.

If you do need this additional step, **you do not need to do both stage (iii) and stage (iv)** – they are alternatives. It is likely that your organisation will already have a policy or practice of undertaking either stage (iii) or stage (iv).

In considering which step to take, think about how you can best make the respondent aware of relevant issues. This may require you to point out critical issues that may not be readily apparent.

If the respondent has refused to respond to the allegations at stage (ii) of the investigation, you should give them a copy of the investigation report (stage (iii)).

Stage (iii): Giving the respondent a copy of the investigation report

If you choose to send a copy of the investigation report to the respondent for comment, make sure they are given sufficient time to respond. This will depend on the length and complexity of the report.

Good practice principles do not require that you, as a matter of course, provide the respondent with verbatim copies of witness statements and documentary evidence along with the report. A decision about what to give or show the respondent needs to be balanced against other considerations. These considerations might include confidentiality, privacy, security risks, and legal professional privilege. Irrelevant comments made by witnesses have the potential to upset the respondent.

An accurate summary of the evidence in the investigation report will likely be sufficient.

You may also redact from the report anything that is not relevant to the respondent. This may include, for instance, allegations against other people and consideration of systemic issues. Be mindful of the possible negative connotations of redactions for the respondent. If the report is likely to cover issues unrelated to the respondent, you may request that these issues be reported separately. [FS21]

> In some organisations, it is mandatory to provide the respondent with full copies of all evidence collected.
>
> If this is the case in your organisation, make sure that every witness is aware of this before they provide their evidence.

Stage (iv): Asking the respondent to respond to proposed adverse misconduct findings

If you choose to ask the respondent to respond to proposed adverse misconduct findings, you will need to supply them with a detailed statement of reasons. This should summarise and set out all relevant evidence, including all material that both supports and does not support the allegations. It may be helpful to give them a copy of the investigation report.

In advising of proposed adverse findings, you need to be very careful that you have not made a prejudgment. The Tasmanian Supreme Court case of *Rainbird v Bonde* [2016] TASSC 10 is relevant to this issue.

The 'show cause' process

You may also consider notifying the respondent of a proposed sanction and asking them to 'show cause' why it should not be enacted. This process is discussed further in [FS23]. You may ask the respondent to show cause when you ask them to respond to proposed adverse findings, or afterwards.

The Integrity Commission's understanding is that the show cause process is **not** generally a requirement of procedural fairness. Authority for this can be found in Coutts v Close [2014] FCA 19 at paragraph [117]. However, there may be particular circumstances – especially if the outcome may come as a 'surprise' to the respondent – in which it would be fairer to follow this process. There may also be specific contractual terms, case law, legislative provisions or policy which requires your organisation to follow the show cause process. If you are unsure, you should seek advice.

17

PLANNING
AN INVESTIGATION

It is good practice for the investigator to make and use an investigation plan. Planning an investigation helps the investigator stay on track and to avoid common pitfalls.

What does an investigation plan look like?

A good plan will help identify the resources and evidence necessary to complete the investigation professionally and in a timely manner.

Investigation plans may be done in a number of ways. The investigator should choose the method that they find most helpful. You may, for instance, use a:

- Gantt Chart or Excel document setting out key dates and tasks
- table setting out the facts in issue, what evidence is required to determine the facts, and how you are going to get that evidence and/or
- a Word document divided into headings, such as 'allegations', 'interviews', 'documentary evidence', 'responsibilities', 'resources', 'tasks' etc.

The investigation plan is a living document that should change as the investigation progresses. You should constantly refer back to the terms of reference to keep the investigation plan on track.

The investigation plan should be altered if new allegations emerge and are incorporated into the investigation.

How to write an investigation plan

Things you should consider in planning your investigation include:

- the allegations and the terms of reference [FS11] [FS12]
- what facts need to be established
- relevant policies and legislation
- what evidence you will need to collect – both documentary and witness
- how you will collect the evidence [FS18]
- the order in which witnesses should be contacted [FS18]
- how you will manage confidentiality and privacy, particularly in relation to the source and the respondent [FS4]
- how you will manage any conflicts of interests (all investigators should make a conflict of interest declaration before starting an investigation) [FS10]
- timeframes and milestones such as interview dates – make sure you include any time you plan to be out of the office
- whether legal or other advice may be needed
- whether an external body should be notified or consulted about the matter [FS6] and
- what resources you will need, for instance a way to record interviews and a vehicle.

Making a chronology of events can help you identify the evidence you need to collect.

Consider making a list of stakeholders, including those that may be adversely affected by the outcomes of the investigation.

Depending on the nature and scale of the investigation, you may need to address risk management in your investigation plan. This may be done in accordance with Australian Standard AS/NZS ISO 31000:2009 Risk management— Principles and guidelines.

Some key risks to consider include:

- threats to confidentiality and privacy [FS4]
- victimisation [FS2]
- media attention
- destruction of evidence
- unauthorised release or use of information
- disruption to the workplace
- stakeholder expectations and
- conflicts of interest. [FS25]

18

COLLECTING EVIDENCE

Evidence is not limited to witness statements. Be broad minded in considering the types of evidence that may be available.

During a disciplinary investigation, you are not limited by the formal evidence rules that apply in court. This means that, in a disciplinary investigation, you can rely on evidence that you could not use in a court of law. These kinds of evidence – such as 'hearsay' and 'opinion' evidence – are discussed further in [FS20].

The nature of the allegations will dictate the amount of evidence you collect, and the extent you go to in order to collect that evidence. The more serious the allegations, the more thorough and extensive your evidence collection should be. In any case, you need to collect enough evidence to make logical and defensible findings of fact.

Types of evidence

Some evidence may have been collected as part of the preliminary assessment. [FS3]

Making a chronology of events can help you to identify the evidence you need to collect.

- Site inspections – including taking photographs and drawing diagrams.
- Photographs.
- Letters and emails – it may be possible for you to access staff email accounts.
- Briefing notes and internal records.
- Rosters and timesheets.
- Access logs and audit results.
- Training records.
- Telephone records and computers – make sure you get expert IT and legal advice if necessary.
- Statements and written responses to questions.
- Values statements, codes of conduct and customer service charters.
- Interviews.
- CCTV footage.
- Personnel records.
- Position descriptions, policies, legislation.
- Technical or expert evidence e.g. legal, human resources, medical, IT, accountants, and document and handwriting examiners.
- Medical records – make sure you get the person's permission before you request these.
- Recordings – though be wary of recordings offered to you by witnesses, and make sure that any material you use has not been collected in breach of the *Listening Devices Act 1991* (Tas).

Character evidence is not usually relevant to whether misconduct has occurred, so it is not normally worthwhile pursuing for the investigator. If you are given written character references, the decision maker may take these into account when deciding on outcomes if relevant.

When to collect evidence

You should try to collect evidence as soon as possible. This is to avoid the risk of it being corrupted, destroyed or lost. For instance, CCTV footage is usually only stored for a limited time.

To avoid the risk of memories fading, you should try to obtain witness evidence as soon as possible. You should, however, make sure you are adequately prepared before you contact a witness.

You should evaluate your evidence as the investigation progresses. Do not be reluctant to collect more evidence if necessary. You may need to go back to a witness to query them about contradictory material that emerges after they give evidence. It is important that you get all obtainable and relevant evidence.

Where counter-allegations are made, these need to be considered and included in the investigation if warranted. [FS12]

How to store evidence

Copies of documents are generally sufficient. You should obtain original documents if you think the original may be destroyed or if you have reason to doubt the authenticity of the copy.

Records should be made as soon as evidence is collected. This is particularly the case with records of meetings, phone calls and interviews.

Evidence should be securely stored in an area or database with restricted access. As you collect evidence, you should note how and when you received it on the running sheet or a separate evidence register. It is a good idea to keep a separate list of evidence stating:

- how it was received
- the form in which it was received
- when and from whom it was received and
- how and where it is stored.

Consider using a system to number and register each item of evidence. [FS7]

Acting with integrity

Investigators should act with integrity at all times, You should not lie or deceive people to obtain evidence, no matter how valuable that evidence is. You may, however, withhold information if that is necessary to maintain the confidentiality or effectiveness of the investigation.

An investigator is supposed to be an objective party whose task is to uncover the facts. It is not the investigator's role to act as a sympathetic ear, a mediator, or a counsellor. It is not the job of the investigator to resolve the issue.

You may, however, take into account issues such as a power imbalance, the emotions of parties, and the impact of organisational structures and systems in planning your investigation and approach.

Using evidence collected by the Integrity Commission

You may be referred a matter by the Integrity Commission that has already been 'assessed' or 'investigated' under the *Integrity Commission Act 2009* (Tas).

The Integrity Commission cannot make misconduct findings in its assessments and investigations. It can only make such findings after an 'integrity tribunal'. Similarly, the Commission does not make decisions about disciplinary action.

However, referred assessment and investigation reports may include findings of fact. They may also include evidence such as interview transcripts and copies of emails.

In taking disciplinary action, the decision maker needs to come to their own conclusions about factual and misconduct findings. Procedural fairness requirements will need to be met before disciplinary action is taken.

Otherwise, the Commission believes that public sector organisations following an administrative process should be able to use and rely on information and evidence gathered by the Commission during an assessment, investigation or integrity tribunal. An investigator may still need to be appointed to determine the facts and to meet procedural requirements, but they should be able to use and rely on Integrity Commission material.

Collecting witness and respondent evidence

It is very likely that you will need to speak to witnesses as part of the investigation. At a minimum, you will need to put the allegations to the respondent.

The form in which evidence is collected from witnesses should vary with the importance of the evidence and the seriousness of the alleged conduct.

At the lowest end of the scale, the evidence may be your notes about a short phone call. If the evidence you require is minimal and very specific, you may request it verbally. For instance, you may contact a supervisor and ask if a person was at work on a particular date.

Evidence may be received via email, or in a more formal written response. Where the allegations are serious and the response is important, you may request it in the form of a statutory declaration. For most serious matters, a formal interview of at least one party (the respondent) is usually required. [FS19]

At least three working days should be allowed for written responses. The potential drawbacks of formal written responses are that they:

- provide opportunities for collusion
- are time consuming and can cause delays
- are difficult for people who are not fully literate and
- pose a risk to confidentiality.

You should try to gather witness evidence in a sequence that means you do not have to speak to a witness more than once. The first witness contacted should usually be the source (if there is one). This may have already happened during the preliminary assessment. The respondent's evidence should be gathered last, so that all relevant material can be put to them.

If necessary, witnesses should be provided with support options. If the investigation is delayed, you should let the source and the respondent (once they are aware of the investigation) know that it is still ongoing.

Make sure that all witnesses are aware of their confidentiality obligations. You may need to give them a formal direction. Remember the need to know principle when dealing with witnesses. [FS4]

Unless there is a particular reason to do so, you should let witnesses (other than the source and the respondent) know that they will not be told the outcomes. [FS24]

Nominated witnesses

You should ask the respondent and the source as soon as possible if they can nominate any witnesses. Where relevant, you should also ask this question of other witnesses.

Nominated witnesses should usually be approached by the investigator or another appropriate person, not by the person who nominated the witness. If you choose not to contact a nominated witness, you should explain why you made this decision in the investigation report. Depending on the circumstances, you may also need to explain this decision directly to the person who nominated that witness. [FS4]

Privacy

Tasmanian public sector organisations fall under either or both the *Personal Information Protection Act 2004* (Tas) and the *Privacy Act 1988* (Cth). Make sure that you comply with the privacy legislation applicable to your organisation in collecting, recording, storing and releasing personal information.

When collecting evidence that may contain personal information, as a matter of good practice and to comply with privacy legislation, you should tell the person:

- the purposes of the investigation (an inquisitorial disciplinary investigation)
- that any evidence they give may be used for the purposes of the investigation and its outcome and

- that their evidence may be provided to others – including the respondent – if required e.g. for the purposes of procedural fairness.

Consent to release personal information may be obtained at the start of an interview.

> You may need to inform third parties that you have collected information about them, or give a party an opportunity to comment before releasing their personal information.

What to do if someone refuses or fails to provide evidence

General

Tell them that this is their opportunity to have their views heard. Make them aware that findings will be made regardless of whether they give evidence.

Employees have a duty to be 'open, frank and honest' with their employer about 'serious issues in the workplace'. The Fair Work Commission has upheld dismissals of employees that have been uncooperative and dishonest during disciplinary investigations.

> A witness may be busy, may not think their evidence is important, or may forget. These scenarios are most likely with external professional witnesses.
>
> You should be persistent in your requests. But also be realistic about getting the evidence. If it is not possible to obtain it, you will have to make do without.

Consider whether you can legally direct the person to attend an interview, answer reasonable questions, or produce a document that they are refusing to provide. This applies to both internal witnesses and the respondent.

If you are unsure if you can do this, you should seek legal advice before issuing a direction. Keep in mind that you cannot usually direct an employee to answer questions that may incriminate them or expose them to sanction.

If you do direct an employee to participate and they still fail to do so, that is potentially an act of misconduct that could result in disciplinary action. [FS14]

Respondent

You should highlight to the respondent the delays that have or will be caused if they choose to respond at a later stage in the process.

If the respondent still refuses to participate, and if they do not have a reasonable excuse for that refusal, you can continue with your investigation.

You should be especially careful to record every offer to participate and their response. These records will be of critical importance if they later challenge the decision on the basis of a breach of procedural fairness. [FS16]

If the respondent refuses to respond to the allegations during the investigation, you should ask them to respond to the investigation report. [FS16]

Failure to respond cannot be taken as proof of misconduct. However, you **may** be able to draw adverse inferences from a respondent's failure to participate or to answer particular questions. You should seek advice on this if you are unsure. Make sure that you do take into account any reasonable explanation provided by the respondent before drawing such inferences.

> If someone internal fails to participate for medical reasons, make sure they provide a medical certificate.

Witness

Where a witness refuses to provide evidence, you should consider why they may have refused. It may be because they fear victimisation or repercussions. Try approaching them from a supportive angle and see if you can provide reassurance or support, including information about any legal protections you can offer them. [FS2]

Some people may refuse for other reasons, such as allegiance to the respondent. Having a written request from the decision maker asking for the full cooperation of employees may help. [FS14]

19

INTERVIEWS

Interviewing is a learned skill that does not come naturally to most people. Do not assume that it is like interviewing someone for a job.

Regardless of whether they are the respondent or a witness, the person you interview is likely to be intimidated by the process. They may be emotional, anxious, antagonistic, or angry. Do be safety conscious when planning interviews. Be aware of the need to protect the welfare of all participants.

Planning an interview

Planning for interviews is very important. This includes deciding what evidence and lines of inquiry you need to cover.

You should start with open ended questions that do not contain assumptions. A good start is to ask the interviewee for their version of events. Your interview should then be divided into lines of inquiry. Make a list and draft questions to ask about each line of inquiry.

For each line of inquiry, commence with open questions (to tell, describe or explain), move to probing questions (what, why, how), and then finish with closed questions (questions with yes/no answers).

As a general rule, do not ask leading questions. The exception to this is when you are summarising and confirming the evidence the interviewee has given.

Do not be rigid in following your plan – be open to following unexpected lines of inquiry.

Make sure you have prepared any documents or evidence you want to show the interviewee.

Where possible, a second person should sit in on the interview. This is advantageous from a safety and guidance perspective. The second interviewer may also pick up things that the principal interviewer does not.

Standard wording and questions for interviews	
Start of the interview:	• time, date, location • name all persons present • seek consent for the interview to be recorded, offer for interviewee to also record interview • advise that the interviewee or the support person may halt the interview for a break or to speak privately at any time • if the interviewee has chosen not to have a support person, ask them to re-confirm this decision • short description of the subject of the interview • make it clear that the information they give will be recorded, may be used in evidence, and may be disclosed to other parties
Start of the interview - questions for the interviewee:	• please state your full name, date of birth, address and occupation • do you have any questions?
Body of interview:	• at the end of each line of inquiry, check in to see if the second interviewer has any questions for the interviewee

End of the interview - questions for interviewee:	• is there anything else you want to say? • are there any other witnesses or other evidence of which you are aware that may assist the investigation? • do you have any complaints about the way the interview has been conducted? • would you like a copy of the recording and/or transcript? (this may have to wait until the investigation is complete)
End of the interview:	• explain what will happen next • remind the interviewee and support person about their confidentiality obligations • give the interviewee your contact details and encourage them to contact you if necessary • ask them to provide you with any evidence they have cited and the contact details of any witnesses they have nominated

Notice and support persons

Notice of about three days should be given to each interviewee. You should give them a general outline of what will be covered in the interview. You should not provide the questions in advance.

When you give notice about the interview, tell the interviewee that they have the right to bring a support person. It should be made clear that this person cannot be involved in the investigation or the alleged misconduct in any way. The support person should be entirely independent.

Unless specifically provided for in an industrial instrument or legislation, the role of this person is to act as an emotional support for the interviewee. It is not their role to act as an advocate. It is particularly important to make this clear if the support person is a lawyer or union representative.

The support person should be made aware of their confidentiality obligations at the start of the interview.

Recording the interview

Wherever possible, you should record interviews. Audio recordings are sufficient. Because of the provisions of the *Listening Devices Act 1991* (Tas), the person you are interviewing must consent to the recording. If they are hesitant, make it clear that this is the most effective and accurate way to record their evidence. They should be given the opportunity to record the interview with their own recording device.

If you are not able to record the interview, you should take detailed notes and write them up as soon as the interview is complete. If possible, have someone else attend the interview to take notes. You should, if possible, get the interviewee's agreement in writing that the notes are a true and correct record.

In certain situations where the evidence you need is not extensive, you may be able to conduct a telephone interview. As above, you should type up the notes immediately and get the interviewee's agreement that the notes are a true and correct record.

If the interviewee disputes the record of interview, the areas of disagreement should be noted and signed by both the investigator and the interviewee.

Effective interviews

Be careful about your body language during interviews. It is important that you do not give tacit approval, support or encouragement to the interviewee. Your role is to be neutral.

When you put evidence to the interviewee, avoid changing the words or phrasing used by other witnesses. Do not give personal opinions or make comments about the evidence provided. For example, do not say things like: 'Yes, I can understand that', or 'Yes, I agree'. This language can show an apprehended bias.

Do not say or do anything that would suggest a decision has already been made about any aspect of the matter. You should avoid making accusations, and be careful not to use threatening language.

If you think or know someone is lying about something, you should continue with your interview. It does not mean that they are lying about everything.

Don't enter into a discussion or debate with the interviewee. You are there to get their evidence, not yours.

Make sure you allow the interviewee to fully answer each question. It is easy to interrupt. Pause and give them time to consider if they have said everything they want to say.

Developing a rapport

If you can make the interviewee comfortable, it is more likely that you will obtain the evidence you need. Be aware of the possibility of unconscious bias, and avoid approaching the interview with an adversarial mindset.

Interview settings can be important. Do not have the interview somewhere the person will be afraid of being overheard. Make sure phones are on silent. The interview room should be as welcoming as possible – no dark, windowless rooms – and the setup should not be adversarial if possible (e.g. round table).

At the start, you should introduce yourself and any other person present, and explain in general terms the purpose of the interview and how it will be undertaken. Discuss the support person, the recording of the interview, how the interview will be used, and what will happen after the interview. Ask them if they have any questions.

Do not make guarantees to the interviewee. You cannot, and should not, guarantee confidentiality, how their evidence will be used, how the process will evolve, or the end result of the process.

Interviews should not run for too long. If necessary, take a break or finish the interview with an agreement to meet again another day.

STAGE 3
OUTCOMES

Pay attention to these key risk areas:

- failure to consider counter-allegations made by the respondent or mitigating factors [FS12] [FS22]
- reliance on unproven assertions [FS20]
- confusing the role of the investigator and the role of the decision maker [FS10]
- poorly drafted investigation report [FS21]
- failure to analyse the evidence [FS20] [FS21]
- findings not supported by the evidence [FS20] [FS21] [FS22]
- findings not made on the balance of probabilities [FS20]
- inconsistent outcomes [FS23]
- breaches of confidentiality [FS4]
- poor record keeping [FS7]
- delay [FS9]

Key concepts to keep in mind:

- procedural fairness [FS15] [FS16]
- timeliness [FS9]
- the public interest
- confidentiality [FS4]
- conflicts of interest [FS10] [FS25]

20

MAKING FACTUAL FINDINGS – ASSESSING THE EVIDENCE & THE STANDARD OF PROOF

Once you have collected your evidence, you will need to assess each piece of evidence and use it to make your findings on the relevant standard of proof. This process will be documented in your investigation report.

Assessing the evidence

Each piece of evidence you collect needs to be examined in terms of its relevance, credibility and reliability. Remember that evidence is not necessarily proof.

The rules of evidence

In a disciplinary investigation, you are not bound by formal legal evidence rules. However, the rules do provide guidance about how much weight to put on particular types of evidence.

Primary evidence is direct evidence, for instance a statement from someone who witnessed an alleged act. Primary evidence is generally given greater weight, depending on factors such as the independence and the credibility of the witness.

Hearsay evidence is evidence provided by a person who was not a direct witness. They heard about it from another source.

Hearsay evidence is not always admissible in a court of law. But in a disciplinary investigation, you can rely on hearsay evidence. It is, however, generally to be given less weight than primary sources of evidence.

Evidence of someone's opinion (**opinion evidence**) is also generally inadmissible in a court of law, unless it is expert opinion. In a disciplinary investigation, you may take opinion evidence into account. It should, however, be given less weight than primary evidence or expert opinion.

Where there is a strong probability, some findings can be logically inferred from other facts without the need for direct evidence. For instance, if someone arrives at work at the same time every single day, unless there is evidence to the contrary it could be logically inferred that they arrived at that same time on a particular date.

> Disciplinary investigations are inquisitorial. This means that findings are often made on the basis of the word of one party against the word of another party.
>
> To make a finding in these circumstances, you may need to assess the credibility and reliability of each party.

Other evidence you can consider includes:

- the nature of relationships and power imbalances
- whether and why there was a delay in the complaint being made and
- whether any organisational systems and structures contributed to the misconduct.

Assessing credibility and reliability

More weight should be placed on records made or evidence given closer to the date of the event. Records made or evidence given weeks, months or years afterwards are less reliable.

Consider whether each witness' evidence was consistent or contradictory, both within one sitting and across time.

Also consider whether there was opportunity and motive for collusion with other witnesses.

Where a statement accords with independent witness evidence, known facts, or documentary evidence, it is more likely to be true. Damaging admissions are also inherently likely to be true.

If a witness has failed to answer a reasonable question (without a reasonable explanation), this may be taken into account in assessing their credibility.

Keep in mind that witness or respondent criticism of a source's motives may be aimed at undermining the source's credibility, and may be made without any real evidence of dishonesty. Such criticism is unlikely to be relevant to the investigation.

Body language and non-verbal cues can be misleading, so be careful when assessing credibility on the basis of demeanour.

Past behaviour of witnesses, where markedly similar and relevant, may be taken into account.

People perceive things differently. If there are two different stories, it does not necessarily mean one party is lying. And it may also be that a person has lied about one matter, but is truthful about all other matters.

Reviewing your evidence and findings

In reviewing your evidence and findings, you should make sure that you have:

- followed counter-allegations and contradictory lines of inquiry
- given the respondent a chance to respond to adverse evidence
- questioned witnesses about evidence that conflicts with their evidence
- given adequate weight to relevant matters of importance, and less weight to relevant matters of less importance
- only considered relevant evidence and
- sought corroboration where possible.

Making findings: the standard of proof

The 'standard of proof' is the objective test you apply to the evidence to make a finding. If the evidence shows that an allegation is accurate to the relevant standard of proof, then you should find that allegation substantiated.

Disciplinary investigations are administrative investigations, which means the findings need to be made on the civil standard of proof. The civil standard of proof is 'on the balance of probabilities'. This is a lower standard of proof than the criminal standard of proof, which is 'beyond reasonable doubt'.

The 'on the balance of probabilities' test

'On the balance of probabilities' means that: the person making the finding should have 'reasonable satisfaction' that the alleged act is more likely than not to have occurred. This should be on the basis of 'logically probative evidence'.

'Logically probative evidence' means that you cannot meet the standard of proof on the basis of evidence that is merely rumour or gossip. The evidence should be relevant and logically capable of supporting the findings.

If you are unsure about whether the findings have been made on the balance of probabilities, you may consider seeking legal advice.

Reasonable satisfaction and the *Briginshaw* test

The High Court case of *Briginshaw v Briginshaw* [1938] HCA 34 is famous for its statements about the balance of probabilities test.

In *Briginshaw* it was said that, where the potential outcomes are more serious, 'reasonable satisfaction' should not be arrived at with inexact proofs, indefinite testimony, or indirect inference. This means that the more serious the outcomes, the more solid the evidence needs to be.

Briginshaw has at times been misinterpreted to mean that the civil standard of proof is a sliding scale, and that where the outcomes are potentially very serious (dismissal), the standard of proof is higher.

Briginshaw actually means that the evidence itself needs to be stronger (more substantial) if the outcomes are potentially more serious. For instance, if the outcomes are potentially very minor, you may be able to be reasonably satisfied on the balance of probabilities on the basis of uncorroborated hearsay evidence. You would be less likely to be reasonably satisfied on the same evidence if the outcome was potentially dismissal.

What does the test apply to?

The balance of probabilities test is to be applied to every factual allegation.

It is usually the investigator's role to make these findings. Their findings will often need to be approved by the decision maker.

The balance of probabilities test does not apply to the misconduct allegations.

For example, the investigator could find that, on the balance of probabilities, Mr Smith did accept a gift from Company A. The decision maker would then decide whether this act amounted to misconduct.

21

WRITING AN INVESTIGATION REPORT

The end product of an investigation is usually an investigation report. This is what the decision maker will use to make misconduct findings.

What to include in the investigation report

The investigation report should:

- explain the allegations
- explain how the allegations have been handled to date
- explain the investigation methodology
- refer to and summarise all relevant evidence
- analyse the evidence and come to clear findings of fact in relation to each factual allegation and
- consider opportunities for organisational improvement.

The investigation report should be as short as possible, while still referring to all necessary evidence. The investigation report for a very simple investigation may only be a page or two. A complex investigation report may be very lengthy.

Large slabs of copy and pasted evidence is generally not helpful. The decision maker can refer to the actual evidence if necessary. It is, however, important to accurately cite materials used as evidence in the report.

All the usual plain English and readability rules apply to investigation reports.

Format for an investigation report

There are many options when setting out an investigation report. Below is a rough guide, but your organisation may have its own investigation report template.

1. Executive summary, including summary of allegations and key findings
2. Purpose/scope of investigation and background
3. Investigation methodology
4. Evidence
5. Assessment and analysis of evidence against each allegation, with findings
6. Organisational issues/opportunities for organisational improvement
7. Conclusion/list of findings/ recommendations
8. Attachments – full copies of all evidence used in the report

Depending on your organisation's disciplinary framework, it may be preferable for matters that are not directly related to the respondent's alleged misconduct to be reported separately. This may include, for example, opportunities for organisational improvement. [FS16] [FS23]

Assessment and analysis of evidence

The section of the report that analyses the evidence is the most important. It is also the hardest part of the report to write.

Remember that the aim of the investigation is not to prove or disprove the allegations. The aim is to uncover the facts. Your analysis of the evidence and the findings this process leads you to is therefore the most important part of your investigation. [FS20]

In the report, you should weigh up the evidence relevant to each allegation. You should explain why you have placed greater weight on some evidence over other evidence, and why you have made the findings that you did. Your rationale should be logical and clear, even to external parties.

Make sure you refer to all relevant evidence, not just the evidence that supports the findings you have made. You should discuss any disputed facts, and set out your reasons for preferring one version over another.

If you have chosen not to follow a particular process, not to contact a particular witness, or not to obtain a particular piece of evidence, you should explain your reasons.

The findings

Findings of fact should be made clearly about each factual allegation. Generally, it is best to make a finding about whether each fact is 'substantiated' or 'not substantiated'.

Another option is that the facts are 'inconclusive'. This would mean that the decision maker has to make misconduct findings without any supporting findings of fact. Generally, this would mean that misconduct findings would not be upheld.

For instance, these may be the factual allegations:

- Mr Smith accepted a gift from Company A
- Mr Smith did not declare a gift from Company A
- Mr Smith used his position as a regulator to gain a gift.

To make findings of fact, you need to come to a conclusion about each of the factual allegations. So, for example, your findings might be:

- Mr Smith accepted a gift from Company A – substantiated

  This means that you have found, on the balance of probabilities, that Mr Smith did accept a gift from Company A.
- Mr Smith did not declare a gift from Company A – not substantiated

  This means that you have found, on the balance of probabilities, that Mr Smith did declare the gift from Company A.
- Mr Smith used his position as a regulator to gain a gift – inconclusive

  This means that you have not been able to make a finding about whether Mr Smith used his position to gain the gift. There may have been evidence, of equal relevance and reliability, which supported both possible findings.

The decision maker will then go on to make the misconduct findings on the basis of your factual findings. [FS22]

Recommendations

The investigator should make recommendations about organisational issues and improvements where necessary. This may be done separately to the investigation report. [FS23]

Unless you have been specifically tasked to do so, it is not the role of the investigator to make misconduct findings, or to recommend or decide on disciplinary outcomes.

Out of scope matters

You may consider including a section, or making a separate report, to alert the decision maker to 'out of scope' matters. These are matters outside the scope of your terms of reference that the decision maker should be aware of.

You should not make any recommendation or findings on out of scope matters.

An example would be misconduct allegations made by a witness that were against an employee not covered by your investigation. Another example could be allegations of systemic bullying or malpractice (this may also be identified in the 'organisational issues' section of the report).

Attachments – copies of evidence

The final investigation report should include as attachments full verbatim copies of all evidence. These should go to the decision maker with the report.

If you choose to send a copy of the report to the respondent, you do not usually need to send them these attachments, as long as the evidence is adequately summarised in the report. [FS16] [FS23]

22

MAKING MISCONDUCT FINDINGS

It is usually the role of the decision maker to make misconduct findings. This is to be done after they have received the investigation report from the investigator.

The process involves:

- independently examining the findings of fact and endorsing or disagreeing with each and
- deciding whether each substantiated factual allegation amounts to misconduct.

The decision maker may also require further investigations to be undertaken.

Assessing the investigator's factual findings

The decision maker needs to consider each finding of fact made by the investigator and endorse or disagree with each one. This should be done on the balance of probabilities standard of proof. [FS20]

It is open for the decision maker to disagree with the investigator's findings. In this case, the decision maker may make alternative findings, request further investigation, or seek independent advice from a third party (such as a lawyer).

Keep in mind that as long as the correct processes have been followed, the investigation report does not need to be perfect for you to make misconduct findings.

What to take into account

After deciding on the findings of fact, the decision maker then needs to determine whether – on the facts as established – the respondent has committed misconduct.

The following table sets out some of the things you should and should not take into account in making this decision.

Past behaviour:	If there have been several allegations of a similar nature against the respondent it may tend to support the allegation, but do not rely on this alone to make a finding. Usually past misconduct is an aggravating factor that should be taken into account in terms of outcomes, not in terms of whether misconduct has occurred.
Medical and health issues:	If there is a medical reason for the conduct, this should not be taken into account at this stage. It is a mitigating factor. Aggravating and mitigating factors should be taken into account in determining outcomes for the respondent.
Extenuating circumstances:	Extenuating circumstances can be taken into account. Extenuating circumstances may lead to a finding that misconduct has not occurred. The most common extenuating circumstances are honest mistakes and ignorance. This may be because, for example, your organisation has failed to give the respondent adequate training.

Extenuating circumstances (cont):	Keep in mind that the more senior a person is, the less room there is for honest mistakes and ignorance. Consider whether the respondent had a duty to inform themselves.
Intent:	Intent is not taken into account in making misconduct findings. That is, do not take into account whether the respondent intended to commit misconduct.
Culture:	The culture of an organisation may be an extenuating circumstance. Similarly, if management has condoned or ignored the conduct it may amount to an extenuating circumstance. However, if the conduct was blatant and clearly gratuitous, these circumstances are unlikely to change the finding. For an example of this, see the case of *Torres v Commissioner of Police* [2017] NSWIRComm 1001.
Common sense:	The decision maker may draw on their common sense and general life experience. They do not need to disclose any particular specialist training or knowledge that they have, unless they attach particular weight to it.

Example

An example of what the decision maker's findings might look like is:

- Breach of Government Department Gifts and Benefits Policy clause 9 (Mr Smith accepted a gift from Company A) – substantiated

  The factual allegation in this case was substantiated, so the decision maker found that Mr Smith committed misconduct.

  The decision maker may have considered whether there were extenuating circumstances e.g. culture or ignorance. In this case, they have decided that there were no extenuating circumstances to negate the misconduct finding.

- Breach of Government Department Code of Conduct section 5 (Mr Smith did not declare a gift from Company A) – not substantiated

  The factual allegation in this case was not substantiated, so the decision maker did not find that Mr Smith committed misconduct.

- Breach of Government Department Code of Conduct section 7 (Mr Smith used his position as a regulator to gain a gift) – not substantiated

  The factual allegation in this case was inconclusive, so the decision maker did not find that Mr Smith committed misconduct.

Procedural fairness, the hearing rule and the respondent's final submission

As covered in more detail in [FS16], you may ask the respondent to make a submission on the investigation report before you make misconduct findings. You may also ask the respondent to make a submission on proposed adverse misconduct findings.

If the respondent has refused to respond to the allegations during the investigation, you should at least ask them to respond to the investigation report. [FS16] [FS18]

When you ask for a response, give the respondent a specific date by which they have to respond. Make sure you give them sufficient time to respond. Generally seven days should be enough, but be open to extending the timeframe if requested.

If you have not received a response by the deadline, you should contact them and make sure they do not intend to respond. Get this in writing if you can.

If they make a submission, you should objectively and carefully consider the submission. When you notify them of your final decision, you should set out why you did or did not take each aspect of their submission into account. [FS24]

23

OUTCOMES

Once a determination has been made about whether misconduct occurred, the decision maker will need to decide on the investigation outcomes.

This is when you should be concerned about 'substantive fairness' for the respondent. This means that the outcomes need to be fair and proportionate.

Outcomes for the respondent

Options

Sanctions

If one or more allegations of misconduct have been substantiated, you may choose to impose a disciplinary sanction.

The most severe disciplinary sanction is dismissal. The most minor sanction is generally a reprimand, a counselling or a warning. Other examples of disciplinary sanctions include demotion, transfer, reduction in salary, or reassignment.

In some organisations, possible sanctions are set out in legislation. In others, they are contained in industrial instruments or policies. In some organisations there is no set disciplinary system. These organisations tend to use a system of formal warnings.

What is a counselling?

A formal counselling is not a counselling session. It is a formal process similar to a warning, where the employee is informed that their behaviour has not reached the required standard. It can be hard to differentiate between a counselling and a reprimand, although in theory a reprimand is more serious.

Counsellings, reprimands and warnings should be given in writing, usually at a formal meeting with a senior executive. A copy of the sanction should be placed on the respondent's personnel file.

Professional development measures

Examples of professional development measures include training and coaching, a performance improvement plan, monitoring and guidance, mediation and conciliation, and an informal chat about what could be done better next time.

Depending on the sanction and the situation, you should consider implementing a professional development measure at the same time as imposing a sanction. This is because the focus of the disciplinary process should be on improvement of conduct – not punishment.

If you decide not to impose a sanction, or if misconduct has not occurred, you may still choose to take a professional development measure. You may also take this action in relation to the conduct of an employee other than the respondent.

For instance, you may have found that the respondent's conduct did not reach the threshold of misconduct, but that their conduct fell short of expectations. You may require the employee to attend some refresher training as a professional development measure.

You should make it clear to the employee that professional development measures are not sanctions.

Management actions

You may also consider taking some kind of management action in relation to the employee's conduct. Examples of management actions include restricting an employee's computer usage rights, and putting in place measures to support an employee with health issues. These kinds of actions should only be taken in consultation and negotiation with the employee.

What to take into account

There are many factors you may take into account in determining the appropriate outcomes for the respondent. This is the stage at which you should take all mitigating, aggravating and extenuating circumstances into account.

Keep in mind that the aim of the disciplinary process is not to punish. The aim is to protect your organisation and the public interest, reform behaviour, and to set an example for the respondent and others. Even if misconduct is substantiated, you do not have to impose a sanction.

Factors to consider in deciding whether and what action to take are set out in the table below.

The employee:	• Employee's awareness that their conduct was unacceptable (was it wilful and deliberate). • Whether they admitted to the conduct, and whether they have shown remorse, willingness to take responsibility, or apologised. • Whether the employee attempted to cover up the conduct, lied or was uncooperative during the investigation. • Employee's employment history, length of service, training and experience. • Seniority of the employee – the more senior the employee, the higher the standards they need to meet. • Impact of the outcome on the employee.
The conduct:	• Actions taken in relation to similar conduct by other employees. • Relevance of the conduct to the employee's role and duties. • Premeditation and planning that went into the conduct. • Culpability and whether there was any provocation, persuasion or coercion by others, including through a power imbalance (whether overt or not). • Whether the employee has committed similar acts of misconduct in the past – consider whether it was identical, relevant, serious or recent (less weight should be placed on less recent conduct). • Warnings or advice given to the employee about similar behaviour in the past. • Whether the behaviour has been condoned or ignored on the past. • Proportionality – the sanction should be proportionate to the conduct. • Medical reasons for the conduct.
The public:	• Public confidence and the reputation of your organisation. • Protection of public money.

Your staff:	• What sanction is necessary for the employee and others to appreciate the seriousness of the conduct. • Risks, health, safety and welfare considerations for the employee, their colleagues, and the community. • Employee morale.
Your organisation:	• Amount of guidance and training provided by your organisation about this particular type of misconduct. • Culture or practice in the work unit or your organisation. • Flaws in the misconduct investigation process.

Flaws in the misconduct investigation process

Flaws in the investigation process may be taken into account as mitigating factors e.g. a breach of procedural fairness, or an unnecessary delay.

For example, two years have passed since the misconduct was committed. The employee has not committed any more misconduct in that time. The delay was due to flaws in your investigative process. This would be a mitigating factor to take into account in determining whether it was worthwhile imposing a sanction and/or a professional development measure.

Past misconduct

Past misconduct findings can be taken into account as an aggravating factor. Acts of past misconduct can be reported to the decision maker separately to the investigation report. For example, in a separate memorandum from human resources.

The exception to this is where the retention period for misconduct records has ended, and the records have been removed from the personnel file and destroyed. [FS7]

Multiple acts of misconduct

Where multiple acts of misconduct have been committed, this should generally lead to a more serious sanction. That is, it should lead to a cumulative outcome.

For instance, there may be three substantiated allegations that, individually, would each warrant a counselling. Taken together, this should lead to a more serious outcome such as a reprimand or demotion, rather than three counsellings.

If the acts of misconduct are unrelated, you may consider taking separate actions for each.

The ‘show cause’ process

As discussed in [FS16], you may notify the respondent of the proposed sanction and ask them to ‘show cause’ why it should not be enacted. This process is rarely mandated, but it is not unusual – particularly in relation to dismissals. In some organisations, the respondent is told of the intended sanction at the same time they are told of the proposed adverse misconduct findings.

If you choose to do this, give the respondent a specific date by which they have to respond. Make sure you give them sufficient time to respond. Generally – unless it is a summary dismissal – seven days should be enough, but be open to extending the timeframe if requested.

Make sure that the respondent is aware that they can seek advice, support and representation from an independent person during this process, including in preparing their response.

If you have not received a response by the deadline, you should contact them and make sure they do not intend to respond. Get this in writing if you can.

If they make a submission, you should objectively and carefully consider the submission. When you notify them of your final decision, you should set out why you did or did not take each aspect of their submission into account. [FS24]

One less common practice is to put the range of possible sanctions to the respondent, and ask them which they think would be most suitable.

This practice is **not** recommended. It is likely to cause delays, and benefits nobody.

What if the respondent asks for copies of evidence?

You do not usually need to give the respondent verbatim copies of evidence. However, unless there are reasons to not do so, you should comply with these requests. You should consider the provisions of the privacy legislation relevant to your organisation in responding to such a request.

In some organisations, respondents are currently required to make right to information requests to obtain evidence gathered in disciplinary investigations. If information is obtainable under the *Right to Information Act 2009* (Tas), insisting on a formal right to information application is unlikely to enhance the employee-employer relationship. If this is required in your organisation, make sure you have regard to section 36 of the *Right to Information Act 2009* in responding to the request. If you are unsure, you should seek advice. [FS4]

Outcomes for the source

Consider whether there needs to be an outcome for the source of the complaint. This may include action such as:

- an apology
- conciliation or an opportunity to meet with the respondent to discuss the matter
- notification of procedural changes made or
- some other form of amendment or reparation.

It is especially likely that you will need to consider outcomes for the source if the matter involves sustained allegations of discrimination, bullying or harassment. You can contact Equal Opportunity Tasmania for advice if needed. [FS4] [FS6]

Outcomes for your organisation

Identifying areas for improvement

An important outcome of misconduct investigations is the identification and implementation of improvements in your organisation. This includes both in terms of misconduct risks, and broader organisational issues.

The investigator and the decision maker should both be alert to possible systemic or organisational issues. These matters should be reported to the appropriate areas (including the executive) and actioned. Usually, you do not need to wait until the end of the investigation to make organisational improvements.

Considerations in identifying areas for organisational improvement include whether there:

- are risks to or in systems or procedures
- are missing or inadequate internal controls
- are accountability systems in place and whether they worked
- is adequate training and guidance
- are adequate records and record keeping systems
- was adequate supervision and oversight
- are consistently applied policies, processes and standards of behaviour or
- are cultural issues.

If you have engaged an external investigator, their views on your workplace may be helpful in making improvements. It may be useful to have a debriefing with them.

Consider whether the matter has revealed gaps in manager skills. Did the matter arise from interpersonal or other issues that could have been better managed in the first instance? If so, is there something your organisation could do to improve the skills of the managers involved?

Reviewing the investigation

At the end of an investigation it is good practice to undertake a review. You should try to identify where the process worked well, and where it could be improved. As part of the review, consider whether you need to change policies or practices.

The review could be as informal as a debriefing meeting, or as formal as hiring a company to audit the investigation.

The review could also be undertaken internally by one employee. Generally the reviewer should be someone more senior and more experienced than the investigator.

What if the decision is appealed?

If adverse findings have been made, you should have made the respondent aware of their appeal and review rights both internally (if applicable) and externally. The importance of proper process and record keeping will become apparent if the decision is appealed.

An appeal should be seen as an opportunity for learning, and should not be taken personally by the investigator or the decision maker. Reviews help to ensure accountability and transparency.

24

COMMUNICATING THE DECISION

There are a number of parties who need to be made aware of the decision.

The respondent

If you have undertaken a disciplinary investigation, and the respondent is aware of that investigation, you should communicate the outcome of the investigation to the respondent in writing. You should do this even if you have not made any adverse findings.

You may want to tell the respondent about the investigation outcomes at a meeting. If you do, you should still give them a copy of the decision in writing.

What to tell the respondent about the final decision

You should view the process as one of giving a 'statement of reasons'. The seriousness of the allegations and the outcomes for the respondent will impact on how formal and detailed these reasons need to be.

The respondent needs to be clear on why and how you made the decision you did. An independent person should also be able to see the reasons, logic and rationale behind your decision.

This process helps to instil confidence in your decision making process. It demonstrates transparency, fairness and accountability. It will make the outcomes easier to defend if they are challenged.

In writing, you should tell the respondent:

- the findings of fact, including the evidence used to come to these findings and the reasons (if you have given them a copy of the investigation report, you will not need as much detail) [FS20] [FS21]
- the misconduct findings, including what factors you took into account in making those findings and the reasons [FS22]
- the outcomes for the respondent (sanctions, professional development measures, management actions), including what factors you took into account in deciding on those outcomes and the reasons [FS23] and
- if adverse findings have been made:
  - appeal and review rights both internally (if applicable) and externally and
  - that the findings and outcomes may be relied on in the event of future misconduct.

You should also check on the respondent's welfare and offer them support options.

You may have given the respondent an opportunity to comment on the investigation report and the proposed misconduct findings and/or sanctions. [FS16]

If so, you should set out in the relevant sections of your letter why you did or did not take each aspect of any submission they made into account.

The source

The source should be told when an investigation has come to an end. What you can and should tell the source will depend on your governing legislation, industrial instruments, and internal policies. [FS23]

You may or may not be able to tell the source exactly what action was taken by your organisation. In some organisations, it is mandatory to inform a complainant of disciplinary action that was taken in response to their complaint.

If possible, the information you give should provide the source with assurance that your organisation:

- has responded adequately to the allegations
- does not tolerate misconduct and
- has taken any steps necessary to remedy organisational deficiencies.

> If the complaint is internal, consider steps you could take to ensure that the parties are able to work together after the matter has been finalised.

You should also tell them how they can have your decision reviewed. This includes both internally if applicable, and by taking the matter to external organisations such as the Ombudsman, the Integrity Commission, or Equal Opportunity Tasmania.

In most situations, it will be possible to give the source enough information about the way the matter was handled without breaching privacy or other legislation. You do need to be mindful of balancing the interests of your organisation, the public, the source, and the respondent.

Other employees, witnesses and the public

Consider whether the misconduct warrants a communication to all or sections of your organisation. It may be a good idea to publicise the breach and the action taken as a warning or education to others. It may be an opportunity for management to communicate what they have done and what's expected of employees, and to reinforce ethical values and behaviours.

Employees and members of the public are also more likely to have confidence in your organisation, and report misconduct, if they have seen evidence of a fair process. Communication may also be necessary to clear the air of rumors and gossip.

Witnesses generally do not have a right to know the outcome of the matter. You may, however, consider whether this is worthwhile from an educational perspective for internal witnesses, or a customer service perspective for external witnesses. [FS18]

Publication of information about complaints and actions taken in response to misconduct allegations, for instance in an annual report, can increase public confidence in your organisation. Where the matter is in the public domain, it may be appropriate to consider a media release.

Record keeping

Copies of all final, signed correspondence to both the source and the respondent should be kept and stored in accordance with legislation and policies. This includes the *Archives Act 1983* (Tas). [FS7]

Make sure you store records of sanctions, professional development measures and management actions on the employee's personnel file as required. These will be particularly important if the employee comes under investigation again in the future. [FS23]

25

RISKS, COMMON PITFALLS & TROUBLESHOOTING

If something goes wrong, it is best to acknowledge it and work quickly to fix or manage it.

Risks

Risks across all stages of the process include:

- breaches of confidentiality [FS4]
- poor record keeping [FS7]
- delay [FS9]

The decision maker and investigator should constantly consider these risks.

Specific risks to consider at each stage are set out in the table below.

Stage	Risks
Stage 1 – Allegation or suspicion:	• not dealing with similar allegations in a similar manner [FS8] • putting serious allegations to the respondent too soon [FS3] [FS8] [FS16] • not contacting external bodies [FS6] *If you did not contact the police about potentially criminal allegations, you should do so as soon as you realise the error.*
Stage 2 – Investigation: *Many of the risks during this phase can be eliminated by prioritising the investigation, and by careful planning and consideration of the terms of reference.*	• poorly defined allegations [FS11] • inadequate terms of reference [FS12] • lack of planning [FS17] • insufficient resources allocated to the investigation • failure to provide procedural fairness [FS15] [FS16] *Breaches of procedural fairness can generally be rectified at any stage before the final decision has been made.* • investigator or decision maker bias or conflict of interest [FS25] • investigator inexperience or lack of understanding [FS13] • failure to consider additional allegations that arise during the investigation [FS12] • loss of focus in the investigation *You should constantly refer back to the terms of reference and the allegations.* • failure to obtain all relevant evidence [FS20] • investigator having an adversarial mindset about proving or disproving the allegations *Remember that the process is inquisitorial, not adversarial.*

Stage	Risks
Stage 3 – Outcomes:	• failure to consider counter-allegations made by the respondent or mitigating factors [FS12] [FS22] • reliance on unproven assertions [FS20] • confusing the role of the investigator and the role of the decision maker [FS10] • poorly drafted investigation report [FS21] • failure to analyse the evidence [FS20] [FS21] • findings not supported by the evidence [FS20] [FS21] [FS22] • findings not made on the balance of probabilities [FS20] • inconsistent outcomes [FS23]

Common pitfalls and troubleshooting

Delay

Where there are excessive delays make sure you keep all parties updated, apologise for the delay, and do what you can to reduce the timeframes. You may need to reduce the scope of the investigation. [FS9]

Unreasonable delay may be a mitigating factor to take into account when deciding on outcomes. [FS23]

Conflicts of interest

If a conflict or bias is discovered part way through the investigation, you should take action immediately. As a first step, the conflict should be documented. [FS10]

You then need to consider whether it is possible for the investigation to continue in light of the conflict, or if a new investigator/ decision maker should be appointed.

Other options are the appointment of an additional person to check the investigator's work, or redoing part of the investigation (e.g. an interview).

In considering what to do, look at the seriousness of the allegations, and the nature and directness of the conflict.

In some circumstances, it is appropriate to put the issue to the respondent and ask for their opinion. They may want to waive their right to a new investigation. This would generally be done to ensure a speedy resolution. Do not pressure the respondent to make a particular decision, but do get their decision in writing.

Breaches of confidentiality

You should try to find the source of the breach as quickly as possible. If it is an internal source, you may need to issue a direction or take disciplinary action.

Work to ensure that no victimisation or destruction of evidence has occurred. You should review your investigation plan. [FS4]

Withdrawn complaints

If you are investigating misconduct that arose from a complaint, the source may have expectations around their involvement in the process. This may include thinking that they can stop the investigation by withdrawing their complaint.

You should consider the welfare of the source and why they may want to withdraw their complaint. Approach them and see if you can provide assurance or support. They may fear, or be suffering, victimisation or other repercussions. [FS4]

> If your organisation has a complaint handling policy, it may contain guidance about what to do if a complainant withdraws their complaint.

The impact of a withdrawal will depend on when the source withdraws the complaint. If the investigation is well underway, you may have no choice but to continue.

If the source withdraws their complaint at the start of the investigation, you should consider the nature and seriousness of the allegations. You should also think about the apparent veracity of the allegations, and if there is likely to be other evidence available.

Your organisation has an obligation to deal with allegations of misconduct, regardless of whether the source participates in the process. This may be hard for them to understand, and it may be worthwhile making this clear at the start of the process or in your complaint handling material.

Respondent leaving the organisation

If the respondent leaves the organisation prior to the finalisation of the matter, there are a number of steps that should be considered. The action taken will depend on the stage the matter is at.

The guidance below should be followed in consideration of any legal issues specific to your organisation. It may not be possible for all organisations to follow exactly all of the steps below.

Before the investigation has started

The respondent may leave before the investigation has started. For instance, this may happen when they are suspended or notified of the impending investigation.

In this case it will probably not be in the public interest to invest resources into pursuing the matter. However, you should take steps to protect your organisation in the event the respondent reapplies for employment. This means that you should – depending on the potential seriousness of the matter – inform the respondent in writing that:

- you will place on their personnel file a declaration about the matter, noting that they left before it was resolved [FS7] and
- if they successfully reapply for employment, the matter may be pursued.

If the matter is potentially relevant to the work of an external body – such as the police or a professional regulatory body – it should still be reported to that body. [FS6]

During the investigation

The respondent may leave part way through an investigation, before they have had a chance to respond to the allegations.

The respondent may also leave after they have responded to the allegations. This may be before you have made findings and decided on outcomes. More commonly, it will be at the 'show cause' stage. [FS23]

In these situations, you need to consider if there is a public interest in continuing the investigation. Specifically, you should think about:

- how serious the matter is
- how likely it is that the respondent will reapply for employment with your organisation or with another public sector organisation and
- the resources it would take to finalise the matter – the further progressed the matter is, the less resources it will take to finalise it.

You need to weigh up these factors to decide whether it is worth pursuing the matter to finalisation. Where the matter is at the 'show cause' stage, it is much more likely that it will be worthwhile finalising it.

If the respondent has not yet responded to the allegations, the resources required to finalise the matter will be greater. You will still need to adhere to procedural fairness principles, which means that you will need to give the respondent an opportunity to respond before findings are made. [FS16] [FS18]

In any case, if you do proceed to finalise the matter, you should notify the respondent of those findings in writing. [FS24]

You will not be able to impose any outcomes on the respondent – although you may be able to if they are re-employed.

If you choose not to finalise the matter, you should follow the steps outlined above in relation to respondents who leave the organisation before the investigation starts.

26

DEFINITIONS & REFERENCES

Definitions

Affected parties:	People who are or may be affected by the matter in some way. May also be known as 'stakeholders'. [FS4]
Allegation:	A specific claim of misconduct. One complaint or matter may contain multiple allegations.
Balance of probabilities:	The civil standard of proof, to be applied to the evidence collected in disciplinary investigations to reach factual findings. [FS22]
Bias rule:	A procedural fairness rule, the basic principle of which is that an administrative decision making process should be free from actual or apprehended bias. [FS15]
Bullying:	Repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety.
Case conferencing:	A meeting of relevant senior employees that discusses the matter and determines the best path forward. [FS3]
Complainant:	A person who has made a complaint or raised a suspicion about misconduct. Also known as a 'source'. Where the word complainant is used in these facts sheets, it indicates that the person is complaining about the alleged conduct, not just reporting it.
Complaint:	A statement alleging misconduct. A complaint may contain multiple allegations.
Conflict of interest:	A conflict between the performance of a public duty and a private or personal interest. A 'personal interest' includes the private, professional or business interests of a person, or of the individuals or groups with whom they have a close association, such as relatives, friends or even enemies. Personal interests may be pecuniary or non-pecuniary. A conflict of interest may be: • actual: a conflict between a person's offical duties and responsibilities in serving the public interest, and their personal interest • perceived: occurs when a reasonable person, knowing the facts, would consider that a conflict of interest may exist, whether or not this is the case or • potential: occurs where a person has a personal interest that could conflict with their official duties in the future. [FS10] [FS25]

Councillor:	As defined in section 3 of the *Local Government Act 1993* (Tas), councillor means 'a person elected to a council and includes the Lord Mayor, Deputy Lord Mayor, mayor, deputy mayor and alderman'.
Decision maker:	A person authorised or delegated with the power to make decisions about misconduct matters, including whether to commence an investigation, whether misconduct has occurred, and outcomes for the respondent. [FS10]
Discrimination:	As defined in section 3 of the *Anti-Discrimination Act 1998* (Tas).
Employee:	Persons employed in any capacity in a public sector organisation.
Evidence rule:	A procedural fairness rule, the basic principle of which is that there should be evidence to support the decision in an administrative decision making process. [FS15]
Grievance:	A complaint made to, and about, the workplace. Work-related grievances may include, but are not limited to; • interpersonal conflict in the workplace • assigned duties or working conditions • the way work is allocated or managed • access to training or career development • management action/s or decisions or • the interpretation and/or application of people management policies. A grievance may involve alleged misconduct. [FS2]
Harassment:	A type of conduct that is usually associated with bullying or inappropriate sexual advances. It is usually repeated conduct of an unwelcome or inappropriate nature. Sexual harassment is defined in section 3 of the *Anti-Discrimination Act 1998* (Tas).
Hearing rule:	A procedural fairness rule, the basic principle of which is that all parties have the right to a reasonable opportunity to be heard in an administrative decision making process. [FS15] [FS16]
Interviewee:	A person being interviewed.
Investigator:	A person appointed to collect evidence in a disciplinary investigation. They are normally expected to write an investigation report and make findings of fact. [FS13] [FS14]
Management action:	Action taken in relation to a respondent that is not punitive, and is also not aimed at developing them professionally. Examples of management actions may include restricting an employee's computer usage rights, and putting in place measures to support an employee with health issues. [FS23]
Misconduct:	As defined in section 4 of the *Integrity Commission Act 2009* (Tas). [FS2]
Organisation:	A public authority, as defined in section 5 of the *Integrity Commission Act 2009* (Tas).

PID Act:	*Public Interest Disclosures Act 2002* (Tas). [FS2]
Principal officer:	As defined in section 4 of the *Integrity Commission Act 2009* (Tas).
Procedural fairness:	A requirement of administrative decision making, it means that procedures must be fair. It is not concerned with whether outcomes are fair. Procedural fairness, also known as natural justice, is made up of a series of rules and principles. [FS15] [FS16]
Professional development measures:	Measures taken in relation to the conduct of an employee that are designed to develop them professionally. It may include things such as mentoring, a performance improvement plan, and training. [FS23]
Protected disclosure:	As defined in section 14 of the *Public Interest Disclosures Act 2002* (Tas). [FS2]
Public authority:	As defined in section 5 of the *Integrity Commission Act 2009* (Tas).
Public interest disclosure:	As determined under the *Public Interest Disclosures Act 2002* (Tas). [FS2]
Public officer:	As defined in section 4 of the *Integrity Commission Act 2009* (Tas).
Public sector organisation:	A public authority, as defined in section 5 of the *Integrity Commission Act 2009* (Tas).
Respondent:	A person against whom one or more allegations have been made. A respondent may also be referred to as a 'subject officer'.
Serious misconduct:	As defined in section 4 of the *Integrity Commission Act 2009* (Tas). [FS2]
Source:	A person who has made a complaint or raised a suspicion about misconduct. Also referred to as the complainant, although not all sources want to 'complain' about the alleged conduct.
Standard of proof:	The standard of proof is the objective test applied to evidence to make a finding. If the evidence shows that an allegation is accurate to the relevant standard of proof, then you should find that allegation substantiated. [FS20]
Victimisation:	In accordance with section 18(2) of the *Anti-Discrimination Act 1998* (Tas), victimisation 'takes place if a person subjects, or threatens to subject, another person or an associate of that other person to any detriment'. Victimisation or reprisal action may also occur under other legislation, such as the *Public Interest Disclosures Act 2002* (Tas). The act of victimising another may amount to misconduct. [FS4]
Witness:	A person who saw or can give evidence about an aspect of the alleged misconduct. A complainant or a source may be a witness.

Useful references and sources for more detailed information

Administrative decision making, complaint handling, procedural fairness:	• Administrative Review Council best practice guides, <www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx> • Australian Standard AS/NZS 10002:2014 Guidelines for complaint management in organizations • Ombudsman New South Wales fact sheets, <www.ombo.nsw.gov.au/news-and-publications/publications/fact-sheets/state-and-local-government> • Ombudsman New South Wales guidelines, <www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government> • Ombudsman Western Australia guidelines and information sheets, <www.ombudsman.wa.gov.au/Publications/Guidelines.htm>
Investigation guides:	• Australian Government Australian Public Service Commission, *Handling Misconduct – A human resources manager's guide* (June 2015) <www.apsc.gov.au/publications-and-media/current-publications/handling-misconduct-a-human-resource-managers-guide-2015> checklists; how to select and work with external investigators; outcomes • Crime and Corruption Commission Queensland, *Corruption in focus – A guide to dealing with corrupt conduct in the Queensland public sector* (October 2014) <www.ccc.qld.gov.au/corruption-prevention/corruption-in-focus> managing the impact of an investigation; templates; troubleshooting; interviews • Government of Western Australia Public Sector Commission, *Disciplinary investigations under Part 5 of the Public Sector Management Act 1994 – A guide for agencies* (2015) <publicsector.wa.gov.au/document/disciplinary-investigations-under-part-5-psm-act-guide-agencies> templates; interviews; troubleshooting • Independent Broad-based Anti-Corruption Commission, Victorian Ombudsman, *Investigations guide – A guide to conducting internal investigations into misconduct* (June 2016) <www.ibac.vic.gov.au/publications-and-resources/article/investigations-guide> planning; procedural fairness; reporting; record keeping; interviews; report template • New South Wales Department of Education and Training, *Guidelines for the Management of Conduct and Performance (PD/2006/0335)* (4 August 2006) <education.nsw.gov.au/policy-library/policies/management-of-conduct-and-performance?refid=285776>

Investigation guides (cont.):	• NSW Ombudsman, *Investigating complaints – A manual for investigators* (June 2004) <www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/state-and-local-government/investigating-complaints-a-manual-for-investigators> troubleshooting; preliminary assessment; interviews; checklist • Paul Vermeesch, 'Misconduct in the Australian Public Service' (Legal Briefing Number 104, Australian Government Solicitor, 15 October 2014) <ags.gov.au/publications/legal-briefing/br104.html> legal issues; suspensions • Rose Bryant-Smith, Grevis Beard and Lisa Klug, *Effective Workplace Investigations* (Worklogic Pty Ltd, 2016) <www.worklogic.com.au/resources/workplace-investigations-book/> (subscription only) interviews; engaging investigators

INTEGRITY
COMMISSION