

# CONFIDENTIALITY AND DEALING WITH PEOPLE

FS4

Stage 1

Allegation or suspicion

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 or respondents, 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 reviews by external bodies such as Ombudsman Tasmania, 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 10002:2022 Guidelines for complaint management in organizations).

*In the case of internally raised matters, you should also be aware of your responsibilities under relevant whistleblower 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]

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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.

Organisations have obligations under the *Work Health and Safety Act 2012 (Tas)* to ensure the health and safety of employees. Under the *Work Health and Safety Regulations 2022 (Tas)*, it is mandatory for organisations to manage psychological health and prevent psychosocial hazards.

*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.