

INVESTIGATION PROCEDURES: NSW/ ACT SCHOOLS

REPORTABLE ALLEGATIONS/ CONDUCT AND PROFESSIONAL MISCONDUCT INVESTIGATIONS

The purpose of an investigation is to establish whether, or not, there is sufficient factual evidence to show that, on a balance of probabilities, an allegation of employee Reportable Conduct/ Professional Misconduct can be substantiated. Investigations can also identify opportunities for system and operational improvements. Investigation outcomes can have a significant impact on the participants, workplace and the Church/ School's reputation.

Investigations must be flexible according to the nature, severity and scope. They must be procedurally fair, unbiased and impartial and conducted in-line with appropriate standards of procedure. Our Investigation Procedures: NSW/ ACT Schools allows for flexibility and ensures due process, defined by NSW and Commonwealth industrial and employment legislation, relevant court matters and other authorities including the NSW and ACT Ombudsman's Offices.

Investigation participants including complainants, witnesses, alleged victims and person/s subject of allegation/s are all provided with information regarding the purpose, and process, of the investigation and interviews, and what supports are available.

STEP 1	<p>ASSESS RISKS AND PLAN INVESTIGATION</p> <ul style="list-style-type: none"> ✓ Obtain all available preliminary information including documents, memos, statements from Complainant/s, relevant policies and procedures ✓ Start investigation file and log details into Adsafe Database ✓ Assess risk regarding: Person Subject of Allegation (PSOA), including them continuing in their role during the investigation; victim/s; other students at school; the school and its ongoing operations; the investigation and its ability to deliver a finding. ✓ PSOA Introductory Letter ✓ Prepare a risk management plan ✓ Prepare investigation plan ✓ Agree and confirm Investigation Plan with Head of Agency
STEP 2	<p>EVIDENCE GATHERING</p> <ul style="list-style-type: none"> ✓ Write to complainant(s) to arrange interview; prepare interview plan; and conduct complainant(s) interview – fully address history, context, circumstances, and extent of alleged conduct <ul style="list-style-type: none"> ○ Obtain full details of conduct to meet evidentiary standards¹ ○ Identify witnesses and other corroborative evidence ✓ Determine if issues raised are considered to be Reportable Conduct/ Allegations and if so notify NSW Ombudsman (Part A - Notification Form) ✓ Write to witnesses to arrange interview; prepare interview plan; and conduct interviews with witnesses ✓ Obtain other relevant evidence – documentation, data reports, photos etc. ✓ Manage participants/ stakeholder expectations – provide regular updates <p>To ensure integrity of evidence we sound record all interviews when possible</p>
STEP 3	<p>REVIEW EVIDENCE WITH CONSIDERATION OF COMPLAINT AND RISKS</p> <ul style="list-style-type: none"> ✓ Preliminary review/ consideration of complaint in light of evidence/information (Step 2) <ul style="list-style-type: none"> ○ Relevance and consistency of evidence/information ○ Conduct with regard to legislation, policies, procedures and Regulatory standards ✓ Re-assess possible/ identified risks and amend risk management plan if required ✓ Review Investigation Plan and agree further steps with Head of Agency, if required ✓ Address any welfare issues emerging at this point ✓ Update
STEP 4	<p>REVIEW EVIDENCE, FORMULATE ALLEGATIONS AND PREPARE LETTER OF ALLEGATION/S</p> <ul style="list-style-type: none"> ✓ Review evidence and formulate allegations ✓ Letter of Allegation/s to PSOA providing sufficient information to fully inform the PSOA of the allegations, nature of alleged conduct, appropriate standards, policies and procedures - to allow PSOA to prepare an informed response ✓ Invitation for PSOA to: respond to allegation/s; identify evidence and witnesses in support ✓ Advise PSOA of opportunity to bring support person to interview/ meetings
STEP 5	<p>PSOA's EVIDENCE</p> <ul style="list-style-type: none"> ✓ PSOA Invitation to Respond Letter to: arrange interview; prepare interview plan; and conduct interview or otherwise invite another appropriate response to allegations <ul style="list-style-type: none"> ○ Obtain full details to meet evidentiary standards ○ Identify witnesses and other corroborative evidence ✓ Subject to relevance, interview witnesses identified by Respondent ✓ Obtain other relevant evidence – documentation, data reports, photos etc.

¹ Evidentiary standards – Civil standard - On the balance of probabilities applying Briginshaw Rule - Attachment 1

STEP 6	<p>PRELIMINARY INVESTIGATION FINDINGS REPORT</p> <ul style="list-style-type: none"> ✓ Produce comprehensive report outlining: investigation methodology; evidence gathered during the investigation; applicable standards, policies and procedures; evidentiary standards and considerations; evidence analysis; fact findings and recommendations ✓ Available findings² - <ul style="list-style-type: none"> ○ Reportable Conduct/ Allegations: Sustained; Not sustained – insufficient evidence; Not sustained – lack of evidence of weight; False or Not reportable conduct ○ Professional Misconduct/ Other Conduct: Sustained or Not sustained ✓ Provide preliminary report to Head of Agency for their consideration ✓ Update participants/ stakeholders of progress
STEP 7	<p>PSOA ADVISED PRELIMINARY FINDINGS</p> <ul style="list-style-type: none"> ✓ PSOA Preliminary Findings Letter advising that: the investigation is complete and details of the preliminary findings; they have an opportunity to respond to preliminary findings/ provide any new information – ensure that the PSOA has sufficient time to respond, generally 14 – 21 days according to severity of allegations and findings ✓ Offer support
STEP 8	<p>PSOA RESPONSE TO PRELIMINARY FINDINGS RECEIVED/ NOT RECEIVED</p> <ul style="list-style-type: none"> ✓ If received, give consideration to PSOA response: <ul style="list-style-type: none"> ○ If new and/ or mitigating evidence is provided further investigation may be required (STEP 2). ○ If response does not change preliminary findings produce Final Findings report ✓ If not received produce Final Findings report
STEP 9	<p>FINAL FINDINGS REPORT</p> <ul style="list-style-type: none"> ✓ Amend preliminary findings report to include: <ul style="list-style-type: none"> ○ further investigation (STEP 2 – STEP 8) ○ response received from respondent, or not ✓ Provide final report to Head of Agency for their consideration
STEP 10	<p>PSOA ADVISED FINAL FINDINGS</p> <ul style="list-style-type: none"> ✓ Under instruction of Head of Agency draft a final findings letter for the Respondent advising: <ul style="list-style-type: none"> ○ Outline final findings ○ They have a further opportunity to comment on final findings ○ Outcomes involving Respondent, systemic and/ or operational issues ○ Offer support
STEP 11	<p>FINALISE/ CLOSE INVESTIGATION</p> <ul style="list-style-type: none"> ✓ If received, maintain the PSOA's response to the final findings letter on investigation file ✓ In consultation with Head of Agency assign recommendations to relevant people ✓ If reported to NSW Ombudsman (Part A – STEP 2) complete relevant NSW Ombudsman final notification form (Part B or No Ongoing Oversight By Ombudsman) ✓ Advise relevant participants that the investigation has been finalised ✓ Update database and investigation file ✓ Close file on database once recommendations are implemented

² Available findings – Attachment 2

Standard of proof

The civil standard of proof, 'on the balance of probabilities' is applied to disciplinary and administrative investigations. The balance of probabilities means that based on the available evidence, it is more probable than not, that the events (allegations) have occurred.

The 'Briginshaw Principle' is also applied. Meaning if a finding, on the balance of probabilities, is likely to produce adverse consequences the evidence should be of a high probative value, that the standard of the evidence is sufficient, on the balance of probabilities, to substantiate the allegations.

Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938)

Briginshaw v Briginshaw was a divorce case. The husband (applicant) had to prove "grounds" for the divorce. He claimed his wife had committed adultery.

The husband's only evidence was his wife's admission that she had kissed the co-respondent, and hearsay evidence that the co-respondent had made a disclosure to a friend of the husband's sister in confidence. The judge refused the divorce as he was not satisfied "beyond a reasonable doubt" that the wife had committed adultery.

The husband appealed, to the High Court of Australia, claiming that the judge was wrong in applying the criminal standard of proof, beyond reasonable doubt, that his wife had committed adultery.

The High Court's decision held that beyond reasonable doubt did not apply but that a finding of adultery would have grave consequences for the wife. Therefore, the evidence against her had to be clear and compelling. When tested, the High Court found that the evidence lacked cogency and the husband's application was rejected.

On the issue of the civil standard of proof, Judge Dixon held:

"Fortunately ... at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

Judge Dixon maintained that the standard of proof should not be satisfied by "inexact proofs, indefinite testimony, or indirect references."

The *Briginshaw principles* are enacted in state and federal legislation e.g. [section 140\(2\) of the Evidence Act 1995](#) (Cth).

AVAILABLE FINDINGS

Reportable Allegations/ Conduct	
Finding	Description
Sustained	(i.e. there is sufficient evidence of weight to determine that the that the conduct occurred)
Not sustained – insufficient evidence	(i.e. there is some evidence of weight however there is insufficient evidence available to reasonably establish that the alleged conduct did occur), or
Not sustained – lack of evidence of weight	(i.e. where the evidence is of such poor probative value or lacking in weight, such as to warrant a finding that, on the balance of probabilities, the conduct did not occur),
False	(i.e. where inquiries into the matter show reportable conduct or an act of violence did not occur). Some of these matters may be vexatious, for example where inquiries into the matter show the allegation was made without substance and to cause distress to the person against whom the allegation was made, or
Not reportable conduct	(i.e. where inquiries into the matter show the conduct was not reportable). For example, use of force that was trivial or negligible in the circumstances, conduct that was reasonable in the circumstances or accidental. This may include ‘misconceived’ matters, where inquiries into the matter show that, even though the allegation was made in good faith, it was based on a misunderstanding of what actually occurred and the incident was not reportable conduct.

Professional Misconduct/ Other Conduct	
Finding	Description
Sustained	a finding that the conduct occurred
Not sustained	there may be some evidence of weight however there is insufficient evidence available to reasonably establish that the alleged conduct did occur