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<b>RELATED POLICIES</b>	Reporting Concerns for Children Policy and Procedures (Version 3.0), Draft Reporting Concerns for People We Support Policy and Procedures
<b>RELATED FORMS</b>	Investigation Forms and related documents (Version 2 2012/13), Exempt Forms and related documents (Version 1 2012)
<b>SPONSOR</b>	Sean Tynan, Manager Zimmerman Services

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## 1. AIM

To ensure that the Diocese of Maitland-Newcastle investigates allegations of abusive, unacceptable or inappropriate conduct in a just and prudent manner.

While specifically related to investigation of child protection matters and allegations of 'reportable incidents' involving 'people we support'; this policy sets the binding standard for any investigations conducted by the Diocese in the civil realm.

This policy does not extend to those investigations conducted under canon law.

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## 2. RATIONALE

The Catholic Church in Australia has made an unambiguous commitment to promoting the protection of children. NSW legislation and Church regulations set out a range of personal, professional and organizational requirements for the promotion of child protection, reporting concerns and conducting investigations. The Diocese of Maitland-Newcastle has a legal and moral obligation to protect children from abuse or neglect, particularly from a member of the Diocese.

The NSW Disability Service Standards and Part 3C of the Ombudsman's Act requires that particular allegations of abusive conduct by staff and peer-to-peer abuse is reported to the NSW Ombudsman and investigated.

The whole of the Diocese is subject to the Children and Young Persons (Care and Protection) Act 1998 and Child Protection (Working with Children) Act 2012. Parts of the Diocese of Maitland-Newcastle are subject to Part 3A of the Ombudsman Act 1974 as designated non-government agencies. CatholicCare Disabilities Services are subject to Part 3C of the Ombudsman Act 1974.

Clause 6, Ombudsman Regulation 2011 makes the Bishop of Maitland-Newcastle the head of agency for the Diocese. The Bishop has delegated the day-to-day functions of head of agency to the Manager Zimmerman Services. For the purposes of clarity, the Bishop has also identified himself as the 'head of a funded provider' under s.25O, Ombudsman Act 1974.

Amongst other roles, Zimmerman Services has a mandate to promote child protection and ensure that the Diocese meets its obligations under NSW legislation and the Catholic Church's expectations under Towards Healing (2010), Integrity in Ministry (2004) and Integrity in the Service of the Church (2011).

All investigations conducted by the Diocese will be conducted as an administrative proceeding. Any person investigated by the Diocese will be afforded procedural fairness.

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### 3. APPLICATION

This policy is applicable to the following Diocesan services:

- |   |  |
|---|--|
| <input checked="" type="checkbox"/> Catholic Schools Office | <input checked="" type="checkbox"/> Parishes |
| <input checked="" type="checkbox"/> CatholicCare            | <input checked="" type="checkbox"/> Chancery |

The following members of the Diocese are required to read and understand this policy:

- |   |  |
|---|--|
| <input type="checkbox"/> Clergy and Religious   | <input type="checkbox"/> Visitors  |
| <input checked="" type="checkbox"/> Contractors ( <i>Those contracted to undertake investigations</i> ) | <input type="checkbox"/> Volunteers ( <i>including authorised carers</i> ) |
| <input type="checkbox"/> Students and trainees  | <input type="checkbox"/> Wage and salaried employees                       |
|   | <input checked="" type="checkbox"/> Other: <b>Zimmerman Services</b>       |
- 

### 4. DEFINITIONS

An **Allegation** is not defined in legislation and, in its absence the term should be given its ordinary meaning. An allegation can be an assertion, statement or declaration made with or without proof.

For the purposes of this policy, an allegation should have the following elements:

- the identity of the person who is subject of the allegation and that person is a current member of the Diocese or was a member of the Diocese at the time the allegation was made;
- detail of a specific conduct or a pattern of behaviour that indicates abusive, neglectful or inappropriate behaviour; and
- the person against whom the conduct or behaviour is directed, is a child.

The **Alleged Victim** refers to the child, class of children who are the subject of an alleged reportable conduct or breach of professional standards committed by a member of the Diocese.

For allegations of historic abuse, the alleged victim is usually an adult.

The alleged victim may also be an adult with disabilities who is a resident of a group accommodation services (refer below '*Person We Support*').

**Child** refers to a person under the age of 18 years.

Under the Children and Young Persons (Care and Protection) Act 1998 there is a differentiation between children (0-15 yrs) and young people (16-17 yrs). However, the Crimes Act 1900, the Ombudsman Act 1974 and the Child Protection (Working with Children) Act 2012 all define children as any persons less than 18 years.

**Child protection concern** is a term used to capture a wide range of possible concerns held by members of the Diocese for the safety, welfare and well-being of children. Child protection concerns include those matters that:

- would constitute risks of significant harm; or
- do not meet the threshold for significant harm but where a Diocesan member has anxiety, concern or fears for one or more children ;
- may constitute reportable conduct under the NSW Ombudsman’s Act 1974;
- may constitute a breach of Integrity in Ministry, when considering clerical and religious; or
- may constitute a breach of Integrity in the Service of the Church, when considering lay people.

**Child-related work** includes paid or volunteer persons whose work involves face-to-face contact with children in:

- Child development and family welfare services
- Child protection
- Children’s health services
- Clubs or other bodies providing services for children
- Disability services
- Early education and child care
- Education
- Entertainment for children
- Justice centres
- Religious services
- Residential services
- Transport services for children
- Youth workers

People who are deemed to be in child-related work must have a working with children check clearance.

Most of the activities carried out within the Diocese would be considered child-related work. Part 2 of the Child Protection (Working with Children) Regulation 2013 defines child-related work in detail. The Office of the Children’s Guardian has an on-line quiz to assist people in determining whether they are in child-related work and require a working with children check clearance:

<http://www.kids.nsw.gov.au/Working-with-children/Quiz--Do-you-need-a-check>

**Common Law** is a set of legal traditions and precepts inherited from the English legal system. For all its antiquity, common law is a living entity that shapes and is shaped by the practice of law. Common law evolves through usage, i.e. the accumulative outcomes of individual trials and judgments. Common law is quite different from laws imposed through codified statutes passed by parliament. Each judgment made by a relevant court provides a basis for judging future matters of a similar nature.

The **Complainant** is the person who makes the allegation of abuse or misconduct against the member of the Diocese. The complainant may be the responsible adult for an alleged child victim or a family member for a person we support.

**Completed Investigation** means that the investigations manager has made findings, the relevant Diocesan service has formulated those outcomes deemed relevant (if any), all relevant persons involved in the investigation have been formally advised and all relevant external authorities have been informed.

**Definitive allegations** are based on the cumulative evidence collected during the investigator's preliminary inquiries. Definitive allegations form the detail to which the respondent is asked to respond and is the basis for making findings.

If previously unknown material comes to light after the definitive allegations are put to the respondent and it is deemed sufficiently important to the integrity of the investigation, it is possible that further or revised allegations may be put to the respondent.

The **Diocese of Maitland-Newcastle** is inclusive of all parishes, services, programmes and agencies that are under the authority of the Bishop of Maitland-Newcastle. The Bishop takes his authority from Canon Law (cannons 375-402) and his status as 'head of agency' from clause 6 of the Ombudsman Regulation 2011.

The Diocese is not wholly geographic in nature. There are elements of the Catholic Church operating within the geographical boundaries of the Diocese that do not fall under the authority of the Bishop, do not have him as 'head of agency' and are not a part of the Diocese of Maitland-Newcastle.

For the purposes of this policy, the meaning of **Employee** is derived from s.25A of the Ombudsman Act 1974 and means:

- any employee of a Diocesan service which is subject to Part 3A of the Ombudsman Act, whether or not employed in connection with any work or activities of that agency that relates to children; and
- any individual engaged by the Diocese of Maitland-Newcastle to provide services to children (including in the capacity of a volunteer).

Employees of the Diocese are subject to Part 3A of the Ombudsman Act and may be subject to a reportable allegation (refer **section 5.1**) and any subsequent investigation of reportable conduct or exempt matters.

The **Findings** made in an investigation are the responsibility of the investigations manager. Based on the evidence available, the investigations manager determines a specific outcome for each of the definitive allegations put to the respondent. The NSW Ombudsman prescribes five possible findings for investigations conducted under the Ombudsman Act, (refer **section 10.9**).

The **Head of Agency** for the Diocese of Maitland-Newcastle is the Bishop, as prescribed in clause 6, Ombudsman Regulation 2011:

(2) *For the purposes of the definition of head of an agency in section 25A (1) of the Act, the Catholic Bishop who has authority over the agency concerned is to be regarded as the head of the agency.*

The Bishop has delegated the day-to-day functions of head of agency to the Manager Zimmerman Services.

The **Investigation Record** is the singular, official Diocesan record of an investigation. Each investigation forms its own file, based on the identity of the respondent. Where there is more than one respondent in the same investigation, the investigation file will be cross referenced to all respondents involved.

The investigation record is wholly separate from a member of the Diocese's personnel records or an authorised (foster) carer's 'placement' file.

An **Investigator** is the person appointed to undertake an investigation conducted under this policy. An investigator may be a person performing work under a contract of employment with the Diocese of Maitland-Newcastle or an independent self-employed investigator. For the most investigations, the investigator will be a staff member of the Prevention and Response Team (refer below).

The **Investigations Manager** is the person with primary oversight and decision-making responsibility for an investigation. The investigations manager appoints the investigator. Unless recused or otherwise unable to fulfil the role, the Manager Zimmerman Services is the investigations manager for the Diocese of Maitland-Newcastle.

Where reference is made specifically to the Manager Zimmerman Services in this policy, it is intended to differentiate the responsibility from the role of investigations manager and is specifically attributed to the Manager Zimmerman Services, irrespective of whether they are also the investigations manager for the relevant investigation.

A **Member of the Diocese** means any person engaged with the Diocese of Maitland-Newcastle, including:

- persons employed by the Diocese under an award or contract;
- performance of work as a self-employed person;
- volunteers;
- persons undertaking practical training as part of an educational or vocational course;
- clergy incardinated to the Diocese of Maitland-Newcastle or providing ministry as an agent of the Diocese (e.g. providing 'relief' for an absent priest);
- members of a religious congregations working for or providing ministry on behalf of the Diocese of Maitland-Newcastle; or
- authorised (foster) carers or relative or kinship carers, within the meaning of the Children and Young Persons (Care and Protection) Act 1998; and
- any adult household members of the authorised carer's household, within the meaning of s.25AAA Ombudsman Act 1974.

A member of the Diocese is inclusive of the definitions of 'child-related work' (ss.6-7) Child Protection (Working with Children) Act 2012, an 'employee of an agency' (s.25A and s.25AAA) Ombudsman Act 1974 and 'Church personnel' (p.3) Towards Healing 2010.

Members of the Diocese who are not ‘employees’ are not subject to reportable allegations. Where there are concerns raised about a member of the Diocese that relate to one or more reports of child protection concerns, the member of the Diocese may be the subject of a professional standards complaint investigation (refer **section 5.6**).

**Outcomes** are key decisions that stem from an investigation but are not the findings. Outcomes are those consequences or actions that stem from the findings and reflect the seriousness of the allegations and address any unresolved risks. Outcomes may relate to:

- personal outcomes,
- operational outcomes, or
- systemic outcomes.

Outcomes are the responsibility of the relevant service; however formulating outcomes should be a collaborative process between the investigator and relevant Diocesan service (refer **section 10.10**).

A **Person We Support** is a person with disability who resides in a CatholicCare supported group accommodation service.

A person with disability is defined in s.7 *Disability Inclusion Act 2014*:

*disability, in relation to a person, includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person’s full and effective participation in the community on an equal basis with others.*

**Personal Information** is taken from s.6 Privacy Act 1988 and means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Conducting **Preliminary Inquiries** is the process of collecting evidence prior to formulating the definitive allegations which are formally provided to the respondent for response.

The **Prevention and Response Team (PaRT)** is the specialist child protection team within Zimmerman Services which conducts a number of roles to prevent or reduce the risk of child abuse occurring within the Diocese. PaRT conducts the majority of child protection and Part 3C investigations. Members of PaRT report to the Manager, Zimmerman Services.

The **Respondent** is the person who is alleged to have committed the reportable conduct or breach of professional standards or having had a reportable conviction and is the ‘focus’ or subject of the investigative process.

For ‘reportable conduct’ or ‘exempt’ investigations, the respondent must be a current member of the Diocese, or was a member of Diocese, at the time the allegation was made. For other investigations, the respondent must be a current member of the Diocese.

A **Relevant Diocesan Service** is the service that is responsible for the respondent as a member of the Diocese. This is primarily an administrative relationship and not an employment or contractual relationship.

For example, if a teacher is the respondent, then the relevant Diocesan service is the relevant Catholic systemic school in which the respondent is teaching. However, as a systemic school, the CSO (Catholic Schools Office) is ascribed the primary role of relevant Diocesan service. Thus both the senior management of the school in which the respondent is working, as well as the relevant senior management in the CSO, have a presumptive expectation to be advised of the investigation's progress (refer **section 6.8.2**).

A child is at **Risk of Significant Harm** if current concerns exist for the safety, welfare or wellbeing of the child because of the presence, to a significant extent, of any one or more of the following circumstances:

- (a) the child's basic physical or psychological needs are not being met or are at risk of not being met;
- (b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child to receive necessary medical care;
- (b1) in the case of a child who is required to attend school in accordance with the Education Act 1990—the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child to receive an education in accordance with that Act;
- (c) the child has been, or is at risk of being, physically or sexually abused or ill-treated;
- (d) the child is living in a household where there have been incidents of domestic violence and, as a consequence, the child is at risk of serious physical or psychological harm;
- (e) a parent or other caregiver has behaved in such a way towards the child that the child has suffered or is at risk of suffering serious psychological harm; or
- (f) the child was the subject of a pre-natal report under section 25 and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

Risk of significant harm may occur from a single act or omission or to a series of acts or omissions.

The meaning of **Significant** in the phrase '*to a significant extent*' is that which is sufficiently serious to warrant a response by a statutory authority irrespective of a family's consent. What is significant is not minor or trivial and may reasonably be expected to produce a substantial and demonstrably adverse impact on the child's safety, welfare or wellbeing.

In the case of an unborn child, what is significant is not minor or trivial and may reasonably be expected to produce a substantial and demonstrably adverse impact on the child after the child's birth. Significance can result from a single act or omission or an accumulation of these.

The functional meaning of ‘risk of significant harm’ will be achieved through the application of the Department of Human Services’ (Community Services) structured decision-making tool.

**Senior management** means a supervisor who oversees other management roles and would include:

In the Catholic Schools Office	Heads of Services, Assistant Directors and the Director of Schools;
In Catholic Systemic Schools	Principal, Assistant Principal;
In CatholicCare	Directors of Service, other members of the executive and the Director;
In the Chancery	Vice Chancellors, the Chancellor and Vicar-General; and
In parishes	the Parish Priest.

A **serious indictable offence** is defined in the NSW Crime Act 1900 as any indictable offence that is punishable to imprisonment for life or to a term of 5 years or more (refer **Appendix D**).

A **Service** refers to the principal internal administrative structures within the Diocese of Maitland-Newcastle and may also be recognised as distinct organisations under civil or canon law. There are three services within the Diocese:

- Catholic Schools Office for the Diocese of Maitland-Newcastle is ascribed the primary role of supporting and leading the Catholic systemic schools within the Diocese, answerable to the Director of Schools or delegates.
- CatholicCare Social Services and all programmes and service outlets that are answerable to the Director of CatholicCare Social Services or delegates.
- The Chancery and all departments answerable to the Bishop of Maitland-Newcastle or delegates.

Each parish is a unique entity, as articulated in Canon 515(3) and where referenced, will be referred to in the collective ‘parishes’.

A **Supervisor** means a member of the Diocese who is in a position of direct authority over another Diocesan member. Direct authority means the supervisor has the ability to assign work to, or direct a member of the Diocese’s work activities, or they have administrative responsibility for the member of the Diocese in such matters as certifying timesheets (where applicable), approving leave or providing supervision.

## 5. MATTERS THAT REQUIRE INVESTIGATION

### 5.1 Reportable Allegations

The Diocese of Maitland-Newcastle is required to report to the NSW Ombudsman, a spectrum of alleged behaviours or a range of convictions relating to members of the Diocese. Collectively these are referred to as reportable allegations and consist of reportable conduct, reportable offences and reportable incidences which involve adults living with disabilities who reside in CatholicCare group accommodation facilities.

The Ombudsman specifies a number of criteria for a matter to be considered reportable.

**Firstly**, the respondent must be a current employee of a designated agency or was an employee at the time the allegation was made. The respondent does not have to be an employee at the time the alleged behaviour occurred.

An employee of a designated agency within the Diocese of Maitland-Newcastle means that the respondent must be an 'employee' working in Catholic Schools Office, a Catholic systemic school or CatholicCare. Employees of the Chancery and parish employees are not subject to Part 3A of the Ombudsman Act. However, parish priests, associate pastors and deacons are deemed to be 'employees' of a designated non-government agency because of their role in Catholic systemic schools, as defined in canon 528(§1) "*....to have particular care for the Catholic education of children and youth.*"

**Secondly**, the allegation must contain a description of behaviour that may constitute reportable conduct or relate to a reportable conviction or is a reportable incident (discussed in detail below).

**Thirdly**, the alleged victim(s) must have been:

- a) a child (under 18 years) at the time of the alleged conduct, or
- b) an adult with disabilities residing in CatholicCare group accommodation at the time of the alleged incident.

If an allegation does not meet these three criteria, it is not reportable.

### 5.2 Reportable Conduct

Reportable conduct is a relatively technical construct and is summarised in Part 3A Ombudsman Act as:

- (a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence); or
- (b) any assault, ill-treatment or neglect of a child; or
- (c) any behaviour that causes psychological harm to a child.

The Ombudsman's practice update provides detailed guidance on what constitutes the various particular forms of reportable conduct (refer **Appendix A**). In summary, as of July 2013, the Ombudsman identifies six categories of reportable conduct:

- **Sexual offences** relates to proven or alleged criminality, i.e. a criminal court conviction or charges and includes sexual assault, indecent assault, production, dissemination or possession of child pornography or acts of indecency.
- **Sexual misconduct** includes crossing professional boundaries, including behaviour that involves an inappropriate and overly personal or intimate relationship with, conduct towards or focus on a child or class of children; or sexually explicit comments and other sexually overt behaviour (which may also involve the crossing of professional boundaries).
- **Physical assault** relates to proven or alleged criminality, i.e. a criminal court conviction or charges and includes hitting, kicking, punching, shaking, throwing, inappropriate restraint or excess force, other use of force that is hostile or reckless or indirect use of force object/substance/threat (including in the context of domestic violence).
- **Ill-treatment** includes those circumstances where a member of the Diocese treats a child in an obviously improper manner and includes unreasonable disciplining, making excessive demands, malevolent acts and inappropriate and hostile use of force.
- **Neglect** involves the actions or inactions of a member of the Diocese who has the responsibility to care for a child, the member's responsibilities provide the context against which the conduct needs to be assessed and includes supervisory neglect, carer neglect, failure to protect from abuse and reckless acts.
- **Psychological harm** involves conduct that is obviously unreasonable and results in significant emotional harm or trauma to a child. There needs to be a proven causal link between the inappropriate behaviour and the harm, and the harm must be more than transient. It can include the exacerbation or aggravation of existing psychological conditions.

### 5.3 Reportable Convictions

A reportable conviction is defined in s.25A of the Ombudsman Act as a conviction (including a finding of guilt without the court proceeding to a conviction), in this State or elsewhere, of an offence involving reportable conduct.

**Appendix B** of this policy lists the reportable convictions for NSW and details relevant technical detail in relation to spent convictions and proven charges.

### 5.4 'Exempt' Matters

There is a range of conduct that the Ombudsman requires to be investigated but does not have to be directly reported to the Ombudsman.

Section 25A(1) defines three classes of exempt matters:

- (a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards; or
- (b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures; or
- (c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA (refer **Appendix C**).

Exempt matters involve allegations of behaviour that are deemed 'less serious' than reportable allegations. Investigations are conducted at a standard commensurate with the seriousness of matter. Exempt matters may be investigated internally by an appropriate employee of the relevant Diocesan service, under the oversight of an investigator (refer **section 10.4**).

All documentation from the investigation of exempt matters form an investigation record (refer **section 9.6**) and are treated accordingly. This includes being stored at Zimmerman Services and will be made available to the NSW Ombudsman on request for auditing purposes.

## 5.5 Reportable Incidents

Reportable incident is a relatively technical construct and is summarised in section 25P, Part 3B Ombudsman Act which are framed by a number of specific relationships. Reportable Incidents include:

- Any incident involving any employee and a person we support which involves:
  - a) a sexual offence committed against, with or in the presence of the person we support,
  - b) sexual misconduct committed against, with or in the presence of the person we support, including grooming of the person for sexual activity,
  - c) an assault of the person we support, not including the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated under workplace employment procedures,
  - d) an offence under Part 4AA of the Crimes Act 1900 committed against the person we support,
  - e) ill-treatment or neglect of the person we support.
- Any incident involving an assault of a person we support by another person we support living in the same supported group accommodation that:
  - a) is a sexual offence,

- b) causes serious injury, including, for example, a fracture, burns, deep cuts, extensive bruising or concussion,
  - c) involves the use of a weapon, or
  - d) is part of a pattern of abuse of the person with disability by the other person.
- An incident occurring in supported group accommodation and involving a contravention of an apprehended violence order made for the protection of a person we support, regardless of whether the order is contravened by a member of the Diocese, a person we support or another person.
  - An incident involving an unexplained serious injury to a person we support.

The Ombudsman's *Guide for Services: Reportable Incidents in Disability Supported Group Accommodation* provides detailed guidance on what constitutes the various particular forms of reportable incidents (refer **Appendix I**).

## 5.6 Professional Standards Complaints

Professional standards complaints encompass a wide spectrum of conduct by members of the Diocese. The determination for what constitutes a breach of professional standards is specific to the member of the Diocese's role and the relevant Diocesan services' policies and procedures, which include:

- Towards Healing (2010);
- Integrity in Ministry (2004);
- Integrity in the Service of the Church (2011);
- Child Protection Code of Professional Standards for Catholic School Employees (2005), specific for employees of the CSO and Catholic systemic schools;
- Code of Behaviour Guide (2010), specific for employees of CatholicCare; and
- Code of Conduct Policy (2009), specific for members of the Chancery.

For members of the Diocese who are the subject of a reportable allegation along with one or more professional standards complaint, it would be expected that PaRT will address the professional standards complaints as part of its investigation into the reportable allegation.

For members of the Diocese who are the subject of an 'exempt' allegation along with one or more professional standards complaint or where the member of the Diocese is only subject of one or more professional standards complaint, the relevant Diocesan service may engage PaRT to undertake an investigation or may choose to undertake the investigation internally (i.e. within the relevant Diocesan service).

All investigations of professional standards complaints conducted by PaRT will be based on terms of reference approved by the Manager Zimmerman Services and a senior manager of the relevant Diocesan service.

## 6. RIGHTS AND OBLIGATIONS

### 6.1 Diocese's Obligation to Report Criminal Conduct

The Diocese of Maitland-Newcastle will report to NSW Police or other relevant authorities, criminal conduct which:

- involves crimes against children; or
- which could constitute a serious indictable offence.

This will be done irrespective of the wishes of the complainant or alleged victim.

Members of the Diocese will report criminal conduct to NSW Police. They are also obliged to report their allegations to their supervisor within one working day.

Where the member of the Diocese is unsure whether the conduct is criminal or not, the member of the Diocese will report their concerns to their supervisor or member of PaRT.

It is a supervisor's responsibility to report any alleged crime or criminal conspiracy to PaRT within one working day of being advised.

Where a member of the Diocese's supervisor is unavailable or they believe their supervisor may have a conflict of interest in relation to the situation, the member of the Diocese must make contact with a member of PaRT within one working day.

Section 316, Crimes Act 1900 makes it a criminal offence to conceal a serious indictable offence. A member of PaRT will report any alleged crime that would constitute a serious indictable offence or conspiracy to commit a serious indictable offence (refer **Appendix D**).

Where the alleged crime was not committed against a child and does not constitute a serious indictable offence, the presumption remains that PaRT will report the allegation to NSW Police. However, in some circumstances the investigator is able to submit an application to the investigations manager requesting an exemption from reporting. Such circumstances are restricted to:

- the alleged offences constituting a summary offence, or being part of a civil dispute, and/or matters that can be dealt with by way of infringement notices or tribunals (for example traffic matters, illicit substance use, minor street offences and stealing offences, family law matters or matters relating to breaches or omissions of local government by-laws or industrial laws); and (if relevant),
- the alleged offence does not involve any sexual misconduct, and
- any alleged victim being no longer being at risk from the alleged offender; and
- any alleged victim providing the investigator with a written statement that they do not want to report the alleged offence to Police.

The investigations manager will make the final decision as to not reporting the alleged criminal conduct. In reaching this decision the investigations manager may consult with legal counsel or other persons as is considered appropriate. Any decision not to report

alleged criminality will be documented by the investigator and form part of the investigations record.

Where appropriate and practical, the investigator will discuss the intended report to Police, with the alleged victim (if they are not the person who informed the investigator of the alleged crime).

However, the Diocese will report alleged crimes to Police irrespective of the reporter's or alleged victim's wishes.

The investigator will report the alleged crime to the most appropriate Police Officer possible. Where the allegations may be relevant to an ongoing investigation, the investigator will contact the senior Officer in charge of that investigation. Alternatively, the investigator will report the allegation to the ***Crime Manager of the Local Area Command***, in which the alleged crime has occurred or will occur. Any verbal report to Police will be followed up with a written confirmation to the relevant Officer.

The written record of the report will form part of the Investigation record.

When a report is made to Police all relevant available information is provided to the Police, including the identity of the reporter and alleged victim(s) and perpetrator(s). The investigator should ensure that the alleged victim is aware of this practice as soon as practicable.

It is understood that there is no possibility of obtaining an indictment where an alleged offender is deceased. Nevertheless, those crimes committed against children that were allegedly committed by a deceased person, will be reported to Police for the purposes of supplying intelligence.

## 6.2 Duty of Care

It is acknowledged that being involved in any investigation may cause stress, feelings of uncertainty, confusion and fear. This is equally true for:

- the alleged victim(s) and their family particularly when the alleged victims are children;
- the respondent, their friends and family; and
- other witnesses to the alleged behaviours, particularly child witnesses.

Where appropriate, the investigator may advocate for additional supports to members of the Diocese or other persons involved in an investigation, e.g. if the parents of a child witness advise the investigator that their child is showing signs of ongoing anxiety.

For most members of the Diocese, the Employment Assistance Programme (EAP) is available. The investigator can assist the person access support through the relevant Diocesan service.

For members of the Diocese not included in the EAP, the investigator is able to offer limited counseling on a fee for service basis. Approval is for up to 5 x 1 hour counseling sessions. The provider should be either a registered psychologist or social worker (eligible for membership of the AASW) and payment will be made at no more than the recommended APS or AASW rates. If there is an identified need for counseling beyond the initial five sessions, the investigator may prepare a written submission to the Manager Zimmerman Services to approve further counseling. This will be determined on the basis of demonstrated need.

If asked, members of PaRT will make themselves available to undertake debriefing or educational sessions with Diocesan workplaces or teams after the completion of an investigation that involved one or more of its members. Arrangements may be made with the Manager Zimmerman Services.

Where colleagues are aware that an investigation is occurring, they have an obligation to be supportive of the respondent or any other person involved in an investigation and suspend judgment; i.e. being understanding but not 'taking sides'.

Supervisors of the respondent, or any other person involved in an investigation, have an obligation to ensure that these people continue to receive appropriate supervision and support. The respondent is afforded special consideration and additional support.

Where the respondent remains in the workplace, special consideration should be afforded to them, including provision of time away from normal business during the work day to meet with their nominated representative to prepare material for the investigation or attend counseling services. Any special consideration for the respondent must also allow for the needs of the workplace.

Where the respondent is the subject of temporary safety measures (refer **section 10.7**) and is no longer in the workplace, it is management's responsibility to:

- maintain regular contact with the respondent, the frequency of which should be discussed as part of the investigation planning process (refer **section 10.5**); and
- formulate strategies for the respondent to remain as integrated as possible with their workgroup without compromising the temporary safety measures, the extent of which should be discussed as part of the investigation planning.

Senior management for the relevant Diocesan service has an obligation to support the respondent's supervisor to develop, implement and maintain strategies to ensure the agency's duty of care is met.

### 6.3 The Respondent's Right to Have a Support Person or Nominated Representative

The respondent has the right to nominate a representative to support them and advocate on their behalf through the investigative process. The representative may be a solicitor, a union official, a cleric, colleague or a member of parish or wider community.

Some of the roles that the representative may fulfill include:

- acting as the contact person for some or all communication with the investigator;
- being the respondent's support person in any face-to-face interviews or meetings; and
- being the respondent's advocate for special consideration (e.g. provision of special leave provisions, counselling, discussion around the application of temporary safety measures, etc.).

The investigator will obtain written instructions from the respondent as to the nature and level of involvement of the representative and what information should be shared or withheld from them.

The investigator has the ability to object to the appointment of specific persons as the respondent's nominated representative if the person identified as the nominated representative:

- has a known conflict of interest relating to the respondent or the investigation; or
- has previously demonstrated an incapacity or unwillingness to fulfil the role of nominated representative appropriately.

If the nominated representative demonstrates inappropriate conduct, including breaches in confidentiality or other actions that threaten the integrity of the investigation, the investigator will advise the investigations manager.

On review of available information, the investigations manager may request a meeting with the nominated representative to address the issue. The nominated representative is able to nominate a support person for such a meeting, other than the respondent. The investigations manager will have a third party scribe in attendance.

If the nominated representative refuses or fails to attend, the investigations manager will make a determination on the available information. The investigations manager may:

- direct that the investigation proceed with the current nominated representative;
- advise the respondent and nominated representative that any further evidence of the representative undertaking actions which threaten the integrity of the investigation, will result in a directive to the respondent that they are required to identify an alternative representative; or
- direct the respondent to nominate an alternative representative.

Any advice or direction will be given to the respondent in writing. The investigations manager will document the basis for such a decision, including any face-to-face meetings. The resultant records will form part of the investigation records.

All due consideration will be afforded to the respondent to compensate for any disruption caused to their ability to participate in the investigative process.

## **6.4 Obligation to Cooperate and Support an Investigation and Possible Disciplinary Action for Failure to Cooperate**

All members of the Diocese are obliged to provide all reasonable cooperation and support to an investigation.

All members of the Diocese are required to maintain:

- a neutral or non-judgemental position as to the validity or otherwise of any allegations or investigative process; and
- strict confidentiality about their role in, or knowledge they may have about the investigation.

If a member of the Diocese has concerns for the integrity of the investigation, it is their responsibility to raise their concerns with the investigations manager as soon as reasonable. If the member of the Diocese believes the investigations manager is compromised, they must advise the senior management in their Diocesan service.

Failure to cooperate and support an investigation is a serious matter. If an investigator believes that a member of the Diocese is not cooperating, the investigator will discuss the matter with the investigations manager.

The investigations manager has no authority to initiate disciplinary proceedings against any member of the Diocese. The investigations manager can refer a complaint about a member of the Diocese; where the member of the Diocese is a:

**Wage or salaried employee** the investigations manager may refer the matter to the relevant director of service or vice chancellor, to determine the appropriate disciplinary proceedings as a breach of this policy and possibly a breach of the employee's code of conduct.

**Contractor or volunteer** the investigations manager may refer the matter to the relevant supervisor within the service to determine whether it is appropriate for the contractor or volunteer to continue in their current role.

Cleric or religious the investigations manager may raise the matter with the Bishop of Maitland-Newcastle to determine whether there is just cause for initiating a disciplinary proceeding under canon law.

Any persons not associated with the Diocese may choose to assist in an investigation. However, the investigator has no means to compel cooperation.

## 6.5 Obligation to Give Evidence, Issues of Privilege and Conflicts of Interest

In an investigation, most members of the Diocese are obliged to provide any evidence (information) that they may have, upon request from an investigator. This obligation is derived from an employee's common law obligation of fidelity to his or her employer.

Justice J. Herron stated in *Associated Dominions Assurance Society Pty Ltd v Andrew* (1949) 49 SR (NSW) 351, that a duty lies upon an employee in general terms to give information to her or his employer such as “*is within the scope of his employment and which relates to the mutual interest of employer and employee*”.

Justice J.R. Ryan in *Patty v Commonwealth Bank* (980007) (1998) IRCA 19/2/98 found that:

*...the applicant's [employee's] refusal to cooperate with the investigators and his refusal to comment on or elucidate the issues troubling the respondent [employer] also amounted to conduct which justified termination of employment. This conduct itself was misconduct such as constituted a valid reason for termination...*

*The information was within the scope of his employment and related to mutual interest of applicant and respondent. The applicant was requested often, at proper times and in a reasonable manner to clarify his actions. The applicant was not obliged to answer questions which might have exposed him to the risk of criminal prosecution...*

As noted by Justice Ryan, the employee's obligation is not absolute; no member of the Diocese is obliged to answer questions that could be self-incriminating. The NSW Ombudsman *Investigating Complaints Manual* (2004) states:

*We have been advised by senior counsel that the privilege against self-incrimination is not confined to investigations concerning alleged criminal actions but extends to civil and disciplinary proceedings that may result in the employee being penalised as a result of the investigation. (p.47)*

Given the above consideration, there is no compulsion for the respondent to participate in the investigation and no inference may be drawn from a decision by the respondent not to participate. However, it is usually in the respondent's best interests to participate, as the

investigator will make a finding based on the evidence available, including in the absence of the respondent's evidence.

Other than the common law right not to self-incriminate, there are a limited range of special considerations that allow members of the Diocese to withhold part or all of the evidence they may have. The investigator will respect:

- the sanctity of the confessional and the privilege of religious confessions<sup>1</sup>; and
- client legal privilege<sup>2</sup>.

For other claims of professional privilege (e.g. the counseling relationship), the investigator will refer the claim to the investigations manager for consideration.

In all circumstances where a witness invokes privilege, the investigator will obtain written confirmation from the witness that they are invoking privilege and the type of privilege invoked. For invoked privilege (other than the privilege of religious confessions or client legal privilege), the witness will be required to provide a rationale for their claim of privilege. This document will form the basis of the investigation manager's review of the claim.

Where a member of the Diocese has a conflict of interest, they may request special consideration. For close relatives of the respondent (i.e. spouses, siblings, parents or children) who are also members of the Diocese, the investigator has the authority to excuse them from being a witness.

For other claims of conflicts of interest, the investigator will refer the claim to the investigations manager.

In determining issues of privilege (other than legal privilege or the sanctity of the confessional), the investigations manager will undertake an assessment of the claim and will take into account the:

- seriousness of the investigation;
- potential probative value of the evidence being sought;
- strength of the argument for privilege being asserted by the witness;
- guidelines of the witnesses' relevant professional body or oversight authority; and
- views of the relevant Diocesan service's senior management on the witnesses' claim for privilege.

Where warranted, the investigations manager may obtain legal advice.

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<sup>1</sup> Section 127 Evidence Act 1995

<sup>2</sup> Sections 117-126, (Division 1 Part 3.10) Evidence Act 1995

Failure to give evidence in an investigation is a serious matter. The investigator will consult with the investigations manager, who is able to refer the issue to the relevant Diocesan service for resolution.

## 6.6 External Statutory Investigations and the Diocese's Obligations

Members of PaRT may be required to work closely with statutory investigative authorities as the matters that the Unit is required to investigate may also involve criminality or issues of statutory child protection. Child protection matters that involve criminality may be investigated by JIRT (the Joint Investigation and Response Team), a multidisciplinary team combining NSW Police and Community Services Child Protection officers.

Criminal and statutory investigations have precedence over a Diocesan investigation and the will cooperate with the statutory authorities. This will extend to the lawful provision of information.

During a criminal or statutory child protection investigation, the investigator will not initiate action in relation to the investigation without conferring with the statutory authorities.

Members of the Diocese will provide all reasonable cooperation and support to statutory investigations, including Police and Community Services, including the provision of information (refer **section 6.8**).

A statutory authority's investigation does not relieve the Diocese of its obligations to its 'employees' or duty of care for service users (notably children). The investigator will identify and address any actual or potential conflicts with the Diocese's obligations and those of the , advise the investigations manager and, where possible, the conflict will be resolved by negotiation with the statutory authority.

In the face of an impasse, the investigations manager may:

- advise the Ombudsman's Office of the situation; and
- obtain formal legal advice as to the recommended discharge of their obligations.

The investigations manager will advise the Bishop of the matter as head of agency.

## 6.7 Confidentiality

Investigations conducted under this policy should be kept out of the public arena. Criminal proceedings are usually undertaken in public, justice is seen to be done; Diocesan investigations are administrative processes where interested parties should be given an appropriate level of privacy.

Section 34(1) of the Ombudsman Act 1974, states:

*The Ombudsman shall not, nor shall an officer of the Ombudsman, disclose any information obtained by the Ombudsman or officer in the course of the Ombudsman's or officer's office...*

...except for a number of specific, legislated circumstances. The Ombudsman's guidelines note, "Agencies should ensure confidentiality following an allegation against an employee" (Child Protection in the Workplace 2004, p.82). The act and statutory guidelines establish a presumption of confidentiality for any reportable conduct material.

The practice of maintaining confidentiality in an investigation reduces the risks of:

- the respondent, alleged victims, witnesses or relatives of those involved in the investigation, suffering any adverse consequences due to unwarranted or ill-informed public scrutiny; and
- the integrity of the investigation being compromised.

Members of the Diocese will not provide any information or make any comment in the public arena relating to any investigation, past, current or pending.

Only the leader of the relevant diocesan service may determine that there is an overriding public interest argument which would justify the release of information into the public arena.

Members of the Diocese who are involved in, or otherwise aware of, an investigation will not make any oral, written or electronic comment about an investigation to family, friends or colleagues, at home, in private, in the workplace or wider Diocese, other than for legitimate purposes. Legitimate purposes include:

- discussions required for the management of the matter, held with supervisors and senior management of the relevant Diocesan service;
- participating in official investigative purposes, undertaken with or at the behest of the investigator;
- providing information to statutory investigators, including law enforcement and child protection authorities; and
- discussing the matter as part of a briefing or de-briefing session, sanctioned and staged under the auspice of senior management of the relevant Diocesan service.

Any breach of confidentiality is a serious matter. The investigator will consult with the investigations manager who is able to refer the issue to the relevant Diocesan service for resolution.

## **6.8 Rights of Privacy and the Provision of Information**

In undertaking an investigation, there are competing, often juxtaposed, needs and wants. This can be particularly evident in the issues of providing or withholding information to

interested parties involved in the investigation, e.g. the respondent, the victim and other relevant parties.

The Diocese is subject to the federal Privacy Act 1988 and is obliged to uphold the National Privacy Principles. The NSW Office of the Privacy Commissioner supports the practice of ensuring the privacy of the individual unless there are strong reasons to disclose information.

The investigator will not use or disclose an individual's personal information for any purpose other than meeting those statutory obligations relevant to the Diocese. This extends to the provision of witnesses' personal information to other persons involved in the investigation, including the respondent.

However, this cannot be an absolute position as there are special considerations for the respondent. There are specific circumstances where a person's right to privacy is counterbalanced by the respondent's right to due process.

### **6.8.1 The Respondent's Right to Know**

The respondent has a presumptive expectation that they will be advised of the alleged victim(s) identity as part of the definitive allegations that will be put to them (refer **section 7.2**). The NSW Ombudsman states that the respondent "*will generally need to be informed of the identity of the alleged victim*".

The respondent may be able to access the investigation record (in part or whole) if the matter is notified to the Office of the Children's Guardian (refer **section 12.2**).

As the focus of the investigation, the respondent's right of privacy extends to:

- the findings made in the investigation (refer **section 10.9**);
- whether the Office of the Children's Guardian was notified (refer **section 12.1**); and
- whether there were any personal outcomes affecting their employment (refer **section 10.10**).

This information will only be released to the respondent and those persons and organisations with an established need to know (refer below **section 6.8.2**).

To further complicate the issue, particular persons (including witnesses or alleged victims) may be afforded particular legislated rights to or restrictions on their privacy beyond the Privacy Act.

Where a witness or alleged victim is also the person who makes a risk of significant harm report to Community Services, s.29 Children and Young Persons (Care and Protection) Act 1998 protects their identity from disclosure, even to the respondent.

The Government Information (Public Access) Act 2009, (GIPA) sets a presumption that the respondent will be afforded access to an investigation that has resulted in a notification to

the Office of the Children's Guardian<sup>3</sup>. However, s.14 of the GIPA Act sets out public interest considerations for withholding information (refer **section 12.2**).

The investigator is required to consider all the relevant factors for and against the rights of a person's privacy when conducting an investigation. The investigator should not give a guarantee to any person that their identity will be protected.

### **6.8.2 Roles with a Presumptive Need to Know**

Information pertaining to an investigation is only given to persons where there is a legitimate need to know, based on a legal capacity to do so. Need to know does not equate to full disclosure, only that information which is relevant to the person's roles and responsibilities.

The investigator will not provide any other persons any information relating to the investigation without the express consent of the person to whom the information relates or without the written approval of the investigations manager. Any determination to provide information to other parties will be documented by the investigator, identifying who was given what information and why. This written record will form part of the investigation records.

Roles with a presumptive need to know, unless excluded by an established conflict of interest, include:

- senior management of the relevant Diocesan service;
- the supervisor of the respondent or service manager in which the alleged behaviour occurred;
- a counsellor or other professional offering support services to the respondent;
- external parties with a statutory right to the information; and
- the respondent's nominated representative (refer to **section 6.3**).

Section 6(1) of the Privacy Act 1988 exempts employee records from the act, however opinion from the Catholic Commission for Employment Relations (February 2011) is that the exemption set out in section 6(1) is restricted to acts or practices directly related to an employment relationship.

Therefore, for the purposes of this policy the release of information, in whole or part, that could form part of an investigation record (refer **section 9.6**) may only be done to those members of the Diocese obliged to be informed as they have an established, legitimate need to know.

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<sup>3</sup> Findings of sexual misconduct committed against, with or in the presence of a child, including grooming of a child or a serious physical assault of a child require notification to the Children's Guardian. Investigation records only fall under the GIPA Act if and when a finding is made that requires notification to the Office of the Children's Guardian, s.46 Child Protection (Working with Children) Act 2012.

During the course of the investigation, the investigator will ensure that there is regular, ongoing contact between themselves and the appropriate personnel within the relevant Diocesan service. This includes the formal pre-investigation planning meeting held at the beginning of an investigation (refer **section 10.5**) and the post-investigation consultation (refer **section 10.10**). The agreed contact schedule between investigator and the Diocesan service should form part of the investigation plan.

### **6.8.3 External Authorities**

As noted earlier, statutory authorities, other than the Ombudsman (refer **Section 11.1**), may have a legitimate need to know and will be advised that the Diocese may hold information relevant to their investigations or other processes. However, the external authority or prescribed body will be provided the information through the exercise of the statutory authority's legal right to information, which requires the use of:

- Chapter 16A exchange of information provisions (refer below **section 6.9** and **appendix E**);
- section 248<sup>4</sup>;
- search warrant<sup>5</sup>; or
- subpoena.

The investigator should refer to the NSW Government website for relevant guidelines and template documents relating to exchanging information:

[http://www.community.nsw.gov.au/kts/guidelines/info\\_exchange/info\\_index.htm](http://www.community.nsw.gov.au/kts/guidelines/info_exchange/info_index.htm)

No provision in this policy affects the duty of an investigator to report any:

- child or class of children that they believe to be at risk of significant harm to the Community Services Helpline;
- matter that may amount to an act or acts of criminality to the NSW Police Force; or
- conduct or conviction that is reportable to the NSW Ombudsman.

## **6.9 Chapter 16A Exchange of Information with Prescribed Bodies**

Chapter 16A Children and Young Persons (Care and Protection) Act 1998 allows for the exchange of information between prescribed bodies. One of the principles of Chapter 16A states that:

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<sup>4</sup> *Children and Young Persons (Care and Protection) Act 1998*

<sup>5</sup> *Part 5, Law Enforcement (Powers and Responsibilities) Act 2002*

*agencies that have responsibilities relating to the safety, welfare or well-being of children or young persons should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,*

There is no question that Catholic systemic schools and CatholicCare are both prescribed bodies.

This policy argues that the whole of the Diocese may be considered a prescribed body under clause 8(1)(j) of the Children and Young Persons (Care and Protection) Regulation 2012 which states that a prescribed body is:

*any other organisation the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children.*

The investigator is an operative of the Diocese and where the investigation relates to the safety, welfare or wellbeing of a particular child or class of children, the investigator is able to obtain documentary evidence from third parties who are prescribed bodies.

**Appendix E** provides a quick checklist regarding Chapter 16A however the investigator should refer to the NSW Government website for complete guidelines and template documents relating to exchanging information under Chapter 16A:

[http://www.community.nsw.gov.au/kts/guidelines/info\\_exchange/info\\_index.htm](http://www.community.nsw.gov.au/kts/guidelines/info_exchange/info_index.htm)

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## 7. PROCEDURAL FAIRNESS

There are a number of principles in common law, some of which are only applicable in the relevant jurisdiction. The *presumption of innocence* relates to criminal charges; the accused does not have to prove that they are innocent of the accusations - that is presumed. The burden is placed on the accuser (the state) to prove to a judge, or jury of their equals, that the accused is guilty beyond reasonable doubt. This is underpinned by the adversarial nature of criminal justice in the English legal system. In effect, the power and resources of the state are reined against the individual. The presumption of innocence is one of the methodologies that have evolved to address this disparity of power.

In the administrative process conducted by PaRT, the respondent does not have a presumption of innocence. There is no disparity of power, given that the inquisitorial process is not adversarial (refer **section 10.1**). In reportable conduct investigations, the respondent is entitled to procedural fairness.

Procedural fairness is a specific form of '*natural justice*' required by common law. The High Court of Australia set the benchmark for interpretation of procedural fairness in a 1985 judgment [*Kioa v West* (1985) 159 CLR 550]. Justice Mason noted:

*The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention...*

*The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*

*In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.*

In a later High Court decision [Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) HCA 72; 225 CLR 88], it was noted that the principles of procedural fairness "*focus upon procedures rather than outcomes*" and govern what a decision-maker "*must do in the course of deciding how the particular power ... is to be exercised*".

As noted by Justice Mason, procedural fairness may be prescribed. The NSW Ombudsman notes "*wherever a statutory obligation to accord procedural fairness exists, the terms of that*

*statute must be followed.*” The Ombudsman note a set of standards that constitute procedural fairness, including:

- informing people against whose interests a decision may be made of the substance of any allegations against them or grounds for adverse comment in respect of them;
- providing people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise;
- hearing all parties to a matter and consider submissions;
- making reasonable inquiries or investigations before making a decision;
- ensuring that no person decides a case in which they have a direct interest;
- acting fairly and without bias; and
- conducting the investigation without undue delay (allowing for the pre-eminence of criminal and statutory child protection investigations).

The Ombudsman notes that in reportable conduct investigations:

*The employee has the right to reply to the allegation. In addition, a final decision should not be reached before the employee has had an opportunity to make a statement in reply to any proposed adverse comments and findings. In this regard, it would generally only be necessary to provide the employee with the substance of the proposed adverse comment, not necessarily all available evidence or a full copy of the fact.*

Child Protection in the Workplace (2004), p.87

## 7.1 Advising the Respondent of the Investigation

Procedural fairness requires that the respondent be afforded all reasonable opportunities to make an informed response to the allegations made against them. This does not translate into a presumptive right for the respondent to be informed of an investigation at its commencement.

The Ombudsman’s guidelines states:

*Ideally, an employee who is otherwise not aware that an allegation has been made against them should not be given the substance of the allegation until all the evidence has been collected. The employee is then in a position to respond to the specifics of the allegation.*

Child Protection in the Workplace (2004), p.87

Unless circumstance requires, the respondent will not be advised of the investigation prior to the investigator completing preliminary inquiries and formulating the definitive allegations relating to the respondent. This practice reduces the potential for the respondent to suffer anxiety or uncertainty while awaiting provision of the specific allegations and lessens the risk to the investigation’s integrity.

Informing the respondent earlier than intended may be required because:

- the respondent's employment conditions are going to be affected (e.g. suspended from duty or stood aside from ministry, having restrictions placed on normal duties);
- the respondent is advised by a statutory authority as part of a criminal or child protection investigation; or
- there is a significant risk that the confidentiality of the investigation has been or will be compromised and the respondent will become aware of the investigation through a third party.

If circumstances require that the respondent be advised of the investigation prior to preliminary inquiries being completed, the investigator should provide the respondent with a general descriptor of the allegations under investigation.

It is appropriate to refer to the relevant forms of reportable conduct described by the Ombudsman. For example, the respondent may be informed, *"the investigation relates to alleged behaviour that may be classified as physical assault and ill treatment"*. The investigator will advise the respondent that detailed allegations will be provided to them once preliminary inquiries are complete.

## 7.2 Giving the Respondent a Definitive Set of Allegation(s)

The investigator will ensure that the respondent is provided with a written copy of the definitive allegations relating to them. These allegations may vary significantly from the initial allegations that triggered the investigation. In the course of conducting the investigation, the initial allegations may be shown to be inaccurate or irrelevant and other allegations may arise. This procedure is designed to ensure that the respondent is given only one, definitive set of allegations which will then form the basis for analysis and the making of findings in the matter.

Definitive allegations will contain a level of detail and specificity of the alleged conduct sufficient to facilitate the respondent's ability to respond. The allegations should include the most accurate detail achievable from the preliminary inquiries, including temporal and geographic location of specific behaviours allegedly committed by the respondent. Complex or serious investigations may produce multiple individual allegations.

In providing the respondent with definitive allegations, it is necessary to provide personal information to the respondent, specifically the victim's identity (refer **section 6.7**).

Circumstances may arise where there is a compelling argument to withhold an alleged victim's identity from the respondent. Such an argument would require a significant level of supporting evidence and relate to a credible fear for the safety or welfare of the alleged victim.

If these circumstances arise, the investigator must prepare a written submission stating the argument for withholding the alleged victim's identity from the respondent. This submission would include, where possible, advice from the NSW Ombudsman.

If warranted, the investigations manager may obtain independent advice in determining the most appropriate decision.

Release of witness identities is much more complicated (refer **section 6.7**). At the point of providing a definitive set of allegations, the respondent has no prima facie argument for witnesses' identities.

### **7.3 Affording All Reasonable Opportunity to Participate and Respond**

The investigator will afford all parties, reasonable opportunity to have their allegations, evidence or submissions included in the investigation. The respondent is afforded particular consideration, as is the alleged victim(s).

If either the respondent or an alleged victim does not wish to participate in the investigation, the investigator should endeavour to obtain written confirmation of the individual's decision. The investigator will follow this up with a letter confirming their decision and offering them an opportunity to change their minds, prior to the completion of the investigation.

When a respondent or alleged victim indicates that they will participate in the investigation, they will be afforded a minimum of three opportunities to:

- attend an investigative (face-to-face) interview; or
- submit a prepared (written) statement

An alleged victim or respondent may initially agree to interview and then request to submit a prepared statement. Three genuine opportunities to respond to allegations, in any combination of attending an interview or the submission of a prepared statement, constitutes the provision of 'reasonable opportunity'.

Arrangements for interviews or submissions of written statements should be confirmed in writing by the investigator.

Interview arrangements should be made in consultation with the interviewee or their identified support person. It is the investigator's responsibility to identify and manage any special needs the interviewee may have.

In arranging for the submission of a prepared statement it may be appropriate to allow up to 14 days, dependent on the complexity of the allegations and seriousness of the investigation.

However, when a respondent is the subject of temporary safety measures (e.g. suspended from normal duties) or is otherwise relieved of normative duties and continues to receive their standard wage, salary or stipend from the Diocese, it is a reasonable that the respondent:

- make themselves available to be interviewed, during their normative work hours, given 2 working days' notice; or
- have a written statement submitted within 5 working days.

Any claim by the respondent or alleged victim that exigent circumstances adversely affected their ability to respond, should be considered sympathetically and an alternate opportunity arranged. The investigator should err on the side of giving the alleged victim or respondent further opportunities to participate and consequently delaying the process, rather than proceeding to complete the investigation report in absence of their evidence.

Prior to any decision to proceed without the alleged victim's or respondent's evidence, the investigator will review the matter with the investigations manager.

For witnesses or other interested parties, the investigator will make a determination as to what is reasonable opportunity, based on:

- the seriousness of the investigation;
- the assessed significance of the witnesses evidence in making a finding; and
- the potential effect on the respondent, alleged victim and other relevant parties, in delaying the resolution of the investigation whilst pursuing the witness evidence.

The investigator will consider all reasonable methodologies for obtaining witness evidence that is delayed, or identifying possible alternative evidentiary sources.

## 7.4 Advising the Respondent of the Investigation's Findings, Notifications and Outcomes

Once the investigation findings are made, there is a determination whether to notify the Office of the Children's Guardian (Children's Guardian) and the relevant diocesan service's management have formulated appropriate outcomes; the investigations manager will advise the respondent in writing, of:

- the finding for each of the definitive allegations that were put to the respondent;
- determination whether a notification will be made to the Children's Guardian and under which category; and
- any personal outcomes determined by the relevant Diocesan service, (e.g. mandatory training, increased supervision, the commencement of disciplinary proceedings against the respondent, etc.).

Where the investigation findings will result in a notification to the Office of the Children's Guardian (refer **section 12.1**) or there are adverse personal outcomes (refer **section 10.11**), the respondent is afforded 14 days in which to respond after being advised of the findings. If there is no response at the end of 14 days, the respondent should receive a second piece of formal advice and given a further 7 days in which to respond.

However, where the respondent continues to be the subject of temporary safety measures where they are suspended from or otherwise relieved of normative duties and continues to receive their normal remuneration from the Diocese; the respondent should be advised that they have 5 working days in which to respond. Should no response be received, the respondent should be afforded a further 5 working days.

The investigator will facilitate a meeting with the respondent or nominated representative to respond to any adverse findings, notifications or outcomes.

Any request by the respondent for an extension on the available time in which to respond should be considered favourably by the investigator.

## **7.5 Timeliness: Establishing Reasonable Benchmarks for Conducting Investigations**

Whilst there are uniform procedures for conducting an investigation, each investigation is unique, making a set of specific timeframes inappropriate. Further, the appropriate thoroughness of an investigation will not be compromised for the sake of expedience. However, investigators should recognise that investigations can cause disruption to a workplace or team and that there is both a professional and economic imperative to expedite the process.

The NSW Ombudsman sets one specific temporal benchmark: reportable conduct matters must be reported to the Ombudsman within 30 days.

As part of planning the investigation, the investigator should establish a **timeline** for the investigation that reflects the complexities of an investigation. The investigation timeline should be developed in conjunction with the relevant Diocesan service and provides it with a benchmark to judge the progress of an investigation.

If there are any significant variations on the investigation timeline, the investigator will advise the relevant Diocesan service and provide a rationale or explanation for the variance. The investigator will also advise the investigations manager.

In general terms, it is reasonable to expect that investigations that are of a less serious nature will be completed within 6 weeks of the allegation being received.

For investigations that are of a serious nature and where there are no statutory investigations or court proceeding occurring, it is reasonable to expect investigations to be completed within 90 days of the allegation being received by PaRT, (as distinct from the allegation being known by within the Diocesan service).

For investigations that are of a serious nature where criminal or other statutory investigations are being conducted, the timeline is dependent on the statutory authority conducting their own investigation. These matters may also be subject to the Ombudsman's

monitoring. Timelines may also be affected by a delay in a statutory authority determining whether a matter will be the subject of investigation by them.

As noted in **section 11.1**, the investigator will advise the NSW Ombudsman as to the progress of investigation every 4 weeks, unless subject to an alternate arrangements under s.25E.

## 7.6 Rights of Appeal

Where the investigation does not result in a notification to the Office of Children’s Guardian and there are no adverse personal outcomes for the respondent, there are no rights of appeal.

The respondent does have the right to appeal any adverse finding or adverse personal outcomes. The respondent’s rights of appeal commence once the investigation is completed.

Where the investigation is reportable to the NSW Ombudsman, the respondent is advised to await the Ombudsman’s formal advice that they have finalised their review and closed the matter.

### 7.6.1 Internal Right of Appeal

The respondent may choose to undertake an internal right of appeal prior to seeking an external review, e.g. the NSW Civil and Administrative Tribunal (NCAT). Undertaking an internal review process has no effect on the respondent’s rights to pursue an external review. However, if an external review has already occurred, the internal right of appeal is no longer appropriate.

The respondent may lodge an appeal with the leader of the relevant Diocesan service to whom the respondent relates:

For CSO or Catholic systemic schools: the Director of Catholic Schools

For CatholicCare: the Director of CatholicCare

For members of the Chancery and parish employees: the Chancellor

For clerics, religious and deacons: the Bishop of Maitland-Newcastle

The respondent will need to demonstrate a reasonable basis for the appeal, which should identify:

- a failure to ensure procedural fairness or address conflicts of interest;
- errors in investigative procedures, including errors in the application of the rules of evidence; or
- previously unavailable exculpatory evidence.

The leader of the relevant Diocesan service may reject an appeal that is without merit, i.e. the respondent fails to offer any reasonable basis for the appeal.

Appeals will not be accepted more than 30 days after the investigation was completed, except in exceptional circumstances, which includes the respondent having been indisposed during the requisite period due to illness or other circumstances.

For any internal appeal processes (i.e. those undertaken within the Diocese), there will be no costs incurred by the respondent for access to Diocesan personnel or records. Further, Diocesan facilities may be made available to the respondent gratis, to assist in preparing an appeal.

To commence the appeal process, the leader for the relevant Diocesan service will appoint an appropriately qualified person to conduct an impartial review of the investigation. The investigation record will be made available to the reviewer. The investigator and investigations manager will make themselves available for interview, as required.

The review cannot be completed without giving the investigations manager an opportunity to address the basis of the appeal.

When an appeal relates to outcomes affecting the respondent's working conditions, the reviewer will consult with the human resources team for the relevant Diocesan service.

The reviewer will complete a report and submit it to the relevant Diocesan leader with appropriate recommendations as to the respondent's appeal. The relevant Diocesan leader will make a determination and formally advise both the respondent and investigations manager. If the matter is reportable to the NSW Ombudsman, all review documentation will be submitted to the Ombudsman on completion.

Dependent on whether the leader's determination involves variation of one or more investigative findings, they may direct that a submission be prepared for the Children's Guardian to request a review of the investigation's original notification (if applicable).

### **7.6.2 External Rights of Appeal**

Under the Child Protection (Working with Children) Act 2012, the Children's Guardian has the responsibility for imposing interim or final bars to child-related employment and adverse decisions may be appealed to the NCAT. Information relating to the process of imposing interim or final bars may be accessed at the Children's Guardian website:

<http://www.kids.nsw.gov.au/Working-with-children/New-Working-With-Children-Check/Publications-and-resources>

Section 47 of the Child Protection (Working with Children) Act 2012 *Relationship with other Acts and laws* states:

1. *A prohibition on employment under this Act prevails to the extent of any inconsistency between it and any other Act or law.*

2. *The Industrial Relations Commission or any other court or tribunal does not have jurisdiction under any Act or law to order the re-instatement or re-employment of a person or worker contrary to a prohibition on employment imposed by this Act, or to order the payment of damages or compensation for any removal from employment of a person from employment prohibited under this Act.*

Section 245 Children and Young Persons (Care and Protection) Act 1998 sets out a range of decisions that are reviewable by the NCAT. Authorised carers or other interested parties are able to appeal a number of possible outcomes from an investigation or temporary safety measures, including:

- any revocation or variation of a carer's authorisation including any additional conditions on a carer's authorisation; and
- any changes to the placement or 'daily care and control' of a child in out-of-home care who has been placed with the carer.

A determination by the NCAT is binding to the designated agency and has the capacity to overturn investigation outcomes.

The respondent will be liable for those opportunity costs inherent in pursuing a course of action (e.g. the respondent's own time, any decision by the respondent to engage external counsel etc.). In limited circumstances of particular financial hardship, the respondent may request the Diocese to provide additional financial support. Any such support will be made at the discretion of the leader of the relevant Diocesan service.

All records generated from an appeals process will form part of the investigation record.

Under canon law clerics and religious have the right to appeal outcomes that affect their ministry. This appeal process is beyond the appeals process described in this section of the policy.

## **7.7 Complaints**

Any party involved in an investigation has the capacity to make a complaint as to the conduct of the investigation or behaviour of the investigator or other members of the Diocese.

Complaints may be made to the investigations manager verbally or in writing. Anonymous complaints will be accepted. Self-evidently, the anonymous complainant will not receive any feedback as to the outcome of their complaint.

If the complaint relates to a person associated with a Diocesan service other than PaRT, the Unit's Manager will refer it to the leader of the relevant Diocesan service for resolution.

Any person involved in a reportable conduct investigation is able to complain to the NSW Ombudsman in relation to the investigation. This includes the respondent making a

complaint in regards the conduct of the investigation, the investigation's findings or the conduct of an appeals process. The Ombudsman's guidelines define a broad scope as a basis for complaint:

*The Ombudsman may also receive complaints about the handling of a matter that has been notified or that may be notifiable under the Act. A complaint may be from a child who has made a reportable allegation against an employee, a parent or their representative, by an employee who is the subject of a reportable allegation, or any other person with an interest in a relevant matter. A complaint may also relate to systemic problems within an agency.*

Child Protection in the Workplace (2004), p.61

As a designated agency, CatholicCare is subject to the Community Services (Complaints Reviews and Monitoring) Act 1998 (CS-CRAMA). Section 22 allows for complaints to the Ombudsman in relation to CatholicCare's:

*"provision, failure to provide, withdrawal, variation or administration of a community service in respect of a particular person or group of persons."*

Part 5 of CS-CRAMA details the scope and process for appealing administrative decisions to the NCAT.

All records generated by a complaints procedure or tribunal ruling will form part of the investigation record.

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## 8. CONFLICTS OF INTEREST

Conflict of interest refers to situations where a conflict arises between public or professional duty and private interest. This conflict could influence the performance of official duties and responsibilities. Such conflict generally involves opposing principles or incompatible wishes or needs.

The issue of conflict of interests was considered in a NSW Supreme Court judgment [(1971) 1 NSWLR 879] in which Justice Street said:

*The Courts have always looked askance upon situations in which a [person] occupying a position of trust engages in activities involving a potentiality of serving interests other than those which his [or her] position requires him [or her] to serve. ...[situations where a conflict arises between duty and self-interest are] fraught with the risk that human frailty will prove unequal to the resolution of the moral issues involved in the conflict.*

The judgment assumes a view that humans are fundamentally driven by self-interest and therefore our adherence to duty and responsibility should not be pitted against our own best interests.

Conflicts of interests can be:

- Actual:** conflicts of interests involving direct conflict between your current duties and responsibilities and existing private interests; or
- Reasonably perceived:** conflicts of interests existing where a person (the ‘reasonable person’) could perceive that your private interests are or are likely to improperly influence the performance of your duties — whether or not this is in fact the case.

### 8.1 Assessing the Significance of a Conflict of Interest

The NSW Ombudsman identifies a number of criteria for identifying the presence and significance of conflicts of interest. Applying these to Diocesan investigations, they include:

- the nature and significance of a relationship between an investigator or investigations manager and the respondent, alleged victim or members of their families;
- the potential for the investigator or investigations manager to benefit from particular findings;
- the seriousness of the investigation being conducted;
- the potential for the conflict of interest to affect the investigation’s findings or outcomes;
- the potential for a perception of bias or inappropriateness;

- the presence of personal or professional biases which may adversely affect the investigator or investigations manager's ability to fulfil their duties in the process;
- the views and experience of the investigator in or investigations manager in appropriately managing previous conflicts of interest;
- awareness of the investigator to issues of conflict of interest (particularly whether the investigator was the person who identified and alerted the investigations manager to the conflict of interest); and
- the views of the respondent, alleged victim and their families.

The seniority of the position held by the respondent within the Diocese is a major factor in determining the seriousness of an investigation. It is also significant when considering conflicts of interest. The more senior the position held by the respondent, the more sensitive the investigation must be to any conflicts of interest.

## **8.2 Procedures for Managing a Conflict of Interest during an Investigation**

It is the responsibility of any member of the Diocese who is aware of an investigation occurring, to monitor themselves and others for any conflicts of interest relating to that investigation and address any concerns with the Manager Zimmerman Services immediately.

In assessing an alleged conflict of interest, the manager will ensure all persons identified as being affected by the alleged conflict are consulted, i.e. the person alleged to have the conflict and those who would be significantly affected by such a conflict.

The Manager Zimmerman Services will assess the alleged conflict, make a determination as to whether there is a conflict and prepare a written record of the process, which will include:

- the nature of the alleged conflict of interest;
- the persons with which the alleged conflict was discussed;
- the determination as to whether there was an established conflict of interest; and if so, what resolution was enacted.

The written record will form part of the investigation record.

Possible resolutions to an established conflict of interest may be:

- exclusion of the implicated person(s) from any role in the investigation; or
- a specific process for the enhanced oversight of the investigation or supervision of the investigator or other persons identified as having the conflict of interest.

Where there is an established conflict of interest involving the investigator or investigations manager, an alternative person should be appointed to the role.

Where the alleged conflict of interest involves the Manager Zimmerman Services, the leader of the relevant Diocesan service will assess the alleged conflict of interest.

If any person believes the Manager Zimmerman Services has not addressed an alleged conflict of interest appropriately, it should be reported to the leader of the relevant Diocesan service immediately.

Failure to address a conflict of interest is a serious matter. The investigations manger is able to refer the issue to the relevant Diocesan service for resolution.

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## 9. EVIDENCE

In an investigation the main evidentiary sources available are:

- oral evidence (recollections);
- documentary evidence (records);
- expert evidence (technical advice); and
- site inspection (forensic material).

For Investigations conducted under this policy, the predominant types of evidence are the oral evidence of witnesses and documentary evidence. In some cases, however, forensic and/or expert evidence may need to be obtained.

Evidence may either:

- support the proposition that the allegation occurred;
- be exculpatory and support the proposition that the allegation did not occur; or
- be neutral and support neither proposition.

All evidence must be considered by the investigator as part of their analysis. In a High Court decision [Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) HCA 72; 225 CLR 88], attention was given to the requirement for the decision maker to consider all evidence and allow the affected person an opportunity to address the information:

*‘Credible, relevant and significant’ must therefore be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision. And the decision-maker cannot dismiss information from further consideration unless the information is evidently not credible, not relevant, or of little or no significance to the decision that is to be made. References to information that is ‘credible, relevant and significant’ are not to be understood as depending upon whatever characterisation of the information the decision-maker may later have chosen to apply to the information when expressing reasons for the decision that has been reached.*

**Witness evidence** is the most common form of evidence in PaRT investigations: firsthand accounts of an alleged behaviour or series of behaviours from people who were there to see and/or hear it.

Ideally, witness evidence should be **oral evidence**, i.e. obtained through interview, allowing the investigator to follow unexpected leads or other lines of questioning. However all persons involved in an investigation (i.e. respondent, alleged victim(s) and witnesses) may choose to make **written statements** rather than undertake an interview.

For matters that are deemed less serious, written statements are the preferred option. In addition, the investigator may also choose to request a written statement for operational reasons (e.g. a witness has relocated outside the Diocese).

**Hearsay evidence** may be considered, particularly where witness evidence is absent or lacking. However, any hearsay evidence must be treated with great caution and assigned a very low probative value. The NSW Ombudsman identifies a partial exception to this rule, evidence from a third party who witnessed the respondent making admissions to their alleged conduct. The Ombudsman notes:

*The reason for this lies in an assumption that people don't tend to make damaging confessions against their self-interest. Therefore, any damaging confession is inherently (more) likely to be true.*

Investigating Complaints (2004), p.39

The use of **expert evidence** requires care and the application of expert opinion should be tightly restricted to the witness' field of expertise. There also needs to be due diligence by the investigator to ensure that the witness is 'expert' and in good standing with their relevant professional body or peers. Expert opinion may be useful in determining probability or assigning probative value to one or more witnesses' evidence or placing alleged behaviour of one or more persons in context. The mental health of a witness (including the respondent or alleged victim) may have a bearing on the probative value of their evidence.

Much expert evidence is classifiable as **circumstantial evidence**: evidence that supports the proposition an alleged behaviour occurred or did not occur via the indirect application of a logical sequence or conclusion. Examples of circumstantial evidence include:

- prior pattern, where the respondent's personnel records document past instances similar to the alleged conduct under investigation); and
- witness statements that place the respondent and alleged victim both at the location of the alleged conduct at the same time.

## 9.1 Rules of Evidence (Probative Value)

Not all evidence is of equal value and the investigator will give evidence more or less 'weight' when conducting the analysis and recommending one or more findings.

There are some initial presumptions, which are then tested by the investigator's more sophisticated analysis of the evidence. For example:

- witness statements, including those of the alleged victim(s) and respondent, have greater probative value than expert opinion or hearsay evidence; and
- direct evidence has greater probative value than circumstantial evidence.

Some evidence will be stronger than other evidence because it demonstrates greater **reliability**. It is important for the investigator to ascertain whether there is any knowledge of hidden agendas, conflicts of interest or other secondary motivations that would cast doubt or concern as to the veracity of one or more witness statements. This is also known as testing the **credibility** of a witness.

If a witness has an established prior history of having made false statements or conducting themselves in such a manner as to be deemed unreliable, (i.e. the matter recorded as a formal disciplinary proceeding or other substantively tested fact), such prior behaviour would need to be considered.

Equally, if the investigator formed the opinion that a witness was affected by a psychotropic substance, issues of mental health, or some other issue that could adversely affect the witness's ability to recall events factually or misinterpret objective reality, the investigator would be required to consider some diminution of probative value. The use of expert evidence to these considerations may be of significant value.

Evidence must be **relevant** to the allegations being decided. This means that it should relate to events, observations and material regarding the allegation. This is particularly important when assessing the probative value of circumstantial evidence. For example, it would be difficult to demonstrate relevance that a respondent was suffering financial difficulties if they were alleged to have sexually assaulted a child. It may be highly relevant if the respondent was alleged to have misappropriated a child's financial assets.

Other circumstantial evidence such as the member of the Diocese's reputation, marital status and past good conduct may be peripherally relevant to whether a particular event or allegation is true. As noted earlier, evidence of prior conduct may be relevant provided it is very similar to the conduct currently being decided and it is arguable that the evidence goes to prior pattern.

Evidence from a witness is given more weight if it is 'internally consistent' and if it is **consistent** with the evidence of other witnesses. The investigator should examine the account given by each witness. That is, is each account logical and plausible or are there discrepancies or inconsistencies that cannot be reasonably explained, that defy common sense or that conflict with other reliable evidence?

A minor variation in evidence between witnesses is normal and does not mean that a witness is not telling the truth or is not credible. The investigator is required to account for the effects of observational bias, i.e. the witness's position in relation to an incident determines what they witness, which may be more or less of the entire reality of the incident. This is a well-known effect in accident investigations.

However, major inconsistencies in evidence, particular internal inconsistencies within a witness's statement, may indicate a serious flaw in the evidence. Generally speaking, the more consistent the evidence, the more weight it should be given to prove or disprove an allegation.

Special care needs to be given when analysing children's evidence. Children's accounts may vary from child to child in the peripheral details provided, whilst remaining consistent regarding the core or central event.

Evidence that supports other evidence provides **corroboration**. A lot of corroborative evidence is circumstantial in nature. Where the evidence is contradictory and there is a lack of or absence of corroboration, the evidence may be of lesser probative value. Corroboration can include:

- physical injuries that are consistent with an allegation or absence of injuries that are consistent with the denial of the respondent;
- evidence from witnesses about matters such as the condition and conduct of the alleged victim(s) or respondent;
- concerns raised or complaints made by the alleged victim(s) following the alleged incident; and
- any 'admissions' made by the respondent.

The more recent an event, the more likely that the evidence of that event will be detailed and accurate. A person's memory fades with time. The more recently a witness saw or heard an event, the more likely the details will be accurately recalled and may be corroborated from other sources. The **contemporaneity** of a person's evidence needs to be considered when assessing its probative value.

## 9.2 Contamination of Evidence or Collusion Between Witnesses

Investigators will use all reasonable endeavours to reduce the risk of contamination of evidence or collusion between witnesses (including the respondent or alleged victims) by:

- interviews of witnesses being conducted individually, i.e. only one witness at a time will be present (a witness cannot be another witness's support person);
- directions from the investigator that the witness prepares their written statement alone, without the assistance of another witness; and
- directions from the investigator that witnesses must not discuss their evidence with other witnesses until the investigation is completed, this is also reinforced in terms of confidentiality (refer **section 6.7**).

When investigating a matter which involves a number of witnesses (particularly child witnesses) who have an identifiable point of commonality (e.g. attending the same school), investigators should use all reasonable efforts to interview the witnesses within as short a timeframe as possible. For example, if a teacher is the respondent and there are three or four students who are identified as possible witnesses, the investigator should arrange (as much as possible) to interview the students one after the other on the same day.

Any indication that there is contamination of evidence will have a significant deleterious effect on the probative value of that evidence.

Any collusion between witnesses is a serious matter. The investigations manager is able to refer the issue to the relevant Diocesan service for resolution (refer **section 6.4**).

### 9.3 Investigative Interviews

All investigative interviews conducted by PaRT should include a standardised introduction. This is of particular importance when the investigation relates to a serious matter. The introduction will include the following elements:

- the start time, date and place the interview is being conducted;
- note if the interview is being conducted electronically (e.g. telephone, web-cam etc.), rather than face-to-face;
- identification of themselves as the interviewer by name and role;
- identification of who the interviewee is including name, date of birth, work address/location and what their role is in the Diocese (e.g. authorised care, teacher etc.);
- identification of whom else is present in the interview and their function (e.g. scribe, support person, parent etc.);
- the purpose of the interview;
- confirmation that the interviewee is participating voluntarily and is aware that they may choose not to participate or cease participating at any time during the interview;
- confirmation that the interviewee is aware that the informational content of their interview, not their identity, may be made available to the respondent;
- confirmation that all parties are aware and agree to the interview being either electronically recorded or manually transcribed;
- confirmation that all parties understand and agree to maintaining strict confidentiality about the investigation and the interview; and
- that any disclosures of a criminal nature will be reported to the NSW Police and may lead to a prosecution of the persons involved.

The introduction will be expressed in a way that is developmentally and circumstantially appropriate for the interviewee. It should be made as a combination of statement and questions, confirming the principle elements of the introduction with the interviewee, particularly in regards to informed consent (where appropriate).

Prior to **interviewing children**, investigators must obtain written permission from the parent, guardian, statutory authority or agency with parental responsibility for the child. For children who are developmentally approaching adulthood, the investigator should make appropriate provisions for increasing levels of autonomous decision-making.

Unless there is a specific reason to exclude a child's parent or guardian, the investigator should promote the option of them being a part of their child's interview.

Where the child is a witness to an alleged behaviour that related to a Diocesan school, the investigators should use all reasonable endeavours to interview child witness at home or, at least, away from the school environment. This reduces any environmental drivers that could affect the child witness' evidence.

When there is more than one child witness, the investigator should use all reasonable endeavours to interview them sequentially, with as little time between interviews as possible, in order to reduce the risk of the child witnesses contaminating each other's evidence.

A parent or guardian may refuse to have a child interviewed or the child may choose not to be interviewed. If this occurs, the investigator may attempt to negotiate obtaining a written statement. If the parent/guardian determines that the child will not participate in the investigation, the investigator should attempt to obtain a written record of the person's decision.

Interviewing children is a specialised skill and should not be undertaken by an investigator if unskilled. Asking children leading questions will significantly reduce the probative value of the child's evidence.

The investigator will undertake all reasonable endeavours to avoid repeated interviews of children. If a child has already been interviewed by a statutory authority in relation to the matter, the investigator will apply for the transcript under Chapter 16A, Children and Young Persons (Care and Protection) Act 1998. If the investigator is unable to obtain the relevant transcript, the matter will be reviewed with the investigations manager.

If an interviewee has a support person (refer **section 6.3**) with them, the support person should be advised that their role is largely passive observation and supporting the respondent by their presence. The support person should not assist the interviewee in responding to the investigator's questions or respond on their behalf.

The support person is able to request a break in the interview if they observe the interviewee is becoming distressed or otherwise adversely affected.

## 9.4 Evidentiary Records

An **interview transcript** is produced either by a scribe at the time of interview or produced from a transcription of an electronic record.

Members of PaRT do not make electronic recordings of the interview to evidentiary standards but rather as a way of allowing the information in the interview to be captured and later transcribed.

The written transcript is the record of interview.

All interview transcripts involving adults should be signed by the interviewee.

Children should be asked to sign their interview transcripts if they are of an age and capacity to understand the significance of what they are signing and with their parent's or guardian's consent.

When the investigation relates to a serious matter each page of the transcript should be signed by the interviewee and then countersigned by a witness, ideally a Justice of the Peace (JP). At the end of the transcript the day, date and place of the transcript being signed should be recorded, along with the JP's registration number.

A copy of the signed transcript will be provided to the interviewee or their parent/guardian. If the witness chooses not to have a copy, this decision needs to be recorded and form part of the investigation record. It is good practice for the investigator to include a question in interview asking the witness whether they wish to have a copy of the interview transcript.

Handwritten records of interview are appropriate if written in a legible manner.

When a transcript is produced at the time of the interview and the interviewee is asked to review and sign the transcript at that time, it is good practice for the investigator to include an adoption page. This confirms the interviewee signed the transcript in an informed way.

For less serious matters, it may be quicker and easier to obtain a **prepared statement** from witnesses, even the respondent. The investigator is able to assist a witness in writing a prepared statement by providing them with:

- a set of questions to answer;
- a set of guide notes or instructions to assist the witness on how to write an evidentiary statement; or
- a template for the witness to complete.

The witness should identify themselves by name, date of birth, work address (if relevant) and role in the Diocese (e.g. school student, parishioner, teacher etc.). The witness should identify whether they have any relationship with the alleged victim(s) or respondent.

Ideally, the witness should sign each page of their statement, witnessed by a third party. At the end of the statement the day, date and place of the statement being signed should be recorded, along with the third party's details.

The witness should be advised to retain a copy of their statement.

## 9.5 Evidence of the Investigator's Activities

Investigator will maintain adequate records of their activities during the investigation via 'running notes', 'case notes', 'activity logs' or 'file notes'. Irrespective of the methodology used, these documents should include a record of any investigations related to:

- phone calls or other 'live time' electronic communications;
- any face to face meetings or consultations;
- any site inspections or other field activities; and
- key decision-making processes (e.g. rationale for not interviewing a witness).

Maintenance of such records increases the integrity of the investigations records and offers an increased level of professional safety for the investigator. It is evidence of the investigator's activities and may be of importance if the matter is subject to appeal or complaint.

The records should be contemporaneous in nature and contain adequate detail, including the time, date and location, persons involved and the nature of the exchange. Verbatim records of conversation are not required for these records.

All records should be signed and dated at the completion of the entry. The records form part of the investigation record and should be placed on the file as completed.

## 9.6 The Investigation Record

All material relevant to an investigation will be included in the 'investigation record'. Each investigation forms its own file, based on the identity of the respondent. Where there is more than one respondent in the same investigation, the file identification needs to reflect the multiple respondent involved.

The investigation record will reflect the seriousness of the investigation: the more serious the matter, the more comprehensive the records. Wherever possible, the investigation record will retain all original documents.

All investigation records conducted by PaRT, whether reportable, exempt or professional standards will physically remain part of Zimmerman Services' Records and be in the control of Zimmerman Services (e.g. the Manager of Zimmerman Service will make the decisions to allow access to the investigation records).

All records of **exempt investigations** (refer **s.5.4**) that are conducted by the relevant Diocesan service will be submitted to PaRT for review on completion of the investigation. These investigation records will be retained by PaRT, be part of Zimmerman Services' Records and be in the control of Zimmerman Services.

Zimmerman Services' investigation records are subject to the audit of the NSW Ombudsman upon request.

All records of professional conduct investigations conducted internally by the relevant Diocesan service will remain the responsibility of the relevant Diocesan service. These records are not automatically subject to the audit of the NSW Ombudsman.

Where relevant to the investigation, the investigation record should include:

- a copy of the original allegation or material that formed the basis for the investigation;
- the determination by PaRT that the allegation fell within the ambit of Part 3A, Ombudsman Act 1974;

- copies of any notifications or reports made to other statutory authorities regarding the allegations (e.g. Helpline ROSH report or complaint to Police);
- the Ombudsman notification form, Parts (A) and (B);
- an investigation plan;
- an investigation report;
- records of the investigator's activities;
- records of the evidence gathered in the course of the investigation (including the respondent's responses to the allegations);
- any response from the respondent to the investigation manager's findings;
- copies of any correspondence sent or received relevant to the investigation (inclusive of e-mails);
- copies of any judicial or tribunal rulings relevant to the matter (e.g. an NCAT ruling that a child in care will remain with an authorised carer); and
- copies of any media coverage or articles relevant to the matter.

Construction and security of the investigation record is the responsibility of the investigator, prior to the investigation record being submitted to the investigation manager.

The investigation record is the Diocese' only legitimate record of an investigation and is subject to the Ombudsman's requirements pertaining to records:

*These records need to be treated as highly confidential, kept securely and must be kept permanently. Records relating to information concerning allegations against an employee should be kept on a file separate to the employee's personnel file.*

Child Protection in the Workplace (2004), p.100

Under clause 24(3), Child Protection (Working with Children) Regulation 2013:

*Records of allegations, investigations and findings concerning the subject of any such notification must be kept by the reporting body or any successor of that body for not less than 30 years, unless the records are given to the Children's Guardian.*

Once an investigation is complete and the investigation record has become part of Zimmerman Services' Records, access to an investigation record will require the approval of the Manager Zimmerman Services. Any person accessing an investigation record should record their activity in the investigation record's access log that records the person's identity, date of access and rationale for access.

Investigation records will be constructed in reverse chronological order, i.e. those documents obtained at the beginning of an investigation are at the end of the file, with the latest documents generated or received being at the beginning of the file.

The investigation record should not have multiple copies of the same document or material included in it. For example, e-mails are often sent in 'reply' to a previous e-mail, forming e-

mail 'chains'. It is the investigator's responsibility to ensure that only the final or complete-mail chain is placed on the investigation record, not repetitious 'stages' of the same chain.

The investigation record must be compiled and appropriately bound in arch-level folder(s) or equivalent.

When the investigation record is prepared for submission to the investigations manager for determination of findings, the investigation record will be paginated, from back (page 1) to front (page 1+X).

All ***electronic material relevant to the investigation*** (inclusive of copies of word documents, pdf files, e-mails, digital recordings of interviews) should be named according to established protocols for Zimmerman Services.

As part of finalising the investigation records (to be submitted to the investigations manager), the investigator will place a complete copy of all electronic records relating to the investigation onto the secure PaRT server.

Once the investigation record has been finalised, the investigator will delete all electronic copies of the investigation record from the local drives of their desktop or laptop computer, any 'jump drives' or other media for data storage or transfer.

As noted in ***section 6.8***, the Diocese is subject to the Privacy Act 1988 and National Privacy Principles. There is also s.34(1) of the Ombudsman Act 1974. Investigation records and the information contained therein are deemed private and all parties are entitled to the protections given them.

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## 10. INVESTIGATIVE PROCEDURES

### 10.1 Inquisitorial Process

The inquisitorial process is a historically laden term, particularly in the Catholic Church. Derived from Canon Law it is simply a process attempting to elicit the truth. Unlike the adversarial process, where the decision maker is passive in the gathering of evidence; the inquisitorial process requires that the decision maker actively seeks out all available evidence.

The pursuit of evidence must be impartial; the 'inquisitor' has no interest in 'proving' or 'disproving' a particular allegation. The intent of the 'inquisitor' is to maximise his/her ability to make as fully an informed decision as is possible. This reduces the burden for both alleged victim(s) and respondent from having to gather and present evidence. However, either party are still able to actively pursue and provide evidence, if they so wish.

There is an expectation that **objective fairness** forms part of the inquisitorial process, evidenced by the separation of roles between the investigator and that of the reviewer or decision maker (i.e. investigations manager).

Investigations conducted under this policy will apply an inquisitorial process. The investigator is an agent of the Head of Agency. The Unit conducts a process of inquiry by:

- gathering evidence, i.e. relevant available facts that pertain to the allegation(s); and
- testing the probative value of the evidence by application of the rules of evidence.

The investigator will reach a **finding based on the available evidence**. If one or more persons involved in the investigation (up to and including the respondent) choose not to give evidence, or fail to do so; the lack of their evidence will not dissuade the investigations manager from making a finding.

### 10.2 Balance of Probabilities

Balance of probabilities is the civil standard or burden of proof for Australia. Derived from common law, it is the standard applied to reach a finding in investigations conducted under this policy.

There are two notable English legal judgments that are used to help define the meaning of 'balance of probabilities' as:

- the evidence available to the investigator indicates that it is 'more probable than not' that the allegation occurred, (*Miller v Minister of Pensions*, 1947); and
- Lord Simon of Glaisdale defined the standard as requiring the 'satisfaction' of odds at least a 51 % to 49% that the allegation occurred (*Davies v Taylor* 1974).

The key Australian judgment in the matter stems from the High Court, [*Briginshaw v Briginshaw* (1938) 60 CLR 336] in which Justice Dixon wrote:

*...Fortunately, however, 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. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

The Briginshaw test requires that investigators 'proceed with caution' commensurate with the seriousness of the allegations and potential consequences to the respondent. The Ombudsman notes:

*Investigators must be careful to ensure that they do not reduce the standard of proof dictated by the test in Briginshaw by erroneously taking into account extraneous considerations. This can sometimes be a difficult task, e.g. where considerations such as the safety and protection of children are at stake. In this situation an agency's duty of care owed to the children using its services does not operate to reduce the standard of proof which must be satisfied to prove the allegations.*

Investigating Complaints (2004), p.63

### **10.3 Applying an Investigative Standard Commensurate with the Seriousness of the Matter**

Not all investigations are of equal seriousness. The Ombudsman notes that:

*The level of an agency investigation should be in keeping with the apparent seriousness of the allegation. The Ombudsman does not expect an extensive investigation of an allegation of a low risk matter.*

Child Protection in the Workplace (2004), p.67

For the Diocese there are a number of factors that affect the level of risk related to an investigation and thus its relative 'seriousness', which may be broken down into four categories:

1. the nature of the allegation(s);
2. the role of respondent;
3. prior allegations or concerns relating to the respondent; and
4. relevant tertiary considerations.

If child protection concerns are seen as a continuum, an allegation of child sexual assault is significantly more serious than an allegation of a teacher using force that is trivial and negligible in disciplining a student.

Any allegation that involves criminality, a potential for criminality or sexual misconduct, should be considered serious. The seriousness of an investigation is also indicated by the possible seriousness of outcomes, should there be a sustained finding. Where there appears to be a reasonable possibility that the respondent's employment conditions may be altered as a consequence of the investigation, it should be considered serious.

The role of the respondent in the Diocese is a key consideration. An investigation is considered more serious when the respondent:

- is in a supervisory role, particularly if the respondent is in senior management;
- has 'whole of life' care of the alleged victim, such as an authorised carer; or
- is a priest incardinated to the Diocese, a religious stationed within the Diocese or an ordained deacon.

If the respondent has been the subject of one or more previous allegations, whether sustained or not, the matter should be treated as being serious. Further, if the respondent's relationship with the relevant Diocesan service is under duress (e.g. there are current unrelated disciplinary proceedings or grievances), the matter must be treated as being 'serious'.

The Diocese, indeed the whole Catholic Church, is struggling with the consequences of past child sexual assaults. The Diocese must be sensitive to a heightened level of expectation and possible negative preconceptions held by some persons. The potential for, or presence of relevant tertiary considerations may include:

- media interest or other means of information pertaining to the investigation (in whole or part) being leaked into the public arena;
- the interest or involvement of a significant external party (e.g. a solicitor acting for one of the parties or a local member advocating on behalf of a constituent); and
- any alleged or established conflicts of interest or other alleged irregularities that threaten to undermine confidence in the integrity of the investigation process.

The presence of one or more of these factors may indicate that a matter be deemed serious in nature and afforded a higher degree of rigour than the allegations alone would warrant.

The investigator's assessment of risk would also be a consideration in assessing the relative seriousness of the matter.

The determination as to the seriousness of a matter is a professional judgment that should be made in consultation between the investigator and investigations manager.

## 10.4 Investigations Conducted Internally by the Relevant Diocesan Service

For exempt matters and professional standards complaints, the relevant Diocesan service may choose to undertake an investigation internally, i.e. appoint personnel from the relevant Diocesan service to conduct the investigation (e.g. a member of the Human Resources team).

If the relevant Diocesan service chooses to undertake the investigation internally, the service should ensure that the investigative process abides by the standards set out in this policy, including but not limited to:

- (a) appointing a person with adequate capacity to undertake the investigation in a competent manner;
- (b) ensuring that the service fulfils its obligations under duty of care, including the management of any risks;
- (c) conducting a process that is inquisitorial and based on the civil standard of balance of probabilities;
- (d) ensuring that the investigation is dealt with in a confidential manner and all persons involved in the investigation, particularly the respondent, are afforded appropriate levels of privacy;
- (e) ensuring that all persons involved in the investigation, particularly the respondent, are afforded procedural fairness;
- (f) ensuring that the integrity of the investigation is protected, including addressing any identified conflicts of interest;
- (g) ensuring that there is a recommendation made as to whether each allegation is sustained or not sustained or, in rare circumstances, that the investigator is unable to make a finding; and
- (h) ensuring that adequate investigation records are made and stored appropriately (refer **section 9.6**).

For exempt matters, a member of PaRT will oversight the internal investigation, given that the matter is conducted under Part 3A of the Ombudsman Act.

All records of exempt investigations will be submitted to PaRT, on completion of the investigation, given that the records are subject to audit by the NSW Ombudsman and must be made available upon request.

For exempt matters, the member of PaRT will review the investigation record and, in consultation with the appointed person from the relevant Diocesan service, make the appropriate finding for each allegation addressed in the investigation, (refer **section 10.9**).

The relevant Diocesan service may ask a member of PaRT to provide assistance in the investigation of professional standards complaints. To do so requires that the relevant Diocesan service and PaRT establish a terms of reference, setting out the scope of the investigation to be undertaken.

## 10.5 Planning the Investigation

Investigations conducted under this policy should be a carefully considered process guided by a clear, documented plan that has been the product of appropriate consultation. The thoroughness of the planning process should reflect the assessed seriousness of the investigation.

The investigation plan will be documented and may include:

- detail the scope of the investigation and the main facts in issue;
- a brief of evidence (alleged victims, respondent, witnesses, documentation etc.), including whose permissions are required to access the evidence or what evidence (if any) is excluded and why;
- the roles and responsibilities of key persons involved in the investigation, including the investigator, relevant Diocesan service any external agencies or statutory authorities;
- a risk assessment of the investigation, (including any agreed temporary safety measures);
- a timeline estimating key milestones for conducting and completing the investigation; and
- a schedule for communication between investigator and the relevant Diocesan service (e.g. providing updates on progress into the investigation).

The investigator should complete the investigation plan within 10 working days of being allocated the investigation. Where there are delays in the investigation proceeding, e.g. a Police investigation occurring, a draft plan will be developed and finalised when the investigator is able to proceed.

Where an investigation is deemed serious, the investigator will ensure that the investigation plan is endorsed by the investigations manager. For less serious matters, the investigator will use their professional judgment as to whether they seek managerial endorsement prior to implementing the plan.

The investigator will undertake a **pre-investigation consultation** with the relevant Diocesan service. Depending on the seriousness of the investigation, the consultation may involve senior management or the relevant supervisors and local management team for the programme or workplace where the respondent is stationed. The more serious the investigation, the more senior the management involved. For less serious matters, the pre-investigation consultation may only involve the relevant supervisors or worksite management (e.g. the Principal of the relevant school where the respondent is stationed).

The pre-investigation consultation is a process that should include at least one face-to-face meeting, unless the worksite is more than 1 hour's drive from the investigator's normal place of work. In such circumstances, both parties may agree that a teleconference or other form of electronic conferencing may be appropriate.

The pre-investigation consultation is designed to:

- ensure that the relevant Diocesan service provides full disclosure of all relevant information relating to the investigation;
- establish an estimated investigation timeline and a schedule for providing update/progress reports;
- establish a contact or liaison person from the relevant Diocesan service to work with the investigator as their primary point of contact;
- identify other persons within the relevant Diocesan service who will be involved, their roles and responsibilities in the investigation and what information will be shared with whom; and
- ensure that the initial risk assessment is reviewed, endorsed and any temporary safety measures are implemented by supervisors or senior management of the relevant Diocesan service.

## 10.6 Assessment of ‘Unacceptable Risk’

The definitive High Court ruling which underpins risk management principles in matters relating to child sexual assault is a Family Court appeal, *M v M* (1988) and the ‘unacceptable risk’ test. The ruling states, in part:

*Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a "risk of serious harm" .... "an element of risk" or "an appreciable risk" .... "a real possibility" .... a "real risk" .... and an "unacceptable risk" .... This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.*

Whilst the High Court ruled on an appeal from a father denied access, *M v M* is applicable to the management of risk in civil investigative processes. The tension between ensuring due process for the respondent is counterbalanced by the Diocese's appropriate consideration of whether the person remaining in their current role may pose an unacceptable risk to a child or class of children.

The ruling also argues against a pre-emptive requirement for a respondent to stand aside from ministry or be removed from their normative functions; rather, it is necessary to assess and identify an unacceptable risk prior to acting. Nevertheless, the ruling is equally clear that the best interests of the child are paramount.

In ensuring that an appropriately detailed assessment of risk occurs, it is the investigator's responsibility to undertake a formal risk assessment process as part of the investigation planning process. The investigator will consider five key areas of risk:

- 10.6.1 any children involved in the investigation (as victims or witnesses);
- 10.6.2 the respondent;
- 10.6.3 other employees;
- 10.6.4 the Diocese; and
- 10.6.5 the integrity of the investigation.

The investigator will analyse potential risk applying the Standards Australia-International Organization for Standardization (ISO) standards for risk management:

*Risk analysis involves consideration of the causes and sources of risk, their positive and negative consequences, and the likelihood that those consequences can occur. Factors that affect consequences and likelihood should be identified. Risk is analysed by determining consequences and their likelihood, and other attributes of the risk. An event can have multiple consequences and can affect multiple objectives. Existing controls and their effectiveness and efficiency should also be taken into account.*

AS/NZS ISO 31000:2009, (p.18)

### **10.6.1 Children**

The safety, welfare and wellbeing of children is the paramount concern of the Diocese of Maitland-Newcastle. The investigator will undertake a detailed review of potential risks to all children involved in the investigation, particularly alleged victims but also witnesses and other child service users. This will be done in conjunction with the relevant Diocesan service (CatholicCare or CSO). Some of the issues that should be considered include:

- potential for a recurrence of the alleged conduct or alternative abusive behaviour which correlates with respondent's level of access to and responsibility for the care of the alleged victim(s);
- inherent and situational vulnerabilities of the children involved, e.g. are the children young and dependent, are there any children with special needs, are they placed in an isolated care setting, what added safeties can be placed around the children in their current situation;
- possible disruption to the child's care or routine, e.g. disruption to a student's schooling;
- the alleged victim being adversely affected by the investigation process (e.g. vicarious trauma, systems abuse, being bullied or ostracised by peers or); and
- one or more children being exposed to public scrutiny, ostracised or otherwise adversely affected.

For children unaffected by court orders, their parents or relative carers have primary responsibility for their safety. Investigators will ensure that the parents and carers of

children involved in the investigation are given sufficient information to care for and protect their children.

Where a child is in the parental responsibility of the Minister for Community Services, the investigator will work with the relevant Diocesan service (usually CatholicCare) and ensure that Community Services are kept fully advised of the situation.

The potential for investigations that involve authorised (foster) carers to contribute to the breakdown of a child's out-of-home care placement is of particular concern. Placement breakdown is a major disruption to a child's life and is a major contributor to damage caused to children in out-of-home care. Investigators will work closely with CatholicCare personnel to identify measures to reduce this risk.

### **10.6.2 Respondent**

The investigator needs to consider the risks posed by the respondent and the most significant and immediate question: should the respondent remain in their current position whilst the investigation is occurring? This is a decision taken in conjunction with the senior management of the relevant Diocesan service but is largely influenced by the investigator's assessment. Some of the issues that should be considered include:

- the nature and seriousness of the allegation(s);
- the nature of the position held by the respondent, particularly around issues of access to children and the quality or nature of that access (e.g. as an authorised carer, access to a child placed in your care is constant, unstructured and unsupervised);
- level of supervision/oversight and supports available to the respondent or that may be put into place for the duration of the investigation; and
- the respondent's disciplinary history, including prior allegations and complaints.

The Diocese also has a duty of care to the respondent, as an 'employee' and the risks to the respondent must be considered. There should also be consideration of possible adverse impacts on the respondent's family. Some of the issues to consider include:

- potential for self-harm or other adverse mental health issues;
- harassment or harm from others, including the respondent or their family, being exposed to undue scrutiny from inappropriate sources;
- professional and social isolation of the respondent from workplace peers and associates; and
- being the victim of intentional or accidental breach in confidentiality and perceived or actual harm to the respondent's career including harassment and discrimination.

### **10.6.3 Other Employees**

As an employer, the Diocese has a duty of care to all its employees, not just the respondent. Some of the issues that should be considered include:

- harassment from third parties, including unwanted exposure in the media;
- loss of workplace effectiveness, team cohesion or workplace morale; and
- potential for self-harm or other adverse mental health issues.

#### **10.6.4 The Diocese**

As both church and employer, the Diocese has suffered significant adverse consequences in relation to the mismanagement of allegations of historic abuse. Protection of the Diocese is an important consideration. Some of the issues that should be considered include:

- liability from failure of duty of care to the alleged victim or other children, or employees adversely effected by the allegations or the investigation process;
- the respondent, alleged victims, witnesses or other affected persons and groups being estranged from the Diocese;
- adverse media attention;
- loss of credibility, public standing and respect among the Diocesan faith communities; and
- complaints against the Diocese being sent within church or external regulatory and funding bodies or being presented in the public domain.

#### **10.6.5 Integrity of the Investigation**

The investigations manager has a responsibility to protect the integrity of the investigation. Some of the issues that should be considered include:

- the respondent, associates or allies interfering with witnesses, subverting evidence or constructing false exculpatory evidence;
- delays in the investigation process;
- breaches in confidentiality;
- conflicts of interest affecting the investigator, investigations manager or other key personnel;
- the experience, training and capacity of an investigator to undertake the standard of investigation commensurate with the seriousness of the matter; and
- broadly held loss of confidence in the integrity of the investigation process.

As part of this process, the investigator should also consider whether the altered circumstances equate to a risk of significant harm, reportable to Community Services under s.24 Children and Young Persons (Care and Protection) Act 1998.

#### **10.6.6 Changes to the Level of Risk**

The investigator's initial assessment of risk (undertaken as part of the planning process) is simply that. The investigator has the responsibility to monitor for and assess the significance of any possible changes to risk levels as the investigation proceeds. If the investigator believes there is a significant change to the assessed levels of risk, they should advise the

investigations manager and review current temporary safety measures. This review of assessed risk levels should occur in conjunction with the supervisor of the respondent and management of the relevant Diocesan service if the respondent remains 'on duty' within the service.

At the completion of the investigation a review of unresolved risk issues should occur. It is the investigator and investigation manager's joint responsibility to have identified any unresolved risks and ensure they are included in the post-investigation consultation. Unresolved risks should be addressed through the formulation and implementation of outcomes (refer **section 10.10**).

## 10.7 Temporary Safety Measures Stemming from the Risk Assessment

As part of the planning process, (refer **section 10.5**) the investigator will present the risk assessment to the relevant Diocesan service and discuss what, if any, temporary safety measures should be applied.

The assessed level of risk has no relationship to the findings of the investigation. Equally, any temporary safety measure that is implemented does not support the validation of any allegations against the respondent, nor does the absence of temporary safety measures indicate that the allegations will not be sustained.

Responsibility for the nature and application of temporary safety measures varies depending on the identified risk area. For risks relating to:

- children using Diocesan services – it is the responsibility of the child's parent, guardian or person with parental responsibility to determine any appropriate measures in conjunction with the relevant Diocesan service;
- the respondent or other employees – it is the responsibility of senior management of the relevant Diocesan service in consultation with the investigator and, where appropriate, the investigations manager;
- the Diocese – it may be the responsibility of senior management from the relevant Diocesan service, the investigations manager or, if deemed sufficiently serious, it may be referred to the Bishop of Maitland-Newcastle; and
- the integrity of the investigation – it is the responsibility of the investigator and, where appropriate, the investigations manager.

Children may require temporary safety measures. It is the responsibility of the child's parent or legal guardian to agree to any protective measures that relate to their child. For example, where the alleged victim is a child in care and the respondent is their current authorised carer, the child may require a temporary, alternative out-of-home care placement. However, this will tend to cause significant disruption and may contribute to placement breakdown. Depending on the transfer of case management, this may be a determination of Community Services or CatholicCare.

For temporary safety measures involving the respondent and other employees, there is a tension between the Diocese's motivation to protect children whilst not unreasonably affecting one or more employees or causing disruption to the provision of Diocesan services.

The temporary safety measures available to the Diocese are dependent on the nature of the employee. Nevertheless, whilst the assessment of risk and subsequent translation into appropriate actions is complex, the guiding principle for Diocesan management is that the least intrusive temporary safety measures possible should be applied.

Wherever possible, the respondent and/or their nominated representative should be consulted as to the application and nature of temporary safety measures, including how any such measures will be announced in the respondent's workplace, if such an announcement is necessary.

It is the Bishop's responsibility to determine what measures, if any, should occur with a priest, deacon or acolyte.

Canon 1741§1 cites one of the causes for which a parish priest may be legitimately removed from his parish as *"a manner of acting which brings grave detriment or disturbance to ecclesiastical communion"*.

Section 38.10 of Towards Healing identifies *"taking into account the gravity of the allegations and the risk of harm to others if the allegations are true."*

Clerics may be asked to stand aside from ministry or agree to undertake restricted ministry that does not include ministry to children (particularly in schools) or public ministry (the celebration of mass etc.).

Unless there is a demonstrable need for urgency, the Diocese's Towards Healing consultative panel should provide advice to the Bishop. Further, the cleric should be given an opportunity to respond to the Bishop's intended temporary safety measures, prior to their implementation.

Wage and salaried employees are subject to the relevant terms and conditions of their employment with the Diocese. It is the responsibility of senior management in the relevant Diocesan service to ensure that any temporary safety measures are in accordance with their employment conditions.

In general terms, lay employees may be:

- suspended from duties;
- placed on alternative or restricted duties;
- temporarily reassigned to a different workplace; or
- subject to increased or varied supervisory arrangements in the workplace.

As a rule, the application of temporary safety measures should not affect the employee's remuneration or other entitlements.

The manager of human resources for the relevant Diocesan service must be consulted as part of establishing any temporary safety measures with wage and salaried employees.

## 10.8 Communicating with Parties during the Investigation and Maintaining Appropriate Contact

Clause 6, Ombudsman Regulation 2011 makes the Diocesan bishop head of agency for all relevant Diocesan services. For the purposes of the investigation, the investigations manager operates as the delegate of the head of agency. All communication in relation to an investigation will originate from the investigations manager or the investigator.

Initial contact with the respondent, alleged victims and witnesses in relation to the investigation may be informal and through the local supervisor, as part of the initial response to an allegation or incident.

### 10.8.1 Formal Correspondence

Irrespective of any possible initial contact, there are key pieces of correspondence which the respondent may receive as part of the investigation.

Formal correspondence is prepared by the investigator. Where matters are contentious or there are identified risks to the standing of the investigation, formal correspondence should be signed, or at least countersigned by the investigations manager.

All formal correspondence to the respondent should be sent by registered or express mail or by some other means of postage which allows for tracking the correspondence.

The relevant Diocesan service will be consulted prior to the distribution of any formal correspondence and relevant supervisors and senior management will receive copies of formal correspondence.

**Initial Advice** may be provided to the respondent prior to completion of the preliminary investigations. Initial advice will be given in accordance with the rules of procedural fairness set out in **section 7.1**. Initial advice should provide:

- a classification of the allegations;
- a descriptor of the investigative processes;
- the respondent's right to appoint a nominated representative;
- the investigator's name and contact details;
- support options available to the respondent; and
- a proposed schedule of contact.

If a temporary safety measure has been initiated, the specifics of the measure will be detailed in the initial advice.

**Definitive Allegations Advice** is provided to the respondent after completion of the preliminary investigations and will be done in accordance with the rules of procedural fairness set out in **section 7.2**. This advice provides the detailed allegations to which the respondent is asked to respond.

The respondent will be advised of the different methodologies for responding and the response times for those responses. The respondent will be advised of their rights for a support person.

Where the respondent was not previously aware of the investigation, the initial advice and definitive allegations advice combine to become a single correspondence.

**Closure Advice** is provided to the respondent after all key decisions have been made and will be done in accordance with the rules of procedural fairness set out in **section 7.4**. The closure advice will:

- list the investigation findings for the respondent;
- alert the respondent to any Children’s Guardian notification and its category (if applicable);
- detail any personal outcomes for the respondent;
- inform the respondent that a copy of the investigation record will be submitted to the Ombudsman for review (if applicable);
- inform the respondent about the storage and security of the investigation record; and
- inform the respondent of his/her rights of appeal.

Closure advice will also be provided to the alleged victim(s) or their parents/guardians and, dependent on the outcome, they may receive:

- a general statement as to the investigative process and the rights of privacy afforded all participants;
- the alleged victim(s) protections against retaliation;
- an apology on behalf of the Diocese (if warranted); and
- the option for some follow-up support (counselling or other therapeutic intervention).

### **10.8.2 General Correspondence and Ongoing Contact**

Once the respondent is aware that an investigation is being conducted, the investigator should keep the respondent apprised of the status of the investigation on a regular basis. This is particularly important when the respondent has become aware early on in the investigation as there may be some time elapse before the matter is completed.

The investigator should establish an agreed schedule of contact with the respondent (e.g. a fortnightly phone call). These arrangements should be documented in the investigator’s records. In serious matters, these arrangements should be more formal, i.e. letters, rather

than phone calls, sent to the respondent updating them regarding the investigation's progress.

It is the investigator's intent to establish an appropriate level of transparency so the respondent can develop a sense of safety around process. Ideally, the investigator should ensure that the respondent has an accurate sense of 'where the investigation is going'. For example, it should come as no surprise to the respondent if the investigator is tending to a view that they will recommend to the investigations manager that one or more allegations should be sustained.

The respondent may choose to have this contact made through their nominated representative, if they so wish.

Alleged victims, or parents/guardians (where the alleged victim is a child), may also have an ongoing schedule of contact, dependent on their level of interest and involvement. The investigator will make a determination whether this is required.

A schedule to provide the relevant Diocesan service with updates as to the progress of the investigation should be established as part of the investigation plan.

The investigator should take into account any communication difficulties that the respondent, alleged victim or other witnesses may have. The investigator will take all reasonable steps to ensure that the identified difficulty is addressed (e.g. using interpreter services or preparing correspondence in extra-large font).

During the course of an investigation the investigator is responsible for general correspondence and ongoing contact with the respondent, alleged victims or their parents/guardians and the relevant Diocesan service.

## **10.9 The Investigation Report and Recommending Findings**

Once the investigator has obtained the respondent's response (or lack of) to the definitive allegations, the investigator will review all available evidence and conduct an analysis, based on the rules of evidence.

The investigation report is the documentation of that analysis as well as summarising the investigative process to date.

The complexity and depth of an investigation report reflects the seriousness of the investigation. Nevertheless, all investigation reports should:

1. provide a brief summary of the investigation process, highlighting any issues of significance, (e.g. threats to the integrity of the investigation, explanations for variations from the investigation plan or delays in the process);
2. catalogue the evidence collected to date and what if any evidence was not obtained or excluded from analysis and why;

3. state the 'definitive allegations' that were put to the respondent;
4. identify what evidence was relevant for each individual allegation, whether it was supportive of the allegation or exculpatory in nature and what probative value it was given;
5. make a recommendation, for each definitive allegation, addressing:
  - (a) the nature of the conduct, i.e. reportable conduct or exempt conduct or a breach of professional standards,
  - (b) the category of conduct, and
  - (c) the finding;
6. make recommendations:
  - (d) whether there should be a notification to the Children's Guardian and, if so, what category (this includes making a recommendation as to whether the NSW Ombudsman should notify the Children's Guardian<sup>6</sup>;
  - (e) as to the appropriate outcomes for the respondent (if any);
  - (f) as to the appropriate outcomes relevant to other persons associated with the Diocese, if any; and
  - (g) to address any operational or systemic / structural issues highlighted by the investigation, if any.

If the investigator believes the alleged conduct was reportable conduct, the investigator must recommend an appropriate finding.

The Ombudsman prescribes five possible findings which will be the applied construct for all findings made in investigations conducted under this policy:

- **Sustained** is applied when there is sufficient evidence, on the balance of probabilities, that the reportable conduct occurred. If there is one or more sustained findings of alleged sexual misconduct committed against, with or in the presence of a child, including grooming of a child or a serious physical assault of a child, the investigation must be notified to the Office of Children's Guardian (refer **section 12.1**)
- **Not sustained – insufficient evidence** is applied when there is some evidence of probative value that reportable conduct occurred, however, there is insufficient evidence available to reasonably establish that the alleged conduct occurred.
- **Not sustained – lack of evidence of weight** is applied when a reportable allegation has been made however the evidence is of such poor probative value or lacking in

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<sup>6</sup> Section 2A 'Notification by the Ombudsman' Schedule 1, Child Protection (Working with Children) Act 2012 states:

(1) A person has been the subject of a notification of concern to the Children's Guardian by the Ombudsman that, on a risk assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to the safety of children.

(2) A notification of concern is a notification made by the Ombudsman as a result of concerns arising from the receipt of information by the Ombudsman in the course of exercising the Ombudsman's functions.

weight, such as to warrant a finding that, on the balance of probabilities, the conduct did not occur.

- **False** is applied when there is clear evidence to show that the alleged conduct did not occur. Some of these matters may be vexatious, e.g. 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.
- **Not reportable conduct** is applied when inquiries show that the conduct was not reportable conduct; e.g. use of force that was trivial or negligible in the circumstances, conduct that was reasonable in the circumstances or accidental. Some of these matters may be ‘misconceived’, 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.

Once the investigation report is prepared, the investigator should offer the respondent an opportunity to discuss and respond to the investigator’s recommendations, prior to submission to the investigations manager (refer **section 7.4**).

The investigator will prepare the investigation record (refer **section 9.6**) and submit it to the investigations manager for review and determination.

## 10.10 Finalising the Investigation: Post-Investigation Consultation and Formulating Outcomes

On receipt of the investigation record, the investigations manager will:

- review the investigation record;
- make a determination, in writing, as to the investigation findings; and
- make a determination as to any notification to the Children’s Guardian and its appropriate category.

The investigations manager returns the investigation record with his/her determinations to the investigator who then conducts a **post-investigation consultation** with the relevant Diocesan service to:

- provide relevant feedback regarding the investigation;
- formulate outcomes; and
- detail an implementation plan for the agreed outcomes.

Outcomes refer to key decisions around:

- **personal outcomes**, i.e. outcomes related specifically to the respondent which may include commencing disciplinary proceedings or imposing variations to the respondent’s roles and responsibilities;

- operational outcomes, i.e. variations to the provision of services for a child or class of children, (e.g. a child being moved to a different class); or
- systemic outcomes, i.e. identified opportunities to improve structure, process or policy which may include targeted training to address poor or out-of-date practice within a workplace or team, development of new or revision of current policy and procedure or restructuring one or more workplaces or programmes to improve oversight and accountability.

Outcomes should:

- reflect the moral and cultural ethos of the Catholic Church and Diocese of Maitland-Newcastle;
- be commensurate with the seriousness of the allegations;
- be commensurate with relevant findings made in other investigations;
- reflect the 'industry standards' and community expectations for reasonableness and proportionality;
- be in accordance with employment and industrial law, should the respondent be an employee;
- address any unresolved issues of risk;
- be in alignment with the strategic or business plan of the Diocesan service; and
- be achievable, within financial and other constraints.

The final construct and implementation of outcomes is the responsibility of the relevant Diocesan service, not the investigator or investigations manager. However, the investigator or investigations manager may prepare recommendations for the relevant service in relation to operational or systemic outcomes.

Where an investigation is reportable to the NSW Ombudsman, the Diocese submits investigation outcomes as part of the investigation record.

Where the personal outcomes relate to the employment arrangements for a member of the Diocese, the outcome should be in accordance with industrial law, normative industry standards, pre-existing enterprise agreements or awards or any specific contractual arrangements relating to the respondent.

Where the personal outcomes relate to the conditions of ministry for a member of the Diocese, the outcome should be in accordance with canon law, current Church norms and *Towards Healing* (2010).

The human resources manager of the relevant Diocesan service must be a party to the formulation of any personal outcomes.

Where the investigator is an independent contractor, the investigations manager will ensure the above steps are completed.

The investigator will ensure a record is made of the:

- post-investigation consultation;
- agreed outcomes; and
- implementation plan for the outcomes.

All participants to a post-investigation consultation should sign an attendance sheet. The appropriate senior management of the relevant Diocesan service must sign off on the outcomes and implementation plan prior to the respondent being given formal closure advice (refer **section 10.8**)

All records generated as part of the post-investigation consultation and copies of all resultant correspondence will form part of the investigations record.

For some investigations, it may be appropriate for the investigator or investigations manager to arrange a professional debriefing with relevant members of the Diocese. Any debrief should consider what worked well what did not work well, why and how could a similar investigation be conducted in a more efficient and effective way in the future?

## **11. WORKING WITH THE NSW OMBUDSMAN**

### **11.1 Consultation with, Monitoring and Oversight by the NSW Ombudsman of Reportable Conduct Investigations**

Section 25B, Ombudsman Act 1974 requires that the NSW Ombudsman keeps relevant systems under scrutiny to ensure that there are systems in place to attempt to prevent reportable conduct as well as ensure matters are reported and investigations are conducted appropriately.

The NSW Ombudsman is able to provide advice to the Diocese prior, during and after investigations, including clarification whether a matter is a reportable allegation.

Once a matter is deemed reportable and the Ombudsman is notified, the matter will be allocated to a specific officer of the Employment Related Child Protection Division. Investigators have the professional discretion to contact the relevant officer of the Ombudsman's Office to consult about specific issues that arise in the investigation. Consultation may be oral or written. Any discussions with the Ombudsman's Office will be documented and form part of the investigation record.

An investigator should consult with the Ombudsman's office about:

- delays in completing the investigation;
- systemic blockages to gathering evidence (e.g. failure of designated agencies responding to Chapter 16);
- conflicts of interest or other threats to the integrity of the investigation; or
- uncertainty as to the appropriate recommendations to make for one or allegation.

The investigator should provide advice to the Ombudsman as to the progress of the investigation at regular intervals every four (4) weeks, unless advised differently by the Ombudsman's Office. The advice may be provided in writing or as a direct conversation with the assigned officer within the Ombudsman's Office.

For criminogenic allegations and most sexual misconduct investigations, the Ombudsman invokes s.25E and will monitor the investigation. If an investigation is subject to s.25E, the Ombudsman will advise the head of agency in writing, requesting relevant information. The investigations manager may direct the investigator to prepare a written respond to the s.25E letter. The investigations manager will review the response and when deemed adequate, submit the response on behalf of the head of agency.

Where the matter is deemed sufficiently serious, the investigations manager may consult with the Bishop, prior to responding to the s.25E.

## 11.2 Responding to the Ombudsman after Completion of the Investigation and Review of Findings on Advice

On review of an investigation record the Ombudsman's office may believe one or more of the findings are unsound. Consequently, the Ombudsman's office may recommend that the Diocese conduct a review of the investigation.

For matters that are subject of s.25E monitoring, the Ombudsman may invoke s.25F(3) which empowers the Ombudsman to:

*...require the head of the agency or any officer involved in the investigation, or both of them, to provide such additional information as the Ombudsman considers necessary to enable the Ombudsman to determine whether the reportable allegation or conviction was properly investigated and whether appropriate action was taken as a result of the investigation.*

On receipt of such advice or direction, the investigations manager will review the investigation and prepare a response. If the investigations manager believes it warranted, they may choose to appoint an alternative investigator to conduct further inquiries.

If deemed of a sufficiently serious nature, particularly if involving a s.25F directive, the investigations manager will advise the Bishop of Maitland-Newcastle as head of agency.

The Ombudsman will be advised of the review's findings.

All correspondence and documentation generated from this review process will form part of the investigation record.

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## 12. WORKING WITH THE OFFICE OF THE CHILDREN'S GUARDIAN

The principle relationship that the Diocese has with the Office of the Children's Guardian ('Children's Guardian') relates to pre-employment screening and the process of changing over to the New Working with Children Check. The Diocese has an obligation to ensure that all members of the Diocese, who are engaged in child-related work, obtain their Working with Children Check Clearances ('Clearances'), either prior to their commencement (as new personnel) or in accordance with the Children's Guardian's timeline for change (for existing personnel).

### 12.1 Obligations to Notify the Office of Children's Guardian

Under the Child Protection (Working with Children) Act 2012, the Children's Guardian has the sole responsibility for determining whether a person is able to engage in 'child-related work'. To do this assessment, the Children's Guardian must be advised of a particular class of conduct and any relevant convictions or criminal proceedings.

Clause 25(c) of the Child Protection (Working with Children) Regulation 2013 specifies that "*the Catholic Church in NSW, including organisations of Dioceses, non-geographical Dioceses operating in NSW and institutes of consecrated life and societies of apostolic life operating in NSW*" are reporting bodies to the Children's Guardian.

The Diocese also has an obligation to notify the Children's Guardian of any child-related worker who:

1. has been convicted of or is awaiting trial for a disqualifying offence, (refer **Appendix F**);
2. is the subject of an offence which triggers the requirement for a risk assessment (refer **Appendix G**); or
3. is the subject of an investigation that finds the person was engaged in 'misconduct' involving children, which includes:
  - (a) sexual misconduct committed against, with or in the presence of a child, including grooming of a child; or
  - (b) any serious physical assault of a child (refer **Appendix H**).

Section 35 of the Child Protection (Working with Children) Act 2012 obliges the Diocese to notify the Children's Guardian of the name and other identifying particulars of the child-related worker.

#### **12.1.1 Methodology for Notifying the Office of the Children's Guardian**

Zimmerman Services has been registered as an 'employer' with the Office of the Children's Guardian, logon details are available through the Administrative Support Team.

Using Zimmerman Services' logon details:

1. Go to [www.newcheck.kids.nsw.gov.au](http://www.newcheck.kids.nsw.gov.au);
2. Click the Start here button on the right hand side. A new screen will appear;
3. Under the Employer section, click 'Log in';
4. Enter your employer login details and click 'Submit';
5. Select the Submit workplace report finding tab across the top of the screen; and
6. A form will appear. Fill in the required fields and click 'Submit'.

If assistance is required with any part of this process, an Officer of the Children's Guardian is available by phoning (02) 9286 7276 during normal business hours.

## 12.2 Managing Release of Information When Misconduct is Notified to the Office of the Children's Guardian

Section 46 of the Child Protection (Working with Children) Act 2012, *Obtaining information on disciplinary matters under Government Information (Public Access) Act 2009* states:

1. *A person against whom a finding referred to in clause 2 of Schedule 1 has been made is, subject to this section, entitled to apply for access under the Government Information (Public Access) Act 2009 to any information about the finding. That Act applies to the determination of any such application for access.*
2. *Any provision of that Act relating to fees or charges payable by applicants does not apply to such an application for access.*
3. *The provisions of the Government Information (Public Access) Act 2009 apply for the purposes of this section whether or not the agency is an agency to which those provisions apply.*
4. *The regulations under this Act may modify any provisions of that Act in its application under this section.*

In other words, where the investigation results in a notification of misconduct to the Children's Guardian, the respondent is able to apply for access to the investigations records under GIPA, [the Government Information (Public Access) Act 2009]. The respondent may make an application to access further information, either personally or through their nominated representative. This application must be in writing.

Section 3 of GIPA states the act is intended to authorise and encourage the proactive release of information unless there is an overriding public interest against disclosure.

On receipt of such an application the investigator will consult with the relevant Diocesan service to ascertain if there are any public interest considerations against disclosure of information. Tables 1 and 3 of s.14 of GIPA set out public interest considerations for withholding information. The relevant Diocesan service needs to assess whether the release of the information could reasonably be expected to:

- adversely affect the capacity of the respondent's work site or work group to function efficiently in the future;
- cause harm to the ability of a supervisor or other persons in a management role to effectively supervise and manage one or more members of the Diocese;
- cause significant distress or anxiety to a witness or alleged victim;
- result in reprisal or a genuine fear of reprisal;
- prejudice the capacity of PaRT to obtain confidential information that facilitates future investigations; or
- prejudice the conduct, effectiveness or integrity of any audit, test, investigation or review conducted by or on behalf of an agency by revealing its purpose, conduct or results (whether or not commenced and whether or not completed).

If the relevant Diocesan service has objections to the release of the investigation record to the respondent on public interest considerations, those objections must be formally provided to the investigator.

Irrespective of other submissions, the investigator will object to the release of identifying information relating to child witnesses. Further, if there had been an earlier determination to withhold a child victim's identity from the respondent, (refer **section 7.2**) the original objection to the release of that child's identify would carry through to the respondent's GIPA application.

The investigator will make an application to the Catholic Commission for Employment Relations (CCER) to prepare a GIPA application on behalf of the Diocese, with any objections to the release of person's identities included in the request. A complete copy of the investigations record will be provided to CCER with the application.

When CCER has prepared the copy of the investigation record and it has been returned, the investigator will arrange access to the file for the respondent and or their nominated representative. Access to the prepared record will be at Zimmerman Services. The respondent will be afforded a private room to review the prepared record.

The respondent may identify particular documents for copying, which will be done by PaRT. The investigator will prepare a list of all copied documents, which the respondent must witness receipt of. This list will include an undertaking from the respondent to securely store or dispose of the documents received. The investigator has capacity to negotiate the number of documents to be copied, if the numbers are deemed excessive.

There will be no costs incurred by the respondent in any part of this process. Access to relevant employment proceedings will be done at the cost of PaRT.

Once in receipt of relevant material and dependent on the seriousness of the investigation, complexity of the findings or potential significance of the outcomes, the respondent should be afforded up to 14 days in which to prepare a formal response.

Any request by the respondent for an extension on the available time in which to respond will be considered favourably by the investigator.

All correspondence and related documentation generated in the managing the release of information to the respondent will form part of the investigation record.

Further, where the respondent has not been notified to the Children's Guardian but their employment conditions are adversely affected, due process requires that the respondent be given an opportunity to request sufficient information to make an informed response. The provision of information will be based on the standards set by GIPA.

For issues related to employment conditions, the investigation record may be subject to subpoena by an industrial commission or civil court. PaRT will comply with any legal order to produce information.

Where the investigation has not resulted in a notification of misconduct to the Children's Guardian and there are no adverse outcomes for the respondent, he/she will not be given access to any further information.

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## SUPPORTING MATERIAL

Civil	Church
<p><b>Legislation</b></p> <p>Children and Young Persons (Care and Protection) Act 1998 and Regulation 2012</p> <p>Child Protection (Working with Children) Act 2012 and Regulation 2013</p> <p>Crimes Act 1900</p> <p>Government Information (Public Interest) Act 2009</p> <p>Ombudsman Act 1974 (Part 3A) and Regulation 2011</p> <p>Privacy Act 1988</p> <p><b>Statutory Guidelines</b></p> <p>Child Protection in the Workplace: Responding to allegations against employees (June 2004)</p> <p>New South Wales Interagency Guidelines for Child Protection Intervention (2010 &amp; 2006)</p> <p>Structured Decision Making System New South Wales: Mandatory Reporter Guide (December 2009)</p>	<p><b>Canon Law</b></p> <p>Book II, Part I</p> <p>Title III, Chapter III: The Obligations and Rights of Clerics</p> <p>Book II, Part II, Section II,</p> <p>Title I, Chapter II: Article 1: Bishops in General, canons 375-380 and Article 2: Diocesan Bishops, canons 381-402.</p> <p>Title III, Chapter IV: Parishes, Pastors, And Parochial Vicars, canons 515-552.</p> <p>Book VI, Part II</p> <p>Title V: Delicts Against Special Obligations, canons 1392-1396.</p> <p>Normae de gravioribus delictis, variations to the original text of Sacramentorum sanctitatis tutela, made by Pope Benedict XVI on 21 May 2010.</p> <p><b>Church Guidelines</b></p> <p>Integrity in Ministry (June 2004)</p> <p>Integrity in the Service of the Church (2011)</p> <p>Towards Healing (January 2010)</p>

## SIGN OFF

Only members of the Prevention and Response Team are required to sign off the Investigations Policy.

I have read, understood and am prepared to abide by the Investigations Policy.

Employee's

Full Name: \_\_\_\_\_

Role: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## REVISION HISTORY

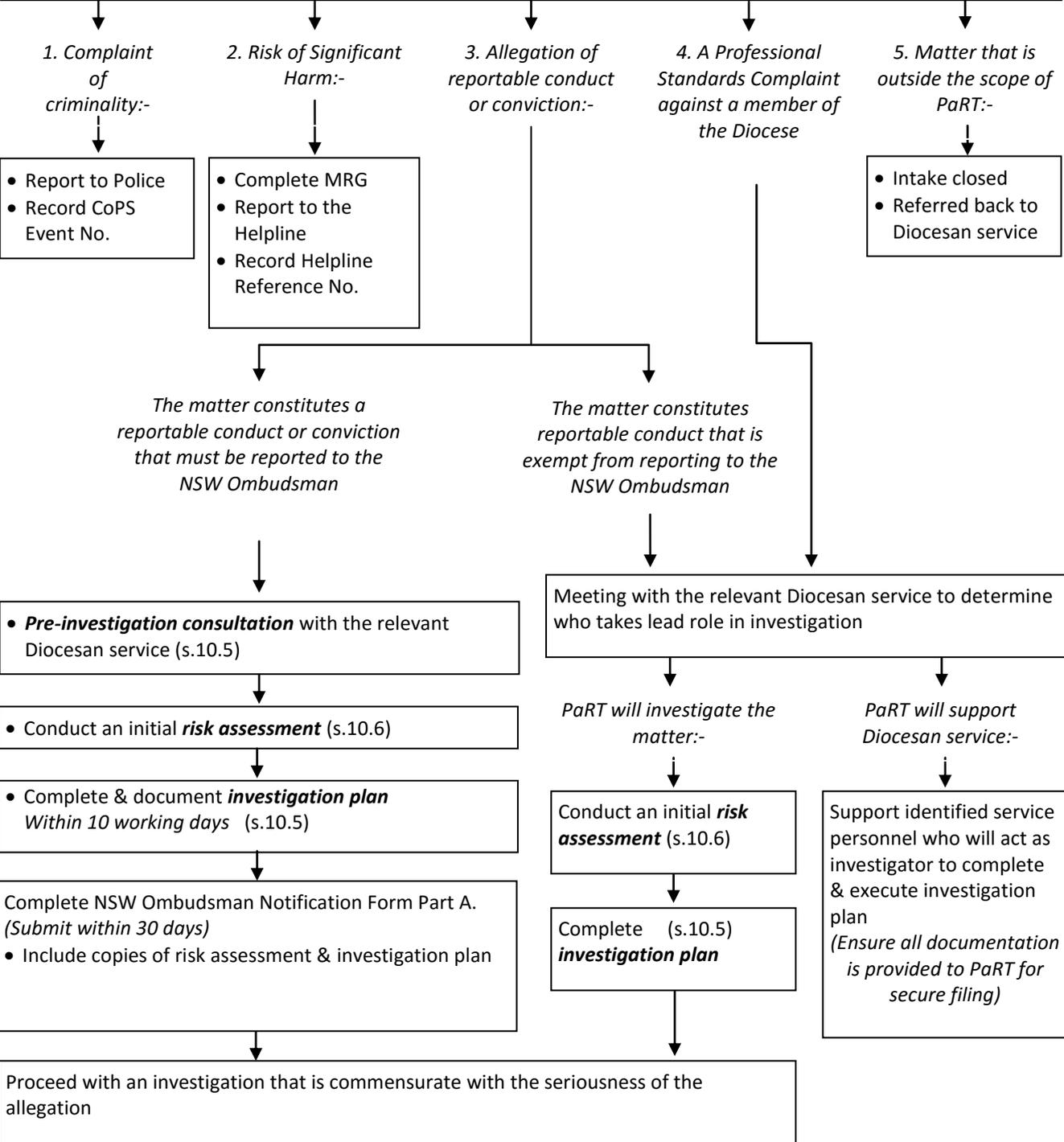
Vers.	Date	Author	Description of Changes
1.0	17/02/2012	Sean Tynan	Original policy derived from draft 0.6
1.1	05/06/2012	Sean Tynan	Changes to Sections 6.6, 6.7, 7.6, 10.9, 10.10, 12.1 and Quick References 2 and 3
1.2	15/10/2012	Sean Tynan	Addition of Section numerated as 6.1, renumbering all sections 6.2-6.
1.3	14/07/2013	Sean Tynan	Changes to sections 6.1, 9.6 and 10.6 replacement of the old CCYP Act with the Child Protection (Working with Children) Act 2012 including changes to procedures in sections 12.1, 12.2, deletion of appendices D and F, insertion of new appendices F, G & H.
1.4	11/06/2016	Sean Tynan	Change of terminology 'PSOA' to "Respondent" and increased differentiation of 'Victim' from 'Complainant'. Addition of 'reportable incidents' elements from Part 3C Ombudsman Act. Update references to Ombudsman Regulation 2011, Children and Young Persons (Care and Protection) Regulation 2012 and NCAT Combining the former sections 6.8 and 6.9 into v.1.4 section 6.8 ' <i>Rights of privacy and the provision of information</i> ' revised numbering of section 6.9 (Chapter 16A). Inclusion of 'adult household members' of foster homes a 'members of the diocese' in accordance with s.25AAA Ombudsman Act 1974.

## QUICK REFERENCE GUIDES

### 1: FLOWCHART FOR DETERMINING THE TYPE OF INVESTIGATION

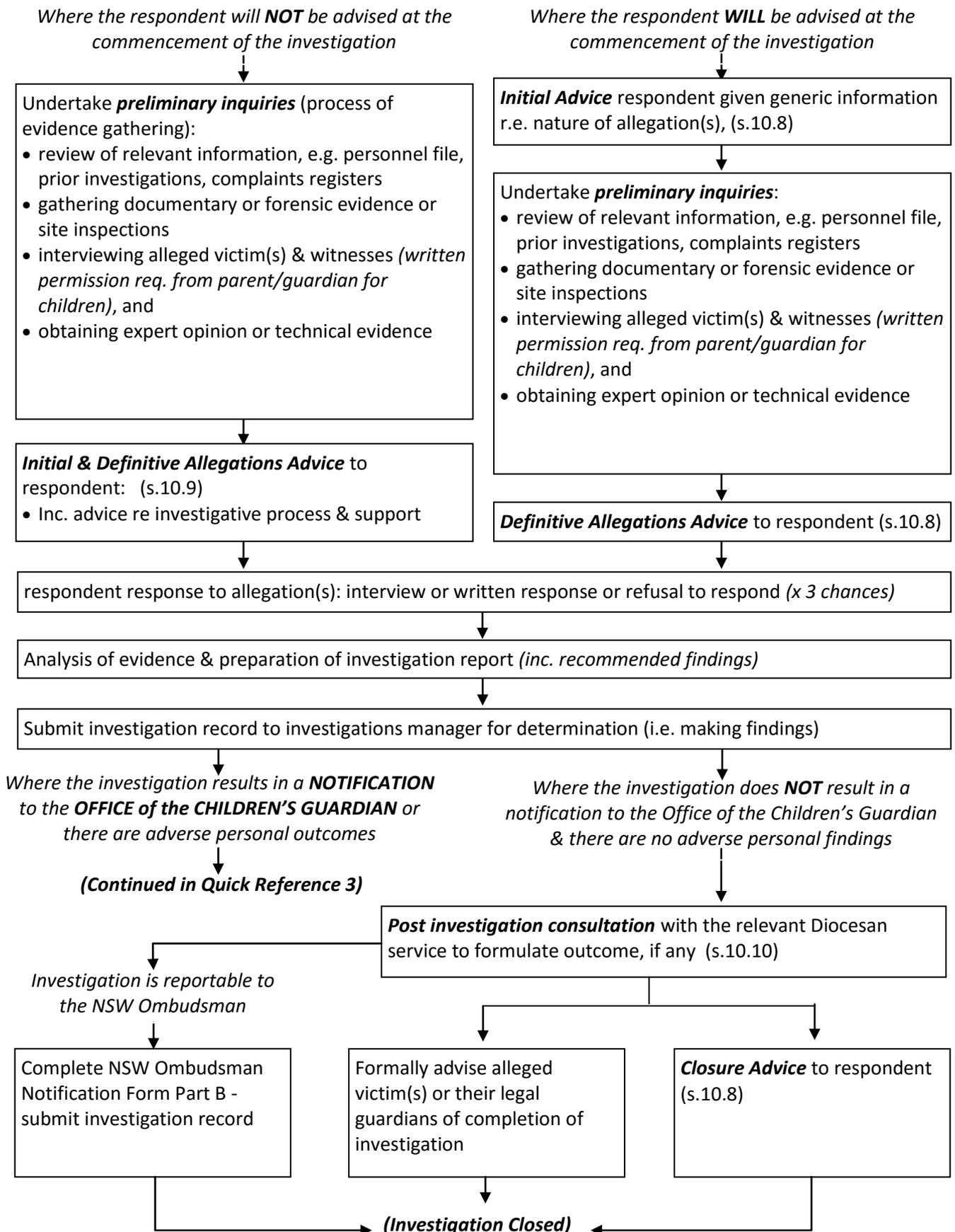
Information received from a member of the Diocese of Maitland-Newcastle or other person that may involve an allegation of reportable conduct or conviction

PaRT Duty Officer processes information using **Intake Form**. Intake assessment decision allows for 5 possible outcomes. Multiple outcomes are possible from a single piece of information  
The information received may constitute a...

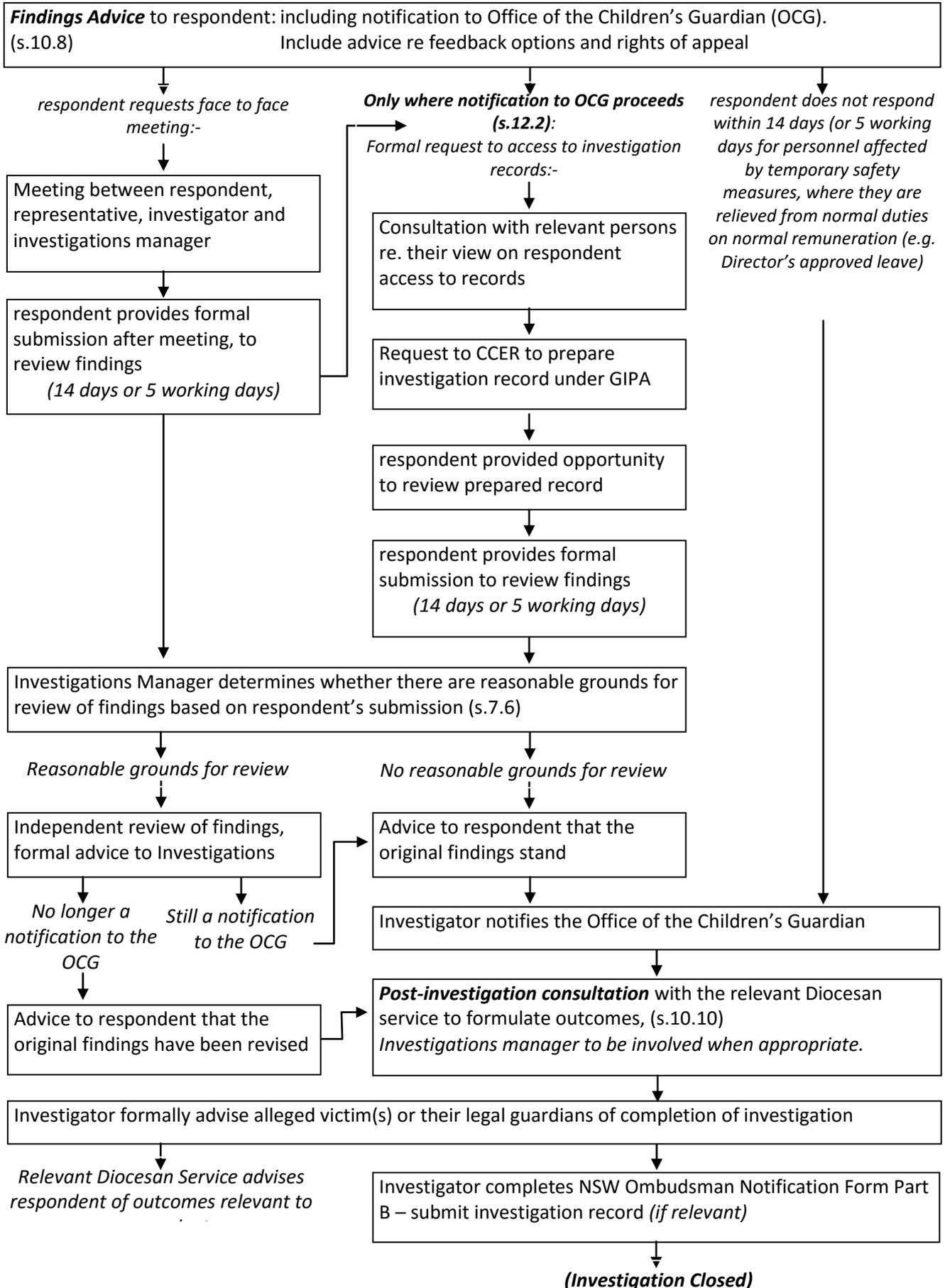


(Continued in Quick Reference 2)

## 2: FLOWCHART FOR INVESTIGATIONS CONDUCTED BY PART



### 3: FLOWCHART FOR FINALISING AN INVESTIGATION THAT FINDS SEXUAL MISCONDUCT OR A SERIOUS PHYSICAL ASSAULT OCCURRED



## APPENDICES

### A: NSW OMBUDSMAN PRACTICE UPDATE 2013/1: DEFINING REPORTABLE CONDUCT

#### A.1 Reportable Conduct

Section 25A of the Ombudsman Act 1974 defines 'reportable conduct' as:

- a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material), or
- b) any assault, ill-treatment or neglect of a child, or
- c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child.

Reportable conduct does not extend to:

- a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or
- b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
- c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

**Note:** Examples of conduct that would not constitute reportable conduct include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental.

Some conduct may fall within more than one category.

These definitions replace those contained within the Ombudsman's publication 'Child Protection in the Workplace: responding to allegations against employees' (2004).

#### A.2 Sexual Offences AND Sexual Misconduct

##### *A.2.1 What is a sexual offence?*

The term 'sexual offence' encompasses all criminal offences involving a sexual element that are 'committed against, with or in the presence of a child'.

These offences include (but are not limited to) the following:

- indecent assault;
- sexual assault;
- aggravated sexual assault;
- sexual intercourse and attempted sexual intercourse;
- possession/ dissemination/ production of child pornography or child abuse material;
- using children to produce pornography;
- grooming or procuring children under the age of 16 years for unlawful sexual activity; and
- deemed non-consensual sexual activity on the basis of special care relationships.<sup>7</sup>

All cases involving a sexual offence would also involve sexual misconduct.

### ***A.2.2 What is sexual misconduct?***

The term 'sexual misconduct' includes conduct that does not necessarily equate to a criminal offence.

For sexual misconduct to constitute reportable conduct, the alleged conduct must have been committed against, with or in the presence of a child.

There are three categories of sexual misconduct in addition to sexual offences:

- crossing professional boundaries,
- sexually explicit comments and other overtly sexual behaviour, and
- grooming behaviour.

#### ***A.2.2.1 Crossing Professional Boundaries***

Sexual misconduct includes behaviour that can reasonably be construed as involving an inappropriate and overly personal or intimate:

- relationship with,
- conduct towards, or
- focus on,

a child or young person, or a group of children or young persons.

In the area of 'crossing professional boundaries', particular care should be exercised before making a finding of sexual misconduct. For example, an employee who, on an isolated occasion, engages in behaviour that involves little more than poor judgment could not be said to have engaged in sexual misconduct. Also, in cases where an employee has 'crossed boundaries' in terms of their relationship with a child, if there is evidence which clearly

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<sup>7</sup> *Special care relationships are defined in section 73 of the Crimes Act 1900 (NSW)*

shows that the employee did not seek to establish an improper relationship with the involved child, then this does not constitute sexual misconduct.

However, persistent less serious breaches of professional conduct in this area, or a single serious 'crossing of the boundaries' by an employee, may constitute sexual misconduct, particularly if the employee either knew, or ought to have known, that their behaviour was unacceptable.

Codes of conduct that outline the nature of the professional boundaries which should exist between employees and children/young people can be particularly useful. For employees who either intentionally breach such codes or have demonstrated an inability to apply them appropriately, it may be necessary to provide more detailed written advice about what constitutes appropriate behaviour.

#### ***A.2.2.2 Sexually Explicit Comments and Other Overtly Sexual Behaviour***

Sexual misconduct includes a broad range of sexualised behaviour with or towards children. While it is not possible to provide a complete and definitive list of unacceptable sexual conduct involving children, the following types of behaviour give strong guidance:

- sexualised behaviour with or towards a child (including sexual exhibitionism);
- inappropriate conversations of a sexual nature;
- comments that express a desire to act in a sexual manner;
- unwarranted and inappropriate touching involving a child;
- personal correspondence and communications (including emails, social media and web forums) with a child or young person in relation to the adult's romantic, intimate or sexual feelings for a child or young person;
- exposure of children and young people to sexual behaviour of others including display of pornography; or
- watching children undress in circumstances where supervision is not required and it is clearly inappropriate.

#### ***A.2.2.3 Grooming Behaviour***

Grooming or procuring a child under the age of 16 years for unlawful sexual activity is a sexual offence. However, Schedule 1(2) of the *Child Protection (Working With Children) Act* also recognises grooming as a form of sexual misconduct. As grooming is a sexual offence if the alleged victim is under 16 years old, caution should be exercised before reaching a grooming finding (particularly in cases where the behaviour is directed towards a child under 16 years). As an alternative to grooming, in many cases it will be more appropriate to consider whether there has been a 'crossing of professional boundaries' (see above) and/or other more overt sexual behaviour.

Furthermore, behaviour should only be seen as 'grooming' where there is evidence of a pattern of conduct that is consistent with grooming the alleged victim for sexual activity, and

that there is no other reasonable explanation for it. The types of behaviours that may lead to such a conclusion include (but are not limited to) the following:

- Persuading a child or group of children that they have a ‘special’ relationship, for example by:
  - spending inappropriate special time with a child
  - inappropriately giving gifts
  - inappropriately showing special favours to them but not other children
  - inappropriately allowing the child to overstep rules
  - asking the child to keep this relationship to themselves.
- Testing boundaries, for example by:
  - undressing in front of a child
  - encouraging inappropriate physical contact (even where it is not overtly sexual)
  - talking about sex
  - ‘accidental’ intimate touching.
- Inappropriately extending a relationship outside of work (except where it may be appropriate - for example where there was a pre-existing friendship with the child’s family or as part of normal social interactions in the community).
- Inappropriate personal communication (including emails, telephone calls, text messaging, social media and web forums) that explores sexual feelings or intimate personal feelings with a child.

An adult requesting that a child keep any aspect of their relationship secret or using tactics to keep any aspect of the relationship secret, would generally increase the likelihood that grooming is occurring.

### ***A.2.3 Determining whether a sexual offence has occurred?***

Generally, a sustained finding of a sexual offence should only be made when a court has found that a sexual offence occurred. In the absence of a conviction, agencies should determine whether or not sexual misconduct has occurred.

## **A.3 Physical Assault**

### ***A.3.1 What is physical assault?***

An assault of a child includes any act by which a person intentionally inflicts unjustified use of physical force against a child. An assault can also occur if a person causes a child to reasonably fear that unjustified force will be used against them. Even if a person who inflicts, or causes the fear of, physical harm does not intend to inflict the harm or cause the fear,

they may still have committed an assault if they acted recklessly (i.e. the person ought to have known that their actions would cause physical harm or the fear of such harm).

Assaults can include hitting, pushing, shoving, throwing objects, or making threats to physically harm a child.

It is important to consider the context in which physical force is used against a child to determine whether it constitutes an assault. For example, an assault has not taken place where there is use of reasonable force in the following examples:

- exercising appropriate control over a child
- disarming a child or young person seeking to harm themselves or others
- separating children or young people who are fighting
- moving a child or young person out of harm's way
- restraining a child or young person from causing intentional damage to property
- self-defence or the defence of others.

When considering whether the physical force used was reasonable, a range of variables should be taken into account, having regard to the circumstances of the case. Variables that may be relevant include matters such as the age, maturity, health or other characteristics of the child or children involved, and professional codes of conduct or standards that the worker is required to follow.

In addition the Ombudsman Act specifically outlines certain conduct which does **not** need to be reported:

- a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards
- b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures.

### ***A.3.2 Conduct to be reported to the Office of the Children's Guardian***

While every allegation of physical assault should be investigated, only findings that a **serious** physical assault occurred are reportable to the Office of the Children's Guardian for consideration in Working With Children Check assessments

### ***A.3.3 Serious physical assault***

A physical assault **is not serious** where:

- it only involves minor force; and
- it did not and was not ever likely to result in serious injury.

A physical assault **is serious** where:

- it results in the child being injured, beyond a type of injury like a minor scratch, bruise or graze; or
- it had the potential to result in a serious injury; or
- the injury suffered may be minor, but the assault is associated with aggravating circumstances (in this regard, aggravating circumstances might include associated inhumane or demeaning behaviour by the employee, for example kicking a child, pulling a child by grabbing the child around the neck).

In considering whether a serious physical assault has occurred, reporting bodies whose work involves regular restraint of children should consider the context of events, including the child's age and vulnerability.

Generally, behaviour that does not meet the standard of a serious physical assault does not become a serious physical assault by means of it being repeated. The only exception to this is where an employer has developed legitimate concerns for the safety of a child or children and intervened with a worker (e.g. warnings, counselling etc.) and the behaviour is repeated.

## **A.4 Ill-Treatment**

### ***A.4.1 What is ill-treatment?***

Ill-treatment captures those circumstances where a person treats a child or young person in an unreasonable and seriously inappropriate, improper, inhumane or cruel manner.

The focus is on the alleged conduct rather than the actual effect of the conduct on the child or young person.

Ill-treatment can include disciplining or correcting a child in an unreasonable and seriously inappropriate or improper manner; making excessive and/or degrading demands of a child; hostile use of force towards a child; and/or a pattern of hostile or unreasonable and seriously inappropriate, degrading comments or behaviour towards a child.

In making a determination regarding ill-treatment it may be important to consider relevant codes of conduct that outline the nature of professional conduct and practice by employees/workers which should occur when working with children/young people.

## **A.5 Neglect**

### ***A.5.1 What is neglect?***

Neglect includes either an action or inaction by a person who has care responsibilities towards a child. The nature of the employee's responsibilities provides the context against which the conduct needs to be assessed.

An incident can constitute neglect if it contains any element within this definition.

Neglect can be an ongoing situation of repeated failure by a caregiver to meet a child's physical or psychological needs, or a single significant incident where a caregiver fails to fulfil a duty or obligation, resulting in actual harm to a child or where there is the potential for significant harm to a child.

#### ***A.5.1.1 Supervisory neglect:***

- An intentional or reckless failure to adequately supervise a child that results in the death of, or significant harm to, a child, or
- An intentional or reckless failure to adequately supervise a child, or a significantly careless act or failure to act, that:
  - involves a gross breach of professional standards, and
  - has the potential to result in the death of, or significant harm to, a child.

#### ***A.5.1.2 Carer neglect:***

- Grossly inadequate care that involves depriving a child of the basic necessities of life: such as the provision of food and drink, clothing, critical medical care or treatment, or shelter.

#### ***A.5.1.3 Failure to protect from abuse:***

- An obviously or very clearly unreasonable failure to respond to information strongly indicating actual or potential serious abuse of a child.

#### ***A.5.1.4 Reckless acts (or failure to act):***

- A reckless act, or failure to act, that:
  - involves a gross breach of professional standards, and
  - has the potential to result in the death of, or significant harm to, a child.

## **A.6 Behaviour that Causes Psychological Harm to a Child**

### ***A.6.1 What is behavior that causes psychological harm to a child?***

Behaviour that causes psychological harm is conduct that is obviously or very clearly unreasonable and results in significant emotional harm or trauma to a child. There needs to be a proven causal link between the inappropriate behaviour and the harm, and the harm must be more than transient.

For reportable conduct involving psychological harm, the following elements must be present:

- an obviously or very clearly unreasonable or serious act or series of acts that the employee knew or ought to have known was unacceptable, **and**

- evidence of psychological harm to the child that is more than transient, including displaying patterns of 'out of character behaviour', regression in behaviour, distress, anxiety, physical symptoms or self-harm, **and**
- an alleged causal link between the employee's conduct and the psychological harm to the child.

Psychological harm can include the exacerbation or aggravation of an existing psychological condition, such as anxiety or depression.

When it is **alleged** that an adult's behaviour has caused psychological harm to a child, it will often be necessary to obtain a psychological or medical assessment of the child to determine whether psychological harm can be established. However, a clinical diagnosis will not be required in every circumstance – particularly if the assessment itself may cause harm. In addition, in certain serious and/or ongoing domestic violence cases, it may be open to infer that a child has been psychologically harmed, in the absence of a clinical diagnosis of such harm. Finally, it is important to stress that, when a report has established a child has a psychological condition, it is still necessary to show the condition was caused by the employee's conduct.

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## B: REPORTABLE CONVICTIONS

In NSW, the offences which may be reportable to the Ombudsman may be found in the Crimes Act and in the Children and Young Persons (Care and Protection) Act 1998:

Children and Young Persons (Care and Protection) Act 1998		Crimes Act 1900	
227	Child and young person abuse	66D	Attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16
228	Neglect of children and young persons	66EA	Persistent sexual abuse of a child
229	Unauthorised removal of children and young persons	66F	Sexual intercourse – intellectual disability
231	Leaving children unsupervised in motor vehicles	73	Sexual intercourse with child between 16 and 18 under special care
Crimes Act 1900		78A	Incest
		78B	Incest attempts
61H	Definition of sexual intercourse and other terms	78E	Rape or attempt – verdict of incest or attempt
61I	Sexual assault	78G	Definition of ‘homosexual intercourse’ for ss. 78H – 78Q
61J	Aggravated sexual assault	78J	Trial for homosexual intercourse offence – male in fact between 10 and 18 (cf. ss. 69, 70)
61JA	Aggravated sexual assault in company	78K	Homosexual intercourse with male between 10 and 18 (cf. s.71)
61K	Assault with intent to have sexual intercourse	78L	Attempt, or assault with intent, to have homosexual intercourse with male between 10 and 18 (cf. s.72)
61L	Indecent assault	78N	Homosexual intercourse by teacher etc. (cf. s. 73)
61M	Aggravated indecent assault	78O	Attempt, or assault with intent, to have homosexual intercourse with pupil etc. (cf. s.74)
61N	Act of indecency	78Q	Acts of gross indecency (cf. s. 81A)
61O	Aggravated act of indecency	80A	Sexual assault by forced self-manipulation
61P	Attempt to commit offence under ss. 61I-61O	91D	Promoting or engaging in acts of child prostitution
65A	Sexual intercourse procured by intimidation, coercion and other non-violent threats	91E	Obtaining benefit from child prostitution
66	Procuring etc. carnal knowledge by fraud	91F	Premises not to be used for child prostitution
66A	Sexual intercourse – child under 10	91G	Children not to be used for pornographic purposes
66B	Attempting, or assaulting with intent, to have sexual intercourse with child under 10	578B	Possession of child pornography
66C	Sexual intercourse – child between 10 and 16	578C	Publishing child pornography and indecent articles

A reportable conviction is defined in s. 25A of the Ombudsman Act 1974, as a conviction (including a finding of guilt without the court proceeding to a conviction), in this State or elsewhere, of an offence involving reportable conduct.

For the purposes of the Ombudsman Act, a conviction can be for any offence, which involves reportable conduct, and can have occurred anywhere. Just as any allegations of reportable conduct against employees must be notified to the Ombudsman, the Ombudsman Act requires any convictions against employees of designated agencies and public authorities to be notified to the Ombudsman. As with allegations of reportable conduct, for employees of a designated agency, such as Life Without Barriers, a conviction of reportable conduct must be notified to the Ombudsman whether the conduct is alleged to have taken place in the course of the person's employment or in any other situation, including in the home or in a community or recreational setting in which the employee might be involved.

## **B.1 Spent Convictions**

A conviction becomes 'spent' when the offender has completed a crime-free period of ten years. The following convictions cannot become spent:

- convictions for which a prison sentence of more than six months has been imposed (this does not include periodic detention sentences)
- convictions for sexual offences, and
- convictions imposed against incorporated bodies.

If a conviction of a person is spent, a person is not required to disclose information about the conviction and any question concerning the person's criminal history is taken to refer only to convictions that are not spent. However, relevant convictions, offences where guilt has been established but a formal conviction has not been recorded, and criminal charges that have not been determined, may still be considered as part of the employment screening process authorised by the Office of the Children's Guardian Act 1998. Serious sex offences cannot be spent and would render a person a 'prohibited person' under the Child Protection (Prohibited Employment) Act.

Information about whether offences will be considered in employment screening, or determination of 'prohibited person' status for child-related employment may be obtained from the Children's Guardian.

## **B.2 Proven Charges**

In NSW, as in some other jurisdictions, there is a provision that allows a court to find that a matter has been proven, but that no conviction is recorded. This means that the court may decide not to record a conviction after the court has taken into consideration the character, age, health, mental condition of the person charged, or to the trivial nature of the offence, or any extenuating circumstances.

In NSW, this provision is s.10 of the Crimes (Sentencing Procedure) Act 1999. If a person has had a charge involving reportable conduct against them proven, but they have been dealt with under s. 10 or a similar provision, then this still amounts to a reportable conduct

conviction for the purposes of Part 3A of the Ombudsman Act, and it needs to be notified to the Ombudsman.

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**C: S.25CA CLASS OR KIND DETERMINATION BETWEEN THE NSW OMBUDSMAN AND THE DIOCESE OF MAITLAND-NEWCASTLE (CATHOLIC SCHOOLS OFFICE AND CATHOLIC CARE)**

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## D: SERIOUS INDICTABLE OFFENCES

A **serious indictable offence** is defined in the NSW Crime Act 40/1900 as any indictable offence that is punishable to imprisonment for life or to a term of 5 years or more.

For the purpose of this section a serious indictable offence is any offence under any act whether it was under NSW legislation or under any other Australian jurisdiction.

**Crimes Act 1900** include the following:

- All Part 3 offences against a person, except s38A, s56, s61, s61N, s81C, s85, s91J, s91K, s91L, s91M as these are considered summary offences (term of imprisonment 3 years or less). The serious indictable offences include:
  - homicide,
  - assault,
  - sexual assault,
  - seeking abortion,
  - kidnapping,
  - prostitution,
  - bigamy.
- All Part 3A – offences relating to public order (except s93FA(2) and s93FB)
- All Part 4 – stealing and similar offences (except some of the Larceny “minor offences”)
- All Part 4AA – fraud
- All Part 4AB – identity offences (except s192L)
- All Part 4AC – money laundering (except s193C)
- All Part 4AD – criminal destruction and damage
- All Part 4AE – offences relating to transport services (except s209, s212 and s213)
- All Part 4A - corruption, All Part 4B - blackmail and All Part 5 – forgery (except s256(2)&(3))
- Part 6, - computer offences, including 308D and 308E
- All Part 6A – escape from lawful detention (except 310F, 310G, 310H)
- All Part 6B – membership of terrorist organisation
- All of Part 7 – perverting the course of justice, intimidating witnesses, perjury etc.
- Part 8A – attempts – the penalty is the same for attempts to commit a serious indictable offence as if the attempt had been successful and the crime had been committed.
- All of Part 9 – accessories before and after the fact shall be liable to the same penalties as if they had been the principle. Except for treason s348. s350 An accessory after the fact to any other serious indictable offence is liable to imprisonment for 5 years as well

Miscellaneous sections of the act including:

- S.530 serious animal cruelty,
- S.531 killing or seriously injuring animals used for law enforcement,

- S.546D(2) impersonation of a police officer with intent to exercise power of a police officer

***Drug Misuse and Trafficking Act 1985*** include the following:

- Supply
- Possess precursors
- Manufacture and cultivate prohibited drugs. (unless cultivate matters are dealt with summarily)

***Firearms Act 1986*** include the following:

- Offences relating to the selling, purchasing, possessing or using a firearm that is not registered.
  - Being an unregistered firearms dealer
  - Shortening, converting firearms
  - Lying on applications under this act
-

## E: CHECKLIST FOR CHAPTER 16A EXCHANGE OF INFORMATION

### E.1 When can I provide information under Chapter 16A?

Are you and the requesting organisation prescribed bodies?

**YES** → A prescribed body is any organisation specified in Section 248(6) of the *Children and Young Persons (Care and Protection) Act 1998* (the Act) or in clause 8(1)(j) of the Children and Young Persons (Care and Protection) Regulation 2012. Generally prescribed bodies include the NSW Police force; NSW Government departments and public authorities; organisations that arrange the provision of out-of-home care; government schools, registered non-government schools or TAFE; public health organisations or private hospitals; private fostering or adoption agencies; child care centres; designated agencies; registered agencies or any organisation responsible for the direct supervision or provision of health care, welfare, education, children's services, residential services, or law enforcement wholly or partly to children.

**NO** → You cannot share information with an organisation under Chapter 16A.

Does the information relate to the safety, welfare or wellbeing of a child or young person?

**YES** → Information can be shared with the prescribed body in accordance with Chapter 16A.

**NO** → Information can only be shared as otherwise required or permitted by any law.

Do I "reasonably believe" that the information would assist the prescribed body to make a decision, assessment or plan; initiate or conduct an investigation; provide a service; or manage a risk that might arise in the recipient's capacity as an employer or designated agency in relation to the safety, welfare or wellbeing of a child or young person?

**YES** → That information can be shared under Chapter 16A.

**NO** → You cannot share information with the prescribed body under Chapter 16A.

I have not received a request for information, but believe I have information that could assist another prescribed body to: make a decision, assessment or plan; initiate or conduct an investigation; or provide a service or manage any risk that might arise in the recipient's capacity as an employer or designated agency in relation to the safety, welfare or wellbeing of a child or young person.

**YES** → That information can be shared under Chapter 16A.

**NO** → You cannot share information under Chapter 16A.

## E.2 When must information not be shared?

Do you reasonably believe that sharing the information would:

- prejudice an investigation of any breach (or possible breach) or any law;
- prejudice a coronial inquest or inquiry;
- prejudice any care proceedings;
- contravene any legal professional or client legal privilege;
- enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained;
- endanger a person's life or physical safety;
- prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a breach (or possible breach) or a law; or
- not be in the public interest.

**YES** → You are not required to provide any information you reasonably believe meets any of the above exemptions. Refer further to organisational policies regarding the exemptions or seek legal advice.

**NO** → Information can be shared under Chapter 16A.

In the event that an exemption does apply, the requesting agency must be notified in writing of the grounds for the refusal.

## E.3 What do I need to do before releasing information?

Consent is not required as Chapter 16A authorises its exchange under law, however it is best practice to seek consent and/or inform a child, young person or their family that information about them is being disclosed, if practicable.

Has the child, young person or their family consented to or been informed that information will be released?

**YES** → The requesting/receiving prescribed body should be advised that the child/young person or family has consented or has been informed.

**NO** → The requesting/receiving prescribed body should be advised of the reasons why consent has not been obtained or the child, young person or family has not been informed including:

- it may further jeopardise a child or young person's safety, welfare or wellbeing;
- it could place yourself or another person at risk of harm; or
- the parent/carer is not able to be contacted and the matter is urgent.

Has all identifying information about the reporter been removed?

**YES** → Information can be shared under Chapter 16A.

NO → Information cannot be provided unless one of the exemptions provided for in section 29 of the Act are met.

#### **E.4 What protection do I have if I share the information?**

Is the information provided in good faith, in accordance with the principles and procedures under Chapter 16A?

YES → A person is not liable for any civil or criminal action or any disciplinary action, and cannot be held to have breached any code of professional etiquette or ethics or departed from any accepted standards of professional conduct.

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## F: DISQUALIFYING OFFENCES

The following table is copied verbatim from the Children’s Guardian Fact Sheet, Automatic Barring Records (April 2013) and lists the set of convictions against a person which will automatically bar a person from child-related work.

A conviction includes a finding of guilt that may not be recorded by the court as a conviction. A spent conviction is an older conviction that is deemed no longer relevant for most considerations. The Child Protection (Working With Children) Act 2012 requires that even spent convictions be considered in assessing a person’s risk to children. The table is derived from *Schedule 2 of the Child Protection (Working With Children) Act 2012*.

Section	Offence
<b>Crimes Act 1900</b>	
s.18	Murder or manslaughter of child (other than as a result of a motor vehicle accident)
s.33	Wounding etc. with intent to do bodily harm (to child under 18)
s.35	Reckless grievous bodily harm or wounding (child under 18)
s.42	Injuries to child at time of birth
s.43	Abandoning or exposing child under 7 years
s.61B	Sexual assault category 1 – inflicting grievous bodily harm with intent to have sexual intercourse (repealed)
s.61C	Sexual assault category 2 – inflicting actual bodily harm etc. with intent to have sexual intercourse (repealed)
s.61D	Sexual assault category 3 – sexual intercourse without consent (repealed)
s.61E	Sexual assault category 4 – indecent assault and act of indecency (repealed)
s.61F	Attempt to commit offence under secs. 61B to 61E (repealed)
s.61I	Sexual assault
s.61J	Aggravated sexual assault
s.61JA	Aggravated sexual assault in company
s.61K	Assault with intent to have sexual intercourse
s.61L	Indecent assault
s.61M	Aggravated indecent assault
s.61N	Act of indecency
s.61O	Aggravated act of indecency
s.61P	Attempt to commit offence under sections 61I–61O
s.65A	Sexual intercourse procured by intimidation, coercion and other non-violent threats (repealed)
s.66	Procuring etc. carnal knowledge by fraud (repealed)
s.66A	Sexual intercourse child under 10
s.66B	Attempting, or assaulting with intent, to have sexual intercourse with child under 10
s.66C	Sexual intercourse with child 10 to 16
s.66D	Attempting, or assaulting with intent, to have sexual intercourse with child 10 to 16

Section	Offence
s.66EA	Persistent sexual abuse of a child
s.66EB	Procuring or grooming a child under 16 for unlawful sexual activity
s.66F	Sexual intercourse—intellectual disability
s.73	Sexual intercourse with child between 16 and 18 under special care
s.74	Attempts (carnal knowledge by teacher etc.) (repealed)
s.76	Assault and commit act of indecency on female under 16 (repealed)
s.78A	Incest
s.78B	Incest attempts
s.78H	Homosexual intercourse with male under 10 (repealed)
s.78I	Attempt, or assault with intent, to have homosexual intercourse with male under 10 (repealed)
s.78K	Homosexual intercourse with male 10 to 18 (repealed)
s.78L	Attempt, or assault with intent, to have homosexual intercourse with male between 10 and 18 (repealed)
s.78N	Homosexual intercourse by teacher etc. (repealed)
s.78O	Attempt, or assault with intent, to have homosexual intercourse with pupil (repealed)
s.78Q	Acts of gross indecency (repealed)
s.79	Bestiality
s.80A	Sexual assault by forced manipulation
s.80D	Causing sexual servitude
s.80E	Conduct of business involving sexual servitude
s.81	(repealed)
s.86	Kidnapping (except where by parent or carer)
s.91D	Promoting or engaging in acts of child prostitution
s.91E	Obtaining benefit from child prostitution
s.91F	Premises not to be used for child prostitution
s.91G	Children not to be used for pornographic purposes
s.91H	Production, dissemination or possession of child pornography (child under 16)
s.91J	Voyeurism
s.91K	Filming a person engaged in private act
s.91L	Filming a person's private parts
s.91M	Installing a device to facilitate observation or filming
578B	Possession of child pornography (repealed)
578C (2A)	Publishing Indecent articles
<b>NSW Summary Offences Act 1988</b>	
s.21G	Filming for indecent purposes (repealed)
<b>Commonwealth Customs Act 1901</b>	
s.233BAB	Importation of items of child pornography or of child abuse material

Section	Offence
<b>Commonwealth Criminal Code Act 1995</b>	
s.270.6	Sexual servitude offences
s.270.7	Deceptive recruiting for sexual services
s.272.8-15	Sexual intercourse with a child (outside Australia)
s.272.18-20	Offences of benefiting from, encouraging or preparing for sexual offences against children outside Australia
s.471.16-22	Using a postal or similar service for child pornography material
s.471.24-26	Offences relating to use of postal or similar service involving sexual activity with person under 16

## G: OFFENCES WHICH TRIGGER THE REQUIREMENT FOR A RISK ASSESSMENT

The Office of the Children’s Guardian will undertake a risk assessment on any person currently in or applying for child-related work for whom a record exists, for a certain class of offences.

These offences may be relevant whether they consist of:

- convictions (whether spent or unspent);
- charges (whether heard or unheard or dismissed); or
- committed as juvenile and recorded as part of a person’s juvenile records.

Schedule 1 of the Child Protection (Working With Children) Act 2012 lists the records that will trigger a risk assessment. A detailed list of these records in NSW law and Commonwealth law is set out below. Equivalent offences from other states and territories will also trigger a risk assessment.

Section	Offence	Record Types
<b>Crimes Act 1900</b>		
	Intentional wounding or causing bodily harm (other than automatically barring offence)	All records
	Any sexual offence committed against, with or in the presence of a child (other than an automatically barring offence)	All records
s.18	Murder or manslaughter of child (other than as a result of a motor vehicle accident)	Non convictions, all juvenile records
s.33	Wounding etc. with intent to do bodily harm (to child under 18)	Non convictions, all juvenile records
s.35	Reckless grievous bodily harm or wounding (child under 18)	Non convictions, all juvenile records
s.38	Using intoxicating substance to commit an indictable offence (victim under 18)	All records
s.38A	Spiking food or drink (victim under 18)	All records
s.42	Injuries to child at time of birth	Non convictions, all juvenile records
s.43	Abandoning or exposing child under 7 years	Non convictions, all juvenile records
s.43A	Failure of person with parental responsibility to care for child	All records other than “not guilty”
s.44	Failure to provide necessities of life (victim under 18)	All records other than “not guilty”
s.45	Female genital mutilation	All records
s.60E	Assaults at school	All records
s. 61	Common assault (victim under 18)	Convictions
s.61B	Sexual assault category 1 – inflicting grievous bodily harm with intent to have sexual intercourse (repealed)	Non convictions, all juvenile records

Section	Offence	Record Types
s.61C	Sexual assault category 2 – inflicting actual bodily harm etc. with intent to have sexual intercourse (repealed)	Non convictions, all juvenile records
s.61D	Sexual assault category 3 – sexual intercourse without consent (repealed)	Non convictions, all juvenile records
s.61E	Sexual assault category 4 – indecent assault and act of indecency (repealed)	Non convictions, all juvenile records
s.61F	Attempt to commit offence under secs. 61B to 61E (repealed)	Non convictions, all juvenile records
s.61I	Sexual assault	Non convictions, all juvenile records
s.61J	Aggravated sexual assault	Non convictions, all juvenile records
s.61JA	Aggravated sexual assault in company	Non convictions, all juvenile records
s.61K	Assault with intent to have sexual intercourse	Non convictions, all juvenile records
s.61L	Indecent assault	Non convictions, all juvenile records
s.61M	Aggravated indecent assault	Non convictions, all juvenile records
s.61N	Act of indecency	Non convictions, all juvenile records
s.61O	Aggravated act of indecency	Non convictions, all juvenile records
s.61P	Attempt to commit offence under sections 61I–61O	Non convictions, all juvenile records
s.65A	Sexual intercourse procured by intimidation, coercion and other non-violent threats (repealed)	Non convictions, all juvenile records
s.66	Procuring etc. carnal knowledge by fraud (repealed)	Non convictions, all juvenile records
s.66A	Sexual intercourse child under 10	Non convictions, all juvenile records
s.66B	Attempting, or assaulting with intent, to have sexual intercourse with child under 10	Non convictions, all juvenile records
s.66C	Sexual intercourse with child 10 to 16	Non convictions, all juvenile records
s.66D	Attempting, or assaulting with intent, to have sexual intercourse with child 10 to 16	Non convictions, all juvenile records
s.66EA	Persistent sexual abuse of a child	Non convictions, all juvenile records
s.66EB	Procuring or grooming a child under 16 for unlawful sexual activity	Non convictions, all juvenile records
s.66F	Sexual intercourse—intellectual disability	Non convictions, all juvenile records
s.73	Sexual intercourse with child between 16 and 18 under special care	Non convictions, all juvenile records
s.74	Attempts (carnal knowledge by teacher etc.) (repealed)	Non convictions, all juvenile records

Section	Offence	Record Types
s.76	Assault and commit act of indecency on female under 16 (repealed)	Non convictions, all juvenile records
s.78A	Incest	Non convictions, all juvenile records
s.78B	Incest attempts	Non convictions, all juvenile records
s.78H	Homosexual intercourse with male under 10 (repealed)	Non convictions, all juvenile records
s.78I	Attempt, or assault with intent, to have homosexual intercourse with male under 10 (repealed)	Non convictions, all juvenile records
s.78K	Homosexual intercourse with male 10 to 18 (repealed)	Non convictions, all juvenile records
s.78L	Attempt, or assault with intent, to have homosexual intercourse with male between 10 and 18 (repealed)	Non convictions, all juvenile records
s.78N	Homosexual intercourse by teacher etc. (repealed)	Non convictions, all juvenile records
s.78O	Attempt, or assault with intent, to have homosexual intercourse with pupil (repealed)	Non convictions, all juvenile records
s.78Q	Acts of gross indecency (repealed)	Non convictions, all juvenile records
s.79	Bestiality	Non convictions, all juvenile records
s.80A	Sexual assault by forced manipulation	Non convictions, all juvenile records
s.80D	Causing sexual servitude	Non convictions, all juvenile records
s.80E	Conduct of business involving sexual servitude	Non convictions, all juvenile records
s.81	(repealed)	Non convictions, all juvenile records
s.86	Kidnapping (except where by parent or carer)	Non convictions, all juvenile records
s.91D	Promoting or engaging in acts of child prostitution	Non convictions, all juvenile records
s.91E	Obtaining benefit from child prostitution	Non convictions, all juvenile records
s.91F	Premises not to be used for child prostitution	Non convictions, all juvenile records
s.91G	Children not to be used for pornographic purposes	Non convictions, all juvenile records
s.91H	Production, dissemination or possession of child pornography (child under 16)	Non convictions, all juvenile records
s.91J	Voyeurism	Non convictions, all juvenile records
s.91K	Filming a person engaged in private act	Non convictions, all juvenile records
s.91L	Filming a person's private parts	Non convictions, all juvenile records

Section	Offence	Record Types
s.91M	Installing a device to facilitate observation or filming	Non convictions, all juvenile records
578B	Possession of child pornography (repealed)	Non convictions, all juvenile records
578C (2A)	Publishing Indecent articles	Non convictions, all juvenile records
s. 530	Serious animal cruelty	Blank
<b>Crimes (Domestic and Personal Violence) Act 2007</b>		
s.13	Stalking, where the victim is a child	All records
<b>NSW Summary Offences Act 1988</b>		
s.21G	Filming for indecent purposes (repealed)	Non convictions, all juvenile records
<b>Drug Misuse and Trafficking Act 1985</b>		
s.23A	Offences with respect to enhanced indoor cultivation of prohibited plants in the presence of children	All records other than "not guilty"
s.24(1A), (2A)	Exposure of children to the manufacture and production of prohibited drugs	All records other than "not guilty"
s.25(1A)	Adult who supplies prohibited drugs to a person under 16	All records other than "not guilty"
<b>Children and Young Persons (Care and Protection) Act 1998</b>		
s.227	Child and young person abuse	All records other than "not guilty"
s.228	Neglect of children and young persons	All records other than "not guilty"
s.231	Leaving children and young persons unsupervised in motor vehicles	All records other than "not guilty"
<b>Prevention of Cruelty to Animals Act 1979</b>		
s.6	Aggravated cruelty to animals	All records
<b>Commonwealth Customs Act 1901</b>		
s.233BAB	Importation of items of child pornography or of child abuse material	Non convictions, all juvenile records
<b>Commonwealth Criminal Code Act 1995</b>		
s.270.6	Sexual servitude offences	Non convictions, all juvenile records
s.270.7	Deceptive recruiting for sexual services	Non convictions, all juvenile records
s.272.8-15	Sexual intercourse with a child (outside Australia)	Non convictions, all juvenile records
s.272.18-20	Offences of benefiting from, encouraging or preparing for sexual offences against children outside Australia	Non convictions, all juvenile records
s.471.16-22	Using a postal or similar service for child pornography material	Non convictions, all juvenile records

Section	Offence	Record Types
s.471.24-26	Offences relating to use of postal or similar service involving sexual activity with person under 16	Non convictions, all juvenile records

## H: MISCONDUCT WHICH MUST BE NOTIFIED TO THE CHILDREN'S GUARDIAN

### H.1 Sexual Misconduct Involving a Child

#### *H.1.1 Sexual Offences*

Sexual misconduct includes sexual offences, which encompasses all criminal offences involving a sexual element that are 'committed against, with or in the presence of a child'. These offences include (but are not limited to) the following:

- indecent assault;
- sexual assault;
- aggravated sexual assault;
- sexual intercourse and attempted sexual intercourse;
- possession/ dissemination/ production of child pornography or child abuse material;
- using children to produce pornography;
- grooming or procuring children under the age of 16 years for unlawful sexual activity;
- or
- deemed non-consensual sexual activity on the basis of special care relationships.

#### *H.1.2 Sexual Misconduct*

For sexual misconduct to be reportable to the Office of the Children's Guardian, the alleged conduct must have been committed against, with or in the presence of a child.

There are three categories of sexual misconduct in addition to sexual offences:

- crossing professional boundaries;
- sexually explicit comments and other overtly sexual behaviour; and
- grooming behaviour.

#### *H.1.3 Crossing professional boundaries*

Sexual misconduct includes behaviour that can reasonably be construed as involving an inappropriate and overly personal or intimate:

- relationship with;
- conduct towards; or
- focus on; a child or young person, or a group of children or young persons.

In the area of 'crossing professional boundaries', particular care should be exercised before making a finding of sexual misconduct. For example, an employee who, on an isolated

occasion, 'crosses professional boundaries' in a manner that involves little more than poor judgment could not be said to have engaged in sexual misconduct. Also, in cases where an employee has 'crossed boundaries' in terms of their relationship with a child, if there is evidence which clearly shows that the employee did not seek to establish an improper relationship with the involved child, then this does not constitute sexual misconduct.

However, persistent less serious breaches of professional standards in this area, or a single serious 'crossing of the boundaries' by an employee, may constitute sexual misconduct, particularly if the employee either knew, or ought to have known, that their behaviour was unacceptable.

Codes of conduct that outline the nature of the professional boundaries which should exist between employees and children/young people can be particularly useful. For employees who either intentionally breach such codes or have demonstrated an inability to apply them appropriately, it may be necessary to provide more detailed written advice about what constitutes appropriate behaviour.

#### ***H.1.4 Grooming behaviour***

Grooming or procuring a child under the age of 16 years for unlawful sexual activity is a sexual offence. However, Schedule 1(2) of the Act also recognises grooming as a form of sexual misconduct. As grooming is a sexual offence if the alleged victim is under 16 years old, caution should be exercised before reaching a grooming finding (particularly in cases where the behaviour is directed towards a child under 16 years). As an alternative to grooming, in many cases it will be more appropriate to consider whether there has been a 'crossing of professional boundaries' (see above) and/or other more overt sexual behaviour.

Furthermore, behaviour should only be seen as 'grooming' where there is evidence of a pattern of conduct that is consistent with grooming the alleged victim for sexual activity, and that there is no other reasonable explanation for it. The types of behaviours that may lead to such a conclusion include (but are not limited to) the following:

- Persuading a child or group of children that they have a 'special' relationship, for example by:
  - spending inappropriate special time with a child;
  - inappropriately giving gifts;
  - inappropriately showing special favours to them but not other children;
  - inappropriately allowing the child to overstep rules;
  - asking the child to keep this relationship to themselves.
- Testing boundaries, for example by:
  - undressing in front of a child;
  - encouraging inappropriate physical contact (even where it is not overtly sexual);
  - talking about sex; or
  - 'accidental' intimate touching.

- Inappropriately extending a relationship outside of work (except where it may be appropriate - for example where there was a pre-existing friendship with the child's family or as part of normal social interactions in the community).
- Inappropriate personal communication (including emails, telephone calls, text messaging, social media and web forums) that explores sexual feelings or intimate personal feelings with a child.

An adult requesting that a child keep any aspect of their relationship secret or using tactics to keep any aspect of the relationship secret, would generally increase the likelihood that grooming is occurring.

### ***H.1.5 Sexually explicit comments and other overtly sexual behaviour***

Sexual misconduct includes a broad range of sexualised behaviour with or towards children. While it is not possible to provide a complete and definitive list of unacceptable sexual conduct involving children, the following types of behaviour give strong guidance:

- sexualised behaviour with or towards a child (including sexual exhibitionism);
- inappropriate conversations of a sexual nature;
- comments that express a desire to act in a sexual manner;
- unwarranted and inappropriate touching involving a child;
- personal correspondence and communications (including emails, social media and web forums) with a child or young person in relation to the adult's romantic, intimate or sexual feelings for a child or young person;
- exposure of children and young people to sexual behaviour of others including display of pornography; or
- watching children undress in circumstances where supervision is not required and it is clearly inappropriate.

## **H.2 Serious physical assault of a child**

An assault of a child includes any act by which a person intentionally inflicts unjustified use of physical force against a child. An assault can also occur if a person causes a child to reasonably fear that unjustified force will be used against them. Even if a person who inflicts, or causes the fear of, physical harm does not intend to inflict the harm or cause the fear, they may still have committed an assault if they acted recklessly (i.e. the person ought to have known that their actions would cause physical harm or the fear of such harm).

Assaults can include hitting, pushing, shoving, throwing objects, or making threats to physically harm a child.

Reporting bodies should consider the context in which physical force is used against a child to determine whether it constitutes an assault. For example, an assault has not taken place where there is use of reasonable force in the following examples:

- actions for the discipline, management or care of children;
- exercising appropriate control over a child;
- disarming a child or young person seeking to harm themselves or others;
- separating children or young people who are fighting;
- moving a child or young person out of harm's way;
- restraining a child or young person from causing intentional damage to property; or
- self-defence or the defence of others.

When reporting bodies are considering whether the physical force used was reasonable, a range of variables should be taken into account, having regard to the circumstances of the case. Variables that may be relevant include matters such as the age, maturity, health or other characteristics of the child or children involved, and professional codes of conduct or standards that the worker is required to follow.

### ***H.2.1 Serious physical assault***

While reporting bodies are expected to investigate every allegation of physical assault, only findings that a serious physical assault occurred are reportable to the Office of the Children's Guardian for consideration in Working With Children Check assessments.

A physical assault is not serious where:

- it only involves minor force; and
- it did not and was not ever likely to result in serious injury.

A physical assault is serious where:

- it results in the child being injured, beyond a type of injury like a minor scratch, bruise or graze; or
- it had the potential to result in a serious injury; or
- the injury suffered may be minor, but the assault is associated with aggravating circumstances (in this regard, aggravating circumstances might include associated inhumane or demeaning behaviour by the employee, for example kicking a child, pulling a child by grabbing the child around the neck).

In considering whether a serious physical assault has occurred, reporting bodies whose work involves regular restraint of children, should consider the context of events, including the child's age and vulnerability.

Generally, behaviour that does not meet the standard of a serious physical assault does not become a serious physical assault by means of it being repeated. The only exception to this is where an employer has developed legitimate concerns for the safety of a child or children and intervened with a worker (e.g. warnings, counseling etc.) and the behaviour is repeated.

## I: EXTRACT OF NSW OMBUDSMAN GUIDE FOR SERVICES: REPORTABLE INCIDENTS IN DISABILITY SUPPORTED GROUP ACCOMMODATION

There are four categories of 'reportable incidents' in disability supported group accommodation that must be reported to the NSW Ombudsman:

- a) Employee to client incidents,
- b) Client to client incidents,
- c) An incident involving a contravention of an apprehended violence order made for the protection of a person with disability, or
- d) An incident involving an unexplained serious injury to a person with disability.

All reportable incidents must involve a person living in supported group accommodation.<sup>8</sup>

### I.1 Employee to client incidents

The Act requires the reporting of an incident involving any of the following in connection with an employee of the Department or a funded provider and a person with disability living in supported group accommodation:

- (i) any **sexual offence** committed against, with, or in the presence of the person with disability
- (ii) **sexual misconduct** committed against, with, or in the presence of the person with disability, including grooming of the person for sexual activity
- (iii) an **assault** of the person with disability, not including the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated under workplace employment procedures
- (iv) an offence under Part 4AA of the *Crimes Act 1900* committed against the person with disability (**fraud**, and other similar offences)
- (v) **ill-treatment** or **neglect** of the person with disability.

An alleged incident is only notifiable to the NSW Ombudsman if the person the subject of the allegation is employed or engaged by the Department or a funded provider at the time the allegation was made.

#### I.1.1 What is a sexual offence?

The term 'sexual offence' encompasses all criminal offences involving a sexual element that are committed against, with, or in the presence of a person with disability in supported group accommodation.

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<sup>8</sup> For the definition of 'supported group accommodation' see section 22 of the *Disability Inclusion Act*

These offences include (but are not limited to):

- **Sexual assault** – this is a broad term describing all sexual offences. Sexual assault includes the specific offence involving a person having sexual intercourse with another person without their consent. Sexual assault also includes when a person is forced, coerced or tricked into sexual acts against their will or without their consent.
- **Aggravated sexual assault** – involves sexual intercourse with another person without their consent in circumstances of aggravation. Circumstances of aggravation can include the offender seriously injuring or threatening to seriously injure the person, breaking into a home to commit the offence, or the victim having a serious physical disability or cognitive impairment.
- **Indecent assault** – involves touching (or threatening to touch) a person’s body in a sexual manner without the consent of the other person. For example, it can include unwanted touching of a person’s breast, bottom or genitals.<sup>9</sup>
- **Deemed sexual offences** – includes carer and exploitation offences under section 66F the *Crimes Act 1900* (NSW). Section 66F of the Crimes Act is designed to prevent the sexual exploitation of people with a cognitive impairment by their carers, or by anyone else who has knowledge of the person’s impairment and enters into a sexual relationship with the intent of taking advantage. Irrespective of the consent of a person, the Crimes Act prohibits sexual intercourse in the following circumstances:
  - between a person with a cognitive impairment and a person who is responsible for the care of that person (the ‘carer’s offence’; s.66F(2)), and
  - between a person with a cognitive impairment and any other person who has the intention of taking advantage of that person’s cognitive impairment (the “exploitation offence”; s.66F(3)).

### ***1.1.2 What is sexual misconduct?***

For sexual misconduct to constitute a reportable incident, the alleged misconduct must have been committed against, with, or in the presence of a person with disability in supported group accommodation, **by an employee**.

The term sexual misconduct is designed to address conduct that does not amount to a criminal offence. There are three categories of sexual misconduct:

- crossing professional boundaries
- sexually explicit comments and other overtly sexual behaviour, and
- grooming behaviour.

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<sup>9</sup> *Definitions of sexual assault, aggravated sexual assault and indecent assault can be found at the NSW Government Victim Services website: [http://www.sexualassault.nsw.gov.au/VOSA/sexual\\_assault\\_victims.html](http://www.sexualassault.nsw.gov.au/VOSA/sexual_assault_victims.html)*

***Crossing professional boundaries***

Sexual misconduct includes behaviour that can reasonably be construed as involving an inappropriate and overly personal or intimate:

- relationship with
- conduct towards, or
- focus on

a person with disability, or a group of people with disability in supported group accommodation.

In the area of ‘crossing professional boundaries’, particular care should be exercised before making a **finding** of sexual misconduct. For example, an employee who, on an isolated occasion, ‘crosses professional boundaries’ in a manner that involves no more than poor judgement could not be said to have engaged in sexual misconduct. Also, in cases where an employee has ‘crossed boundaries’ in terms of their relationship with a client, this would not constitute sexual misconduct if there is evidence which shows that the employee did not seek to establish an **improper relationship** with the client.

However, a single **serious** ‘crossing of the boundaries’, or **a course of less serious breaches** of this type, may constitute professional misconduct – particularly if the employee either knew, or ought to have known, that their behaviour was unacceptable. Codes of conduct that outline the nature of the professional boundaries which should exist between employees and clients can be particularly useful.

***Sexually explicit comments and other overtly sexual behaviour***

Sexual misconduct includes a broad range of sexualised behaviour with or towards people with disability in supported group accommodation. It is not possible to provide a complete and definitive list of unacceptable sexual conduct involving clients. However, the following types of behaviour give strong guidance:

- sexualised behaviour with or towards a client (including sexual exhibitionism)
- inappropriate conversations of a sexual nature
- inappropriate comments relating to sexual acts
- unwarranted and inappropriate touching of a client
- personal correspondence and communications (including emails, social media and web forums) with a client concerning the employee’s romantic, intimate or sexual feelings for the client
- inappropriate exposure of clients to sexual behaviour of others, and/or
- watching clients undress in circumstances where supervision is not required and it is clearly inappropriate.

### ***Grooming behaviour***

Behaviour should only be seen as ‘grooming’ where there is evidence of a **pattern of conduct** that is consistent with grooming the alleged victim for sexual activity, and there is no other reasonable explanation for that pattern. The types of behaviours that may lead to such a conclusion include (but are not limited to):

- Persuading a client or group of clients that they have a ‘special’ relationship with the employee, for example by:
  - inappropriately giving gifts
  - inappropriately showing special favours to them but not other clients, or
  - asking the client to keep the relationship to themselves.
- ‘Testing boundaries’, for example by:
  - undressing in front of a client
  - encouraging inappropriate physical contact (even where it is not overtly sexual), or
  - ‘accidental’ intimate touching.
- Extending a relationship with a client outside of work (except where it may be appropriate - for example, where there was a pre-existing friendship with the client’s family, or as part of regular social interactions in the community).
- Inappropriate personal communication (including emails, telephone calls, text messaging, social media and web forums) that inappropriately explores sexual feelings or intimate personal feelings with a client.

A staff member requesting that a client keep any aspect of their relationship secret, or using tactics to keep any aspect of the relationship secret, would generally increase the likelihood that grooming is occurring.

#### ***1.1.3 What is an assault?***

An assault of a person with disability in supported group accommodation includes any act by which a person intentionally inflicts unjustified use of physical force against a client. An assault can also occur if a person causes a client to reasonably fear that unjustified force will be used against them. Even if a person who inflicts, or causes the fear of, physical harm does not intend to inflict the harm or cause the fear, they may still have committed an assault if they acted recklessly (i.e. the person ought to have known that their actions would cause physical harm or the fear of such harm).

Assaults can include hitting, pushing, shoving, throwing objects, or making threats to physically harm a client.

***When the use of physical force does not need to be reported***

The Ombudsman Act specifically outlines certain circumstances involving the use of physical force which do not need to be reported:

- the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated under workplace employment procedures.

It is also important to consider the context in which physical force is used against a client to determine whether it constitutes an assault. For example, an assault has not taken place where there is use of necessary and reasonable force in the following circumstances:

- restraining a client when it is in accordance with an approved behaviour support plan authorised by a Restricted Practices Authorisation mechanism<sup>10</sup>
- taking reasonable steps to disarm a person with disability seeking to harm themselves or others
- separating people with disability who are fighting
- moving a person with disability out of harm's way
- restraining a person with disability from causing intentional damage to property
- self-defence, or the defence of others.

***1.1.4 What is an offence under Part 4AA of the Crimes Act?***

An allegation of fraud against an employee must be reported to the NSW Ombudsman. Where an allegation of fraud is made against an employee of FACS or a funded provider, this is a reportable incident.

Part 4AA of the *Crimes Act 1900* (NSW) contains a range of offences relating to fraud, including:

- fraud (s.192E)<sup>20</sup><sup>11</sup>
- intention to defraud by destroying or concealing accounting records (s.192F)<sup>12</sup>
- intention to defraud by false or misleading statement (s.192G)<sup>13</sup>, and

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<sup>10</sup> For more information, see the *FACS Behaviour Support manual*

<sup>11</sup> The Judicial Commission of NSW outlines that s.192E of the *Crimes Act 1900* makes it an offence for a person who, by any deception, dishonestly obtains property belonging to another or obtains a financial advantage or causes any financial disadvantage. The offence can involve all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time: s.192E(3). The offence can be an alternative to a charge of larceny or an offence that includes larceny: s.192E(4). For further information see: <http://www.judcom.nsw.gov.au/publications/benchbks/criminal/fraud.html>

<sup>12</sup> Section 192F makes it an offence to dishonestly destroy or conceal accounting records with the intention of obtaining property or a financial advantage.

- intention by an officer of an organisation to deceive members or creditors by a false or misleading statement (s.192H)<sup>14</sup>.

### ***1.1.5 What is ill-treatment?***

Ill-treatment captures those circumstances where a person treats a client in a seriously inappropriate, improper, inhumane or cruel manner.

The focus is on the nature of the alleged conduct itself, rather than on the effect of the conduct on the person with disability.

Ill-treatment may include:

- behaviour management that is seriously inappropriate or improper and/or is the use of a restricted practice that has not been endorsed in a person's Behaviour Support Plan, or is not in accordance with the plan authorised by Restricted Practices Authorisation mechanism
- making excessive and/or degrading demands of a person with disability
- hostile use of force towards a person with disability
- a pattern of seriously inappropriate, degrading comments or behaviour towards a person with disability.

In making a determination regarding ill-treatment, it is important to consider relevant codes of conduct that outline the nature of professional conduct and practice by employees which should occur when working with people with disability.

### ***1.1.6 What is neglect?***

Neglect includes an action or failure to act by a person who has care responsibilities towards a person with disability in supported group accommodation. The nature of the employee's care responsibilities provides the context against which the conduct needs to be assessed.

#### ***Supervisory neglect***

- An intentional or reckless failure to adequately supervise or support a client that results in the death of, or significant harm to, the client.
- An intentional or reckless failure to adequately supervise or support a client that also:
  - involves a gross breach of professional standards,

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<sup>13</sup> *The section makes it an offence to dishonestly make, publish or concur in making or publishing, a statement that is false or misleading in a material particular with the intention of obtaining property or a financial advantage.*

<sup>14</sup> *The offence is concerned with an officer of an organisation making a false or misleading statement with the intention of deceiving members or creditors of the organisation about its affairs.*

- and
  - has the potential to result in the death of, or significant harm to, the client.

### ***Carer neglect***

Grossly inadequate care that involves depriving a client of the basic necessities of life, such as food, drink, shelter, clothing, medical care/treatment.

### ***Failure to protect from abuse***

An obviously unreasonable failure to respond to information which strongly indicates actual or potential serious abuse of a client.

### ***Reckless act/failure to act***

A reckless act, or failure to act, that:

- involves a gross breach of professional standards, and
- has the potential to result in the death of, or significant harm to, a client.

Neglect can be a single significant incident where a caregiver fails to fulfil a duty, resulting in actual harm to a client, or where there is the potential for significant harm to a client.

Neglect can also be an ongoing pattern of repeated failures by a caregiver to meet a client's physical or psychological needs.

## **I.2 Client to Client Incidents**

The Act requires the reporting of an incident involving an assault of a person with disability living in supported group accommodation by another person with disability living in the same supported group accommodation that:

- (i) is a **sexual offence**, or
- (ii) causes **serious injury**, including, for example, a fracture, burns, deep cuts, extensive bruising or concussion, or
- (iii) involves the use of a **weapon**, or
- (iv) is part of a **pattern of abuse** of the person with disability by the other person.

### ***1.2.1 What is a sexual offence?***

Reportable client to client sexual offences only relate to circumstances involving sexual assault.

These offences include (but are not limited to):

- **Sexual assault** – this is a broad term describing all sexual offences, for example when a person is forced, coerced or tricked into sexual acts against their will or without

their consent. Sexual assault also describes a specific offence when a person has sexual intercourse with another person without their consent.

- **Aggravated sexual assault** – is sexual intercourse with another person without their consent in circumstances of aggravation. Circumstances of aggravation can include (but not limited to) the offender seriously injuring, or threatening to seriously injure the person.
- **Indecent assault** – is touching (or threatening to touch) a person’s body in a sexual manner without the consent of the other person. For example, it can include unwanted touching of a person’s breast, bottom or genitals.<sup>25</sup>

### ***1.2.2 What is serious injury?***

Serious injury can include (but is not limited to) fractures, burns, deep cuts, extensive bruising, or concussion.

### ***1.2.3 What is a weapon?***

A weapon may include (but is not limited to):

- a firearm or knife,
- anything that is made or adapted for attacking someone, or
- anything that, in all of the circumstances, is used, intended for use, or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm.

### ***1.2.4 What is a ‘pattern of abuse’ of a client by another client?***

A ‘pattern of abuse’ occurs where there is **repeated** physical abuse and/or ill treatment and/or harassment of a client by another client.

Abusive conduct includes the following, alone or in any combination:

- abuse of a sexual or non-sexual nature
- physical force or inappropriate physical contact
- threats of physical force or threats of inappropriate physical contact, and
- conduct that causes physical harm or emotional distress to the victim.

## **1.3 Contravention of an apprehended violence order**

The Act requires the reporting of an incident occurring in supported group accommodation and involving a contravention of an apprehended violence order made for the protection of a person with disability, regardless of whether the order is contravened by an employee of the Department or a funded provider, a person with disability living in the supported group accommodation or another person.

## **I.4 Unexplained serious injury**

The Act requires the reporting of an incident involving an unexplained serious injury to a person with disability living in supported group accommodation.

A serious injury includes, but is not limited to:

- a fracture,
  - burns,
  - deep cuts,
  - extensive bruising, or
  - concussion.
-