

Summary of investigation requirements

The investigation requirements of the Reportable Conduct Scheme (**the Scheme**) can be summarised as follows:

CHECKLIST OF REPORTABLE CONDUCT SCHEME INVESTIGATION REQUIREMENTS

- Consult with WA Police Force or any other body conducting an investigation into the matter as to whether your investigation should be suspended; inform the Ombudsman of any suspension and the steps taken to manage the risks that might arise from suspension of your investigation; and, if an investigation is not suspended, ensure it is conducted in a way that will not compromise another investigation, particularly an investigation by the WA Police Force.
- Provide the employee with an opportunity to make submissions when they are informed:
 - That they are the subject of an investigation;
 - Of any proposed adverse finding; and
 - Of proposed action to be taken as a result of the finding.
- Notify the Ombudsman of matters affecting an investigation, including where:
 - The conduct is not reportable conduct;
 - The report of the matter is trivial, vexatious or not made in good faith;
 - Another body is dealing with or investigating the matter; or
 - Where directed by another body to cease or discontinue the investigation.
- Take all reasonable steps to ensure that an investigation is carried out in a timely way.
- Provide the employee written notice that the investigation has ended and a written report setting out the findings of the investigation and the reasons for those findings.
- As soon as practicable after conducting the investigation, make a finding as to whether reportable conduct has or has not occurred, and ensure that appropriate action is taken in relation to the employee and, if needed, to improve the organisation's identification of, and response to, reportable conduct.
- As soon as practicable after the investigation, provide the Ombudsman a written report that includes:
 - The findings of the investigation and the reasons for those findings;
 - Any submissions made by the employee;
 - Any disciplinary or other action taken, or proposed to be taken, in relation to the employee as a result of the findings of the investigation;
 - If the organisation does not propose to take any disciplinary or other action in relation to the employee, the reasons why no action is to be taken;
 - Any action taken, or proposed to be taken, as a result of the findings of the investigation, to improve the identification or prevention of reportable conduct, or the reporting, notification or investigation of reportable allegations and reportable convictions, involving employees of the organisation; and
 - Any other information that the head of the organisation considers relevant to the report.
- Do not publish information that may identify a child the subject of reportable conduct or someone who reports conduct and do not disclose information to a child or person with parental responsibility if it would put the wellbeing of the child or anyone's safety at risk; contravene the *Children and Community Services Act 2004* s. 124F and 240; compromise another investigation; or, if the child has sufficient maturity and does not consent to the disclosure.

More detailed information on these requirements is set out below.

Concurrent investigations or proceedings

Investigations and findings under the Scheme should not compromise investigations or proceedings by other bodies. Accordingly:

- If the WA Police Force or another body investigating the conduct advises the head of the organisation that a reportable conduct investigation or finding is likely to compromise an investigation:
 - The head of the organisation may suspend the reportable conduct investigation or finding; and
 - Take steps to manage any risks while it is suspended;
- The head of the organisation must consult with the WA Police Force or the other body undertaking the investigation before making a decision about the suspension and management of risks;
- The head of the organisation must inform the Ombudsman of the suspension and steps taken to manage risk if the investigation or finding is suspended; and
- If the head of the organisation decides not to suspend the investigation, they must ensure it is conducted in a way that will not compromise the WA Police Force or other investigation.

These requirements also apply in relation to any court proceedings (including an appeal) arising out of the investigation.

Procedural Fairness

The Scheme provides for an employee who is the subject of a reportable conduct investigation to be provided with the opportunity to make submissions at three critical stages of an investigation:

- Before any adverse finding is made, the head of the organisation¹ must:
 - Inform the employee that they are the subject of an investigation, and of the reportable allegation or reportable conviction being investigated, and give them the opportunity to make submissions; and
 - After considering any submission made by the employee, inform the employee of any proposed adverse finding and give them an opportunity to make submissions; and
- Before any disciplinary or other action is taken in relation to the employee as the result of the findings of the reportable allegation or reportable conviction investigation, inform the employee of the action that is proposed to be taken, and give the employee an opportunity to make submissions.

These employee submissions must be included when the head of the organisation gives the Ombudsman their written report on the outcome of their investigation.

In addition, the head of the organisation must, as soon as practicable after the end of an investigation, give the employee:

- Written notice stating that the investigation has ended; and
- A written report setting out the findings of the investigation and the reasons for those findings (this does not need to be the same written report provided to the Ombudsman).

¹ A reference to the head of the organisation includes a delegate of the head of the organisation.

Notifying the Ombudsman of certain matters and discontinuing investigations

The Scheme requires organisations to notify the Ombudsman of certain matters affecting an investigation and provides for organisation to request an exemption from the requirement to continue an investigation. Circumstances that may lead to an investigation being discontinued include where the matter does not constitute reportable conduct or where continuing the investigation is unnecessary because another appropriate body is dealing with, or investigating the matter, is contrary to law, or potentially prejudicial to an investigation undertaken by another body.

Notifying the Ombudsman of matters affecting investigation

The head of an organisation must, as soon as practicable, notify the Ombudsman in writing if, in relation to a matter being investigated, the head of the organisation:

- Forms the view on reasonable grounds that:
 - The matter does not constitute reportable conduct; or
 - The report of the matter to the organisation is frivolous or vexatious or not made in good faith;
- Becomes aware that another appropriate person or body is dealing with or investigating the matter;
- Is required by law to comply with the directions of another person or body in relation to the investigation of the matter; or
- Is requested or directed by another appropriate person or body to cease, or discontinue for a period, the investigation of the matter.

Requesting an exemption from the requirement to continue an investigation

The head of the organisation may, when providing the Ombudsman the written notice of matters affecting an investigation, request the Ombudsman exempt the head of the organisation from the requirement to continue the investigation.

If the Ombudsman grants the exemption, the head of the organisation is not required to provide a report of the investigation to the Ombudsman.

Making findings

After conducting an investigation, the head of the organisation must make a finding and may need to take appropriate action in response to the findings.

Balance of probabilities and findings

The head of the organisation conducting a reportable conduct investigation must apply the balance of probabilities as the standard of proof when making a finding. The investigator should consider whether it is more likely than not that the reportable conduct occurred.

The standard of proof is met when the head of the organisation is 'reasonably satisfied', or persuaded, that the reportable conduct occurred.

The standard of proof does not change when dealing with more serious allegations, even if the allegation amounts to a criminal offence. However, a more rigorous approach to fact-finding may be employed when a serious allegation is made.

The investigator may be guided by the 'Briginshaw principle' (established in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362) which states that serious allegations should be accepted cautiously, considering the:

1. seriousness of the allegation,
2. inherent unlikelihood of an occurrence of a given description, and
3. gravity of the consequences flowing from a particular finding.

The Briginshaw principle is not, in and of itself, a separate standard of proof. A finding must be made on the balance of probabilities, with the application of the Briginshaw principle if required.

As soon as practicable after conducting an investigation in relation to an employee, the head of the organisation must make one of the following findings:

Finding	Definition
Substantiated	The head of the organisation has formed the view, on reasonable grounds, that the alleged reportable conduct occurred on the balance of probabilities.
Unsubstantiated	The head of the organisation did not form the view, on reasonable grounds, that the alleged reportable conduct occurred on the balance of probabilities.

The investigator makes findings as to whether the allegations are or are not substantiated on the balance of probabilities.

Taking action in response to findings

As soon as practicable after making a reportable conduct finding, in relation to an employee under the Scheme, the head of the organisation must ensure that:

- appropriate action is taken in relation to the employee in response to the finding; and

If the head of the organisation has formed the view that action is needed, it must ensure that appropriate action is taken to improve:

- the identification or prevention of reportable conduct; and/or
- the reporting, notification or investigation of reportable allegations and reportable convictions involving employees of the organisation.

The findings and the action taken in response to the findings are to be included in the written report on the outcome of the investigation. This report is to be provided to the Ombudsman.

Reporting the outcome of the investigation to the Ombudsman

The Scheme requires organisations to report the outcome of an investigation to the Ombudsman.

The head of an organisation must, as soon as practicable after the end of an investigation, give the Ombudsman a written report setting out:

- The findings of the investigation and the reasons for those findings;
- Any submissions made by the employee;
- Any disciplinary or other action taken, or proposed to be taken, in relation to the employee as a result of the findings of the investigation;
- If the entity does not propose to take any disciplinary or other action in relation to the employee, the reasons why no action is to be taken;
- Any action taken, or proposed to be taken, as a result of the findings of the investigation, to improve the identification or prevention of reportable conduct, or the reporting, notification or investigation of reportable allegations and reportable convictions, involving employees of the organisation; and
- Any other information that the head of the organisation considers relevant to the report.

After receiving the report and other information, the Ombudsman may require that the head of the organisation provide additional information that the Ombudsman considers relevant to determine whether the matter was properly investigated and appropriate action was taken as a result of the investigation.

Disclosure of information

Disclosure information to child or person with parental responsibility

The Scheme provides for certain information to be disclosed to a child the subject of conduct that forms a basis for a report and to persons with parental responsibility for that child. The matters that can be disclosed are:

- The progress of the investigation;
- The findings of the investigation; or
- Any action taken as a result of the investigation.

As a general principle, information should be disclosed unless there is a good reason not to disclose the information. Under the Scheme, information must not be disclosed if the disclosure would:

- Put the wellbeing of the child, or the safety of any other person, at risk;
- Contravene the *Children and Community Services Act 2004*, section 124F (Confidentiality of reporter's identity) or section 240 (Restrictions on disclosing notifier's identity);
- Compromise an investigation under the Scheme, a police investigation, or another investigation; or
- If the disclosure would be to a person with parental responsibility and the head of the organisation is satisfied that the child has sufficient maturity and understanding to consent to the disclosure and the child does not consent to the disclosure.

If you are unsure about disclosing information, we recommend you contact our office for guidance, and to talk through any issues of concern before proceeding.

Prohibition on publishing certain information

The Scheme specifically prohibits the publishing of certain information. Publish means to disseminate to the public by any means, including in a written publication or other mediums such as radio broadcast, television, a website, or other electronic means. A person must not publish, or cause to be published, information that identifies or is likely to identify:

- A person who has made a report of a reportable allegation or reportable conviction; or
- A child who is the subject of conduct that forms the basis of a report or a finding of reportable conduct.

Consultation in relation to Scheme

The Scheme provides for the head of the organisation to consult with certain persons or bodies regarding:

- A reportable allegation or reportable conviction;
- Any investigation conducted for the purposes of the Scheme; or
- Any other matter that is relevant to the functions of the head of the organisation under the Scheme.

Information obtained by the head of the organisation or an investigator conducting an investigation for the purposes of the Scheme may be disclosed for the purposes of any consultation by the head of the organisation with:

- The Commissioner of Police;
- The Commissioner for Children and Young People; or
- The Director General of the Department of Communities.

Where to get help

Organisations covered by the Scheme should contact the Ombudsman for clarification and guidance, and to talk through any issues of concern.

- Telephone: (08) 9220 7471
- Email: reportableconduct@ombudsman.wa.gov.au

Further information is also available on the Ombudsman's website at www.ombudsman.wa.gov.au

