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PREFACE

This policy and associated procedures set out the principles and processes guiding the prevention, identification and eradication of unacceptable workplace behaviours including bullying, harassment, sexual harassment, and discrimination within the Ombudsman's Office (Office).

The purpose of the policy is to:

- Define unacceptable workplace behaviours, including bullying, harassment, sexual harassment, and discrimination
- Provide information for workers around their rights, obligations, and available options for raising concerns about unacceptable workplace behaviour
- Provide guidelines for the effective and timely management of complaints that instils confidence in the complaint management process and supports workers in coming forward to report unacceptable workplace behaviour.
- Assist managers to fulfil their obligation to eliminate or minimise the risk of unacceptable workplace behaviours and manage complaints relating to such behaviours.

This policy is supported by a procedure which outlines the complaint management process in detail.

LEGISLATIVE AND COMPLIANCE FRAMEWORK

Anti-Discrimination Act 1977 (NSW)

Government Sector Employment Act 2013 (NSW)

Government Sector Employment Rules

Work Health and Safety Act 2011 (NSW)

Age Discrimination Act 2004 (Commonwealth)

Disability Discrimination Act 1992 (Commonwealth)

Racial Discrimination Act 1975 (Commonwealth)

Sex Discrimination Act 1984 (Commonwealth)

Guide for preventing and responding to workplace bullying – May 2016 – SafeWork Australia

Dealing with workplace bullying - A worker's guide – May 2016 – SafeWork Australia

1. POLICY STATEMENT

The Office does not tolerate harassment, bullying or discrimination in the workplace.

A harassment, bullying and discrimination free workplace is a workplace where people respect and tolerate the rights and differences of others.

The Office is an equal opportunity employer and does not discriminate between individuals on the basis of gender, race, marital status, pregnancy, age, disability, sexual orientation, religion or responsibilities as a carer. The Office supports the principle of employing the best person for the role.

The Office recognises that harassment, bullying and discrimination can have a physical and psychological impact on individuals, and their capacity to operate effectively in their roles.

Under the *Work Health and Safety Act 2011 (NSW)*, the Office (as a person in charge of conducting a business or undertaking) acknowledges these types of behaviour can pose a work health and safety risk, as well as breach State and Federal laws. This is why we will not tolerate any type of harassment, bullying or discrimination in our work or workplace.

This policy is supported by the *Procedure for Managing complaints of Bullying Harassment and Discrimination*.

2. WHAT IS UNLAWFUL DISCRIMINATION

Unlawful discrimination means treating one person or group less favourably than another, or causing them disadvantage, in certain circumstances. This generally occurs because they have a particular characteristic or belong to a particular group of people.

Australia has laws regarding discrimination at the Federal level, such as the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, and the *Sex Discrimination Act 1984*. The *Anti-Discrimination Act 1977* (NSW) operates at a State level.

These laws make discrimination unlawful on a variety of grounds, including on the basis of a person's:

- Sex, pregnancy, or breastfeeding
- Marital or relationship status
- Sexual orientation, gender identity including transgender status, or intersex status
- Race, colour, descent, nationality, national origin, ethnicity, or ethno-religious origin
- Family responsibilities or responsibilities as a carer
- Disability or impairment
- Age.

2.1 How can unlawful discrimination occur?

Discrimination can occur in the recruitment process, during the course of employment or upon termination of employment. Discrimination can also occur in the provision of goods and services. Employees should not unlawfully discriminate against colleagues or customers. Similarly, suppliers should not unlawfully discriminate against employees.

Discrimination can be direct or indirect.

- **Direct discrimination** occurs where someone is treated less favourably because of their sex, age, race etc. An example of direct discrimination is when an employee misses out on an internal promotion because they are considered too old for the job.
- **Indirect discrimination** occurs where everyone is treated on the same terms according to a rule, policy, or directive but which has the effect of being less favourable to people of a particular sex, age, race etc., and which is not reasonable in all the circumstances. An example of indirect discrimination would be a security company that has height and weight requirements for its employees – this may exclude a large proportion of women, and this requirement is not reasonable.

There are exceptions from anti-discrimination law which may apply in some situations – for example, because of the inherent requirements of a particular job.

Discrimination laws also prohibit vilification and racial hatred.

Racial hatred occurs where a person does a public act that is reasonably likely to offend, insult, humiliate or intimidate another person or a group of people, which is done because of that person or group's race, colour or national or ethnic origin. Acts of racial hatred include circulating racially offensive material or making racially offensive and/or abusing comments. Racial hatred is unlawful under the *Racial Discrimination Act 1975* (Cth).

Vilification occurs where a person does a public act that incites hatred, serious contempt for or severe ridicule of a person or group of persons because the person/group has a particular attribute. Protected attributes include race, sexuality or gender identity and HIV/AIDS status. Vilification is unlawful under the *Anti-Discrimination Act 1977* (NSW).

3. WHAT IS WORKPLACE BULLYING

'Workplace bullying' is defined as repeated and unreasonable behaviour directed towards an employee or a group of employees that creates a risk to health and safety.

'Repeated behaviour' refers to the persistent nature of the behaviour and can involve a range of behaviours over time.

'Unreasonable behaviour' means behaviour that a reasonable person, having considered the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating, or threatening.

Workplace bullying can occur at the place of work or outside work. Depending on the particular circumstances, behaviour which occurs outside of ordinary working hours and work-related activities may still be deemed workplace bullying if it affects workplace relationships.

Examples of behaviour, whether intentional or unintentional, that may be considered to be workplace bullying if it is repeated, unreasonable and creates a risk to health and safety include:

- abusive, insulting, or offensive language or comments,
- unjustified criticism or complaints,
- deliberately excluding someone from workplace activities,
- withholding information that is vital for effective work performance,
- setting unreasonable timelines or constantly changing deadlines,
- setting tasks that are unreasonably below or beyond a person's skill level,
- denying access to information, supervision, consultation, or resources to the detriment of the employee,
- spreading misinformation or malicious rumours, and
- changing work arrangements such as rosters and leave to deliberately inconvenience a particular employee or employees.

A single incident of unreasonable behaviour is not considered to be workplace bullying, however, it may have the potential to escalate and should not be ignored.

Bullying is not limited to the above and whether a particular set of circumstances or series of incidents constitutes bullying will be determined after taking into consideration all information relevant to the alleged incidents.

Workplace bullying can also be carried out in a variety of ways, including:

- in person,
- through email,
- text messages,
- via a third party, and
- social media channels.

Bullying behaviour can be by one or more persons against any other person or persons. Managers and staff at any level can either be responsible for carrying out bullying or be the recipient of bullying conduct.

In considering what is workplace bullying, it is necessary to apply common sense. The above points should not be applied rigidly or without regard to all relevant factors. All bullying complaints must be treated seriously, confidentially and acted on promptly.

This policy is not intended to cover all issues that may arise and as such should be viewed as a set of general principles rather than an exhaustive list of behaviours and actions that may constitute bullying.

3.1 Workplace bullying is not:

Legitimate and reasonable managerial actions, to direct and control how work is done in the workplace, which may include:

- providing appropriate, fair, and reasonable feedback on a staff member's work performance (the fact that a staff member may find the feedback upsetting, does not on its own constitute bullying)
- managing performance or underperformance issues
- issuing reasonable directions about work allocation and performance, and about attendance at the workplace
- transferring a staff member or taking action to make a staff member redundant where the process is conducted fairly and equitably
- making justifiable decisions related to recruitment, selection, and other development opportunities
- ensuring that workplace policies, procedures and reporting are implemented
- managing allegations of misconduct and utilising disciplinary actions where appropriate
- overseeing injury and illness processes in accordance with work, health and safety, injury management and workers compensation laws and policies.

Workplace conflict. Differences of opinion and disagreements are generally not considered to be workplace bullying. People can have differences and disagreements in the workplace without engaging in bullying. However, in some cases, conflict that is not managed may escalate to the point where it meets the definition of workplace bullying.

4. WHAT IS UNLAWFUL HARASSMENT?

Unlawful harassment is a form of unlawful discrimination. Unlawful harassment includes sexual harassment and other types of harassment which the law does not allow in particular circumstances. In general, unlawful harassment is any form of behaviour that:

- Is unwelcome (not wanted) or uninvited (not asked for)
- A reasonable person would have anticipated would humiliate, offend, or intimidate the person exposed to the conduct, and
- Is based on one of the grounds of unlawful discrimination.

In some cases a single action or incident can create unlawful harassment. In other cases there may need to be a persistent pattern of behaviour before unlawful harassment has occurred.

Harassment will not be unlawful, as such, if it is not based on one of the unlawful grounds, although it may amount to a breach of other laws or policies (including, for example, bullying).

In any event, the Office expects its employees to treat each other and other people whom they come into contact as representatives of the Office with respect and courtesy in accordance with the Office's Code Of Ethics and Conduct.

Unlawful harassment can include:

- Sexual harassment (see below)
- Verbal abuse or comments that degrade or stereotype people because of their race, sexual orientation, pregnancy, disability etc.
- Jokes based on race, sexual orientation, pregnancy, disability, etc
- Mimicking someone's accent, or the habits of someone with a disability
- Offensive gestures based on race, sexual orientation, pregnancy, disability etc
- Ignoring or isolating a person or group because of their race, sexual orientation, pregnancy, disability, etc

- Displaying or circulating racist, pornographic, or other offensive material (including electronically)

4.1 What is unlawful sexual harassment?

Unlawful sexual harassment occurs where a person:

- Makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to another person, or
- Engages in other unwelcome conduct of a sexual nature in relation to the other person, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated, or intimidated.

Unlawful sexual harassment can include:

- Pressure or demands for dates or sexual favours
- Unnecessary familiarity – for example, deliberately brushing against a person or constantly staring at a person
- Unwanted physical contact – for example, touching or fondling
- Sexual jokes or innuendo
- Offensive telephone calls
- Offensive sexual gestures
- Unwelcome comments or questions about a person's sex life
- Display or circulation of sexual material, including magazines, posters or pictures and email messages (including electronically)
- Sending email or text messages which contain sexual content or tone, or
- Sexual assault.

It is important to understand that some of these forms of sexual harassment are also criminal behaviour and may be treated as a criminal offence. These include:

- Sexual assault,
- Physically molesting a person,
- Indecent exposure, and
- Obscene phone calls or emails/letters.

4.2 What is not unlawful sexual harassment?

Mutual attraction between people is not sexual harassment. Conduct which is welcome or consensual is not unlawful, and friendships (sexual or otherwise) which develop between people who meet at work are a private concern provided they do not adversely impact on the workplace or create a conflict of interest.

However, you should take great care before engaging in conduct you believe to be welcome. Always remember that some people may not feel comfortable telling you that your behaviour is offending them and is not welcome. This may be because of their personality or may be because of the relative status of the people involved (e.g. they are too worried about the possible impact on their employment if they complain).

It is your responsibility to ensure that you do not engage in conduct which is not welcome.

You should also remember that even conduct which is welcome may not be appropriate in the workplace. If you are unsure whether conduct is appropriate, you should speak to your immediate manager or People and Culture.

5. STAFF RESPONSIBILITIES

5.1 It is the responsibility of all staff to respect the rights of others and to not engage in or encourage harassment, bullying or discrimination.

The Office will ensure that all staff receive training in preventing harassment, bullying and discrimination in the workplace.

All staff are expected to respect other people, and all staff have the legal right to a workplace that feels safe, and that is not inappropriately sexual, sexist, racist, homophobic, anti-disability, ageist, or stereotyping in any other way.

5.2 All staff must be careful about anything that could be interpreted as sexual or stereotyping people because of perceived difference or personal preferences of other staff.

Staff should remain conscious of the negative impact on individuals of actions like:

- the words and tone used in conversations and interactions in the Office
- throw-away comments
- sexual or stereotyping jokes
- sexual or stereotyping pictures, cartoons, verse – on paper, walls, boards, phones or computers
- any type of touching
- standing too close to individuals
- any gestures towards individuals or groups of individuals
- sexual behaviour of any sort
- isolating or segregating others
- initiation rites.

5.3 Staff are expected to respond in a positive manner to feedback from other individuals about the impact of their behaviour and to take appropriate action

All staff are responsible and proactive in maintaining good working relationships, including receiving and acknowledging feedback about their behaviour.

Staff should participate in a professional manner, in any action taken by their manager or director to address the complaint including:

- training
- counselling
- facilitated conversations
- mediations with either internal or external mediators
- changed working arrangement – either on a temporary or permanent basis.

5.4 What can you do if you are the subject of harassment, discrimination or acts of bullying?

If you feel that you are being bullied, harassed, or unlawfully discriminated against, the Office encourages you to take action to resolve the problem.

Do not ignore circumstances where you feel you are being bullied, unlawfully discriminated against, harassed, or vilified, thinking it will go away. Ignoring the behaviour could be taken by the person responsible as tacit approval of the behaviour.

Step 1 – Address the individual

If you feel comfortable and safe to do so, ask the person to stop, or make it clear that you find the behaviour offensive or unwelcome. Maybe the alleged

bully/discriminator/harasser is not aware that his/her behaviour is intimidating or unwelcome and will stop once they are told. It may be useful to speak with your Manager or People and Culture in the first instance to seek guidance on how to do this.

If the behaviour does not stop or you do not feel comfortable or the issue is serious you can start at Step 2.

Step 2 – Use the Complaint Management Procedure

If you don't feel comfortable or the matter is of a serious nature or there are any further incidents, use the Office's *Procedure for Managing complaints of Bullying Harassment and Discrimination* to resolve the situation.

The *Procedure for Managing complaints of Bullying Harassment and Discrimination* can be found on the intranet.

5.5 What if you witness other staff being the subject of harassment, discrimination or acts of bullying?

If individuals become aware that someone whom they work with is being bullied, harassed, or discriminated against, staff should help prevent this behaviour occurring by offering to support the affected individual. Further guidance and support can be sought through management or People and Culture.

If staff become aware indirectly that someone might be being bullied, harassed, or discriminated, they should not say anything to the person being accused. Staff should consult their supervisor, Divisional Director, Statutory officer or People and Culture for further information and assistance.

5.6 Managers' general obligations under this procedure

Managers must make sure that the workplace is free from all forms of harassment, bullying and discrimination. They should understand and apply the principles of equal employment opportunity and ensure that the staff they supervise are informed of these principles.

Managers should also take all necessary steps, such as training and other active measures to prevent and deal with harassment, bullying and discrimination in their work area.

As a manager if you witness bullying, harassment, or harassment you should take immediate action to stop it, whether or not the staff member being harassed has lodged a complaint.

6. ROLES AND RESPONSIBILITIES

6.1 Complainant

- Recognise their individual role in maintaining a harmonious workplace that reflects of the Office's values and consistent with the Code of Ethics and Conduct. Lead and role model appropriate behaviour.
- Take responsibility for their own actions in the workplace and where the actions of others are disagreeable to them, attempt to settle matters with the other person(s) as appropriate.
- Raise matters of concern at an early stage and participate fully in the complaint resolution process.
- Cooperate with the complaint procedure in a timely manner.
- Ensure complaints are made honestly, and not vexatiously or maliciously.
- Maintain confidentiality and to not release information relating to a complaint.

- Provide relevant information regarding workplace bullying, harassment and discrimination and be prepared for their complaint being made known to the person they are making the complaint about.

6.2 Respondent - Employee who is the subject of the complaint

- Participate fully in the complaint resolution process.
- During the complaint resolution process to behave in a manner that is consistent with the Office's values and the Code of Ethics and Conduct.
- Provide as much relevant information as possible to assist in the effective resolution of the complaint.
- Maintain confidentiality.
- Assist with steps taken by the manager conducting the assessment of the complaint to minimise disruption to work and to avoid situations which may be seen as victimising or taking reprisal against the complainant.
- Be prepared to recognise and apologise for inappropriate behaviour where the complaint is substantiated.

6.3 Manager/Supervisor

- Take a proactive approach to the prevention of workplace bullying, harassment, and discrimination by promoting the values of the Office's Code of Ethics and Conduct.
- Ensure all staff are aware of their rights and responsibilities in respect of workplace conduct involving bullying, harassment and discrimination, and staff know how to access the complaints resolution process.
- Treat all complaints fairly, confidentially and in a timely manner.
- Document the process undertaken to resolve a complaint and retain records and that these documents remain confidential.
- Ensure each stage of the process is handled in an efficient and effective manner, following the complaint procedures, and minimising disruption to work as much as possible.
- Protect staff from victimisation or reprisals for raising complaints.
- Ensure that the complainant and the person who is the subject of the complaint have access to the employee assistance program.

6.4 Support Person

- Attend meetings related to the complaint with the person they are supporting.
- To provide support to the employee during the meetings, but not to advocate on behalf of the employee being interviewed.
- Maintain appropriate confidentiality.
- Both the Complainant and the Respondent have the right to a support person of their choice, e.g. colleague or union representative, at meetings relating to the complaint.

6.5 People and Culture

- People and Culture are responsible for the implementation of this policy through communication to all staff, inclusion in induction, and providing advice, training and support to employees and managers to implement this policy.
- People and Culture are responsible for the day-to-day activities associated with coordinating and maintaining this policy, including the facilitation of complaint handling, mediation and investigations if required.
- Keep relevant Senior Officer informed of the status and action being taken in relation to Complaint investigations.

7 APPLICATION OF THIS POLICY

This policy applies to all persons employed in any capacity within the Office, all persons engaged by the Office, and any person working in any capacity within the office including:

- Ongoing and temporary employees
- Contractors
- Sub-contractors and employees of sub-contractors
- Employees of a labour hire company, e.g. agency staff
- Volunteers
- Apprentices or trainees
- Students on work experience or other placements
- Consultants who carry out work for the Office.

OMBUDSMAN APPROVAL

A handwritten signature in black ink, appearing to read 'Paul Miller', written in a cursive style.

Paul Miller
NSW Ombudsman

3 August 2021

BULLYING, HARASSMENT AND DISCRIMINATION PROCEDURE

1. PURPOSE OF THIS PROCEDURE

The Ombudsman's Office (Office) is committed to providing a productive and respectful workplace free from unlawful discrimination, harassment, and bullying. This procedure aims to provide a clear investigation process to ensure complaints of workplace bullying, harassment and discrimination are handled and resolved in an appropriate, fair, transparent, and timely manner, and in accordance with the principles of procedural fairness.

Bullying, Harassment and Discrimination in the workplace can take various forms and several types of inappropriate behaviour may be in evidence when a complaint is received. Legislation may provide different remedies for each type. Recognising the type of discriminatory behaviour can assist in the resolution of these behaviours. Refer to the Workplace Bullying, Harassment and Discrimination Policy for definitions on these behaviours.

This procedure **does not** apply to:

- Disputes about awards and agreements.
- Conduct that is subject to Public Interest Disclosure which includes: corrupt conduct, maladministration, serious and substantial waste of public money, breach of the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act).
- Minor workplace issues or concerns that can be addressed through the Grievance Management Policy and Procedure.

2. PARTIES

The following parties may be involved in resolving complaints of Bullying, Harassment and/or Discrimination:

Complainant	The Employee who raises the Complaint. There may be more than one Complainant.
Complaint Handler	The person appointed by the Office to take responsibility for responding to a Complaint. This person may be a supervisor, a more senior manager, a People and Culture representative or another person.
Investigator	The person nominated by the Office to be responsible for the conduct of the formal process of an investigation undertaken in accordance with this policy. The role may be performed by a representative of People and Culture, Legal Counsel or another person (e.g. an external investigator engaged by the Office).
Respondent	A person who is named as the subject of a Complaint. There may be more than one Respondent.
Support Person	Both the Complainant and the Respondent have the right to a support person of their choice, e.g. colleague or union representative, at meetings relating to the complaint. The support person can provide advice and support to the party and discuss the meeting with the party afterwards, but they cannot represent or advocate for the party. They must maintain the confidentiality and privacy of the complaint procedure.

Witness Anyone who can provide information that is relevant to a complaint or its resolution.

3. KEY PRINCIPLES

3.1 Privacy and confidentiality

All employees have rights and responsibilities in relation to confidentiality. Information about a complaint should only be provided on a 'need to know' basis (e.g. Employee Assistance Program (EAP), union/association representative, manager, investigator – to whom confidentiality also applies) and should not be provided to third parties with no legitimate involvement in the process.

Those involved in a complaint have both the *right* to confidentiality and the *responsibility* for maintaining confidentiality in respect of both the identity of those involved as well as the subject matter.

3.2 Seriousness and sensitivity

All complaints will be taken seriously and handled with sensitivity, taking into account the individual background and values of each party and any differences between them.

All reasonable steps will be taken to ensure that complaints are handled as quickly as possible.

3.3 Procedural fairness and impartiality

Before a decision is made which adversely affects the interests of a person under this policy, the person should be informed of the substance of the complaint against them and provided with an opportunity to respond.

Procedural fairness does not require that all parties be provided with:

- a copy of documents detailing the complaint; or
- a copy of any report or other documentation relating to a fact-finding inquiry or investigation.

If anyone involved in handling a complaint has a bias or conflict of interest that may affect their ability to be fair and impartial, they must declare this to the parties and to People and Culture. In these cases, the complaint will be handled by someone else. If the bias or conflict is within Senior management or People and Culture an external investigator or complaint handler may be engaged.

3.4 Obligation to report certain forms of conduct or activity

In some instances, you may have a legal obligation to report certain forms of conduct or activity, such as criminal activity. In other instances, you may have an obligation or duty as an employee to report certain conduct to the Office. Nothing in this policy changes your legal obligations or duties.

3.5 Support and information

Both parties to a complaint will have access to the EAP for advice and support during this process. Details of this service can be found on the intranet or by contacting People and Culture.

In addition, they should have ready access to sufficient information that will help them to determine how best to respond and to consider their options for raising their concerns or responding to complaints.

Information can be obtained from their manager, People and Culture or their union. Further guidance material is available from SafeWork NSW.

3.6 Freedom from victimisation

Employees will not be treated unfairly, harassed, or intimidated because they have lodged a complaint, or participated in an investigation. The Office will take all reasonable steps to prevent the victimisation of anyone connected with a complaint. Victimisation constitutes a breach of the Workplace Bullying, Harassment and Discrimination Policy and will result in disciplinary action.

3.7 Reasonable assistance

The Office will provide all reasonable assistance to those who need help to communicate in relation to the complaint. Assistance may include, for example, access to an interpreter service or agreement to a personal interview during which the details of the complaint can be written down on the Complainant's behalf.

3.8 External agencies

The parties to the complaint can contact an external agency for information, advice or help at any time during the complaint handling procedure. They can also do this if they are unhappy with the way the complaint has been resolved. Agencies that may be able to help are listed in Appendix 1.

4. RESPONSIBILITIES

The Complainant

- Comply with this procedure
- Be honest and truthful about the circumstances of the complaint
- Be aware that all complaints are treated as allegations until they have been substantiated
- Ensure that confidentiality is maintained over the investigation and the detail of the investigation

The Respondent

- Comply with this procedure
- Be honest and truthful about the circumstances of the complaint
- Be aware that all complaints are treated as allegations until they have been substantiated
- Ensure that confidentiality is maintained over the investigation and the detail of the investigation

The Immediate Supervisor/Manager

- Comply with this procedure
- Be available to receive a complaint if a Complainant wants to make one
- Inform the relevant People and Culture representative of any complaint received under this procedure
- Ensure as far as possible that confidentiality is maintained over the investigation and the detail of the investigation
- Take all reasonable steps to ensure that the Complainant, Respondent, and potential witnesses are protected from potential victimisation or retribution by providing safe and appropriate work arrangements during and after the complaints process and refer matters to their manager or People and Culture representative if such efforts are unsuccessful for any reason

Complaint Handler

- Comply with this procedure
- Ensure as far as possible that confidentiality is maintained during the complaint process
- Adhere to the key principles outlined in section 3 of this process
- Seek advice from People and Culture
- Manage the complaint in a timely manner
- Communicate with all parties

Senior Officers

- Keep records and give reasons for decisions
- Comply with this procedure
- Be available to receive a complaint in the event a Complainant wants to make one
- Ensure as far as possible that all employees are well-informed about this procedure so that they can actively comply with it
- Seek assistance from People and Culture to manage complaints made under this procedure
- Ensure as far as possible that confidentiality is maintained
- Keep relevant Senior Officer informed of the status and action being taken in relation to complaint investigations

Investigator

- Comply with this procedure
- Seek assistance from relevant employees to conduct an investigation in accordance with this procedure
- Ensure as far as possible that confidentiality is maintained during the investigation
- Keep senior management informed of the status and action being taken in relation to complaint investigations

People and Culture

- Comply with this procedure
- Ensure as far as possible that confidentiality is maintained during the complaint process
- People and Culture are responsible for the implementation of this policy through communication to all staff, inclusion in induction, and providing advice, training and support to employees and managers to implement this policy
- People and Culture are responsible for the day-to-day activities associated with coordinating and maintaining this procedure, including the facilitation of complaint handling, mediation and investigations if required
- Keep relevant Senior Officer informed of the status and action being taken in relation to complaint investigations

5. COMPLAINT PROCEDURES

Complaints should usually be made to the relevant manager. Where the complaint is against the manager or where there may be a perceived conflict of interest, the complaint should be made to the next more senior manager.

Where this is not feasible, the complaint should be referred to Manager, People and Culture for appropriate action.

While it is desirable that a verbal complaint be followed up in writing, responding to the complaint should not be dependent on its receipt in writing. However, the person receiving the complaint should take notes in the first instance and confirm with the Complainant that the notes reflect the essence of their concerns.

There are two internal processes available to resolve complaints of workplace bullying, harassment and discrimination within the Office: the **Informal process** and the **Formal process**. As each process differs, People and Culture will determine the most appropriate process for dealing with the complaint in consultation with the Complainant and the relevant Senior Officer. The Office will retain the discretion to treat any complaint as formal or informal.

In some circumstances, it will not be appropriate to address an issue at a local level, for example where informal attempts to resolve a complaint have been unsuccessful or where the alleged

conduct is of a serious nature. In certain circumstances, complaints may require reporting to an external agency or body.

5.1 Informal complaint handling process

The focus of an informal complaint process will be on resolution rather than factual proof or substantiation of a complaint.

The informal complaint process will usually be applied to bring the Respondent's attention to conduct that the Complainant believes is unacceptable or inappropriate and should stop.

Complaints that may be appropriate to be dealt with in accordance with the informal complaints process might include, but not be limited to:

- an allegation that the Respondent has engaged in conduct that the Complainant believes would, if it were to continue, constitute workplace bullying
- an allegation that the Respondent is treating the Complainant in a manner that would, if it were to continue, constitute harassment
- an allegation that the Respondent is treating the Complainant in a detrimental and/or disadvantageous manner that is different to the Complainant's peers and the action is not reasonable management action, implemented reasonably.

Examples of Complaints that would **not** usually be appropriate to be dealt with in accordance with the informal Complaints procedure would include allegations that the Respondent has:

- physically assaulted the Complainant or another person
- strong or repeated allegations of discrimination
- strong or repeated allegations of harassment
- matters of alleged sexual harassment.

A complaint may be made to the employee's manager or a People and Culture representative, depending on whom the Complainant feels comfortable approaching. Where a complaint is made to a manager, the manager should immediately notify a People and Culture representative.

Where a complaint is to be dealt with under the informal complaint process:

- The Office will appoint a Complaint Handler to take responsibility for responding to the complaint.
- The Complaint Handler will discuss the complaint with the Complainant.
- The Complaint Handler will discuss the complaint with the Respondent.
- The Complaint Handler will seek to resolve the complaint as soon as practicable and decide on any outcomes as appropriate in the circumstances.

If appropriate, a complaint that is being dealt with under the Informal Complaint Process may be redirected to the Formal Complaint Process at any time.

5.2 Formal complaint handling process

The focus of a formal complaint process is on determining whether a complaint can be substantiated, and if so, what action should be taken.

Complaints are to be dealt with as promptly as possible.

An Investigator may be appointed at the outset or during the process.

Where a complaint is to be dealt with under the formal process:

- The Office will appoint a complaint handler

- The Complainant will be interviewed. The Complainant may be asked to provide a written statement of the complaint or verify notes taken during the interview to ensure they reflect the complaint.
- The Complaint Handler will make an initial assessment of the complaint. They may decide not to proceed with the Formal Process if the complaint is vexatious, trivial, or there is likely to be difficulty in establishing the facts.
- The Respondent is informed of the complaint and is interviewed or given a reasonable opportunity to respond to the complaint.
- Where necessary, different work arrangements may be put in place by the Office to ensure that the Parties are provided with safe and appropriate work arrangements during an investigation process. This may include changes in reporting lines, seating arrangements, or other changes to prevent further incidents of the conduct or activity that is the subject of the complaint.
- The Complaint Handler or Investigator may seek further information, including witness statements if appropriate.

An investigation finding will be made which may be one of the following:

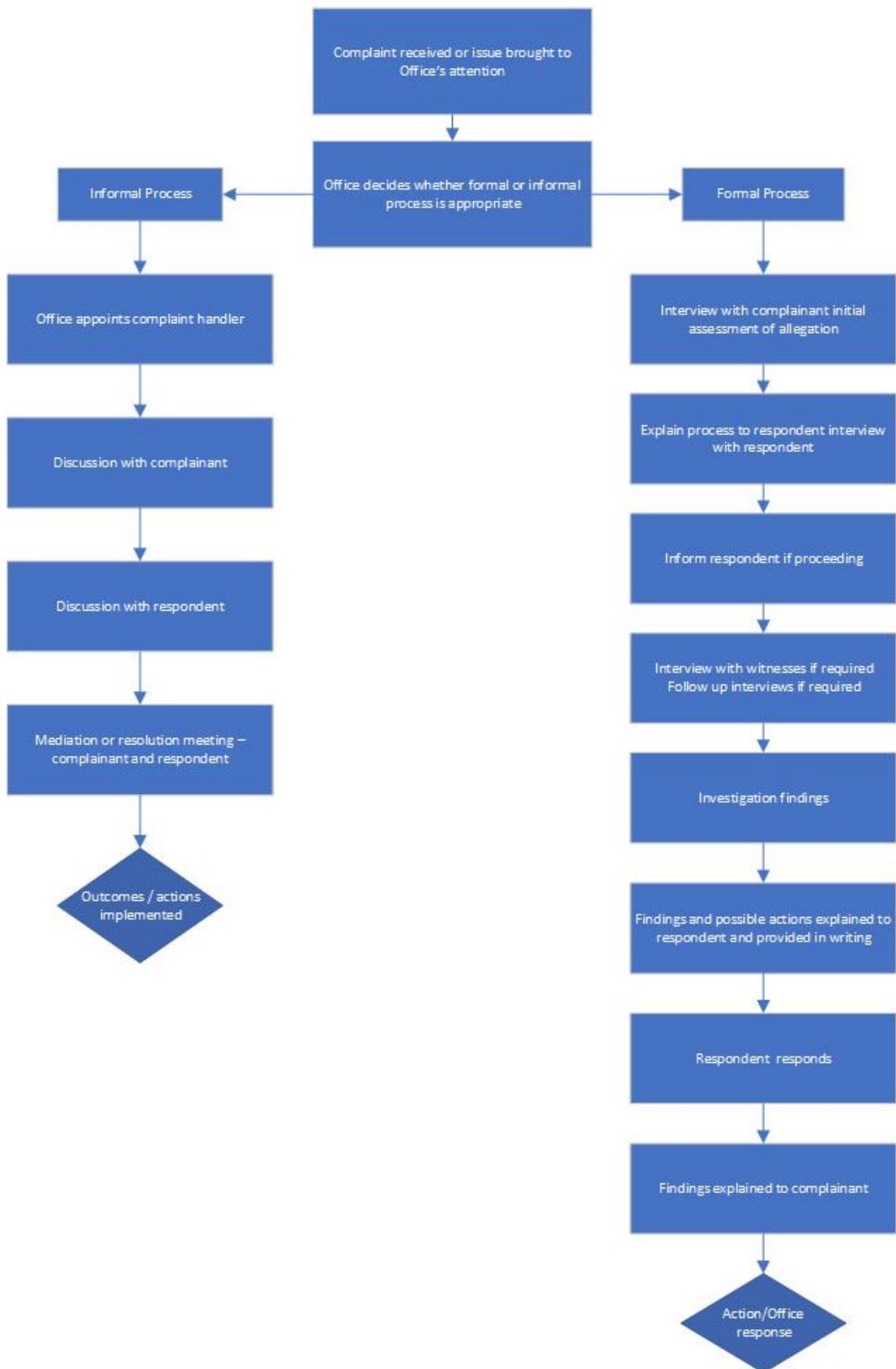
- The complaint is substantiated in whole or in part, and whether any misconduct has occurred,
- The complaint is not substantiated in whole or in part, or
- Insufficient evidence is found to make a clear determination of the complaint.

The Complaint Handler will advise the Parties of the findings and proposed actions to be taken. The Office will then make a decision on any actions to be taken.

If any party is dissatisfied with the process or the outcome, they can lodge an appeal within one week of the resolution. Appeals must be lodged in writing, to the Director, Corporate.

Following a formal process, if either party is still dissatisfied with the outcome, they can get advice from, or seek assistance from an external agency to resolve the complaint. A list of external agencies is provided in Appendix 1.

5.3 Flow chart of example complaint management process



6. MANAGER RESPONSIBILITIES UNDER THIS PROCEDURE

6.1 Within three working days of the receipt of a complaint, an initial assessment of the complaint should be conducted.

All complaints must be treated seriously and confidentially and acted on promptly to reinforce the message that workplace bullying, harassment, sexual harassment, and discrimination will not be tolerated. The manager receiving the complaint should seek advice from People and Culture to conduct an initial assessment, determine if the complaint will proceed to a formal or informal complaint process or another process.

The initial assessment involves seeking as much information as possible from the Complainant in order to:

- Assess the nature of the complaint (e.g. grievance, bullying, harassment, sexual harassment, discrimination, assault)
- Assess the potential seriousness of the matter
- Reduce the likelihood that significant time and resources are allocated to frivolous or vexatious complaints
- Determine whether any immediate action needs to be taken.

Where the initial assessment suggests that the alleged behaviour meets the definition of bullying, harassment or discrimination as set out in the Workplace Bullying, Harassment and Discrimination policy, the complaint should be managed in line with this procedure, generally through the Formal Complaint Procedure.

Additional circumstances to take into consideration include:

- Where there is a significant number of complainants
- The behaviour has been severe or frequent in nature
- A history of complaints against the same employee
- A history of complaints being made by the same employee.

If People and Culture advise the complaint will proceed, they will appoint the Complaint Handler (who may be the Complainant's manager).

6.2 Conduct a risk assessment

Where it appears to the manager receiving the complaint or the Complaint Handler that some immediate response is necessary (e.g. the Complainant seems deeply distressed, feels threatened), a risk assessment should be undertaken immediately. Action resulting from the risk assessment should not be based on any presumption that the alleged behaviour has occurred. People and Culture should be consulted to support this process.

The following factors should be considered:

- Relevant information from the initial assessment
- The physical/psychological state of the Complainant, and where necessary, the person against whom a complaint is made
- How long the alleged behaviour has been going on
- How serious the initial allegations appear to be
- The degree of disruption the issue appears to be causing in the working environment
- Any complicating factors
- Any previous history of allegations of unacceptable workplace behaviour involving the parties to the complaint, and the outcome
- The views of the Complainant about possible management options
- The potential for the Complainant to be subjected to reprisals.

Proposed temporary arrangements should be discussed with the complainant and their views considered. As far as possible – and again this will be governed by the particular circumstances of the complaint – neither party should be unduly disadvantaged by these arrangements.

If the alleged behaviour involves violence, for example actual or threatened physical or sexual assault, **it must be reported to the police.**

7. INVESTIGATING THE COMPLAINT

It is not always necessary to conduct an investigation. An investigation is only necessary where there is uncertainty about the relevant facts or when complex issues arise which require clarification for the complaint to be dealt with, or where the complaint makes credible assertions of serious misconduct. The purpose of an investigation is to gather and analyse all relevant information to help identify whether or not the complaint is able to be substantiated, and whether there are any extenuating circumstances or other contributing factors that may need to be considered.

7.1 Determining who should conduct an investigation

The person(s) identified to do the investigation should possess the skills necessary for undertaking the type of investigation that is required and be able to act impartially. Usually the manager who receives the complaint or People and Culture are the most appropriate person to investigate.

In some circumstances, the manager of the complaint may consider it necessary for someone else in the organisation to undertake the investigation.

A decision to use an external investigator is a decision to be made by the relevant Senior Officer and the Ombudsman considering all relevant information.

7.2 Conducting and finalising an investigation

Any investigation process must be fair, impartial, and professionally conducted. The *Government Sector Employment Act 2013* (NSW) framework must be followed.

8. OTHER CONSIDERATIONS

8.1 What if the affected employee requests that no action be taken?

This may be appropriate where the complaint does not meet the definition of bullying, harassment or discrimination and could be resolved using the grievance resolution model.

However, the employee should be advised of options to resolve the matter and any concerns regarding the process should be explored with the employee and addressed as far as possible.

There may still be an obligation on the manager to take action, depending on the individual circumstances, as the manager has a responsibility to intervene and eliminate or minimise risk.

8.2 Managing complaints received via workers' compensation claim

A manager may first become aware of a potential bullying issue as a result of an employee's compensation claim citing bullying, harassment or discrimination as the cause of injury, usually psychological injury. It needs to be recognised that the two issues are distinct and need to be managed separately.

The manager should follow the process in this procedure to manage the complaint.

8.3 Managing complaints received from anonymous complainants

Anonymous complaints are not encouraged. However, where they are received, they need to be assessed. A general organisational response may be required such as meeting with the relevant group of employees and encouraging them to come forward with any concerns or providing them

with general information on how to make complaints. Where allegations can be independently verified, this should occur, and appropriate action should be taken.

8.4 Investigation where Complainant or Respondent has left the Office

The complaint should be actioned, regardless of whether or not the Complainant or Respondent are still employed with the Office.

Any report arising from the investigation of a complaint is to be provided to the Executive. Identifying the appropriate decision-maker is dependent on the action proposed (e.g. mediation, warning, termination) in accordance with the Office's Delegations Manual.

The outcome of the investigation should be communicated to the Complainant and Respondent regardless of, whether or not they are still employed in the Office.

9. RESPONDING TO THE FINDINGS

9.1 Where the complaint is substantiated

Where a complaint is substantiated, in determining what action is to be taken the following should be considered:

- Material gathered during any investigation
- The extent of any uncertainty about the facts involved
- Findings and recommendations, where provided and any extenuating circumstances
- Any submission from the person against whom a complaint has been made regarding adverse findings
- Previous relevant disciplinary history.

The form of action to be taken must be decided on a case-by-case basis. Action should include focusing on preventing a continuation/repetition of the behaviour and repairing as far as possible the future work relationships. The Complainant must also be protected against any victimisation for having made the bullying complaint in the first place.

9.2 Where the complaint is not substantiated

Where the findings suggest it is unlikely that bullying, harassment, or discrimination occurred, an organisational response may still be necessary. The investigation may have identified gaps in the bullying, harassment and discrimination prevention framework that requires remedy.

9.3 The Office's responses to workplace bullying, harassment, and discrimination

Strategies for managing organisational issues that may have been identified as permitting or facilitating unreasonable conduct involving bullying, harassment and discrimination include:

- Address identified workplace culture issues, work practices and supervisory arrangements
- Ensure all staff understand what constitutes bullying and bullying will not be tolerated
- Review related training to ensure it is appropriate
- Review existing conflict resolution mechanisms
- Promote a positive workplace culture including communicating and discussing with staff the Office's values and Code of Ethics and Conduct.

9.4 Disciplinary action

Substantiated allegations of unreasonable conduct involving bullying, harassment and discrimination constitute misconduct and should be dealt with in accordance with the Office's procedure for *Managing Misconduct*.

Allegations need to be made in a form consistent with the *Government Sector Employment Act* framework.

9.5 Ongoing work arrangements

Regardless of the outcome of a complaint, consideration may need to be given to ongoing work arrangements, particularly where interim changes occurred as a risk management strategy. While the aim should be to re-establish normal working arrangements, this will depend on the circumstances and any perceived ongoing risk to the welfare of either party.

9.6 Notifications

Any required internal or external notifications concerning potential or substantiated misconduct (such as to registration authorities) must be made without delay in accordance with relevant statutory and/or policy provisions.

9.7 Documentation

All documents relating to the management of the complaint, regardless of the outcome, should be kept on a confidential file. A separate confidential file should be kept for each complaint. This should not impede having systems in place to assist in identifying possible patterns of workplace unreasonable conduct involving bullying, harassment, and discrimination by individuals.

9.9 Further information

Contact People and Culture for further assistance.

OMBUDSMAN APPROVAL

A handwritten signature in black ink, appearing to read 'Paul Miller', written in a cursive style.

PAUL MILLER

NSW Ombudsman

3 August 2021

APPENDIX 1 – EXTERNAL AGENCIES

Type of assistance	External agency contact details
Allegations of corrupt conduct	Independent Commission Against Corruption <ul style="list-style-type: none"> • Independent Commission Against Corruption website • Call: (02) 8281 5999 (Australia) • + 61 2 8281 5999 (overseas) • Toll free: 1800 463 909
Allegations of criminal conduct	NSW Police <ul style="list-style-type: none"> • NSW Police website • Crime Stoppers Call: 1800 333 000
Discrimination	Anti-Discrimination Board of NSW <ul style="list-style-type: none"> • Anti-Discrimination Board of NSW website • Call: (02) 9268 5544 • Toll free: 1800 670 812 (for regional NSW only) Australian Human Rights Commission <ul style="list-style-type: none"> • Home Australian Human Rights Commission • Call: 1300 369 711
Privacy	Information and Privacy Commission <ul style="list-style-type: none"> • Information and Privacy Commission website • Call: 1800 472 679
Public Interest Disclosure	NSW Ombudsman <ul style="list-style-type: none"> • Follow the Internal reporting policy available in ADM/320
Work health and safety obligations including bullying	SafeWork NSW <ul style="list-style-type: none"> • SafeWork NSW • Call: 13 10 50