

Document name:	Dealing with Misconduct Allegations Policy and Procedure
Type of document:	Policy
Status:	New
Version number:	1
Date originally created:	n/a
File reference:	
Superseded policy:	n/a
Compliance:	All Staff
Related policies/ documents:	Code of Ethics and Conduct, Grievance Management Policy, Internal Reporting Policy
Publication date:	August 2021
Review date:	August 2024
Policy owner:	Director, Corporate
Distribution:	All Staff
Feedback:	People & Culture Unit

Dealing with misconduct allegations policy

Preface

This Policy (and the attached Procedure) set out the requirements for managing potential and/or substantiated misconduct by staff within the office of the NSW Ombudsman.

Legislative and compliance framework

Government Sector Employment Act 2013 (GSE Act)

Government Sector Employment (General) Rules (GSE Rules)

Government Sector Employment Regulation (GSE Regulation)

Public Interest Disclosures Act 1994 (PID Act)

Ombudsman Act 1974

Independent Commission Against Corruption Act 1988 (ICAC Act)

Children's Guardian Act 2019

Policy statement

The NSW Ombudsman's Office is committed to the highest standards of lawful, ethical, professional and honest conduct.

This Policy sets out requirements for the handling of misconduct allegations.

What is misconduct?

There is no exhaustive definition of 'misconduct' either in the Act or elsewhere. Certain conduct will almost always constitute 'misconduct', but in other cases the characterisation of conduct as 'misconduct' is a question of fact and degree.

'Misconduct' is described in the Act as extending to:

- a contravention of the GSE Act, GSE Regulation or GSE Rules, or any other instrument made under the GSE Act
- taking detrimental action (as defined in the PID Act) against a person substantially in reprisal for the person making a public interest disclosure with the meaning of that Act
- taking action against another government sector agency employee substantially in reprisal for that employee making a disclosure of the alleged misconduct of the employee taking that action, or
- a conviction or finding of guilt for an offence punishable by imprisonment for life or for 12 months or more (described in the Act as a 'serious offence').¹

The following types of conduct may also, depending on the circumstances, constitute misconduct:

- a breach of the Ombudsman Code of Ethics and Conduct or other Ombudsman policies
- a wilful breach of the secrecy or privacy obligations imposed on Ombudsman employees under the Ombudsman Act or other legislation
- a refusal to comply with a lawful and reasonable direction by the Ombudsman or a statutory officer in circumstances where the Ombudsman or statutory officer has cautioned the employee that failure to comply may constitute misconduct
- corrupt conduct as defined under the ICAC Act
- serious wrongdoing that could be the subject of a public interest disclosure under the PID Act

¹ This includes an offence committed outside NSW that would be an offence punishable by imprisonment for life or for 12 months or more if it had been committed in NSW.

- the making of vexatious, false, or misleading allegations
- reportable conduct, as defined in the *Children's Guardian Act 2019*, or
- a failure, without reasonable excuse, to comply or co-operate in accordance with the attached Procedure.

This is not an exhaustive list.

On occasion, conduct that occurs while an employee is not at the workplace or carrying out Ombudsman duties, that takes place while the employee is not 'working', or that occurred before the employee was employed by the Ombudsman, may also amount to misconduct.

Compliance with legal requirements and the Procedure

Allegations of misconduct by Ombudsman staff are handled in accordance with the requirements of the GSE Act, GSE Rules and general law principles governing procedural fairness and other workplace investigation issues.

The attached Procedure outlines the steps taken to deal with these allegations in the Ombudsman's office.

The Ombudsman may modify the steps in the Procedure in certain circumstances, but legal advice should be obtained before making any modifications to ensure such modifications do not impact on the Ombudsman's legal obligations.

The Procedure applies regardless of whether a person is still employed by the Ombudsman when the allegation is made or being dealt with.

Misconduct allegations are treated seriously

Potential misconduct will be treated seriously. An initial review of any apparent or potential misconduct must take place without delay.

Where an initial review indicates there is a credible and non-trivial allegation or possibility of misconduct, further action to pursue the matter in accordance with this Policy should take place in a timely manner and consistent with the requirements of procedural fairness.

Roles and responsibilities

Ombudsman

The Ombudsman is responsible for making findings and other decisions about misconduct allegations: GSE Act ss [31](#), [69\(2\)](#). The Ombudsman may delegate those functions to another statutory officer or senior executive officer (GSE Act [s 32](#)), and where this is done, references to 'the Ombudsman' below should be read as references to that delegate.

The Ombudsman will deal with misconduct allegations:

- (a) as promptly as the circumstances allow
- (b) as confidentially as is reasonably practicable
- (c) in accordance with all applicable principles of procedural fairness, and
- (d) having regard for the impact on the relevant employee and any other affected employees, and the continued operation of the office.

The Ombudsman will keep any employee against whom an allegation is made, and the person who has made the allegation, informed of the progress of the dealing with the allegation.

The Ombudsman may, if appropriate, issue confidentiality directions, or a confidentiality protocol that directs those involved in dealing with the allegation about their confidentiality obligations.

The Ombudsman may engage an external investigator or other third party, or other Ombudsman employee, to assist with various steps in the Procedure, but remains responsible for findings and other decisions relating to the allegation.

Relevant employee

The relevant employee (that is, the person the subject of misconduct allegations) must:

- (a) attend interviews, provide statements and/or answer written questions, relevant to the allegation, provided those interviews are scheduled in a manner that reasonably accommodate the employee's circumstances and any requirement to provide statements or written answers give the employee a reasonable timeframe for the employee to respond
- (b) comply with any confidentiality directions or protocol issued by the Ombudsman for the purposes of managing the allegation, and
- (c) follow any other lawful and reasonable directions of the Ombudsman in relation to dealing with the allegation.

Other Ombudsman employees

Other Ombudsman employees are required to:

- (a) provide, in response to a request or direction by the Ombudsman, records or things held by that employee or by the Ombudsman's office that may be relevant to the allegation
- (b) attend an interview, provide a statement and/or answer written questions, relevant to the allegation, subject to the Ombudsman scheduling interviews that reasonably accommodate the employee's circumstances, and any requirement to provide statements or written answers give the employee a reasonable timeframe for the employee to respond
- (c) comply with any confidentiality directions or protocol issued by the Ombudsman for the purposes of managing the allegation,
- (d) follow any other lawful and reasonable directions of the Ombudsman in relation to dealing with the allegation.

OMBUDSMAN APPROVAL

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

Paul Miller
NSW Ombudsman
17 August 2021

Dealing with misconduct allegations - procedure

1. Receiving allegations and making initial assessments

An allegation of misconduct may be made to the Ombudsman by any person. Depending on the nature of the allegation and the status of the person making the allegation, provisions of the PID Act and Ombudsman policies and procedures concerning PIDs may apply to the allegation. Refer to [Internal Reporting Policy](#) for guidance.

Each allegation must be assessed by the Ombudsman to decide whether inquiries should be made into it. The Ombudsman may require the person who made the allegation to provide additional information for the purposes of any assessment.

2. Deciding whether to proceed to inquiries

If the Ombudsman is satisfied that:

- (a) the allegation is vexatious or trivial
- (b) the alleged conduct does not amount to misconduct, or
- (c) it is likely to be difficult to establish the facts alleged

the Ombudsman may decide not to proceed with the matter: GSE Rules r [38\(2\)](#). If this occurs, the person who made the allegation must be informed of the dismissal.

3. Notifying relevant employee of allegation and potential consequences

If the Ombudsman decides to conduct inquiries into the allegation, the relevant employee must be provided with details of the allegation and any action that might be taken if misconduct is found. The relevant employee must also be given a reasonable opportunity to make a statement in response to the allegation: GSE Rules r [38\(3\)](#), [38\(4\)](#).

4. Considering any statement from relevant employee and deciding again whether to or proceed to inquiries

If the relevant employee does respond within a reasonable timeframe or declines to respond, the Ombudsman must, having regard to that response, again decide whether to proceed with inquiries into the allegation or take no further action: GSE Rules r [38\(5\)](#). If the Ombudsman decides not to proceed with the matter, the person who made the allegation must be informed: r [38\(6\)](#).

5. Placing the relevant employee on alternative duties or suspension

If the Ombudsman decides to conduct inquiries, and it is not appropriate for the relevant employee to continue with their usual duties while the allegation is being dealt with, the Ombudsman may choose to suspend the employee or place him or her on alternative duties: GSE Act s [70](#); [M1994-35 Suspension of Public Employees from Duty](#). When considering whether to place the employee on alternative duties or suspend them, the Ombudsman must have regard to:

- (a) the nature of the allegation and the relevant employee's current and proposed duties
- (b) the public interest
- (c) the efficient operation of the Ombudsman's office, and
- (d) the maintenance of good order and discipline: M1994-35.

Where reasonably possible, the Ombudsman will attempt to place the relevant employee on alternative duties, in preference to placing them on suspension. However, where the Ombudsman considers that the charges are sufficiently serious, or that having the employee

remain at work would be detrimental to the effective running of the Ombudsman's office, the employee may be suspended: M1994-35.

An employee may be suspended on full pay, or on the basis that remuneration owing to them during the period of suspension be withheld: GSE Act s 70(4). Suspension of an employee without pay will only occur in exceptional circumstances, as outlined in M1994-35.

The relevant employee may be suspended until the allegation has been dealt with and any subsequent action taken, but the Ombudsman may also lift a suspension at any time: GSE Act s [70\(2\)](#), [70\(6\)](#). Where an employee is suspended during the handling of an allegation, the Ombudsman must review the suspension decision at least every 30 days: M1994-35.

6. Making inquiries

The Ombudsman may make any inquiries that they think relevant and appropriate to determine whether the alleged misconduct has occurred. These inquiries may include accessing and inspecting documents or things in or held by the Ombudsman's office, obtaining external documents or information, and obtaining information or material from the relevant employee, other employees and the person who made the allegation. This information and material may be obtained by conducting interviews or requiring the production of documents, things, written statements or written responses to questions.

None of the inquiries made will involve formal hearings, the provision of information under oath or affirmation, or the official examination or cross-examination of any person: Rules r 39. However, the Ombudsman may choose to make audio recordings of interviews to assist him or her in the process of dealing with the allegation. If the Ombudsman decides to make an audio recording of any interview, the person being interviewed:

- (a) will be informed that the interview is being recorded
- (b) will be given a transcript of the recording and asked to verify the accuracy of that transcript, and
- (c) must comply with any transcript provided to them in accordance with any confidentiality protocol issued by the Ombudsman for the purposes of managing the allegation.

Audio recordings of any interview, and transcripts made of audio recordings, will only be used for the purposes of managing the allegation, unless the Ombudsman is compelled by law to provide the recording of the interview to another person or entity, integrity agency, an investigative body or a law enforcement agency.

7. Findings

The Ombudsman must, having regard to the information and material obtained in the course of dealing with the allegation, including any report prepared in the course of that process, may make a finding, on the civil standard of proof:

1. that misconduct has occurred, or
2. that misconduct has not occurred (in which case the allegation is dismissed: Rules r [40\(1\)](#)).

Where the Ombudsman has found that misconduct has not occurred, an allegation must be dismissed. The employee must be advised of the dismissal of the allegation in writing: GSE Rules r [40\(1\)\(b\)](#). No further action is to be taken in response to the allegation, although the employee will continue to be supported in the manner in which support has been provided during the process.

8. Actions that may be taken where misconduct has been found

Where the Ombudsman has made a finding of misconduct, the Ombudsman may:

- (a) terminate the employee's employment (without giving the employee an opportunity to resign)
- (b) terminate the employee's employment (after giving the employee an opportunity to resign)
- (c) impose a fine on the employee (which may be deducted from the employee's remuneration)
- (d) reduce the employee's remuneration
- (e) reduce the employee's classification or grade
- (f) assign the employee to a different role
- (g) caution or reprimand the employee: GSE Act s [69\(4\)](#).

Alternatively, the Ombudsman may require the employee's conduct to be monitored over a period of time (that is notified to the employee): GSE Rules r [40\(3\)](#).

Before taking any action, the Ombudsman must notify the relevant employee of what action he or she proposes to take, and the basis for doing so (in a manner that complies with the relevant employee's entitlement to procedural fairness). The relevant employee must be given a reasonable opportunity to make submissions in relation to the proposed action, and the Ombudsman must take into account those submissions before taking action: GSE Rules r [40\(2\)](#).

These actions can be taken even where the employee has ceased to be employed by the Ombudsman. This means an employee's employment can be taken to have been terminated under the Act even where they are no longer an Ombudsman employee: GSE Act s 69(5).

9. Where the Ombudsman decides to monitor the relevant employee's conduct

Where the Ombudsman decides to monitor the relevant employee's conduct for a specified period of time and the Ombudsman is satisfied that, during that time, the employee engages in the same or similar misconduct of the kind previously found, the Ombudsman may take any of the actions listed in 8(a)-(g) above, without providing the employee with an opportunity to make further submissions: GSE Rules r 40(4), (5).

10. Records relating to misconduct allegations

All records relating to misconduct allegations that are in the possession or control of the Ombudsman must be stored securely, confidentiality, separately from other Ombudsman employee file and in accordance with State Records NSW requirements. Access to these records will be limited to People & Culture and Senior Officers.

However, the Ombudsman must decide, based on his or her opinion about whether it is in the public interest, to have any or all of those records linked to or copied into the relevant employee's personnel file. In making this decision, the Ombudsman must regard to:

- (a) the nature and seriousness of the misconduct, and
- (b) the need to minimise any unnecessary or prejudicial information being kept on the employee's personnel file: GSE Rules r 41.

11. Support

The relevant employee may have a support person of their choice (e.g. colleague or union representative) attend any interview or other discussion concerning the allegation, provided that person's role is limited to support and does not involve advocating for the employee. However, where an employee's nominated support person was significantly involved in the events giving rise to the allegation, or their involvement could prejudice or compromise the process of dealing with the allegation, the Ombudsman may require the relevant employee to nominate another support person.

An Ombudsman employee may not be nominated a support person without their consent. If nominated, an Ombudsman employee must:

- attend meetings related to the complaint with the relevant employee they are supporting
- provide support to the employee during the meetings, but not to interfere with or advocate on behalf of the employee being interviewed, and
- maintain appropriate confidentiality, including complying with any relevant confidentiality directions or protocol issued by the Ombudsman.

The relevant employee is not required to have legal representation for the purposes of managing the allegation, and the Ombudsman does not have authority to pay any legal costs associated with legal representation for this purpose. If, however, the employee wishes to be legally represented they can, the name and contact details of that representative should be provided to the Ombudsman, external investigator or other person assisting the Ombudsman to deal with the allegation.

The relevant employee is entitled to receive support from People and Culture and services organised by People and Culture throughout the process of dealing with the allegation.

All employees affected by the allegation and the process for dealing with it are entitled to receive support from People and Culture and services organised by People and Culture throughout the process.

12. Confidentiality

Confidentiality for all parties should be maintained, where practicable and appropriate.

Information about alleged misconduct should generally only be provided on a 'need to know' basis and should not be provided to third parties who are not involved in the process. Confidentiality should extend, where appropriate, to both the identity of those involved, as well as the subject matter.

The Ombudsman may formally issue directions and/or a protocol requiring staff to maintain confidentiality.

Failure on the part of an employee to maintain confidentiality may itself constitute misconduct, and may result in action being taken against the relevant employee.

(Subject to any contrary and reasonable direction of the Ombudsman) an obligation of confidentiality will not preclude an employee from engaging a disinterested support person or seeking disinterested professional or psychological assistance (for example from the Employee Assistance Program, a union representative, a legal adviser or a family member).

13. Procedural fairness

Procedural fairness will apply in accordance with the requirements of the law.

Generally this means that, except in cases of unavoidable urgency, the relevant person should be informed of the substance of the allegation against them and provided with an opportunity to be heard before a decision is made which adversely affects the interests of a person.

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

- the identify of any person who has raised allegations against the person,
- a full copy of all documents detailing the allegation of the breach, or
- a full copy of any report relating to a fact-finding inquiry or other documentation.

14. Timeframes

All allegations, including any investigation, should be handled as expeditiously as possible. Where timeframes are delayed, affected parties should be notified as a matter of courtesy.