

Managing Misconduct

Summary This Policy Directive sets out the requirements for managing potential and/or substantiated misconduct by staff of the NSW Health Service and by visiting practitioners.

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Distributed to Ministry of Health, Public Health System, Divisions of General Practice, NSW Ambulance Service, Private Hospitals and Day Procedure Centres, Health Associations Unions, Tertiary Education Institutes

Audience All staff, Managers, Workforce directorates, Clinical governance directorates, Audit units

Secretary, NSW Health

This Policy Directive may be varied, withdrawn or replaced at any time. Compliance with this directive is mandatory for NSW Health and is a condition of subsidy for public health organisations.

MANAGING MISCONDUCT

PURPOSE

This Policy Directive sets out the requirements for managing potential and/or substantiated misconduct by staff of the NSW Health Service and by visiting practitioners. Further guidance and support in managing misconduct are provided by non-mandatory Information Sheets, including flowcharts, checklists and templates, which are available online on the NSW Health intranet site.

MANDATORY REQUIREMENTS

- The protection of an organisation's patients and clients, including the children for whom it is responsible, is to be the primary consideration when managing and making decisions related to potential and substantiated misconduct.
- Potential misconduct must be treated seriously and an initial review of any apparent or potential misconduct must take place without delay.
- Where an initial review indicates there is a credible allegation or possibility of misconduct, or that the matter involves a child-related allegation, charge or conviction, further action to pursue the matter in accordance with this policy should take place in a timely manner consistent with the requirements of procedural fairness.
- Any ongoing risks related to potential or substantiated misconduct must be identified, assessed, managed, and regularly reviewed throughout the management process, including any requirements arising from the Service Check Register policy.
- Those involved in a potential misconduct process have both the right to confidentiality and the responsibility for maintaining confidentiality, subject always to the overriding need to be able properly to undertake any inquiries or investigation that may be necessary, and to take the action required by this Policy Directive.
- A person who is subject of a misconduct process must be given adequate opportunity to respond to any allegations, adverse findings, and proposed disciplinary action, prior to any final decision being made.
- A person who is subject of a misconduct process must be afforded the right to a support person being present at any interviews. Other support may also need to be offered to all affected persons, where appropriate.
- Any findings made must be based on relevant available information that is established 'on the balance of probabilities'.
- Any action to be taken as a response to a misconduct finding must be proportionate to the nature of the misconduct, after consideration of any extenuating circumstances, previous work performance and history, and any identified ongoing risks.
- A termination of employment in NSW Health Service following a finding of misconduct will apply to all roles or multiple assignments undertaken as an employee in the NSW Health Service unless the person can show cause as to why

this should not occur. NSW Health organisations must provide dismissed staff access to the show cause mechanism outlined in Section 9.3 of the following Procedures.

- Where the appointment of a visiting practitioner is terminated following a finding of misconduct, the relevant Health organisation must notify any other Health organisation(s) where the visiting practitioner also holds an appointment contract to allow them to assess and manage any local risks.
- Any required internal or external notifications concerning potential or substantiated misconduct (such as to registration authorities) must be made without delay in accordance with the relevant statutory and / or policy provisions.
- Appropriate records of all stages of the process (including the initial review and any investigation) and outcomes must be kept and stored securely.

IMPLEMENTATION

This Policy Directive applies to all staff of the NSW Health Service and to visiting practitioners. It does not apply to staff employed in the NSW Health Executive Service, contractors who are not visiting practitioners, or to agency staff, students, volunteers or researchers who are not staff employed in the NSW Health Service. However, where it is decided to conduct an investigation into alleged misconduct by any person in these categories, this Policy Directive may nevertheless be used to guide the process.

Where a complaint or concern relates to a clinician, the NSW Health policy on managing complaints or concerns about clinicians must be consulted.

The following staff have key responsibilities in relation to this Policy Directive:

Chief Executives are required to:

- Ensure that this Policy Directive is communicated to, and complied with by staff involved in managing potential or substantiated misconduct.

Workforce Directorates / Human Resources Departments / Internal Audit Units / Governance or Professional Conduct and Standards units are required to:

- Ensure provision of information and advice as necessary to support effective implementation of this policy.

Supervisors / Managers are required to:

- Comply with this Policy Directive in dealing with all cases of potential and substantiated misconduct.

REVISION HISTORY

Version	Approved by	Amendment notes
September 2018 (PD2018_031)	Deputy Secretary, People Culture and Governance	Minor updates for consistency with the NSW Health Policy on Managing Complaints and Concerns about Clinicians: Partial misconduct finding removed Removal of reference to Part 4 of the Health Services Regulation 2013 for definition of misconduct for Ambulance Service
November 2014	Deputy	Revised, consolidated policy relating PD2005_225,

(PD2014_042)	Secretary, Governance, Workforce and Corporate	PD2005_095 and PD2006_026.
21 April 2006 (PD2006_026)	Director-General	New policy.
25 January 2005 (PD2005_095)	Director-General	New policy.
27 January 2005 (PD2005_225)	Director-General	New policy.

ATTACHMENTS

1. Managing Misconduct: Procedures

Managing Misconduct



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1 BACKGROUND

1.1 About this document

These Procedures outline the requirements for managing potential or substantiated misconduct of staff of the NSW Health Service. Information Sheets have also been developed to provide guidance and support in meeting the requirements of this Policy Directive. Links to Information Sheets have been provided throughout the Procedures, and a complete list is available on the Ministry of Health's intranet site at <http://internal.health.nsw.gov.au/jobs/conduct/index-conduct.html>.

A summary flowchart of the overall process for managing potential misconduct is provided at [Information Sheet 1](#). Suggested timelines are at [Information Sheet 2](#). The rights and responsibilities of all parties involved in managing misconduct (including the need to maintain appropriate confidentiality throughout the process) are outlined in [Information Sheet 3](#).

1.2 Key definitions

Misconduct – includes:

- Behaviour or conduct which seriously or repeatedly breaches expected standards, as identified in relevant legislation (such as the [Health Services Act 1997](#) or the [Health Practitioner Regulation National Law \(NSW\)](#)), registration standards or codes/guidelines approved by a National Health Practitioner Board or NSW Health policies (such as the Code of Conduct).
- Refusal to carry out a lawful and reasonable direction given by a line manager or another member of staff authorised to give the direction
- Reportable (ie child-related) conduct as defined under the [Ombudsman Act 1974](#) (including allegations relating to conduct outside the workplace)
- Corrupt conduct as defined under the [Independent Commission Against Corruption Act 1988](#)
- Serious wrongdoing that could be the subject of a public interest disclosure under the [Public Interest Disclosures Act 1994](#), ie relating to corrupt conduct, maladministration, serious and substantial waste, or failure to deal appropriately with Government Information
- Criminal charges or convictions that have an adverse impact on the workplace or the role or performance of the staff member (including such offences committed outside the workplace and/or work hours, or prior to appointment to NSW Health)
- Making vexatious allegations, or knowingly making false or misleading public interest disclosures
- A failure to comply or cooperate with the processes for investigating or managing misconduct set out in this Policy Directive.

NSW Health organisation - *For the purposes of this Policy Directive*, any public health organisation as defined under the *Health Services Act 1997*, the Ambulance Service of

NSW, Health Infrastructure, HealthShare NSW, NSW Health Pathology, any other administrative unit of the Health Administration Corporation, and Albury-Wodonga Health in respect of staff who are employed in the NSW Health Service.

NSW Health Service - All persons employed under Chapter 9, Part 1 of the [Health Services Act 1997](#).

Staff member - For the purposes of this Policy Directive, any person who is employed in the NSW Health Service, or engaged in the NSW public health system as a visiting practitioner.

2 INITIAL REVIEW AND RESPONSE

2.1 Purpose of an initial review

A staff misconduct issue may arise or be identified from a number of sources, such as: internally or externally raised allegations; complaints or concerns; managers' or colleagues' observations; notifications including self-disclosure by a staff member; inquiries or investigations; or other workplace processes.

There must be an initial review of any allegation or concern about potential misconduct without delay ([Information Sheet 4](#)). An initial review seeks to assess all readily available information that may assist in clarifying an allegation or concern in order to:

- Identify any immediate risks to the safety and welfare of patients and/or staff (including any complainant) that need to be managed immediately
- Determine, as far as practical, the credibility, nature and seriousness of the matter
- Determine whether the matter should be managed under this policy or another policy (eg grievance etc) ([Information Sheet 5](#))
- Identify and consult all relevant Policy Directives and their process requirements ([Information Sheet 5](#))
- Identify any immediate internal and external notification requirements ([Information Sheet 6](#)), including the NSW Health [Service Check Register](#). All allegations that involve possible criminal conduct must be reported to the NSW Police.

2.2 Determining further action

Where an initial review indicates that the matter does not involve a misconduct issue (eg is assessed as a low level, low risk grievance or Code of Conduct issue, a performance issue etc), this outcome is to be clearly documented and the provisions of this Policy Directive are no longer applicable. Any further action appropriate to the circumstances should be taken in accordance with any other relevant policies ([Information Sheet 5](#)).

Where an initial review indicates that an allegation is credible or there is an indication of apparent misconduct, or that the matter involves a child-related allegation, charge or conviction, appropriate action must be taken to address the matter in accordance with

this Policy Directive (and, as appropriate, the current NSW Health policy on [child-related allegations, charges and convictions](#)).

Such action must be taken irrespective of whether the matter is being investigated by an external regulatory or investigative body (such as the Police and/or Community Services), and irrespective of the outcome of any such external proceeding. However, consultation with any external regulatory or investigative bodies must take place to ensure that any external investigations are not compromised.

In circumstances involving serious criminal allegations or child-related allegations, discussions should occur with NSW Police and/or Community Services at an early stage, which may result in a decision to defer any investigation by the NSW Health organisation pending the resolution of the criminal or child protection proceedings. Where this occurs the organisation must still undertake a risk assessment (see Section 3) to determine whether any immediate action is required to manage risks. This will normally involve a consideration of suspension of the staff member from duty or other available strategies in accordance with Section 3 and 4 of this document.

Where a matter involves a clinician, the current NSW Health policy on [managing complaints or concerns about clinicians](#) must be consulted.

Where a matter relates to conduct outside the workplace, its relevance to the workplace must be assessed to determine if any action is required (however, specific requirements apply to child-related matters outside the workplace - see the current NSW Health policy on [child-related allegations, charges and convictions](#).)

An investigation into an allegation or apparent incident of misconduct should only occur where there is uncertainty about the relevant facts ([Information Sheet 4](#)). Where the facts are clear and uncontested, findings arising from the initial review can at that stage be provided to the decision-maker, who must either accept or reject them, and then decide what action should be taken in response to the findings. A staff member subject to an adverse finding in such circumstances must be provided with an opportunity to respond to such a finding, as well as to any proposed disciplinary action (refer to Section 7.5.2 for further information).

Appropriate documentation about an allegation or incident of potential misconduct, the initial review, and any recommendations for further action, or a decision not to proceed further, must be kept.

2.3 Advising the staff member

A staff member who is the subject of an initial review regarding potential misconduct should be informed that an issue has been raised about them as soon as credible details indicating potential misconduct have been identified, and it is deemed safe and appropriate to do so ([Information Sheet 7](#)). Any verbal advice should be confirmed in writing.

3 MANAGING RISKS

3.1 General

Where managing potential misconduct needs to involve more than just an initial review, a risk assessment must be conducted and a risk management strategy put in place as soon as possible. The purpose of a risk assessment is not to determine if misconduct took place, but purely to assess whether there are any significant ongoing risks in the workplace that require managing ([Information Sheet 8](#)). The need to continue with any immediate risk response put in place at the time of the initial review should also be assessed as part of the risk assessment.

A suggested risk assessment template is available at [Information Sheet 9](#).

Any action to manage the identified risks must be communicated to the staff member who is to be subject to that action in writing ([Information Sheet 7](#)) and include advice of any creation of a record in the NSW Health [Service Check Register](#). It may also be necessary to manage communications to other affected staff, patients or others.

Appropriate support should be offered to a staff member who is subject to risk management action, and may also need to be provided to other affected staff / patients / other parties.

Any notification requirements must be attended to without delay.

The position of a staff member must not be permanently filled while that staff member is suspended or on interim work arrangements as a risk management measure.

3.2 Options to manage risks

Action to manage risks arising from a risk assessment must be specific and proportionate to the circumstances. Where risk management action is necessary, consideration must be given to appropriate and available administrative action by way of alternative interim work arrangements.

Suspension from duty is a last resort risk management strategy (see Section 4).

See also Section 4.3 regarding payment of shift-penalties and other allowances while undertaking alternative duties or during suspension on pay.

3.3 Ongoing review

While a potential misconduct matter is ongoing, any risk management measures must be reviewed and any risks reassessed, at a minimum every 30 days, or when new information, relevant to the risk management strategy in place, comes to light. Where the review results in a change in risk management measures, any relevant NSW Health [Service Check Register](#) record must also be reviewed and amended as appropriate.

3.4 Requests for review of risk management measures

A staff member subject to risk management action may request a review of the risk management measures by application in writing to the relevant manager or person who conducted the risk assessment, on the grounds that:

- The risks have not been identified or assessed appropriately or
- The risks have changed or no longer exist.

4 SUSPENSION OF STAFF

4.1 General

Suspension of a staff member from duty can only occur as a risk management strategy where:

- A risk assessment has been conducted
- A potential risk is posed by the staff member remaining at their current work and
- The potential risk cannot be appropriately managed in any other way.

In addition, Section 120A(1) of the [Health Services Act 1997](#) outlines specific circumstances in which a staff member who is subject to actions taken by an external body can be suspended. Whether suspension is appropriate in these circumstances will depend on:

- 1) Whether the staff member can continue to perform the role for which they were employed, having regard to the following circumstances:
 - (a) Suspension of the registration of a staff member as a registered health practitioner by a health professional council under s150 of the *Health Practitioner Regulation National Law (NSW)* - the staff member cannot practise as a health practitioner
 - (b) Conditions imposed on the registration of a staff member as a registered health practitioner imposed by a health professional council under s 150 of the *Health Practitioner Regulation National Law (NSW)* – the staff member may not provide some or all of the services which they were employed to provide, or cannot do so without adjustment to working arrangements
 - (c) An interim prohibition order by the Health Care Complaints Commission during an investigation into a staff member as an unregistered health practitioner prohibiting the provision of health services or specified health services by that staff member – the staff member may not provide some or all of the services which they were employed to provide
 - (d) An interim prohibition order by the Health Care Complaints Commission during an investigation into a staff member as an unregistered health practitioner that places conditions on the provision of health services – the staff member may

not be able to provide all the services they were employed to provide, or cannot do so without adjustment to working arrangements

- (e) Charged with a serious criminal offence and is remanded in custody or has bail conditions imposed that prevent or restrict the ability to present for work – the staff member cannot fulfil the terms of their employment
 - (f) Charge of a serious criminal offence (other than in the circumstances in (e) above) – a risk assessment must be conducted to determine whether it is appropriate for the staff member to continue to provide the services they were employed to provide.
- 2) Whether alternative interim work arrangements are appropriate, available and can be safely provided without adverse impact on the operational efficiency and budgetary constraints of the NSW Health organisation.

4.2 Whether suspension under s120A of the Health Services Act 1997 should be with or without pay

Where a staff member is suspended, the payment of salary at the applicable ordinary time rate (ie without shift penalties and other allowances, but refer to Section 4.3 regarding reimbursement in certain circumstances) should usually continue. Suspension may be without pay in the circumstances set out in Section 120A(1) of the *Health Services Act 1997* if the Secretary of the Ministry of Health, or the Chief Executive of the relevant NSW Health organisation (acting under their delegated employer function), so directs.

A staff member who is suspended without pay must be allowed to access any paid annual or long service leave entitlements accrued prior to the suspension. While accessing such leave entitlements, their employment will remain suspended.

4.2.1 Final decisions regarding salary which has been withheld during suspension without pay

Where a staff member is suspended due to action taken against the staff member by an external body under s120A(1) of the *Health Services Act 1997*, and the staff member's salary has been withheld during that action (under s120A(2)), and the outcome of the external body action is one of the following:

- (a) The staff member's registration is suspended or cancelled by the Civil and Administrative Tribunal under Section 149C of the [Health Practitioner Regulation National Law \(NSW\)](#)
- (b) Conditions are imposed by the Tribunal on the registration of the staff member as a registered health practitioner under Section 149A (1) (b) of the *Health Practitioner Regulation National Law* that, in the opinion of the Secretary of the Ministry of Health, or the Chief Executive of the relevant NSW Health organisation (acting under their delegated employer function), are inconsistent with any of the inherent requirements of the terms of employment of the staff member
- (c) A prohibition order is made by the Health Care Complaints Commission in respect of the staff member as an unregistered health practitioner under Section 41A of the

[Health Care Complaints Act 1993](#) that prohibits the staff member from providing health services or specified health services

- (d) A prohibition order is made by the Health Care Complaints Commission in respect of the member of staff under Section 41A of that Act that places conditions on the provision of health services or specified health services by the staff member that, in the opinion of the Secretary of the Ministry of Health, or the Chief Executive of the relevant NSW Health organisation (acting under their delegated employer function), are inconsistent with any of the inherent requirements of the terms of employment of the staff member or
- (e) The person is convicted of a serious criminal offence

The Act provides that the staff member's salary is to be forfeited to the State, unless the Secretary of the NSW Ministry of Health, or the Chief Executive of the relevant NSW Health organisation (acting under their delegated employer function), directs otherwise (s120A(3)).

Conversely, where the action against the staff member by the external body does not result in any of the final actions in (a)-(d) above being taken against the staff member, the Act provides that any salary withheld is to be paid to the staff member, unless the Secretary of the NSW Ministry of Health, or the Chief Executive of the relevant NSW Health organisation (acting under their delegated employer function), directs that the salary is to be forfeited to the State (s120A(4)).

Where withheld salary is paid to the staff member, it should include any relevant allowances and shift penalties (calculated as outlined in Section 4.3 of these Procedures). If the staff member had accessed any paid annual or long service leave while suspended without pay, this leave should be re-credited to him or her.

There may be circumstances where it is not appropriate to provide public money to a staff member for a job that they did not, and could not, perform, particularly where the Health organisation has incurred an additional expense to provide the services during the staff member's period of suspension. In these circumstances the Secretary of the NSW Ministry of Health, or the Chief Executive of the relevant NSW Health organisation (acting under their delegated employer function), may, in accordance with the Act, direct that the withheld salary is to be forfeited to the State. Relevant considerations may include:

- The extent to which the conduct of the staff member contributed to the issue in the first place
- Whether the staff member has complied with statutory duties to report certain criminal conduct and disciplinary matters
- Where a risk assessment suggests that the continued employment of the staff member poses an unacceptable risk to the Health organisation
- The length of the period the staff member was unable to meet the inherent requirements of their employment.

4.3 Reimbursement of shift penalties and other allowances following suspension on pay or alternative duties

Where a staff member is engaged as a shift worker on a permanent or regular basis, or has undertaken shift work regularly in the previous 3 months, and where

- The staff member is suspended or allocated alternative duties as a risk management strategy pending the outcome of an investigation and/or decision-making process in relation to a misconduct allegation against him or her, and
- The suspension or alternative duties result in a loss of shift penalties and/or other work related allowances, and
- No adverse finding is subsequently made against the staff member,

the staff member is to be reimbursed for the loss of shift penalties and/or work related other allowances. The reimbursement is based on the average of any shift penalties and / or other work related allowances for the preceding 6 months or, if the period of shift work is less than 6 months, the average for the period worked.

4.4 Suspension of visiting practitioners

The [Visiting Medical Officer Determinations](#) provide that an organisation may suspend the appointment of a visiting medical officer where it is considered necessary in the interests of the hospital to which the visiting medical officer is appointed. The suspension of any visiting practitioner is without pay. Note that the [Health Services Act 1997](#) provides for an appeal mechanism for visiting practitioners whose appointment is suspended.

For further information regarding suspending the appointment of a Visiting Health Practitioner, refer to the NSW Health Policy on Managing Complaints or Concerns about Clinicians.

5 INVESTIGATION

5.1 The purpose of an investigation

An investigation is a formal process of collecting and analysing all available relevant information to ascertain facts in order to make findings. An investigation precedes, and is separate from, any final decision by a decision-maker about whether to accept or not accept findings, and about whether and what further action (disciplinary or other) is required.

The purpose of an investigation is to determine whether:

- The alleged or suspected misconduct has occurred and, if so, to put forward findings to that effect
- The substantiated conduct breached expected standards, or relevant policies or legislation

- There are any extenuating circumstances or other contributing factors that may need to be considered.

An investigation need only occur into potential misconduct where there is uncertainty about the relevant facts. Even where no investigation is necessary, the decision-making process set out in Sections 7 and 8 of these Procedures should be followed. The requirements of any additional relevant policies identified during the initial review must also be complied with ([Information Sheet 5](#)).

Any investigation must be completed as expeditiously as possible without compromising procedural fairness.

If a matter has been referred to an external regulatory or investigative body, ongoing liaison with that body must occur to coordinate, as appropriate, the timing and conduct of any internal investigation with any action being undertaken by the external body (see also Section 2.2 regarding serious criminal allegations and child-related allegations).

A flowchart of the investigation process is provided at [Information Sheet 10](#). The following publications also provide guidance on conducting internal investigations:

- NSW Ombudsman: [Investigating Complaints - A manual for Investigators](#)
- ICAC's Fact-Finder: A Guide to Conducting Internal Investigations - search for 'Fact finder' at <http://www.icac.nsw.gov.au/publications-and-resources/publications-search>.

5.2 Selecting investigators

Investigators must have suitable skills and experience, an understanding of the investigation process, and, if an external investigator, no direct involvement with or interest in the matter under investigation.

In most cases, an investigation can be conducted by someone internal to the NSW Health organisation, supported by local HR, internal audit, governance, or professional conduct and standards units, as necessary.

External investigators may be used, for example, where a Health organisation considers that there is no one available within the organisation or elsewhere in NSW Health with the appropriate skills, or where very senior executive staff are involved. A government-wide panel of pre-qualified service providers is available and can be accessed through NSW Government ProcurePoint at <https://www.procurepoint.nsw.gov.au/performance-and-management-services-scheme>, although persons not on this panel can also be used.

External investigators must sign a contract (a standard services / consultancy contract is available at <http://internal.health.nsw.gov.au/legal/goods.html>), as well as a declaration that they understand the expectations for the investigation and have received information about any relevant NSW Health policies. Appropriate checks must also be conducted to confirm the capacity of an external investigator to carry out the investigation appropriately.

The decision-maker should not be involved in any investigation.

5.3 Advice to a staff member who is subject to a misconduct process

Written advice must be provided to the staff member about the allegations against him or her and about the investigation process. The advice must contain sufficient information about the allegations to allow the staff member to provide a considered response ([Information Sheet 7](#)).

5.4 Interviews

The investigator must put the substance of the allegations and any key relevant evidence to the staff member subject to the allegations as part of the interview process. In order to do this, it is usually best to interview any complainants and/or witnesses first to gain as much detail about the alleged misconduct as possible.

An investigator may decide to accept receipt of information in a written statement instead of, or in addition to, an interview, although an interview is usually preferable, particularly where additional detail is required or to explore issues in greater detail.

Reasonable notice of an interview must be given in writing (usually 48 hours). All persons to be interviewed must be advised that they may have a support person of their choosing present, and that the reasons for the interview and its content must remain confidential.

The support person does not represent the staff member nor advocate or make representations on behalf of that person.

Records of interviews should be taken and kept (note that under the [Surveillance Devices Act 2007](#), electronic / tape recordings can only be made with the agreement of all parties to the interview). Persons interviewed should be provided with a copy of a summary or record of interview for review and signature as soon as possible. See also Section 6.8 regarding disputes over interview records.

6 ISSUES ARISING DURING INITIAL REVIEW, INVESTIGATION OR DECISION-MAKING PROCESSES

6.1 Unreasonable conduct by complainants

Complainants may demonstrate unreasonable persistence, demands or arguments, lack of cooperation, aggression etc.

- Refer to the NSW Ombudsman publication [Managing Unreasonable Complainant Conduct](#) for guidance in managing complainants
- Any aggression or threats of violence by staff are to be managed as a breach of the NSW Health [Code of Conduct](#).

6.2 Frivolous, vexatious or misconceived allegations/concerns

If at any point in the process it becomes apparent that an allegation of, or concern about, misconduct is frivolous, vexatious, misconceived or otherwise lacking in substance:

- The process must stop
- This must be communicated to the decision-maker for assessment
- The decision to conclude the process must be recorded with reasons
- If the staff member subject to the allegation or enquiry has already been notified, they must be advised as soon as possible that allegations or concerns were not supported (it may also be appropriate to provide an apology)
- Vexatious allegations amount to misconduct. If a complainant is a staff member, such an allegation must be separately managed in line with this Policy Directive.

6.3 When a staff member does not cooperate

All staff members are expected to cooperate in any process to manage potential misconduct.

- If a staff member fails or refuses to attend an interview or provide a written statement within the timeframe advised, any reasons for the failure put forward or otherwise identified must be considered, any reasonable accommodation made as required, and the staff member advised of a final date for the interview/written statement.
- If the staff member continues to refuse to attend an interview/provide a written statement without reasonable grounds, they are to be directed in writing to attend an interview or provide a written statement by a specific date and advised in writing that a refusal may constitute a breach of the NSW Health [Code of Conduct](#) with potential disciplinary consequences, and that the investigation will continue in any case and a decision will be made based on available information.
- If the staff member attends an interview but refuses to engage or to provide relevant information sought by the interviewer, they must be advised that the content of the interview will nevertheless be recorded, and that the investigation will continue and a decision will be made based on available information. This advice is to be confirmed in writing following the interview.

6.4 When a staff member is on approved leave during an investigation

It may be appropriate to recall the person from leave to be interviewed or seek a written statement from him or her where a timely completion of the investigation is necessary.

6.5 When a staff member is on sick leave / workers compensation leave during an investigation

Consideration must be given to whether the medical condition of a staff member reasonably prevents him or her from taking part in an interview or providing a written statement.

If the staff member is on workers compensation leave, any return-to-work restrictions in place must be considered.

If the staff member is on sick leave due to a non-work related injury or illness, the Health organisation should rely on the available medical advice from the employee's treating doctor in the first instance to determine the staff member's ability to participate in the investigation. Where there are ongoing concerns or a lack of clarity over the staff member's prognosis, action may include seeking the staff member's consent to discuss their prognosis with their treating doctor, or, if the staff member does not consent to this, referring them for a further medical assessment (the process is set out in the current NSW public sector [procedures for managing non-work related injuries and health conditions](#)).

If the staff member is not able to attend an interview, but is able to provide, or arrange for the provision of, a written statement, this should be formally sought on the basis that a timely completion of the investigation is necessary. In these circumstances, the staff member should be advised of the deadline for the provision of the written statement, and that the investigation will continue in any case, and a decision will be made based on available information.

6.6 Where the staff member resigns prior to completion of a misconduct management process

The process must still be completed, including making findings and decisions about any action that would have been taken against the staff member had they still been in the position, and all relevant notifications.

The management process must be fair to the former staff member (including the timely completion of any investigation and providing the former staff member with an opportunity to respond to any allegations or adverse findings).

An entry into the Service Check Register may have to be made or amended – see the current NSW Health policy on [Service Check Register](#).

6.7 Delays in completing the management process

If the completion of the process is delayed beyond the recommended 12 weeks ([Information Sheet 2](#)) or any timeframe previously advised, all key parties must be advised of this in writing.

6.8 Disputes over interview records

Any issues about the content of the record of interview are to be discussed and resolved if possible, and the record altered to reflect any agreed changes.

If the issues cannot be resolved, the interviewee is to be asked to submit a statement giving reasons for not signing the record, the investigator must record reasons for not agreeing to the requested changes, and both statements must be appended to the interview record.

6.9 Complaints about the investigation/investigator

Complaints about the investigation or the investigator are to be referred for review to the manager responsible for the process and assessed without delay to ensure continued integrity of the process.

7 MAKING FINDINGS

7.1 Options for findings

Generally, the findings arising from an investigation or, in appropriate circumstances, an initial review, fall into one of the following:

- Misconduct is substantiated
- Misconduct is not substantiated (no evidence that misconduct has occurred, or evidence that it did not)
- Misconduct is not substantiated due to insufficient or inconclusive information.

Note: Specific requirements apply to findings that can be made for child-related allegations that are notifiable to the Ombudsman (refer to current NSW Health policy on [child related allegations, charges and convictions](#)).

The strength, sufficiency, relevance and reliability of any information must be carefully assessed to determine whether it can support a finding, and where clarification is required, more information should be gathered.

7.2 Standard of proof

Findings of misconduct must be proved to the civil standard, that is, “on the balance of probabilities”. In other words, based on available evidence, it must be more probable that misconduct has occurred than that it has not.

In addition, consistent with the “Briginshaw v Briginshaw principle”, the more serious the potential misconduct, and therefore the more serious the consequences for the staff member, the stronger the evidence must be to support an adverse finding.

7.3 Investigation findings and investigation report

Where an investigation has been conducted, the person conducting the investigation should provide a report setting out findings arising from the investigation and the facts supporting those findings to the decision-maker ([Information Sheet 11](#)).

The investigation report should not contain information that is not relevant to the conduct under investigation. Where new allegations arise during an investigation, these must be assessed: allegations or concerns not closely related to the investigation, or any counter-allegations, must be managed separately in line with this Policy Directive. Where appropriate, an investigator should include in a report any material which may set out mitigating factors or be otherwise exculpatory in respect of the staff member subject to the investigation.

All supporting documentation should be available to be examined by the decision-maker.

7.4 Findings where no investigation has taken place

As set out in Section 2.2, an investigation is only necessary where there is uncertainty about the facts. Where an initial review determines that the facts are clear and uncontested, findings arising out of the initial review should be set out together with the supporting facts in a report which should be provided to the decision-maker.

7.5 Final decisions about findings

7.5.1 The role of the decision-maker

The decision-maker should not have any direct conflict of interest involving the complaint. They must act in an objective and impartial manner, and have regard to procedural fairness requirements and risk management.

It is the role of the decision-maker to:

- Accept or reject findings arising from the investigation, or the initial review. The decision-maker may accept some but not all of the findings. Any decision to reject a finding, and the reason for it, must be documented.

It is also open to the decision-maker to ask that the person or persons who conducted the investigation make further enquiries, or otherwise to initiate or undertake further enquiries, where they are concerned that more information is needed to support findings.

- Make decisions about any action to be taken by the Health organisation as a response to the findings (see Section 8).

7.5.2 Seeking a response to adverse findings

An adverse finding is a finding that is unfavourable to the staff member subject to a misconduct process, ie supports the allegation or apparent incident of misconduct. Adverse findings do not include inconclusive findings.

Where the decision-maker is proposing to support an adverse finding against a staff member, the staff member must be so advised and given an opportunity to provide any additional information, or raise any concerns about an investigation process or the proposed findings to the attention of the decision-maker.

In order to be able to provide a considered response, the staff member has a right to access relevant information that has been taken into consideration by the decision-maker in making an adverse finding. The material should be sufficient to enable the staff member to understand fully any alleged misconduct, but need not include all information in the possession of the decision-maker, particularly where the interests of other members of staff may need to be protected or the material is not relevant to the findings.

In certain circumstances (eg [public interest disclosures](#), in respect of confidential information about third parties, or where there may be a potential risk to the wellbeing of the staff member or others) it may be appropriate to withhold some information. What information is withheld and for what reason should be appropriately recorded.

A response from the staff member should be required within a reasonable time period (usually two calendar weeks unless otherwise agreed).

Where the staff member's response provides additional information that has not been raised before and may materially affect the findings, the findings should be reviewed accordingly. In some instances further investigative action may need to take place.

The staff member must also be provided with an opportunity to make submissions about any proposed disciplinary action. The response to proposed disciplinary action may be sought at the same time as the response to proposed adverse findings (after considering what may be appropriate action in line with Section 8). However, where the staff member's response affects the findings, the proposed action will need to be reviewed accordingly, and the staff member must be given an opportunity to respond to any revised proposed disciplinary action.

8 MAKING DECISIONS ABOUT ACTION TO BE TAKEN

8.1 Considering an appropriate response to findings

The decision-maker must form a view of the appropriate outcome of the process based on the material available. In deciding what action is appropriate the following must be considered:

- As the paramount consideration, the protection of a NSW Health organisation's patients and clients and of children for whom it is responsible. In particular, Section 119 of the [Health Services Act 1997](#) specifies this as the paramount consideration in relation to determining whether to take disciplinary action against a member of staff in respect of serious sex or violence offences.
- The health, safety and well-being of the organisation's staff.
- The seriousness of the misconduct, and the extent to which it constitutes a breach of any relevant legislation, registration standard or the Code of Conduct or any other NSW Health or Health organisation policies.
- Any penalties prescribed by legislation or other relevant Policy Directives (eg the [hand hygiene policy](#), the policy on [misuse of NSW Health communication systems](#)).

- Any action taken by external regulatory bodies in relation to the staff member (eg deregistration etc).
- Whether the misconduct involved a pattern of behaviour or was an isolated incident.
- The staff member's length of service and previous work history, including the period of time since any previous conduct issues (this may involve a review of the [Service Check Register](#)).

Where a NSW Health organisation becomes aware of similar substantiated misconduct by the staff member elsewhere in the NSW Health Service, further information is to be sought from the relevant Health organisation and considered by the decision-maker in determining the appropriate action to be taken (eg a pattern of behaviour may be shown). The information should only be used in determining the appropriate response to the current substantiated misconduct, not to weigh the balance of probability during an investigation.

- Any factors affecting the staff member's behaviour. Where information obtained during the initial review or investigation suggests an underlying health issue may have caused or contributed to the conduct, it may be appropriate to refer the staff member to a medical assessment. For further information, refer to the current NSW public sector [procedures for managing non-work related injuries and health conditions](#). Note also that employers have statutory notification requirements in relation to potential impairment of a health practitioner under the [Health Practitioner Regulation National Law \(NSW\)](#).
- Any matters raised by the staff member about the findings or about the penalty or action that should be taken in response to the misconduct (see Section 8.3 following).
- The impact of the conduct on the organisation and other staff.
- The potential impact that any action may have on the staff member's personal circumstances and professional reputation.

8.2 Options for action in response to findings of misconduct

The following options exist for a decision-maker (refer also to [Information Sheet 12](#)):

- No further action – relevant where conduct did not breach expected standards, or misconduct occurred but no further action is warranted because of mitigating circumstances.
- Remedial (ie non-disciplinary corrective) managerial action – may be relevant where findings of misconduct were made but not considered to warrant disciplinary action, or in conjunction with disciplinary action, or can be appropriate where allegations have not been substantiated as misconduct but the staff member's conduct nevertheless needs to be addressed (eg low level breach of the Code of Conduct, performance or behavioural issue, other policy requirements – refer to [Information Sheet 5](#)).
- Disciplinary action, which can take the following form:

- A formal warning, clearly stating the improved standard of conduct that is required within a given timeframe and the possible consequences of failing to reach that standard, and indicating any assistance available to help the staff member meet the expectations
- An annulment of appointment, where a staff member is on probation
- For staff of the Ambulance Service of NSW only, reduction of the staff member's classification or position
- Dismissal from the NSW Health Service, or termination of a visiting practitioner's appointment. Termination of employment must be approved by the Chief Executive, who must be independently satisfied that this action is warranted (see also Section 9.3 regarding other action arising from a termination of employment).

Note that some other NSW Health Policy Directives (such as those dealing with [hand hygiene](#), and [misuse of NSW Health communication systems](#)) also contain provisions for disciplinary action.

Note also that specific provisions exist under the [Health Services Act 1997](#) in relation to a member of staff (Section 118) or a visiting practitioner (Section 100) who has been convicted of a serious sex or violence offence.

- Addressing systems / organisational issues – these may be appropriate even where allegations have not been substantiated or findings are inconclusive.

Any action proposed must be proportionate to the seriousness of the conduct and any identified ongoing risks, after consideration of any mitigating circumstances. In some instances, more than one of the above responses may be appropriate.

8.3 Seeking a response from a staff member regarding proposed disciplinary action

Any disciplinary action proposed by a decision-maker in response to a staff member's misconduct must be communicated to the staff member in writing. The staff member must be given an opportunity to make submissions to the decision-maker in relation to the proposed disciplinary action before a final decision about it is taken.

The decision-maker can seek a response to proposed adverse findings and proposed action at the same time (see also Section 7.5.2).

A reasonable period of time (usually two calendar weeks, unless otherwise agreed) must be allowed for a response. Any such response must be considered by the decision-maker before a final decision is made about the action to be taken.

9 IMPLEMENTING DECISIONS AND FINALISING THE PROCESS

9.1 Advice about the outcome

At the completion of the process a final risk assessment must be conducted regardless of the outcome to identify any issues requiring ongoing management.

All persons involved must be advised of the outcome of the process in so far as it relates to them, having regard to the confidentiality rights of other people involved in the matter (further guidance is provided by the NSW Ombudsman publication [Managing information arising out of an investigation](#)). It may also be necessary to offer appropriate support (such as the employee assistance program) to affected persons.

The person subject to the misconduct process must be advised of any disciplinary or remedial action the NSW Health organisation will take (including its effective date), or any other outcome of the process (including any issues that will be referred to the relevant line manager for local management). They must also be advised of any final notifications made (including the NSW Health [Service Check Register](#)) (see also Section 9.3 regarding action arising from termination of employment or appointment.)

Where allegations or concerns were not substantiated, there should be a discussion with the staff member involved about any support they may require to continue with or resume their role in the organisation.

9.2 Visiting practitioner appeals

Visiting practitioners have a right of appeal regarding certain decisions against them. These are detailed in Part 4 of the [Health Services Act 1997](#). Further advice can be sought from each NSW Health organisation's medical administration.

9.3 Action arising from termination of employment or appointment

Where a staff member's appointment is terminated in one part of the NSW Health Service following a finding of misconduct, the termination will apply to any other employment across the NSW Health Service. All other NSW Health organisations where the staff member holds employment must be notified of the termination.

However, a process is available to staff members to 'show cause' as to why the termination should not apply to their other employment in the NSW Health Service. The process is outlined in [Information Sheet 13](#) (flow chart) and [Information Sheet 14](#) (checklist), including advice to be provided to the staff member. Any decision made by a Health organisation about a show cause application must be endorsed by the Ministry of Health's Director, Workplace Relations before implementation.

Where the contract of a visiting practitioner with one Health organisation is terminated following a finding of misconduct, any other Health organisation(s) where the visiting practitioner holds a contract must be advised of the termination to allow them to assess and manage any risks arising from the finding(s) for the other organisation (see also current NSW Health policy on the [Service Check Register](#).)

9.4 Finalising the process

Once any investigation and all decisions about findings and further action are finalised, any relevant final internal and external notification requirements as outlined in legislation and relevant policies must be attended to, including the NSW Health [Service Check Register](#) ([Information Sheet 6](#)).

Appropriate records of all stages of the process (including the initial review and any interviews) and outcomes must be kept. All documentation must be managed in line with State Records NSW requirements for keeping personnel records ([General Retention and Disposal Authority GA28](#)) and kept on a dedicated and confidential file, separate to a staff member's personnel file ([Information Sheet 15](#)).