

## 2.14.3 CHIEF COMMISSIONER'S DIRECTIVE – GUIDE TO CONDUCTING AN INVESTIGATION

### INTRODUCTION

While guidelines around the process for handling “disputes / grievances” in Scouting exists, there are often situations where an investigation is required to provide the required information to make a determination. This directive provides guidance in the conduct of an investigation for volunteers.

An important point to note is where a matter may / will require the intervention of the Police no investigation is to be held prior to their engagement. Doing so, could well compromise the outcome. However, post a Police investigation and determination of next steps, Scouting does have a right to conduct additional enquiries to decide if further action (by Scouts) is required.

### INVESTIGATION PROCESS

The process of conducting an Investigation has four main steps: **Preparation and information Collection, Interviewing the Relevant Parties, Making a Finding and Report and Making a Decision.**

Communication and feedback to relevant parties should occur throughout the process. An overview of each step is provided below.

#### 1. PREPARATION AND INFORMATION COLLECTION

When planning for an investigation there are some preliminary considerations:

- Who is the best person to investigate this matter? That is, could there be a conflict of interest due to a relationship with either of the parties / skill / availability?;
- What will be the identification and categorisation of the nature of the complaint?;
- Are we clear as to who the parties to the matter are, their location and availability - Complainant(s) / Respondent(s) / Witnesses / Other interested parties?;
- What other relevant background information is available, including:
  - Any complaint document(s);
  - Relationships (organisational structure);
  - Relevant policies and procedures and codes of conduct;
  - Training records; Position descriptions;
  - Past ARDP reviews (if conducted);
  - How previous incidents have been managed, relevant operational processes and procedures;
  - Previous investigations / complaints / observed patterns of behaviour; and
  - Environmental factors such as structural change, operational pressures, threat of role loss etc.
- Determine an appropriate location for interviews and administrative matters such as who organises the interview times etc.
  - Take into consideration geographical factors for interviews such as home locations and travelling times, and availability of parties if involved in shift work, weekend work or currently on holidays etc.;
- Consider representation matters. It may be appropriate for the interviewee to have a support person present (to provide moral support and take notes. However, their role is observer not contributor);

- Be realistic in scheduling appointment times. Allow at least 2-3 hours with the complainant and a similar time with the respondent and 1 hour for each witness (if applicable);
- Decide who will be interviewed, in what order?
- Prepare an interview question guide based on the allegation(s) (use open ended questions where possible);
- Review the plan after initial interviews with the complainant(s) and the respondent(s) – as it is important that transparency of process occurs;
- Allow for a second interview with both the complaint and the respondent to provide them feedback from the initial round of interviews and particularly around any conflict in evidence or statements that you do not feel have been supported in the investigation thus far;
- Provide to the complainant and respondent a copy of the ACT Branch Grievance and Conflict Resolution policy and Chief Commissioner’s Directives. This is so all parties understand who will be making the decision and what (if any appeals process) is available;
- Be clear (for yourself) as to your terms of reference.
  - What have you been specifically asked to do? Consider having an “in scope” / “out of scope” statement. Will you be making a decision or a recommendation? At all times the “brief” must be in writing.

## 2. INTERVIEWING THE RELEVANT PARTIES

Once the interview is ready to commence the following guides an order of process:

- Introduce yourself and explain why they are present and your role clearly;
- Check that representation / support has been offered or if they have any special needs such as an interpreter. Explain role of any support person (e.g. to support not speak for them);
- Ensure the complainant understands the process and is aware of the relevant policies / options open to them in having their complaint handled (see note above);
- Talk about the processes:
  - Confidentiality - including the need to protect the integrity of the investigation process;
  - Communication of information and material with the respondent(s);
  - Note taking, documentation, witness statements and / or the giving of permission to record the conversation; and
  - Likely timing of the investigation moving forward.
- Check their willingness to progress. Sometimes people chose to not progress when they realise what is involved. This should be discouraged as matters left unresolved will often fester and become worse;
- Manage emotions and apply sensitivity
  - remember that the person may be emotional and distressed. Suggest breaks if the interviewee becomes upset or distressed;
- Obtain as much specific detail (evidence) as possible:
  - Description of behaviour such as what was said/done and how often (what / who / when / where);
  - List potential witnesses, of people the complainant may have spoken to about the complaint, or other people who may have experienced similar behaviour from the respondent;

- Ask how they feel, what impact has the incident had on them (immediate and subsequent) and what they see as an appropriate outcome; and
- Filter details being provided to see if it is going to be material to your findings (probative value<sup>2</sup>), check matters raised for currency (consider not allowing matters that may have occurred more than 12 months ago to be used as it is difficult to revive memory about such events after that space of time).
- Explore the impact of environmental matters (i.e. culture, training etc.);
- Ask the interviewee if they have any further questions;
- Explain timings and when you will get back to the interviewee; and
- Write up interview summary or statement, ask complainant/ respondent/ witness to review and sign – make sure all recordings are factual (no hearsay).

### 3. MAKING A FINDING AND REPORT

- Firstly, it is necessary to “assess” the evidence. Consider:
  - Consistency, reliability and credibility of each party, etc. how strong is the evidence?;
  - Balance of probabilities and reasonable person test - the more serious the implication of a finding the stronger the Balance of Probabilities test needs to be. Severe consequences need to have almost irrefutable evidence (circumstantial evidence will often lead to an appeal);
  - Impact on complainant, severity and frequency of behaviour;
  - Whether the respondent intended or not to harass, discriminate or bully is largely immaterial in determining a finding;
  - Wishes of the complainant;
  - Association Policy contravention (make sure no ‘local’ rules are applied – the rules are either National or Branch);
  - The impact on Scouting in terms of its exposure to vicarious liability claims and/or damage to its reputation.
- Completing an Evidence Matrix (Allegation, Policy / Rule Breach, Elements/Facts in Issue, Avenues of Inquiry, what / who / when / where) may be useful in summarising information but is not necessary.

Once the evidence has been assessed next comes the “finding”. For each element of the complaint make a finding on the facts:

- Behaviour found to have occurred
- Behaviour found NOT to have occurred
- Inconclusive
- For each item it may be appropriate to categorise as:
  - Potentially unlawful
  - Breach of policy/code
  - Unreasonable
  - Unprofessional and/or
  - Reasonable in all the circumstances

### 4. DECISION MAKING

- Usually the final decision will rest in the hands of another (e.g. Region Commissioner or Chief Commissioner). As such the decision in the context of an investigation is

about making a “recommendation”. Sometimes, the appointing person (i.e. responsible Commissioner) may not want a recommendation to be made and is only interested in the “finding / report” and they will then decide (based on these details) what decision they wish to take.

- For anyone conducting an investigation it is important (up front) to know the parameters in which you are to operate (Terms of Reference).
- In getting to a decision / recommendation:
  - Don't leave any material matters unaddressed. A finding might be that there is insufficient evidence to support a finding of inappropriate behaviour or that the case against the respondent has not been established on the balance of probabilities.
  - It is not fair to the respondent(s) to leave a matter unresolved.
  - Take one last look to see if the various elements of the complaint in totality establish a "pattern" of unacceptable behaviour.
  - Ensure a connection between the evidence and your findings and any subsequent conclusions so that your rationale is evident.
- Note: There is always the risk that evidence on how the organisation dealt with the complaint may be submitted in subsequent legal proceedings.
  - For example, if a complaint is lodged with the Human Rights and Equal Opportunity Commission or another Anti-discrimination agency.
  - Records of internal action will be useful in establishing whether 'reasonable steps' were taken to deal with the matter and may assist in discharging the organisation's liability.
  - Making sure that a fair, equitable and fact-based investigation (no hearsay) process has been followed is a MUST.
- Before finalising the investigation report and making a decision / recommendation, consider the following checklist:
  - Have all issues in the Terms of Reference been addressed?
  - Have all respondents against whom an adverse finding might be made been advised of each relevant allegation and been given a chance to provide information in relation to the allegation?
  - Have all relevant witnesses been interviewed?
  - Have all witnesses interviewed had the opportunity to review and make any necessary corrections to their statements.
  - Have all witnesses interviewed signed their statements (printed versions of the statements are preferable, however keep the original notes).
  - Have copies of all relevant evidence (e.g. e-mails, photos, etc.) which have come to light in the course of the investigation been obtained?
  - Where necessary, has any relevant evidence been put to witnesses?
  - If the investigation is a workplace health and safety investigation, has expert opinion been obtained if this is necessary?
  - Have the balance of probability test been applied when determining factual conclusions, i.e. an investigator should not find a fact to be established unless it is 'more probable than not' that it occurred. (see comment above about evidence guide).

## REACHING RESOLUTION

- No investigation is fully complete unless there is a resolution. Every situation is different so the suitability of resolution activities will also vary. Examples of potential resolution actions include:
  - Conciliation / mediation;
  - Counselling;
  - Formal apology;
  - Training;
  - Communication of policies to the wider Scouting community;
  - Disciplinary action – e.g. warning, redirection of appointment, suspension, termination, etc.;
  - Dismissal of the complaint if it is found to have no substance;
  - Increased supervision / monitoring;
  - Reimbursing costs (e.g. medical, counselling);
  - Disciplinary action against the complainant if complaint was vexatious or malicious; and
  - Applying an appeals process if parties are not satisfied with the investigation result.
- In reality, the final resolution could be a combination of many of these. Often there is no one solution.

## CONCLUSION

- Properly conducted investigations often lead to constructive outcomes both for the people involved and Scouting more widely. Sometimes, we need to change our policies and processes as a result of finding / decision.
- Unfortunately, not all investigations are conducted properly, and the downstream consequence can be catastrophic for all involved.
- Investigations will take time and not allowing sufficient time to explore all the facts / parties concerned can result in second / third attempts needing to be made and this usually leads to a poor outcome.
- Please keep in mind that whilst an investigation may be carried out and may meet all process requirements, it is the perceptions of the individuals involved in a complaint that will influence their ability to accept the outcome. A communication plan should be carefully considered and carried out at all steps of the investigation process.
- Finally, getting onto the issue quickly, in a process driven way, with the right people involved are key ingredients for a successful resolution.

Note: This process has been adapted from an article published by iHR Australia (<http://www.ihraustralia.com/factsheets/workplaceinvestigation-process>).

## AUTHORITY

This Chief Commissioner's Directive or amended Directive was approved by the Chief Commissioner on 7 August 2019.