

ACT Ombudsman Practice Guide No.6

Making a finding of Reportable Conduct

This practice guide provides information to assist employers to make a finding in relation to ‘reportable allegations’ and ‘reportable convictions’ against employees.

Making a finding of reportable conduct

At the conclusion of an employer’s¹ investigation of reportable conduct the employer should assess the evidence regarding the allegation(s) and any conclusions or recommendations made by the investigator. A final finding should then be made in relation to each allegation.

Weight of the evidence

The employer must assess the strength or weight of the evidence when making a finding. There are some general considerations that can assist in determining how much weight to place on information and to determine a finding. The employer should consider:

- the reliability of evidence
- whether the evidence is relevant to the alleged conduct
- if accounts are consistent (over time, with other evidence, and more or less plausible)
- whether there is any other evidence to corroborate or contradict the allegation noting that evidence which satisfies one consideration may very well also satisfy others
- sufficiency of procedural fairness offered to the employee
- whether the conclusions of the investigation are supported by the evidence.

Employers should exercise caution when considering making a sustained finding in a matter that involves a criminal allegation—such as a sexual offence allegation or a physical assault allegation- in the absence of a criminal conviction. While it is not necessary to meet the criminal standard (e.g. beyond a reasonable doubt) to make a sustained finding of reportable conduct, it should be based on material that logically tends to show that all the facts necessary to establish an incident are made out to the reasonable satisfaction of the employer.

The employer should base their decision on evidence, and not guesswork, suspicion or rumour. The employer should exercise diligence when deciding whether they are satisfied that the conduct is sustained.

The final finding should inform an employer’s final risk assessment and any action taken to mitigate ongoing risks, including reporting any finding of workplace misconduct to Access Canberra and other regulators as appropriate.

¹ For purposes of this practice guide, the word employer will be substituted for the phrase head of designated entity.

Available findings

The **findings** made in an investigation are the responsibility of the employer or their delegate. Based on the evidence available, the employer determines a specific outcome for each of the definitive allegations put to the person subject of the allegation (PSOA). The civil standard of proof, ‘the balance of probabilities’, applies to designated entity investigations of reportable allegations against employees.

For purposes of the ACT Reportable Conduct Scheme there are five possible findings:

- sustained (e.g. a finding that the conduct occurred), or
- not sustained – insufficient evidence (for example, there is some evidence of weight however, there is insufficient evidence available to reasonably establish that the alleged conduct did occur), or
- not sustained – lack of evidence of weight (e.g. where the evidence is of such poor probative value or lacking in weight, such as to warrant a finding that, on the balance of probabilities, the conduct did not occur), or
- false (for example, where inquiries into the matter show reportable conduct or misconduct with a child did not occur). Some of these matters may be vexatious, for example where inquiries into the matter show the allegation was made without substance and to cause distress to the person against whom the allegation was made, or
- not reportable conduct (for example, where inquiries into the matter show the conduct was not reportable).² For example, use of force that was trivial or negligible in the circumstances, conduct that was reasonable in the circumstances or accidental. This may include ‘misconceived’ matters, where inquiries into the matter show that, even though the allegation was made in good faith, it was based on a misunderstanding of what actually occurred and the incident was not reportable conduct. While the conduct may be determined to be not reportable, the employer must still respond to the allegation, perhaps even investigate the matter. The finding and outcomes should be documented and maintained by the employer. The documentation relating to the decision that a matter is not reportable should be archived as this determination may be audited by the ACT Ombudsman.

Making a finding is separate to determining outcomes and consequences. Determining outcomes and consequences should begin once a finding is made.

Contact

We encourage contact with the Ombudsman. We may be contacted using the details below.

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More information is available at ombudsman.act.gov.au

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² See s 17E (2) of the *Ombudsman Act 1989*.