

Investigations: Guidance for Good Practice

Resource Paper for Disability Service Providers

Investigations of Incidents of Alleged Staff
to Client Assault or Unexplained Injuries

Disability Services Commissioner is an independent voice promoting rights and resolving complaints about disability services.

Investigations: Guidance for Good Practice

Resource Paper for Disability Service Providers

Investigations of Incidents of Alleged Staff to Client Assault or Unexplained Injuries

To receive this publication in an accessible format please phone 1300 728 187 using the National Relay Service on 13 36 77, if required, or email <contact@odsc.vic.gov.au>.

This document may also be downloaded in PDF and RTF formats from the Disability Services Commissioner website at <www.odsc.vic.gov.au>.

© Copyright State of Victoria, Disability Services Commissioner, 2015.

This publication is copyright, no part may be reproduced by any process except in accordance with the provisions of the Copyright Act 1968.

Unless indicated otherwise, this work is made available under the terms of the Creative Commons Attribution 3.0 Australia licence. To view a copy of this licence, visit <creativecommons.org/licenses/by/3.0/au>. It is a condition of this Creative Commons Attribution 3.0 Licence that you must give credit to the original author who is the State of Victoria.

Authorised and published by the Disability Services Commissioner, 570 Bourke Street, Melbourne.

Contact us:

Office:	1300 728 187
Enquiries & Complaints:	1800 677 342
TTY:	1300 726 563
Fax:	03 8608 5765
Email:	complaints@odsc.vic.gov.au (enquiries & complaints) contact@odsc.vic.gov.au (publications & training)
Website:	www.odsc.vic.gov.au

Note: From 1 January 2015 the **Department of Human Services** (DHS) became the **Department of Health and Human Services** (DHHS)

Investigations: Guidance for Good Practice

Resource Paper for Disability Service Providers

Investigations of Incidents of Alleged Staff to Client Assault or Unexplained Injuries

Contents

1.	Introduction	page 2
2.	The context for better practice in investigations	page 5
3.	Preliminary assessment and steps following the incident	page 8
4.	Plan the investigation	page 10
5.	The investigation phase	page 14
6.	Decision making - responding to the investigation	page 17

Attachment A

Information Sheet:

Role of the Disability Services Commissioner in reviewing and monitoring incidents of alleged staff to client assault or unexplained injuries

Attachment B

Practice Guidance Sheet No. 1:

Preliminary assessment of incidents involving allegations of staff to client assault or unexplained injuries

Attachment C

Practice Guidance Sheet No. 2:

Investigating incidents involving allegations of staff to client assault or unexplained injuries

Attachment D

References and resource material

1. Introduction

Purpose

This paper is a resource for service providers in the disability services sector to undertake investigations relating to allegations of staff to client assault or unexplained injuries. This resource paper is supplemented by an information sheet and guidance advice sheets, which are designed to inform practice.

This paper promotes consistent good practice in investigations, where the experience and situation of the person with a disability is appropriately addressed, and appropriate action is taken in relation to the staff member who is the subject of the allegation.

Background

The need for guidance on investigations has emerged from lessons learnt through the complaints resolutions work of the Disability Services Commissioner (DSC) and through our role in reviewing Category One incidents of alleged staff to client assault or unexplained injuries in disability services.

DSC has been reviewing Category One staff to client assault or unexplained injuries incidents since June 2012, through referrals for advice from the Minister for Disability Services and Reform under s. 16(c) of the *Disability Act 2006*; a process that is governed by a protocol with the Department of Health and Human Services (DHHS).

DSC applies the following **key principles** in monitoring Category One incidents of staff to client assault or unexplained injuries:

1. the **client's experience**, particularly from a human rights perspective
2. **safeguards** for the client, both immediate and long term
3. appropriate **support** for the client and their family in the wake of trauma
4. the client's **access to justice** and protection
5. the client **human rights**, balanced with staff rights and substantiation of assault in an investigation
6. **broader systemic issues** associated with the allegations.

DSC's review, of incident reports and DHHS' Quality of Support Reviews, have revealed inconsistent approaches and standards applied in investigations conducted or commissioned by service providers.

DSC has identified significant gaps or poor practice in investigations, including instances when:

- the client was not interviewed, or interviewed only after a considerable amount of time had passed since the incident
- insufficient attention was given to the situation and experience of the client
- staff interviews were conducted in public, in a group setting
- there was an inappropriately limited scope to the investigation.

The limitations and shortcomings of some responses and investigations may compromise the wellbeing and safety of clients. DSC has reviewed many incidents that have not been investigated consistently, with adequate rigour, leading to missed opportunities for practice and service improvement, or for redress, and the risk of recurring abuse.

In June 2012 DSC issued Occasional Paper No. 1: Safeguarding People's Right to be Free from Abuse as part of its 'Learning From Complaints' series¹. In this paper DSC outlines key lessons learnt, the features of a 'safeguarding framework' and rigorous approaches to investigations. DSC's recommended approach is person-centred, rights based and informed by contemporary literature and research. Separate and equal consideration needs to be given to the client's experience and outcomes as well as determining the allegation of assault against the staff member.

The guidance outlined in this paper has been informed not only by DSC's experience, but also by an extensive literature review of relevant research and a focus group involving service providers and advocacy organisations. It provides criteria for service providers to adopt an adequate and balanced approach to investigations that takes into account the range of possible situations and contexts, as well as the 'real-life' operational context in which services are provided.

¹ Disability Services Commissioner 2012, *Occasional Paper No. 1: Safeguarding People's Right to be Free from Abuse*, State Government of Victoria, Melbourne. This paper contains a detailed analysis of the key considerations from the literature and research (pp. 7–28) from which material in this document is drawn.

Definition of an investigation

An investigation involves the planned and systematic gathering and analysis of all relevant facts through obtaining evidence by interviewing witnesses, examining documentation, skilled observation and obtaining expert opinion. An investigation into alleged staff to client assault or unexplained injuries must remain person-centred throughout the process.

Preliminary review and questioning of staff immediately after the incident – also called ‘preliminary assessment’ – is not considered to be part of the investigation.

Investigation and subsequent decision making are two separate processes; however the information, analysis and findings from investigations should enable sound and appropriate decision making.

Scope of this guidance

This guidance provides a high-level overview of the key features and criteria for good practice in conducting investigations involving clients of disability services.

More detailed guidelines for the conduct of specific aspects of investigations can be found in the documents listed in Attachment D.

Complex investigations may warrant the engagement of investigators with special expertise.

2. The context for better practice in investigations

Risk and prevalence of abuse

Occasional Paper No. 1: Safeguarding People's Right to be Free from Abuse identifies a consistent theme in both Australian and international research – that people with a disability are much more likely than the general population to experience abuse, including physical and sexual assault. This is especially the case for people with an intellectual disability or cognitive impairment, a communication or sensory impairment, high support needs or behaviours of concern.

The literature highlights the risk of abuse in supported accommodation, and the barriers and challenges to detection, disclosure and investigation in these settings. Australian research on sexual assault has highlighted the risks for women with a disability in residential settings². Physical assault or harm inflicted as a consequence of inappropriate responses by staff to behaviours of concern is well documented in the literature³. Risk factors such as staff turnover, frequent use of casual staff, staff stress, an isolated or 'closed' service, poor management and the absence of practice leadership allow unacceptable staff practices to become normalised⁴. People without family, advocacy or community connections are particularly vulnerable.

Knowledge about the prevalence of, and risk factors for, abuse of people receiving disability services should inform both the development of protective cultures to safeguard people against abuse, and the implementation of rigorous investigative practices by service providers.

2 See the research review in Goodfellow, J & Camilleri, M 2003, *Beyond belief, beyond justice: the difficulties for victims/survivors with disabilities when reporting sexual assault and seeking justice*, Final report of stage one of the sexual offences project, Disability Discrimination Legal Service, Melbourne.

3 See Office of the Senior Practitioner 2009, *Physical restraint in disability services*, State Government of Victoria, Melbourne.

4 See the research review in Faulkner, A & Sweeney, A 2011, *Prevention in adult safeguarding: a review of the literature*, Social Care Institute for Excellence, London.

The Victorian context

The *Disability Act* 2006 provides important safeguards and mechanisms for monitoring the quality of disability services including:

- a person's right to be free from abuse
- the role of the Disability Services Commissioner and Senior Practitioner
- independent monitoring against quality standards
- the Community Visitors Program of the Office of the Public Advocate.

The 2007 *Quality Framework for Disability Services in Victoria*⁵ required all disability service providers to ensure 'freedom from abuse and neglect' with detailed evidence indicators related to this standard. This framework was superseded by the 2012 *Department of Human Services Standards*, which incorporate similar standards and indicators for all services funded or provided by the DHHS. DHHS staff and disability service providers are also required to report and respond to incidents and allegations in accordance with *Critical Client Incident Management Instruction (technical update 2014)* and *Responding to Allegations of Physical or Sexual Assault: Departmental Instruction (technical update 2014)*.

The *Charter of Human Rights and Responsibilities Act* 2006 (the Charter) establishes substantive and procedural rights, freedoms and responsibilities for all Victorians, including the right to be free from exploitation, violence and abuse and to be treated equally. The Charter requires that all Victorian legislation, policy and service delivery decisions consider people's human rights.

The abuse of people with a disability has received increased attention in recent years from the Office of the Public Advocate, Community Visitors, and the Victorian Ombudsman. In 2010, the Office of the Public Advocate's *Violence against people with cognitive impairments* reported on situations that had come to the attention of the guardianship and advocacy programs. The investigation by the Victorian Ombudsman to Parliament in 2011 *Ombudsman Investigation: assault of a disability services client by Department of Human Services staff* highlighted the need to identify and implement effective ways to safeguard people's right to be free from abuse.

⁵ Industry standards 8 and 9 in Department of Health and Human Services 2007, *Quality framework for disability services in Victoria*, State Government of Victoria, Melbourne.

In March 2011 the Department of Human Services' response to the Ombudsman's report included the introduction of the Quality of Support Review (QoSr). A QoSr is not an investigation; it is a DHHS administrative review of compliance with processes, policies and practice, and identifies any learning or opportunities for practice improvement. QoSrs review whether:

- a client's immediate wellbeing and safety were addressed
- the incident response and investigation were adequate
- support was provided to clients after the incident
- any practice improvements were identified as a result of review.

QoSrs are now conducted on all allegations of staff to client assault; they are discretionary in cases of unexplained injuries. The DHHS is required to assess responses to incidents and allegations from the client's perspective, and to assess the adequacy of investigations.

This guide does not cover QoSrs.

Specific requirements for investigations where the alleged victim is a person with an intellectual disability or cognitive impairment

Investigations of serious matters where the alleged victim is a person with an intellectual disability or cognitive impairment **must** follow accepted best practice. A person-centred approach is essential.

Best practice involves:

- establishing the framework of the investigation
- providing procedural fairness
- ensuring that appropriate matters are referred to police
- using an independent third person where appropriate
- appropriately determining investigation outcomes.

The alleged staff to client assault **must** be substantiated for the purpose of disciplinary and possible criminal proceedings in relation to the alleged perpetrator. Investigations must also equally consider the impact on the client and whether they have experienced abuse, a breach of their rights or trauma.

Clients with cognitive impairment and communication difficulties may require specialist support as well as support from a family member or advocate at different stages of the investigation, including evidence gathering, assessing the impact of the alleged incident, assessing the effectiveness of the response, and communicating the process and outcomes. Regardless of the client's communication ability, a person-centred approach is paramount. Throughout the investigation a supported decision-making approach will ensure that the client's rights are respected and protected.

To promote zero tolerance of any form of staff to client assault, service providers must constantly reinforce the requirement for staff to report any instance of assault that they have witnessed.

As noted elsewhere, DSC has observed a general tendency of investigations to focus on substantiating the alleged assault, rather than considering the incident more broadly from the client's perspective. In the case of unexplained injuries the main focus seems to be on the forensic medical opinion. While this should inform the recommendations of the investigation, it is not in itself a conclusion.

3. Preliminary assessment and steps following the incident

Preliminary assessment of an incident is a separate step from investigation, and must focus of the client and the implicated staff member.

Staff and their line manager should undertake a preliminary assessment during and immediately following the incident reporting process. It is important to gain as specific and accurate an account of the allegation as possible, identify potential witnesses and, where appropriate, arrange for the relevant staff member to be stood down or moved pending the investigation.

Service providers should not do anything at this point to jeopardise the investigation or deny the principles of natural justice for all parties. This includes ensuring they do not interview staff without police advice to proceed, or interview staff without progressing to the investigation stage. Service providers must protect staff coming forward as witnesses from any form of reprisal or harassment, and service providers need to continually reinforce the responsibility of staff to report incidents.

If after preliminary assessment a decision is made that the incident does not warrant further follow-up, the grounds for this decision must be supported and recorded with persuasive reasoning backed up by evidence, acknowledging that a clients' right to safeguards and a supportive response could potentially be denied.

If the alleged victim is a child please note there may be other considerations when an allegation of staff to client assault or unexplained injury is received.

Address the immediate support needs of the client

Service providers should take proactive steps to address the immediate support needs of the client.

- Ensure the client is safe, and separate the client and staff member who is alleged to have assaulted them.
- Provide immediate support to the client. Administer first aid if necessary, check on their physical and emotional wellbeing, provide reassurance and arrange appropriate medical care, including a forensic medical assessment if appropriate.
- Arrange appropriate communication aids and specialist supports for the client.
- If necessary, check the client's support plan to clarify who can speak on their behalf, and clarify the involvement of particular family members.
- Contact family members and/or an advocate, and establish a process of ongoing communication at key stages of the investigation.
- Ensure that a staff member who has the client's trust and understands their communication needs provides them with initial support and communicates the next steps in an appropriate way. If this staff member is the alleged perpetrator or a witness, the client may not be able to get support from the person they feel the most comfortable with.
- Remove the staff member against whom the allegation has been made from the setting until the investigation is completed.
- Consider the impact of the incident on the other clients within the setting and provide them with appropriate support. It is important that they are not treated simply as potential witnesses.

Follow relevant reporting requirements

After addressing the immediate support needs of the client, all relevant reporting requirements should be followed.

Every organisation has its own protocols that inform who should be contacted within and outside the organisation. However, the following requirements are mandatory for all providers.

- Report all Category One incidents to DHHS on the appropriate form within one working day.
- Report allegations of staff to client assault, or other allegations of a criminal nature, to police. When in doubt, consult with police. If you are concerned about the police response, request a review of their decision(s).

Preserve relevant evidence

Preserve any physical or documentary evidence that may be critical to an investigation by the police or the service provider. This may require discussions with the police. Take photographs and record detailed descriptions of injuries if appropriate. Physical and documentary evidence should be recorded and located in a secure and confidential place.

4. Plan the investigation

Appoint a manager to coordinate and direct the investigation process

A manager with decision-making capacity will assume overall responsibility and take charge of all aspects of the investigation. In small organisations this is likely to be the Chief Executive Officer. Shared management responsibility is usually inappropriate in this context. The manager must be separate from the team supporting the client, and must ensure that the investigation is person-centred.

Liaise with police

The DHHS has advised that, where the matter has been referred to police for possible criminal charges, service providers should check with police before starting an investigation.

- If police advise that the service provider's investigation may proceed without risk of prejudicing a police investigation, the manager should document this advice and proceed with the investigation.
- If the service provider's investigation could prejudice the police investigation, the service provider must delay their investigation.
- If the police request a delay in the service provider's investigation, their reasons for this request should be documented.
- If police ask the service to refrain from mentioning police involvement to the staff member alleged to have assaulted the client, the service must comply with this request.

If the service provider's investigation is delayed at the request of police, the investigation manager should liaise regularly with police to ensure that this decision is regularly reviewed. All relevant parties, including the client, their family and advocate, and the alleged perpetrator, should be updated on progress. The manager may consult with their DHHS contact if needed.

Set the purpose and scope of the investigation

It is important that the scope of the investigation is both clear and appropriate. It needs to address all relevant allegations and evidence, and be informed by any relevant contextual factors.

The NSW Ombudsman's manual for investigators⁶ characterises investigative strategies as formal or informal, and evidence or outcome focused. Evidence-focused investigations are primarily directed at gathering and documenting evidence to be considered in formal proceedings against one or more individuals or agencies. Outcome-focused investigations are primarily directed at identifying and remedying problems uncovered by the allegation or injuries, including addressing the concerns of client.

It is DSC's view that best practice in investigation incorporates both these approaches.

In determining the scope of the investigation, consideration needs to be given to whether a wider examination of circumstances surrounding the alleged assault or unexplained injuries is necessary. For example, it may be relevant to ascertain whether other clients in that location have expressed similar concerns about the alleged perpetrator.

Review the preliminary assessment of the incident or allegation

The investigation manager should examine all preliminary assessment material, including incident report(s), to determine and clarify all known details of the allegation(s) or circumstances of the unexplained injuries, including timeframes and witnesses.

Determine who investigates

Depending upon the circumstances, service providers may undertake an internal investigation or engage an external investigator.

While all allegations of staff to client assault and situations of unexplained injuries are serious, those that involve potentially criminal conduct, particularly complex circumstances or a senior staff person, should generally be referred to an external investigator, preferably a person with expertise in disability.

Service providers may consult with DHHS about outsourcing the investigation, and about the choice of an investigator.

Organisations may consider engaging a senior staff member from another disability provider to conduct the investigation. This would provide an independent view from someone with experience in interacting with persons with a disability.

Organisations may consider keeping a list of potential investigators and sharing resources and information about investigators with one another.

⁶ NSW Ombudsman 2004, *Investigating complaints: a manual for investigators*, New South Wales Government, Sydney, p. 15.

The decision about whether to engage an external investigator is not always an easy one. DSC has found that some external investigations focus on the alleged perpetrator to the exclusion of the experience of the person with a disability. If well conducted, an internal investigation can be just as rigorous as an external one. It is important to ensure that staff undertaking the investigation have sufficient knowledge and experience, and do not have any conflict of interest. The investigation should be conducted independently and separate from the program or service area directly involved in the incident.

Determine the framework for the investigation

Whether the investigation is being conducted internally or externally, it is important that the investigation manager establish and approve a clear framework and parameters.

The framework and parameters usually take the form of a terms of reference that informs a written investigation plan. A plan is more detailed if the matter to be investigated is complex and an external investigator is being contracted. However, every investigation plan should include:

- scope and purpose of the investigation
- timeframes, including completion dates for the main steps
- the resources required
- any requirements or conditions to ensure maximum feasible involvement of the person with a disability
- arrangements for an interview with the client in the presence of a support person
- the witnesses to be interviewed
- the order of the interviews
- arrangements to provide the alleged perpetrator with the substance of the allegation(s) made against them
- arrangements to interview the alleged perpetrator
- documentary evidence to be reviewed by the investigator
- arrangements for site visits
- arrangements to obtain expert evidence, for example, a forensic medical assessment
- a plan for communicating with other clients, families and staff
- in the case of more complex investigations, reporting and review arrangements.

It is rare that an investigation proceeds completely according to plan, especially with more complex matters. For example, material considered during the initial part of the investigation may lead to additional witnesses to be interviewed or a different line of inquiry to be pursued. A process for monitoring progress and changing the plan should be included.

Timeliness is essential to ensure evidence is well preserved. Interviews with clients should be completed as a priority. Clients with an intellectual disability or cognitive impairment may have decreased recall of the incident after a period of time, which could jeopardise the investigation.

If the person who normally supports the client is the staff member alleged to have assaulted them, or is a witness, another support person must be found to support the client during the interview. Unfortunately the client may not be as comfortable with this person, or the person may not understand their communication needs as well.

Plan effective communication with the client, their family members and advocate

A plan for communicating with the client, family members and advocate (if involved) needs to be developed during the planning phase. Communications should aim to convey the goals and expectations of the investigation, reassure the client that the matter is being taken very seriously, and reduce any avoidable anxiety. The service provider should be clear about what they can and cannot communicate to the client, their family and advocate.

5. The investigation phase

A person-centred approach

The investigator must have adequate knowledge of, and training in, engaging people with a disability in the interview process, and the particular requirements of people with an intellectual disability or cognitive impairment.

It is essential that the investigation adopt a person-centred and rights-based approach, taking into account what is important to and for the person with a disability. Clients should get the support they need to participate in the investigation process, including communication aids when necessary. The client, their key worker, a family member or advocate can identify these needs.

The client should be interviewed in a setting that makes them as comfortable as possible, with a support person present with whom they have an effective relationship.

In the interview the investigator should:

- explain why the discussion is taking place, in a way the person can understand
- explain that the person has the right to ask for a break or end the discussion at any time
- check periodically whether the person would like a break
- ask open-ended questions rather than questions that elicit 'yes' or 'no' answers (for example, 'Tell me what happened...')
- ask clear and brief questions using short words and sentences
- break down complicated concepts or information into smaller chunks
- if the person has sufficient verbal skills, check their understanding by asking them to repeat back the question(s) in their own words
- allow enough time for the person to answer the question⁷.

⁷ This material has been drawn from Victoria Police and the Office of the Public Advocate, *Responding to a person who may have a cognitive impairment*, State Government of Victoria, Melbourne. This document assists police in effectively communicating with persons who have a cognitive impairment.

The investigator should understand the key elements of investigations:

- principles of procedural fairness – hear all parties involved in the incident, consider all relevant submissions, act fairly and without bias, and conduct the investigation without undue delay
- confidentiality and privacy – keep information provided by a witness confidential, obtain consent from the person being interviewed to record the interview, provide people with the opportunity to review their statements, and check to make sure their statements are accurate
- the civil standard of proof – make findings based on the balance of probabilities
- appropriate interview techniques – including ‘soft’ and ‘hard’ interviewing – to get to the truth of the matter ⁸
- avoiding leading questions, for example, ‘You were afraid when John came into the room, weren’t you?’ ⁹
- forms of evidence, for example, hearsay or opinion evidence. While ‘rules of evidence’ do not apply to investigations by service providers, and service providers should rely on the best evidence available, evidence should be relevant to the facts at issue
- weighing the evidence according to the type of evidence
- recording the interview – in more complex investigations, the investigator may obtain witness statements.

The investigation process

The investigation should balance formality with flexibility.

A degree of formality is required to ensure procedural fairness and to reflect the seriousness of the matter. Thus interviews of group home or day service staff should take place in a separate setting, preferably at a different location. Witnesses should be advised to not discuss the contents of their interview with colleagues.

Flexibility should be allowed to ensure that best possible evidence is obtained from the client, their family and other affected clients, and to reduce distress and anxiety as much as possible.

⁸ NSW Ombudsman 2004, *Investigating complaints: a manual for investigators*, New South Wales Government, Sydney. The manual refers to the soft interviewing approach, which should be used with most witnesses and is characterised by a relatively friendly and non-threatening approach, the use of open-ended questions and requests for information that might be of assistance. The hard interviewing approach asks more difficult questions and challenges statements in a way that the witness might find objectionable or uncomfortable. This approach should be used in situations where a witness is giving an inconsistent account or is being ‘economical with the truth’ (p. 44).

⁹ Please consult a reliable source of interviewing techniques and the particular needs around interviewing people with cognitive impairment.

Unexplained injuries

Investigations of unexplained injuries should consider all possible scenarios and causes in detail, and all types of evidence. Where interviews with staff, family and the client do not lead to one clear cause, forensic examination of evidence such as photographs of bruises may be useful. The profile of the client – for example, their communication or mobility needs or behaviours – will be particularly important in such investigations.

The investigation report

The investigation report should include:

- a description of the matter investigated
- details of the allegation(s)
- details about the investigation, for example, the witnesses interviewed
- documentary evidence considered
- summary of the key evidence
- conclusions and findings based on the salient evidence.

Care should be taken to distinguish findings of fact and findings of opinion.

6. Decision making - responding to the investigation

As noted earlier, the investigator should be a different person than the investigation manager. The investigator provides findings and the investigation manager then makes decisions regarding the findings. The decisions and determinations made by the investigations manager allow the service provider to take action regarding the matters investigated.

In making decisions the manager scrutinises the investigation report carefully and considers whether:

- the findings are well founded
- the investigator has provided a clear and strong case based on reasonable probability that events are likely to have happened according to one view or another
- all possible evidence has been sought and considered, and the investigation does not rely on a single piece of evidence or opinion such as a forensic medical report
- the findings and recommendations include both matters of evidence and matters of outcomes (for clients and staff)

The response to the investigation should also address any underlying patterns or causes of the incident so that systemic and practice improvements can be implemented to minimise the occurrence of similar incidents.

The manager needs to ensure that appropriate feedback is given to all parties with due regard to confidentiality and privacy requirements.

Considering findings of evidence

When communicating findings in relation to alleged staff to client assault, and whether allegations have been sustained or not sustained, the following language is recommended:

- ‘sustained’ is used when there is sufficient evidence that the reported conduct occurred
- ‘not sustained – insufficient evidence’ is used when there is some evidence that the reported conduct occurred but not enough evidence to make a conclusive finding
- ‘not sustained – lack of evidence of weight’ is used when there is no evidence of weight that the reported conduct occurred.

Considering findings of outcomes (client's experience)

A person-centred response considers actions to acknowledge and remedy the situation from the client's perspective.

Regardless of whether the allegation is sustained, it is vital to address the client's experience and implement specialist and other supports as needed.

When it is evident that the *Disability Act 2006* and the *Charter of Human Rights and Responsibilities Act 2006* have not been complied with, this should be communicated to staff and acknowledged to the client, including an apology if appropriate.

The client should be advised – at least in broad terms – of the decisions and actions resulting from the investigation, including actions taken or planned to ensure the wellbeing and safety of the client and action to prevent future occurrences.

The investigation manager should draw up an action plan to address these matters and monitor the plan until all actions have been finalised.

The two practice guidance sheets attached provide a useful framework for person-centred responses:

- *Practice guidance sheet no. 1: preliminary assessment of incidents involving allegations of staff to client assault or unexplained injuries*
- *Practice guidance sheet no. 2: investigating incidents involving allegations of staff to client assault or unexplained injuries.*

Addressing the outcomes for staff

If an allegation against a staff member has been sustained, appropriate action should be taken in accordance with requirements of relevant legislation, policies and industrial agreements. It is imperative that the staff member does not work again in the same setting as the client unless there are exceptional circumstances that relate to the client's situation.

In situations where the allegation has not been sustained, consideration needs to be given to whether it is appropriate for the staff member to continue working in the same setting as the client.

Addressing opportunities for practice or systemic improvement

Consideration needs to be given to any opportunities to address practice or systemic improvement that arise from the investigation. The aim is to protect the wellbeing and safety of all clients, and minimise the possibility of future incidents.

All investigations, whether allegations are sustained or not, provide opportunities for practice or systemic improvement.

Risk factors underpinning incidents include staff who lack skills in managing behaviours of concern or staff who are not getting the support they need to undertake complex work.

The service provider may consider:

- additional staff training
- strengthening supervision of staff activities
- changes to routines or rosters within a group home
- reviewing and refining support plans for certain clients.

Attachment A

Information Sheet:

Role of the Disability Services Commissioner in reviewing and monitoring incidents of alleged staff to client assault or unexplained injuries

Attachment B

Practice Guidance Sheet No. 1:

Preliminary assessment of incidents involving allegations of staff to client assault or unexplained injuries

Attachment C

Practice Guidance Sheet No. 2:

Investigating incidents involving allegations of staff to client assault or unexplained injuries

Attachment D

References and resource material

Information Sheet

Role of Disability Services Commissioner in Reviewing and Monitoring Incidents of client assault, injury and poor quality of care.

Following a referral from the Minister for Housing, Disability and Ageing under s. 16(c) of the *Disability Act 2006*, the Disability Services Commissioner (DSC) independently reviews and monitors Category One incidents relating to client assault, injury and poor quality of care in Department of Health and Human Services (DHHS) and DHHS-funded disability services - effective 1 July 2016. All registered, contracted or funded disability service providers are required to comply with the DHHS policy on incident reporting, and these incident reports are provided to DSC for review. DSC has the power to request attendance, information, evidence and documents regarding the incident, including a copy of the Quality of Support Review (QoS) that the DHHS has undertaken.

DSC may provide a Notice of Advice to the DHHS or funded organisations to address specific issues in the response to an incident or in processes. DSC also provides a regular Notice of Advice to the Secretary of the DHHS, including thematic analysis on the extent to which responses to incidents address the wellbeing, safety and rights of people with a disability, and how approaches recommended by DSC in relation to incident reporting, QoSs and safeguarding have been implemented.

DSC applies the following **key principles** in monitoring Category One incidents

1. the **client's experience**, particularly from a human rights perspective
2. **safeguards** for the client, both immediate and long term
3. appropriate **support** for the client and their family in the wake of trauma
4. the client's **access to justice** and protection
5. the client's **human rights**, balanced with staff rights and substantiation of assault in an investigation
6. **broader systemic issues** associated with the allegations.

DSC evaluates both the preliminary response, investigation and follow up actions. Through our monitoring and review role, DSC has gained an understanding of investigations undertaken in response to staff to client assaults and unexplained injuries since 2012.

Preliminary response and assessment

This phase consists of the service provider's initial response to the allegation, during and immediately following the reporting of an incident. The preliminary response to the incident must be person-centred and responsive to meeting the needs of the client, as well as the needs of others involved. The service provider must secure the client's immediate safety, ensure their physical and emotional wellbeing, and meet their immediate support needs. The service provider seeks an accurate account of the allegation, identifies potential witnesses, secures evidence and reviews the information.

Investigation

The investigation should focus on both evidence and outcomes, address all the allegations and material gathered, and be informed by relevant contextual factors. The investigation will obtain evidence to inform decisions regarding:

- whether the allegation can be substantiated
- whether there has been an abuse of the client's human rights
- what trauma the client has experienced.

DSC's Framework for reviewing responses to clients and their families/carers.

DSC has developed the **Four A's - Acknowledgement, Answers, Actions and Apology**¹ as a framework for providing effective responses to complaints as these are the four most common outcomes sought by people when making a complaint. The Four A's, in the following order, can be used to assess the adequacy of responses to incidents involving alleged abuse from a **client outcome perspective**.

Acknowledgement

- Has the impact on the client, their family and significant others been sufficiently addressed and acknowledged?
- Does the client feel that they have been heard and that their concerns have been acknowledged and addressed?

1 Disability Services Commissioner 2012, *Occasional paper no. 1: safeguarding people's right to be free from abuse* from the 'learning from complaints' series, State Government of Victoria, Melbourne, pp. 29–30.

Actions

- Have all necessary actions been taken to address the health, safety, wellbeing and rights of the client, including access to justice?
- Were the actions taken informed by what is important to and for the client?
- Have ongoing responses to the incident been incorporated into the client's support plan?
- Has the investigation been conducted with appropriate rigour, documentation and independence?
- Was all relevant evidence obtained, particularly from clients with cognitive impairments or communication support needs?

Answers

- Has the client, their family and significant others received sufficient information and explanation about the events associated with the incident, actions taken and outcomes of police or other investigations?
- Does the client, their family and significant others understand what conclusions and decisions have been made?

Apology

- Has an apology been provided where appropriate?
- Where incidents have been observed and are undisputed, has an apology been offered?

This information sheet should be read in conjunction with the following guidance documents from the Disability Services Commissioner:

- *Practice guidance sheet no. 1: preliminary assessment of incidents involving client assault, injury and poor quality of care.*
- *Practice advice sheet no 2: conducting investigations of incidents involving client assault, injury and poor quality of care.*

For more information please contact the Disability Services Commissioner at www.odsc.vic.gov.au

Practice Guidance Sheet

No. 1

Preliminary Assessment of Incidents Involving Allegations of Staff to Client Assault or Unexplained Injuries

This practice advice is informed by the Disability Service Commissioner's experience in assessing complaints, reviewing staff to client assaults and unexplained injuries incident reports, and monitoring how responses to these incidents address the wellbeing, safety and rights of people with a disability.

This practice advice notes some key considerations for **preliminary assessment** following an allegation of staff to client assault or unexplained injuries; however it is not a comprehensive guide of the steps to be taken. It should be used in conjunction with DSC's *Investigations: guidance for good practice* resource paper.

Preliminary assessment must be **person-centred** and **rights based**. The **client's wellbeing and safety**, both **physical** and **psychological**, underpins the actions taken.

The preliminary assessment includes the **initial review of evidence** and **questioning of staff**. The preliminary assessment may establish persuasive, evidence-based reasons why an investigation should not be conducted. Or, a decision may be made to proceed to investigation, and the preliminary assessment will inform that investigation.

The preliminary assessment, like the investigation, focuses on whether the allegation regarding a staff member can be substantiated, whether the client's human rights have been abused, and on the trauma they have experienced. A preliminary assessment that is not thorough, or fails to secure sufficient evidence, may jeopardise the investigation.

Matters to consider when there has been an allegation of staff to client assault or unexplained injuries

Has the **immediate safety** and **wellbeing** of the client been addressed?

- Has the staff member been separated from the client?
- Has the client been reviewed by a forensic or other medical professional, or a centre against sexual assault?
- If appropriate or agreed by the client, has the client's family or advocate been notified?
- For all staff to client assaults and some unexplained injuries, have the police been notified and was this done in a timely manner?
- Was the incident report completed and submitted in a timely manner?
- If relevant, has the allegation been reported as unauthorised restraint on the Restrictive Intervention Data System (RIDS)?

Attachment B

What steps have been taken in the **preliminary assessment**?

- Has the allegation been received promptly?
- Has the allegation been clarified, where possible?
- Has the allegation been accurately documented?
- Has an initial risk assessment been undertaken?
- Have all relevant parties been questioned or consulted, including the person identified in the client's support plan as their representative, if appropriate?
- Has all physical or documentary evidence critical to a police or organisational investigation been preserved?
- Have photographs and a detailed description been taken of any injuries and stored in a secure place?

Has the preliminary assessment been informed by a **person-centred approach**? How has the client been included in the process?

- Has the client been asked about their experience and supported to tell their story?
- Have they been asked what they need to feel supported and safe?
- Have they had their experience acknowledged?
- Has their experience of trauma been acknowledged?
- Has the client's history, including any history with police that may further impact them, been acknowledged?
- Has the support plan been reviewed for any reference to related issues or supports?
- Who is able to speak for and make decisions on behalf of the client, if the client is unable to?
- What should be the involvement of family members or advocates?

How has the client been **supported**, both immediately and longer term?

- Has the client's physical and emotional and psychological wellbeing been considered?
- Is the service provider monitoring the client for changes to their behaviour or wellbeing?
- Has counselling been offered to the client? How has it been offered?
- Has a trusted key worker provided initial support and communicated appropriately about next steps?
- Has an independent third party been organised for the police interview?
- Has the client's circle of support been reviewed to ensure it includes at least one person who is external to the service provider?
- Is the service provider talking to the client's family, advocate or day service about how the client has been coping since the incident?
- Are the client's family, friends or advocate involved to provide support?
- Is the client's support plan, including their communication supports, being reviewed?
- If appropriate, is the client's behaviour support plan being reviewed?
- Have the next steps been adequately communicated to the client and family?
- If the police have advised that no information can be released, or no organisational investigation can proceed at this point, has this been communicated to the client and family?

Has the service provider or DHHS assessed the **police** action?

- Is the police approach consistent?
- If the police are not investigating, why not, and is this reasonable?
- Has the police approach, including the timing of interview, considered the client's needs?
- Should the police reconsider their decisions, and has this request been made?

Have the **broader implications** of the allegation been considered?

- Has the implicated staff member been separated from other staff and clients who may be witnesses or able to contribute evidence regarding the alleged assault or unexplained injuries?
- Did the alleged perpetrator work in other homes or services?
- Could the alleged perpetrator have assaulted other clients?
- Are there concerns about the staff culture at the service and how this may impact on clients?
- Has the client been the alleged victim in a number of incidents?
- Has the alleged perpetrator been involved in other incidents?
- Has the impact of the incident on other clients of the service – whether they are witnesses or are experiencing trauma or distress – been considered and addressed?

This practice guidance sheet should be read in conjunction with the following DSC resources:

- *Investigations: guidance for good practice*
- *Information sheet: role of the Disability Services Commissioner in reviewing and monitoring incidents of alleged staff to client assault or unexplained injuries*
- Practice guidance sheet no. 2: investigating incidents involving allegations of staff to client assault or unexplained injuries.

For more information please contact the Disability Services Commissioner at www.odsc.vic.gov.au.

Practice Guidance Sheet

No. 2

Investigating Incidents Involving Allegations of Staff to Client Assault or Unexplained Injuries

This practice advice is informed by the Disability Services Commissioner's (DSC) experience in assessing complaints, reviewing staff to client assaults and unexplained injuries incident reports, and monitoring how responses to these incidents address the wellbeing, safety and rights of people with a disability.

This practice guidance outlines the key steps and requirements for investigating allegations of staff to client assault or unexplained injuries. It is not intended as a comprehensive guide and should be read in conjunction with DSC's Investigations: guidance for good practice.

Preliminary assessment and investigation are two distinct but related processes. In most cases an investigation will follow preliminary assessment, unless a persuasive, evidence-based reason is established that an investigation should not be conducted.

The investigation should assess the efficacy of the preliminary assessment, including whether the client's safety and wellbeing have been addressed, and whether documents and other evidence have been secured and preserved.

Both processes must be **person-centred** and **rights based**. The **client's wellbeing** and **safety**, both **physical** and **psychological**, underpin the actions taken.

The investigation must emphasise the dual role of investigating whether the allegation can be sustained regarding a staff member and of investigating whether there has been an abuse of the client's human rights, and the trauma they experienced.

This practice advice relates to investigation only. For advice regarding preliminary assessment, see *Practice guidance sheet no. 1: preliminary assessment involving allegations of staff to client assault or unexplained injuries*.

Matters to consider when investigating an allegation of staff to client assault or unexplained injuries

Planning for the investigation

Police liaison

- If the matter has been referred to police (as will be the case in all staff to client assaults) have the police agreed that the organisation can begin an investigation, as this will not interfere with the integrity of the police investigation? If the police have advised that an investigation can begin, has the organisation established effective liaison and communication with the police, including recording the police officer's name and badge number?

Investigation manager

- Has someone suitable been assigned to take responsibility for the investigation process, including making decisions once the investigation is complete? The investigation manager should not be from the same work unit as the staff member or client, and must be suitably distant from the staff member.

Investigator

- Has a suitably skilled investigator, with experience in the disability sector, been assigned to conduct the investigation? Is this person independent of the circumstances surrounding the allegations? Can they demonstrate this? Can they demonstrate that their involvement will not bias the investigation?
- Do the investigation **terms of reference** and **investigation plan** accurately and adequately define the scope and focus of the investigation? Do they include arrangements to gather evidence, address outcomes for the client, and address the trauma the client has experienced?

Client focus

- Does the investigation plan document whether sufficient supports including communications supports have been provided to the client, or other clients affected by the incident?
- Is there sufficient understanding of the client's communication ability and needs to allow them to participate in the investigation?
- Does the investigation plan include regular communication with the client, their family and advocate?

Investigation plan

- Does the investigation plan include arrangements for obtaining expert evidence, such as a forensic medical assessment, where necessary?
- Does the investigation plan include timelines, review processes and communication updates? Have sufficient time and resources been allocated to the investigation?
- Does the investigation plan address compromising factors such as delays in reporting the incident, influencing witnesses, or delays in gathering statements from witnesses?

The investigation phase

Client focus

- Is the interview process person-centred? Can the client fully participate? Do they understand the process and is their anxiety addressed? Have their support needs, including support people and communication aids, been considered? Is the interview at an appropriate time and place?
- Are the interviews sequenced so that information from the client and alleged perpetrator informs subsequent interviews? Does the sequence allow the investigator to build on the facts and return to key people to clarify issues and test different versions of the events?

Procedural fairness

- Have the principles of procedural fairness informed the investigation, including hearing all parties, considering all relevant submissions and information, acting fairly and without bias, basing findings on evidence and undertaking the investigation in a timely manner?
- Has the confidentiality and privacy of all parties been protected?
- Have the interviews been recorded? Have people interviewed seen their interview report, and is it a fair and accurate record of the interview?
- Has all appropriate and relevant evidence been examined?
- Acknowledging that the rules of evidence do not apply to service provider investigations, has due weight been given to the different types of evidence? Have the different types of evidence been weighted appropriately? Has the investigation relied on the best evidence available?

Findings

- Has a report on the investigation been written? Does it include details of the investigation, a summary of evidence obtained, details on how the evidence was weighted and how the evidence informed the report's conclusions?
- Are the findings consistent with the test of reasonable probability, noting that there is a different standard of proof than for forensic investigations? Does the investigation report identify both evidence and outcome-based findings and observations?
- Does the investigation report identify systemic or practice issues and does it make recommendations for addressing these?

Following the investigation: decision making

Evidence base

- Has the decision maker considered the investigation report and other relevant material when making their decision? Have they considered associated issues for the service provider and people involved in the incident?
- Has the decision maker clearly articulated how they reached their conclusions and the basis for their decisions, including what evidence was used? Has the decision maker tested their conclusions?

Client focus and human rights focus

- Has the decision maker adequately considered whether the client has experienced ongoing trauma, and whether further supports, including specialist supports, are required?
- Have clear decisions been made in relation to both the staff member and outcomes for the client? Does the decision address the client's experience and provide appropriate responses for the client?
- Has due attention been paid to whether there were human rights breaches? Has the decision maker considered how these will be addressed, considering options such as acknowledgement or an apology?

Determination and action

- Has it been determined whether the allegation(s) have been sustained or not sustained? Does the decision clearly articulate these definitions?
- Has appropriate action been initiated in relation to the staff member in accordance with the requirements of relevant legislation and industrial agreements?

Systems

- Has the investigation identified practices or systemic issues or opportunities for improvement? What strategies have been developed or implemented to address these concerns and how will these be followed up?

Client focus and communication of outcomes

- How will the outcomes for staff and client will be communicated to the client, their family and advocate?
- How will feedback be gathered about the investigation, its outcomes and communication mechanisms, particularly from the client, their family and advocate? How will this feedback be addressed or actioned?

Please note that this practice guidance sheet should be read in conjunction with the following DSC resources:

- *Investigations: guidance for good practice*
- *Information sheet: role of the Disability Services Commissioner in reviewing and monitoring incidents of alleged staff to client assault or unexplained injuries*
- *Practice guidance sheet no. 1: preliminary assessment involving allegations of staff to client assault or unexplained injuries*

For more information please contact the Disability Services Commissioner at www.odsc.vic.gov.au

References and resource material

Department of Human Services 2007, *Understanding the quality framework for disability services in Victoria: a resource guide for disability service providers*, State Government of Victoria, Melbourne.

Department of Human Services 2011, *Department of Human Services Standards*, State Government of Victoria, Melbourne.

Department of Human Services 2014, *Responding to allegations of physical or sexual assault: departmental instruction (technical update)*, State Government of Victoria, Melbourne.

Department of Human Services 2014, *Critical client incident management instruction (technical update 2014)*, State Government of Victoria, Melbourne.

Disability Services Commissioner 2012, *Occasional paper no 1: safeguarding people's right to be free from abuse* from DSC's 'learning from complaints' series, State Government of Victoria, Melbourne.

[See extensive bibliography of references and research in this paper]

NSW Ombudsman 2004, *Investigating complaints: a manual for investigators (June 2004)*, New South Wales Government, Sydney.

Victoria Police and Office of the Public Advocate 2010, *Responding to a person who may have a cognitive impairment*, State Government of Victoria, Melbourne.

