

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 oversight body resolving complaints and promoting the right of people with disability to be free from abuse.

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

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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 and Major Impact incidents of alleged staff to client assault or unexplained injuries in disability services.

DSC has been reviewing Category One and Major Impact 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 and Major Impact 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 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 in disability services, involving people with disability.

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.

Note - this guidance was first published in 2013 and has been slightly updated in 2019. We recommend seeking out additional guidance to complement the advice in this paper - for instance, National Disability Services’ *Conducting Investigations: A guide for Victorian disability service providers*, available at www.nds.org.au/zero-tolerance-framework/responding-to-abuse.

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 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 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.

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.

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 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 policies and procedures such as *Critical Client Incident Management Instruction* and *Client incident management guide*.

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 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.

The 2015-16 Parliamentary Inquiry into abuse in disability services found that the disability sector in Victoria was marked by an intrinsic lack of effective safeguarding and oversight. The Inquiry produced a number of recommendations to create fundamental change in the sector to address these ingrained issues of violence, abuse and neglect. 2017 amendments to the *Disability Act 2006* addressed these recommendations and instilled in legislation the principle of zero tolerance to abuse in disability services.

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.

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 become aware of, or witnessed first-hand.

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 on the person with disability 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 person with disability's right to safeguards and a supportive response could potentially be denied.

If the alleged victim is a child please note there are other considerations when an allegation of staff to client assault or unexplained injury is received (e.g. the Child Safe Standards).

Address the immediate support needs of the person with disability

Service providers should take proactive steps to address the immediate support needs of the person with disability.

- Ensure the person with disability is safe, and separate the person with disability and staff member who is alleged to have assaulted them.
- Provide immediate support to the person with disability. 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 person with disability.

- If necessary, check the person with disability'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 person with disability's trust and understands their communication needs provides them with initial support and communicates the next steps in an appropriate way. This should not be the alleged perpetrator or a witness, even if the person with disability feels closest to them.
- 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 people with disability 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 person with disability, 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 and Major Impact incidents to DHHS in the required timeframe.
- 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

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 person with disability, 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.

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

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 people with disability 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 service provider to conduct the investigation. This would provide an independent view from someone with experience in interacting with people with disability.

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

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 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 disability
- arrangements for an interview with the person with disability 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 people with disability, 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 people with disability should be completed as a priority. People 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 person with disability is the staff member alleged to have assaulted them or is a witness, another person must be found to support the person with disability during the interview. Unfortunately the person with disability 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 person with disability, 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 person with disability 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 person with disability, 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 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 disability. Clients should get the support they need to participate in the investigation process, including communication aids when necessary. The person with disability, their key worker, a family member or advocate can identify these needs.

The person with disability 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 accommodation 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 person with disability, their family and other affected people with disability, 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 person with disability do not lead to one clear cause, forensic examination of evidence such as photographs of bruises may be useful. The profile of the person with disability – 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 people with disability 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.

Addressing the outcomes for people with disability

A person-centred response considers actions to acknowledge and remedy the situation from the perspective of the person with disability.

Regardless of whether the allegation is substantiated on the balance of probabilities, it is vital to address the person with disability'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 person with disability, including an apology if appropriate.

The person with disability should be advised – at least in broad terms – of the decisions and actions resulting from the investigation, including actions taken or planned to ensure their wellbeing and safety 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 substantiated, appropriate action should be taken in accordance with requirements of relevant legislation, policies and industrial agreements. Careful consideration should be given as to whether the staff member works again in the same setting as the person with disability.

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

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 people with disability, and minimise the possibility of future incidents.

All investigations, whether allegations are substantiated 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 supported accommodation
- reviewing and refining support plans for certain people with disability.

- Attachment A** **Information Sheet:**
Oversight of Major Impact Incidents
- 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**

Oversight of major impact incidents

The Disability Services Commissioner (DSC) inquires into and can decide to investigate Category One/Major Impact incidents relating to abuse, neglect, injury and poor quality of care that occur in Victorian disability services. The aim is to improve services for people with disability and promote their wellbeing, health and safety.

How does DSC receive information about an incident?

DSC receives incident reports relating to abuse, neglect, injury or poor quality of care that occur in Victoria's disability services from the Department of Health and Human Services (DHHS), after they have been submitted to DHHS by a disability service provider.

What does DSC look for when they inquire into an incident?

When DSC inquires into an incident, we consider factors such as:

- The nature and quality of supports provided to the person or people with a disability before and after the incident occurred.
- Any internal or external investigations conducted and their outcomes.
- If any staff performance issues have been identified, investigated and addressed.
- Whether policies and procedures such as DHHS *Critical client incident management instructions* and the *Client incident management guide* have been followed.
- Whether the incident was reported to relevant entities such as Victoria Police and the Disability Worker Exclusion Scheme (DWES).
- Whether a Quality of Support Review, Case Review or Root Cause Analysis or similar has been conducted, and if advice or recommendations have been implemented.

What can DSC ask for when inquiring into an incident?

DSC can speak to the service provider and/or DHHS and ask for further information or documentation. This might mean asking questions such as:

- a. Has the person involved in the incident received medical attention or other external supports (e.g. a referral to a Centre Against Sexual Assault)?
- b. Has the person's family or other supports been notified of the incident so they can also provide support?
- c. How have other people with a disability who witnessed the incident been supported?
- d. Have behaviour support plans and other support documentation been reviewed?
- e. Have all staff members, not just those involved in the incident, been provided with additional training?
- f. Have there been internal or external investigations into the incident, and what were the outcomes?

During an inquiry, a service provider can respond to DSC requests but is not compelled to do so.

What happens after an inquiry?

DSC may provide comments on what steps a disability service provider should take to improve the provision of disability services including ways to address the health, safety, and wellbeing of people with a disability involved in the incident. The Commissioner may also decide to investigate any incident report received.

What does a service provider have to do after DSC has made the decision to investigate?

DSC may decide to conduct an investigation into an incident report which allows DSC to use additional powers to compel evidence and inspect the premises of disability service providers.

Disability service providers need to provide reasonable assistance to DSC investigations. This may include providing information and documents, attending interviews, and allowing DSC Authorised Officers access to disability service premises for inspection.

There are various protections available for people who give information or documents during an investigation. Information provided in good faith will not constitute unprofessional conduct or a breach of professional ethics and the person will not be liable for disclosure of information.

What happens after an investigation?

After an investigation, DSC will notify the disability service provider of the decision and reasons for decision. DSC may also decide to issue the service provider with a *Notice to Take Action*. This notice will outline the actions the disability service provider should take to improve the services investigated.

DSC must also provide an investigation report to the Minister of Disability, Ageing and Carers and the Secretary to DHHS.

If the report contains adverse comments or opinions about the disability service provider, DSC will give the service provider at least 14 days to respond before the report is sent to the Minister and Secretary to DHHS.

Why is DSC conducting inquiries and investigations?

The then Minister for Housing, Disability and Ageing requested that DSC conduct inquiries, and at his discretion, investigations into Category One/Major Impact incidents related to Victorian disability services as part of a referral made in September 2017.

DSC advice and recommendations can help drive change that improves both individual service providers and the disability sector as a whole.

1. Contact us

Phone (preferred)	1800 677 342 (free call from landlines) or TTY 1300 726 563
Website	www.odsc.vic.gov.au
Fax	03 8608 5765
Email	ODSCReview@odsc.vic.gov.au
National Relay Service	www.relayservice.gov.au then 1800 677 342

Skype calls are available by appointment. You can request a Skype call by phone, TTY, fax or email.

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 handling 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 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 person with disability'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 person with disability been addressed?

- Has the staff member been separated from the person with disability?
- Has the person with disability been reviewed by a forensic or other medical professional, or a centre against sexual assault?
- If appropriate or agreed by the person with disability, has their 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 person with disability'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 person with disability been included in the process?

- Has the person with disability 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 their 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 their behalf, if they are unable to?
- What should be the involvement of family members or advocates?

How has the person with disability been **supported**, both immediately and longer term?

- Has the person with disability's physical and emotional and psychological wellbeing been considered?
- Is the service provider monitoring the person with disability for changes to their behaviour or wellbeing?
- Has counselling been offered to the person with disability? 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 person with disability'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 person with disability's family, advocate or day service about how they have been coping since the incident?
- Are the person with disability's family, friends or advocate involved to provide support?
- Is the person with disability's support plan, including their communication supports, being reviewed?
- If appropriate, is the person with disability's behaviour support plan being reviewed?
- Have the next steps been adequately communicated to the person with disability 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 person with disability and their 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 person with disability'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 people with disability 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 people with disability?
- Are there concerns about the staff culture at the service and how this may impact on people with disability?
- Has the person with disability 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 people with disability – 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: Oversight of major impact incidents*
- Practice guidance sheet no. 2: investigating incidents involving allegations of staff to client assault or unexplained injuries.

For more information please contact 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 handling 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 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 person with disability'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 **person with disability'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 substantiated regarding a staff member and of investigating whether there has been an abuse of the person with disability'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 person with disability, 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 person with disability, or other people with disability affected by the incident?
- Is there sufficient understanding of the person with disability's communication ability and needs to allow them to participate in the investigation?
- Does the investigation plan include regular communication with the person with disability, 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 person with disability 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 person with disability 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 person with disability 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 person with disability? Does the decision address the person with disability's experience and provide appropriate responses for them?
- 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 substantiated or not substantiated? 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 be communicated to the person with disability, their family and advocate?
- How will feedback be gathered about the investigation, its outcomes and communication mechanisms, particularly from the person with disability, 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: Oversight of major impact incidents*
- *Practice guidance sheet no. 1: preliminary assessment involving allegations of staff to client assault or unexplained injuries*

**For more information please contact
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.

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

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