INVESTIGATION GUIDELINES

of the Regulatory Authority for Early Childhood Education and Care Services in Victoria

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# EXECUTIVE SUMMARY

These guidelines set out how investigations into alleged non-compliance with the *Education and Care Services National Law Act 2010* (National Law) and the Education and Care Services National Regulations 2011(National Regulations) are conducted by the Regulatory Authority. They also apply to investigations conducted in relation to the *Children Services Act 1996* (Children’s Services Act) and Children’s Services Regulations 2020 (Children’s Services Regulations).

Under the National Law and Children’s Services Act, the Regulatory Authority may authorise appropriate persons to be Authorised Officers who have certain powers to carry out their duties. Authorised Officers conduct investigations into matters that come to the attention of the Regulatory Authority usually through notifications from approved providers or complaints from members of the public, such as a parent. These matters are assessed to ensure they fall within the Regulatory Authority’s jurisdiction and then prioritised, including as to whether the matter meets the threshold for further investigation, to ensure targeted and proportionate responses.

Investigations by the Regulatory Authority are systematic processes of inquiry to establish the facts of a matter. Authorised Officers collect evidence in relation to a matter until such time as they can be satisfied, on the balance of probabilities, about whether or not there has been non-compliance with the applicable legislation. Importantly, Authorised Officers work within Regulatory Standards (Chapter 2) and in particular, their activities are carried out with the objective to ensure the safety, health and wellbeing of children and improve children’s educational and developmental outcomes.

Whilst these guidelines provide detailed information and guidance about the various processes common to investigations by the Regulatory Authority, the underlying principle is that Authorised Officers investigate each matter on its merits and make decisions about how best to progress each investigation using their skills, experience, advice from Area Managers and specialist units as well as policies and guidance material such as this document. These guidelines do not set out strict requirements for how an investigation should be conducted other than in relation to being procedurally fair, acting in good faith and in accordance with our Regulatory Standards. There are also a small number of specific obligations that must be adhered to by those who are authorised under the National Law or Children’s Services Act, such as in when using powers of entry and maintaining confidentiality of protected information.

These guidelines emphasise many of the less formal aspects of conducting investigations such as the usefulness of making inquiries and talking with people. Additionally, straight-forward investigative skills of taking contemporaneous notes as well as making and recording defensible decisions are highlighted as the cornerstones of good investigations. There is also detailed information about the more complicated aspects of investigations. This includes topics such as establishing the scope of an investigation, determining who can be held responsible for the alleged non-compliance, taking witness statements and conducting interviews.

Throughout these guidelines, attention has been given to explaining why something may be necessary or why it is good practice. The Regulatory Authority supports its Authorised Officers to utilise their skills and professional judgement and to continue to learn and improve their work through reflective practice.

# FOREWORD

The purpose of these Investigation Guidelines is to support Authorised Officers conducting and managing investigations under the *Education and Care Services National Law Act 2010* (National Law) and the Education and Care Services National Regulations 2011(National Regulations). The same principles outlined in these Guidelines also apply to investigations under the *Children Services Act 1996* (Children’s Services Act) and Children’s Services Regulations 2020 (Children’s Services Regulations)*.*

As with all reflective practice, these Guidelines are refined over time and this is their second major iteration. This version reflects increasing maturity in investigating matters under the National Law and draws on the experience gained since the introduction of the National Law, as well as updates changes to the Children’s Services legislation that came into effect in 2020.

These Guidelines do not cover everything that may arise in an investigation but seek to guide and support investigative work. Recognising the expertise and skill of our staff, these Guidelines are not prescriptive and encourage professional judgement and defensible decision making with reference to our Regulatory Standards. Authorised Officers, and all Regulatory Authority staff, must at all times act in good faith and be guided by the objectives and guiding principles of the National Law.

**Madeleine Smith**

Executive Director

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# INTRODUCTION

## The National Quality Framework

The National Quality Framework (NQF) for Early Childhood Education and Care, was agreed by all Australian state and territory governments and came into operation on 1 January 2012. The NQF aims to achieve a nationally consistent approach to the provision of quality education and care services.

In Victoria, the Regulatory Authority responsible for administering the NQF, including investigating complaints and notifications, is the Secretary to the Department of Education and Training (the Department). The Secretary can delegate these powers under the National Law and, under section 195 of the National Law, the Secretary (or their delegates) can appoint appropriate persons to be Authorised Officers to carry out certain functions.

Authorised Officers have powers under the National Law that support them to carry out regulatory functions such as investigations. Such powers make the role of Authorised Officer a privileged and important one, requiring care and regard for the statutory powers they are authorised to use in their daily work.

## Victorian Children's Services

Some education and care services continue to operate under the Children’s Services Act and the Children’s Services Regulations (which have been significantly amended with effect in 2020) and do not fall under the National Law.[[1]](#footnote-2) These Guidelines provide general guidance and principles for investigating matters and therefore are also relevant to investigations under the Children’s Services Act even though this may not be specifically mentioned. There are times when the Children’s Services Act and Regulations specifically provide differently to the National Law and critical differences are addressed in blue text boxes throughout this document.

When conducting investigations regarding these services, it is important that Authorised Officers are aware of the different legislative requirements and check with their Area Manager or the Investigations Unit if uncertainty arises. In addition, historical and current information about the Children’s Service Act and Regulations is available on the intranet and Department website.

## Purpose of these Guidelines

The purpose of these Guidelines is to provide Authorised Officers of the Regulatory Authority with information and guidance relating to conducting investigations into alleged non-compliance with the National Law.

These Guidelines are not intended to be prescriptively followed; Authorised Officers need to make professional, defensible decisions throughout investigations which best suit the needs of the matter at hand. Authorised Officers should ensure they consult or seek advice from Area Managers and specialist units as appropriate.

## What is an Investigation?

Investigations undertaken by Authorised Officers of the Regulatory Authority are a systematic process of inquiry to learn the facts about something that has been alleged and that if confirmed, would amount to non-compliance with the National Law or National Regulations. The process is undertaken until such point as an Authorised Officer can be satisfied, on the balance of probabilities, about what occurred. The Regulatory Authority conducts investigations with the overarching aim of ensuring the safety, health and wellbeing of children and positive outcomes for children at education and care services.

Investigations are conducted by an Authorised Officer who works through a series of phases to learn the facts about the allegation/s. Those phases include planning, gathering evidence, analysing the evidence and making final written findings. As part of this work, the Authorised Officer keeps a clear record of their actions, stores evidence appropriately, revises plans where needed and makes recommendations about what should occur after the investigation is complete.

Not all complaints and notifications require investigation. Investigations take place after the initial notification or complaint is assessed and found to be within scope of the National Law (or the Children’s Services Act) as well as having met the threshold for investigation. Some matters require little investigation in order to be satisfied about what occurred. No further investigation is required once a decision can be made about whether the allegations are supported by the evidence or not. Some investigations require more extensive evidence collection in order to be satisfied (on the balance of probabilities) about what occurred.

When determining investigative actions, Authorised Officers should proceed based on defensible reasoning with reference to the Objectives and Guiding Principles of the National Law (set out in the Regulatory Standards table in Chapter 2). This means that Authorised Officers should think through the investigative issues they confront, consult the resources available to them, including colleagues, Area Managers and these Guidelines as appropriate, and make defensible, recorded decisions based on the information and resources available.

# OPERATING FRAMEWORK

This chapter outlines the operating framework that surrounds investigations by the Regulatory Authority. These are critical elements for Authorised Officers to understand because along with setting out who does what, there is also important information and guidance about behaviour expectations and standards that guide Authorised Officers’ and the Regulatory Authority’s work.

[ACECQA’s Guide to the National Quality Framework](https://www.acecqa.gov.au/nqf/about/guide) operates in conjunction with, and complementary to, these Guidelines.

## Roles and Responsibilities

| **Authorised Officers** | Appointed under section 195 of the National Law to conduct investigations on behalf of the Regulatory Authority in accordance with the National Law. The powers and functions of Authorised Officers are set out in Divisions 2 and 3 of Part 9 of the National Law and are discussed in further detail in these Guidelines.Authorised Officers carry out investigations including gathering evidence using their powers under the National Law. They also keep Area Managers informed of progress and participate in regular case meetings about their investigations and the evidence collected. |
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| **Area Managers**  | Responsible for overseeing and guiding all investigations to completion (except those undertaken by the Investigations Unit), making decisions on administrative sanctions and making recommendations to delegates in relation to the imposition of statutory sanctions or prosecution. Are also Authorised Officers. |
| **Investigations Unit**  | Provides operational guidance, assistance and advice, as required, to Area Managers and Authorised Officers in relation to investigations, including whether something meets the threshold for investigating. Also undertake some complex investigations in accordance with these Guidelines and in collaboration with Area Managers. |
| **Monitoring and Compliance Unit**  | Provides policy guidance, assistance and advice, as required, to Area Managers and Authorised Officers in relation to monitoring & compliance, information sharing, sanctions and prosecution. |
| **Executive Director, and Director, Operations**  | Carries the delegated authority to make decisions based on the recommendations of Area Managers/Authorised Officers in relation to sanctions and prosecutions and the exercise of some powers under the National Law. There are others in the Department who also hold these delegations; see the relevant instrument of delegation for a complete list. |

## Regulatory Standards

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| **OUR REGULATORY STANDARDS** |
| The Regulatory Authority operates with professionalism and integrity by upholding and committing to the principles and objectives set out below. This requires all those who work for the Regulatory Authority to conduct themselves, and all activities, in line with these standards. |
| **Safety, health and wellbeing of children** **&****educational and developmental outcomes for children** | The Objectives and Guiding Principles of the National Law are set out in section 3 and apply to all aspects and functioning of the National Law, including the conduct of the Regulatory Authority.The **Objectives** of the National Law are:* To ensure the safety, health and wellbeing of children attending education and care services;
* To improve the educational and developmental outcomes for children attending education and care services;
* To promote continuous improvement in the provision of quality education and care services;
* To establish a system of national integration and shared responsibility between participating jurisdictions and the Commonwealth in the administration of the national education and care services quality framework;
* To improve public knowledge, and access to information, about the quality of education and care services;
* To reduce the regulatory and administrative burden for education and care services by enabling information to be shared between participating jurisdictions and the Commonwealth.

The National Law also prescribes the following **guiding principles**:* The rights and best interests of the child are paramount;
* That children are successful, competent and capable learners;
* That the principles of equity, inclusion and diversity underlie this Law;
* That Australia’s Aboriginal and Torres Strait Islander cultures are valued;
* That the role of parents and families is respected and supported;
* That best practice is expected in the provision of education and care services.
 |
| **Standards of Conduct and Ethical Behaviour**  | Authorised Officers must behave at all times in a way which upholds the Victorian public sector values, as prescribed in section 7 of the *Public Administration Act 2004*. When conducting investigative activities for the Regulatory Authority, Authorised Officers must:* adopt a professional approach;
* perform their duties with impartiality, professionalism and integrity;
* act honestly and ethically, and use discretion when exercising powers;
* act with equity, sensitivity and cultural awareness when dealing with the public, by treating people and their affairs, including the matter under investigation, with dignity, respect, confidentiality and privacy, and ensure the principles of procedural fairness are applied;
* use Victorian Government resources efficiently and economically; and
* avoid any real or possible conflict of interest.

All employees of the Department of Education and Training (the Department), under the *Public Administration Act 2004* are also subject to the [*Code of Conduct for the Victorian Public Sector*](https://vpsc.vic.gov.au/html-resources/code-of-conduct-for-victorian-public-sector-employees/) and the Department Values. |
| **Conflicts of interest** | In accordance with the [*Code of Conduct for the Victorian Public Sector*](https://vpsc.vic.gov.au/html-resources/code-of-conduct-for-victorian-public-sector-employees/) and the Department’s [Conflict of Interest Policy](https://www.education.vic.gov.au/hrweb/workm/Pages/Conflict-of-Interest.aspx), all Department staff, including the Regulatory Authority, must avoid conflicts of interest (actual, potential or perceived) wherever possible. A conflict of interest occurs where there is conflict between the public duty and private interests of a Department staff member, including the Regulatory Authority. For example, an Authorised Officer should not have a relationship (family, personal, business or otherwise) with a subject of their inquiries, such that others may reasonably perceive that any decision made affecting that person is not impartial and independent. Any pre-existing relationship between an Authorised Officer and any person to be the subject of an inquiry should be raised with the Authorised Officer’s manager and decisions made separate to that Authorised Officer about whether the investigation commences.Additionally, Department staff, including at the Regulatory Authority, should not utilise materials, services or information they have access to by virtue of their role at the Department for their own (or friends/family) benefit. |
| **Accountability** | The Regulatory Authority is accountable for ensuring that decision-making processes are fair, transparent, timely and consistent. The Regulatory Authority is accountable for these processes in relation to those it interacts with in carrying out its functions, including investigations. This includes taking complaints seriously, investigating on the merits of a matter and keeping people informed about what has been done or is being done.The Regulatory Authority is also broadly accountable to the public and strives to act as expected and required by users of early childhood education and care services, including children.In order to provide this accountability, Authorised Officers need to conduct investigations in a manner that allows others to understand and report on the Regulatory Authority’s work. This includes keeping up to date records, managing evidence appropriately, keeping managers informed of progress and conducting themselves in accordance with these Regulatory Standards. |
| **Human rights**  | The Department, including the Regulatory Authority, is subject to obligations under the [*Charter of Human Rights and Responsibilities Act 2006*](https://humanrightscommission.vic.gov.au/index.php/the-charter/) including that the Department must not act in a way that is incompatible with a human right or, in making a decision about a natural person (not an entity), fail to give proper consideration to a relevant human right.  |
| **Duty of confidentiality**  | Authorised Officers have a duty to keep the identity of other individuals confidential and must not disclose 'protected information' (section 271-273 of the National Law). 'Protected information':* comes to the knowledge of an Authorised Officer because they are exercising functions under the National Law or National Regulations; and
* identifies, or could lead to the identification of, a person (e.g. a person's name, their address, the name of family members, their place of work).

There are some **exceptions** to this duty. For example, an Authorised Officer may disclose protected information where:* the person in question agrees to having their identity disclosed;
* the disclosure is required or permitted by law (e.g. where an approved provider is required to make a notification, their identity must be disclosed); and
* the information is already accessible to the public (e.g. the information has been lawfully published or relates to an open court proceeding).
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| **Procedural Fairness** | Procedural fairness (sometimes referred to as natural justice) requires decision makers to adopt fair procedures, appropriate in the circumstances, to ensure unbiased and fair decision making. In particular, any person who is the subject of inquiries must be given an opportunity to be heard before decisions are made that may be adverse to their interests. Procedural fairness requires:* impartiality and acting without bias at all times; and
* rational, objective decisions based on the evidence, including that only relevant information is obtained and considered; and
* participants in any process, such as investigations, to be treated fairly, including obtaining an account from an individual before making a decision that impacts their interests; and
* conducting activities, such as investigations, in a timely manner.

Keeping an open mind as well as acting impartially and without bias, means not making decisions or conclusions based on assumptions, speculation or past experience. For example, whilst the compliance history of a service or an approved provider is relevant to decisions regarding sanctions and assessing risks to children’s safety, health and wellbeing, it cannot be used to predict or determine whether a new complaint is true or not.Keeping an open mind also involves actively listening to a person to ensure their information has been clearly understood. Each decision or conclusion should be based on objective facts. If this is not done, there is a significant risk that poor decisions will be made based on unreliable or incomplete information or even that biased decisions could be made. All decisions made by Regulatory Authority staff must be made on the basis of clear and cogent evidence that supports the decision. Many of these decisions may be internally reviewed or even externally reviewed by others such as Ombudsmen, tribunals or courts. |
| **Best Practice Regulation Principles** | ACECQA set out the nine best practice regulation principles that apply to all Regulatory Authorities and are explained from page 581 in ACECQA’s guide to the NQF. The best practice regulation principles are:1. Outcomes focused
2. Proportionality and efficiency
3. Responsiveness and flexibility
4. Transparency and accountability
5. Independence
6. Communication and engagement
7. Mutual responsibility
8. Consistency and cooperation across jurisdictions
9. Awareness of the broader regulatory environment
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# RECEIVING NOTIFICATIONS AND COMPLAINTS

Notifications or complaints of alleged or suspected non-compliance with the National Law or National Regulations can be received by the Regulatory Authority in a number of ways, both internally and externally as outlined below.

## Notifications by Approved Provider

Section 174 of the National Law requires an approved provider to notify the Regulatory Authority in writing of certain matters. These matters include a serious incident[[2]](#footnote-3), any circumstance arising at the service that poses a risk to safety, health or wellbeing of a child attending the service and when complaints are received by the approved provider that allege a serious incident has occurred/is occurring or that there is non-compliance with the National Law or National Regulations.

Notifications by approved providers are usually received via the National Quality Agenda IT System (NQAITS). However, they are at times received by other means (in discussions with an Authorised Officer for example) and should be handled in the same manner, as well as giving support/education to the approved provider about notifying via NQAITS and always in writing as required by section 174.

Children’s Services Act difference

Providers of children’s services may not yet be able to notify via NQAITS. These providers should email their notifications to the Regulatory Authority. Contact may also be made by calling the Regulatory Authority’s Area Team regional office and the Authorised Officer will discuss the issues and provide information about how the provider should submit the notification in writing (usually via email).

## Direct and Anonymous Complaints

Complaints are sometimes made directly to the Regulatory Authority, for example by a parent, member of the public, someone who works or volunteers at a service or from another government or community organisation. The Regulatory Authority may also receive a referral from a regulatory authority in another state or territory to investigate a matter concerning a service located in Victoria on its behalf.

Authorised Officers may receive complaints in many ways such as during a service visit, over the telephone or via email and the complaint can be entered directly into NQAITS. At this point the complaint has not been assessed to see if it is within jurisdiction or meets the threshold for investigation (explained in Chapter 4.1 and 4.2). After that assessment is complete, the complaint entry will be marked accordingly with the outcome of that assessment (e.g. recorded to show that either it was not within jurisdiction or does not meet the threshold for investigation or that an investigation is to be undertaken).

In some cases, anonymous complaints or ‘tip offs’ are also received. Authorised Officers and Area Managers should review the information and apply the same threshold testing processes as for any other complaint (as set out in Chapter 4.1 and 4.2). Sometimes anonymous complaints are more difficult to investigate as there is no complainant to make inquiries with, however genuine attempts should be made to investigate the matter.

**Advice to the Complainant**

At the point of receiving a direct complaint it is recorded, even before it has been assessed for priority or to determine if it meets the threshold for investigation. If received verbally, it is important to inform a complainant that for all notifications received by the Regulatory Authority, the first step is to assess the details of the complaint and determine, in line with our policy, whether or not further action can and should be taken.

Often an Authorised Officer will be able to determine at the time if the direct complaint is outside the scope of the Regulatory Authority’s jurisdiction and should explain this and refer the person elsewhere as needed without delay (and record what they have done in their contemporaneous notes and/or follow up email to the complainant). Some complaints will involve a mixture of issues with some that meet the threshold for investigation, some that do not and others that are outside the Regulatory Authority’s jurisdiction. In these situations, the Authorised Officer should advise what they can at the time and that the complaint will be further assessed shortly and they will receive confirmation about what is to be investigated and what is not (and record what they have advised in their contemporaneous note of the call). Similarly, if the scope of the investigation changes during the investigation, this also needs to be clearly communicated to the complainant.

Always advise the complainant when they will next be contacted and what will occur next (unless the entire matter is clearly outside the scope of the Regulatory Authority’s jurisdiction and the complainant has been referred elsewhere at the time of the initial call). If the complainant is a parent/guardian consider the issues in Chapter 4.8 and provide as much information about the process as possible. Where someone is referred elsewhere, it is preferable to confirm this in an email or letter after the call to avoid confusion about roles and what action the Regulatory Authority is taking (this is the case even if some issues are going to be investigated by us and others are not).

Confidently explaining the role of the Regulatory Authority and how investigations are conducted (in broad terms) at this early stage can be very beneficial for the ongoing relationship with a complainant. This may include explaining issues such as:

* the Regulatory Authority determines what action is appropriate in the circumstances based on a range of factors including a service’s history of compliance,
* all information from a complainant received is reviewed, recorded and considered by the Regulatory Authority,
* the Regulatory Authority will provide them with as much information as we believe we can but that we are also sensitive to the service’s business needs and confidentiality issues.

A complainant who is concerned about revealing their identity can also be advised that, where the Regulatory Authority determines that the matter is to be investigated:

* In the course of progressing any investigation, it is possible that other persons may be able to identify them from the circumstances of the complaint.
* If the complainant objects to their identity being disclosed this is understandable but it may restrict the investigation or action that the Regulatory Authority can take.
* If the complainant is an employee or volunteer at an education and care service, the National Law makes it an offence for 'serious detrimental action' to be taken against them for making the disclosure (sections 296-300 of the National Law for further detail).

The identity of a complainant should be protected wherever practicable. Authorised Officers should be aware of their obligations under section 273 of the National Law to not disclose protected information unless allowed by the National Law in section 273(2).

Despite difficulties that may be presented by a complainant wishing to remain anonymous, the complaint is still investigated so far as possible and necessary if the matter reaches the threshold for investigation. The Regulatory Authority investigates as it determines necessary in accordance with these guidelines and whilst the views of a complainant (or any other party) are a relevant consideration, they are not determinative as to whether or how a matter proceeds.

**Recording the complaint**

Authorised Officers can enter the details directly into NQAITS or make notes at the time and enter the details as soon as possible after the complaint is received.

Taking detailed and accurate contemporaneous notes from the complainant is critical in order to assess if the complaint is to be investigated, which priority it will be assigned and also for use as part of the investigation. Contemporaneous notes are explained in detail in Chapter 7.3. Other general tips for obtaining an accurate picture of what has happened from a complainant include:

* Obtain an account of the incident first before starting to take detailed notes.
* Allow the person to tell the story and in their own words. For example, Authorised Officers should not form conclusions or ask questions until the initial story telling is complete.
* Obtain facts, not opinions (for example, ask the person to describe what they personally saw or heard).
* Complaints should not be dismissed because the person cannot tell the ‘full story’ or cannot tell the story in a neat orderly way. Once a person has told their story then questions and clarifications by the Authorised Officer can assist in taking down the notification so that it is as clear as possible. If it is a parent/guardian complainant and clearly a matter for the Regulatory Authority to investigate, consider the issues in Chapter 4.8 and whether meeting with the person is the best way to gather the complaint details and/or a statement.
* Complaints should be recorded in detail and the information considered on its merits.
* Avoid using jargon, such as 'non-compliance', 'nominated supervisor' or ‘person in day-to-day charge’ (unless that is the language used by the notifier). Instead, ask questions in plain English and record information to reflect the words used by the notifier. This does not mean recording verbatim everything that is said; Authorised Officers can judge what is important to the complainant’s story and relevant for investigating the matter.

If the Authorised Officer believes it would be useful to seek written details from the complainant, and it is appropriate to ask this of the individual, a notifier’s consent form or other form of written correspondence such as an email can be requested. At times this may be useful; for instance to help clarify information and/or to ensure the complainant is aware of how the information will be used.

##  ‘Own Motion’ Investigations

On occasion when conducting their usual activities, Authorised Officers may observe or become aware of suspected non-compliance with the National Law. For example, when conducting visits an Authorised Officer may see something or when making inquiries someone may inform them of an entirely separate incident to their current investigation. Usually these can be recorded as a non-compliance but occasionally will require separate investigation; ‘own motion’ because it’s commenced due to the Regulatory Authority initiating the matter rather than a notification or complaint.

Authorised Officers can initiate an investigation based on what they saw or the information they were provided where it amounts to alleged non-compliance with the National Law or National Regulations. However, more often a non-compliance or associated matter can be noted in communications with the approved provider or investigated as part of the current investigation. Where the issues are too different or serious, consideration can be given to creating a new and separate investigation. This would usually be determined in consultation with the Area Manager and possibly the Investigations Unit.

An example of a likely own motion investigation is where an Authorised Officer is conducting an investigation visit regarding insecure fencing and equipment and observes an educator appearing to inappropriately discipline a child. Given the issues are quite separate and the observation quite serious, the Authorised Officer will likely decide (in conjunction with their Area Manager) to commence a separate investigation.

Importantly, Authorised Officers should take contemporaneous notes (explained in Chapter 7.3) on the suspected non-compliance when they see or hear about it. The information can then be discussed with the Area Manager and a decision made as to how to handle the suspected non-compliance based on whether it is related and suitable to be incorporated as part of current activities or a new investigation is required.

# ASSESSING NOTIFICATIONS AND COMPLAINTS

Notifications and complaints received by the Regulatory Authority may contain allegations of non-compliance with the National Law and National Regulations (or the Children’s Services Act and Children’s Services Regulations). Before any further action is taken, there must be an assessment made about whether the matter falls within the scope of the Regulatory Authority’s jurisdiction and which legislative framework the notification or complaint relates to.

## Determine If Within Jurisdiction

Usually, the first step in assessing a notification or complaint is to ensure that it relates to a service covered by the National Law or Children’s Services Act. If it does not, then it will not be within the scope of the work of the Regulatory Authority.

Under the National Law, an education and care service can only be provided by an approved provider and approved service. Those assessing notifications and complaints should always check NQAITS to determine if there are active approvals, whether any conditions currently apply and if any other action by the Regulatory Authority (or other state/territory regulatory authorities) is currently underway in relation to that service. The Service Administration and Support Unit is an important source of inquiry about what is recorded on NQAITS.

**Operating without approval under the National Law**

If the service appears to meet the definition of an education and care service (see below) and is not listed on NQAITS, it may be operating as an unapproved education and care service.

Providing an education and care service in circumstances where the provider and/or service are not approved under the National Law is a serious offence under section 103 of the National Law.

In the event an Authorised Officer becomes aware an unapproved service may be operating, the Authorised Officer should discuss with their Manager as soon as possible to determine how the matter should proceed as such instances may put children at high risk of harm. Seek guidance and support from the Investigations Unit if needed.

**The definition of 'education and care service'**

An ***education and care service*** is “any service providing or intended to provide education and care on a regular basis to children under 13 years of age” as defined in section 5 of the National Law. There are numerous exclusions to this definition, including most schools, personal arrangements and prescribed classes of disability service. Determining whether a service meets the definition, or is excluded from the National Law, can be complex; guidance can be sought from the Monitoring and Compliance Unit and there are relevant resources on the intranet.

**When something is not within jurisdiction (scope)**

Where a notification or complaint is not within the scope of the Regulatory Authority’s jurisdiction the person making the complaint can simply be advised of this (and referred elsewhere if relevant). This means that it will be a matter that does not relate to alleged non-compliance with the National Law or National Regulations (or the Children’s Services Act or Children’s Services Regulations) but cannot include matters that the approved provider is required to notify under section 174 of the National Law.

**Determining whether something is outside the scope of the Regulatory Authority’s jurisdiction is an important determination because the Regulatory Authority must ensure it has authority to act.**

Matters that are not within the scope of the Regulatory Authority’s jurisdiction include matters that are unrelated to education and care services or children’s services as well as those that could not constitute non-compliance with the National Law or National Regulations (or the Children’s Services Act or Children’s Services Regulations).

Once the person has been advised that the matter cannot be looked into by the Regulatory Authority and why, no further action needs to be taken other than recording the matter in NQAITS. The person can be contacted by telephone and a contemporaneous note made of the contact (see Chapter 7.3 for details on taking contemporaneous notes) or alternately an email or letter can be sent that provides the relevant information. Authorised Officers may also use NQAITS email templates for alerting approved providers of notifications that were received by the Regulatory Authority however were not required to be notified under section 174 of the National Law.

If unsure about whether something is outside the scope of the Regulatory Authority’s jurisdiction, Authorised Officers should consult their Manager or the Monitoring and Compliance Unit.

Children’s Services Act difference

A **Children's Service** is a service that falls outside the scope of the National Law and meets the definition of a children’s service in section 3 of the Children’s Services Act (and is not excluded under section 5). This includes limited hours and occasional care services. Changes to the Children’s Services Act and associated regulations became effective on 17 May 2020 (with some transitional arrangements). The reform aligned the Children’s Services Act to the NQF where appropriate. In relation to investigations, it is critical for an Authorised Officer to determine whether the National Law or the Children’s Services Act applies to the matter and ensure the requirements of the appropriate legislation are applied.

Approved **Associated Children's Service** still exist but will be phased out by 2022. Associated Children’s Services are services operated as part of an education and care service under the National Law. An approved Associated Children's Service must continue to meet the requirements of the Children’s Services Act and Children’s Services Regulations. The National Law and the National Regulations do not apply to an approved Associated Children's Service unless expressly provided in that legislation.

NQAITS records all currently operating Children’s Services and Associated Children's Services as out of scope services. If potential non-compliance relates to a Children's Service or approved Associated Children's Service, Authorised Officers should consult their Area Manager regarding further action.

**Children's Service operating without a licence**

It is an offence for a children's service to operate without approval. If the service is not an ‘education and care service’ under the National Law and appears to meet the definition of a children’s service and is not listed on the NQAITSdatabase,it may be operating unlawfully (check if it falls into the National Law first).

In the event an Authorised Officer becomes aware an unapproved children’s service may be operating, the Authorised Officer must discuss the matter with their Area Manager to decide how the matter should proceed as such instances may put children at high risk of harm. Seek guidance and support from the Investigations Unit if needed.

## 4.2 Determine if Further Investigation Required

Where it is established that the complaint or notification is within the scope of the Regulatory Authority’s jurisdiction, a determination is needed regarding whether further investigation is required. The Regulatory Authority seeks to act proportionately, which includes focusing attention and resources on the most serious matters and in some instances, determining not to investigate something further. The table below sets out the criteria for assessing whether a matter requires further investigation.

Area Managers (or appropriately skilled staff who have been assigned this task) make the determination regarding whether further investigation is required. The assessment should also consider whether the notification or complaint reveals a potential failure by an approved provider to notify the Regulatory Authority in accordance with section 174 and regulation 175.

Conducting this assessment is sometimes straightforward but often requires skilful consideration of the issues. Decisions should be recorded either in the response to the complainant/notifier or in a separate decision note (see Chapter 4.9 for details on making and recording decisions). A decision that something does not meet the threshold for further investigation is not implying that the complaint or notification should not have been made. It is still important information for the Regulatory Authority to receive and may have been a required notification by the approved provider in any event. The information will be captured and stored by the Regulatory Authority and may inform future actions, such as when repeated complaints are received about similar issues. Determining that a notification or complaint does not meet the threshold for further investigation is simply a decision that the current complaint or notification will not require further investigation at this stage and in the context of the overall role and functions of the Regulatory Authority.

Area Managers ultimately make determinations about the need to investigate (and the priority of a matter) based on their assessment of the risk to the safety, health and wellbeing of children or the seriousness of the possible non-compliance with the National Law or National Regulations. It is not the role of an approved provider to make this determination. The making of an independent decision is a fundamental role of the Regulatory Authority. Where an approved provider notifies that they have taken steps to resolve the problem this should be noted, however it may not affect the decisions made by the Regulatory Authority about further investigation and prioritisation because there still may have been very serious non-compliance. The action taken by the approved provider is likely to impact the next investigative steps though, such as verifying what the approved provider has said to determine if ongoing risks have been adequately removed or mitigated (see Chapter 4.3 below for further detail).

Approved providers should be sent an email in relation to notifications that are determined not to meet the threshold for investigation. Authorised Officers can use the template email for incidents that require no further action. Direct complainants should also be contacted by email or telephone (with a contemporaneous note made if by telephone) and advised if the information will not be investigated further at this stage.

|  |
| --- |
| **Does Not Meet the Threshold for Further Investigation** |
| **Criteria** | **Action Required** |
| The incident has, or is likely to have, minimal or no impact on the safety, health or wellbeing of a child or children being educated and cared for by the service. For example:* + Routine medical attention was sought for small cut after child trips over their own feet. The service enacted their first aid procedures, parents were appropriately notified.
	+ Medical attention is sought following an epileptic fit of a child known to have epilepsy. Educators followed the child’s medical management plan, parents are appropriately notified.
	+ Emergency services are called to the service following an altercation between parents out the front of the service.
 |  Notification received via portal:* Mark record as ‘This notification does not meet the criteria for investigation’.
* Brief email or phone call (and contemporaneous note made of phone call) to advise that notification received and no further action at this point in time.
 | Notification not recorded in system:* Create notification in NQAITS.
* Mark record as criteria for investigation not met – phone call (and contemporaneous note made of phone call) or brief email to advise that notification received and no further action at this point in time.
 |

##

**Making further inquiries before deciding to investigate**

If it is unclear whether an investigation is required (or which priority it should be assigned), initial inquiries made in a timely fashion may assist these determinations. If the matter is also being investigated by other external agencies, such as Victoria Police or Child Protection, consult with the other investigating agency **prior to making further inquiries to ensure their investigation will not be compromised by the initial inquiries**.

Initial inquiries, such as with a parent, frequently assist in determining whether an investigation is required or with assigning a priority where:

* there are significant gaps in the information provided or critical information requires clarification; or
* the approved provider is the notifier and there is a risk that the information provided may not accurately reflect the seriousness of the alleged incident; or
* the information suggests that something more serious may be occurring.

Always make a contemporaneous note of the inquiries so there is a record and it can be relied on in the investigation (see Chapter 7.3 for details about taking contemporaneous notes).

Where the notifier is not the approved provider and serious allegations have been made, it may not be appropriate to contact the approved provider or the service to obtain further information at this point. This is to minimise the risk of compromising any investigation where an unannounced visit may be of value. There may be other people an Authorised Officer can talk to in order to gather sufficient information to make an informed decision about the risks or seriousness of the matter.

*An example of the benefit of making further inquiries*

*A section 174 notification from an approved provider reported that a child fell from play equipment and broke their arm. The parents were called, attended the service and took their child to hospital. The approved provider indicated that the parents were happy with the service’s response.*

*While this notification seemed straightforward, on further inquiry with the service the Authorised Officer learnt that the child was one of 20 children in the yard with one staff member supervising at the time of the incident, who was some distance from the child and did not see the incident. On speaking with the parents, the Authorised Officer learnt that they were very concerned that an ambulance had not been called and that first aid had been insufficient and that, on arriving at the service, they had found their child sitting alone and distressed in the children’s room while the staff and children were outside. The parents also spoke of other concerns they had with the service.*

## Prioritising Matters for Investigation

For matters that are assessed as meeting the threshold for investigation, a priority needs to be assigned to the investigation. The priority helps determine the investigative response and indicates the seriousness and/or risk of the matter. There will be some instances where a number of notifications with varying priorities will form the one investigation. In such cases, the highest priority notification determines the priority of the investigation.

The table below should be used as a guide in allocating a priority to an investigation. Importantly, Authorised Officers must always consider the level of risk to children posed by the alleged matter and any ongoing risk that may still be present. Also consider whether the information provided suggests that something more serious is occurring or has occurred and consider making further inquiries before assigning priority (further inquiries are detailed in Chapter 4.2 above), this may include a reasonable concern that chronic or systemic problems exist.

Matters may still be serious even though they did not cause direct harm or risk to a child/children at the time, but may cause harm if not addressed. For example, this is likely to be where key tenets of the National Law have not been met such as not making/keeping important records, not notifying appropriately, not checking references or ensuring currency of Working with Children Checks, not complying with total number of places and not meeting children’s educational and developmental needs. This is not an exhaustive list, Authorised Officers and Area Managers determine seriousness based on the information available about each matter.

Prioritisation is usually done based on the information provided in the notification and, if helpful, initial inquiries that don’t compromise the investigation and that can be made promptly. The initial prioritisation is done quickly to ensure the Regulatory Authority is acting in a timely manner to safeguard children in education and care services. Checking whether there is current activity (such as active sanctions or monitoring activities) underway in relation to that service is also important for the purpose of reflecting current chronic issues in the prioritisation.

In many instances, the investigation may later uncover that the priority determined was not reflective of the seriousness or impact of the matter. This is common and all investigative action should be based on the matter as it unfolds (there is no need to change the priority). The initial prioritisation is an important step for the Regulatory Authority to assess risk to children and best allocate resources where they are most needed based on the information at hand at the time.

It is important to recognise that the priority will not dictate how much work, nor what work, is required in the investigation. Sometimes priority 1 matters will have been well assessed and rectified by an approved provider, as well as acknowledged and communicated appropriately, whilst some priority 3 matters are complex and require more evidence gathering. Other matters may only require a couple of phone calls to determine that no further investigation is required though it initially appeared otherwise. The case should be followed and acted on based on what is identified rather than following a series of pre-determined steps, and the investigation should conclude as soon as determinations about outcome and final resolution of the matter can be made. Authorised Officers should also be alert to situations where approved providers are trying to present the matter in a particular light to disguise the seriousness of what occurred.

| **PRIORITISING MATTERS FOR INVESTIGATION** |
| --- |
| **Criteria** | **Requirements** |
| **Priority 1**  |
| * There appears to be a serious\* non-compliance with the National Law or National Regulations; **or**
* The alleged non-compliance has, or is likely to have, a significant impact on the safety, health or wellbeing or educational and development outcomes of a child or children being educated and cared for by the service; **or**
* The operation of an unapproved service.

\* to be assessed as ‘serious’ this will usually include: * chronic/systemic/repeated issues, or
* potential lack of understanding of Child Safe Standards; or
* key tenets of the National Law.
 | * Commence the investigation by taking action in a manner that reflects the seriousness/impact of the allegations including ongoing risk and within 2 working days.
* Always consider whether emergency action is required in order to remove or mitigate the risk to children, and if so, escalate and take action immediately.
* Where there may be ongoing risk that impacts the safety, health or wellbeing of a child or children being educated and cared for by the service an investigation visit should be conducted as soon as practicable.
* Create investigation record in NQAITS.
 |
| **Priority 2**  |
| * There appears to be a significant non-compliance of the National Law or National Regulations; **or**
* The alleged non-compliance has, or is likely to have, a moderate impact on the safety, health or wellbeing or educational and developmental outcomes of a child or children being educated and cared for by the service.
 | * Take action in a manner that reflects the seriousness/impact of the allegations and within 10 working days.
* Where there may be ongoing risk that impacts the safety, health or wellbeing of a child or children being educated and cared for by the service an investigation visit should be conducted as soon as practicable.
* Create investigation record in NQAITS.
 |
| **Priority 3**  |
| * The alleged non-compliance has, or is likely to have, a low impact on the safety, health and wellbeing or educational and developmental outcomes of a child or children being educated and cared for by the service.
 | * Take action within 15 working days.
* Plan the investigation, including whether an investigation visit is required for evidence gathering or assessing the risk of low impact non-compliance.
* Create investigation record in NQAITS.
 |

## Taking Emergency Action when Required

If a notification or complaint indicates that children attending a service are at immediate or potential risk of harm, or an emergency threatens the safety, health or wellbeing of a child or children, the Regulatory Authority must ensure that the approved provider takes immediate and appropriate emergency action. If the approved provider fails to take action or takes insufficient action, the Regulatory Authority must act to protect children attending the education and care service. There may also be situations that arise which require emergency action by the Regulatory Authority to address deficiencies in an approved provider’s practice that contributed to the incident/s. In any of these instances, a visit to the service may be required immediately (investigation visits are explained in detail in Chapter 7.1).

The Delegate also has power to act immediately to safeguard children by:

* issuing an emergency action notice (section 179);
* issuing a prohibition notice (section 182);
* issuing a direction to exclude an inappropriate person (section 171); or
* arranging the emergency removal of children (section 189); or
* suspending the provider (section 28) or service approval (section 73).

If there may be a need for emergency action to be taken this should be escalated immediately to the Area Manager, Director, Operations and the Monitoring and Compliance Unit. It is also noted that some of these sanctions will also be appropriate to use at other points in the investigation even though they were not used as part of an initial emergency response.

## Acknowledging a Direct Complaint

Where a complaint that is within the scope of the Regulatory Authority’s jurisdiction is received it should be acknowledged to confirm receipt and advise what the Regulatory Authority’s intended next steps are (for example, that an investigation is being commenced).

Where complaints are received by email a brief acknowledgement can be sent by reply email including contact details of the investigating Authorised Officer. Where complaints are received in a letter, an investigation acknowledgment letter can be sent.

Acknowledgement of the complaint may also occur over the telephone accompanied by a contemporaneous note made by the Authorised Officer about the telephone call and/or a brief follow-up email. A telephone call may be most appropriate when the complainant needs to be called anyway, for example when the Authorised Officer wants to make initial inquiries about the complaint in order to properly assess next steps (see Chapter 7.3 for details on taking contemporaneous notes).

## Urgent Issue Alerts

Urgent issue alerts are required in certain circumstances to bring urgent issues to the attention of the Minister and key staff. For example, the death or serious injury of a child while being educated and cared for by a service, or death or serious injury of a staff member while working at an education and care service, will always require an urgent issues alert.

The process, including the criteria for an urgent issues alert and relevant templates, are available in policy titled ‘Operations Branch – Urgent Issues Alerts’. Area Managers will usually identify these matters and are to contact Operations Branch prior to preparing an urgent issue alert to discuss the matter.

## Reporting Requirements & External Liaison

Approved providers have important reporting requirements in relation to children’s safety, health and wellbeing. This includes their reporting obligations (notifications) to the Regulatory Authority as outlined previously. It also includes obligations to report certain things to Victoria Police, Child Protection, the Commission for Children and Young People (CCYP) and the Victorian Institute of Teaching. Information about these obligations including a [detailed table](https://www.education.vic.gov.au/Documents/childhood/providers/regulation/Reporting-requirements-for-early-childhood-services-19122019.docx) of reporting requirements is available on the Regulatory Authority website under ‘incidents and complaints’.

Matters involving the suspected harm or abuse of a child or children will also need to be reported to other organisations such as Victoria Police and CCYP, depending on the circumstances. The reporting obligations lie with the approved provider (unless these issues are detected directly by an Authorised Officer) and primarily the role of the Regulatory Authority is to remind approved providers about reporting obligations and point them to information about those organisations so that they can determine if they should report. The Regulatory Authority may also liaise with those other organisations where necessary regarding the matter.

If Authorised Officers are ever uncertain of their obligations or what to advise an approved provider, they should speak with their Area Manager. The Monitoring and Compliance or Investigations Unit can also assist. Also see Chapter 5.5 in relation to overlapping investigations and collaboration with these organisations.

**Victoria Police**

If the notification or complaint includes allegations (or an Authorised Officer becomes aware of such allegations or reasonably forms such a view) that a child has been sexually or physically assaulted whilst in the care of an education and care service, the Authorised Officer should remind the approved provider of their obligations and recommend they make contact with Victoria Police immediately.

Authorised Officer’s should also consider whether the Regulatory Authority should liaise with Victoria Police about the matter and must discuss any concerns with their Area Manager as soon as possible. Area Managers will liaise with Victoria Police as soon as possible where necessary (or assign to Authorised Officers as appropriate).

Where liaison with Victoria Police confirms that a matter is also being handled by Victoria Police, the Authorised Officer **must** seek advice from their Area Manager as to whether the Regulatory Authority’s inquiries/investigation should be put on hold and the appropriateness of any provisional measures to protect the safety, health and wellbeing of children (such as a compliance or investigation visit). The Investigations Unit can assist with these deliberations if uncertain.

If Victoria Police advice is that the Regulatory Authority should not investigate at this point (and/or take any other action) as it may compromise their investigation, the Regulatory Authority’s investigation should be suspended (with reasons and conversation recorded on NQAITS) and regular contact maintained with Victoria Police so that the Regulatory Authority may reactivate its investigation when appropriate. In some cases, a **focused compliance visit** to the service will still be made to assess the general safety, health and wellbeing of children (advise Victoria Police prior to the visit and liaise in regard to what information can be provided to the service/provider). In those cases, Authorised Officers may only be able to advise the service that a visit is being undertaken because of a notification, without providing any specific information. (Note: this is not an investigation visit and therefore Authorised Officers use their powers of entry for monitoring compliance under section 197. An investigation visit may be required at a later date to collect evidence about the specific allegations.)

Where police have concluded their investigation and are not taking action, the Regulatory Authority may request copies of documents (such as witness statements) from Victoria police. A Memorandum of Understanding (MoU) regarding the sharing of information is in place between the Department and Victoria Police; contact the Monitoring and Compliance Unit or the Investigations Unit about seeking information under the MoU. Seeking documents from Victoria Police would be done where it is determined to be beneficial to the investigation, for example when it is a serious matter and/or the Authorised Officer’s contemporaneous notes are insufficient and/or it may prevent a traumatised witness having to provide another account of events.

**Commission for Children and Young People (CCYP)**

Circumstances that involve reporting to Victoria Police are very likely to require reporting to the CCYP by the approved provider as part of the Reportable Conduct Scheme. There will also be additional circumstances that are not reportable to Victoria Police but are reportable to CCYP. CCYP encourage those with reporting obligations to call their information line to check if they should report if ever unsure. Authorised Officers should remind notifiers, particularly approved providers, of requirements to report certain matters to CCYP (and suggest they enact their policies and procedures relating to the Reportable Conduct Scheme if they haven’t already).

Reportable conduct includes sexual offences, sexual misconduct, physical violence, behaviour that causes significant emotional or psychological harm and significant neglect. CCYP’s website has useful fact sheets about reportable conduct such as ‘[what is reportable conduct?](https://ccyp.vic.gov.au/assets/resources/RCSInfoSheetUpdates/FINALPDF-Information-Sheet-2-What-is-reportable-conduct-2.pdf)’.

The Reportable Conduct Scheme leads to some overlap with investigations by the Regulatory Authority and handling this is discussed in Chapter 5.5. The Regulatory Authority, via the Monitoring and Compliance Unit, has established relationships with CCYP. Any questions about their role or investigations can be facilitated by the Monitoring and Compliance Unit.

**Child Protection**

Mandatory reporters (such as early childhood educators and teachers, approved providers and nominated supervisors) have a legal requirement to report a reasonable belief of child physical or sexual abuse to child protection authorities. Disclosures of sexual or physical abuse or probable non-accidental injuries or observations concerning indicators such as problem sexual behaviour must always be taken seriously.

The Regulatory Authority may not need (or be authorised) to investigate matters that relate to Child Protection (such as reports regarding abuse occurring outside of an education and care service). If matters come to their attention, Authorised Officers must consider whether there are any areas of the National Law or National Regulations that may not have been complied with, for example, whether policies or supervision were inadequate. If there are no potential areas of non-compliance with the National Law or National Regulations then the Regulatory Authority does not have scope to take action and must simply ensure compliance with mandatory reporting obligations under the *Children, Youth and Families Act 2005* (Vic).

Where an investigation by the Regulatory Authority is to be undertaken concurrent to a Child Protection investigation, Area Managers should inform Child Protection and avoid unnecessary overlap if possible. Consult the Monitoring and Compliance Unit or Investigations Unit if needed.

**Victorian Institute of Teaching (VIT)**

Those who employ teachers (such as early childhood or primary teachers) also have reporting obligations to VIT. In circumstances that involve alleged misconduct or incompetence of a teacher, approved providers (as employers) should ensure they appropriately report to VIT. Initially they may wish to check their obligations on VIT’s website ([www.vit.vic.edu.au](http://www.vit.vic.edu.au)). For example, employers must report situations where they take action against a registered teacher in response to allegations of serious incompetence, serious misconduct, lack of fitness to teach, a physical or mental impairment that adversely affects the teacher’s ability to teach.

The Regulatory Authority works collaboratively with the VIT, and in line with the relevant Memorandum of Understanding, where matters require investigation or further action such as sanctions, in relation to a registered teacher. Authorised Officers/Area Managers should advise the Monitoring and Compliance Unit of any investigations involving a teacher. The Monitoring and Compliance Unit will liaise with VIT to ensure appropriate information sharing, avoid unnecessary overlap in investigations and arrange joint activity where appropriate. Consult the Monitoring and Compliance Unit for further information and see relevant business rules titled ‘VIT Business Rules’ for further information.

## Considering Parent/guardian Involvement

**Where Parent/Guardian is the Notifier**

It may be useful to talk to parents/guardians to make additional inquiries before determining whether a notification requires investigation or to help determine the priority of the investigation.

As part of that first conversation or as one of the first steps of an investigation, parents/guardians who are notifiers should also be contacted and asked for further details about the incident and/or previous issues with the service. Authorised Officers should consider whether, due to the complexity of the matter or other circumstances, it would be more useful to use the phone call to invite the parents/guardians to meet in person to provide those further details or a witness statement at that early stage. In any event, it will usually be necessary to obtain a statement from parents/guardians during the investigation when they are a witness and/or the main complainant.

It is imperative to engage with and update parents/guardians continually through the investigation and these early interactions are the first opportunity to build a positive relationship. Taking the time to build that relationship and be clear about what they can expect from you is very important. Being clear, as early as possible, about the scope of the Regulatory Authority investigation (including what is not being investigated that they have notified/complained of) is crucial (and remembering to update them if the scope changes over time). Authorised Officers should continue to keep parents advised of the progress of the investigation and inform them of the outcome of the investigation (Chapter 9 has more information about informing people of outcomes).

**Where Parent/Guardian is Not the Notifier**

When an incident involves a child, and the notifier is not the child’s parent/guardian, in most situations the Authorised Officer should contact the parent/guardian of the child as soon as practicable to inform them that an investigation is being conducted regarding an incident that involves their child. This may be done in order to make additional inquiries before determining priority and/or as part of the investigative steps. Critically, if the matter may relate to a child known to Child Protection or is under investigation by Child Protection or Victoria Police, consultation with those organisations must occur FIRST to discuss whether it is safe to notify parents/guardians.

Notifying the parent/guardian, where it does not put a child at risk, is very important because it allows for the child’s parents/guardians to be informed of the Regulatory Authority’s role in relation to the alleged matter. It is imperative to include and update parents/guardians from the outset and this is the first opportunity to build a positive relationship with them. It also provides an opportunity for the parents/guardians to provide relevant information they may have or to advise on any previous issues with the service. However, the confidentiality of the notifier (if not the approved provider) should be maintained as outlined above. Authorised Officers can also determine if they may wish to seek a statement from the parent/guardian and discuss things such as the regularity of updates and the role of the Regulatory Authority.

In all cases, Authorised Officers should keep parents advised of the progress of the investigation, explain when they can expect to next hear from the Authorised Officer and inform them of the outcome of the investigation (seeChapter 9 for more information).

## 4.9 Making and Recording Decisions

Authorised Officers and Area Managers make numerous decisions when conducting investigations. For example, determining whether a matter requires further investigation and which priority it is to be assigned (covered in Chapters 4.2 and 4.3), are often the first decisions that are made about any matter. There may be related decisions such as whether to refer someone to another organisation about aspects of their complaint and whether/when to inform parents (covered in Chapters 4.7 and 4.8). From then on, Authorised Officers continue to make a range of decisions in their investigations including analysing the evidence and making final determinations about the outcome of the matter (as set out in Chapter 8.1 and 9).

Decisions are important steps in any investigation and should be recorded by Authorised Officers at the time the decisions are made. When making decisions Authorised Officers must be guided by the Regulatory Standards as set out in Chapter 2. Authorised Officers need to make defensible decisions based on the information they have available at that time. Recording the decision provides transparency and demonstrates the defensibility of the decision (why it’s been made). In addition, the decision record allows others to see, understand and follow the investigation and adds integrity to the investigation by reflecting the deliberations and reasoning an Authorised Officer has applied (transparency and accountability).

Recording decisions does not need to be elaborate, it is simply making a brief file note[[3]](#footnote-4) (in NQAITS, or an Authorised Officer’s notebook and then copied to NQAITS, or as part of another document such as an investigation plan) that clearly identifies which matter it relates to and contains the necessary points about what is decided and why. The content will be more detailed for bigger or complex decisions that involve consideration of numerous and competing issues. In some cases, such as at the end of an investigation, the decision is actually recorded in a memo or briefing so that it can be submitted for approval and usually contains quite a bit of information.

In many cases, such as recording which priority is to be assigned, the file note may be part of another document already being used (such as an investigation plan) and simply note a sentence or two. For example: “*this matter has been assessed as priority 2 due to xyz as described in the complaint. The allegations in relation to xyz relate to another organisation and the complainant has been advised to discuss that aspect of their complaint with xyz organisation*.” Sometimes recording a decision can be done by making an update to the investigation plan (without deleting prior copies).

These decisions are being made anyway, recording them is simply good investigative practice. It can often be a useful tool to help progress tricky issues and determine if more information to make a defensible decision is needed. Importantly, further information that comes to light may change a recorded decision later and acknowledging this change to the decision is excellent practice.

It is not uncommon for an Authorised Officer to feel uncomfortable or unsure at different points in an investigation. If the process of attempting to record a decision does not help the Authorised Officer and they still feel unsure, it is good practice to discuss with a colleague or Area Manager, or consult the Investigations Unit to talk through the issues. The decision record can also reflect those discussions such as *“discussed matter with Area Manager and determined abc due to xyz”.*

Key decision points that will usually be associated with a record of that decision include:

* Whether the matter meets the threshold for investigation (this decision might be adequately reflected in the acknowledgement response or file note and not require anything additional).
* The priority of the investigation (usually covered in an investigation plan)
* Other organisations to liaise with (usually covered in an investigation plan)
* When and how to keep parents informed (usually covered in an investigation plan and most critical to record if a decision is made not to inform them and why)
* The scope of the investigation and where relevant before interviewing someone, the refined allegations (usually covered in an investigation plan)
* When and whether to conduct an investigation visit (usually covered in an investigation plan)
* Whether additional non-compliance, risks or areas for investigation were identified at the visit and how these are to be dealt with
* Who to take witness statements from (usually covered in an investigation plan, including deciding whether or not to talk with a child)
* Who the person/s subject of the allegation are (usually covered in an investigation plan)
* When new information presents and changes the focus or direction of an investigation
* Analysis of the evidence before determining whether to interview anyone (this may be one overarching analysis or a series of different decision notes made throughout the investigation)
* The final decision about the outcome of the investigation (usually in a findings memo but may record preliminary decisions or deliberations prior, particularly where it’s too detailed for the memo).

The above points won’t apply to all matters and there will be other decisions that arise in some investigations that need recording. The key for Authorised Officers is to simply record when/what/why they make a decision, even small decisions. Provided Authorised Officers adhere to the Regulatory Standards set out in Chapter 2, recording decisions will enhance their investigations and their ability to withstand scrutiny if ever required.

# INVESTIGATION PLANNING

Investigations, like most activities, are more efficient and effective with good planning. Robust planning, with revisions and updates over time, assists to focus the investigation, prevent unnecessary activity and ensure important matters are not overlooked.

## Develop an Investigation Plan

**Objectives of an investigation plan**

An investigation plan is a document that can be added to and revised at any time during the investigation (template available).

An investigation plan assists Authorised Officers to obtain complete and accurate evidence and information so they can make findings about whether there has been non-compliance with the National Law or National Regulations. A plan strives to keep investigations timely as well as being a mechanism to check that risk to children’s safety, health and well-being are appropriately addressed. Effective planning also ensures proportionate resource allocation and methodical, efficient, procedurally fair investigations.

A sound investigation plan achieves its objectives by:

1. **Clarifying the scope and nature of the allegations to be investigated.**

This will involve determining:

(a) whether the matter involves an education and care service or children’s service which is approved or not approved (Chapter 4.1 explains how to do this); and

(b) the scope of the investigation by defining how the initial allegations in the notification or complaint are relevant to the National Law or National Regulations (Chapter 5.2 has further details). In some cases this may involve identifying aspects of the notification or complaint that are not being investigated and reasons why (outside jurisdiction for example) as well as those areas that are going to be investigated. In some cases, there may also be changes to the scope of the investigation over time, such as where additional matters come to light or are notified later and this should be carefully recorded in the investigation plan with dates and explanation; and

(c) whether an urgent visit, emergency action or other action is required by the Regulatory Authority to ensure safety, health and wellbeing of children (see further information in Chapter 4.4 ‘Emergency Action’ and Chapter 7.1 ‘Visits’).

2. **Identifying the person/s subject of the allegation**

Determining who can be held responsible for the conduct alleged by the notification or complaint (Chapter 5.3 has further details) is an important step. This will usually be the approved provider and it may also be a staff member such as a nominated supervisor or educator. This step also involves consideration of whether there may be any individuals who the Regulatory Authority may wish to sanction should the alleged conduct be substantiated.

3. **Identifying and planning to obtain relevant evidence**

This involves determining the evidence needed in relation to the scope of the investigation and how to collect that evidence, including whether and when to conduct a visit (see Chapter 7.1) and who is a potential witness (see Chapter 7.5). It also involves recording those decisions including recording why a visit is or is not being undertaken. The investigation plan may also be used to prioritise evidence collection and record how and when evidence will be obtained. Planning to obtain certain evidence should be relatively detailed, for example specifying what things are planned to be photographed or collected at a service rather than simply ‘take photographs’ or ‘collect documents’..

4. **Ascertaining relevant background information.**

To undertake an informed investigation and help with planning, Authorised Officers need to identify information about a service (usually from NQAITS) such as:

* Information about the service premises.
* Service information, including days and times of operation.
* Conditions or waivers in place or any applications in progress relating to service or provider approval.
* Whether there are current investigations underway (in which case discuss with investigating officer to ensure their investigation is not compromised).
* Whether there are sanctions in place that may impact the operation of the service.
* Whether there are additional monitoring activities currently underway (in which case discuss with the relevant Authorised Officer to ensure activities are co-ordinated to maximise efficiencies and not jeopardise each other’s work).
* Compliance history such as when the last visit to the service was and whether serious non-compliance was identified at that time, as this information may assist in determining visit urgency and previous issues to be mindful of regarding the safety, health and wellbeing of children.
* Identity of approved provider and person with management or control.

5. **Confirming the investigation team including each member's role in the investigation.**

The investigation should, so far as possible, be resourced to reflect the seriousness of the matter. Consider whether one or more Authorised Officers should be involved, their expertise and experience, who will lead and ensure an up-to-date investigation file (usually on NQAITS) and whether particular skill/expertise is required (such as interviewing a child). The investigation team may change as more evidence comes to light.

1. **Schedule regular investigation case conferences**

Case conferences are meetings at regular intervals with a senior colleague and/or Area Manager, to discuss ongoing investigations. This is to enable decisions to be made in relation to the investigation with a focus on progress and decision making for each matter including whether or not there is sufficient evidence to conclude the investigation(see Chapter **8.1** for further detail on analysing the evidence). Authorised Officers should conduct periodic reviews of the evidence they have collected to inform these meetings. Investigations should be finalised once a determination about the outcome can be made; evidence collection does not continue after this.

NOTE: Most investigations will be completed within three months and many in much less than this. If the investigation is to extend beyond 30 days from date of notification, an investigation holding letter should be sent to the approved provider (see Chapter 5.6 for further information).

## Establishing the Scope of the Investigation

Authorised Officers should establish what has been alleged and how that relates to the role of the Regulatory Authority (i.e. there may be lots of information and it may relate to many issues but clarify what is relevant to the National Law or National Regulations). This provides boundaries to the investigation. This requires the Authorised Officer to identify:

* broadly, which are the most likely sections/regulations that may not have been complied with;
* which part/s of the notification indicate this possibility; and
* any issues that are not part of the Regulatory Authority role.

Establishing the scope of the investigation need not be overly technical. In the early stages of planning an investigation, an Authorised Officer will usually have a notification or complaint and perhaps some information from initial inquiries. The Authorised Officer is reviewing that information and examining it to see if it might constitute non-compliance with the National Law or National Regulations (and if so, which are the key provisions that are relevant).

This just means thinking about the information and reviewing the sections or regulations that may be relevant. It doesn’t have to be everything that is possibly wrong, but the most serious or clearly raised by the matter, including sections and regulations that commonly go together such as where there may be inappropriate discipline it would usually also be appropriate to consider regulations around interactions with children and policies. Whilst this task of establishing the scope of the investigation is more difficult when an Authorised Officer is new or unfamiliar with the details of the National Law and National Regulations, it becomes easier as familiarity increases. Colleagues and Area Managers can assist with identifying sections or regulations to consider. The Avenues of Inquiry table on the intranet also sets out some common notifications and possible areas of non-compliance.

Importantly, the Authorised Officer should focus on the incident or issues raised by the notification or complaint and not limit their investigation (become close-minded) by rigidly defining the sections/regulations they intend to consider. Instead, it is appropriate for much of the investigation to more broadly consider whether the National Law or National Regulations has been complied with and focus on uncovering the facts of the alleged incident or issues that have been brought to the Regulatory Authority’s attention.

The Authorised Officer records in their investigation plan a simple statement about what they plan to investigate and why (this should of course evolve and be refined over time as more evidence comes to light). Usually a sentence or two will suffice in the investigation plan but this may be longer in complex matters with lots of alleged incidents and issues.

An example of how an Authorised Officer may establish the scope of their investigation in the initial investigation plan:

“*the complaint suggests that an educator, <educator name>, in a centre-based service did not see a 3 year old child, <child name>, leave the room. I will investigate whether the approved provider ensured adequate supervision in accordance with section 165 and what happened to the child after she was outside the room as she may have been exposed to harm and hazards (section 167). The parent of the child when contacted also spoke about her concerns with the services lack of contact and information for parents and so investigation of regulations in relation to policies and interactions with parents will occur.”*

It is important to note that powers of entry for investigating approved education and care services require reasonable suspicion of an ‘offence’ and therefore may only be utilised if the scope of the investigation includes provisions that constitute an offence if not complied with (Chapter 6.2 explains what makes something an ‘offence’).

As the investigation progresses and the Authorised Officer gets closer to the end of the evidence collection process, they will define the allegations more specifically if needed. In particular, after analysing the evidence collected (see Chapter 8.1) it may be decided that person/s subject of the allegation (defined below) need to be provided with an opportunity to respond (as covered in Chapter 8.3). Prior to offering such an opportunity, detailed formal allegations will be formed (covered in Chapter 8.2).

## Defining the Person/s Subject of the Allegation

The person/s subject of the allegation are those who the National Law (or Children’s Services Act) specify as obligated to do something that has allegedly not occurred. In other words, these are persons who are suspected of having committed, and/or are responsible for, the alleged non-compliance. It is important to note that ‘person’ is defined by the National Law and includes an individual, body corporate, eligible association, partnership or prescribed entity. This means that a person/s subject of the allegation can be a company, such as where a company holds a provider approval.

Defining the person/s subject of the allegation is critical because they must be provided procedural fairness (procedural fairness is explained in the Regulatory Standards section in Chapter 2). Should the evidence support it, those persons will likely be interviewed by the Authorised Officer and will not be treated as a witness (see Chapter 7.5 and 8.3). Ultimately, those persons may be subject to decisions by the Regulatory Authority that adversely impact them, such as being warned, sanctioned or even prosecuted, and therefore must have an opportunity to put forward their response to any allegations that are supported by evidence.

When creating an initial investigation plan, working out who the person/s subject of the allegation are simply relies on the information currently available (such as in the complaint or notification and any initial inquiries) and using the established scope of the investigation (as outlined above) which allows the Authorised Officer to check who the relevant sections/regulations make responsible for the potential non-compliance. Sometimes in the early stages of the investigation it will not be possible to name the person/s or their positions and so it may be quite broad such as “*at this stage it is clear that the notification alleges non-compliance with section 168. The approved provider is therefore a person subject of the allegation and there may also be a staff member who is a person subject of the allegation but this is currently unclear as the notification only states it was an educator at the service. This will be investigated further and updated in due course.”*

In most investigations, the approved provider will be a person subject of the allegation because the National Law makes them responsible for most requirements. This is the case even where they did not necessarily carry out the specified actions. In some investigations there will also be others, such as one or more educator, nominated supervisor and/or family day care educator, who is a person/s subject of the allegation. For example, in a case of alleged inappropriate discipline, the educator who performed the discipline as well as the approved provider will usually both be persons subject of the allegation.

There are a few provisions of the National Law, such as providing false and misleading information to the Regulatory Authority (s 295), which apply to a person and may not be relevant to an approved provider. Even in a case where an educator or nominated supervisor provided false and misleading information to the Regulatory Authority, the approved provider cannot be held responsible for such an offence (nor treated as a person subject of the allegation) unless they are suspected of the offence, or involvement with the offence, themselves.

**Who can the Regulatory Authority take action against?**

The Regulatory Authority can take action, such as sanctions, against the person/s responsible for the non-compliance (where the evidence supports this and they have been provided procedural fairness, including a chance to respond to allegations). Where this is the approved provider or nominated supervisor, in most cases it will not have to be established that they were personally responsible for the conduct where the National Law makes the compliance their responsibility.

The Regulatory Authority can also take action, such as sanctions, against the person/s who directly carried out the non-compliance where the National Law provides that those person/s (such as a nominated supervisor, staff member or family day care educator) are responsible and the investigation establishes evidence that they personally failed to comply with their obligations (and they have been provided procedural fairness, including a chance to respond to allegations).

**What about person/s who are alleged to have done the wrong thing but are not held directly responsible for the non-compliance?**

On rare occasions, where evidence supports that there have been serious failings by an individual that harmed or put a child at risk, the Regulatory Authority may wish to take action against that person even though the National Law may not hold them responsible for the specific non-compliance. For example, to prohibit a person determined by the Regulatory Authority to be an unacceptable risk of harm to a child or children (section 182) or to have them excluded from a service (section 171). Therefore, during planning, Authorised Officers should be alert to the potential of these scenarios and act to avoid the possibility of denying the person procedural fairness.

In practice this will arise rarely. When planning, if Authorised Officers are faced with a notification or complaint that includes allegations which may involve serious failings by an individual that harm or put children at risk they should discuss with their Area Manager and the Investigations Unit if needed. In these situations, it is preferable to plan for the person to be treated as a person subject to the allegation rather than as a witness. This is simply so that any information collected from that person can be obtained after the person is cautioned and aware of the potential for there to be action taken against them. Usually, this can be handled by collecting other evidence first and analysing the evidence before determining whether to treat that person as a witness or a person subject of the allegation (this will benefit from regular consultation and case conferencing with the Area Manager and/or Investigations Unit).

## Planning to Collect Evidence

An Authorised Officer’s role is to make an assessment as to whether the alleged matter occurred and, if it did, whether it constitutes non-compliance with the National Law or National Regulations. The Authorised Officer must make this assessment based on objective evidence obtained during the investigation.

Questions that Authorised Officers should ask themselves during planning are:

1. What **evidence** is needed to be **satisfied on the balance of probabilities** that the alleged matters occurred? (Balance of probabilities is explained in Chapter 8.1)

2. How should this evidence be **obtained**?

3. **Who** is a potential witness?

4. **Who** are the person/s whose interests may be adversely affected by the investigation (and therefore ensure they are afforded procedural fairness in the process)? These are the person/s subject of the allegation and explained in Chapter 5.3 above.

Evidence is information that may prove or disprove the existence of a fact. The type of evidence Authorised Officers collect will depend on the alleged contravention of the National Law or National Regulations. The different types of evidence that can be collected are discussed below. Often, evidence is collected through discussions and making inquiries, collecting documents and other relatively informal means. Whilst other evidence may be collected more formally, such as when interviewing someone.

The evidence required in an investigation is the evidence necessary for Authorised Officers to be satisfied on the balance of probabilities (explained in Chapter 8.1), that each element of the alleged non-compliance of the National Law or National Regulations occurred or did not occur. Evidence should only be collected until an Authorised Officer is satisfied on the balance of probabilities about what occurred. In many matters, Authorised Officers may only need to collect a few key pieces of evidence and should not keep gathering evidence ‘just to be sure’. This does not negate the need to provide procedural fairness (if there may be adverse findings against a person/s then the person/s **must** be provided with an opportunity to give their version of events).

When planning evidence collection, Authorised Officers may consider external expert evidence such as medical or engineer reports where directly useful to the investigation. When seeking information from external sources, Authorised Officers may be required to formally request the information in writing and seek authorisation from the child's parents for release of information about their child. Template letters and consent forms are available. The Investigations Unit can provide guidance if needed.

When gathering evidence, it is important to think about the things needed in order to be satisfied about determining what occurred. For example, details such as a child’s name, date of birth and attendance records, where something occurred or where people were standing and who was involved directly or perhaps observing or hearing. In some matters, specific dates and times of incidents may be needed while others may be more general (see Chapter 8.2 for further information about particulars and elements of offences that will be required if a formal allegation needs to be formed later in the investigation).

For example, the evidence needed to demonstrate a contravention of section 166(3)(b) (offence to use inappropriate discipline) of the National Law includes:

* who was the person involved in the alleged incident;
* the name and location of the service where the alleged incident took place;
* the identity and age (age will be relevant to what is appropriate or inappropriate discipline under s 166) of the child involved in the alleged incident and proof the child was being educated and cared for by the service at the time of the alleged incident;
* the type of discipline allegedly administered; and
* evidence of why the discipline was unreasonable in the circumstances.

**Gathering evidence**

Collecting evidence is the major part of an investigation and ultimately provides the information to be relied on by the Authorised Officer to make decisions about the alleged matter/s. Evidence collection does not have to be complicated or overly formal. There are many different ways an Authorised Officer can gather evidence, including:

* making inquiries with the notifier or complainant, parents or other relevant people;
* requesting information (this may be by phone or in writing);
* conducting visits of the service (i.e the investigation visit), including inspecting the service’s records, seizing objects, copying documents;
* making inquiries with persons at the service who may be able to provide information about the alleged matter;
* making inquiries and taking witness statements (including from notifiers);
* entering the business premises of the approved provider;
* compelling persons to provide information or evidence;
* obtaining search warrants.

There are certain powers available to Authorised Officers to obtain evidence (outlined in Chapter 6). Using these powers is generally quite straightforward and Authorised Officers will primarily rely on their section 199 powers of entry to collect evidence at a service. In some investigations there may be no need to rely on any formal powers. For example, some investigations may only require telephone inquiries in order to be reasonably satisfied about what occurred. Where the use of other powers or search warrants are being considered, consult the Monitoring and Compliance or Investigations Unit.

To assist with identifying evidence needed, some investigators may find it useful to use an evidence checklist (template available). This may be particularly useful in complex investigations where lots of evidence is being sought.

**Different types of evidence**

Some evidence may be of greater evidentiary value than other types of evidence. For example, direct evidence, such as an observation by an Authorised Officer of a broken fence surrounding the premises of an education and care service, is of greater value than being told by a parent that they heard the fence was broken.

Assessing the value of the evidence obtained is something that occurs later in the investigation (see Chapter 8.1). At the planning stage, the Authorised Officer simply needs to be aware that there are different types of evidence and some has higher evidentiary value. For example, direct evidence (what a witness experienced themselves or perceived with one or more of their five senses) has more probative value than circumstantial evidence (which is where a number of pieces of information point to the same conclusion but cannot eliminate alternate scenerios). The Authorised Officer should consider:

* what the best type of evidence is likely to be in the circumstances. For example, a photograph leaves less room for doubt than a description of what someone saw, but may have limited value without context; consider whether a photograph needs other information to provide context (such as height or size) or a few photographs to show background or positioning (and always with contemporaneous notes made by the Authorised Officer taking the photographs about what they see and intend to photograph).
* ways to obtain evidence of the highest evidentiary value taking into account the efficiency of doing so and whether it is justified in the circumstances. Only one or two pieces of evidence with high evidentiary value may be needed in order to make a defensible decision about the outcome of the investigation. However, in some investigations it may only be reasonably practicable to obtain circumstantial evidence. The critical part is to think about what evidence might be sought and preference the collection of evidence of higher evidentiary value where possible.
* whether documentary evidence (book, report, letter, map, drawing, photograph, label, disk, tape, film etc.) will be relevant to the investigation scope. Common documentary evidence in investigations by the Regulatory Authority that may verify or disprove certain elements include enrolment and medical information, attendance records and staff records. CCTV footage may be useful in some matters; making inquiries about its existence may be helpful and then liaise with the Manager or Investigations Unit about whether to obtain it if unsure.
* Whether any of the evidence being collected is, or may be, ‘hearsay evidence’. Hearsay is second-hand evidence of what someone else told the witness happened. The witness then relays what they were told. While hearsay evidence can be considered as part of an investigation, it is less reliable than direct evidence. In those circumstances, if relevant information for the investigation, the Authorised Officers should seek to speak to the person directly. Hearsay evidence is generally inadmissible in criminal proceedings.

## Overlapping Investigations and Collaboration With External Organisations

With some investigations, there will be other organisations or the approved provider themselves also conducting an investigation (at least in relation to some aspects of the allegations). For example, in relation to Reportable Conduct, approved providers may be required to conduct an investigation which is submitted to the CCYP. In other instances, approved providers may be conducting an investigation for other reasons such as employment disciplinary purposes. As noted previously, there are also matters that the Regulatory Authority investigates that also involve Victoria Police, VIT or Child Protection.

Investigations conducted by others will often cover similar or overlapping incidents. Frequently, those investigations will not consider non-compliance under the National Law or National Regulations. Investigations by the Regulatory Authority are still required, however, there is the possibility that the investigation may be able to make use of evidence collected by others.

Where others have conducted investigations, including approved providers, Authorised Officers should seek to collect and review the evidence already obtained. Sometimes this may involve following protocols about established relationships (such as CCYP and Child Protection) or under Memorandums of Understanding (such as with Victoria Police). In other instances, it may simply involve making inquiries with those who hold the investigation documentation.

If Authorised Officers are able to obtain evidence collected by others they then review and determine how much can be utilised for their investigation. Usually, it won’t be appropriate to solely rely on those documents, however they may reduce the number of statements needed for example, or reduce the questioning required of a witness. If the investigation appears unbiased and thorough and there is no reason to discount it or be concerned about authenticity, then Authorised Officers can utilise the information as part of their investigation. This may be particularly useful to ensure witnesses don’t need to tell the same account multiple times where there are no gaps in a genuine, un-influenced account.

If prosecution or sanctions are likely, Authorised Officers will need to factor this into their planning around how much they can utilise from other investigations and/or how extensive they need to be when testing the reliability and truthfulness of information. Authorised Officers can seek guidance from their Area Manager and also the Investigations Unit if unsure.

It is critical to note that irrespective of other investigations, procedural fairness must always be provided by Authorised Officers. If a person or entity may have adverse findings made against them under the National Law, they must be given the opportunity to be heard in relation to the potential non-compliance and implications (and evidence relied on) under the National Law.

For example, where approved providers have conducted an investigation under their reportable conduct obligations it may be highly appropriate for Authorised Officers to utilise that information. Authorised Officers can undertake additional investigative activities to verify critical information and to ensure all aspects relevant to the requirements of the National Law are established. If the Authorised Officer analyses the evidence and decides there may be non-compliance under the National Law by the approved provider, they will need to seek the approved providers response (usually by interviewing them). This is irrespective of whether the approved provider has recorded their account or response about the incident as part of the reportable conduct investigation. This is so that the approved provider has the opportunity to know about, and respond to, the evidence and potential findings, as well as any potential implications like penalties or sanctions, that may apply under the National Law.

## 5.6 Communications with Approved Provider

Authorised Officers should communicate with the Approved Provider regularly during an investigation. Authorised Officers need to ensure that Approved Providers are kept informed, that effective working relationships are maintained and that procedural fairness is provided. Communications with approved providers will look different for different investigations and taking into account the type of Approved Provider. In some cases, some communications may be with a representative, in other communications and depending on their purpose, it may be critical to liaise with the Approved Provider directly. There are also some communications that need to be in writing, although many Authorised Officers will also find that it is good practice to have a discussion prior to sending the letter.

This section provides some guidance on these issues and Authorised Officers can seek further guidance from their manager in their regular investigation case conferences, or at other times, and consider the Investigation Unit as a source of information as well.

Regularity of communications

For some investigations, particularly complex ones and/or those that take over 30 days, it will be common for Authorised Officers to talk with approved providers (and make contemporaneous notes of the conversations) on a number of occasions, such as:

* to clarify aspects of a notification as part of further inquiries (Chapter 4.2),
* during or after a visit,
* when it has been some time since the last contact and an update is warranted,
* to understand the approved providers actions in response to the matter being investigated (see Chapter 8.3),
* to discuss provisional findings or invite them to interview (see Chapter 8.3),
* at any other time an Authorised Officer determines it appropriate for the investigation.

In other investigations there may only be a need for one or two conversations with the Approved Provider, particularly with matters that are to be closed quite quickly or where there are no substantiated findings and the matter is not complex.

Investigations will nearly always require some written communications as well and a variety of template letters are available and outlined below. These need to be used purposefully and thoughtfully, they can be combined or altered as appropriate for each investigation. Importantly, when making decisions about how to communicate with someone in an investigation, these decisions should be recorded in writing with reasons. For example, there is nothing wrong with making changes to a template, not using a template or combining templates, and making a record of what is to be done and why allows the investigation to be understood and withstand scrutiny.

Authorised Officers, in conjunction with their Area Manager, should consider whether to alter these communications as needed in each case. For example, an approved provider with multiple services may not need all of these contacts and/or may prefer contact is with a representative or nominated supervisor. Caution should be applied though when it is the approved provider who specifically needs to be consulted, such as to put allegations to a person subject of the allegation. Always consult Area Manager or the Investigations Unit if unsure.

**Informing Approved Provider of Commencement of Investigation**

In most instances, the Approved Provider should be informed that an investigation is being commenced as soon as practicable after the notification/complaint is received (template email available). This is simply to ensure that approved providers are aware of the investigation irrespective of how it was initiated. Usually this will be done by a brief email to inform that the Regulatory Authority is commencing an investigation in relation to xx service, that they will be contacted in due course with further information and to provide an Authorised Officers contact details.

There will be times when such a communication is not used, as determined by the Authorised Officer and Area Manager such as:

* when the investigation planning has determined that an unannounced visit is important (and the reasons for this are also recorded in the plan),
* when an urgent visit is required to ensure safety, health and wellbeing of children and there is not time to alert the approved provider to the investigation,
* when the matter is being closed after reviewing the notification/complaint (e.g. below threshold or P3 notification email to close the matter is being used),
* when it is decided that it is not appropriate to do so and reasons for the decision are recorded on the file (see defensible decision making in Chapter 4.9). For example, a phone call and contemporaneous note may suffice and be more efficient if needing to call the Approved Provider to confirm information anyway. In that case a simple email to confirm the call and contact details may be all that is used.

There may also be other variations on the use of this communication. For example, in situations where Victoria Police have asked the Regulatory Authority to delay an investigation, the template email may be used once the investigation does commence and after Victoria Police have confirmed this will not interfere with their work. In those cases, the template email may need to be tailored to address any irregularities such as the delay between receiving the notification and commencing the investigation. Seek advice if unsure.

**Investigation Holding Letter (with or without visit findings)**

If a visit is conducted, a letter outlining the findings of the visit and providing further information and update about the investigation, should be sent as soon as practicable after the visit. In cases where a visit is not conducted, a holding letter should be sent to the approved provider unless the matter will be finalised in less than 30 days.

Any non-compliances identified during an investigation visit to a service that are unrelated to the original notification, should be discussed with the approved provider (or the responsible person) at the conclusion of the visit, and they should be provided with a copy of a Compliance Summary Sheet. Summary Sheets should relate to the non-compliances identified at the visit and give the reason for the visit as advised to the responsible person or approved provider. These non-compliances are then also attached to the Investigations Holding Letter (if the investigation will not be completed within 30 days) or Investigations Findings Letter.

**Investigation Provisional Findings Letter**

In some matters, an Investigation Provisional Findings Letter may be utilised. This is for situations where substantiated findings appear likely and the person/s subject of the allegation have not had another opportunity to respond to the alleged non-compliance (explained in detail in Chapter 8). Whether to use this letter will be determined after the majority of evidence has been collected and analysis of the evidence (Chapter 8.1) suggests that non-compliance may be substantiated.

In serious matters including those with potential for sanctions, the person/s subject of the allegation will usually be invited for an interview (or to provide a written response to the allegations). That is their opportunity to respond to the allegations against them and ensures procedural fairness. Where this has occurred, the Investigation Provisional Findings Letter is unnecessary (please note this includes instances where the offer for interview is made and it is declined).

However, where there has not been another opportunity provided to respond to potentially substantiated findings, Authorised Officers can send an Investigation Provisional Findings Letter. This is only needed for procedural fairness purposes and can be altered if procedural fairness has been afforded to an approved provider in some other manner.

The Investigation Provisional Findings Letter explains that evidence has been collected and it appears that non-compliance may be substantiated. An attached table details those provisional findings. It is very similar to an Investigation Findings Letter however it says that as the recipient of the letter has not yet had a chance to respond, these are provisional findings and invites them to respond if they choose.

If no response is received, the findings are confirmed and a simple final letter is issued to confirm this. If a response is received, this needs to be considered as part of the evidence collection and a final letter sent detailing the findings after consideration of all the evidence including their response (examples available).

**Investigation Findings Letter**

An Investigation Findings Letter is sent at the conclusion of an investigation (template available). If the Investigation Provisional Findings Letter was sent, then the findings letter will be a very simple and brief letter unless major edits are required as a result of the response to the provisional findings (template available).

In many instances, the Investigation Provisional Findings Letter will not have been used and so the Investigation Findings Letter will contain information about the evidence collected and any findings made (usually set out in a table attached to the letter). The letter will also provide information about whether further action is being taken or considered by the Regulatory Authority. The letter should also address all matters that were investigated by the Regulatory Authority even where some matters were less significant than others. In other words, the letter should be clear around the scope of the investigation and may even include confirmation of what was not investigated if that helps in the situation (even though any areas outside jurisdiction or that do not meet the threshold for investigation should already have been communicated at the outset (as per Chapter 4).

Any non-compliances identified during the course of the investigation that have not yet been identified to the Approved Provider and do not require own motion investigation, can be identified in the Investigation Findings Letter (or table attached to that letter).

The Investigation Findings Letter should contain information consistent with the information contained in the investigation findings memo/decision record about the findings (see Chapter 9). This doesn’t mean the information needs to be identical, but they should be consistent and make sense when read together.

# POWERS

In conducting an investigation, Authorised Officers have powers to obtain evidence, and must consider **if and how** they will approach the exercise of these powers. This will generally be quite straightforward and Authorised Officers will primarily rely on their section 199 powers of entry to collect evidence at a service. In some investigations there may be no need to rely on any formal powers and only telephone inquiries will be required in order to be satisfied on the balance of probabilities about what occurred. This Chapter sets out the key powers under the National Law that Authorised Officers need to understand.

## Powers of Authorised Officers

**Identity Cards**

Under section 196 of the National Law, an Authorised Officer **must carry** an Authorised Officer identity card when exercising powers under the National Law or National Regulations (including entering premises).

The Authorised Officer identity card **must be shown** before exercising a power of entry under the National Law and at any other time during the exercise of a power when requested. Failure to do so is an offence under the National Law. Further, anything done by the Authorised Officer may not be valid if these requirements are not met.

In practice, an Authorised Officer must carry their identify card and show their identity card to the person/s allowing them entry and again at any time they use their powers. It is recommended that the identity card be shown again to other individuals an Authorised Officer talks with during the visit to avoid any doubt about whether powers were being used at that time or not. In any event, it is good practice for Authorised Officers to be in the habit of showing their card and clearly introducing themselves and their role to people they talk to when on visits.

**Powers of entry – overview**

There are a number of powers in the National Law that give Authorised Officers the authority to enter premises in order to carry out various duties. These powers are summarised in a table at Appendix A and are briefly outlined below with a focus on the power to enter for investigative purposes.

It is critical that Authorised Officers understand their powers and can identify which power of entry they are using and what it entitles them to do. Incorrect use of powers of entry, such as taking action that is not permitted by the power entered under, can seriously jeopardise investigations and the regulatory integrity of the Regulatory Authority. Additionally, evidence collected during a visit may be inadmissible or subject to challenge in any relevant proceedings. If ever unsure about powers of entry, please discuss with the Monitoring and Compliance Unit or Investigations Unit prior to entering the premises.

**Powers of entry - monitoring compliance (s 197)**

Section 197 of the National Law allows an Authorised Officer (and any assistants as may reasonably be required) to enter, at any reasonable time, any education and care service for the purpose of *monitoring compliance* with the National Law or National Regulations (including conducting rating and assessment visits). Section 197 cannot be used for investigating because alternate powers exist (see below).

**Powers of entry - investigating an offence (s 199)**

Section 199(1)of the National Law permits Authorised Officers to investigate an approved education and care service if the Authorised Officer reasonably suspects that an offence may have been, or may be being, committed against the National Law or National Regulations. In practice, Authorised Officers will have reasonable suspicion where they have reviewed the details of a notification or complaint and determined that there may be potential non-compliance with the National Law or National Regulations that require further investigation including a site visit.

Section 199(2) of the National Law empowers Authorised Officers to enter the education and care service premises, with or without consent, at any reasonable time and do any of the following:

* search any part of the premises;
* inspect, measure, test, photograph or film, or make audio recordings of, any part of the premises or anything at the premises;
* take a thing, or a sample of or from a thing, at the premises for analysis, measurement or testing;
* copy, or take an extract from, a document, at the premises;
* take into or onto the premises any person, equipment and materials the Authorised Officer reasonably requires for exercising a power under this subsection;
* require the occupier of the premises, or a person at the premises, to provide information to assist in the conduct of the investigation.

When exercising powers of entry under section 199, an Authorised Officer is limited to only taking documents or things that are used, or likely to be used, in the provision of the education and care service. An Authorised Officer who has taken a document or a thing is required to return the items as set out by sections 202-203 (see Appendix B for further information).

Authorised Officers must not enter a ***residence*** under section 199, unless:

* the Authorised Officer reasonably believes that an approved education and care service is operating at the residence at the time of entry; or
* the register of family day care educators records that the approved education and care service operates at the residence at the time of entry; or
* the occupier of the residence has consented in writing to the entry and inspection (*Consent to Enter Form* available).

An occupier who consents in writing must be given a copy of the signed *Consent to Enter Form* immediately. In any proceeding, unless the written consent of the occupier is produced to the court, it will be presumed that the occupier did not consent.

**Powers of entry – business premises and unapproved services (ss 200 and 200A)**

Section 200 of the National Law empowers an Authorised Officer to enter the business premises of an approved provider if they reasonably suspect that documents or other evidence relevant to the possible commission of an offence against the National Law or National Regulations are present at the principal office or any other business office of the approved provider.

Section 200A permits an Authorised Officer who reasonably believes an unapproved service is operating, to enter any premises (including residential or business premises) for the purpose of determining whether an education and care service is operating without a service approval at or from the premises.

When exercising powers of entry under section 200 or 200A, an Authorised Officer must not enter and search the premises until:

* they have produced their identity card for inspection;
* they have informed the occupier:
* of the purpose of the search and the powers that may be exercised; and
* that the occupier may refuse to give consent to the entry and search or to the taking of anything found during the search; and
* that the occupier may refuse to consent to the taking of any copy or extract from a document found on the premises during the search; and
* the occupier has consented to the Authorised Officer entering the premises (template available).

If entry has been consented to, an Authorised Officer may conduct the activities listed in the table at Appendix A including searching, inspecting, and making copies of documents. Authorised officers must be clear about which power they are entering under as section 200 and 200A are slightly different in relation to what can be done during the entry.

**Powers of entry - search warrants (s 201)**

Section 201 allows an Authorised Officer to enter certain premises under the authority of a search warrant. Search warrants may be executed in relation to suspected unapproved service premises, approved education and care services premises, principal offices or any other business premises of an approved provider if the Authorised Officer reasonably believes that documents or other evidence relevant to the possible commission of an offence against the National Law are present at those premises. Powers under section 201 are not often exercised and Authorised Officers should discuss any consideration of entering with a search warrant with their Manager and the Investigations Unit. If search warrants are to be sought this would be done in consultation with the Department’s Legal Unit.

Children’s Services Act difference

Any investigations being conducted under the Children’s Services Act will require Authorised Officers to utilise their powers and authorisation (identity card) under that legislation. Like under the National Law, the identity card issued to the Authorised Officer (in accordance with s 137 of the Children’s Services Act) must be carried whenever the Authorised Officer is exercising any functions under the Children’s Services Act and must be shown before exercising a function or whenever asked during the exercise of a power under the Children’s Services Act.

Section 138 of the Children’s Services Act sets out powers of entry for assessing and monitoring children’s services. The power to enter an approved children’s service for the purpose of investigating a reasonably suspected offence is provided in s 139. Section 139 allows the same activities to be undertaken at the children’s service as s 199 of the National Law allows at an education and care service. Additional powers of entry in relation to business premises and search warrants are also provided in s 140-142.

Utilising appropriate powers of entry is an important part of an Authorised Officer’s role. If ever unsure, consult Area Manager or the Investigations Unit for guidance.

## Offences and Non-compliances

It is important to make the distinction between a non-compliance which might constitute an offence, and a non-compliance which does not. An ‘offence’ is non-compliance with a provision under the National Law or National Regulations that has a penalty attached for a failure to comply (i.e. a monetary penalty is set out at the foot of the provision). Prosecution for an offence (under the National Law or Children’s Services Act) must be commenced within 2 years of the date of the alleged offence.

It is possible for an education and care service to be in non-compliance with certain ‘non-penalty’ (civil penalty) provisions of the National Law. For example, regulation 109 of the National Regulations states that an approved provider must ensure that adequate toilet facilities are provided for children, but there is no penalty for failing to comply with this provision. However, in some instances the evidence underpinning such a non-compliance may also constitute the commission of an offence. For example, whilst failure to ensure adequate toilet facilities is a non-compliance of regulation 109, it may also support non-compliance of section 51 which is a penalty provision (i.e. a failure to comply with a service condition to ensure the safety, health and wellbeing of the children being educated and cared for by the service).

It is important to note that some Authorised Officer powers under the National Law can only be exercised when an offence (non-compliance with a penalty provision) is reasonably suspected, such as section 199 power of entry or powers to obtain information. This will also have an impact on the approach to an investigation. The following information sheets are available:

* offences and persons responsible under the National Law (INV04).
* offences and persons responsible under the National Regulations (INV05).
* regulations that may be subject to a compliance direction[[4]](#footnote-5) (it is an offence to fail to comply with a compliance direction).

## Powers of Compulsion

**Authorised Officer Powers of Compulsion**

There are a number of powers under the National Law that permit Authorised Officers to require or obtain particular information. Using these powers requires careful, defensible decision making and where possible, consultation with the Investigations Unit or Monitoring and Compliance Unit.

Authorised Officers need to be aware of these powers as occasions may arise where they are needed on the spot. In such a case, an Authorised Officer must think about the power, be sure they understand the power, have good reason to use it and show their identify card when exercising the power. Authorised officers need to also be aware of the protection against self-incrimination and whether they need to warn the person (explained further below). Whenever utilised, the Authorised Officer should make contemporaneous notes about their use of such a power and that they raised the protection against self-incrimination. See Chapter 7.3 for details about taking contemporaneous notes.

**Section 204** of the National Law empowers an Authorised Officer to require a person to state their name and residential address if they find the person committing an offence against the National Law, or reasonably suspect they have committed an offence. The Authorised Officer can also require the person to produce evidence of their name and residential address.

**Section 205** of the National Law empowers an Authorised Officer to request evidence of age, name and address of a staff member, a family day care educator or a volunteer if they reasonably suspect the person has not attained the prescribed minimum age. For example, regulation 119 requires a family day care educator to be 18 years or older, whilst regulation 120 sets out special requirements for educators under the age of 18 years who are working in centre-based services.

**Section 206** of the National Law empowers an Authorised Officer to issue a notice in writing requiring a ‘specified person’ to provide any relevant information stipulated in the notice.[[5]](#footnote-6) Notices issued under section 206 are intended to assist an Authorised Officer with:

* monitoring compliance with the National Law;
* conducting a rating assessment of an approved education and care service under Part 5 of the National Law; and
* collecting details of parents of all enrolled children due to the suspension or cancellation of a service or provider approval (section 35 or 83).

**Sections 207-210** of the National Law create offences for persons who obstruct, impersonate or fail to assist an Authorised Officer or destroy or damage certain documents or notices. Authorised Officers may find the need to inform people of these offences in some cases.

**Protection against self-incrimination (section 211)** provides thatan individual may refuse or fail to give information or do anything that he or she is required to do under the National Law or National Regulations, if giving the information or doing the thing might incriminate the individual, **unless** the requirement is in relation to:

* the production of a document or part of a document that is required to be kept under the National Law and National Regulations (e.g. enrolment records, medication records); or
* the giving of the individual's name or address in accordance with the National Law or National Regulations (such as under section 204).

An Authorised Officer **must warn a person** about their entitlement to this protection against self‑incrimination under section 211 and should document that this warning was given..

**The Delegate’s Powers of Compulsion**

There may be some persons who withhold consent to enter a service, or who are unwilling to give statements, attend interviews or otherwise voluntarily assist Authorised Officers in an investigation. The National Law provides a number of powers of compulsion to the Delegate which are intended to assist with gathering evidence in these circumstances.

Evidence obtained by compulsion often has limited admissibility in legal proceedings. However, obtaining evidence using powers of compulsion can assist by enabling evidence to be obtained that would not have been otherwise gathered, assisting Authorised Officers by opening up new avenues for further investigation. Further information at Appendix C. Advice from the Monitoring and Compliance Unit or Investigations Unit must be obtained if considering these options.

# EVIDENCE GATHERING AND MANAGEMENT

## 7.1 Investigation Visits

**Planning an Investigation Visit**

An investigation visit will be a planned and focused visit where, during their planning, the Authorised Officer has determined it to be part of the evidence collection process (always record why a decision is made to conduct a visit or not). It is important to note that the Regulatory Authority may also conduct compliance visits at any time to ensure safety, health and wellbeing of children at a service (or these visit types may sometimes be combined).

There will be some matters under investigation that require an urgent visit in order to collect evidence and most importantly at the time, assess risk and take action to ensure the safety, health and wellbeing of children including considering whether emergency action is required. In some investigations, a visit may not be necessary, for example if there has been a recent visit to the service and the notification/complaint does not raise risks to the safety, health and wellbeing of children. If uncertain, consult Area Manager or the Investigations Unit.

In most cases the visit is **unannounced**, meaning the approved provider and service are not informed in advance of the impending visit. There may be situations where an announced visit is useful and a decision can be made and recorded on the file (in consultation with Area Manager as required). The purpose of an investigation visit is to:

* Assess any risks to the health, safety and wellbeing to children and take emergency action if required (discussed further in Chapter 4.4).
* Undertake evidence collection in relation to the matter/s under investigation, such as:
* check relevant physical evidence relating to the allegation, for example: fence; attendance book; staff record; program being implemented;
* make copies, notes, diagrams, take photographs, digital recordings of the physical evidence where needed. In certain cases this may include seizing evidence in accordance with the National Law (see Appendices and consult the Investigations Unit);
* obtain contact details of parents, witnesses and others who may need to be contacted or interviewed at a later date;
* make inquiries with staff members who were present at the time of the notified occurrence to identify any potential witnesses (take appropriate notes). An Authorised Officer may need to take statements from these witnesses later.

Like many of the activities that an Authorised Officer carries out, the visit is about collecting information and/or evidence so that it can be analysed and decided upon at a later point. During the planning of the visit, even if the time for planning is quite short due to the urgency, it is important to consider what evidence will be actively sought and how it might be gathered. For instance, think about whether photographs might be taken and if so, what they would be useful to show and if it’s possible that a photograph could show that and how. It is good practice to note these aims in the investigation plan such as “*as xx has been alleged, it will be important to observe yy. I will also try and get 2 photographs of zz – one when in use and one when not* ”.

Prior to conducting the investigation visit, Authorised Officers should be familiar with the details of the education and care service and have undertaken a thorough review of the relevant information on NQAITS. This includes:

* service details, including operating hours, type of care provided, and service type (e.g. centre-based service, family day care service);
* any current applications relating to the approved provider or service, including transfers, waivers, amendment to service approval etc.;
* any factors particular to that service, including waivers and conditions;
* information regarding previous visits and any active investigations, current monitoring activities or sanctions;
* identity of the approved provider (or person with management or control) of the service and the nominated supervisor; and
* floor plans (if available) (as these may assist in understanding who may be a witness for example or establishing matters in relation to supervision).

This information can be recorded in the investigation plan. When planning a visit, Authorised Officers should also consider the equipment that will assist with collection of evidence relating to the investigation (for example consider taking a notebook, phone, camera, USB to save documents or CCTV footage if available etc.). In every instance, in accordance with section 196, Authorised Officers **must** **carry** (and show)their identity card when exercising powers under the National Law, including entering a service.

Future compliance visits may be required if the service requires additional monitoring due to the non-compliances identified at an investigation visit. These are not specifically part of the investigation but non-compliances are noted on relevant investigation correspondence and future visits can then be scheduled as part of ordinary monitoring activities.

**Conducting an Investigation Visit**

When commencing an investigation visit, an Authorised Officer must ensure they comply with their powers of entry and identity card requirements (section 196 and 199). In practice, this means an Authorised Officer must ensure they are carrying their identify card, show their identity card to the staff member who lets them in and show it again at any other time when exercising their powers during the visit. More information is provided about powers in Chapter 6.

It is important to be transparent by informing the approved provider/responsible person of the service that the visit is a result of a notification or complaint that is being investigated. Depending on the nature of the allegation (e.g. if it is being investigated by police, or if it may compromise evidence or witnesses) it may not be appropriate at this stage to provide specific details about the matter/s under investigation (where the approved provider is not aware of the details) and always be conscious of complainants who wish to remain anonymous.

Such visits may cause some discomfort and stress to service staff. Authorised Officers should:

* Remain calm, courteous and professional at all times.
* Be systematic and efficient in conducting the visit and collecting evidence.
* Be thorough by ensuring that, during the investigation compliance visit, all evidence identified in the investigation plan is collected to avoid additional unnecessary visits.

Unless the Authorised Officer has determined otherwise, investigation visits can be focused on collecting evidence in relation to the matter under investigation, whilst remaining alert to risks to children’s safety, health and wellbeing. Most of the visit will be concentrated on planned activities with reference to what has been alleged by the notification or complaint.

Additionally, Authorised Officers review children’s safety, health and wellbeing and will often conduct a number of short observations of higher risk activities/situations as appropriate/relevant for the service. For example, this may involve:

* an initial walk-through of the service, noting things such as staffing and ratios and identifying where to undertake further observations,
* undertaking those further observations of a few key and more high-risk situations such as a transition period and/or educators practice in the context of harm and hazard and/or children’s engagement in the program.

These observations should commence as relatively brief checks and then extend as determined by the Authorised Officer based on what they have seen and any concerns raised.

During an investigation visit, where appropriate, it is useful for Authorised Officers to briefly question all persons who may have witnessed the matter/s being investigated for the purpose of identifying who statements should be sought from. Collecting information early in the investigation and whilst there is opportunity can be very helpful. Only a few questions may need to be asked to establish who may be a potential witness and whether the information they may provide will assist to determine whether the alleged incident/s took place. Ensure clear notes are taken of the discussions. Authorised Officers must be sensitive to situations where educators are in the midst of carrying out their role of educating and caring for children and take appropriate steps to minimise disruption and distraction when talking to educators.

Taking contemporaneous notes of these discussions is particularly important if the person discloses information directly related to the matter under investigation (for example someone advising that they saw the incident or making admissions) (contemporaneous notes are explained in Chapter 7.3). The contemporaneous notes are critical because if a person later retracts or denies that information, the Authorised Officer’s notes may become the only reliable evidence of the facts in question (and can be relied on in the investigation).

When making inquiries with potential witnesses, the questions asked should be:

* short and simple for the purpose of gathering important information about the allegation/s and to identify staff involved in or who witnessed the incident;
* asked in a way that elicits factual information (such as what was seen or heard rather than opinions);
* asked in an open-ended fashion.

Occasionally during visits, issues around corroborating the actions of an Authorised Officer may arise and consideration should be given to conducting more sensitive activities together.

**Taking a witness statement at a visit**

Occasionally, an Authorised Officer may determine that taking a witness statement during or immediately after the visit, while on site, is appropriate (this relates only to witnesses, not those who may be person/s subject of the allegation and may be interviewed at a later date). This can only occur if it does not impact the safety, health or wellbeing of children, when the staff member is not required to meet educator to child ratios and there is an appropriate confidential space to do so. Always consider whether the educator needs to return to their work with children afterwards and if they may be upset or highly distracted. (See Chapter 7.5 for details about how to take a witness statement.)

Importantly, in a situation that is unplanned, Authorised Officers must be extra careful to ensure the witness is providing the statement voluntarily. It is critical that the process is not intimidating and, in any event, is only worthwhile if additional planning is not required. Consideration of issues such as support persons, appropriate location, impartiality, impact on the witness and the service are critical. An Authorised Officer may wish to call their Area Manager or the Investigations Unit if considering this option on site to discuss any potential issues.

If, during planning, the Authorised Officer believes that taking witness statements during the visit is likely, they should discuss with the approved provider prior to the visit (unless an unannounced visit is planned). This may be useful in situations such as where services are fairly remote or it is known that a potential witness is not going to be available at later dates. The Authorised Officer can discuss with the approved provider and determine if and how it may be possible without hindering relationships. The Authorised Officer should also be clear that even if it is planned, it will ultimately depend on all of the circumstances on the day whether it is appropriate and practicable.

Chapter 7.5 discusses Witness Statements in detail.

## 7.2 Maintaining an Investigation File

This Chapter discusses the keeping of a ‘file’ in relation to each investigation. This is critical for the Regulatory Authority’s record keeping, transparency and accountability obligations. It also allows for proper evidence management and the potential to use that evidence in court if ever required. The evidence management principles prescribed in this Chapter become most important when the Regulatory Authority is seeking enforcement action such as sanctions and prosecution. Generally, the more serious an allegation or suspected non-compliance, the greater the importance for robust evidence management.

When undertaking an investigation, Authorised Officers must maintain an accurate and up-to-date investigation file, which is simply a recording of all activity in relation to the investigation, usually in chronological order or grouped by type of activity (such as evidence, communications and planning). This should be electronic (on NQAITS) unless there are defensible reasons for hard copy files. It is important that someone else could open the NQAITS case entry, from wherever they are located in the state, and be able to understand all steps and interactions to date and have access to all communications sent and received.

NQAITS is the primary recording method for investigation files. The Case record should be used to record everything relevant to that investigation (and the case identifier should be reflected on any documents made about the investigation). Hand written notes and forms as well as general notebooks are regular investigative tools, the relevant entries simply need to be contemporaneously uploaded to NQAITS.

Good file keeping has numerous benefits including:

* helping to manage the investigation, analyse evidence and make findings,
* allowing others to take on the work, such as when staff leave;
* for preparing a case for sanction or prosecution,
* for the purposes of reviews when they are necessary,
* to meet government requirements about the recording of their work and the collection and handling of evidence and personal information.
* for the purposes of meeting information requests such as in relation to privacy, freedom of information or from Ombudsmen, ministers etc.

For all investigations, Authorised Officers should make a record of each activity or action taken in relation to the investigation. For example, the investigation plan forms part of the investigation file as do any notes of an investigation visit and letters/emails sent to any person in relation to the investigation. In addition, any phone call or in-person conversation with someone should be recorded in a simple file note (electronic or in a note book; see contemporaneous notes information below) and stored on NQAITS (file notes are explained in Chapter 4.9). Sometimes this can be most usefully done by keeping a running sheet which is a chronological list of the actions and tasks undertaken during the investigation (see the ACECQA Guide to the NQF on Record Keeping [page 565] for further information).

## 7.3 Contemporaneous Notes

Notes taken by an Authorised Officer during an investigation are very important and useful pieces of evidence and are referred to as contemporaneous notes. For example, these may be notes made by an Authorised Officer that record their recollection and understanding of meetings with individuals, telephone calls and visits to premises.

Notes should always be taken by Authorised Officers when conducting any interactions in relation to the investigation. Notes may be quite simple, for example writing down that a phone call was attempted by recording who made the call, the date, the intended recipient, the telephone number called and what message was left (if any). Notes may be much longer and more complicated, such as when conducting a site visit.

Notes are 'contemporaneous' if they are taken as reasonably close as possible to the time of the event and where possible, concurrently with that event. For example, during an investigation visit, Authorised Officers will often be taking notes as they go around the service, or, when someone calls an Authorised Officer, they may be typing notes straight into NQAITS as a record of the conversation. Other times, Authorised Officers may make notes after something has occurred, provided this is as soon as is practicable and is a genuine account of the Authorised Officers memory of events, these are still contemporaneous notes.

Contemporaneous notes are valuable records in an investigation and the original notes of Authorised Officers should always be kept and stored appropriately as part of the investigation file (which may simply be the NQAITS record of the investigation). For example, it may be necessary to attach contemporaneous notes to a witness statement of an Authorised Officer or they may be used by an Authorised Officer when providing evidence in a court such as when a witness’s memory fails but the contemporaneous note can be relied on to state what the Authorised Officer recorded at or near the time of an event.

In practice, it is often useful to always have a dedicated notebook on hand to make notes when it is not possible to record directly into NQAITS. Always transfer any notes made by hand into NQAITS as soon as possible or scan/photo/upload a copy of those notes (and reference that original notes are in the notebook). Authorised Officers should keep their dedicated notebooks for at least 2 years so that the originals can be used if ever needed in court (and longer if proceedings are underway).

Contemporaneous notes should record factual, unbiased accounts of what was done or said. When recording what another person said, always use their words where possible. Clarifying questions can be asked to ensure that the individual's account of the matter is clear. Authorised Officers should not express judgements in the notes.

Taking contemporaneous notes is excellent investigative practice primarily because it is a record made as close as possible to the event when memory is most accurate. The form the notes are made in is not the critical issue, it is the fact of making the notes and doing so contemporaneously that is important. To ensure an Authorised Officer is prepared and can also later identify or locate information, it is good practice to always carry a notebook and visit recording sheets for this purpose, or when possible, they can make notes directly into NQAITS (such as when phone calls are made/received.

When making notes, Authorised Officers should be clear about when, where and by who the notes are taken, and make sure to store their notes carefully. Usually, a copy should be uploaded to NQAITS as soon as possible, and the original can be maintained in a paper file.

## 7.4 Taking of Photographs, Film and Documents

**Photographs and filming**

Photographs and film may form part of useful evidence collection. It is often tempting to think that a photograph is the best and easiest evidence to collect. This may be the case but Authorised Officers should think about what they are trying to show and whether a photograph can really do that. Authorised Officers should use devices provided by the Regulatory Authority when taking photographs or film.

Whenever taking photographs or filming (or scans of documents) it is important that the Authorised Officer can show how and when this was done. Authorised Officers should record in their contemporaneous notes when and where the photograph was taken. It is also good practice to briefly note why it was done (such as what it is meant to show or what relevance it has).

Where a photograph is taken as evidence, an Authorised Officer should record in their notes what they consider the photograph to be demonstrating. Authorised Officers should then consider how many photographs might assist in showing this. For example, it is generally recommended that 3 photographs are useful: a close up of identifying features, a close-up to show the whole subject and a wide shot to show context. Authorised Officers can also consider whether including an object for size/scale in the photo is useful. For example, placing a ruler in the picture or an everyday object like a coin may assist in demonstrating the size of something. This won’t always be necessary, but for example if showing the height of equipment or the size of a bruise/graze/injury then it may be helpful.

Authorised Officers should limit taking photographs to only what they have decided is useful for the investigation, and any photographs not to be used (for example if blurry or not well centred on the subject, or if more than one of the same thing were accidentally taken) be immediately deleted at the time of taking them.

Authorised Officers should avoid taking photographs or film of children unnecessarily when exercising their powers. If there is a way to take the photograph or film without the child/children in it and still show what the Authorised Officer is intending to show, or collect the equivalent evidence in a different way, this is preferable. If it is determined there is no alternative and it is important evidence, Authorised Officers can reassure people (if needed) that the documents will only be used for purposes directly related to the Regulatory Authority’s functions, in accordance with the National Law and that confidentiality provisions of the National Law apply.

If a matter may result in prosecution, there may be additional evidentiary considerations in relation to photographs or film. For example, continuity of custody issues may be relevant so that it can be demonstrated that the photographs are original and have not been tampered with. See ACECQA’s Guide to the NQF on pages 570-571 for further information. Much of these issues, such as having clear policies and appropriate online storage facilities, are not directly in the control of the investigating Authorised Officer. The Authorised Officer should consult their Area Manager and the Investigations Unit in relation to potential prosecutions and always handle their evidence collection as carefully as possible (by making contemporaneous notes of what they do, following the guidance provided here and any policies of the Regulatory Authority or the Department in relation to storage of documents).

**Taking or copying documents**

Authorised Officers exercising powers of entry under the National Law may take copies of, or take extracts from, any document kept at the premises. Authorised Officers have the authority to make copies of any documents at the premises that are used or likely to be used in the provision of education and care services. Authorised Officer’s may copy any document kept at a principal office or other business premises of an approved provider.

Documents relevant to an investigation will often include attendance records, enrolment records, staff rosters, records of any accident, injury and illness book, and service policies/procedures (not necessarily every document that services have in all these categories will be required, but some of these items will be relevant for most matters). If making copies, it is ok to use equipment provided at the service as long as permission has been given by those at the service. If there is a photocopier at the service, the Authorised Officer may request the use of the copier for the purpose of their investigation.

If a photocopier is not available and a record is required, the Authorised Officer may take a photograph of the items or take the items back to the office for copying. If an Authorised Officer is considering removing any documentation from a service the Authorised Officer will need to consider the consequences of doing this, including that the documents may be needed by the service to operate in compliance with the National Law and National Regulations i.e. enrolment records. Discuss with the Investigations Unit if uncertain or having difficulties getting the documents needed for the investigation. There is a template form that can be used when taking documents from a service.

When making copies of documents, no notations should be recorded on the copy and avoid folding, stapling, perforating or attaching stickers or labels to these documents. Preserve the documents in plastic sleeves and make contemporaneous notes (on separate pieces of paper/forms or in a notebook) about what documents have been copied as detailed further below.

CCTV footage is another document that may be available at services and relevant to the investigation. Authorised Officers should always consider and inquire about CCTV footage if it may be helpful to the investigation. Having an unopened and clear USB (with nothing else on it) is good practice as the CCTV footage can be downloaded by the service and saved onto the USB if possible. Where that is not possible, Authorised Officers should view the footage and film it from their phones or other recording device as secondary evidence (as there is a chance of errors when downloading onto USB, it is useful to do this even if a copy has been obtained). CCTV footage may contain highly sensitive, personal information so a copy should only be taken if it is relevant to the investigation. Where it is relevant, care must be taken to ensure the privacy of those covered in the footage.

Importantly, Authorised Officers should record in their contemporaneous notes that they took/copied the documents (and briefly note where they did this/what equipment they used), what the documents were and how many and the date (e.g. *during the visit I took 3 photographs on my work phone of the enrolment records for today. I also viewed CCTV footage shown to me by xx in the office. As it seems relevant to the investigation I recorded the CCTV footage on my phone as well as obtaining a copy onto USB labelled xyz*). Once back at the office, Authorised Officers should attach the documents to the relevant notes and store on the file including on NQAITS if possible (or note on NQAITS where and how to access them).

**Evidence Log**

An Authorised Officer must ensure the integrity of items taken or seized as evidence under sections 197, 199, 200, 200A, 201 (search warrants), 215 or 216.

When evidence is taken it should be logged in an evidence log and recorded in the order in which it is collected and filed. All evidence gathered (including photographs, video recordings as well as any documents or other items copied or taken) can be recorded in the evidence log (template evidence log available).

Evidence should be managed to ensure that it has not been altered or tampered with. Evidence taken should be securely stored and not altered in ANY way. For example:

* keep documentary evidence in plastic sleeves and do not mark or write on them (make working copies are kept on file if it is useful for the investigation).
* store the evidence at the office in a safe place that cannot be accessed or accidentally seen by those not authorised to do so.
* Authorised Officers must ensure they know the whereabouts of the evidence at all times during the investigation.
* After the investigation is complete, check all evidence is either returned as appropriate (with copies kept) or carefully attached to the relevant file and stored in secure file storage rooms.

## Witnesses

A witness is a person who has observed something or has information about an alleged non-compliance. This does not necessarily mean they saw something happen, sometimes the fact that it was not seen is important evidence depending on the situation.

A witness is **not** a person/s who is the subject of the allegations. It is generally inappropriate to take a witness statement from someone who may have committed an offence or be responsible for identified non-compliance. Those people are persons subject of the allegation (see Chapter 8.3).

A witness may include, but is not limited to, the following people:

* The notifier or complainant who has made the notification (unless they are responsible for the alleged offence/non-compliance).
* Someone who observed the alleged incident/non-compliance (such as a staff member of the service, a relative of a child, another parent or a neighbour) or who was present but observed something different to the alleged incident/non-compliance.
* Someone who corroborates an aspect of the non-compliance (for example, a person who found a child from the education and care service in the supermarket) or someone who corroborates that non-compliance did not take place (for example an educator or parent who were present and observed something different to what was alleged).
* An expert such as a medical practitioner or a building engineer.
* Another person who has relevant information such as a police officer, or ambulance officer.

During planning, Authorised Officers will have identified potential witnesses and prioritised who to speak to in relation to their investigation. During other evidence collection steps, such as site visits and telephone calls, other witnesses may have come to light and the investigation plan updated accordingly. It is important to recognise that not all witnesses will need to provide formal statements, or even be spoken to in every investigation.

Authorised Officers will make decisions for each investigation about who to speak to, which order and where to do so, in order obtain the evidence they need to establish what occurred. Usually, the notifier or complainant will be the first person to collect detailed information from. After that, it might depend on availability as well as the likely importance of the evidence. Statements should be obtained in a timely manner to ensure that the incident is fresh in the person’s memory and to prevent witnesses discussing their observations with other witnesses and distorting their independent recollection of the incident.

Authorised Officers obtain information from witnesses simply by talking to them and where useful for the investigation, asking if they will provide their account in a statement. Sometimes only one witness account will be needed in order to be reasonably satisfied about what occurred. Other times there will be conflicting evidence, or very serious allegations that may be prosecuted, and Authorised Officers may need to gather more witness accounts in order to establish the facts of a matter and finalise the investigation.

A witness statement should not be discarded or not taken just because it does not fit with recollections of other witnesses. It should be considered along with all other evidence.

**Making Inquiries with witnesses**

Authorised Officers will gather much information and evidence through making inquiries by talking to people and making contemporaneous notes of those discussions. For example, this includes talking to the notifier or complainant, talking to staff members during an investigation visit and talking to the approved provider. Taking detailed contemporaneous notes is one of the most important skills of an Authorised Officer. Often those notes are as valuable to the investigation as a witness statement because they record the Authorised Officer’s reflections of what they heard or saw. Chapter 7.3 has detail about how to take contemporaneous notes.

Authorised Officers should remain absolutely open-minded when making inquiries and talking to people. Authorised Officers will be professional and respectful, as well as curious, in interactions so that people are more likely to be respectful and open in return. Listening carefully to people is critical. Providing information (as much as possible without compromising investigations), working in a timely manner and keeping people updated are also important ways to interact with witnesses and ensure that they maximise the person’s likelihood to provide information.

It’s crucial to remember that in some cases Authorised Officers will be talking to people who are distressed and who may have already told their story numerous times. For example, they may have lost their job or be worried about what happened to their child. It is to be expected that they may be feeling frustrated, upset and/or angry and therefore may come across as difficult or even rude. Authorised Officers should seek to remain empathetic and avoid trying to gather information from someone who, at that time, is particularly upset or angry. If possible, take a few minutes to listen, be clear about your purpose and role, and determine if it is better to re-contact the person at a later time.

Cultural differences are also highly relevant during an Authorised Officer’s interactions. Providing a culturally safe environment and approach is vital in an Authorised Officer’s work. Be prepared, be clear about what you are asking and be sure you can explain clearly and simply what you are there for. Always be respectful, try to be aware of your own biases and consider respectfully checking if there is anything that would assist the person to talk to you (such as an interpreter, a quiet place or a phone call later when they are away from work/home etc.).

In all cases, detailed contemporaneous notes should be made when talking to witnesses or potential witnesses.

**Witness Statements – Introduction**

A witness statement is a signed, written account by a person who can provide relevant information about matters which are subject to an investigation.

Obtaining a statement is the process of working with the person to produce a document that tells their version of events, as relevant to the investigation, in their own words. Providing a statement gives witnesses an opportunity to have their say about the matter being investigated. The information gained may either support, refute or be inconclusive about the alleged non-compliance.

Authorised Officer’s should only take a witness statement if they reasonably believe doing so has evidentiary value. This will usually mean that the person was a direct witness, was present when an incident allegedly occurred or has other relevant knowledge to assist the investigation.

Authorised Officers should also consider if, for the purposes of the investigation at hand, they have sufficiently recorded the person’s account in contemporaneous notes from previous discussions with the person. If the contemporaneous notes contain what is relevant to the investigation, it may not be necessary to obtain a witness statement at all. This decision will be case by case and influenced by factors such as the seriousness of the matter and the likely outcome or action from the Regulatory Authority.

In some circumstances it may be useful to have statements from people who did not witness the incident as such evidence may indicate a lack of supervision or too few staff members or may be evidence that the incident did not occur; in any event it ensures a person’s account of events is established from an early date.

**Witness statements - Planning**

Witness statements will sometimes be arranged for the future, at a time convenient to the person but as soon as practicable. Authorised Officers should determine an appropriate place to take the statement, in consultation with the witness, and consider locations that are most likely to support the witness in being open and completely independent. Critically, Authorised Officers must assess whether taking a statement is appropriate and safe before proceeding.

Where a witness statement is being sought, the Authorised Officer will usually first telephone or talk with a witness and may send correspondence to the witness inviting them to make a formal statement (template available). In some cases, the service may be an appropriate location to take a witness statement but this must be carefully considered by the Authorised Officer at the time. Do not take statements at the service if this may limit what is said, leave children unattended or the service operating in non-compliance of the child-educator ratio, or be otherwise inappropriate.

Authorised Officers should also plan what they are hoping to know from the witness. For example, why is a statement being sought from that person and are there any specific questions that would be helpful to know the person’s account of? It is not necessarily helpful to have a long list of questions as the Authorised Officer is seeking to gain the witnesses account of things. Once the witness has provided this account it is likely that the Authorised Officer will have specific questions or points to clarify based on what the witness has said. There is a template that can be used for taking a witness statement. Prior to taking a statement, Authorised Officers should review the template and amend it to fit the matter as necessary.

Witness statements can usually be adequately taken by one Authorised Officer. The Authorised Officer may decide to have a second officer with them to take notes or support them if the circumstances require. Witness statements should be in written form (preferably typed) rather than taped, except in very complex matters involving a large number of allegations or in other extenuating circumstances.

A witness statement should be taken face to face if possible. Consider other options such as video or teleconference if face to face is not practicable. Sometimes telephone calls are used but the limitations of this should always be considered. For example, if you can’t see who the person is with and you have any doubts about the person’s account being independent it may be sensible to find a polite way to bring the discussion to a close and attempt to arrange an alternate setting or time – this is not always easy to assess and Authorised Officers should record in their notes any concerns they have and why (without any judgements, bias or assumptions) and proceed as best they see fit based on all the circumstances they are faced with.

In some instances, it may be necessary to take more than one statement from a witness should further relevant information come to light at a later stage. When this may occur it is often worth seeking further guidance about how to do this effectively if there is any possibility of it raising questions about the witnesses account.

**Interpreters**

Always respectfully check if someone needs an interpreter where English may not be the person’s first language. If interpreters are utilised when taking a witness statement from a witness, the interpreter must certify they are giving ‘true and correct’ information that has been supplied by the witness. The interpreter's name and position should be recorded in the witness statement. Interpreters can be obtained through the [Translating and Interpreting Service (TIS) National](https://www.tisnational.gov.au/): or the [VITS Language Link](http://www.vits.com.au/). The interpreters should be of NAATI Level 3 as a minimum.

**Taking a witness statement**

Witness statements are taken from witnesses voluntarily. If an Authorised Officer is concerned that someone is not talking to them voluntarily, for example someone else is pressuring them or the person feels pressured in some way, the Authorised Officer can discuss and check with the person if they are comfortable to continue to provide a statement or even decide to simply cease the process politely and then contact the person at a later time.

Witnesses who are officers authorised under other legislation, such as Police Officers, may provide their own written statement provided it is formally notated, signed and dated by the witness. However, provision of a written statement in those circumstances does not preclude the Authorised Officer from requesting further information from the witness (further information about using evidence collected by others is available in Chapter 5.5).

Witnesses need to always be given time to read and review their statement before being asked to sign it. This should be done as soon as possible after the statement is taken. The witness may make amendments or correct information electronically or by hand on the statement. Any written correction must be initialled by the witness and the Authorised Officer. The witness should be asked to confirm that the statement is correct and sign the bottom of each page and at the end of the statement. The witness has the right to choose not to sign their statement.

Statements do not have to be finalised at the time of taking the statement, they can be emailed to witnesses later for checking and then arrangements made for signing. This may be particularly appropriate in the case of long or complex statements.

**Role of a support person**

When providing a witness statement, the witness may be accompanied by a support person.
A support person can be anyone, for example an employee representative, a legal representative, a friend or family member as long as they are independent of the investigation.

The support person cannot be:

* another witness to the non-compliance, as this may affect the integrity of the evidence given by both witnesses; or
* a person who is the subject of the allegation, as it may compromise the investigation and evidence collected. There is also often a conflict of interest involved.

The approved provider (or their representative) of the education and care service is generally not an appropriate support person as they are usually responsible for any non-compliance. There may also be arguments that they are biased or have a conflict of interest by virtue of the employer-employee relationship. There may be some limited circumstances where the support person may be a representative of the approved provider but it is critical that the witness wants this person to support them and that the person is not otherwise part of the investigation.

It is important to clarify the role of the support person at the commencement of taking the statement to ensure everyone is clear about expectations. The support person is not there to answer questions or become involved in the statement because it is critical that the information is genuinely the own account of the witness. Understandably, people sometimes become emotional and may interrupt or interfere, Authorised Officers use their judgement to ensure the witness is providing their own account and is not being influenced by others. Consider taking a break, reminding the witness of the purpose of the statement and the need for independence, and even postpone things if it becomes impossible to get a useful witness statement.

**Content of witness statements**

When taking a witness statement it is common for the witness to talk a lot and possibly about irrelevant things for the purposes of the investigation. Sometimes it may be the first time anyone has really listened to their version of events. It is important to let them talk and actively listen. However, at times it can be helpful to re-focus the witness and keep them on track. It is not necessary to record everything a witness says verbatim. Listen and then ask questions to clarify or elaborate on the matters of relevance to the investigation.

Recording the statement does not mean writing down everything that was said. The statement needs to make sense, be readable and clear. Taking a good statement involves recording the relevant information (and arranging in chronological order during or straight after) and in a way that makes it easy to understand. Subheadings and numbering of paragraphs can be useful to make them easier to read. A witness statement must be in the witnesses own words however, it does not need to record everything the witness says where it is irrelevant. The statement should use the witnesses terminology (such as the words/name/description they use to refer to their manager or what they call the child when talking to you, such as a nickname; but clarify who this is after they’ve given their account and include a reference to this at the end of the statement if it is not clear). The witness will be able to read and review the statement before signing.

Details of the witness should be included at the start of the witness statement such as:

* name of the witness;
* employment and residential address (usually only the one relevant to the statement is needed);
* occupation;
* place of employment;
* qualifications; and
* if the witness is an employee of an education and care service, record their actual position (e.g. approved provider, nominated supervisor, person in day-to-day charge etc.) and their length of employment.

The content of the statement will include:

* the witness’s account of the relevant events (presented as a narrative of what occurred);
* paragraphs numbered;
* content in chronological order (even if that isn’t the way it was said at the time);
* witness’s own words (referred to in the first person);
* the witness’s explanation of slang terms/abbreviations etc, for example if a witness says “went for a sixer”: ask witness to explain (usually done after the account has been given) what this meant and record their explanation such as: “When I said John went for a sixer, I meant John fell over.”

When reading a completed statement, someone who is completely unfamiliar with the service/people involved/investigation/incident should be able to establish:

* where and when the incident/events occurred;
* who was involved;
* what each persons’ role and context to the statement is (i.e. how they fit in such as “*Sally – one of the other educators at the service…*”);
* what each person said and did;
* what was the outcome of the incident/events;
* the order that each of the events took place **as witnessed by that person.**

Ultimately, every statement should tell a story from start to finish that is logical and totally comprehensible to the reader to identify what happened as perceived by that witness.

Taking statements is not an overly complicated task or one that requires special qualifications, all Authorised Officers can take useful statements. However, it can take practice and doesn’t always come naturally to everyone; seek support from your manager, work with/support/observe others who are good at this task, consult the Investigations Unit and utilise training (including reading well taken statements by colleagues) whenever helpful.

**Witness refusing to provide statement**

If a witness refuses to provide a statement and it is believed they can provide key evidence, powers such as under section 215 of the National Law can be considered. See Appendix C for details about the delegates powers of compulsion.

**Children as a Witness**

In some circumstances it may be appropriate to make inquiries with and even take a statement from a child. Particularly school aged children, and even pre-school children, should be considered depending on the circumstances and the child. It will often be important to allow a child an opportunity to tell their story, provided they are appropriately supported and always being mindful not to cause additional trauma or unnecessarily go over events they’ve already recounted to Police or as part of Reportable Conduct investigation.

Before talking with a child, preparation is critical and it may be helpful to liaise with the Investigations Unit. Discussions and statements with children will be only undertaken:

* where parent/guardian permission is given prior to the interview taking place;
* where it has been well planned and determined not to be a further trauma to the child;
* in the presence of a parent or guardian (or, where not appropriate such as if the parent is also a witness, or if a parent is not available, an independent adult);
* by a person with appropriate experience or expertise.

Unless specifically required as part of a prosecution, the process for taking a statement from a child is quite informal. Use a location that is comfortable for the child and has any necessary facilities available; the child’s home is often an appropriate location but careful thought needs to be given to this issue. It will generally involve a recorded conversation between the Authorised Officer and the child about what occurred.

Investigation training material provides further information and guidance about this topic and the Investigations Unit can also assist. There is helpful information about taking statements from children available from the Commission for Children and Young People website.

## 7.6 Understanding Cautions

On occasion, Authorised Officers may be in situations where someone (such as a witness) tells them something which the Authorised Officer reasonably believes may constitute an offence under the National Law or National Regulations (or the Children’s Services Act or Regulations). This could happen at any time when Authorised Officers are talking to people in the course of their duties.

In those situations, an Authorised Officer should pause the person and caution them. This simply means asking the person to stop for a moment and explain that:

* they have just said something that may be an offence under the National Law or National Regulations (or Children’s Services Act or Regulations if relevant); and
* anything they say or do may be used as evidence regarding that offence.

The Authorised Officer should ask if the person understands before proceeding. If the person does not understand then do not proceed to collect information from that person.

The reason for doing this is to be procedurally fair to the person; so that they are aware that what they say is voluntary and may result in adverse findings or action against them and to affirm their rights against self-incrimination. To issue a caution, the Authorised Officer needs to have formed the reasonable belief that an offence may have occurred based on what the person has said. In many instances, unless talking to an approved provider or nominated supervisor, there are not very many offences that can be personally committed by an individual. Unless the person can be held accountable for the offence (such as inappropriate discipline or providing false and misleading information to the Regulatory Authority), no caution is necessary.

There is also the potential for the Regulatory Authority to sanction an individual, such as prohibit them, for very serious actions that pose unacceptable risk of harm to a child. Therefore, a person, such as an educator, who told an Authorised Officer about highly concerning actions they have personally taken that could be a serious risk to a child, should also be cautioned.

Additionally, Authorised Officers may not realise or form a view about their being a potential offence until afterwards. It is only once that view has been formed that a caution needs to be given. This is why a caution is given at the start of an interview with a person/s subject of the allegation; the Authorised Officer has formed a reasonable view that the person may have committed an offence under the National Law or National Regulations (or Children’s Services Act or Regulations).

Other than a planned caution prior to an interview, issuing cautions is not something that will occur very often. It is just something for Authorised Officers to know about and to understand what to do if needed. If ever unsure, it is ok to cease a conversation and seek guidance. Like all activities of an Authorised Officer, the important thing is to act in good faith and with reference to the Regulatory Standards set out in Chapter 2. Seek advice or training from the Area Manager or the Investigations Unit whenever helpful.

# FINAL INVESTIGATIVE STEPS

## 8.1 Analysing the Evidence & the Balance of Probabilities

Analysing the evidence collected is an important step that will likely occur more than once in an investigation. This process allows an Authorised Officer to determine if they have enough evidence to make findings about the matter. Once findings can be made, no further evidence collection should occur except if interviews of the person/s subject of the allegation need to occur (interviews are explained at Chapter 8.3).

An analysis of the evidence should always occur prior to seeking a response from person/s subject of the allegation (including an approved provider), and again at the conclusion of an investigation. The Authorised Officer needs to determine whether or not they are satisfied on the balance of probabilities (explained below) about what occurred and whether the evidence supports non-compliance with the National Law.

If the Authorised Officer analyses the evidence and determines there has not been non-compliance, then there is no need to seek a response from the person/s subject of the allegation (i.e. no need to interview anyone nor use provisional findings letter because there are no decisions being made that adversely impact anyone). In those cases, the Authorised Officer is satisfied, on the balance of probabilities, that non-compliance did not occur in relation to the alleged matters/incidents and therefore no further evidence collection is required. Whereas, if the evidence collected to date supports a finding that non-compliance occurred, the person/s subject of the allegation must have an opportunity to respond and for their response to be taken into account before final determinations about the matter are made.

It is important to note that whilst the balance of probabilities is the standard of proof required by an Authorised Officer when making determinations about a matter, there is a higher standard that is applicable in relation to criminal proceedings.

**Suggested steps when analysing evidence**

1. **Review evidence**
* Has the incident been witnessed and by who (or has something else been witnessed)?
* Has the allegation been corroborated?
* Should some witness accounts be weighted differently and why?
* Have other potential witnesses been identified/referred to in statements (it is useful to identify these as potential future sources of inquiry however they may not need to be spoken to if the outcome of this analysis is that the Authorised Officer is satisfied, on the balance of probabilities, about what occurred)?
1. **Review relevant provisions of the National Law or National Regulations**

The purpose is to confirm that evidence has been gathered, or attempted to be gathered, to satisfy all elements of the alleged non-compliance (Chapter 8.2 explains ‘elements’). In some instances, it can be helpful for an Authorised Officer without direct involvement in the investigation to review the evidence to identify gaps (especially with serious matters).

1. **Is there sufficient evidence to support or refute the allegation/s?**

The Authorised Officer must bear in mind the purpose behind the investigation: to be satisfied on the balance of probabilities (explained below) as to whether or not the alleged non-compliance occurred.

1. **Are there gaps in the evidence/missing evidence?**
* Does additional evidence need to be collected?
* Is another visit to the service required?
* Are follow-up interviews with the approved provider and/or any other person required?
* Are additional statements from other witnesses required?
1. **Have new allegations emerged?**

New allegations might be adequately addressed in the current investigation or may require a new investigation depending on what it is and when it comes to light. This is different to non-compliance identified during a visit which can be communicated as non-compliances in the visit findings.

1. **Have the person/s subject of the allegation had opportunity to respond?**

This is a critical procedural fairness step and always necessary if the evidence analysis finds that substantiated findings are likely. See Chapter 8.3 for details.

**The balance of probabilities**

There are two different standards of proof, the civil standard which is ‘on the balance of probabilities’ and the criminal standard which is ‘beyond reasonable doubt’. When making determinations about investigations under the National Law or the Children’s Services Act, Authorised Officers determine if they are *satisfied on the balance of probabilities* about what occurred. This is a determination about whether it is more likely than not that the alleged matter/s occurred, or in other words, that it is probable. It is a lower standard of proof than ‘beyond reasonable doubt’ which is required in criminal matters.

The principles of the Briginshaw case are also relevant in that ‘the more serious the allegation and the gravity of a substantiated finding, the more comfortably satisfied on the evidence the Authorised Officer should be before making a substantiated finding’.[[6]](#footnote-7) This is not a third standard of proof but it is important to be aware of when dealing with serious allegations.

Making a determination on the balance of probabilities is not always straight-forward. A thorough analysis of the available evidence will assist an Authorised Officer to make such a determination. It may involve comparing conflicting versions of events and deciding which version is more probable based on the evidence. This does not require a mathematical assessment of probabilities.

When assessing evidence, an Authorised Officer may need to evaluate the strength or weight of the various evidence. The more weight that can be placed on a piece of evidence, the more persuasive it is. Determining the strength of the evidence may be assisted by considering:

How reliable is the evidence?

Is there another piece of evidence that supports or contradicts the evidence in question?

How plausible is the evidence in all of the circumstances?

What is the source of the evidence? Is it objective, such as CCTV footage, or is it just a rumour?

Do relevant witnesses give consistent accounts?

Was the person who is the subject of the allegation given an opportunity to comment on the evidence and were they given an opportunity to be heard?

Another way to think about it is to try and determine if one version of events is more plausible than the other/s and backed by evidence (not hunches or rumours). Ultimately, an Authorised Officer should be persuaded by the evidence in order to make their finding.

## Developing ‘Allegations’

If the analysis of the evidence has identified that there is sufficient evidence to suggest that non-compliance may be substantiated and a formal response from those responsible is required, the Authorised Officer will need to refine the scope of the investigation by developing formal allegations that can be put to the person/s subject of allegation.

In order to develop the allegations, the Authorised Officer needs to have narrowed down the specific sections or regulations that appear not to have been complied with based on the evidence analysis. These will usually be suspected ‘offences’ because they relate to penalty provisions under the National Law (see Chapter 6.2 for a definition of offences).

**Elements & Particulars**

Offences are comprised of elements (also referred to as points of proof). Each element must be proven (to the required standard) in order to substantiate an offence. The required standard will usually be the balance of probabilities as outlined above.

In order to draft an allegation, Authorised Officers need to break down offences into their elements. The purpose of this is to identify what is required to be proven to substantiate the offence. Once this is done, the Authorised Officer can identify the relevant evidence required to support the substantiation of the offence.

**Example – Offence of inadequate supervision**

*S 165 - The approved provider of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.*

*Penalty: $10,000 in the case of an individual*

 *$50,000 in any other case*

The elements of the offence are:

* approved provider
* education and care service
* child/children being educated and cared for by the service
* child/children not adequately supervised.

As well as specific elements which must be proven, all offences are characterised by particulars which are unique to each offence. Particulars include:

* Date of the offence - In circumstances where the date of an incident is unknown, the allegation can be framed as ‘between dates’ based on the best evidence of dates that is available (avoid using ‘unknown date’ wherever possible).
* How the offence occurred – the actions that create the offence
* People (children/educators etc) involved in the offence.

Specific particulars of the offence are not required to be proven; however **basic** particulars of the offence are included in the allegation to provide context. Drafting an allegation is simply integrating the details of the specific notification with the elements and particulars of the offence. It is not good practice to include any factors that are not elements or relevant particulars of an offence when framing an allegation. Each and every detail of an incident does not need to be included in the allegation. The allegation simply needs enough detail to sustain the elements of the offence. The detail and evidence that is gathered in respect of how the incident occurred is evidence supporting the substantiation of the allegation.

**Scenario/Example**

*On 1 February 2020 a child, Jack Harris (DOB: 3/4/16) was attending Happy Kids Early Learning Centre, 123 Smith Street Collingwood when he placed a milk crate next to a water tank that was situated near a boundary fence and was able to climb over the fence. He was not seen by the two staff members who were in the playground supervising the 16 children. He was last seen at 10.20 am when a head count was conducted on leaving the four year old room and entering the playground. He was returned to the service at 10.50 am by a member of the public who said that he had to brake and swerve his car to avoid hitting Jack who was running across a busy road and into the car park of a supermarket.*

The allegation of *inadequate supervision* for the above scenario would read as:

It is alleged that on *1 February 2020*, **XX Pty Ltd**, the approved provider of **Happy Kids Early Learning Centre**, *123 Smith Street Collingwood* failed to adequately supervise ***Jack Harris***, a **child being educated and cared for by the service** in that Jack Harris left the service by ***climbing a boundary fence* and *being absent for approximately thirty minutes* without staff being aware of his absence,** which is contrary to section 165(1) of the National Law.

In the above allegation, the elements of the offence are in bold and the particulars of the offence are italicised. Some areas of the allegation are both elements and particulars. Note that there is no information in respect of the fact the child was brought back to the service by an unknown person, how the child was able to climb the fence and what he did when he left. Evidence of what he did to help him climb the fence **is evidence that supports** the allegation of inadequate supervision and evidence of what occurred later is not relevant to the offence. It may however be relevant to a further offence in respect of harm and hazard. The time that the incident occurred is not necessary in the framing of this allegation.

The allegation must relate to the **incident** that occurred and whether that is an offence - not what somebody said. For instance, an allegation cannot be framed to state that *‘the child told his mother that educator “Sally” had smacked him on the left leg’.*

A child telling their parent (or anyone) that an incident occurred is not an offence against the National Law. This is information/evidence that may support an allegation of inappropriate discipline. In this circumstance, the disclosure could be used as supporting evidence in the substantiation of the allegation, but it is not the allegation itself. The allegation is that the educator “Sally” subjected the child to inappropriate discipline in that she smacked him.

The allegations should be worded to cover all elements of the offence and sufficient particulars for the person subject of the allegation to respond to the allegation. When framing allegations, it is only necessary to include sufficient information to cover the elements of that specific offence and the relevant particulars. Avoid extraneous information such as “slapped with a right hand on the left leg” as this may be incorrect and therefore impossible to prove, even though it can be established that the educator slapped the child. Similarly, generally do not include specific times within allegations unless it is an element or particular of the offence – instead provide approximate times and obtain supporting evidence around these times. Further sample allegations are provided below:

* **Section 167 – National Law**

It is alleged that on 1 April 2013, XYZ Childcare Pty Ltd, the approved provider of XYZ Childcare Centre, 1 XYZ Street XYZ did not ensure that every reasonable precaution was taken to protect Sally South, a child being educated and cared for by the service from harm and from any hazard likely to cause injury, in that Sally South left the service for a period of approximately ten minutes without the educator’s knowledge, exposing her to a busy road and members of the public, until she was returned to the service by a parent, which is contrary to section 167(1) of the National Law.

* **Section 166 (1) – National Law**

It is alleged that on 1 April 2013, XYZ Childcare Pty Ltd, the approved provider of XYZ Childcare Centre, 1 XYZ Street XYZ did not ensure that Sally South, a child being educated and cared for by the service was not subjected to any discipline that was not unreasonable in the circumstances in that educator Jane Smith grabbed Sally South by the arm and squeezed it after Sally South had taken a toy from another child, which is contrary to section 166(1) of the National Law.

* **Section 166 (3) – National Law**

It is alleged that on 1 April 2013, Jane Smith, a staff member of XYZ Childcare Centre, 1 XYZ Street XYZ did not ensure that Sally South, a child being educated and cared for by the service was not subjected to any discipline that was not unreasonable in the circumstances in that she grabbed Sally South by the arm and squeezed it after Sally South had taken a toy from another child, which is contrary to section 166(1) of the National Law.

## Providing An Opportunity to Respond To Allegations

Person/s subject of the allegation need to have an opportunity to understand and respond to allegations against them. This is the case even if the person has responded to allegations related to the same incident/s under other legislation. The Regulatory Authority is specifically investigating matters under the National Law and National Regulations and if there may be findings made against the person, that person must be informed of this and given the right to be heard about those matters as they apply under the National Law.

The person/s subject of the allegation are those who the National Law or National Regulations specify as obligated to do something that has allegedly not occurred. In other words, these are persons who are suspected of having committed non-compliance or are responsible for non-compliance. It is important to note that ‘person’ is defined by the National Law and includes an individual, body corporate, eligible association, partnership or prescribed entity. This means that a person/s subject of the allegation can be a company, such as where a company holds a provider approval.

The person/s subject of the allegation may include:

* the approved provider (as represented by the person with management or control if the approved provider is not a natural person); and/or
* anyone else who the National Law or National Regulations names as responsible for that section or regulation which has allegedly not been complied with. This might include a nominated supervisor or a staff member (such as an educator) or a family day care educator. Documents titled INV04 and INV05 list the offences and those who can be held responsible.

**Who is required to be interviewed?**

Person/s who are the subject of the allegation and **may have findings made against them** must be given the opportunity to respond to the allegations. For serious matters, and always in relation to potential prosecutions, this is done by interview (the person is invited to attend an interview for the purpose of responding to the allegations; if they decline this is up to them and no further opportunity needs to be provided unless there are special reasons to do so).

In some cases, a response to the allegations could be sought formally in writing (this does not mean sending a list of questions to respond to, but providing a description of the allegation/s and seeking their account/response in writing). Another alternative, especially in less serious matters, may be to issue an Investigation Provisional Findings Letter which sets out the provisional findings of the investigation and provides an opportunity to respond.

Following receipt of any written responses in the timeline specified, Authorised Officers can contact the person to clarify matters if important to do so, but this should be done with caution and in consultation with the Area Manager (and Investigations Unit if helpful). The critical issue is always to assess whether the person has genuinely been provided procedural fairness by the Regulatory Authority (and the importance of this is increased where sanctions or prosecution may be used as a result of the findings).

If the person/s subject of the allegation include individuals who are not the approved provider, the Authorised Officer must also ensure those person/s are provided an opportunity to respond (such as by inviting for interview in addition to, but separately from, the approved provider or writing to the person).

Interviews are usually conducted after all other evidence has been collected. This enables the Authorised Officer to present all allegations and relevant evidence and provides the person with an opportunity to put forward their version of what occurred and why it occurred. This is critical for procedural fairness so that decisions are not made without the person having the opportunity to understand and respond to the allegations against them**.**

**Request to attend interview**

Where a person is to be invited to an interview this should be, in the first instance, requested in person or via telephone.

This discussion should be followed up in writing (email or letter) and you may wish to include the information sheet regarding interview process (template letters and guidance are available – see INV26 and INV27C for example). The person should be informed of their right to have a support person/legal practitioner with them if they wish and that they will be given a copy of the recorded interview afterwards.

It’s important that the Regulatory Authority is specifically providing the person subject of the allegation with the opportunity to respond. Sometimes, such as with large approved providers, this can be tricky if they wish to send someone to an interview on their behalf. As outlined previously, where an approved provider is not a natural person (such as where they are a company), a person with management or control can represent the approved provider. There may also be other situations where a person subject of the allegation can legitimately delegate someone to represent them at interview. It is absolutely critical that the person subject of the allegation understands what they are doing and what it means if they do delegate this responsibility.

It is also important to remember that it is up to us to determine if it is appropriate and worthwhile to go ahead with the interview; if interviewing the delegated individual may not be ensuring that procedural fairness has been given to the actual person/entity who will be held responsible for the offence/s then there is probably no point going ahead (although consider if taking a statement from that individual may be worthwhile and/or whether they too are another person subject of the allegation who could be interviewed about their responsibilities). Context will always be important in weighing up these issues, for example the seriousness and likely outcome may influence the decision and always seek guidance if unsure as such issues can be tricky to determine.

If a person refuses to attend an interview, the Regulatory Authority may consider whether there are grounds to compel that person under section 215 (see Appendix C and consult the Monitoring and Compliance Unit or Investigations Unit as this would require careful planning and oversight). In some cases, after a refusal to attend an interview is received, the Regulatory Authority may accept a written response from the person (this is not a ‘question and answer’ document but a response to the specific allegations). The person subject of the allegation should be made aware that findings will be made based on the available evidence and the interview offer (or other options if provided) is their chance to put forward their response/input before findings are made.

If a request for interview has been made and the person refuses to attend, then procedural fairness may have been afforded (provided there have been genuine attempts to invite the person, sufficient time for them to respond and consideration of any relevant personal circumstances effecting the person). This can be a contentious and important issue; if ever unsure consult Area Manager or the Investigations Unit.

**Preparing for an interview**

Authorised Officers should prepare for an interview by:

* being familiar with the provisions of the National Law and National Regulations that may not have been complied with, and **all** elements of the offence (these will all need to be addressed in the interview);
* completing an interview plan/template to ensure the interview is conducted in a professional manner, covering all relevant areas of inquiry (e.g. matters requiring clarification, missing information, issues on which the Authorised Officer would like the person to provide comment, exhibits to be shown); and
* preparing notes of the evidence collected to date and ensuring all relevant evidence is available for the interviewer and person being interviewed, if required. This also involves providing any documents/exhibits to be shown/discussed at interview to the person prior to the interview taking place – see below for further information on how to do this. Authorised officers should prepare questions that **encourage** the person being interviewed to provide as much information as they can about the matter under investigation.

If the Authorised Officer plans to show and discuss documents during the interview, the person should be provided opportunity to review those documents **before** the interview and be advised that they will be discussed during the interview. This would usually be done by providing the documents with the request to interview letter or in response to their confirmation of attendance (and with sufficient time to consider them prior to the interview). Providing the documents prior to interview is procedurally fair; it avoids allegation of unfairness or that the person was ‘ambushed’ at the interview and allows time for legal counsel to be sought if the person wishes.

**Conducting the interview**

Where interviews are conducted, they should be audio recorded and a copy for the file as well as a copy for the interviewee should be made.

Build rapport with the person to be interviewed. This is very important because it can influence the quality of information that is obtained. If the person being interviewed feels nervous or defensive, this will have a significant impact on the information an Authorised Officer is able to elicit. Building rapport begins with the Authorised Officer's first discussion with the person being interviewed – this is often the telephone call inviting them for the interview.

Building rapport involves:

* adopting a polite, professional, calm and non-confrontational manner;
* introducing yourself, explaining your role as an Authorised Officer and how the interview will be conducted;
* making sure the person is physically comfortable, for example:
* for interviews conducted in person: providing water; access to bathroom facilities; ensuring the room is sufficiently comfortable and fit for the purpose; if the interview continues for longer than half an hour, providing the person with an opportunity to take a break and a confidential space for them to use for breaks or when talking with their support person or legal representative (this may be the interview room when the Authorised Officer/s is not present);
* for interviews conducted over the phone: ensuring that it is a good phone line; if the interview continues for longer than half an hour, providing the person with an opportunity to take a break and offering the opportunity to talk privately with support person or legal representative whenever needed.

It is very important that Authorised Officers use **neutral language**. Neutral language is language that does not convey a judgement or value. For example, a question such as: '*Have your premises always been so filthy*?' is highly subjective. Such questions communicate a viewpoint and may lose the confidence of the person being questioned. It may appear as though the Authorised Officer has formed a view already and has not performed their duties in an impartial manner. Suitable questions might be: *'Can you tell me about the cleaning arrangements for your premises?*', ‘*How do you know if your premises need cleaning?’, or ‘Do you have a policy or process for staff to monitor the premises cleanliness?’*

It’s important to remember that the interview is not an interrogation. The Authorised Officer should be professional and polite, and remain impassive throughout the interview, putting aside any personal feelings or views they have formed in order to always remain objective. If the person being interviewed believes that the Authorised Officer has already made up their mind about the matter, the interview is unlikely to be constructive. It may also give rise to the person forming the view that the Authorised Officer is biased and that he or she has not received a fair hearing as a result.

It is good practice to have a corroborating officer take detailed notes during the interview as outlined below.

Lead interviewer (Authorised Officer)

The lead interviewer’s role generally is to ask the majority of the questions and manage the progress of the interview, including:

* Explaining the reasons for the interview and the format of the interview.
* Advising of the intention to record the interview.
* If the person is on their own, reminding them of their right to a support person/legal practitioner.
* Issuing a **caution** (it is essential to verify that the person has understood the caution, where the person has English as a second language, an interpreter may be required) (see interview template for caution wording).
* Reminding the person they will receive a copy of the recording of the interview at the end of the interview or shortly thereafter.
* Ensuring that any exhibits which are to be shown to the interviewee are placed in the interview room in readiness for the interview (as noted above, the person should already have seen these and be aware that they will be discussed in the interview).

Corroborator (Authorised Officer or Departmental officer)

The corroborator’s role is generally to:

* Manage and operate recording equipment.
* Assist with building rapport with the people in the room.
* Take notes in the form of a synopsis including noting start and finish times and times of all suspensions and resumptions of the interview.
* Manage and maintain continuity of exhibits. This will include noting the exhibit number of all exhibits shown to the key person during the course of the interview.
* Monitor interview questions, taking into consideration the elements of the non-compliance or offence, and ensure that any elements not covered or addressed are brought to the attention of the interviewer. This should be done in a discreet and professional manner.
* Monitor the need for breaks and the comfort of the room.
* General support for the lead interviewer.

Support person/legal representative

Any person interviewed in an investigation must be fully informed of their rights, including the right to be supported in the interview by a legal representative or support person (this should be done during the invitation stage as noted above). If the person chooses not to have a support person or legal representative present, this should be noted on the recording at the commencement of the interview.

The legal representative can advise the person before and during the interview. Any confidential conversation between the legal representative and their client is protected by legal professional privilege. The support person or legal representative cannot answer questions. The legal representative can advise the interviewee not to answer certain questions.

If the support person or legal representative interjects in other ways, the Authorised Officer should politely but firmly remind the support person of the boundaries (i.e. they are not to actively participate in the interview). One way to diffuse a situation is to offer the person being interviewed the opportunity to speak privately with their support person/legal representative. However, if the Authorised Officer is unable to conduct the interview appropriately due to support person/legal representative interference, the interview may need to be terminated.

**Concluding the interview**

At the conclusion of an interview the Authorised Officer should usually:

* Provide a copy of the interview to the person being interviewed. Usually this is done immediately after the interview but there may be occasions when this is not appropriate, e.g. where there are multiple interviews and therefore a need to prevent collusion.
* Explain what will happen next and how this will be communicated.
* Explain that recommendations based on the findings of the investigation will be made to the Delegate for a decision to be made about the outcome of the investigation. This advice will be communicated to them as soon as appropriate. Follow up on any additional information obtained in the interview as soon as possible after the interview.

## Authorised Officer Statements

Where enforcement action is likely, Authorised Officers and Regulatory Authority staff involved in an investigation may need to prepare a statement detailing their involvement in the investigation and the evidence they gathered. This is particularly important where the available evidence is substantially based on observations of an Authorised Officer and/or Regulatory Authority staff member. The physical evidence gathered (e.g. photographs, plans, manuals, documents) may be attached to the statement/s. The Investigations Unit or Monitoring and Compliance Unit will assist with making these statements.

Authorised Officers should take detailed, contemporaneous notes from the beginning of the investigation (see Chapter 7.3 for information about taking contemporaneous notes). The Authorised Officer statement will include a chronology of the investigation and can remain as an open document to be added to throughout the investigation. All details of the statement must be relevant to the investigation issues. Notes maintained during the course of the investigation inform the statement and may include:

* what steps were taken;
* what the Authorised Officer observed;
* who the Authorised Officer spoke to and when;
* what statements were taken; and
* what evidence and/or exhibits were collected.

The statement should be written in the first person and should be an accurate and complete account of all steps undertaken by the Authorised Officer throughout the investigation. At the conclusion of the investigation, the Authorised Officer statement should be signed and dated.
A template Authorised Officer statement is available.

# 9. FINALISING AN INVESTIGATION

## 9.1 When and How to finalise an investigation

An Authorised Officer must finalise an investigation (and in some circumstances refer the matter to the Delegate for recommended further action) once they have reached the point where they:

* are satisfied on the balance of probabilities**,** based on the evidence collected, and can make a finding that the alleged non-compliance is substantiated or unsubstantiated; **or**
* have exercised powers and functions appropriate to the priority and nature of the matter and cannot conclude whether or not the alleged non-compliance occurred.

Evidence gathering should not continue once the Authorised Officer can be satisfied about what occurred, provided procedural fairness is afforded. In other words, Authorised Officers may only need to collect a few key pieces of evidence if there are clear, undisputed allegations, but must always put the allegations to a person if there is a chance of adverse findings against them.

If an Authorised Officer is having difficulty deciding whether the investigation should continue or should be concluded they should discuss with their Area Manager (conducting regular investigation case conferences with the Area Manager throughout investigations is good practice in any event). Complex issues that cannot be resolved with the Area Manager may be consulted with the Investigations Unit.

Authorised officers should ensure their investigation files and NQAITS are organised and up-to-date. Documents should be filed in the correct places, and in date order. An analysis of the evidence (as outlined in Chapter 8.1) needs to have taken place and determinations drawn. This should be recorded in a decision note stored on file or in an investigation findings memorandum.

**Recording the decision about the outcome of the investigation**

If the Authorised Officer is compiling an investigation findings memorandum (explained in Chapter 9.2 below) all relevant documentation must be available (hyperlinked if possible) so that any decisions are properly informed. If an investigations findings memorandum is unnecessary, there still needs to be a recording of the conclusion/s made by the Authorised Officer and associated reasoning (see Chapter 4.9 for information on making and recording decisions). This is the case whether the matter is to be substantiated or otherwise. In the case of adverse findings that may result in further action, a recommendation is to be made to the Area Manager with clearly articulated findings (template available).

As part of finalising the investigation, relevant persons (approved provider, anyone who was interviewed, the notifier and parents/guardians) should be contacted – further information below. There should be consistency between the information contained in the decision record or memo and what is provided to the approved provider in correspondence/discussions. Where possible, this includes in findings letter and holdings letter/s and where something has changed or evolved between sending letters this should be addressed directly.

**Consider what happens next**

In cases that involve substantiated findings (based on evidence and the balance of probabilities), an Authorised Officer (usually in conjunction with their Area Manager) also needs to consider what happens next. Determinations are required about whether the Regulatory Authority will take action in relation to the findings and with reference to the compliance history. It is important to note that this consideration of history is only relevant to what action is to be taken next.

The Regulatory Authority has a range of options to respond to serious non-compliance (or a history of non-compliance) as well as to bring services into compliance. Those options and decision making are beyond the scope of these Guidelines but include sanctions, prosecution, warnings. The Authorised Officer should ensure that after finalising the investigation, if non-compliance was substantiated, they also analyse the history of compliance and raise any issues identified at the end of their decision record/investigation findings memo or with their Area Manager for further discussion. Case conference with the Monitoring and Compliance Unit or Investigations Unit or Director, Operations should be considered.

The Authorised Officer should also make a decision about whether additional monitoring of the service is required as a result of the findings (or visit) and if so, make recommendations to their Area Manager including the steps (and their timing) that should be incorporated in the additional monitoring. If the service is already on additional monitoring the Authorised Officer should discuss this in their decision record/investigation findings memo and whether any changes to the monitoring actions are required as a result of the investigation findings.

## Investigation Findings Memorandum

At the conclusion of an investigation, in particular where it is a Priority 1 Investigation or further action is recommended (sanctions or prosecution), an investigation findings memo must be submitted through the Area Manager to the Director, Operations and/or Executive Director, so they can assess the investigation conducted, review the outcome of the investigation and the recommended action:

* Priority 1 investigations - an investigations findings memo must be completed for all Priority 1 Investigations whether allegations are substantiated or not, and whether sanctions or prosecution are recommended or not.
* Statutory sanctions/prosecution – where a statutory sanction or prosecution is recommended an investigations findings memo must be submitted.

The memo will summarise the investigation and will contain sufficient information (and relevant attachments/hyperlinks) for the Delegate to make an informed decision about the action to be taken.

It is important that in finalising the investigation the Authorised Officer makes findings as to:

* whether there has been substantiated non‑compliance with the National Law and/or National Regulations (or if there is insufficient evidence to make a determination) and the response of the approved provider to the non-compliance;
* the seriousness of the non‑compliance, having regard to the impact on the health, safety or wellbeing of children attending the education and care service; and

After making those findings, it is also important that an investigation findings memorandum includes the relevant analysis of the compliance history and whether current monitoring activities are in place (this is not a print out from NQAITS or a list of items but a discussion of the issues specific to that service/provider).

Investigation findings memorandums should provide sufficient information to properly review the findings and also determine the most appropriate action to take in response to the seriousness of the non-compliance (e.g. what sections have not been complied with and what is the significance of that non-compliance, is there a history or failure to rectify). Issues can also be case conferenced with appropriate managers and/or decision makers for advice before or after an investigation findings memo is prepared.

## Contacting Relevant Parties

**Contacting an approved provider**

An Investigation Findings Letter must be sent to the approved provider (templates available). The letter should attach an investigation report and also discuss what will happen next such as whether further action is being considered or action such as additional monitoring is in place or a regional meeting will be scheduled.

**Contacting the complainant and parents**

In cases where the notifier is the approved provider, they will be notified of the outcome of the investigation via the Investigation Findings Letter as outlined above.

In the case of parent or families of children subject to the notification or complaint they should be advised by telephone that the investigation has concluded and provided with appropriate details of the outcome of the investigation. This advice should be confirmed in writing at least in serious matters or where parent/relatives request written information (template available).

In other cases, where the complainant has requested to be notified of the outcome, they should be sent the appropriate letter (template available).

Informing parents/families of the outcome of an investigation, is incredibly important and not always straightforward. Building a positive professional relationship with parents/families is crucial from the beginning of the interactions an Authorised Officer has with the individuals. Being clear about the Regulatory Authority’s role, what action is being taken, what is being investigated (and what is not and why) and keeping people updated, are critical to building this positive professional relationship throughout the investigation. It is unlikely that a call and letter about the outcome of an investigation will be well received or understood if there has been no other interaction since the investigation commenced, particularly if that was quite some time ago.

Please see other chapters of these Guidelines for guidance information about suggested interactions with parents/families/complainants in Chapter 3,2, 4.8, 5.1, 5.6 and 9.2. Many of the important factors covered in the guidance is about explaining what action we are taking as soon as possible (including what is being investigated and what is not and why), confirming in writing if referring some or all matters elsewhere and providing updates when things change and when time has passed without any other contact with those individuals.

**Contacting Staff Members Subject of the Allegation**

It is important to notify any staff members who are person/s subject of the allegation, of the outcome of the investigation (template available) where those person/s were provided an opportunity to respond to allegations in accordance with Chapter 8. This is usually done after the approved provider has been informed of the outcome. This letter may also need to note that further action by the Regulatory Authority is being considered in relation to the individual where relevant.

## APPENDIX A – Powers of Entry Under National Law Summary

| **Section** | **When can this power be exercised?** | **Premises that can be entered** | **Powers that can be exercised** |
| --- | --- | --- | --- |
| **Section 197****Powers of entry for assessing and monitoring approved education and care services** | Monitoring compliance with National Law and National Regulations.A rating assessment of an approved education and care serviceObtaining information requested under section 35 or 83. | Education and care premises, at any reasonable time and with such assistants as may reasonably be required. | Inspect the premises and any plant, equipment, vehicle or other thing\* | Photograph or film, or make audio recordings or make sketches of, any part of the premises or anything at the premises\* | Inspect and make copies of, or take extracts from, any document kept at the premises\* | Take any document or any other thing at the premises\* | Ask a person at the premises to answer a question to the best of that person's knowledge, information and belief | Ask a person at the premise to take reasonable steps to provide information or produce a document. |
| **Section 199**Powers of entry for investigating approved education and care service | To investigate an approved education and care service if the authorised officer reasonably suspects that an offence may have been or may be being committed against National Law or National Regulations. | Education and care premises\*\*, with any necessary assistants, may with or without the consent of the occupier of the premises, enter the premises at any reasonable time. | Search any part of the premises\* | Inspect, measure, test, photograph or film, or make audio recordings of, any part of the premises or anything at the premises\* | Take a thing, or a sample of or from a thing, at the premises for analysis, measurement or testing\* | Copy, or take an extract from, a document, at the premises\* | Take into or onto the premises any person, equipment and materials the authorised officer reasonably requires for exercising a power under s.199(2) | Require the occupier or person at the premises, to give the authorised officer information to help the authorised officer in conducting the investigation. |
| **Section 200****Powers of entry to business premises** | If an authorised officer reasonably suspects that documents or other evidence relevant to the possible commission of an offence against the National Law or National Regulations are present at the premises and has the occupier’s written consent to the entry and inspection | Principal office or any other business premises of an approved provider, **with the consent** of the occupier gained only after showing identity card and informing the occupier of the items listed in s 200(3)(b). | Same powers as section 199 above |
| **Section 200A****Entry to premises without search warrant** | If an authorised officer reasonably believes that a person is operating an education and care service without a service approval at or from any premises and has the occupier’s written consent to the entry and inspection. | Any premises including residential or business **with the consent** of the occupier gained only after showing identity card and informing the occupier of the items listed in s 200A(2)(b). | Search any part of the premises | Inspect, measure, test, photograph or film, or make audio recordings of, any part of the premises or anything at the premises | Take a thing, or a sample of or from a thing, at the premises for analysis, measurement or testing | Copy, or take an extract from, a document, at the premises | Take into or onto the premises any person, equipment and materials the authorised officer reasonably requires for exercising a power under Schedule 5. |  |
| **Section 201****Entry to premises with search warrant** | With the authority of a search warrant in a number of scenarios as outlined in section 201. | Any premises that the search warrant specifies. | Search any part of the premises | Inspect, measure, test, photograph or film, or make audio recordings of, any part of the premises or anything at the premises | Take a thing, or a sample of or from a thing, at the premises for analysis, measurement or testing | Copy, or take an extract from, a document, at the premises | Take into or onto the premises any person, equipment and materials the authorised officer reasonably requires for exercising a power under Schedule 5. | Require the occupier or person at the premises, to give the authorised officer reasonable help to exercise the authorised officer’s powers under Schedule 5(2)(a) to (e). |

**\* Power limited to a document or thing that is used or likely to be used in the provision of the education and care service.**

**\*\* An Authorised Officer may not, under section 199, enter a residence unless they have reasonable belief that an approved education and care service is operating at the residence at the time of entry, or, the register of family day care educators records that the approved education and care service operates at the residence at the time of entry, or the occupier of the residence has consented in writing to the entry and the inspection.**

## APPENDIX B – Taking and Returning Evidence

**Evidence Receipts**

It may sometimes be necessary for Authorised Officers to take items when utilising powers under sections 197, 199, 200, 200A, 201, 215 or 216 of the National Law.

If evidence is taken, an evidence receipt should be issued to the approved provider and certified by the Authorised Officer responsible for taking the item (templates available).

**Seizing evidence under Section 197**

Section 197 of the National Law enables an Authorised Officer to take any document or any other thing used or likely to be used in the provision of an education and care service. The Authorised Officer must give notice of the taking to the person apparently in charge of the document or thing being taken, or an occupier of the premises. Any documents or things taken under section 197 of the National Law must be returned to the person or the premises within 7 days.

**Seizing evidence under Section 199**

Section 199 of the National Law empowers Authorised Officers to enter the premises of an education and care service if there is a reasonable suspicion that an offence may have been or may be being committed, and take a thing, or a sample of or from a thing, at the premises for analysis, measurement or testing. Items taken under section 199 of the National Law may not be kept for more than 60 days without permission of the Magistrates’ Court, or unless legal proceedings are on foot.

**Seizing evidence under section 200 and 200A**

Section 200 of the National Law empowers Authorised Officers to take a thing, or sample of or from a thing, at the business premises of an approved provider for analysis, measurement or testing. Items taken under section 200 of the National Law may not be kept for more than 60 days without permission of the Magistrates’ Court, or unless legal proceedings are on foot.

**Returning taken items**

Unlike under section 197, where a thing taken must be returned within 7 days, a thing taken under sections 199, 200 or 200A of the National Law may be retained for a longer period.

Section 202 of the National Law provides that if an Authorised Officer has taken a thing under sections 199 or 200, the Authorised Officer must take reasonable steps to return the thing to the person from whom it was taken if the reason for the taking no longer exists.

Further, section 202 provides that if a seized thing has not been returned within 60 days after it was taken, the Authorised Officer must take reasonable steps to return it unless either:

* proceedings have been commenced within the 60 day period and those proceedings (including any appeal) have not been completed; or
* a Court makes an order under section 203 of the National Law for an extension of the period for which the seized thing can be held.

An Authorised Officer may apply to the Magistrates' Court within the 60 day period, or within a period extended by the Court for which the seized thing can be held, for an extension of time for which the thing seized may be held.

The Investigations Unit and Department’s Legal Services Unit will arrange such an application.

## APPENDIX C – Powers of Compulsion – The Delegate

**Section 215** of the National Law empowers the Delegate to require **a specified person**[[7]](#footnote-8) to provide information, documents or evidence if the Delegate reasonably suspects that an offence has or may have been committed against the National Law or National Regulations.

The Delegate may, **by notice in writing**, require a specified person to:

* provide to the Delegate, in writing signed by that person or, if the person is not an individual, by a competent officer of that person, within the time and in the manner specified in the notice, any relevant information that is specified in the notice;
* produce to the Delegate, in accordance with the notice, any relevant document referred to in the notice; or
* appear before the Delegate at a time and place specified in the notice to give any evidence or to produce any relevant document specified in the notice. The person may give evidence by telephone or video conference unless the Delegate, on reasonable grounds, requires the person to give evidence in person.

The notice must warn the person that failure or refusal to comply with the notice would constitute an offence, and warn the person about the effect of sections 217, 218 and 219 of the National Law:

* It is an offence under section 217 for a person to refuse or fail to comply with a notice under section 215 to the extent that the person is capable of complying with it.
* It is an offence under section 218 for a person to obstruct or hinder the Delegate in exercising a power under section 215.

Section 219 states that a person is not excused from complying with a notice or requirement on the ground that to do so may incriminate that person. Information disclosed under section 215 is not admissible in evidence against the individual in any criminal proceedings (other than proceedings under sections 218 or 295 (providing false or misleading information) of the National Law) or in any civil proceedings. However, information obtained from a document required to be kept under the National Law or National Regulations is admissible in evidence against the person in criminal proceedings under the National Law. It should be noted that information disclosed under section 215 may be relied on when determining sanctions.

**Section 216** of the National Law empowers the Delegate to require (**without notice**)a **specified person**[[8]](#footnote-9) at an education and care service to provide specified information or documents if the Delegate reasonably suspects that an offence is being, or may have been committed, against the National Law or National Regulations.

The Delegate may require a specified person at an education and care service:

* to provide the Delegate with any specified information that is relevant to the suspected offence; or
* to produce to the Delegate any specified document that is relevant to the suspected offence.

Section 216 has the same requirements as section 215 in relation to warning the person that failure or refusal to comply with the requirement would constitute an offence, and warning of the effects of sections 217, 218 and 219.

This power is usefully exercised in cases where the Regulatory Authority has real concerns for the immediate safety, health and wellbeing of children (because of the otherwise limited admissibility of evidence in civil or criminal proceedings) and where the Regulatory Authority does not wish to put the specified person on notice (e.g. there are concerns that evidence will be destroyed).

The main difference between sections 216 and 215 is that the Delegate has the power under section 216 to require information or documents from a specified personat an education and care service without giving notice, whereas this is not the case if section 215 is being utilised. The Delegate must not require a person to remain at the education and care service more than a reasonable time for the purposes of providing the information or documents. Under section 216 the Delegate does not have a power to require a person to give evidence on oath or affirmation.

Always consult the Investigations Unit regarding consideration of these sections. The Department’s Legal Unit would also be consulted should the delegate of the Regulatory Authority be considering using these powers.

1. Section 3 of the Children's Services Act defines a ‘children’s service’. Section 5 defines those services that fall outside the jurisdiction of the Children's Services Act. [↑](#footnote-ref-2)
2. Regulation 12 of the National Regulations defines ‘serious incident’. [↑](#footnote-ref-3)
3. A file note is simply the recording of something in writing for the purposes of the investigation and kept on the investigation file (usually on NQAITS). A file note can take any form and is the way that information, actions and decisions are noted/recorded so there is a trail of everything that is done in relation to that investigation. File notes, along with the other activities saved on the file, allow someone to read the file and understand everything that has happened so far in relation to that matter and where it is currently at. File notes can be part of other documents and do not need to be separately made if another document already records the information (for example if a letter is sent out, a copy of the letter is placed on the file and there is no need for a file note saying “letter sent on xx date”. However, a phone call does need to be recorded in a file note, even just attempted calls, because otherwise there is no record of this action). [↑](#footnote-ref-4)
4. Compliance directions are a type of statutory sanction provided under section 176 of the National Law. [↑](#footnote-ref-5)
5. Sections 293 and 294 of the National Law set out the accepted methods for serving a notice and section 206(4) defines ‘specified person’. [↑](#footnote-ref-6)
6. Briginshaw v Briginshaw (1938) 60 CLR 336. [↑](#footnote-ref-7)
7. A ‘specified person’ means a person who is or has been an approved provider or a staff member of, or a volunteer at, an approved education and care service; or a family day care educator. [↑](#footnote-ref-8)
8. As above. [↑](#footnote-ref-9)