



New Zealand

ASSOCIATION OF
WORKPLACE
INVESTIGATORS

Association of Workplace Investigators - New Zealand

Best Practice Statements



Introduction

All members of AWI New Zealand are encouraged to abide by these Best Practice Statements in undertaking investigations in New Zealand. However, they have no binding force and their breach has no disciplinary consequences within AWI New Zealand. These Best Practice Statements do not apply to AWI members in any other AWI jurisdiction. They reflect the unique state of law and practice in New Zealand and should be read in tandem with the Guiding Principles for Investigations – AWI New Zealand.

This Best Practice comprises 12 Statements. Each Statement is followed by a Commentary and Guidance sections. The Best Practice comprises the Statements, Commentaries and Guidance Sections. When interpreting and applying the Guidance, these 3 sections are to be given equal weight. Members are expected to know and understand this Best Practice.

References in this Best Practice to a “party” or “parties” includes the person or persons appointing the investigator and any other person (including but not limited to a complainant, a respondent, and a witness or other interviewee or like participant) who is or may reasonably be anticipated to be, involved in the investigation.

Statements

Statement 1: Prior to accepting an appointment to act as investigator, a member should have appropriate skill, training and experience in the process.

Statement 2: Before accepting an appointment and at any time during an appointment, a member should disclose any interest or relationship likely to affect impartiality or neutrality or which might create an appearance of partiality or bias.

Statement 3: A member should uphold the integrity and fairness of the investigation process.

Statement 4: A member should accept an appointment only if he/she has the ability to conduct the process in an efficient and timely manner.

Statement 5: The investigation process should be conducted with diligence.

Statement 6: Unless expressly permitted to act otherwise and subject to legal obligations, a member should observe the duty to protect the privacy of those participating in the investigation process, and the confidentiality of all elements of the process.

Statement 7: Confidential information received by a member as an investigator, or in any other role in an investigation, may not be:

1. used to the member’s personal advantage, or
2. in the absence of other party consent, be used in other separate process involving one of the original parties and a third party.

Statement 8:

1. A member should not act with impropriety and should not give the appearance of impropriety.
2. A member should not harm AWI New Zealand, AWI or bring the reputation of these bodies into ill repute.

Statement 9: A member should make decisions in a just, independent and considered manner.

Statement 10: A member should fully disclose and explain the basis of fees and charges before accepting appointment.

Statement 11: Advertising or promotion by a member must be factually accurate.

Statement 12: A member has a duty to uphold this Best Practice.



Statement 1

Prior to accepting an appointment as an investigator, a member should have appropriate skill, training, and experience in the process.

Commentary

Competency must be the starting point when considering appointment acceptance. A member should not practice in the field of the proposed appointment without having a sound knowledge of the process so as to ensure that he/she can uphold the integrity and fairness of the investigation process.

Members must ask themselves whether or not by dint of training and experience they have the necessary competency to undertake the tasks requested of them. The test to apply is to ask yourself:

“How would my competence to undertake this task be judged by my peers?”

Guidance

If in doubt discuss in confidence the proposed appointment with a senior colleague, if possible one who is also a member of AWI New Zealand.

Statement 2

Before accepting an appointment and at any time during an appointment, a member should disclose any interest or relationship likely to affect impartiality or neutrality or which might create an appearance of partiality or bias.

Commentary

This is a fundamental duty of disclosure owed to the parties prior to accepting any appointment. It is an ongoing duty to disclose, which continues throughout the process. The question to ask yourself is not whether you believe your impartiality or neutrality might be affected through some interest or relationship held by you; rather:

“Would an objective observer with knowledge of the relevant facts think that I might not be impartial, might be biased in some way, or might have my neutrality affected in some way?”

The duty to disclose is a high obligation continuously owed to the parties.

Guidance

If in doubt, disclose. The mere fact of having doubt is a sufficient trigger to affirm the duty. Over-disclose rather than under-disclose.

The disclosure ought to be given in writing at the earliest opportunity, and when given should be comprehensive so that the parties are fully and fairly informed of the relevant facts which might warrant your unilateral recusal, or lead to a recusal request.

Be vigilant for the emergence of new facts during the course of the process which might oblige you to disclose. Do not delay with the discharge of this duty once the need for possible disclosure becomes apparent. It is for the parties to decide how to respond to your information about disclosure. It is never for you to decide to withhold the disclosure. Circumstances which might give rise to an appearance of partiality include familiarity with some of the participants in the process. If you are in any doubt as to the need to disclose and yet have not disclosed, you may be at risk of breaching this Statement. You are advised to urgently consult confidentially with a senior colleague of and if possible also a member of AWI and to seek advice about your obligations under this Statement.

Statement 3

A member should uphold the integrity and fairness of the investigation process.

Commentary

The Shorter Oxford English Dictionary Sixth Edition 2007 defines “integrity” to mean:

1. The condition of having no part or element taken away or lacking; undivided state; completeness
2. The condition of not being marred or violated; unimpaired or uncorrupted condition; original state; soundness
3. **a.** Freedom from moral corruption; innocence, sinlessness **b.** Soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity”.

An appointment may be on terms of reference which may not meet the usual standards of natural justice applicable to courts and tribunals. You should carefully consider appointment on such terms and preferably discuss any concerns with the party proposing to appoint you. You should consider whether or not to consider such an appointment if factors such as the following are present and ensure fairness between the parties and the maintenance of your integrity: that all relevant parties have had the benefit of legal advice; whether any statutory, case law, or other legal requirements allow or disallow such a procedure to be followed; that all parties have been made aware of the potential shortcomings of such a process.

Parties may agree to any one of a broad range of processes, some of which objectively may have aspects to them breaching the normal understanding of natural justice. So long as the parties are independently represented or are both advised of the possible shortcomings of a proposed process, and if necessary by you, then your obligation is to uphold the integrity of the agreed investigation process.

This will require an understanding of any relevant legislation applying to the particular process so that statutory requirements are adhered to. Additionally, there will generally be an expectation that natural justice, which includes fairness, will be observed – unless elements of that concept have been modified by terms of reference and/or party agreement, prior to the otherwise perceived breach happening.

“Fairness” must be assessed in the context of the particular investigative process.

Guidance

To be able to uphold the integrity of the process requires that the member be conversant with that relevant investigative process.

Used in the context of this Statement, the member is required to uphold the soundness of the process so as to ensure that the process can be trusted by the participants and, if appropriate, by the public at large.

To fail to uphold the integrity of the relevant process is to let down AWI New Zealand and its members. Only if the public have faith in the process will they use it and will others, including the judiciary, support it.

If you are asked to undertake a process which is foreign to you it will be prudent to explore what they are trying to achieve so as to discuss process options and how they might best be managed. This includes giving consideration to whether or not you should be accepting the appointment.

Statement 4

A member should accept an appointment only if he/she has the ability to conduct the process in an efficient and timely manner.

Commentary

The axiom “*Justice delayed is justice denied*” applies.

While it is not always possible to predict accurately in advance how long an investigation will take, investigators should not accept appointment unless they can deal with the matter in a timeframe that responds to party needs and does not jeopardise the process working as a consequence of delay. If an initial estimate is exceeded or likely to be exceeded, this issue should be raised with the parties with supporting reasons and an extension sought.

Guidance

Every matter is different and time expectations have to have regard for the nature of the issue(s), possibly its history, in any event, and the process being applied to its resolution.

Investigators have a responsibility to positively drive the process through to a conclusion. This duty remains even in the face of an obdurate party pursuing delay. Just as the courts are now interventionist when it comes to setting timetables for the process, the investigator similarly should be setting timetables and insisting on adherence where reasonable to do so.

If potential prejudice is an issue, the management of it will need to be resolved in discussion with the party appointing the investigator. If the investigation is to take place in the midst of other external timetable directions or orders, then availability to investigate must work around that timetabling.

If at the outset a member cannot confidently meet required or expected time demands to ensure the efficient and timely discharge of the process then the member’s obligation is to decline the appointment.

Statement 5

The process should be conducted with diligence.

Commentary

The Shorter Oxford English Dictionary Sixth Edition 2007 defines “*diligence*” to mean:

1. *“Careful attention; heedfulness, caution*
2. *The quality of being diligent; industry, assiduity*
3. *Speed, dispatch, haste”.*

This Statement is an injunction for the member to at all times conduct the process with care and applying persistence and effort in doing so. A hallmark of investigator professionalism is the application of diligence to the task.

Guidance

This Statement is in part linked to the requirement to have time to undertake the task. But even with time for the task, there will always be an obligation to attend to the work with care and persistence. This is done by both understanding the various points of view and working towards an outcome, along with the necessary effort to meet the “*care*”, “*timely*” and “*efficient*” obligations.

Diligence is also about preservation of standards. It includes ensuring that you have the knowledge and experience necessary to carry out the task.

Statement 6

Unless expressly permitted to act otherwise and subject to legal obligations, a member must observe the duty to protect the privacy of those participating in the investigation process, and the confidentiality of all elements of the process.

Commentary

There are privacy and confidentiality expectations in most investigation processes. Ideally, these should be addressed comprehensively in the terms of reference for the investigation and/or of engagement of the investigator. Members should be proactive in raising and discussing these expectations at the time of engagement and ensuring they are recorded.

“*Privacy*” is defined in the Shorter Oxford English Dictionary Sixth Edition 2007 to mean:

1. *“The state or condition of being withdrawn from the society of others or from public attention; freedom from disturbance or intrusion; seclusion”*
2. *Absence or avoidance of publicity or display; secrecy*
3. *A private or personal matter; a secret*
4. *The state of being privy to something, privacy”.*

“*Confidential*” is defined to mean:

1. *“Indicating private intimacy; inclined to impart confidences, confiding*
2. *Spoke or written in confidence; not intended for public knowledge*
3. *Enjoying another’s confidence; entrusted with secrets; charged with a secret task”.*

The right to privacy and confidentiality belongs to the parties.

Both of these duties are common to other professions including medicine and law. The approach to these duties taken by other professions can be a helpful guide as to how we as members of a professional body such as AWI New Zealand, should apply these duties to ourselves.

The duty is an on-going duty from the time of appointment and continues on indefinitely after the appointment when the process has concluded. Where a participant dies, then the duty is owed to their personal representative.

When Disclosure of Private or Confidential Information is Permitted

Disclosure is only permitted under the most limited of circumstances. Examples of such circumstances include:

1. Where disclosure is required by law, or by order of a court.
2. Where the member reasonably believes that disclosure is necessary to prevent a serious risk to the health, safety or welfare of any person.

3. Where the intention to commit a crime is disclosed, and the member has reasonable grounds for believing that the crime will be committed, the member then has a duty to report that intent to the appropriate authority.
4. Where a party has expressly authorised a disclosure to another and where that information is solely held by that party. Where the information is held by more than one party, then all parties having the information must authorise the disclosure
5. Where it is necessary to protect the interests of a party where the member comes to appreciate that there are genuine incapacity issues applying to a party in the process.
6. Where disclosure is necessary to give effect to any insurance cover arrangements, or collection of unpaid professional fees and disbursements incurred in the course of the process.
7. Where disclosure is necessary to respond to or to defend a complaint, allegations, claim or other form of proceeding against the member brought by a party to the process.

Where any of these circumstances apply, disclosure of private or confidential information as an exception to this Statement is only allowed to the minimum extent reasonably necessary to discharge the exception.

Guidance

The duties concerning privacy and confidentiality are given powerful recognition in most investigative processes.

Any breach of these obligations by a member is likely to be viewed as a most serious issue for the member concerned.

If reliance is to be placed on any of the exceptions, the member is advised to discuss, in confidence, the relevant exception with a senior member of AWI New Zealand.

Two questions may need to be considered. First whether or not a particular exception really applies, and second, what should the parameters of the disclosure be so as to meet the needs of the relevant exception while endeavouring to preserve as much of the confidentiality duty as possible.

Where guidance is sought from a senior AWI member

for the purpose of determining the proper course of professional conduct, then both the member seeking guidance and the person giving advice are encouraged to make careful notes of the conversation and conclusions. These notes should be exchanged, each with the other prior to the advice being acted upon. If the notes exchanged reveal any uncertainty about the advice given, then further discussion should take place.

While seeking advice will not necessarily discharge the member from responsibility for a breach, where the advice is given and followed, then being able to show that the advice was sought and adhered to is likely to be treated as a mitigating circumstance.

In every instance, the member who seeks to apply an exception to this Statement must take ultimate responsibility for his/her own actions.

Good practice requires that parties and other participants to an investigation understand the privacy and confidentiality expectations of them. That understanding is best evidenced by having the parties and other participants (including legal counsel) sign a confidentiality undertaking once they have read it and it has been explained to them.

Statement 7

Confidential information received by a member as an investigator, or in any other role in an investigation, may not be:

1. used to the member's personal advantage, or
2. in the absence of other party consent, be used in other separate process involving one of the original parties and a third party.

Members may not put themselves in a position which might give the impression that they have relied upon or used confidential information gained in one process when acting as a third party neutral, or in some other role, in a second or subsequent unrelated process and whether or not one of the original parties is involved in the second or subsequent process.

Commentary

This first part of this Statement is akin to a fiduciary relationship. A member may not use confidential information gained in the process to their personal

advantage. The advantage extends to giving that advantage to a third party such as a spouse, other relative or friend.

The second part of this Statement effectively inhibits an investigator from again acting in that role where similar facts to a previous process apply and particularly where one of the parties in the second or subsequent process is common to the original process.

Guidance

The duty not to profit from use of confidential information received by a member in the process is absolute. The second element of this Statement is best managed, if reasonably practicable, by full pre-appointment disclosure to the parties of your involvement in the first process when being asked to take appointment in a subsequent similar fact and or similar party process. That duty might also require you to indicate that you are privy to certain confidential information which arose in the first process but which cannot be shared or used in the subsequent process. It will then be for the appointing party to decide whether or not to appoint you to the role. If disclosure is made after your appointment and a party objects to your remaining in the role, you must consider seriously stepping aside.

Statement 8

Confidential information received by a member as an investigator, or in any other role in an investigation, may not be:

1. A member should not act with impropriety and should not give the appearance of impropriety.
2. A member should not harm AWI New Zealand, AWI or bring the reputation of these bodies into ill repute.

Commentary

“Impropriety” is defined in the Shorter Oxford English Dictionary Sixth Edition 2007 to mean:

1. *“Incorrectness; inaccuracy”*
2. *“Unbecomingness, unseemliness, indecency; improper conduct”*

3. *“Unsuitableness, inappropriateness”*

4. *“An instance of improper conduct, language, etc.”*

These obligations go beyond how members conduct themselves in relation to a particular investigation. A criminal prosecution unrelated to AWI New Zealand/AWI affairs and leading to a conviction may result in a finding of impropriety. Not every crime will necessarily be treated as a breach of this Statement. It will depend on the nature of the crime, its gravity, impact on others, mitigating circumstances and possibly even the public awareness about and response to the event.

Behaviours which are judged to harm AWI New Zealand/AWI or to bring its reputation into disrepute are likely to be behaviours incompatible with holding AWI New Zealand/AWI membership.

Guidance

The professional duty is at all times to act with propriety – meaning to apply a correctness of behaviour and standards to the way one lives one’s life.

Obviously within AWI New Zealand/AWI there will be a range of views as to how behaviours ought to be judged. Some key indicators include how other professional bodies have responded to the particular event, for example by striking off a member for a standards breach, or perhaps through conviction for a particular crime followed by imprisonment or some other liberty deprivation imposed as a punishment.

Statement 9

A member should make decisions in a just, independent and considered manner.

Commentary

This Statement is fundamental to all decision making.

For the parties, whether or not the investigation involves what might be viewed by others as a modest amount of money or a minor issue, the issues should be treated seriously and parties will generally have the right to expect that conclusions and advice will be treated and described judicially and respectfully.

The Shorter Oxford English Dictionary Sixth Edition 2007 defines “just” to mean:

1. *“That does what is morally right, righteous impartial in one’s dealings; giving everyone his or her due; fair, unbiased*
2. *In accordance with the principles of moral right or of equity; equitable, fair; (of a reward, punishment, etc) deserved, merited.*
3. *In accordance with the law, lawful, rightful*
4. *Having reasonable or adequate grounds; well-founded*
5. *Conforming to a particular standard; proper; correct, appropriate”.*

Unless the appointing party has stipulated for this specifically, moral judgment is usually irrelevant. Rather, in a legal context, the word “just” embodies notions of fairness and observance of natural justice as understood and explained through the common law. Where the parties agree to dispense with certain natural justice requirements, others will still apply having regard to the particular circumstances of the case. “Independence” has already been discussed in the context of Statement 2. It is a keystone to judicial decision making and applies also to those undertaking investigations who may have to determine issues between two or more parties in conflict.

The “considered” requirement of this Statement is a reminder that although members are charged with conducting the process in an efficient and timely manner there is an overarching duty to give the matter careful thought. There is an obligation to take into account and weigh the evidence before making a decision.

Guidance

Those entrusted with decision making powers are expected to exercise those powers applying well identified decision making characteristics. On occasion however, that expectation will be altered by party agreement. For example, the parties might agree that an investigator with specialist expertise can read the relevant documents, apply their own knowledge to the issue without necessarily advising the parties of what parts of that expertise were relied upon and then deliver a brief decision. Here the parties are entrusting the investigator with a process which breaches many of the natural justice requirements conventionally applied

to judicial process and decision making.

Reasons for a decision, especially a significant decision in the investigation, should generally be given. That is particularly so where that decision may accept the veracity of one person and reject that of another. The detail into which the investigator should go will depend of the significance of the particular decision. Care should always be taken as to how rejection of one person’s account or case is expressed.

Where the parties agree that their decision maker should depart from conventional judicial process and decision making characteristics, that agreement should be recorded in writing. If the parties have not recorded it themselves then it must be recorded by a memorandum from the investigator to the parties. While parties may waive their rights to challenge apparent bias, actual bias or partiality in the course of an investigation can never be waived. If independent decision making is not possible then the member must either decline the appointment, or, if appointed, must give notice to withdraw.

If you are in doubt as to how this Statement might apply to you on the particular facts, you are encouraged to seek advice from and to discuss in confidence the issue with a senior AWI New Zealand colleague. Where reasonably practical, notes of this discussion ought to be exchanged prior to the member coming to a final decision on how to act. If that exchange of notes demonstrates uncertainty as to what was decided, further discussion should follow.

Statement 10

A member should fully disclose and explain the basis of fees and charges before accepting appointment.

Commentary

The basis for charging should be transparent and be readily understood by persons looking to engage a workplace investigator. Note that commercial and consumer legislation may apply to the provision of a member’s services.

Guidance

Members are encouraged to enter into written contracts with the parties and those contracts must include the basis for billing fees and disbursements.

That information must be drawn to the attention of the party appointing the investigator and/or their legal advisers/representatives before they are asked to sign the contract. Investigators, particularly those involved in a lengthy investigation, are encouraged to keep the party appointing them up-dated with reports about their charges if interim billing is not adopted.

Statement 11

Advertising or promotion by a member must be factually accurate.

Commentary

Relevant commercial and advertising legislation may apply. But in addition to the statutory obligations and consequence of breach, there is also a duty to ensure that advertising and promotion material is factually accurate.

The member is personally responsible for his/her own advertising in print or soft copy form. There is a high duty not to mislead the public or colleagues when publishing advertising and promotional material.

Guidance

There can be a risk of hyperbole when setting out one's advertising and promotional material. The member is best positioned to test the accuracy of statements made and to ensure that the individual and collective statements fairly and appropriately state facts that are true in all respects.

Statement 12

A member has a duty to uphold this Best Practice.

Commentary

This Statement makes the point that compliance with this Best Practice is the responsibility of each and every member. Therefore, it is a requirement and expectation of AWI New Zealand that all members of AWI New Zealand are conversant with this Best Practice comprising the Statements, Commentary and Guidance provisions.

It is important to appreciate that the seeking of guidance from another member of AWI New Zealand will not of itself absolve a member from responsibility for breaching this Best Practice, although following the advice given will very likely be accepted as a mitigating circumstance in the event of a breach and a complaint arising.

Guidance

Where advice from another AWI New Zealand member is sought in confidence to help the member to determine an appropriate course of conduct, both that member and the other member where practicable, prior to the advice being acted on, ought to exchange their records of the discussion and advice in writing. In the event of conflict of understanding as to the advice given a further discussion should follow which again ought to result in an exchange of memoranda.

