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# Employer investigations, fact-finding interviews and procedural fairness

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If an employer has been made aware of a complaint or concerns, then it may be obligated to investigate and take appropriate action to manage associated risks. Employers are often obliged to conduct such investigations to ensure compliance with the law and policies; that quality standards are maintained; and to ensure the safety of employees, clients and patients.

### Employers can investigate a broad range of matters including:



Client or patient dissatisfaction



Allegations of employee misconduct



Employee conflicts



Clinical errors



Other errors or system failures



Serious incidents



Reportable incidents



Safety concerns

In some cases, a single matter could be investigated by an employer as well as by external bodies such as the police, the Health Care Complaints Commission (HCCC) and SafeWork NSW. This may result in multiple investigations occurring concurrently. This member resource will assist you in navigating an employer investigation.

Employers conduct investigations by gathering evidence. They may do so by interviewing employees and other witnesses; requesting statements from employees; and reviewing available records such as patient notes, computer records and surveillance video. It is best practice for employers to have a policy that sets out the procedure as to how employer investigations are undertaken. You should familiarise yourself with that policy if you're required to participate in an investigation.

Sometimes an employer will engage an external organisation to undertake the investigation. This is best practice as it provides a degree of independence to the investigation and its report.

If an employer notifies you that there are allegations being made against you and that you are required to attend an interview, this does not mean any conclusions have been made about the allegations. Rather, it means that the employer is fulfilling its duty to investigate any issues or concerns that they have been made aware of and is giving you an opportunity to provide your responses.

If a complaint or allegation is of a sufficiently serious nature, the employer may decide to redeploy you or

to suspend your employment while the investigation is in progress. Other risk management procedures may include restricting work to certain hours when more supervision and support is available; restricting overtime; restricting in-charge responsibilities and/or restricting clinical duties. The decision to suspend work, redeploy or place restrictions should be appropriate and proportionate to manage any identified risks and consistent with prevailing industrial rights and entitlements. Where a permanent part time or full time employee has been suspended, it is almost always required that this occur with pay.

There is usually no set duration in which an employer investigation must be completed. The timeline may depend upon the number and nature of the allegations, the number of witnesses to be interviewed and their availability. You should consult your employer's policy to see if any guidelines are provided in relation to the duration of the investigation.

At the conclusion of the investigation the employer will come to a decision in relation to the investigation. The employer makes its decision on the balance of probabilities based on the evidence available.



**You should contact the Association for advice at the earliest opportunity if your employment is suspended or you're asked to participate in an employer investigation.**

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# Investigation terminology

It might be helpful to explain a few terms to help you understand how an employer investigation works.

A **complainant** is a person or organisation that has lodged a complaint. The **respondent** is the person required to answer the complaint. A **witness** is anyone who may have some information about what happened. A complainant can sometimes also be a witness.

An employer will often interview the complainant, witnesses and respondent as part of its investigation process. The investigation interview is often referred to as a **fact-finding interview**. Each person should be interviewed separately.

**Burden of proof** or **onus of proof** refers to who has to prove a case. For employer investigations the employer carries the burden of proof, which means it is up to the employer to prove the allegations.

The **standard of proof** refers to the amount and quality of evidence required to prove allegations. The standard of proof in a criminal court case is **beyond reasonable doubt** whereas the standard of proof in civil and employer investigations is the **balance of probability**.

The balance of probability is a lower standard of proof than beyond reasonable doubt. The balance of probability requires an employer to consider only whether there is more evidence to indicate that an allegation is true than there is evidence to indicate that an allegation is untrue. Unlike a criminal case, the employer is not required to eliminate all reasonable doubt.

In a very simple example, an employer may find that an allegation is true on the balance of probability if there are two witnesses who say they saw the alleged conduct and only one witness who says that it did not occur.

It is important to note that this standard of proof exists on a sliding scale where the standard of proof is higher for more serious allegations. This means that more evidence may be required to prove a more serious offence.

Once the employer has reached a decision about the allegations these are the **investigation findings**. The term to describe allegations that have been proven is that the allegations are **substantiated**. If there is not enough evidence to prove allegations, then they are said to be **unsubstantiated**.

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# Your rights

If you have been notified of allegations being made against you, you do have rights. These rights fall under the broad categories of **procedural fairness** and **substantive fairness**.

Procedural fairness is about the fairness of administration and procedure. All employees required to respond to complaints or allegations should be provided with procedural fairness.

## Procedural fairness includes:

- Notice in writing of any investigation meeting or fact-finding interview.
- A reasonable period of notice to enable the employee to obtain advice from their union; to arrange a support person; and to prepare a response.
- Sufficient details of the complaint or allegation in writing to enable the employee to respond. Such details may include a description of an incident, dates, times, locations and identities of persons involved.
- Access to the evidence against them including access to documentation relevant to the complaint or allegations.
- The right to obtain advice from their union.
- Right for the employee to bring a support person to the interview or to participate by video or teleconference.
- A fair opportunity to respond to each complaint or allegation.
- An investigation free from conflict of interest.

If an employer has received a complaint about you then they should put the allegations to you in writing on its letterhead. This is so you can be clear about what you are required to respond to and what the employer will be making a decision about. If the allegations are not put in writing, there is a risk of ambiguity, misunderstanding and a risk of the allegations changing without notice.

The letter should also include sufficient details of the allegations so you can reasonably respond. It is not enough to say, for example, that it is alleged sometime last month you spoke inappropriately to an unnamed patient. Instead, the employer should provide the date and time, the identity of the patient and details of what was inappropriate about what was allegedly said. What words were allegedly said? And was it the words spoken, or the tone of voice used that was inappropriate?

Case law suggests that in some cases you should be provided the identity of the complainant. However, so long as you are provided with enough information so that you are able to respond, then this would generally be regarded as sufficient information.

The letter from your employer should be provided to you with reasonable time before you are required to respond, allowing you time to consider the allegations; obtain advice and support from your union; access any relevant evidence (with permission of the employer); and to prepare a response. Reasonable time will of course depend on the circumstances. Preparing a response to multiple allegations may require more time than preparing a response to a single allegation. Preparing a response to a serious allegation may require more time to prepare a response to a less serious allegation. Also, you will require more time if you've not been given a fair opportunity to access assistance from your union. Regardless of the circumstances, anything less than 24 hours' notice is considered unreasonable. If insufficient notice has been provided, then you should ask your employer in writing for the interview or response deadline to be postponed.

An employer has a general right to discuss performance concerns with its employees. However, if you are asked to attend a meeting with your manager without notice and it becomes apparent there are allegations against you that could result in disciplinary action, you should ask for the details of the allegations to be put to you in writing and an opportunity to respond to those at a later date in accordance with your procedural fairness rights. If you are unsure you can always ask your manager, **"Is disciplinary action a potential outcome of this process?"** Ask that they confirm their response in writing.



**It's important that you do not respond, verbally or in writing, to any allegation that may result in disciplinary action until you have had the opportunity to obtain advice from the Association.**





An employer should make you aware of the evidence against you including any complaint letter, witness statement, patient documentation, computer records or surveillance video. You should be given an opportunity to review all the evidence. Usually this does not mean you will be given a copy of the evidence to take away, instead you may be offered the opportunity to arrange a time with your employer to review the evidence at an appropriate location in the workplace.

All investigations should be free from conflict of interest. This means that the person who undertakes the investigation or is the final decision maker cannot also be the complainant or a witness. This is important to ensure there is no bias and to maintain the integrity of the investigation and its findings.

The Industrial Relations Commission of NSW expressed best practice in relation to procedural fairness in the following terms:

*“Our view is that the right to know the nature of the charges, the identity of the accuser, the material to be relied upon and time and opportunity to prepare an answer are not privileges but entitlements, nor are ‘indications’ enough.”*

– Full Bench of the Industrial Relations Commission of NSW  
**Rapp, Paul v Wauchope RSL Club Ltd [1995]**  
**NSWIRComm 233**

It should be noted that what a court or tribunal considers to be procedurally fair or unfair may differ from case to case. Employers also often approach matters of this kind differently, and an arguable failure by an employer to abide by principles of procedural fairness will not necessarily mean that the investigation can be prevented from proceeding. Similarly, it is not uncommon for a court or tribunal to excuse an employer’s failure to afford procedural fairness on certain grounds such as where the employer’s ultimate decision is considered to be substantively fair.

**Substantive fairness has two important aspects for employer investigations:**

- The findings must be justified and supported by the evidence. This means that there must be sufficient evidence to prove the allegations on the balance of probability.
- The outcome or any proposed actions must be justified by the findings. In other words, the proposed actions must be proportionate to the offence. For example, it would be unfair to terminate an employee’s employment for a relatively minor offence, such as being five minutes late to work, particularly if the employee has an otherwise good track record of punctuality.



**Notify the Association as soon as possible if you believe you have not been afforded procedural fairness.**

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# Your responsibilities

Throughout an investigation process you will be required to continue to comply with your employer's policies and procedures including its Code of Conduct if it has one.

It's very important to maintain confidentiality about employer investigations. You can confirm or acknowledge that an investigation is occurring, however, you must not discuss the subject of the investigation or any of the details of the investigation with anyone, including your colleagues and people outside of work.

Of course, there are some exceptions about whom you can discuss the investigation with:



**The investigator/s**



**Your support person**



**Your union**

Never approach another witness to discuss the investigation. If you believe there are witnesses with relevant information, you can provide their names to management and allow the employer to interview the witnesses as part of the formal investigation process.



**Approaching witnesses will be viewed as a breach of confidentiality and undermines the integrity of the investigation process. If you are found to have done this, then you may be subject to disciplinary action by your employer.**

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# The fact-finding interview

You should be given an opportunity to respond to allegations by providing a written statement and/or by responding at a fact-finding interview conducted by the employer or by an external investigator engaged by the employer.

If you are required to participate in a fact-finding interview, you should have a right to have a support person present in person or by video or teleconference. Each respondent and witness should be interviewed separately.

If you are the respondent in an investigation the Association will endeavour to make a support person available by teleconference if you require one. However, if you are a witness then the Association would not normally provide a support person. In that case, you may ask a local Association Branch Official; a colleague who is not involved in the investigation; a friend; or family member to act as your support person.

Best practice is for the interview to be video or audio recorded by the employer. To make a recording, permission is required from all persons present and we advise that the employee and their support person grant this permission as it is in the interest of all parties to have an accurate record of what was said at the interview.

Management should ask questions relevant to the defined issues. Management should not ask irrelevant questions or questions about other issues without notice. You should not be required to answer questions about new allegations without notice. If this occurs, you should ask for the details of the new allegations to be put to you in writing and an opportunity to respond to those at a later date in accordance with your procedural fairness rights.

If you are accused of criminal conduct, you cannot be forced to answer questions which may incriminate you. However, if you exercise your right to silence in these circumstances, the employer may proceed with the investigation and make findings based on the information it has gathered. Whether it is fair for your employer to act on any findings it makes will depend upon the circumstances. Also, your employer's policy may set out how an investigation should be managed when an external agency, such as the police, is involved. If you are accused of criminal conduct in the workplace, you should contact the Association as soon as possible.

When responding to allegations it is important that you are clear, specific, succinct and professional. You should provide the names of any witnesses if there are any and refer to evidence that may support your case.

It's normal for participants to feel anxious or nervous at a fact-finding interview so you can prepare for this by making useful notes for yourself. You should also be permitted to hand over or read from a prepared statement if you wish. If you become upset or need a moment, you should be allowed to take a short break from the interview. You should be able to step outside the room with your support person if they are there in person or management should leave the room if the support person is participating by video or teleconference. You or your support person may also ask for a short break if you need to discuss anything in private. Always ensure the recording is paused when breaks are taken.


It will not help your cause to raise your voice or to become defensive or personal with management. Do your best to maintain your composure, demonstrating professionalism and focusing on the issues at hand.

It is likely to be in your best interest to be honest and forthright in your responses at a fact-finding interview. This means that where you have acted inappropriately, unprofessionally, or not exercised best clinical judgement, you should demonstrate insight by owning up to this; acknowledging the relevant policies and procedures; apologising for your error; stating that you have reflected on your actions; and assuring management that a similar mistake will not occur again. Showing insight in this way will often produce a better result than refusing to acknowledge any errors you have made.

Of course, in cases where you believe you have acted appropriately you should give a clear explanation of the events and your point of view, supporting this with reference to witnesses and evidence where applicable.

If you don't recall a particular incident or a detail of a particular incident, then you should state that you do not recall.

It is best practice for the employer to provide you with a transcript or minutes of the interview. Your support person should also take notes.

 **Always seek advice from the Association before providing a response at a fact-finding interview, especially if the allegations are of a criminal nature or concern other serious misconduct.**



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# Role of the support person



Your support person could be an Association Officer, an Association Branch Official, colleague, friend or family member. It's essential to preserving the integrity of the investigation process that the support person is not a witness or otherwise directly involved in the matter to be investigated.

The support person might be present at a fact-finding interview in person or participate by video or teleconference. Generally, when an Association Officer acts as a support person this role is undertaken by teleconference.

## **The role of the support person includes:**

- To support the employee and assist in the preparation of their responses where possible.
- Assisting the employee to ensure that in conducting the investigation the employer provides procedural fairness and adheres to relevant policies.
- Act as a witness at the fact-finding interview.
- Intervene in a fact-finding interview if managers do not provide the employee with a fair opportunity to respond to the complaints or allegations.
- Intervene if managers otherwise act inappropriately or unprofessionally at the interview.
- Allow the employee to respond to the complaint or allegation on their own behalf.
- Take notes of the interview.

Employers often claim that the role of a support person is to be a silent witness. Indeed, it is best practice for a respondent to answer a complaint or allegations on their own behalf and in their own words. However, case law suggests that union members are entitled to the active representation of their union during disciplinary proceedings. Most commonly, a support person is able to intervene in an interview and advocate for the respondent where breaches of procedural fairness have occurred or are occurring.

The active representation of a support person may also become particularly important where there is a language barrier or health issue that prevents a respondent from adequately responding on their own behalf. If a support person is prevented from actively representing a union member, then they should ask for this to be noted in the official record of the interview and the support person should make their own note.

A support person should take notes of the meeting for you so you can focus on listening to the questions being put to you and carefully respond to the allegations or complaints. Make sure you keep these notes in case there is any dispute about what was said or what occurred at the fact-finding interview.

The Association will endeavour to provide you with a support person if you are required to respond to allegations that have the potential for a disciplinary outcome.

# Investigation outcome

Following the fact-finding interview, management may adjourn briefly before making decisions or may defer to a later meeting date. This process may depend upon its policy and procedure. Sometimes the responses provided by the employee will require the employer to investigate further before it is able to reach a decision about the appropriate outcome.

The employer should determine whether each allegation is substantiated or unsubstantiated on the balance of probability and then set out the proposed outcomes.

**Outcomes may include one or a combination of the following:**

## DISCIPLINARY OUTCOMES

**(Allegation must be substantiated)**



- Summary dismissal (Termination of employment without notice for serious and wilful misconduct).
- Termination of employment with notice or payment in lieu of notice.
- A final formal warning.
- A formal warning.

## NON-DISCIPLINARY OUTCOMES

**(Substantiation of allegations not required)**



- Mediation or facilitated discussion between conflicting parties.
- Remedial outcome such as education or training.
- Employee counselled (i.e. a non-disciplinary discussion is held with the employee to remind them of their responsibilities; they may be asked to read and sign the Code of Conduct or other relevant policies).
- No action taken.

Contrary to common belief, it is not necessary for an employer to issue a formal warning prior to issuing a final formal warning or prior to terminating employment. For example, an individual first offence, such as fraudulent activity, could be sufficiently serious to warrant termination of employment.

A formal warning letter will generally remain on an employee's personnel file indefinitely. However, as time goes on that warning letter will lose its weight or significance in the absence of any further disciplinary issues of a similar nature. It's possible that an employer could agree to remove a warning letter from an employee's personnel file if there has been a sufficient subsequent period of unblemished conduct.

Summary dismissal is for serious and wilful misconduct, e.g., assault, theft, fraud. This is conduct that is so serious that the employee is taken to have repudiated (or "torn up") their employment contract through their conduct. For summary dismissal the employer is not required to give notice (or payment in lieu of notice) and depending on their length of service, the employee may be considered to have given up their right to pro rata long service leave.

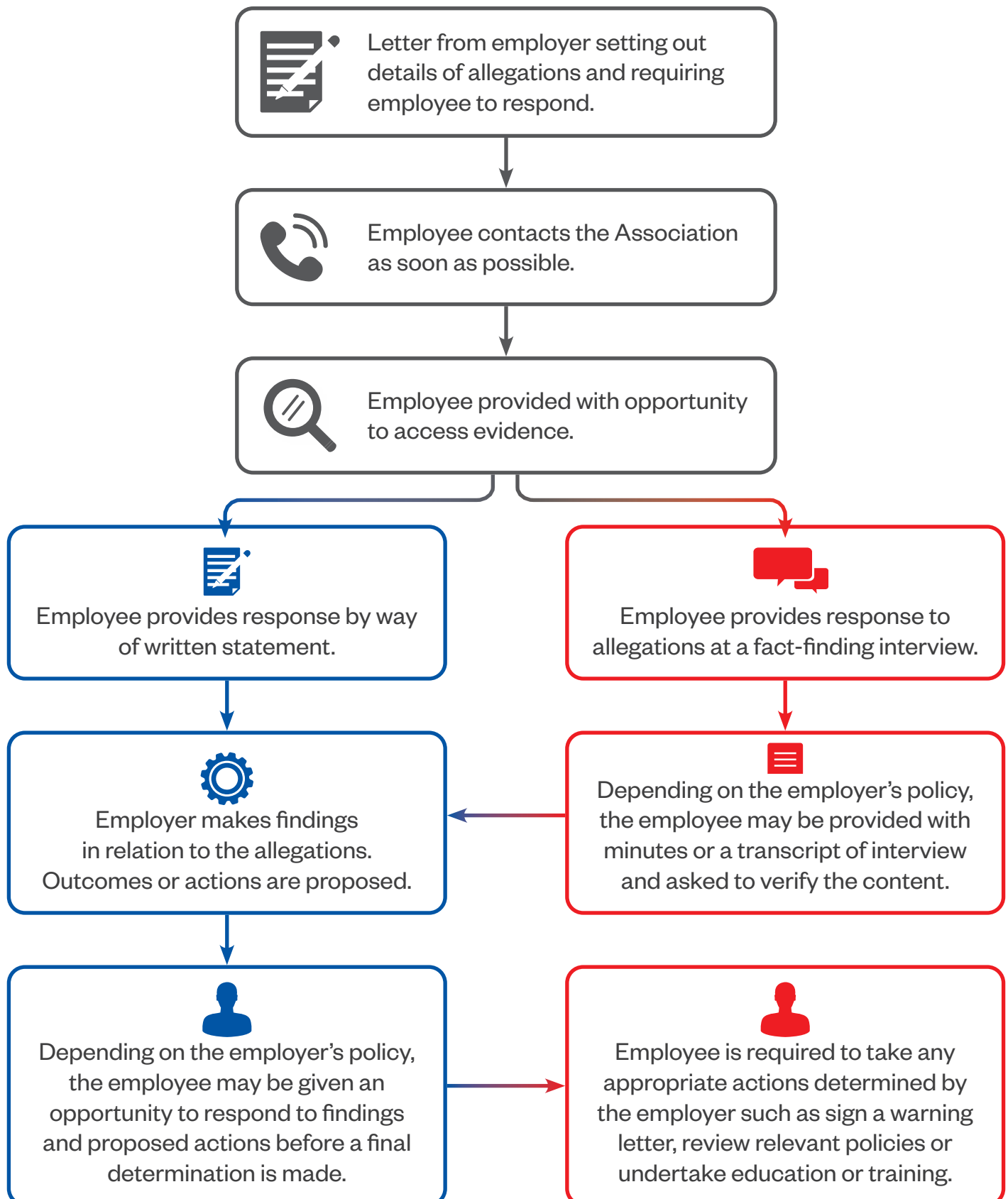


**If you disagree with an investigation finding or outcome, please contact the Association for advice.**



**If your employment has been terminated you should contact the Association as soon as possible for advice.**

# Example employer investigation process



# FURTHER SUPPORT



Whether you're a complainant, respondent or witness, going through an employer investigation process can be stressful. Confidentiality requirements mean that it can feel isolating to be restricted to who you can talk to about it.

The Association can provide you with industrial advice, support and representation, but you may require further support for your health and well-being from other professional services.



Your employer may have an Employee Assistance Program which allows you to access free confidential counselling sessions through an external provider.



**Nurse & Midwife Support**

If you're a registered nurse, enrolled nurse or student nurse, another option is to contact Nurse & Midwife Support. For more information please visit: **[nmsupport.org.au](https://nmsupport.org.au)**



If you are feeling unwell or could be suffering from a health condition, please see your general practitioner. Your general practitioner can also refer you to counselling and other services.



## NSW NURSES AND MIDWIVES' ASSOCIATION

**Phone** 02 8595 1234 (metro) • 1300 367 962 (non-metro)

**Fax** 02 9662 1414

**Email** [gensec@nswnma.asn.au](mailto:gensec@nswnma.asn.au)

**[www.nswnma.asn.au](https://www.nswnma.asn.au)**