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Submitted by email: integrity@nhmrc.gov.au

Dear Samantha,

Draft NHMRC Policy on Misconduct relating to NHMRC Funding

Thank you for providing us with the opportunity to comment on this draft policy. Overall, we are supportive of NHMRC's endeavors to formalise, standardise and communicate measures that will be taken in relation to research related complaints and allegations of research misconduct.

Our major concern with the draft policy is that the proposal to implement precautionary actions does not allow for procedural fairness and as such is not consistent with the general principles of procedural and substantive fairness. The argument that precautionary actions are not sanctions does not hold, since with NHMRC's current systems, precautionary actions taken against a particular researcher are visible to the research community and may have a significant negative impact on the researcher's professional reputation.

We do not support the proposal that a CI-A on a grant should be implicated in any complaint or allegation relating to that grant, when the complaint is specifically directed to other named personnel. There is a need to recognize the practical limitations to what a CI-A can do, and to limit his or her responsibility accordingly. We are particularly concerned that precautionary action may be taken against a CI-A who is not the subject of a complaint, has had no role in the alleged misconduct and has not been afforded the opportunity to respond. Reporting on alleged breaches of the Australian Code for the Responsible Conduct of Research (the **Code**) should be restricted to matters pertaining to research.

From a practical perspective, we have some concerns about the scope of the policy and the ability of institutions to implement it.

Specific issues are as follows:

1. The policy defines misconduct very broadly and will apply to matters such as bullying and employee misconduct, not related to the NHMRC or to research. This represents a significant change to current policy.

We recommend that the concept of misconduct should be restricted to matters arising in the course of assessing or awarding NHMRC funding and/or the conduct of NHMRC-

funded Activities.

2. Clauses 1.3 and 3.1 and other clauses indicate that the policy applies equally to researchers who have received grant funding from NHMRC and those who have been unsuccessful. Clause 1.3 also specifies that the policy applies to individuals who are involved in other NHMRC Activities, such as serving as assessors and on Grant Review Panels (GRP).
 - a. There are differing statements in the draft policy concerning its scope (clauses 1.3 and 3.1). The policy should be adjusted so that the sections on scope and notifications are consistent. If different requirements are to be applied to grant holders and researchers involved in other NHMRC business, this should be made clear.
 - b. Sydney currently does not hold information about NHMRC grant submissions and awards that predate the term of employment of staff at Sydney. We believe that other administering institutions are in a similar position. There is no way for us to reliably obtain this information, other than by contacting the NHMRC.
 - c. Sydney has no way of reliably ascertaining which researchers are “involved in NHMRC Activities”. The NHMRC contacts researchers directly to ask them to participate on review panels and the employing institution is not consulted or informed of membership of review panels at any stage in the process.

On this basis, we expect that implementation of clause 1.3 would require the employing institution being informed by the NHMRC whenever a staff member has been engaged in “NHMRC Activities” – subject to any confidentiality considerations.

- d. As currently drafted, the policy does not specify whether there is a limitation period in relation to its scope. We propose that NHMRC should constrain the scope of the policy to matters that occurred within the holding period for relevant documentation and data.
3. Clause 1.4 defines “Misconduct” in an inclusive way, but, other than specifying that it includes research misconduct and fraudulent conduct, does not specify what level of seriousness is required before a person’s actions are taken to constitute “Misconduct”. We suggest that this is clarified.
4. Clause 2.1 states that relevant parties “are entitled to be advised by the research institution of the outcome of any investigations conducted by the institution”. As the outcome of an investigation may include disciplinary action being taken against an individual (and such action is usually confidential between the institution and that individual), we suggest that the words “where appropriate” are added to this paragraph.
5. Clause 2.1 advises researchers that they may complain anonymously to the NHMRC. We propose a modification to the content of this clause to make it clear that:
 - a. where possible, complaints should be raised with the employing institution and the complainant should identify themselves in order to facilitate communication and allow concerns to be fully considered;

- b. administering institutions must abide by privacy laws and the whistleblower protection laws. Complainants concerned about disclosure of their identities should enquire as to the measures that can be put in place to ensure privacy;
 - c. anonymous complaints should only be made to the NHMRC as a last resort (once the options above have been explored).
- 6. Clause 3.1 describes the need to notify the NHMRC of research misconduct matters. Sydney welcomes the proposed change, and notes that it is consistent with ARC policy, and will (at least in some instances) allow institutions to conduct a preliminary enquiry prior to notification.

Clause 3.1 is entitled “notification of research misconduct matters”, but includes notification of breaches of the Code, even when the breach is not referred to initial enquiry (i.e. there has been no allegation or finding on assessment that the breach could constitute research misconduct, even if proven).

The text in clause 3.1 is not consistent with the flow chart on p 10 of the draft policy. The text would require all breaches of the Code to be reported, whilst the flow chart allows issues to be resolved by the ethics committees without reporting.

We do not support the requirement to report all breaches (including those not referred to initial enquiry) in addition to allegations of research misconduct. The Code is a principles based document and minor breaches, without serious consequences, occur frequently. These issues are appropriately managed locally and are not reported centrally.

Examples include; use of an unapproved version of a document approved by the HREC, failure to use the record keeping sheet prescribed by the AEC (keeping records in another format), researchers storing data in a way that is not consistent with University policy, trainees not seeking adequate guidance, minor disputes over authorship, managed within a lab, researchers not reading and understanding the policy on conflict of interests etc.

It would be impractical for the University to report these sorts of breaches to NHMRC and the information would be of little use to the NHMRC. In support of this position, section 12 of the Code specifies:

“Ignorance, poor judgement or inexperience may lead some researchers to breach inadvertently the provisions of this Code. Provided the alleged breach does not constitute research misconduct (as defined above), the researcher acknowledges the breach, the consequence of the breach are remedied and appropriate steps are taken to prevent recurrence, the matter can be resolved at departmental level.”

- 7. The language used in the policy “preliminary investigation”, “research misconduct inquiry”, “misconduct of a minor nature” is not consistent with the Code. We note that there are also inconsistencies within the Code itself. We request that these issues be addressed when the Code is updated and that consistent language is used across both documents. If terms such as “misconduct of a minor nature” and “serious misconduct” are to be used, a definition should be added.
- 8. Clause 3.1 requires institutions to notify NHMRC when an initial enquiry has taken, or is likely to take more than 30 days. Due to the increasing complexity of complaints (multiple parties and organisations involved, multiple, complex allegations, legal and union representation of respondents etc.), initial enquires often take longer than 30

days. Initial enquires may also be delayed as a consequence of the unavailability of the complainant or respondent.

We are concerned that in cases where an initial enquiry takes longer than 30 days, precautionary action may be taken against investigators, with significant negative effects and without allowing procedural fairness. We propose that precautionary action should not be taken against researchers as a consequence of a delayed initial enquiry, in particular where the researcher in question has not caused or contributed to the delay. (Please see points 12 and 13 in this submission - comments on clause 5).

9. In regard to clause 3.2, we note that the information that must be provided to NHMRC, when notifying about allegations of research misconduct, has been greatly expanded and that this will require additional resources to be allocated to the management of complaints, both by administering institutions and by the NHMRC.
10. Clause 3.3 requires institutions to notify NHMRC of misconduct other than research misconduct. Fraud, theft and conflicts of interest are listed as examples of misconduct.
 - a. The existence of a conflict of interest *per se* is not misconduct. A conflict of interest would only be a cause for concern if it had not been declared, or not been managed in accordance with the relevant policy. The management of conflicts of interest in relation to research is covered in section 7 of the Code and breaches of this section of the Code are treated in the same way, and would be reported in the same way, as all other breaches (i.e. referred to initial enquiry).
 - b. NHMRC has proposed that administering organisations must report on criminal acts such as theft and fraud and has not restricted this requirement to work-related or research related activities. There are two concerns with this approach:
 - If a criminal act occurs in relation to the University, we have responsibility to co-operate with the police, or with whichever authority is responsible for investigating it. It may not be possible for us to report these matters to NHMRC without compromising the criminal investigation.
 - If a criminal act is committed by a University staff member, student or affiliate outside of the auspices of the University, the University would have little or no information about it and would not be in a position to substantiate, or assess any reports received. A requirement to report incidents that are unsubstantiated and have not been assessed to the NHMRC (and the potential for the NHMRC to then apply precautionary measures to researchers involved) does not meet the requirement for procedural fairness. (Please see parts 12 and 13 of this response comments on clause 5).

We submit that reporting on alleged breaches of the Code should be restricted to matters pertaining to research.

11. Clause 4 specifies that the NHMRC will consider the Chief Investigator (CI-A) or Fellow of a grant to be implicated until such a time that the NHMRC is advised otherwise by the institution.

We have a number of concerns with this proposed approach:

- a. Informing the CI-A and other investigators about a complaint for which they are not the subject, and where there is no evidence to suggest they have been, or should have been involved, may compromise investigations and confidentiality. It may also irreparably damage the reputation of the person who is the subject of the investigation and his or her ability to collaborate with the CI-A in future, even if the allegations are unproven.
- b. CI-As cannot reasonably be expected to undertake a deep review of all aspects of research material provided by collaborating CIs contributing to a grant application or project and on this basis, it is not reasonable to hold a CI-A responsible for alleged research misconduct by a co-researcher. This is an issue of concern in all cases, but most particularly in collaborative and multidisciplinary research and research where investigators are located remotely from each other. The prospect of a CI-A being subjected to an investigation or sanctions merely by virtue of having assumed the role of CI-A places an unreasonable burden on researchers, and one which is likely to have a serious adverse impact on the willingness of researchers to take on the role of CI-A, especially in collaborative research.
 - We propose that the CI-A should not be implicated as being in breach of the Code in the absence of any evidence implicating them directly.
- c. NHMRC proposes that a CI-A is implicated until “the Institution advises that the CI-A was not able to detect, prevent or have played a role in the research misconduct.....”
 - This statement is absolute and it will be difficult to provide with any sufficient level of certainty. There are practical limitations to what a CI-A might reasonably be expected to undertake to prevent or detect research misconduct. The NHMRC’s proposed changes are therefore unacceptable as written as they do not limit the responsibility of the CI-A to a level of reasonableness.
 - We propose that the word “reasonably” be inserted in front of the word “able”. Or that the text be modified to reflect that the CI-A should have taken all of the steps reasonably expected by a researcher in his or her position.
 - This statement essentially operates on the proposition that the CI-A (and potentially other researchers) are guilty until they are shown to be innocent. Sydney submits that this is contrary to general principles of procedural and substantive fairness.
 - By including this requirement, any investigation into potential misconduct against a researcher will also need to include an inquiry into the actions of the CI-A to establish whether the requested undertaking can be provided by the Institution. To afford procedural fairness in this regard, the CI-A will need to be provided with an opportunity to respond to the assumption that they are implicated. This will unnecessarily complicate and elongate what can already be a complicated and lengthy process and may lead to situations where a CI-A is not as forthcoming as they

may otherwise be in any investigation into the conduct of another researcher due to concerns regarding the potential impact on their own career.

- d. In respect of allegations the NHMRC categorises as misconduct in a body of research, *all* researchers involved in the research are considered implicated until the institution can provide advice that they each could not have detected, prevented or played a role in the alleged misconduct. This again considerably expands the scope of any misconduct investigation and potentially leads to situations where a particular researcher may not be forthcoming regarding the conduct of another individual for fear that they could be implicated in the misconduct.

As with our comments regarding the CI-A, Sydney proposes that the focus should be on the researcher who is alleged to have engaged in the misconduct and the enquiry is only extended to the role of the CI-A or other researchers if it is established that there are reasonable grounds to suspect that the CI-A or other researchers were implicated.

- e. Provision must be made to ensure procedural fairness (e.g. a right to be heard) in any matter in which precautionary actions, which will be visible to other researchers are contemplated (see point 12a below).

12. Clause 5 refers to precautionary action taken by NHMRC and states that precautionary action is not a sanction against a researcher.

- a. NHMRC's current system allows members of the research community to see when precautionary action has been taken against a particular researcher (i.e. when a particular researcher has been put on the "do not contact" list, this is visible to others using the system). This means that, being placed on the "do not contact" list may result in lasting damage to a researchers' reputation and may impact negatively in his or her career. Whilst this measure may not be intended to be a sanction (a penalty, punishment, or deterrent), if applied using the current system, it has the same effect as one.

We propose that this measure should not be introduced until the NHMRC's IT system can be modified, so that it is not visible to others when a particular researcher is placed on the "do not contact" list.

13. Clause 5 specifies that precautionary action may be taken by NHMRC against researchers during the course of the investigation, and up until the allegations are resolved. This effectively means that precautionary action could be taken following an initial enquiry, during an initial enquiry if it runs for more than 30 days, or very shortly after an institution becomes aware of an allegation, if there is deemed to be a high risk to animals people or the environment, or if funds are suspended.

- a. This proposal contravenes the principle of procedural fairness, which underpins the Code. With NHMRC's current system, a precautionary action has the same effect as a sanction and puts researchers at serious risk of irreparable damage to their professional reputations. Affected researchers should be advised of the issues against them and given the opportunity to respond as an important safeguard in this situation and we propose that provision should be allowed for this to occur (within a reasonable timeframe) and for consultation with the relevant administering institution.

- b. The proposed process allows for precautionary action to be imposed on researchers irrespective of whether allegations potentially involve serious misconduct, a relatively minor breach of the code, or are baseless or possibly even vexatious. The changes to reporting requirements come some way towards addressing these issues, but we anticipate that many matters will need to be reported before completion of the initial enquiry.

We propose that precautionary action should not be taken against researchers as a consequence of a delayed initial enquiry, in particular where the researcher in question has not caused or contributed to the delay.

14. Clause 5.2 describes the NHMRC's decision-making process regarding the application of precautionary action.

Under the current process, there is a lack of transparency around the decision making process. It is unclear as to why precautionary action is taken against some researchers and not against others.

We propose that when NHMRC takes measures to increase transparency around the decision making process (e.g. publishes the criteria that are assessed when these decisions are made). We also propose that, when NHMRC contacts an institution to advise that precautionary action has been applied to a researcher, reasons for the decision are provided.

15. Clause 8.2 specifies that NHMRC expects that any correspondence sent by NHMRC to an Institution will be treated as confidential and will not be shared without NHMRC's permission. Sydney does not support this proposal. In many situations it will not be possible to implement given various requirements under legislation and situations in which the University may be obliged to disclose.

Should you wish to discuss any aspect this submission, or the ethical conduct of research generally, please contact Dr Rebecca Halligan, Director of Research Integrity and Ethics Administration, (rebecca.halligan@sydney.edu.au, ph +61 2 8627 8502), in the first instance.

Yours sincerely,

Signature removed for electronic distribution

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