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To: Integrity and/or HR focal points DRA partners
Date: 18 May 2020
Subject: Implementation toolkit for the Inter-Agency Misconduct Disclosure Scheme

Introduction

In 2019, the Inter-Agency Misconduct Disclosure Scheme (the “Scheme”) was launched by the Steering Committee for Humanitarian Response (“SCHR”). In brief, this initiative aims to prevent individuals who have been proven to have engaged in (safeguarding) misconduct to move through the sector ‘undetected’ by establishing “a minimum standard for humanitarian, development and other civil society organizations to share information as part of their recruitment process.”¹

Within the DRA, discussions were held regarding the implementation of this Scheme. Since many legal impediments are involved, Oxfam Novib’s Legal Counsel initiated a thorough analysis supported by a Dutch law firm (Nysingh) and an external privacy expert to identify the primary hurdles and to offer practical solutions in accordance with the Dutch law. The findings, also documented in a memo (see annex 3), were shared with DRA Partners during a workshop conducted on February 20th, 2020. Upon the positive reception by the representatives of the DRA Partner’s, the CEO’s endorsed the commitments of the Scheme during the DRA’s CEO meeting held on March 2nd, 2020. It was agreed to develop a common approach for the DRA Partners to ensure a collective and harmonized implementation of the Scheme.

Drawing on the aforementioned memo, this document lays out a toolkit of the core elements essential to implementing the Scheme while adhering to applicable (Dutch) law and the General Data Protection Regulation (GDPR). The toolkit provides:

- The Minimum Standards (by SCHR) to adhere to if committed to the implementation of the Scheme (Annex 1)
- Wording to include in the organisation’s recruitment policy and job description (Annex 2) and reference format (Annex 3)
- A memo with an analysis of the possibility of implementing the Scheme under Dutch law (Annex 4)

Amendment to Recruitment Policy

When a DRA Partner decides to commit to the implementation of the Scheme, as a consequence its recruitment policy needs to be amended, stating the organization’s participation in the Inter-Agency Misconduct Disclosure Scheme and reflecting the Minimum Standards of the implementation (see Annex 1).

The Scheme does not replace an organization’s own recruitment policy in any way; it rather complements it. The organization’s existing recruitment policy needs to be amended, implementing the Minimum Standards by:

- 1) adding a provision which states that all recruitment (and decision making on recruitment) is subject to the provision of references;
- 2) the references of candidates need to be provided in a prescribed format, with included a mandatory statement of conduct (see standard wording in Annex 3);
- 3) all references the organization provides to other employers shall always include a statement of conduct in a fixed format;

1. <https://static1.squarespace.com/static/57ffc65ed482e9b6838607bc/t/5c1a6df3cd836607357e9ebb/1545235956565/Inter-agency+Misconduct+Disclosure+Scheme+FINAL.+Dec+2018.pdf>

- 4) provision and processing of references will be channelled only through authorized, designated staff (preferably 1 or 2 HR officers).

The statement of conduct included in the references shall contain wording as stipulated in Annex 3. In short this entails a statement about (mis)conduct, and - if applicable - the measures that were taken in case of misconduct. Prior to rolling out their new (adjusted) recruitment policy, organizations must obtain the approval of their works council (in accordance with article 27 Wet op de Ondernemingsraden) as it constitutes a change in the recruitment and dismissal policy and impacts the privacy of the employees. The approval of the works council is needed to adopt the policy of providing references with a mandatory statement of conduct.

Compatibility with Dutch law

Within the Dutch Civil Code, the Employment Law states that the approval of the employee is required for sharing references. Thus, the consent of the employee must be obtained prior to requesting a reference from a former employer or sharing a reference with a potential new employer.

Furthermore, because of privacy legislation, the candidate must provide consent on the contents of the reference as well, before the reference can be shared.

The provided reference must be accurate and relevant to the role applied for and should not be misleading towards the new employer. For example, a reference is misleading if certain sections are left blank because the employee does not give consent to a certain section of the reference, and relevant information on e.g. misconduct is therefore missing.

Under the Scheme the statement of conduct is a mandatory part of the reference. If therefore consent is not given by the employee on this statement, the organization will need to refuse to provide a reference. Only references that contain the statement of conduct shall be provided.

Does consent of the employee stand in the way of the implementation of the Scheme?

The risk that a candidate does not give his/her consent is not high, as the reference is a pre-condition for hiring. The Scheme could provide for a natural selection process in this way. As the recruitment policy is clear on the conditions of the reference format, the employee could be motivated to act more diligently during his/her career.

Disputes could arise on the interpretation of the definition of misconduct though. Therefore it is vital that participating organizations have a clear code of conduct and a robust, fair and reliable investigation process approved by their works council (or staff representation). Signing the code of conduct should be part of the recruitment process. During employment staff awareness and guidance / training on safeguarding is essential for implementation of the internal procedures.

If the employee does not give his/her consent for the statement of conduct included in the reference, the possibility is to state 'no consent given' in the statement of conduct. However this is only acceptable if there has been no misconduct or this was unsubstantiated, or it concerns already ameliorated minor level misconduct as defined by an organisation's policy².

The Scheme advises to disclose the fact of an on-going investigation process in the Statement of Conduct: "If an investigation process is commenced or is concluded only after a Statement of Conduct has been provided, and the investigation process concludes with a finding that misconduct has been committed, the responding organization is obliged to provide an updated Statement of Conduct, as long as this is permitted by law."

² The misconduct was minor and the employee has been disciplined and conduct since has since improved/changed.

In case an alleged subject of complaint's employment ends before the commencement or conclusion of an investigation process, the process still needs to be concluded and an updated statement of conduct needs to be provided to the new employer. This could however lead to a situation in which an individual is not hired because the pending investigation is communicated with the prospective employer. If subsequently the allegations would not be substantiated, the former employee could claim damages. It is evident that it is important that a careful and diligent procedure must be followed to avoid harming employees. Employers must ensure that an employees' misconduct history is accessible to the employee upon their request, and must provide employees with a reasonable opportunity to comment on the Statement of Conduct.

The memo with the analysis on the Dutch legal context is provided in Annex 4. This memo can serve as background information for the introduction of the Scheme in your organization. The SCHR provides a "How to Implement Guide" on its website, which is very useful as well.

Reference format

The Scheme itself focuses on sexual exploitation, sexual abuse and/or sexual harassment. However, organizations are free to broaden the scope of misconduct they want to include in their reference form.

Note that, as the definition of misconduct is based on the code of conduct of the individual organizations, it is possible that as a consequence, certain types of misbehaviour might not be a breach of the law as such. The employee could therefore argue that inserting a breach of such behaviour in a reference could be unlawful against him/her. In addition to the fact that the employer must refrain from making unlawful statements when giving a reference, the employer must also continue to behave as a good employer and not jeopardize the employee's career without just/reasonable cause.

The misconduct referred to in the statement of conduct will be determined in accordance with the organization's own relevant internal processes and standards. Organizations are encouraged only to include warnings within the statement of conduct where they have been issued within the last two years of the candidate's employment or position within the organization according to the Scheme. However, organizations need to assess what is reasonable and fair. Organizations are not expected to disclose disciplinary measures which are considered "spent" or "expunged" according to the applicable law or policy.

How to be compliant with the Scheme?

To be compliant with the Scheme DRA Partners shall add a page on misconduct to the reference format that they are already using. For this DRA Partners can use the format provided by the Scheme, the 'statement of conduct' (See Annex 3).

The Scheme provides optional questions to include in a statement of conduct. However, given the applicable Dutch law and GDPR, the following use is recommended: After consent of the employee, the statement of conduct can be added to the reference format of the organization. If the employee was found to have committed misconduct, most probably consent will not be given. The organization can then tick the box: consent was not given. If the works council has approved these ways of working, employees are aware that a statement of conduct is mandatory in any reference they ask for.

1. Was the Candidate found to have committed Misconduct (sexual exploitation, sexual abuse or sexual harassment) during the period of employment?
 - No
 - I cannot provide an answer to this question for the following reason(s): no consent was given.
2. Is the Candidate currently being investigated for an allegation of sexual exploitation, sexual abuse or sexual harassment?
 - I am unable to provide an answer because of privacy legislation.

The reference format will need to include that the organization issues as a mandatory part of the reference format a statement on conduct in a fixed format, but only after consent of the employee. This makes it clear that the decision to provide the reference to the new employer is based on employee's consent. However, the employer will not provide a reference that does not include the statement of conduct. If leaving employees request a reference for a new position outside the organization (including with other affiliates within a broader cooperation form such as a confederation), the fixed format must be used.

For employees under ongoing investigation that leave before the investigation has been completed, the Scheme suggest to add the following in the statement of conduct:

“If an investigation process is commenced or concluded only after a statement of conduct has been provided, and the investigation process concludes with a finding that misconduct has been committed by a candidate, the responding organization will provide an updated statement of conduct for that candidate to the requesting organization“.

In practice it will be very difficult to implement this. The consent of the former employee will need to be given beforehand on 1) the disclosure of the ongoing investigation (of which the employee could not even be aware at the time, and which is not finalized yet) and 2) the outcomes of this investigation after his/her employment. This disclosure will most certainly be a show stopper for the new employment. Therefore if an organization expects that serious misconduct will be substantiated, a statement of conduct and a reference cannot be given until the investigation is finalized. Needless to say that this should then be executed in a reasonable period of time.

The SCHR advises to ask references from at least several former employers and dating back up to 5 years, as there may be a pattern of sexual misconduct .

Requesting references

For candidates the same rule applies, only references with a statement of conduct will be accepted. The recruiting organization needs to inform candidates that seeking statements of conduct is part of the recruitment and selection process. The reference must be requested directly from the former employer. In addition to substantive and performance-related subjects, the statement of conduct needs to be requested in the required format. Parallel to this request the consent from the candidate is needed, which should be acquired prior to the receipt of the reference. A reference which does not include a statement of conduct will be handled as a negative reference.

Self-declaration

If a candidate is not able to provide a reference / statement of conduct, because this is for instance not usage for the kind of work the candidate does, or the previous employer is not able to provide the requested information, it is possible to ask the candidate to sign the statement of conduct him/herself as a self-declaration as part of the recruitment process. In the format a sentence can then be included that false statements will have consequences and will be dealt with in accordance with the law and the organization's policy.

In addition to a self-declaration, organizations should seek statements of conduct on the candidate from other, potentially older, sources.

Public visibility and roll out

The recruitment policy must be clearly stated in all employment offers. In addition, organizations must make this policy publicly visible on their own website and other relevant websites such as job search engines. The Scheme will be implemented by DRA Partners for recruitment in The Netherlands at first and subsequently rolled out in the country offices as well.

Annexes:

- I. Minimum Standards Scheme Participation
- II. Example Wording for Recruitment Policy and Job Description
- III. DRA Proposed Statement of Conduct to Add to Reference Form
- IV. Memo

Annex I MINIMUM STANDARDS SCHEME PARTICIPATION

Participating organisations have made a commitment to:

- 1) Demonstrate a firm commitment to preventing sexual exploitation and abuse by their staff, volunteers and other stakeholders. It is expected that participating organisations will have robust policies and procedures in place to foster a good safeguarding culture.
- 2) Implement the Scheme to the fullest extent possible having regard to applicable legal and regulatory requirements.
- 3) Ensure that they systematically request a Statement of Conduct from all previous employers as part of their recruitment process, and use the provided data, or lack of data, to support recruitment decisions.
- 4) Ensure that they systematically respond to requests for Statements of Conduct regarding current or former staff, these should only be provided by Authorised Personnel and used for the primary purpose of assessing the suitability of a candidate for a position as part of the recruitment process.
- 5) Ensure that the misconduct history of all staff is accurate, up to date and reliable.
- 6) Take prompt action in cases of allegations/reports of inappropriate conduct, including through conducting and concluding a robust, fair and reliable investigation process, even if the subject of complaint's employment ends before the commencement or conclusion of the process.
- 7) Provide and update contact information for those authorised to provide a Statement of Conduct

Annex 2 Example Wording for Recruitment Policy and Job Description

As part of its recruitment process, [NAME ORGANISATION] carries rigorous background and reference checks for all candidates. As [NAME ORGANISATION] participates in the Inter-Agency Misconduct Disclosure Scheme, all reference checks include a written questionnaire, the “Statement of Conduct”, sent to past employers regarding Misconduct (sexual exploitation, sexual abuse or sexual harassment). This Statement of Conduct adopts the definitions used in the Scheme.

The provision of references by [NAME ORGANISATION] will be subject to the Scheme as well.

The organization can for all job applications ask candidates to read and agree (proactively sign) the following statement, which then provides them with consent to request information on conduct:

“Application statement:

I certify that all of the statements made in this application are true, complete, correct and are made in good faith. I understand that falsifying, misrepresenting or intentionally withholding information will be grounds for rejection of my application or the withdrawal of any offer of appointment or, if an appointment offer has been accepted, for its immediate cancellation or termination.

For the purposes of this application, I authorize all current and former employers and educational institutions named in my application to release to the [NAME ORGANISATION] information about my academic credentials and qualifications; conduct, including any pending investigations concerning my conduct; performance; reason for separation; as well as any known affiliation with terrorist entities or groups.

My e-signature below releases the aforesaid employers and educational institutions from any liability whatsoever for providing such information to the [NAME ORGANISATION], or its agents. I understand that the [NAME ORGANISATION] may provide a copy of this authorization to said employers or educational institutions in support of a request for such information”

The paragraphs in yellow are optional and can be used separately in a later phase of the recruitment process in a consent form for the reference request.

Annex 3 Contents Statement of Conduct³

1. Was the Candidate found to have committed Misconduct (sexual exploitation, sexual abuse or sexual harassment) during the period of employment?

- No
- Yes
- I cannot provide an answer to this question for the following reason(s): no consent was given.

The nature of the Misconduct is:

I am unable to specify the nature of the Misconduct because of the following legal/regulatory requirements:

2. If the answer is yes, was a Disciplinary Measure imposed upon the Candidate?

- No, for the following reasons:
- Yes, the Disciplinary Measure was:

Date of Disciplinary Measure:

- I cannot provide an answer to this question because of privacy legislation.

3. [OPTIONAL]: Is the candidate currently being investigated for an allegation of sexual exploitation, sexual abuse or sexual harassment?

Yes

No

I am unable to provide an answer for the following reasons:]

The organization has adopted the following definitions of sexual exploitation, sexual abuse and sexual harassment:

- The UN definitions:
- The following definitions:

³ Optional part of statement in yellow

Annex IV Memo

Memo for the DRA

Date: 14 February 2020

From: Barber Dordregter, Legal Counsel DRA

Subject: Implementation of the Inter-Agency Misconduct Disclosure Scheme

Decision needed:

- 1) Participation to the Inter-Agency Misconduct Disclosure Scheme (“Scheme”), if not already signed.
- 2) Decide on approach towards implementation of the Scheme position.

Consultation on the Scheme – short description

The intention behind the Scheme is that the humanitarian and development sector takes responsibility to avoid that persons that have misbehaved (sexual harassment) are re-employed in the sector. If an allegation of sexual harassment is substantiated the participating organizations must ensure that the perpetrator is not hired elsewhere in the sector, therefore participating organisations will provide each other with references on former employees that include a paragraph on misconduct.

Several Partners of the DRA have committed to the Scheme in 2018 / 2019 already. However as described in this memo there are legal impediments to start the implementation of the Scheme (labour law and privacy related).

Therefore the purpose of the workshop is to brainstorm on how to implement the Scheme: not *as is*, but with a referencing procedure *in the spirit of* the Scheme in line with the Dutch legal context.

During the workshop the proposed implementation will be discussed, the legal constraints of the implementation in The Netherlands and the possibilities to implement the Scheme in the DRA (and with support of Partos to the broader sector).

The Inter-Agency Misconduct Disclosure Scheme

The purpose of the Inter-Agency Misconduct Disclosure Scheme (the 'Scheme') (see Annex 1) is to establish a minimum standard for humanitarian, development and other civil society organisations to share information as part of their recruitment process about people who have been found to have committed 'Misconduct', meaning sexual harassment, sexual abuse or sexual exploitation, during employment. It complements the work that organisations are already doing as part of their recruitment processes. Organisations who sign up to it work to a common exchange of information, to prevent and address the consequences of sexual harassment and sexual exploitation and abuse in the humanitarian and development sector.

External legal review in 2018

The first draft of the Scheme was reviewed for Oxfam Novib in 2018 by Nysingh law firm. Their conclusion was that for Dutch organisations it is a legal risk to participate in the Scheme based on the following findings:

- The general requirements of employment (ref. article 7:656 Dutch Civil Code) demand the approval of the employee when sharing references.
- Implementation of the Scheme is not in line with the general requirements of privacy legislations and regulations:
 - Specifically on data relating to criminal acts: article 10 of the EU General Data Protection Regulation (EU) 2016/679 ('GDPR') provides that the processing of personal data relating to criminal convictions and offences or related security measures shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.
 - An organisation is only allowed to use a black list of its employees in accordance with the GDPR requirements. Black lists containing personal data of members of staff who have committed serious offences may be used only within a particular organisation. The Dutch General Data Protection Implementation Act (the 'Act') requires a license if an organisation aims to share relevant information of criminal nature about individuals who have committed misconduct in the recruitment process with other organisations (ref. article 33 par. 4c Act).

Conclusion => This means that providing the Statement of Conduct, as envisaged by the Inter-Agency Misconduct Disclosure Scheme could be against the Act and an unlawful act on several grounds.

If Dutch organisations want to participate in the Scheme, they will have to instigate the implementation of this as legal entities situated in The Netherlands and within the legal context of The Netherlands. The Scheme will need to be adjusted to ensure alignment with GDPR, and the specifics of the Act. This will lead to adjustments of the Scheme or restrictions for the Dutch participating organisations in the implementation.

Prior to implementation Dutch organisations (e.g. jointly with other Dutch NGOs) would have to acquire approval of the Dutch Privacy Authority. Also approval of the Works Council of each organization would be needed prior to implementation (as any decision that impacts staff privacy needs works council approval under GDPR in The Netherlands).

Analysis legal review and further legal reasoning

The external legal opinion focused on the restrictions of the Dutch legal framework. However, this should not be an impediment for Dutch organisations to implement *the spirit* of the scheme.

In July 2019, the OECD Development Assistance Committee agreed on a comprehensive set of recommendations aimed at preventing sexual exploitation, abuse and harassment in the aid sector. These recommendations are very interesting in the context of the Inter-Agency Scheme, as with it the countries commit to a principle of enhanced background screening of aid workers in recruitment processes. While it doesn't change data protection laws, it does assist in arguments of 'necessity' and 'proportionality' (which are aspects of lawful bases for disclosures of information under GDPR) when including misconduct information in references, or adopting, as a condition of recruitment of aid workers, that they agree to the

recruiting organisation requesting relevant information on misconduct and disciplinary actions from previous employers, and the previous employer disclosing it.

See: <https://www.oecd.org/development/donor-countries-set-international-standard-for-preventing-sexual-exploitation-abuse-and-harassment-in-development-sector.htm>

In the light of these developments, and the current demands on humanitarian organisations and development organisations from donors, host governments and regulators not to miss opportunities to prevent misconduct recurring, and in particular to prevent perpetrators of sexual exploitation and abuse from moving from one organization to another undetected, the DRA attaches great importance to the goals of the Scheme. Several Partners of the DRA have therefore already publicly committed themselves to the Scheme.

Oxfam Novib has been investigating how to implement the Scheme without breaching labour and/or privacy laws and regulations. Referencing approaches/mechanisms that fit in the Dutch legal context and achieve a similar result were explored.

Black listing

For black listing GDPR provides strict criteria. However, the Scheme is not aiming at developing 'black lists' and references will not be kept in a separate database. The retention periods of the references (whether provided or received) can be done in compliance with the GDPR requirements and are the responsibility of the requesting/receiving employer.

Processing of data on criminal offenses

Although the processing of data that may relate to criminal offences is very restricted, the Act provides an exception. Personal data relating to criminal law matters may be processed by the controller that processes these data for its own purposes in order to assess a request from the data subject to take a decision on him or her. This would seem to cover the recruiting organisation requesting the information. However, stating that someone has committed misconduct within an organisation's internal businesses of operation does not necessarily qualify as 'criminal offence data' as not all violations of an organisations' Code of Conduct or PSEA policy constitute crimes.

There is a risk that the disclosure of information on misconduct may also contain sensitive information, especially in relation to information on a person's sex life or sexual orientation. The legitimate interest rule does not apply to sensitive information, and the grounds for processing such information under a substantial public interest in accordance with article 9(2)(g) of the GDPR does not apply in this case. Processing of sensitive information due to substantial public interest is subject to a narrow scope of application under GDPR. However, if the declaration on misconduct is generally formulated as above, the risk of sharing sensitive information is not applicable.

GDPR - Legitimate interest ground for disclosure of misconduct

Under GDPR, the 'legitimate interest' can be that of a *third party*. In the humanitarian / development aid context, there may be a compelling legitimate interest of the (often vulnerable) individuals with whom and for whom humanitarian and development agencies work: i.e. that the organisation takes all necessary steps to avoid those who would harm them being employed in the sector. This is also in line with the 'Do No Harm' principle, which is part of the core humanitarian standards and is derived from international law obligations.

Separately, it is in the legitimate interest of employers in the development and humanitarian sector to know if a person they are recruiting has a history of established serious sexual misconduct in prior employment, and it is in the legitimate interest of the organisation to produce a reference that is not misleading and that avoids "passing on" inappropriate candidates.

This combination of legitimate interests may outweigh the interest of an individual not to have established misconduct disclosed in a reference for a role in an humanitarian or development organisation (or the issue being flagged in another way in that reference).

However, under the Dutch Civil Code, the approval of the employee when sharing references is still required.

GDPR - consent ground for disclosure of misconduct

Alternatively, and for the same contextual reasons described above, it may be proportionate to seek an individual's consent, as part of a recruitment process, to the disclosure of misconduct in prior employment where this is relevant to the role applied for.

On the point about 'consent' not being possible in the context of an employee/employer relationship (because of the power imbalance), the relationships we need to consider would normally be: (1) job applicant/potential employer and (2) job applicant/ex-employer. While there may be some power imbalance in such relationships, this is not the same imbalance that exists in employer/employee relationships.

If there is a degree of power imbalance, the question is proportionality. Is it disproportionate to ask an applicant to agree to their prior employer confirming no serious prior sexual misconduct if they are applying for a job where such conduct would present serious risks to individuals?

In The Netherlands, there is no legal obligation on an organisation to provide a reference. However, if an employer is asked to provide a reference, the reference should be accurate and relevant to the role applied for, but should also not be misleading (towards the new employer). Accordingly, it would not be disproportionate for a former employer (or for staff moving between affiliates) to say they will only agree to provide a reference if the individual requesting the reference consents to the organisation disclosing information that is accurate and relevant to the role applied for including any established relevant misconduct.

Adjusted version of the Scheme

In June 2019, a revised Appendix 1 to supplement the Statement of Conduct of the Inter-Agency Misconduct Disclosure Scheme was drafted. Appendix 1, as of June 2019, was developed in order to allow organizations from EU countries to apply the Scheme in accordance with the GDPR, thus creating the necessary conditions to enable these organisations to sign on to the Scheme.

Part A is the Statement of Conduct (boxes to tick), which Dutch organisation can't share with third parties because of constraints related to privacy and labour laws (as described above).

Part B of Appendix 1 gives the option for five possible answers that could be given to a requesting organization by an organization to which GDPR is applicable. Of these options, only options 2 and 5 are possible, given its applicable legal context in the Netherlands.

- Option 2: "I am lawfully permitted to share conduct information contained in employee records with the individual's consent; the individual has not given consent". However, the information that the former employee expressly disagreed with the disclosure of information about his behaviour could suggest that the consent was not given because there was e.g. a case against this person and could possibly give rise to claims for damages.
- Option 5: "add other relevant statement you can lawfully provide"

Option 5 could be used to add wording on how the Dutch organisation implements the Scheme, such as "[name organisation] issues declarations on conduct in the fixed format of Annex 1 Part A to new employers, but only after consent of the employee." In combination with option 2 it is then clear that the decision to provide the reference to the new employer is based with the employee, but the former employer will not provide a reference that does not include the statement.

Conclusion

Dutch organisations can implement the Scheme in an adjusted form for new employees, former employees and current employees (current employees who require a reference if they apply for a job elsewhere or within the confederation).

Dutch organisations can include in their recruitment policy a provision that they will request references including a statement on conduct from all new employees as a pre-condition of employment. This policy should also be clearly visible on the website, on the jobs website, and within job vacancies. Candidates are free not to apply for a position with the organisation if they do not agree for their former employers to give references, therefore the imbalance of power does not play a role.

The reference will always need to be requested directly – after written consent of the candidate (or by email, if this email is clearly linked to the candidate) - from the former employer and in a fixed format in which, in addition to substantive and performance-related subjects, the declaration regarding misconduct will be included.

If leaving employees request a reference for a new position outside the organisation (including with other affiliates within a confederation), or the new employer requests the reference, the same fixed format will be used. The (former) employee will always need to sign the consent form (or email his/her consent) before the reference including the misconduct statement can be shared.

Towards candidates, the procedure does not entail privacy implications. However, it is important that the candidate demonstrates the required consent *before* the former employer can be asked for a reference. Using a consent form for new candidates will meet the general requirements, including necessity, legitimacy and proportionality. This can be incorporated into the job application process.

Next steps

For the implementation of the Scheme in the organisation and its Field/Country Offices the HR department of the organisation will need to adjust its referencing process protocol and reference form (the format will need to include a fixed set of questions regarding sexual misconduct).

Works council

If a DRA Partner decides to adopt this new procedure of providing references for (former) employees, this is subject to approval of the works council as it constitutes a change in the recruitment and dismissal policy and impacts the privacy of the employees.

Annex 1

Inter-Agency Misconduct Disclosure Scheme

Inter-Agency Scheme for the Disclosure of Safeguarding-related Misconduct in Recruitment Processes within the Humanitarian and Development Sector

Preamble

The purpose of this scheme is to establish a minimum standard for humanitarian, development and other civil society organisations to share information as part of their recruitment process about people who have been found to have committed “Misconduct”, meaning sexual harassment, sexual abuse or sexual exploitation, during employment. It complements the work that organisations are already doing as part of their recruitment processes.

This scheme ensures that all organisations who sign up to it work to a common minimum exchange of relevant sensitive information, while respecting applicable legal and regulatory requirements. By so doing it contributes to organisations’ work to prevent and address the consequences of sexual harassment and sexual exploitation and abuse in the humanitarian and development sector.

Organisations committed to this scheme hope that it can be a good start and the basis from which to explore further collaborative approaches.

Inter-Agency Misconduct Disclosure Scheme

Inter-Agency Scheme for the Disclosure of Safeguarding-related Misconduct in Recruitment Processes within the Humanitarian and Development Sector

1. Introduction

- 1.1 This Scheme has been developed by a group of humanitarian, development and other civil society organisations to describe their commitment to share relevant information about individuals who have been found to have committed sexual harassment, sexual exploitation or sexual abuse in the course of their employment or terms of their position.
- 1.2 This Scheme is premised on the belief that sharing relevant information in the recruitment process will allow employers to be more confident that individuals they recruit are fit to participate in development and humanitarian activities and/or other relevant activities, which will help mitigate the pressing safeguarding concerns within the Sector.
- 1.3 This Scheme is intended to be consistent with and support implementation of the Core Humanitarian Standard on Quality and Accountability (CHS).
- 1.4 For further information on the development of this Scheme or interpretation of its provisions please see the Explanatory Notes.

2. Purpose

- 2.1 The safeguarding and related obligations of humanitarian, development and civil society organisations require them, individually and collectively, to take appropriate measures to prevent harm from occurring to the people that these organisations interact with and those who work for these organisations. These obligations require organisations to apply high standards in their recruitment process, which requires that they have access to reliable information to be able to form an accurate picture of whether a candidate may pose a safeguarding risk to their beneficiaries, staff and those of partner organisations.
- 2.2 This Scheme facilitates Participating Organisations disclosure and receipt of relevant information about individuals found to have committed misconduct relating to sexual exploitation, sexual abuse or sexual harassment, for the sole purpose of making informed recruitment decisions.
- 2.3 The Scheme is designed to offer a proportionate approach to sharing of such information. The Scheme relies on the legitimate interests of Participating Organisations and the public interest of the Sector in accessing and disclosing such information while ensuring appropriate safeguards are in place that duly take into consideration the interests of Candidates for whom the disclosure of Misconduct History may have significant consequences.
- 2.4 Participating Organisations will implement this Scheme to the full extent possible having regard to applicable legal and regulatory requirements. Participating Organisations will be transparent about any difficulties they encounter in applying this Scheme.

3. Definitions

When used in this document:

“Authorised Personnel” refers to the individual(s) within the Participating Organisation who is/are authorised to access a Candidate’s Misconduct History, and who are responsible for managing and processing Statements of Conduct.

“**Candidate**” refers to an individual who works, or has worked, for a Participating Organisation as an employee, or in a governing position (i.e. as a member of a Participating Organisation’s corporate bodies, such as Trustee / Board Director, etc. unless prohibited by the Participating Organisation’s constitutional documents).

“**Disciplinary Measure**” means the sanction applied by a Participating Organisation to a Candidate who is found to have committed a Misconduct as a result of an Investigation Process, or the sanction that would have been applied in circumstances where an Investigation Process concluded with a finding of Misconduct after the Candidate has left the Participating Organisation.⁴ For the purposes of the Scheme, Disciplinary Measures are limited, with respect to sexual harassment, to written warning, suspension or dismissal.

“**Investigation Process**” for the purposes of this Scheme refers to each Participating Organisation’s internal investigation process, including any subsequent disciplinary process, to determine whether a Candidate has committed Misconduct.

“**Misconduct**” for the purposes of this Scheme covers sexual exploitation, sexual abuse and sexual harassment, as defined by each Participating Organisation. As part of a Statement of Conduct, Participating Organisations shall make clear how they define these three terms, or whether they adopt the United Nations definitions of these terms.⁵

“**Misconduct History**” means the following information relating to a Candidate held by a Participating Organisation:

- Whether the Candidate was found to have committed Misconduct during the period of employment with the Responding Organisation;
- the nature of the Misconduct (sexual exploitation, sexual abuse or sexual harassment);
- the Disciplinary Measure imposed for the Misconduct; and
- the date of the Disciplinary Measure.

“**Participating Organisations**” refers to the humanitarian, development and other civil society organisations who have committed to implement this Scheme (see external web link).

“**Recruitment Process**” means the process by which Participating Organisations assess the suitability of a Candidate for a position, to decide whether to hire the Candidate.

“**Requesting Organisation**” means the Participating Organisation requesting a Statement of Conduct about a Candidate.

“**Responding Organisation**” means the Participating Organisation providing a Statement of Conduct about a Candidate.

“**Scheme**” shall mean the Inter-Agency Scheme for the Disclosure of Safeguarding-related Misconduct in Recruitment Processes within the Humanitarian and Development Sector.

“**Sector**” shall mean the humanitarian, development and civil society sector.

⁴ “Found” or “finding” for these purposes shall mean that, in accordance with the Participating Organisation’s own relevant internal processes and standards, Misconduct has been determined to have occurred.

⁵ Sexual harassment is defined in the [UNSG's bulletin ST/SGB/2008/5](#) Sexual exploitation and abuse is defined in the 5 Oct 2016 [UN Glossary on Sexual Exploitation and Abuse](#).

“**Statement of Conduct**” means a statement from the Responding Organization substantially in the form and substance set out in Appendix 1, or a version of this form tailored by a Participating Organisation but which as a minimum contains Misconduct History about the Candidate.⁶

4. Scope

- 4.1 This Scheme sets out the principles and processes according to which Participating Organisations will share a Candidate’s Statement of Conduct as part of the Recruitment Process.
- 4.2 This Scheme is complementary to and separate from any other forms of due diligence that Participating Organisations may carry out as part of the Recruitment Process for the purposes of assessing a Candidate’s suitability for a position, such as provision of references and background checks or other vetting and screening mechanisms. In this context, it is within the discretion of each Participating Organisation to request or provide further information than the minimum required within the Statement of Conduct.
- 4.3 The Scheme is also complementary to and separate from other forms of information sharing which may or may not be part of the Recruitment Process, for instance providing certificates of employment, updates to employee record books, and confirmations of employment for administrative purposes, to the extent that these do not conflict with the Scheme.
- 4.4 This Scheme does not apply to vetting and screening measures concerning consultants, as the contractual processes for engaging consultants are different from those that apply to employees or those in governing positions. Participating Organisations endeavour to work together to achieve appropriate information sharing for consultants, so as to appropriately mitigate safeguarding-related risks.

5. Common Principles

Participating Organisations agree that they will cooperate in the context of the Recruitment Process in accordance with the following common principles:

- 5.1 Each Participating Organisation will ensure that the provision of, and the request for, a Statement of Conduct is a mandatory part of the Recruitment Process.
- 5.2 Each Participating Organisation will ensure that Statements of Conduct are only provided by Authorised Personnel within the Participating Organisation and only used for the purpose of assessing the suitability of a Candidate for a position as part of the Recruitment Process.
- 5.3 Participating Organisations will endeavour to ensure that:
- 5.3.1 Allegations of Misconduct are followed up and acted upon appropriately, including through conducting and concluding a robust, fair and reliable Investigation Process, even if the subject’s employment or position ends before the commencement or conclusion of the Investigation Process.
- 5.3.2 Disciplinary Measures are appropriate to the Misconduct and documented so as to ensure that a Candidate’s Misconduct History is accurate and reliable.
- 5.3.3 A Candidate’s Misconduct History is processed internally by Participating Organisations in accordance with applicable data protection legislation, regulations and internal policies.

⁶ If a Participating Organisation chooses to adapt the Statement of Conduct they should ensure that any amendments do not directly or indirectly reveal the identity of the victim of a Misconduct.

Participating Organisations will ensure that a Candidate's Misconduct History is accessible to the Candidate as required by applicable law or policy and to Authorised Personnel, and that appropriate measures are taken to protect a Candidate's Misconduct History from deletion, alteration and unauthorised access.

- 5.4 Participating Organisations will adopt and implement the Scheme in a spirit of transparency and cooperation. If a Participating Organisation in a particular case is not able to request or provide the information contemplated with the Statement of Conduct for reasons owing to compliance with applicable legal and regulatory requirements, or an investigation, inquiry, or decision from a competent authority or judicial body, the Participating Organisation should be transparent about the reasons for this, including by documenting these reasons within the Statement of Conduct. More generally, Participating Organisations are encouraged to communicate with each other about any challenges in implementing this Scheme within the countries in which they operate.
- 5.5 Participating Organisations will inform Candidates about this Scheme, during the Recruitment Process and as relevant, during their time as employees.
- 5.6 Participating Organisations will endeavour to raise awareness of this Scheme within the Sector more broadly, with a view to increasing the number of Participating Organisations and the effectiveness of the Scheme, and to strengthen public trust in Sector safeguarding and related procedures.
- 5.7 Each Participating Organisation is encouraged to adopt a policy and / or procedures as may be necessary to ensure implementation of this Scheme.

6. Providing a Statement of Conduct

- 6.1 Authorised Personnel within the Responding Organisation will provide a Statement of Conduct on request for Candidates who are currently employed by the Responding Organisation or who have left the Responding Organisation within five years prior to the request, and who are undergoing a Recruitment Process for a position with the Requesting Organisation.
- 6.2 If an Investigation Process is commenced or concluded only after a Statement of Conduct has been provided, and the Investigation Process concludes with a finding that Misconduct has been committed by a Candidate, the Responding Organisation will provide an updated Statement of Conduct for that Candidate to the Requesting Organisation.
- 6.3 Participating Organisations may at their discretion choose to disclose the fact of an ongoing Investigation Process within a Statement of Conduct. An option for this is provided at Section 3.2 of the Template Statement of Conduct, at Appendix 1.
- 6.4 Responding Organisations are encouraged to take necessary measures to ensure that the Candidate is informed of the content and provision of the Statement of Conduct, including the possibility to amend it pursuant to section 6.2 above. To that end, and as referred to in section 5.3.3 above, Participating Organisations will ensure that a Candidate's Misconduct History is accessible to the Candidate, upon request, as required by applicable law or policy, so as to ensure transparency for the Candidate on the content of a Statement of Conduct. Where required by applicable law or policy, Participating Organisations should provide Candidates with a reasonable opportunity to comment on the Statement of Conduct.
- 6.5 Participating Organisations should retain copies of Statements of Conduct in line with applicable data protection legislation, regulations and internal policies.

7. Requesting a Statement of Conduct

- 7.1 Authorised Personnel within Requesting Organisations will request a Statement of Conduct from a Candidate's current or most recent employers to cover a period of at least the five years preceding the request.
- 7.2 Requesting Organisations will inform Candidates about their request for Statements of Conduct as part of the Recruitment Process.
- 7.3 Requesting Organisations will make all offers of employment or other position, or the commencement of employment or position, contingent on receipt of Statements of Conduct. In this context, Requesting Organisations are encouraged to make the request for a Statement of Conduct at the last stage before making an offer of employment, or other similarly late stage of the Recruitment Process, so as to minimize the amount of information processed.

8. Recruiting Candidates from non-Participating Organisations

- 8.1 When a Candidate has not been previously employed by a Participating Organisation, Participating Organisations will, as part of the Recruitment Process, endeavour to seek information from the Candidate's previous employers within the spirit of this Scheme.
- 8.2 If a Requesting Organisation does not receive the information requested as part of a Statement of Conduct, for instance if the Candidate has not been previously employed by or held a position with a Participating Organisation, if the previous employer is not in a position to provide the information requested, or if the Candidate has had a period of unemployment, the Requesting Organisation it will take reasonable steps to procure satisfactory answers to the questions posed as part of the Statement of Conduct request, including by:
- 8.2.1 Ensuring that self-declaration of a Candidate's Misconduct History forms part of the Recruitment Process.
- 8.2.2 Seeking Statements of Conduct on the Candidate from other, potentially older, sources.

9. Adoption, implementation and revision of the Scheme

- 9.1 This Scheme is applicable as from 1 January 2019.
- 9.2 Participating Organisations will endeavour to review this Scheme annually together to ensure it remains up to date and implementation challenges are identified and addressed.

Appendix 1

This Appendix should be completed if the requesting organization participates in the SCHR Inter-Agency Misconduct Disclosure Scheme. Terms used in these questions as are defined in the Scheme (available at: <https://www.schr.info/the-misconduct-disclosure-scheme>). If, for legal reason, you cannot provide the Statement of Conduct in Part A, please complete the Declaration in Part B.

Part A: STATEMENT OF CONDUCT – CONFIDENTIAL

1. Was the Candidate found⁷ to have committed Misconduct (sexual exploitation, sexual abuse or sexual harassment) during the period of employment?

- No
- Yes

The nature of the Misconduct is:

I am unable to specify the nature of the Misconduct because of the following legal / regulatory requirements:

2. If the answer is yes, was a Disciplinary Measure imposed upon the Candidate?⁸

- No For the following reasons:
- Yes The Disciplinary Measure was:
Date of Disciplinary:

I cannot provide an answer to this question for the following reasons:

3. [OPTIONAL⁹: Is the candidate currently being investigated for an allegation of sexual exploitation, sexual abuse or sexual harassment?]

- Yes
- No
- I am unable to provide an answer for the following reasons:]

4. Organization XXX adopts:

- the UN definitions of sexual exploitation, sexual abuse and sexual harassment; OR
- the following definitions:

⁷ "Found" for these purposes shall mean that, in accordance with the Organization's own relevant internal processes and standards, Misconduct has been determined to have occurred.

⁸ Organizations must at a minimum disclose information where a Candidate was dismissed for Misconduct. Organizations may, in their discretion, disclose the fact of lesser Disciplinary Measures such as suspension and warning. Organizations are encouraged only to include warnings within the Statement of Conduct where they have been issued within the last two years of the Candidate's employment or position within the Organization. Organizations are not expected to disclose Disciplinary Measures which are considered "spent" or "expunged" according to applicable law or policy.

⁹ In accordance with section 6.3 of the Scheme, this question in the Statement of Conduct is optional; it is within each Participating Organization's discretion whether to include it.

Part B:

DECLARATION – CONFIDENTIAL

I cannot lawfully provide information in accordance with the Statement of Conduct.

I advise as follows (please tick relevant statement¹⁰):

- 1. An employment certificate has been provided to the individual as mandated by relevant law and contains accurate information on the individual’s conduct during employment¹¹.

 - 2. I am lawfully permitted to share conduct information contained in employee records with the individual’s consent; the individual has not given consent.

 - 3. The individual is not eligible for rehire by my organisation.

 - 4. Based on the information available to me, I do not recommend the individual for the role described.

 - 5. *[add other relevant statement you can lawfully provide]*
-

End.

¹⁰ Statements in this Part should be made having regard to the objectives of the Scheme, and in accordance with the same principles (including principles of proportionality) and processes set out in the Scheme Terms.

¹¹ Information is available to Scheme participants on the SCHR website on how to read and understand employment certificates provided in different jurisdictions.