

**TERMS OF REFERENCE**  
**FOR INDEPENDENT INVESTIGATION OF ALLEGATIONS OF INAPPROPRIATE TREATMENT OF**  
**HAWTHORN FOOTBALL CLUB PLAYERS AND THEIR FAMILIES**

**A. Purpose of Document**

The AFL has commissioned an independent investigation (**Investigation**) by a panel of independent investigators (**Investigation Panel**) of allegations of inappropriate conduct by the Hawthorn Football Club (**HFC**) (including by its coaches, football operations staff, independent contractors, management and/or board), directed towards some players on its playing list and in particular affecting First Nations players, their families and/or their intimate partners.

This document sets out the Terms of Reference for the Investigation, including the matters which are the subject of the Investigation, the matters upon which recommendations are sought and the Process Plan for the conduct of the Investigation.

**B. Definitions**

In these Terms of Reference:

- a. “HFC” includes, unless otherwise indicated, any current or former employee, independent contractor, director or other officer of the Hawthorn Football Club.
- b. “Inappropriate Conduct” includes:
  - i. racist behaviour;
  - ii. bullying, and/or intimidatory conduct whether towards HFC listed players, and/or their intimate partners, friends or families;
  - iii. inappropriate intrusion upon or purported control (including coercive control), over the family, cultural and/or non-football lives and wellbeing of HFC listed players and/or their intimate partners, friends and families;
  - iv. racialized and/or gendered stereotyping directed towards First Nations players, their families and intimate partners;
  - v. conduct unbecoming or likely to prejudice the interests or reputation of the AFL, or bring the game of football into disrepute, within the meaning of clause 2.3(a) of the AFL Rules; and
  - vi. Notifiable Conduct, as defined in the AFL Rules.

- c. A reference to the '**Relevant Period**' means the period from 1 January 2008 to 31 December 2016 inclusive, or such further period as appears to the Investigation Panel from the information provided to it to be appropriate.
- d. A reference to a '**First Nations**' person means an Aboriginal person or a Torres Strait Islander person or any other person who is Indigenous to their country of origin.

### **C. Matters for Investigation**

The Investigation will investigate, consider and report on and in relation to the following matters:

1. Whether during the Relevant Period (or any part thereof) HFC engaged in any conduct which involved or included Inappropriate Conduct directed towards players, their families and/or their intimate partners.
2. Specifically with regard to First Nations players, whether during the Relevant Period (or any part thereof) HFC engaged in Inappropriate Conduct directed towards any First Nations players, their families and/or their intimate partners which involved or included demands, duress or pressure in relation to, or interference with:
  - a) the living arrangements of First Nations players (including where and with whom they lived and whether they were counselled or encouraged to alter existing living arrangements);
  - b) the intimate relationships of First Nations players (including whether the First Nations players were counselled or encouraged to end intimate relationships);
  - c) the reproductive choices or health of intimate partners of First Nations players (including whether they were counselled or encouraged to terminate pregnancies or which impacted on or affected pregnancies);
  - d) the freedom of movement of First Nations players (including whether they were counselled or encouraged not to visit family and friends interstate, or to limit the frequency or duration of such visits); or
  - e) the freedom of communication of the First Nations players (including whether they were counselled or encouraged not to communicate with their families, their intimate partners and/or their friends, or to limit such communication).
3. If Inappropriate Conduct is found to have occurred during the Relevant Period (or any part thereof) in respect of the Matters for Investigation:

- a) whether any Inappropriate Conduct identified was known and countenanced (and if so to what extent) by any and who of the senior management and/or Board of HFC;
  - b) whether any Inappropriate Conduct identified ought to have been known (and if so to what extent) by any and who of the senior management and/or Board of HFC;
  - c) whether and to what extent HFC provided appropriate support for players, their families and/or intimate partners with respect to trauma, harm or distress arising from any identified Inappropriate Conduct;
  - d) whether and to what extent HFC provided mechanisms for the performance review of persons involved in any identified Inappropriate Conduct or reprimands, warnings, counselling or education to those persons; and
  - e) whether HFC provided appropriate and culturally safe support for the First Nations players, their families and/or intimate partners including with respect to trauma, harm or distress arising from any identified Inappropriate Conduct.
4. Whether the HFC appropriately supported the First Nations players, their families and/or their intimate partners in the period immediately following the cessation of their employment by the HFC during the Relevant Period, including by the provision of assistance in the relocation back to their home communities.
5. Whether the '*Cultural Safety Review*' commissioned by HFC and undertaken by Mr Philip Egan of Binmada Pty Ltd (**Binmada Report**) was an appropriate mechanism and/or adopted appropriate procedures for the matters Mr Egan was engaged to review and/or ultimately investigated.

#### **D. Recommendations**

6. The final report addressing the Matters for Investigation above, will set out:
- a) Recommendations as to whether any persons who engaged in, were involved in and/or were aware of any Inappropriate Conduct should, in the view of the Investigation Panel, be subject to disciplinary action pursuant to AFL Rules and commenced by persons so authorised under AFL Rules.
  - b) Any other recommendations connected to the Matters for Investigation that may be considered by the Investigation Panel to be appropriate.

## Process Plan

### Investigation Panel and Participants

7. The AFL General Counsel has appointed an Investigation Panel, in accordance with Rule 3.1 of the AFL Rules, comprising Bernard Quinn KC as Chair and barristers Julie Buxton, Jacquelyn Turfrey and Tim Goodwin (**Investigation Panel**).
8. The role of the Investigation Panel will be to:
  - a) investigate any matter it considers relevant to the Terms of Reference; and
  - b) conduct the Investigation in accordance with this Process Plan and the AFL Rules; and
  - c) produce a report in accordance with this Process Plan and the AFL Rules.
9. The Investigation Panel will act independently (including of the AFL) in exercising its role. It will not act as an advocate for any Participant in the Investigation. Each of the engagements between the members of the Investigation Panel and the AFL expressly preserves the independence of the panel members in the conduct of the Investigation. In addition, if the Investigation Panel requires legal advice or representation in the course of its work, it may retain a law firm of its choosing (save that that law firm may not be Gordon Legal or any other law firm currently retained in any matter by the AFL). The AFL will pay the reasonable costs of such legal advice or representation but will have no right of access to or influence or control over it. Nothing in this paragraph prevents the Investigation Panel and Gordon Legal from liaising including as to logistical, process and procedural matters (including any arrangement directed by the Investigation Panel pursuant to paragraph 15(f) of these Terms of Reference). Participants will direct all correspondence for the attention of the Investigation Panel to Gordon Legal, unless otherwise directed or requested by the Chair of the Investigation Panel. Gordon Legal will also be responsible for coordinating any document requests made by the Investigation Panel or Participants, receipting documents provided by the Participants, the storage, organisation and provision of access of such documents by Participants, and the delivery to Participants of the documents and evidence of other Participants (as only delivered in accordance with these Terms of Reference), unless otherwise directed or requested by the Chair of the Investigation Panel.
10. The Investigation Panel will not be bound by the formal rules of evidence when performing its work, but may have regard to those rules at its discretion in order to ensure that the Investigation is conducted fairly including as to the standard of proof to be applied and the weight to be accorded to evidence.
11. The Investigation Panel may invite to participate in the Investigation, persons or entities whom it considers may have a sufficient connection with or involvement in the subject matter of the Investigation, or who may be able to provide information or documents

relevant to the subject matter of the Investigation (**Participants**). A person who wishes to be a Participant must first inform the Investigation Panel via Gordon Legal that they elect to do so by 28 October 2022, or on such later date as agreed by the Investigation Panel. It is currently anticipated that those Participants will include:

- a) those persons whose views have been recorded in the Binmada Report and/or the ABC News article authored by Russell Jackson and published on 21 September 2022 titled '*Hawthorn racism review to allege that former coaches separated First Nations players from families and demanded a pregnancy termination*';
  - b) where relevant to the issues to be determined by the Investigation Panel, the family or friends of those persons referred to in 11(a);
  - c) any other HFC player or intimate family member or intimate partner of a HFC player who provides evidence which persuades the Investigation Panel that they have experienced, or know of, Inappropriate Conduct;
  - d) HFC;
  - e) Binmada Pty Ltd, Phil Egan and Dr Meaghan Katrak Harris and any other relevant officers of that company; and
  - f) independent experts whose expertise is considered by the Investigation Panel to be relevant to the subject matter of the Investigation, including expertise in systemic racism, cultural safety of First Nations people and coaching of professional sport at the elite level.
12. The Participants may be represented by lawyers and/or a support person, but that support person cannot be a witness or potential witness in respect of the facts the subject matter of the evidence being provided by that Participant.
13. If any of the Participants consider that other people or entities should be invited to assist the Investigation Panel in its work, they may make such a proposal to the Investigation Panel. The Investigation Panel may also ask other people or entities to be Participants on terms and in the manner that the Investigation Panel determines.
14. Where a Participant is the subject of obligations under the AFL Rules, the Participant will comply at all times with their obligations under those Rules.

### **Gathering of evidence**

15. The Investigation Panel will provide guidance to Participants on how the Investigation will be conducted in a manner that is culturally appropriate to First Nations peoples prior to commencing substantive work. This may be done in a conference with the Participants, or in a written guide or procedure document. For the assistance of Participants, and without limitation to other reasonable requests made by Participants:

- a) The Investigation Panel will have regard to the principles set out in **Annexure A** to these terms of reference and Process Plan in the conduct of the Investigation;
- b) the Investigation Panel may conduct interviews or allow '*story-telling*' when gathering evidence (being the provision of relevant accounts by Participants) at places of the Participants' choosing;
- c) the Investigation Panel may allow the accounts of Participants to be recorded and retained on video, audio or transcript and provided in that form to the Investigation Panel and any other Participants who are directly affected by any aspect of those accounts;
- d) the Investigation Panel may issue directions as to the persons who may be present during such interviews or storytelling; and in particular, the panel may direct that only women and/or that only First Nations women be present for the taking of certain accounts, upon the request of any Participant. For the avoidance of doubt, no such direction limits the right of any person required to respond to any allegation made in such an interview to be provided with a complete account of the evidence provided in such an interview;
- e) The Investigation Panel may make directions enforceable under AFL Rules and binding upon persons amenable to AFL Rules, suppressing the disclosure of any such accounts from any publication in the public domain or to persons who are not Participants in the investigation, save as required by law; and
- f) The Investigation Panel may, in its sole and absolute discretion, request that the AFL provide financial assistance (excluding legal costs) to persons who wish to participate in the Investigation to ensure equality of participation, and access to all relevant information and documents.

16. The Investigation Panel will not hold public hearings and will have absolute control over who is entitled to be present at the giving of any account by any person.

17. The Investigation Panel may at any time during the course of the Investigation request or require Participants to produce documents that it considers relevant to the matters for Investigation; and Participants may also produce documents to the Investigation Panel of their own volition. Where documents are produced, the following will apply:

- a) Any documents produced to the Investigation Panel will be provided to other Participants, where in the opinion of the Investigation Panel, those documents directly concern a relevant interest of a Participant, but not otherwise.
- b) Where a document produced to the Investigation Panel:
  - i. is the subject of a claim for privilege; or

- ii. is the subject of a claim that the Australian Privacy Principles apply to it or, that a document is protected by the *Privacy Act (1988) Cth*,

such document (or part of it) must be identified as such by the providing Participant and the Independent Panel may make such directions as appropriate, as to the manner and scope of its production to any other Participant, including whether any part of the document should be redacted before being produced.

18. The Investigation Panel will first request that any person wishing to be a Participant who claims that they have been the subject of, or adversely affected by, any Inappropriate Conduct and who wishes to provide evidence to the Investigation Panel, provide their accounts of the matters they consider relevant to the Investigation in a manner consistent with the options identified and set out in this Process Plan.
19. The Investigation Panel will provide all evidence collected from each Participant to other Participants within five days of its receipt.
20. The Investigation Panel may, having considered all the evidence provided by each Participant, invite participation in the Investigation by any other person who it considers may be affected by or wish to respond to any matter raised by the evidence provided in accordance with paragraphs 17 and 18.
21. Each Participant who receives evidence and/or material as described in paragraph 19 will then be entitled within 14 days of receipt of all material from the other Participants that directly concerns a relevant interest of that Participant to provide evidence and/or submissions in reply (**Reply Material**). The Reply Material will be provided to all the other Participants.
22. After receiving any Reply Material, the Investigation Panel may make further enquiries of Participants, request further documents and information and re-interview Participants. It will do so in a manner consistent with natural justice principles and with regard to the cultural safety and First Nations cultures of the interviewee.
  - a) If any Reply Material of a Participant introduces new facts or issues, the Investigation Panel may make further enquiries of Participants with respect to those facts or issues, at its discretion.
  - b) The Participants may request the Chair of the Investigation Panel to interview other Participants on aspects of their evidence and documents. Whether or not an interview or further interview is conducted will be at the sole discretion of the Chair of the Investigation Panel. Any interview by a member of the Investigation Panel will be the subject to the oversight of the Chair of the Investigation Panel and will be conducted with regard to natural justice principles and the cultural safety and First Nations culture of the interviewee.

## **Mediation**

23. At any time during the Investigation, any Participant may request that the Investigation Panel direct a mediation of matters in dispute in relation to the subject matter of the Investigation or any matter incidental to it.
24. Within two (2) business days of receiving any request under paragraph 23, the Chair of the Investigation Panel shall determine in their absolute discretion whether it is appropriate to appoint a Mediator to conduct a mediation and if so, may make such directions as to the conduct of the Mediation as they deem appropriate.
25. Any Participant must agree to only seek to, or participate in a mediation process concerning or arising from the matters for Investigation in accordance with paragraphs 23 to 28 herein, and not otherwise.
26. Any communications within any mediation will be strictly confidential and without prejudice. The fact of the convening of any mediation will not be confidential. All Participants will be required to sign an agreement that they will keep the subject matter of the mediation and all documents used to prepare for or exchanged in the course of the mediation confidential and they will not use any information obtained in the mediation process for any other purpose, including litigation.
27. An independent mediator will be appointed for the mediation. The independent mediator cannot be a member of the Investigation Panel. The mediator will be responsible for the conduct of, and rules of, the mediation. The independent mediator will be appointed by agreement of the parties and in default of agreement the Chair of the Investigation Panel will appoint the mediator.
28. The AFL will pay the reasonable fees of any mediator engaged by the parties to conduct a mediation under this Process Plan.

## **Interim and Final Report**

29. After conducting the Investigation in the manner described above, the Investigation Panel will prepare a written report into the Matters for Investigation and Recommendations. It will do so as expeditiously as is reasonably possible.
30. If the Investigation Panel forms the view that it would be desirable to provide an Interim Report covering some (but not all) of the matters for Investigation and later a Final Report covering all of the matters for Investigation, it may do so.
31. When considering making any adverse findings or recommendations against any person, the Investigation Panel will adopt a standard of proof appropriate to the seriousness of those contemplated findings or recommendations.
32. If adverse findings or recommendations are proposed to be made by the Investigation Panel in the report against any Participants, those Participants will be given an



opportunity to review those proposed findings or recommendations prior to the finalisation of any Interim Report and the Final Report (subject to them providing the Investigation Panel with appropriate confidentiality undertakings relating to their receipt and use of any draft report or part thereof). They will be provided with a reasonable opportunity to respond to those proposed adverse findings or recommendations and the Investigation Panel will consider such response and whether any changes to the report are warranted in light of the response. Participants will not be afforded an opportunity to review, consider or respond to any such proposed changes before the Investigation Panel provides its any Interim Report or Final Report to the AFL and Participants.

33. Copies of any Interim Report and the Final Report will be provided to the AFL and contemporaneously to Participants upon its completion.
34. Prior to the public release of any Interim Report and the Final Report, Participants will have the opportunity to communicate with the Investigation Panel as to any redactions they consider to be necessary or appropriate or to bring to the attention of the Investigation Panel any matter they consider to be factually inaccurate or incorrect. The Investigation Panel has absolute discretion as to the response to any such request or notification.

#### **Notification of Investigation**

35. The Investigation Panel through Gordon Legal will on 21 October 2022, take the following steps to notify persons potentially affected by or interested in this Investigation:
- a) It will require HFC to provide notices in the form of **Annexure B** to be sent to the last held addresses of its listed players from 2008 to 2016;
  - b) It will request the AFLPA to send notices in the form of **Annexure B** to the last known addresses of HFC players listed between 2008 and 2016, insofar as those addresses differ from the addresses held by HFC; and
  - c) It will require the AFL to cause a notice in the form of **Annexure B** to be placed in a place of prominence on the AFL website for a period of seven days expiring on 28 October 2022.

#### **Legal Costs**

36. Participants may apply to the AFL for the payment of a contribution to their reasonable legal costs in participating in the Investigation.

#### **Confidentiality**

37. Participants, including their legal representatives and any support persons, must undertake in writing by way of a deed of agreement to keep confidential any evidence, information, documents or Reply Material they receive or produce, and that they will keep:

- a) the contents of the evidence;
- b) the documents; and
- c) any Reply Material

of the other Participants confidential and that:

- d) any material provided by another Participant is provided to them pursuant to an equitable claim of confidence in favour of the providing party; and
- e) they will not cause or assist in that material received by them being quoted, referred to, or re-produced in the public domain.

### **Timetable for Process Plan**

38. The Investigation Panel may vary the Timetable for the Process Plan as appears to the Investigation Panel to be appropriate.

<b>Task</b>	<b>Date</b>
Appointment of Chair and Investigation Panel	7 October 2022
Consultations with known Participants over Terms of Reference	4 October 2022 to 19 October 2022
Requests from the Investigation Panel for production of relevant documents from Participants	21 October 2022 to 28 October 2022
Provision of required documents to Investigation Panel	4 November 2022
Deadline for initial written or otherwise communicated statements	11 November 2022
Deadline for dissemination of evidence to other Participants	18 November 2022
Reply Material by Participants	2 December 2022
Final submissions of Participants on matters pertinent to the Terms of Reference	6 December 2022

## **ANNEXURE A**

### **Principles relevant to the interaction between the Investigation Panel and First Nations persons and Participants:**

1. **First Nations Engagement:** First Nations Participants should be given the opportunity to engage with and contribute to the development of processes and procedures relevant to their culture, health and wellbeing. This extends to the way in which the Investigation is conducted. Detailing the overall process and purpose of the enquiry is vital for adherence to the ethical expectations set by the *Guidelines for Ethical Research in Australian Indigenous Studies* (Ethical Research Guidelines).
2. **Cultural Safety:** The Investigation should ensure, to the full extent possible, that it is conducted in a culturally safe, secure and respectful manner for First Nations Participants.
3. **Limitation of Harm:** The Investigation should limit, to the fullest extent possible, harm caused to First Nations Participants as a result of the Investigation process.
4. **Practical Flexibility:** The Investigation process should be flexible in its practices and procedures to allow First Nations Participants to engage with it transparently and in a manner and form appropriate for them.
5. **Culturally Appropriate Investigation practice:** The Investigation process should proceed with the understanding that western evidentiary procedures, methods of interview will not produce the same outcomes when applied to First Nations Participants as they might to non-First Nations Participants.

Similarly, the invocation of these procedures may be both harmful for First Nations Participants and elicit inaccurate or unreliable responses from them.

Ensuring the veracity of the evidence and findings means granting the Investigation Panel the ability to identify and ameliorate established cultural and communication barriers relevant to First Nations people during investigation processes. This does not subjugate the interests of certain Participants over others. It merely recognises that there may be communication and cultural differences in how some First Nations people provide evidence. Affording the Investigation Panel the authority to navigate these issues will enhance the veracity of the Investigation for all Participants.

## **6. Investigation Process**

- a. The Investigation Panel has the discretionary authority to engage with external experts to ensure its practices are appropriate in the circumstances.
- b. Details of the Investigation process and procedure will be made available to prospective First Nations Participants.

## **7. Engagement Statements**

- a. The Panel will provide Participants with the opportunity to choose where and when they would like their interview conducted, and which panel member will be conducting it.
- b. First Nations Participants will be given the opportunity to provide a statement on how they would like to engage with the investigation process. This will be termed an 'Engagement Statement'. The 'Engagement Statements' are subject to the terms of the Process Plan, which requires the Investigation Panel to provide all evidence collected from each Participant to other Participants.
- c. Engagement Statements will be reviewed by the Investigation Panel to help inform the cultural safety and consistency of future practice.

## **8. Limitation of Harm**

- a. The Investigation Panel will have the discretionary authority to engage culturally trained trauma practitioners, psychologists and other professionals to provide care for First Nations Participants during the investigation process.
- b. If a First Nations Participant wants emotional or psychological support during the Investigation process, this request will not be unreasonably refused.
- c. The Investigation Panel will adhere to other sections of this document principally to minimise harm to First Nations Participants.

## **9. Procedural Flexibility for First Nations Participants:**

- a. Participants will be invited to provide a statement presenting the substance of their stories, allegation or allegations by:
  - 1) Providing a written statement to the panel, or;

- 2) Engaging in an interview with a First Nations Investigation Panel member and, if the Participant should wish, a support person who might assist them in engaging with the interview process. Who this person is will be up to the Participant, but that person cannot be a witness or potential witness in respect of the facts the subject matter of the evidence being provided.
- b. All First Nations Participants will have the option of having a translator present during the interview process. The Investigation Panel will not unreasonably refuse this request.
- c. During the interview itself, Investigation Panel members are empowered to pose any question to the Participant that may be reasonable and relevant given the nature of the Participant's testimony.
- d. Investigation Panel members are empowered to adjust their questioning style to ensure cultural safety in line with approaches adopted by members of the Australian Judiciary.

10. **Culturally Appropriate Investigation Practice:**

- a. The Investigation Panel will be aware and consider the relevance of issues pertaining to the interrogation and cross examination of First Nations people, and how best to ensure cultural safety in this process.
- b. The Investigation Panel will give effect to these requirements not only to ensure the cultural security of the Investigation process, but the veracity of evidence and its findings.

## **ANNEXURE B**

### **Notification of Investigation**

The AFL has commissioned an independent investigation into allegations of inappropriate conduct by or occurring at the Hawthorn Football Club (**HFC**) directed towards some players on its playing list between 2008 and 2016, including First Nations players, their families and/or their intimate partners.

The Investigation is principally focussed on allegations of, 'Inappropriate Conduct' including:

- a. racist behaviour;
- b. bullying, and/or intimidatory conduct whether towards HFC listed players, and/or their intimate partners, friends or families;
- c. inappropriate intrusion upon or purported control (including coercive control), over the family, cultural and/or non-football lives and wellbeing of HFC listed players and/or their intimate partners, friends and families;
- d. racialized and/or gendered stereotyping directed towards First Nations players, their families and intimate partners;
- e. conduct unbecoming or likely to prejudice the interests or reputation of the AFL, or bring the game of football into disrepute; and
- f. Notifiable Conduct, as defined in the AFL Rules.

If you were a HFC listed player, or a family member, intimate partner or close friend of a HFC list player and wish to draw information to the attention of the Investigation Panel, or;

If you know something about such allegations which you believe may assist the Investigation;

Please contact: [HFCinvestigation@gordonlegal.com.au](mailto:HFCinvestigation@gordonlegal.com.au)

Your enquiry will be treated confidentially.

We will be able to supply you with answers to any questions you have about the Investigation and you will not be obligated to pursue your enquiry if after communication with us, you do not wish to.

A copy of the Terms of Reference for the Independent Investigation are **enclosed**.

If you would like to make an enquiry, please contact us by 5:00 pm 28 October 2022.

James Naughton  
Partner  
Gordon Legal