

Child Protection: Notifying and identifying reportable conduct

This fact sheet provides guidance for agencies in relation to notifying and identifying reportable allegations to the NSW Ombudsman.

Part 1: Notifying reportable allegations and convictions

1.1 Which agencies fall within the reportable conduct jurisdiction?

Our employment-related child protection jurisdiction involves our office overseeing the handling of reportable child protection allegations that are made against employees and certain volunteers of thousands of government and non-government agencies in NSW.

There are three types of agencies that must notify the Ombudsman of reportable allegations or convictions against employees: designated government agencies,¹ all other public authorities, and designated non-government agencies (such as schools, child care centres, out of school hours services and agencies providing substitute residential care).²

All agencies in the Ombudsman's child protection jurisdiction must notify the Ombudsman about reportable allegations and reportable convictions against employees that arise in the course of an employee's work. Designated agencies, whether government or non-government, must in addition report allegations or convictions against employees that arise outside the workplace.

Employees are defined broadly in the Act to include any employee of the agency, any individual engaged by the agency to provide services to children – such as: contractors, students on placement, instructors of religion, foster carers and the adult household members of authorised carers, and volunteers.

1. Section 25A of the *NSW Ombudsman Act 1974* defines 'designated government agency' and includes, but is not limited to, the following agencies: the Departments of Education, Family and Community Services, Health, and Justice.

2. Section 25A defines 'designated non-government agency' and includes the following types of agencies: a non-government school within the meaning of the *Education Act 1990*; a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*; an approved education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011*; an agency providing substitute residential care for children, or any other body prescribed by the regulations for the purposes of this definition.

1.2 When and how do reportable allegations and reportable convictions need to be notified?

Section 25C of the Act requires the head of relevant agencies to notify the Ombudsman of reportable allegations and convictions **as soon as practicable** and, in any event, within 30 days of becoming aware of them.

Allegations of child abuse only fall within our reportable conduct jurisdiction if the involved individual is an 'employee' of a relevant agency at the time when the allegation becomes known by the head of agency.

We encourage agencies to notify us at the earliest possible opportunity, whether by way of formal notification or through telephone contact, so that we can play an early role in guiding agencies through their initial response. Agencies are expected to respond to allegations by conducting an investigation, and undertaking any risk management or other action which may be required.

Agencies are encouraged to call us on our dedicated **Employment-Related Child Protection Line on 02 9286 1021** to:

- seek guidance on whether an allegation requires notification to the Ombudsman
- make an initial verbal notification – particularly for allegations that also require a mandatory report to FACS and/or a report to police
- obtain advice on how to respond to an allegation, or
- make general inquiries regarding the reportable conduct scheme or employment-related child protection matters more broadly.

The formal notification can be made by completing and submitting the Ombudsman's Part A Notification form, attaching copies of all relevant documentation. A copy of this form is available on the Ombudsman's website.

The reportable conduct scheme is **allegations-based**. If an allegation is, on the face of it, a reportable allegation, it must be notified to the Ombudsman irrespective of other factors or information that may suggest that the allegation has no weight. The definition of 'reportable allegation' makes it clear that the threshold for notifying an allegation to the Ombudsman is lower than the threshold for making

a finding that reportable conduct occurred. The scheme is designed to ensure that decision-making is transparent and open to scrutiny.

The role we play varies depending on the circumstances. We may actively monitor the progress of an investigation, in which case we will require the agency to provide us with relevant documents and information about the investigation. We also have the power to observe interviews conducted by or on behalf of an agency, and confer with those involved in conducting the investigation.

At the end of their investigation, the involved agency must provide us with a range of information, such as the report and advice on any action taken as a result of the investigation. This enables us to determine if the investigation was carried out in a satisfactory manner. We also have the power to directly investigate any reportable allegation, or to directly investigate an agency's handling of a reportable allegation.

Part 2: Identifying reportable conduct

2.1 What is a reportable allegation or reportable conviction?

Section 25A of the *Ombudsman Act 1974* defines a 'reportable allegation' as an allegation of **reportable conduct** against a person, or an allegation of **misconduct that may involve reportable conduct**.

A **reportable conviction** means a conviction of an offence involving reportable conduct.

What is reportable conduct?

Section 25A of the *Ombudsman Act* defines 'reportable conduct' as:

- (a) any **sexual offence, or sexual misconduct**, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material), or
- (b) any **assault, ill-treatment or neglect** of a child, or
- (c) any **behaviour that causes psychological harm to a child**,³ whether or not, in any case, with the consent of the child.

Reportable conduct does not extend to:

- (a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or

3. The child or young person who was alleged to have been involved in reportable conduct by an employee, must have been under 18 years at the time of the alleged incident or conduct. See s 25A of the *NSW Ombudsman Act 1974* for definition of a 'child'.

- (b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
- (c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

Examples of conduct that would not constitute reportable conduct include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental. Sometimes an allegation may fall within more than one category.

2.2 Factors to consider in seeking to define reportable conduct

Sexual offences and sexual misconduct

What is a sexual offence?

The term 'sexual offence' encompasses all criminal offences involving a sexual element that are 'committed against, with or in the presence of a child'.

These offences include (but are not limited to) the following:

- indecent assault
- sexual assault
- aggravated sexual assault
- sexual intercourse and attempted sexual intercourse
- possession/dissemination/production of child pornography or child abuse material
- using children to produce pornography
- grooming or procuring children under the age of 16 years for unlawful sexual activity
- deemed non-consensual sexual activity on the basis of special care relationships.⁴

What is sexual misconduct?

For sexual misconduct to constitute reportable conduct, the alleged conduct must have been committed against, with or in the presence of a child.

There are various types of sexual misconduct including (but not limited to):

- crossing professional boundaries
- sexually explicit comments and other overtly sexual behaviour, and
- grooming behaviour.

4. Special care relationships are defined in section 73 of the *Crimes Act 1900 (NSW)*.

Crossing professional boundaries

Sexual misconduct includes behavior that can reasonably be construed as involving an inappropriate and overly personal or intimate:

- relationship with;
- conduct towards; or
- focus on;

a child or young person, or a group of children or young persons.

In the area of 'crossing professional boundaries', particular care should be exercised before making a finding of sexual misconduct. For example, an employee who, on an isolated occasion, 'crosses professional boundaries' in a manner that involves little more than poor judgement could not be said to have engaged in sexual misconduct. Also, in cases where an employee has 'crossed boundaries' in terms of their relationship with a child, if there is evidence which clearly shows that the employee did not seek to establish an improper relationship with the involved child, then this does not constitute sexual misconduct.

However, persistent less serious breaches of professional conduct in this area, or a single serious 'crossing of the boundaries' by an employee, may constitute sexual misconduct, particularly if the employee either knew, or ought to have known, that their behaviour was unacceptable.

Codes of conduct that outline the nature of the professional boundaries which should exist between employees and children/young people can be particularly useful. For employees who either intentionally breach such codes or have demonstrated an inability to apply them appropriately, it may be necessary to provide more detailed written advice about what constitutes appropriate behaviour.

Sexually explicit comments and other overtly sexual behaviour

Sexual misconduct includes a broad range of sexualised behaviour with or towards children. While it is not possible to provide a complete and definitive list of unacceptable sexual conduct involving children, the following types of behaviour give strong guidance:

- sexualised behaviour with or towards a child (including sexual exhibitionism)
- inappropriate conversations of a sexual nature
- comments that express a desire to act in a sexual manner
- unwarranted and inappropriate touching involving a child
- personal correspondence and communications (including emails, social media and web forums) with a child or young person in relation to the adult's romantic, intimate or sexual feelings for a child or young person

- exposure of children and young people to sexual behaviour of others including display of pornography
- watching children undress in circumstances where supervision is not required and it is clearly inappropriate.

Grooming behaviour

Grooming or procuring a child under the age of 16 years for unlawful sexual activity is a sexual offence. However, Schedule 1(2) of the Child Protection (Working With Children) Act also recognises grooming as a form of sexual misconduct. As grooming is a sexual offence if the alleged victim is under 16 years old, caution should be exercised before reaching a grooming finding (particularly in cases where the behaviour is directed towards a child under 16 years). As an alternative to grooming, in many cases it will be more appropriate to consider whether there has been a 'crossing of professional boundaries' (see above) and/or other more overt sexual behaviour.

Furthermore, behaviour should only be seen as 'grooming' where there is evidence of a pattern of conduct that is consistent with grooming the alleged victim for sexual activity, and that there is no other reasonable explanation for it. The types of behaviours that may lead to such a conclusion include (but are not limited to) the following:

- Persuading a child or group of children that they have a 'special' relationship, for example by:
 - › spending inappropriate special time with a child
 - › inappropriately giving gifts
 - › inappropriately showing special favours to them but not other children
 - › inappropriately allowing the child to overstep rules
 - › asking the child to keep this relationship to themselves.
- Testing boundaries, for example by:
 - › undressing in front of a child
 - › encouraging inappropriate physical contact (even where it is not overtly sexual)
 - › talking about sex
 - › 'accidental' intimate touching.
- Inappropriately extending a relationship outside of work (except where it may be appropriate – for example where there was a pre-existing friendship with the child's family or as part of normal social interactions in the community).
- Inappropriate personal communication (including emails, telephone calls, text messaging, social media and web forums) that explores sexual feelings or intimate personal feelings with a child.

An adult requesting that a child keep any aspect of their relationship secret or using tactics to keep any aspect of the relationship secret, would generally increase the likelihood that grooming is occurring.

Determining whether a sexual offence has occurred

Although there may be circumstances where a sexual offence may be sustained in the absence of a conviction, caution should be exercised when reaching a sustained finding of sexual offence in the absence of a conviction.

In this regard, it is not necessary that reportable conduct be sustained to the criminal standard (i.e. beyond reasonable doubt). However, a sustained finding must be based on material that logically tends to show that all the facts necessary to establish the incident are made out to the reasonable satisfaction of the decision maker.

The decision maker should base their decision on clear and cogent evidence, and not guesswork, suspicion or rumour. The more serious the wrongdoing, the more care the decision maker must exercise when deciding whether they are satisfied that the conduct is sustained.

Substituting a sexual offence finding with another finding

In addition, in cases involving an alleged sexual offence, there may be insufficient evidence to justify a sustained sexual offence finding but sufficient evidence to nevertheless justify a sexual misconduct finding. However, in all these cases, your finding must conform with our sexual misconduct definition.

If there is not sufficient evidence to sustain a sexual offence finding, then the **only** circumstance in which a sexual misconduct finding can be made is if the available evidence supports that conduct took place which falls within our broader sexual misconduct definition. To illustrate, if the only matters in issue relate to whether a person indecently assaulted a child, and there is no related behaviour which is relevant to our broader sexual misconduct definition, then the case must be decided solely based on whether or not there has been a sexual offence.

On the other hand, if an alleged sexual assault is investigated and found to be non-sustained, but there is sufficient evidence to sustain that the individual crossed professional boundaries or engaged in another form of sexual misconduct, then it is legitimate to make a sexual misconduct finding.

For further information see our fact sheet – *Making a finding of reportable conduct*.

Assault

What is an assault?

An assault can occur when a person intentionally or recklessly applies physical force against a child without their consent (**actual physical force**), or intentionally or recklessly causes a child to apprehend the imminent use of physical force against them without their consent (**apprehension of physical force**).

Actual physical force can comprise conduct such as hitting, pushing, shoving or throwing objects. Apprehended physical force can comprise words and/or gestures that lead the child to apprehend the imminent application of physical force, regardless of whether the person actually intends to apply any force.

The element of intention or recklessness relates only to the application of physical force or the creation of the apprehension. The person must either intend to apply physical force or to create the apprehension, or know that it is possible this will happen but ignore the risk. It is not necessary that the person intends to harm or injure the child.

The circumstances in which any physical force is used will be crucial when determining whether an assault has occurred, as the question will often be one of degree. There is a range of physical contact that, because of the context in which it occurs, falls within the standards of ordinary everyday conduct and does not amount to assault.

For an assault to occur, it is not necessary that the person act with hostility or that the child sustain an injury. However, the presence or absence of any hostility or injury may be significant when deciding whether the physical force used, or the apprehension created, constituted an assault.

In addition, the Ombudsman Act specifically outlines certain conduct which does **not** need to be reported:

- a) conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards
- b) the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures.

Refer to *Practice Guidelines – Defining Assault* for more detailed information about what constitutes assault.

Determining whether a physical assault has occurred

Caution should be exercised when reaching a sustained finding of assault in the absence of a criminal conviction.

The decision maker must base their decision on clear and cogent evidence that logically tends to show all the necessary elements, and not guesswork, suspicion or rumour. The decision maker must be reasonably satisfied, in the sense that they are actually persuaded that each element of the assault has been established. It is not enough to mechanically calculate the probability that each element has been established.

The more serious the wrongdoing, the more care the decision maker must exercise when deciding they are satisfied that the conduct is sustained.

Substituting a physical assault finding with another finding

Where assault has been alleged, there may be instances where assault cannot be established but the conduct may be characterised as ill treatment. However a finding of ill treatment must meet all the requirements of the ill treatment definition set out below in – What is ill-treatment? It is not sufficient, for a finding of ill treatment, that the decision maker suspects assault, but has insufficient evidence to establish it.

For example, an ill treatment finding might be made in cases where the evidence is clear that there was a degree of physical force used, you **are not** comfortably satisfied that the force used went beyond 'ordinary everyday conduct', but you **are** comfortably satisfied that the force used, in conjunction with other aspects of the conduct under investigation, falls with the broader ill treatment definition.

Conduct to be reported to the Office of the Children's Guardian

While every allegation of assault should be investigated, only findings that a **serious** physical assault occurred are reportable to the Office of the Children's Guardian for consideration in Working With Children Check assessments.⁵

Serious physical assault

A physical assault is **not serious** where:

- it only involves minor force; and
- it did not and was not ever likely to result in serious injury.

A physical assault is **serious** where:

- it results in the child being injured, beyond a type of injury like a minor scratch, bruise or graze; or
- it had the potential to result in a serious injury; or
- the injury suffered may be minor, but the assault is associated with aggravating circumstances (in this regard, aggravating circumstances might include associated inhumane or demeaning behaviour by the employee, for example kicking a child, pulling a child by grabbing the child around the neck).

In considering whether a serious physical assault has occurred, reporting bodies whose work involves regular restraint of children should consider the context of events, including the child's age and vulnerability.

Generally, behaviour that does not meet the standard of a serious physical assault does not become a serious physical assault by means of it being repeated. The only exception to this is where an employer has developed legitimate concerns for the safety of a child or children and intervened with a worker (e.g. warnings, counselling etc) and the behaviour is repeated.

Ill-treatment

What is ill-treatment?

Ill-treatment captures those circumstances where a person treats a child or young person in an unreasonable and seriously inappropriate, improper, inhumane or cruel manner.

The focus is on the alleged conduct rather than the actual effect of the conduct on the child or young person.

Ill-treatment can include disciplining or correcting a child in an unreasonable and seriously inappropriate or improper manner; making excessive and/or degrading demands of a child; hostile use of force towards a child; and/or a pattern of hostile or unreasonable and seriously inappropriate, degrading comments or behaviour towards a child.

In making a determination regarding ill-treatment it may be important to consider relevant codes of conduct that outline the nature of professional conduct and practice by employees/workers which should occur when working with children/young people.

Neglect

What is neglect?

Neglect includes either an action or inaction by a person who has care responsibilities towards a child. The nature of the employee's responsibilities provides the context against which the conduct needs to be assessed.

Supervisory neglect:

- An intentional or reckless failure to adequately supervise a child that results in the death of, or significant harm to, a child, or
- An intentional or reckless failure to adequately supervise a child, or a significantly careless act or failure to act, that:
 - › involves a gross breach of professional standards, and
 - › has the potential to result in the death of, or significant harm to, a child.

5. Please note there are a small number of non-government agencies that do not have a class or kind determination with the Ombudsman that are not under a legislative obligation to report relevant misconduct findings to the Office of the Children's Guardian. However, where there is a finding of serious physical assault that indicates an individual may pose a risk to the safety of children, this should be reported to the Office of the Children's Guardian by either the Ombudsman or by the agency itself. (In each of these cases the issue of making a report to the Guardian will need to be discussed with the Ombudsman.)

Carer neglect:

- Grossly inadequate care that involves depriving a child of the basic necessities of life: such as the provision of food and drink, clothing, critical medical care or treatment, or shelter.

Failure to protect from abuse:

- An obviously or very clearly unreasonable failure to respond to information strongly indicating actual or potential serious abuse of a child.

Reckless acts (or failure to act):

- A reckless act, or failure to act, that:
 - › involves a gross breach of professional standards, and
 - › has the potential to result in the death of, or significant harm to, a child.

An incident can constitute neglect if it contains any element within this definition.

Note: Neglect can be an ongoing situation of repeated failure by a caregiver to meet a child's physical or psychological needs, or a single significant incident where a caregiver fails to fulfill a duty or obligation, resulting in actual harm to a child or where there is the potential for significant harm to a child.

Behaviour that causes psychological harm to a child

What is behaviour that causes psychological harm to a child?

Behaviour that causes psychological harm is conduct that is obviously or very clearly unreasonable and results in significant emotional harm or trauma to a child.

There needs to be a proven causal link between the inappropriate behaviour and the harm, and the harm must be more than transient.

For reportable conduct involving psychological harm, the following elements must be present:

- an obviously or very clearly unreasonable or serious act or series of acts that the employee knew or ought to have known was unacceptable, **and**
- evidence of psychological harm to the child that is more than transient, including displaying patterns of 'out of character behaviour', regression in behaviour, distress, anxiety, physical symptoms or self harm, **and**
- an alleged causal link between the employee's conduct and the psychological harm to the child.

Psychological harm can include the exacerbation or aggravation of an existing psychological condition, such as anxiety or depression.

When it is **alleged** that an adult's behaviour has caused psychological harm to a child, it will often be necessary to obtain a psychological or medical assessment of the child to determine whether psychological harm can be established. However, a clinical diagnosis will not be required in every circumstance – particularly if the assessment itself may cause harm. In addition, in certain serious and/or ongoing domestic violence cases, it may be open to infer that a child has been psychologically harmed, in the absence of a clinical diagnosis of such harm. Finally, it is important to stress that, when a report has established a child has a psychological condition, it is still necessary to show the condition was caused by the employee's conduct.

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*).

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.