

## Defining Reportable Conduct

### 1. 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,

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
- 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.

**Note:** 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.

Some conduct may fall within more than one category.

These definitions replace those contained within the Ombudsman's publication 'Child Protection in the Workplace: responding to allegations against employees' (2004).

### 2. Sexual offences and sexual misconduct

#### 2.1 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.<sup>1</sup>

All cases involving a sexual offence would also involve sexual misconduct.

#### 2.2 What is sexual misconduct?

The term 'sexual misconduct' includes conduct that does not necessarily equate to a criminal offence.

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 three categories of sexual misconduct in addition to sexual offences:

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

##### 2.2.1 Crossing professional boundaries

Sexual misconduct includes behaviour 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

<sup>1</sup> Special care relationships are defined in section 73 of the *Crimes Act 1900* (NSW)

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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.

### 2.2.2 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.

### 2.2.3 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.

### 2.3 Determining whether a sexual offence has occurred

Generally, a sustained finding of a sexual offence should only be made when a court has found that a sexual offence occurred. In the absence of a conviction, agencies should determine whether or not sexual misconduct has occurred.

## 3. Physical assault

### 3.1 What is an assault?

An assault of a child includes any act by which a person intentionally inflicts unjustified use of physical force against a child. An assault can also occur if a person causes a child to reasonably fear that unjustified force will be used against them. Even if a person who inflicts, or

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causes the fear of, physical harm does not intend to inflict the harm or cause the fear, they may still have committed an assault if they acted recklessly (i.e. the person ought to have known that their actions would cause physical harm or the fear of such harm).

Assaults can include hitting, pushing, shoving, throwing objects, or making threats to physically harm a child.

It is important to consider the context in which physical force is used against a child to determine whether it constitutes an assault. For example, an assault has not taken place where there is use of reasonable force in the following examples:

- exercising appropriate control over a child
- disarming a child or young person seeking to harm themselves or others
- separating children or young people who are fighting
- moving a child or young person out of harm's way
- restraining a child or young person from causing intentional damage to property
- self defence or the defence of others.

When considering whether the physical force used was reasonable, a range of variables should be taken into account, having regard to the circumstances of the case. Variables that may be relevant include matters such as the age, maturity, health or other characteristics of the child or children involved, and professional codes of conduct or standards that the worker is required to follow.

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.

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

While every allegation of physical 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.<sup>2</sup>

<sup>2</sup> 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.)

### 3.3 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.

## 4. Ill-treatment

### 4.1 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.

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### 5. Neglect

#### 5.1 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.

##### 5.1.1 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.

##### 5.1.2 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.

##### 5.1.3 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.

##### 5.1.4 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.

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.

### 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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Telephone Interpreter Service (TIS): 131 450  
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

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This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.

### 6. Behaviour that causes psychological harm to a child

#### 6.1 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.