

# 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>

### 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 two categories of sexual misconduct:

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

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

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, engages in behaviour that involves little more than poor judgement could not be said to have engaged in 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.

Nevertheless, in connection with an employee 'crossing the 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.

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

Behaviour involving sexually explicit comments and other overtly sexual behaviour which can constitute sexual misconduct. Some forms of this behaviour also involve crossing professional boundaries. This conduct may include:

- inappropriate conversations of a sexual nature
- comments that express a desire to act in a sexual manner
- unwarranted and inappropriate touching
- sexual exhibitionism
- personal correspondence (including electronic communications such as e-mails and text messages) with a child or young person in relation to the adult's 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. For example, in change rooms or toilets when supervision is not required or justified.

### 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 is any act by which a person intentionally inflicts unjustified use of physical force against another. An assault can also occur if a person causes another person to reasonably apprehend that unjustified force is going to be used against them. Even if a person who inflicts physical harm or causes another person to reasonably apprehend physical harm does not actually **intend** to inflict the harm or cause fear, they may still have committed an assault if they acted 'recklessly'. 'Recklessness' in this context relates to circumstances when the person **ought to have known** that their actions would cause a person physical harm or cause them to fear injury.

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

### 3.2 When does the use of physical force amount to 'reportable conduct'?

It is important to understand that not all allegations about the use of physical force need to be reported to the Ombudsman. 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.

In addition, any alleged conduct that involves the reasonable use of physical force **for the purpose of exercising appropriate control over a child** does not constitute reportable conduct. For example, using reasonable force to:

- disarm a young person seeking to harm themselves or another, or
- separate young people in the act of fighting, or
- move a young person away from a place where the person may be harmed, or
- restrain a young person from causing intentional damage to property.

Furthermore, any alleged conduct which involves the **reasonable** use of physical force in an act of self defence or the defence of others does not constitute a physical assault and therefore is not reportable conduct.

## 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 obviously or very clearly improper 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 obviously unreasonable or inappropriate manner; making excessive and obviously unreasonable demands on a child; malevolent acts towards children; and inappropriate and hostile use of force against a child.

## 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 fulfil a duty or obligation, resulting in actual harm to a child or where there is the potential for significant harm to a child.

## 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 allegations of behaviour causing psychological harm to be notifiable to the Ombudsman, the following 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.

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## 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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