

Identifying reportable allegations

The NSW Reportable Conduct Scheme – Fact sheet 1

August 2022

(02) 8219 3800
reportableconduct@ocg.nsw.gov.au

What is the difference between a 'reportable allegation' and 'reportable conduct'?

A reportable allegation is an allegation that an employee has engaged in conduct that may be reportable conduct.

A reportable conviction means a conviction (including a finding of guilt without the court proceeding to a conviction), in NSW or elsewhere, of an offence involving reportable conduct.

The Reportable Conduct Scheme is an **allegation-based scheme**. The threshold for making a notification to the Office of the Children's Guardian is that a reportable allegation has been made – that is, there is an allegation that an employee has engaged in conduct that may be reportable conduct or that they are the subject of a conviction that is considered a reportable conviction.

'Reportable conduct' means certain defined conduct (see below). A finding of reportable conduct is

a sustained finding, which requires evidence supporting that the conduct occurred on the balance of probabilities (see Fact Sheet 8 - Making a finding of reportable conduct) and that it constitutes reportable conduct (or a reportable conviction). The threshold for making a notification of a reportable allegation is therefore lower than the threshold for making a finding of reportable conduct.

Assessing conduct

Under the Act, heads of relevant entities must consider whether reportable allegations relate to conduct that is in breach of established standards that apply to the subject employee and, in doing so, must have regard to relevant Codes of Conduct (including professional or ethical codes), professional standards and accepted community standards.

The Act requires relevant entities to have a Code of Conduct aimed at preventing and detecting reportable conduct. They should clarify the behaviour that is and is not acceptable by employees towards children and contain information about what will happen if an employee breaches it. They should also include information about the Reportable Conduct Scheme, including employees' reporting obligations.

Codes of Conduct should reflect the entity's practices and the services it provides to children. As such, a Code of Conduct for one entity may differ from that of an entity that provides a different kind of service.

Further clarification

Sometimes an allegation may appear to fall within a 'grey area' that requires further clarification or which appears to have taken place within the reasonable boundaries of a person's professional duties. Entities are encouraged to seek advice from the Office of the Children's Guardian to help determine whether an employee's alleged behaviour constitutes a 'reportable allegation' for the purposes of the scheme.

Reportable conduct definitions

The *Children's Guardian Act 2019* defines reportable conduct as:

- a sexual offence
- sexual misconduct
- ill-treatment of a child
- neglect of a child
- an assault against a child
- an offence under s 43B (failure to protect) or s 316A (failure to report) of the Crimes Act 1900; and
- behaviour that causes significant emotional or psychological harm to a child.

Sexual offence

A sexual offence is an offence of a sexual nature under a law of NSW, another state/territory, or the Commonwealth committed against, with or in the presence of a child, such as:

- sexual touching of a child;
- a child grooming offence;
- production, dissemination or possession of child abuse material.

An alleged sexual offence does not have to be the subject of criminal investigation or charges for it to be categorised as a reportable allegation of a sexual offence.

Sexual misconduct

The Act defines sexual misconduct to mean any conduct with, towards or in the presence of a child that is sexual in nature (but is not a sexual offence) and provides the following (non-exhaustive) examples:

- descriptions of sexual acts without a legitimate reason to provide the descriptions;
- sexual comments, conversations or communications;
- comments to a child that express a desire to act in a sexual manner towards the child, or another child.

Note - crossing professional boundaries comes within the scope of the scheme to the extent that the alleged conduct meets the definition of sexual misconduct. That is, conduct with, towards or in the presence of a child that is sexual in nature (but is not a sexual offence).

Assault

Technically, any form of unwarranted touching can, depending on the context in which it occurs, constitute an assault. However the Act explicitly exempts from notification assaults that are, in all the circumstances, trivial or negligible – as long as they are investigated under workplace procedures.

Generally, physical force that does not result in more than transient injury and which had no potential to result in serious injury – with consideration to the context and circumstances in which the alleged assault took place – would be considered ‘trivial or negligible’.

Under the Act, an assault can occur when a person intentionally or recklessly (ie. knows the assault is possible but ignores the risk):

- applies physical force against a child without lawful justification or excuse - such as hitting, striking, kicking, punching or dragging a child (**actual physical force**); or
- causes a child to apprehend the immediate and unlawful use of physical force against them – such as threatening to physically harm a child through words and/or gestures and regardless of whether the person actually intends to apply any force (**apprehension of physical force**).

Allegations of ‘serious physical assault’, if proven, must be reported to the OCG for the purpose of the Working With Children Check. Therefore, it is important to obtain the information necessary to determine whether the alleged assault, if proven, will constitute a serious physical assault.

What is 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).

What is ill-treatment?

The Act defines ill treatment as conduct towards a child that is:

- unreasonable; and
- seriously inappropriate, improper, inhumane or cruel.

Ill-treatment can include a range of conduct such as making excessive or degrading demands of a child; a pattern of hostile or degrading comments or behaviour towards a child; and using inappropriate forms of behaviour management towards a child.

What is neglect?

The Act defines neglect to mean a significant failure – by a person with parental responsibility for the child, or an authorised carer or an employee if the child is in the employee’s care – to provide adequate and proper food, supervision, nursing, clothing, medical aid or lodging for the child that causes or is likely to cause harm to the child.

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. Examples of neglect include failing to protect a child from abuse and exposing a child to a harmful environment.

What is behaviour that causes emotional or psychological harm to a child?

Behaviour that causes significant psychological or emotional harm is conduct that is intentional or reckless (without reasonable excuse), obviously or very clearly unreasonable and which results in significant emotional harm or trauma to a child.

For a reportable allegation 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 significant emotional or psychological harm to the child.

Notifying and investigating reportable allegations

Once the head of a relevant entity is made aware of a reportable allegation, they must:

- notify the Office of the Children’s Guardian within 7 business days and make other reports (see Fact Sheet 2 - Head of Entity responsibilities);
- investigate the reportable allegation (see Fact Sheet 4 - Planning and conducting an investigation); and
- make a finding about the reportable allegation (see Fact Sheet 8 - Making a finding of reportable conduct).

Office of the Children’s Guardian

www.ocg.nsw.gov.au

Switchboard: (02) 8219 3600

Locked Bag 5100

Strawberry Hills NSW 2012