

Making a finding of reportable conduct

The NSW Reportable Conduct Scheme – Fact sheet 8

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Under the Children's Guardian Act 2019 (the Act), heads or relevant entities must notify and investigate reportable allegations against their employees, unless they are exempted from doing so. This fact sheet is designed to provide guidance around making findings at the conclusion of reportable conduct investigations.

Heads of entities' responsibilities

Under the Act, heads of relevant entities must advise the Children's Guardian of the findings they have made after completing the investigation, including whether they have made a **finding of reportable conduct**.

A 'finding of reportable conduct' is defined in the Act to mean a finding that a reportable allegation has been sustained. The Act states that heads of relevant entities must make a finding of reportable conduct if satisfied, on the **balance of probabilities**, that the case against the employee has been proved.

To fulfil this obligation, the head of the relevant entity will base their finding on the evidence obtained by the investigator and consideration of the investigator's recommendations. However, it is for the decision-maker themselves to weigh the evidence, on the balance of probabilities, to reach a reasonable satisfaction as to whether or not the reportable conduct occurred. The decision-maker should document this process. The record should include confirmation that they have considered all the evidence and provided reasons for either accepting or rejecting the investigator's recommendation/s.

In reaching their decision, heads of relevant entities must have regard to certain **mandatory considerations** outlined in the Act and also to the principles of **procedural fairness**.

On the balance of probabilities

The common law recognises two standards of proof: the civil standard (the balance of probabilities), and the criminal standard (beyond reasonable doubt).

The civil standard is the standard of proof for all reportable allegations, including those that involve allegations that amount to criminal offences.

This standard is met when the decision-maker is 'reasonably satisfied' (that is, actually persuaded) that the reportable conduct occurred. The determination is not a purely mechanical or mathematical exercise. The Head of a relevant entity may take into account, among other factors:

- the nature of the reportable allegation and any defence; and
- the gravity of the matters alleged.

This does not change the standard of proof required when dealing with more serious allegations. It simply means that a rigorous approach to fact-finding must be employed and that the strength of the evidence necessary to make a sustained finding on the balance of probabilities may vary according to the nature of what it is alleged.

Reportable allegations should *not* be sustained on the basis of mere suspicion, speculation, inexact proofs, indefinite testimony or indirect inferences. However, this should not be misinterpreted to mean that reportable allegations cannot be sustained on circumstantial or uncorroborated evidence. Uncorroborated and circumstantial evidence *can* be relied on to sustain reportable allegations, as long as it has sufficient probative value. For example a clear, detailed, consistent and credible account from a child can be preferred over an employee's general denials regardless of any lack of direct witness evidence or corroboration.

Mandatory considerations

When making a finding, the decision-maker must have regard to the mandatory matters outlined in Division 6 of the Act. Division 6 states that the head of the relevant entity must consider whether the reportable allegation relates to conduct that is in breach of established standards applying to the employee of the relevant entity, having regard to –

- professional standards,
- codes of conduct, including any professional or ethical codes,
- accepted community standards.

Thresholds for findings of reportable conduct

When considering a finding of reportable conduct, it is important to assess the evidence against the thresholds outlined in the Act in connection with each category of reportable conduct.

- **Sexual offence** – A sexual offence does not have to have resulted in a charge or conviction for it to be sustained as reportable conduct. In addition, as the rules of evidence do not apply, the decision-maker may give consideration to evidence that would not be admissible in criminal court proceedings. However, to make a finding of reportable conduct for a sexual offence, the decision-maker must be reasonably satisfied that all the elements of the sexual offence have been proven on the balance of probabilities.
- **Sexual misconduct** – To make a finding of sexual misconduct, the decision-maker must be reasonably satisfied that the alleged conduct occurred and that it was sexual in nature.
- **Assault** – Assault has both a physical (or ‘action’) element and a mental (or ‘attitude’) element. To make an assault finding, decision-makers need to be reasonably satisfied that both the action and attitude elements have been satisfied.
- **Ill-treatment** – In making a finding of ill-treatment, it is important to consider relevant codes of conduct that outline the nature of professional conduct and practice by the employees, which inform whether the conduct was not only unreasonable but also seriously inappropriate, improper, inhumane or cruel.
- **Neglect** – To make a determination of neglect, the decision-maker must be reasonably satisfied that the employee engaged in the alleged conduct (including an omission to act); that it constituted a significant failure; and that the child either was harmed or it was likely the child could have been harmed as a result.
- **Behaviour causing significant emotional or psychological harm to a child** – To make a determination under this category, the decision-maker must be reasonably satisfied that all three elements are met – that is, that the alleged inappropriate behaviour occurred; that the child suffered harm that was more than transient; and that there was a causal link between the inappropriate behaviour and the harm. 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.

Principles of procedural fairness

The Act requires heads of relevant entities to have systems in place to ensure that the handling of and response to reportable allegations has regard to the principles of procedural fairness. What procedural fairness entails may differ according to the particular circumstances of the case and the overarching paramountcy of the safety, welfare and well-being of children.

Generally, when making a finding after a reportable conduct investigation, a decision-maker should:

- consider all relevant factors that the decision-maker has real or constructive knowledge of,
- give appropriate weight to factors that have probative value,

- not assign weight to irrelevant factors or give disproportionate weight to factors of little or no substance,
- form and document a logical rationale for proposed findings, which logically flow from the evidence and which indicates that it is reasonably open – on the balance of probabilities – to make the proposed decision.

If the decision-maker requires more information to make a finding, they might refer the matter back to the investigator for further inquiries. The employee should be informed if this step is taken, and the likely timeframe for completing the further inquiries.

If the decision-maker has reasons not to undertake these steps, it is important to fully document these reasons and provide them to the Guardian, along with any supporting documentation.

Non-adverse findings

If the decision-maker proposes to make a finding under the *Act other than a finding of reportable conduct*, the decision-maker should inform the employee in writing about the finding and any action the head of the entity will be taking. (If the employer is making misconduct findings, they should consider any further steps they should take in accordance with their misconduct-related policies and procedures.)

However, if an adverse reportable conduct finding is proposed, procedural fairness will generally entail taking further steps. Again, if these further steps are not taken, it is important to document the reasons and provide them to the Guardian.

Adverse finding (finding of reportable conduct)

If the decision-maker proposes to make a finding of reportable conduct, the following further procedural fairness steps are generally necessary before confirming that finding:

- inform the employee, generally in writing, of the proposal to make the adverse finding;
- provide as much detail about the reasons for the proposed adverse finding as is reasonable; and
- provide the employee with an opportunity to make a further submission in response to the proposed finding and reasons.

It is important to note that, while the Act states that the head of the relevant entity may give the entity report to the employee who is the subject of the report, the Act does not require it. Further, the head of the relevant entity should carefully consider the rights and welfare of other parties who may be mentioned in the report before deciding to provide a copy to the employee. In this regard, procedural fairness only requires that the employee be given sufficient particulars to be able to respond to the allegations against them and reasons for any adverse findings – this does not require provision of the entire or un-redacted entity report. In this regard, the safety, welfare and wellbeing of children is the paramount consideration.

The employee should be given a reasonable amount of time to make any further submission and if/when it is received, the decision-maker must give the submission genuine consideration before proceeding to make a final decision. This should be clearly documented. Sometimes, the employee's submission can give rise to a need to make further inquiries or further test the evidence before the decision-maker can finalise their decision. If the employee identifies other relevant lines of inquiry and the decision-maker chooses not to pursue those lines of inquiry, the reasons should be documented. If there are no sound reasons, the finding may be open to challenge.

Once the final decision is made, the employee should be informed in writing. They should also be informed of any external referrals (such as to the WWCC Directorate) and internal review or appeal options available to them.

Findings referred to the WWCC Unit

A finding of reportable conduct in relation to sexual misconduct, a sexual offence or a serious physical assault must be referred within the Office of the Children's Guardian to the Guardian's Working with Children Check Directorate.

Therefore, when informing an employee of a finding of reportable conduct against them, entities should alert them to the consequent report to the WWCC Directorate in relation to sustained findings of sexual misconduct, a sexual offence or a serious physical assault.

Information must also be referred internally to the Guardian's Working with Children Check Directorate if it meets the threshold for consideration of an interim WWCC bar pending a formal risk assessment

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