

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 (HRE) must advise the Office of the Children's Guardian (OCG) 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 at [section 26](#) of the Act to mean a finding that a reportable allegation has been sustained.

[Section 40](#) of the Act states that HREs must make a finding of reportable conduct if satisfied, on the balance of probabilities, that the case against the employee has been proved.

Under [section 65](#) of the Act, the HRE may delegate the decision-making function to a suitable employee, however the HRE remains ultimately responsible for the decision.

To fulfil the obligation to make a finding, the decision-maker 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 determine whether they are reasonably satisfied that the reportable conduct occurred. The decision-maker should document this process. The record should include confirmation that they have considered all the evidence and should provide reasons for either accepting or rejecting the investigator's recommendation/s.

In reaching their decision, heads of relevant entities/their delegates must have regard 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 persuaded that it is more probable than not that the alleged conduct occurred. The determination is not a purely mechanical or mathematical exercise. [Section 40\(2\)](#) of the Act states that the decision-maker 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 mean that the standard of proof is changed or elevated for 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.

Thresholds for findings of reportable conduct

When making findings, entities must take into account [section 7](#) of the Act, which makes clear that the safety, welfare and wellbeing of children, including protecting children from child abuse, is the paramount consideration in decision-making under the Act.

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

Sexual offence – [section 21](#) of the Act:

A reportable conduct finding of a sexual offence requires the decision-maker to be reasonably satisfied, on the balance of probabilities, that the employee engaged in conduct that:

- a) was a sexual offence under any law of NSW, another state/territory, or the Commonwealth, and
- b) committed against, with or in the presence of a child.

A finding of sexual offence can be made in the absence of a criminal conviction. However, the decision-maker must be reasonably satisfied that all elements of the offence have been established.

A finding of sexual offence against an employee with a Working with Children Check (WWCC) clearance will trigger an assessment by the OCG's WWCC unit of the employee's suitability to continue working with children.

Sexual misconduct – [section 22](#) of the Act:

A reportable conduct finding of sexual misconduct requires the decision-maker to be reasonably satisfied, on the balance of probabilities, that the employee engaged in conduct that was:

- a) with, towards or in the presence of a child, and
- b) sexual in nature (but not a sexual offence).

The finding may be based on one-off conduct or a pattern of conduct assessed in totality. A decision-maker may reach reasonable satisfaction that conduct was 'sexual in nature' on evidence that would satisfy a reasonable person that the conduct was:

- unambiguously sexual in nature without a legitimate purpose; or
- sexual innuendo or had sexual undertones; or
- engaged in – in whole or in part – for the purpose of sexual gratification; or
- carried out in other circumstances that make the conduct sexual in nature.

Unambiguously sexual in nature

Conduct with, towards or in the presence of a child that is unambiguously sexual in nature without a legitimate purpose is reportable conduct, whether or not the employee is alleged to have been motivated by sexual gratification or by an intention to groom or sexually assault a child.

Unambiguously sexual conduct is 'sexual in nature' in and of itself. The only intention the decision-maker needs to be reasonably satisfied about is that the employee intended to engage in the conduct with, towards or in the presence of a child or children or was reckless in doing so.

When this type of conduct is proved on the balance of probabilities, the HRE has no discretion about making a finding of sexual misconduct. In circumstances where the HRE finds sexual misconduct however is of the view that, in all the circumstances – including the employee's response and any remedial action introduced by the entity – the conduct does not give rise to concerns about the employee continuing to work with children, the entity can include this information with its entity report for consideration by the WWCC Unit when the finding is reported to it.

Not unambiguously sexual in nature

Conduct that is not unambiguously sexual is sexual misconduct when the decision-maker is reasonably satisfied that the employee either intended the conduct to be sexual in nature or that the conduct was sexually motivated. This does not require proof of the employee's intention or motivation, but the evidence must reasonably point to this conclusion. In this regard, decision-makers need to use their judgment and be guided by what has been alleged, the context, the associated risk level and the employee's explanation for their conduct to decide whether it is more probable than not that the conduct was sexual in nature.

A finding of sexual misconduct against an employee with a Working with Children Check (WWCC) clearance will trigger an assessment by the OCG's WWCC unit of the employee's suitability to continue working with children.

Assault – section 25 of the Act:

A reportable conduct finding of assault requires the decision-maker to be reasonably satisfied, on the balance of probabilities, that the employee engaged in conduct that:

- a) was either intentional or reckless (i.e. knows the assault is possible but ignores the risk), and either
- b) was an unlawful application of physical force against a child; or
- c) caused a child to apprehend the immediate and unlawful use of physical force against them.

Technically, any form of unwarranted touching can, depending on the context in which it occurs, constitute an assault. The Act explicitly recognises that the following uses of physical force do not constitute reportable conduct:

- conduct that is reasonable for the purposes of discipline, management or care of a child, having regard to the age, maturity, health or other characteristics of the child and any relevant code of conduct or professional standard, or
- the use of physical force if in all the circumstances, the physical force is trivial or negligible, *and* the circumstances in which it was used have been investigated and the result of the investigation has been recorded in accordance with appropriate procedures.

If a reportable conduct investigation finds that an assault was either a reasonable application of physical force in the circumstances or was the use of force that was trivial or negligible in all the circumstances, the appropriate finding is "sustained but not reportable conduct".

Serious physical assault

If an assault is proven against an employee with a WWCC clearance and it is assessed by the relevant entity to be a "serious physical assault", the finding will trigger an assessment by the OCG's WWCC unit of the employee's suitability to continue working with children.

Therefore, when a decision-maker makes a reportable conduct finding of assault, they must also decide whether the assault constituted a "serious physical assault".

A physical assault is 'serious' where it:

- results in a serious injury; or
- had the potential to result in a serious injury.

A 'serious injury' is at the threshold of – but is not limited to – concussion, dislocated joints, nerve damage, fracture, extensive bruising, welts, harm requiring stitches, harm requiring other significant medical treatment.

Ill-treatment – section 23 of the Act:

A reportable conduct finding of ill-treatment requires the decision-maker to be reasonably satisfied, on the balance of probabilities, that the employee engaged in conduct that was:

- a) unreasonable, and
- b) seriously inappropriate, improper, inhumane or cruel.

A finding of ill-treatment can be based on one-off conduct or a pattern of conduct assessed in totality. Whether or not the subjective elements of this category of reportable conduct are met is a judgment call the decision-maker needs to make and support by a rationale with consideration to the circumstances of the matter. This will include known expectations of the employee that are based on the entity's policies and procedures, the training the employee has received, the entity's code of conduct or professional or community expectations as well as the circumstances of the child or children involved. The reasoning needs to be clearly documented.

Neglect – section 24 of the Act:

A reportable conduct finding of neglect requires the decision-maker to be reasonably satisfied that the employee:

- a) had parental responsibility for, was the authorised carer of or had care of the neglected child at the time of the neglect, and
- b) engaged in a significant failure – whether a single significant failure or repeated failures which together were significant, and
- c) the significant failure related to the provision of adequate and proper food, supervision, nursing, clothing, medical aid or lodging, and
- d) the significant failure either caused harm to the child or was likely to cause harm to the child.

Significant failure that causes or is likely to cause harm to a child

The Act does not require any actual or likely harm caused by the failure to be significant or serious, however the gravity of the harm or likely harm is a factor to consider when assessing whether the employee's failure was significant.

A likelihood to cause harm equates to a probability of harm being caused by the employee's conduct. A mere remote possibility would not meet this threshold.

Whether or not the failure may be significant is a judgment call the decision-maker needs to make and support by a rationale with consideration to the individual circumstances of the matter. This will include known expectations of the employee that are based on the entity's policies and procedures, the training the employee has received, the entity's code of conduct or professional or community expectations. In this regard, the fact that a child has been seriously harmed does not automatically mean that there has been a significant failure by the employee. The decision-maker's assessment against each element must be clearly documented.

Adequate and proper

The terms 'adequate' and 'proper' are not defined in the Act, so they take on their usual meaning, which is: fully sufficient, equal to the requirement or occasion, fit, suitable, correct, conforming to established standards of behaviour.

Food, supervision, nursing, clothing, medical aid or lodging

The Act limits the reportable conduct category of neglect to failures involving the provision of food, supervision, nursing, clothing, medical aid or lodging. All of these categories hold their usual meaning, other than "nursing", which does not relate to medical care but instead to factors such as personal care, support, affection, hygiene and a safe and healthy environment (outside the category of lodging).

Failures outside of those six categories do not constitute reportable conduct – neglect.

Behaviour that causes significant emotional or psychological harm to a child – section 20(g) of the Act:

A reportable conduct finding of behaviour that causes significant emotional or psychological harm to a child requires the decision-maker to be reasonably satisfied, on the balance of probabilities, that the employee engaged in conduct that involved:

- a) intentional or reckless conduct (including a pattern of conduct) that is very clearly unreasonable, and
- b) a causal link to significant psychological or emotional harm to a child.

Emotional or psychological harm to the child that is short-term or minor is not considered 'significant'. For example, a child being temporarily distressed after being reprimanded, or feeling transient anxiety or nervousness, are not examples of significant emotional or psychological harm. Whether conduct is clearly unreasonable is a judgment call for the decision-maker that should be informed by known expectations of the employee, the entity's policies and procedures, the training the employee has received, the entity's code of conduct or professional or community expectations. The reasons for concluding that conduct was clearly unreasonable should be clearly documented.

A causal link requires more than a mere contribution to existing or developing harm. The employee's conduct must be found to be the sole cause or a significant contributor to the significant emotional or psychological harm to the child.

Sections 316A or 43B offences – NSW Crimes Act 1900:

A section 316A offence is an offence of concealing a child abuse offence, while a section 43B offence relates to a negligent failure to reduce or remove the risk of a child becoming the victim of child abuse.

Similar to the reportable conduct categories of sexual assault and assault, an employee does not need to be the subject of a criminal investigation or charge in connection with these offences for a decision-maker to be reasonably satisfied on the balance of probabilities that the offence occurred. However, the decision-maker does need to be reasonably satisfied that the elements of the criminal offence were met.

The elements of these reportable conduct categories are spelt out in the *Crimes Act 1900*, and can be found [here for the section 316A offence](#) and [here for the section 43B offence](#).

The core elements of the s316A offence a decision-maker must be reasonably satisfied of are that the employee:

1. was an adult at the time of the alleged failure,
2. knew, believed or ought reasonably to have known that a child abuse offence had been committed,

A 'child abuse offence' includes a range of offences against a child under 18 including sexual offences, serious assaults and failing in parental responsibilities.
3. knew, believed or ought reasonably to have known that they had information they might be of material assistance to the arrest, prosecution or conviction of the alleged offender,

'Information of material assistance', which is not defined, is a matter of fact to be determined by the decision-maker.
4. failed to bring the information to the attention of NSW police as soon as practicable, and
5. had no reasonable excuse for the failure.

Section 316A(2) outlines non-exhaustive circumstances that constitute a "reasonable excuse".

The core elements of the section 43B offence the decision-maker must be reasonably satisfied of are that the employee:

1. was an adult working for an organisation that engages adult workers in child-related work,
'Child-related work' is defined at section 6 of the *Child Protection (Working with Children Act) 2012*.
2. knew that there was a serious risk an adult worker in the organisation would commit a child abuse offence against a child in the current or future care of the organisation,
A 'child abuse offence' includes a range of offences against a child under 18 including sexual offences, serious assaults and failing in parental responsibilities. It is not necessary to establish that a child abuse offence was committed.
3. by virtue of their role in the organisation, had the power or responsibility to reduce or remove the risk, and
4. negligently failed to take action to reduce or remove the risk.
A negligent failure of this type means a failure to take the care a reasonable person would have taken in the same or similar situation.

Principles of procedural fairness

The Act requires HREs to have systems in place to ensure that the handling of and response to reportable allegations has regard to the principles of procedural fairness. The steps that are required to be procedurally fair may differ from one investigation to another 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 flows from the evidence and which indicates that it is reasonably open – on the balance of probabilities – to make the proposed decision; and
- unless prohibited (see below, section 57(7)), inform the employee about the proposed finding and finding, reasons and action taken or to be taken.

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.

Decision-makers must be aware that section 57(7) states that information about the reportable allegations, finding, reasons and action taken must not be disclosed to the employee if the head of the relevant entity reasonably believes disclosure would:

- put a person's health or safety at serious risk; or
- put a person who made a report, complaint or notification, or other person, at risk of being harassed or intimidated; or
- prejudice an investigation or inquiry.

A 'serious risk' denotes a risk that is more than minor or transient and must be a risk that cannot be mitigated. For example, the usual risk that an employee may experience shock and stress associated with a reportable allegation would not be reason not to disclose the information to the

employee – this is a transient and manageable risk that does not outweigh the importance of a thorough and fair investigation. By contrast, if an alleged victim has self-harmed over the prospect of the employee being informed of the allegation, it may be reasonable for the HRE to suspend disclosure of the allegation to the employee unless and until the risk to the alleged victim’s safety is managed.

Similarly, a mere possibility that a person may be harassed or intimidated will not give rise to a reasonable belief that information should not be disclosed to the employee. There is no requirement – and it is not best practice – to inform an employee about the source of a reportable allegation. However, often the allegation itself will make clear who has reported it. Ordinarily, reminders to the subject employee about not approaching witnesses and about protections for reporters under [section 64](#) of the Act will be sufficient to manage the risks associated with a reporter’s identity being identifiable. In some cases, these protections may be inadequate – in particular cases involving allegations of intrafamilial offending – and the HRE may form a reasonable belief that the employee should not be provided with all or any information about the reportable allegation.

Any decision to invoke [section 57\(7\)](#) and the rationale and evidence should be clearly documented and provided to the OCG.

Unless [section 57\(7\)](#) applies, the steps outlined below should be followed.

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.)

Even in the case of non-adverse findings, the employee should still have the opportunity to provide a written submission about the finding and the action if they choose, and this is particularly so if the entity decides to take remedial action on a risk-assessment basis. However, there will be occasions when an entity forms the reasonable view that there are reasons not to put an allegation to the subject employee. In such cases, the entity may approach the Children’s Guardian about an exemption, under [section 31\(1\)](#) of the Act, from the requirement to continue its reportable conduct investigation.

Adverse finding (finding of reportable conduct)

If the decision-maker proposes to make a finding of reportable conduct, the further procedural fairness steps outlined below are generally necessary before confirming that finding. If these further steps are not taken, it is important to document the reasons and provide them to the OCG. A failure to take these procedural fairness measures may leave the finding open to being challenged and overturned.

- Inform the employee, in writing unless this is not possible or suitable, of the proposal to make the adverse finding.
- Provide as much detail about the reasons for the proposed adverse finding as is reasonable.
- Provide the employee with an opportunity to make a further submission in response to the proposed finding and reasons.

When providing reasons about the proposed adverse finding to the employee, it is not necessary – and may be impermissible – to provide the employee with the investigation report.

While [section 36\(4\)](#) of the Act states that the HRE may give the entity report to the employee who is the subject of the report, this does not extend to the entity’s full investigation report or

associated evidence. The reference in section 36(4) to providing an employee the subject of the investigation with the entity report is a reference to the information outlined at [section 37\(1\)](#) of the Act, which correlates with information [section 57\(6\)](#) of the Act states the HRE may give to the subject employee; that is, information:

- that the report has been made
- whether the HRE has made a finding of misconduct or determination of a reportable conviction
- the reasons for the finding or determination, and
- information about action taken, or to be taken, in response to the finding or determination.

Procedural fairness requires that the employee be given sufficient particulars to be able to respond to the allegations against them and reasons for any adverse findings. While this does not require provision of the entire or un-redacted investigation report, as at earlier stages when the employee is provided an opportunity to respond to the reportable allegations (see [Fact Sheet 4 – Planning and conducting an investigation](#)), the employee should:

- be given the details of the reportable conduct categories the subject of the decision-making, including:
 - the definition for those categories
 - the elements to be proven, and
 - the decision-maker’s rationale for making a preliminary finding that the elements are met.
- be alerted to the potential implications of an adverse finding, including for example, any referral to the Working with Children Check unit of a sustained findings of sexual offence, sexual misconduct or serious physical assault.

At all times when making decisions under the Act, the safety, welfare and wellbeing of children is the paramount consideration. See [Fact Sheet 11 - Disclosing Reportable Conduct information](#) for more information about circumstances that permit disclosure of reportable conduct information to the subject employee beyond the information outlined above.

When the employee is alerted to proposed findings and/or action, 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, unless this is not possible or suitable for the employee. They should also be informed about internal review or appeal options available to them. See also below – findings referred to the WWCC Unit.

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 OCG to the Working with Children Check (WWCC) Unit.

Although, in the case of relevant entities, the report to the WWCC is managed by the OCG, the entity should inform the employee of this consequence of the finding against them. If best practice has been followed, the entity would already have alerted the employee to this possibility at the time the allegations were first put to the employee for a response, however it should be reiterated at the preliminary finding and finding stages.

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