

# Reportable Conduct – Identifying and responding to allegations against an employee

## CONTENTS:

- Context
- Relevant Legislation and Considerations
- Policy Statement
- Types of Conduct that may constitute reportable conduct
- Reporting Sexual Misconduct
- Information to collect
- Determining if a allegation is reportable
- Procedures for dealing with a notification against an employee
- Support for relevant parties

## **CHAPTER 1:**

### **Reportable Conduct – Identifying and responding to allegations against an employee**

#### **Context**

The safety, welfare and wellbeing of children and young people are vital and a key priority for Out of School Hours Care in NSW. It is essential that services create a child safe environment and have clear child protection procedures in place to prevent or minimise any related risks to children. This is also critical when responding to allegations against employees, should they arise. The OOSH service also has a responsibility to ensure its employees are treated fairly and the rights of the employee are respected during an investigation and any disciplinary process as a result of the investigation.

Parents and other guardians of children attending OOSH services have a right to expect that their children will be safe and looked after during their time with the service, and that all protective measures will be considered for children should an allegation arise. To ensure confidence in the service, parents and other guardians will be provided with advice about this policy, as well as an identified position whom they can report any concerns to in relation to the conduct of an employee.

This policy concerns the prevention, identification and handling of allegations of child abuse and neglect made against employees. In relation to Family and Community Services, such allegations are referred to as reports of Risk of Significant Harm (ROSH). In relation to the NSW Ombudsman, such allegations are referred to as allegations of reportable conduct. If such allegations as they arise allege or indicate a criminal offence, they are to be forwarded to NSW police.

#### **Relevant Legislation and Considerations**

##### ***Children and Young Persons (Care and Protection Act) 1998***

Concerns of risk of significant harm (ROSH) to a child or a class of children may arise in relation to an allegation notified to the Ombudsman. Such concerns require a ROSH report to be made to the Community Services Helpline. Any concerns of children at any risk of harm should be processed through the Mandatory Reporting Guide, to determine the best management of any concerns.

##### ***Ombudsman Act 1974***

The Ombudsman must be notified of any reportable allegations involving Out of School Hours Care employees, subsequent actions of the service and the outcomes of these actions.

**Part 3A** - For the purposes of Part 3A of the *Ombudsman Act 1974*, OOSH is classified as an Education and Care Service which provides care for over primary school age children. OOSH services are designated agencies, which means that employee conduct towards children that occurs outside of work activities is potentially reportable to the Ombudsman.

##### ***Education and Care Services National Laws and Regulations 2010***

It is an offence under the National Law for failure to notify certain information to the Regulatory Authority (ECECD), including complaints alleging that the safety, health and wellbeing of a child/children was/is being compromised while at the service. Allegations against staff must be reported to the Regulatory Authority within 24 hours of the complaint,

allegation or incident or the time the person becomes aware of the complaint, allegation or incident.

### **(NSW) Crimes Act 1900**

Allegations that constitute criminal conduct or may constitute criminal conduct in relation to children should be referred to NSW Police. This would typically be your Local Area Command, or possibly a specialist unit within the police force dealing with child related complaints.

### **Policy Statement**

As an employer, the Approved Provider has a responsibility to:

- Ensure that all employees are aware of their obligations to report suspected risk of significant harm and reportable allegations, and of the procedure for doing this.
- Provide support for employees to ensure they are given a copy of professional standards related to Educators relationships with children, including a Code of Conduct.
- Make sure that all employees are aware of the indicators of child abuse and neglect of children and young people, and ensure access to relevant training to assist with this.
- Investigate allegations of a child protection nature specifically related to the actions of any employees, and ensure that appropriate action is taken in relation to the finding.
- Advise employees under investigation for an allegation of a child protection nature, of support services that are available from the staff support officer, the Employee Assistance Program (EAP) and the union.
- Ensure that procedural fairness, applies in situations where a decision is to be taken which could have a detrimental effect on an employee's professional circumstances.
- Assist employees in implementing relevant policy and procedures related to protecting children and young people from harm.
- Ensure that current employees and new applicants for child related work have undergone (where required) a Working with Children Check and are cleared to work with children.
- Ensure that parents or other caregivers are provided with reasonable advice in relation to any child protection concerns regarding their children, subject to confidentiality and 'need to know' considerations.
- Consider the support needs of children and their parents/caregivers where child protection allegations have arisen.

### **Reportable conduct**

Allegations of reportable conduct (including related convictions) are defined in Section 25A of the *Ombudsman Act 1974* as:

- Any sexual offence or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), or
- Any assault, ill-treatment or neglect of a child, or
- Any behavior that causes psychological harm to a child.

This may take the form of an allegation or an identified conviction against an employee.

It's important to note that reportable conduct only applies to:

- A current employee or one employed at the time the head of agency became aware of the allegation/s.
- An alleged victim who was under the age of 18 years at the time the alleged conduct occurred.
- An agency in the jurisdiction of the ombudsman.
- Alleged conduct that falls within the following definitions, and is not otherwise exempted from reporting.

The following advice is taken from the NSW Ombudsman *Child Protection Practice Update 2013*:

### **Sexual offence**

The term 'sexual offence' encompasses all criminal offences involving a sexual element '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/discrimination/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.

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

### **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.

#### ***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 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.

### ***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 exhibition)
- 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.

### ***Grooming behaviour***

This means patterns of behaviour aimed at engaging or 'grooming' a child as a precursor to sexual abuse. It is a separate offence from the actual sexual abuse. Please also refer to the *Network Fact Sheet on Grooming Behavior*.

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 itself.
- 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.

### **Physical 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 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.

### **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.

### **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.

#### ***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.

#### ***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.

#### ***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.

#### ***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.

### **Psychologically harmful behavior towards a child in care**

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.

### **Conduct not reportable to the Ombudsman**

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.

### **Procedures for dealing with allegations – what actions must be taken when there is an allegation of child abuse made against an employee?**

If there is an allegation against an employee including an anonymous report involving a child the following must happen: -

- The Nominated Supervisor (NS) must be informed
- If the allegation is against the NS the Approved Provider must be informed.



- If not reportable conduct, often issues can be resolved between the NS and the employee using the organisation's grievance procedure or complaints policy.

### **Reporting alleged Reportable Conduct by an employee – whose responsibility?**

The Nominated Supervisor (Centre Director/Co-coordinator) is the Head of Agency for the purposes of Part 3A of the Ombudsman Act **1974**. The Supervisor must respond promptly, in accordance with legislative responsibilities, and in a sensitive manner when they become aware of an allegation of a child protection nature against an employee.

In situations where an allegation has been made the Nominated Supervisor (Centre Director/Co-coordinator) must consult with the Approved Provider to determine what further information, if any, should be sought.

The Nominated Supervisor (Centre Director/Co-coordinator) will record details of the allegation using the person's exact words to describe the allegation. In some matters written information such as incident reports may have been provided by the complainant or witnesses.

All necessary and reasonable steps are to be taken to ensure the identities of the persons who made the allegations, or who are the subject of the allegations, are treated confidentially. The identity of the reporter of Risk of Significant Harm to a child is protected under the *Children and Young Persons (Care and Protection) Act 1998* and disclosure of their identity constitutes a breach of that Act.

However, no guarantees of confidentiality should be given because the identity of those people who are involved in, or witnessed, the alleged conduct may need to be revealed to the Educator who is the subject of the allegation, to enable the effective investigation of the matter. Identifying information may also need to be provided to Community Services or NSW Police if either agency is involved in an allegation.

Information to collect:

- The details of the allegation
- Names of Educator/child/ren involved
- What is alleged to have occurred
- Date and times of the alleged incident
- Any identified or alleged further risks/concerns to children
- The contact details of the person reporting the allegation
- The name and contact details of the initial complainant
- Names and addresses of the parents or caregivers of the children involved
- Names of witnesses and how they may be contacted
- Whether the employee/s already knows about the allegation.

### **Determining if an allegation is a reportable allegation**

- Clarify exactly what the allegation is – collect the facts
- When and where?
- Who was involved?
- Compare against definitions for reportable conduct
- Record details
- Record any conclusion and any further action that is required.

### **Consider if the alleged conduct:**

- Was reasonable for the purpose of caring for children
- In line with the organisation's policies and procedures
- In agreement with the Code of Professional Conduct for Educators

Does the allegation relate to any reportable conduct detailed in this policy? If yes, the HOA is required to report the matter to the Ombudsman within 30 days. This is done by attaching a copy of the initial complaint and any other relevant information to a completed Part A Notification form, which can be found on the NSW Ombudsman website at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au). Download the form, complete the required sections, print a copy (the original stays with your investigation file), sign it and forward it by registered mail to the NSW Ombudsman.

**If No:**

Follow the organisation's usual policy and procedures and conduct your own analysis of the situation to hand and record findings. If the organisation finds that the alleged conduct is more serious than initially assessed and is reportable, then the Ombudsman must be notified as soon as possible.

If you are unsure about whether the allegation constitutes reportable conduct, or should you wish to clarify any aspect of your management of an investigation, contact the office of the Ombudsman for advice on (02) 9286 1000. Ask to be put through to the Enquiries section for the Employment Related Child Protection Division.

**How will the service deal with the initial notification against an Employee?**

Assess the immediate (known or potential) risks associated with the allegation in relation to the alleged victim; to other children/witnesses; to the employee; to other staff; to confidentiality; to the conduct of the investigation, and to the service.

Assess the initial support needs for all the relevant parties to the allegation. This includes the alleged victim/s; the employee/s subject to the allegation/s; other children accessing the service; the parents and other caregivers of the alleged victim and other children involved; other staff. This can range from enquiring about a person's wellbeing; ensuring a person has family support, someone to talk to; or requires more formal support. Medical or counselling requirements may be identified at this point.

Children or young people who are victims or witnesses in a matter that relates to an employee need sensitive, ongoing support. Every effort must be made to ensure that all children or young people in this situation are treated fairly and with respect.

Nominated Supervisors must ensure that children and young people are informed of:

- their right to be treated fairly and without discrimination or intimidation
- their right to choose not to be interviewed or give a statement
- their entitlement to support
- the support services available to them
- the reporting responsibilities of agencies where reportable allegations and/or risk of significant harm concerns, or criminal complaints, are identified.

An employee who is the subject of the allegation is able to seek support from their employer – this may be in the form of a specialist counsellor. The employee can take a support person to an interview or meeting. Support is also available from relevant trade union representatives or other support groups.

Consider which individuals and other agencies/services will be party to the investigation. This would likely include the employee subject of the allegation; the alleged victim and their

parents/caregivers; potential witnesses; your agency, the Department of Education and Communities Directorate; professional support groups and other industrial representatives, and the NSW Ombudsman. It could possibly include Family and Community Services, NSW Police, health services or other contracted services.

By considering stakeholder involvement and what expectations they may have in a matter, investigations can be better planned and likely complaints avoided.

**Further considerations**

- Unless advised not to do so by Police or Community Services, when practicable inform the employee subject of an allegation of the general allegations and the immediate actions that need to be taken. Do not disclose the details of the allegations to the employee at this stage. Rather, advise them that they will be provided with a formal letter of allegation and offered an opportunity to respond.
- Maintain confidentiality – only disclose to those who need to know
- Remind the employee and other staff affected by the allegations to respect expectations of privacy and requirements of confidentiality.
- Keep a record of all allegations and actions.
- Keep notes of relevant conversations.