



ST STANISLAUS' COLLEGE

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Child Protection Policy & Procedures

Summary: Child Protection Policy and Procedures

Intended Audience: Staff, Volunteers, parents and students

NESA Reference: *Registered and Accredited Individual Non-government Schools (NSW) Manual Reference 3.6.1 and 3.11.4*

Distribution: *College Policies and Procedures Manual, College Website, Staff Induction*

Responsibility for Policy Implementation	Head of College
Previous Revision Date	May 2018
Policy Revision Due	June 2019

Child Protection Policy

1. Purpose

All organisations that care for and educate children and young people have significant responsibilities.

As part of their particular mission, Catholic organisations have strong imperatives for committing themselves to fostering the wellbeing of children and young people, and to protecting them from any form of neglect, harm or abuse.

St Stanislaus' College is committed to maintaining practices that create a culture of safety and wellbeing within which children and young people are supported and protected. The creation of such a culture across the community of the College is the most effective means to prevent harm. Preventative programmes to raise the awareness of students, employees and the community about child protection issues are central to the development of this culture.

An important part of the maintenance and enhancement of this culture is the College Staff Code of Conduct. The Child Protection Policy of St Stanislaus' College seeks to maintain and enhance a culture of safety and to also put in place appropriate and comprehensive measures to respond to circumstances where children may be harmed or put at risk of harm.

Involvement of all members of the community through regular dissemination of information is an important component of Child Protection.

To this end, the College has processes in place to ensure that all NSW Child Protection legislative requirements are met. Under the legislation in NSW, St Stanislaus' College is a designated non-government agency.

2. Policy Principles

Within St Stanislaus' College the approach to creating a safe environment and procedures for responding to allegations and disclosure of reportable conduct or risk of significant harm of children and young people, are based on the following principles:

- All children and young people have a right to safety and freedom from mistreatment of any kind.
- All adults working with children and young people have a responsibility to care for them, to promote their wellbeing and to protect them from risk of significant harm.
- When any action is taken to prevent or respond to the mistreatment of a child, the welfare and wellbeing of the child or young person are the primary concerns.

3. Legislative Requirements

For the purposes of this Policy and the various legislative requirements, the Head of College or Acting Head of College is the College Head of Agency. A summary of the NSW legislation pertaining to Child Protection is listed at the end of this Policy.

4. Definitions

These definitions may alter and reference should always be made to the source documents for the latest content.

- **Allegation**

An allegation against an employee might involve behaviour that is reportable conduct or behaviour that is exempt from notification to the Ombudsman but is required to be investigated by the College.

- **Apprehended Violence Order**

An Apprehended Violence Order (other than an interim order) made by a Court under the Crimes Act 1900, or an interstate restraint order (within the meaning of the Crimes Act 1900) which is registered in NSW, and made on the application of a police officer or other public official for the protection of a child (or a child and others).

- **Behaviour that causes psychological harm**

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 or young person. There needs to be a proven causal link between the inappropriate behaviour and the harm, and the harm must be more than transient.

- **Behaviour that does not constitute reportable conduct**

Allegations against employees, that are exempt from notification to the Ombudsman, are:

- 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 s. 25CA of the Ombudsman Act 1974. (There is a detailed process to observe to determine if alleged behaviour falls within this exemption and further information can be obtained from the Deputy Head of College).

Examples of conduct that would not constitute "reportable conduct" include:

- touching a child in order to attract a child's attention to guide a child or to comfort a distressed child
- a teacher raising his or her voice in order to attract attention or to restore order in the classroom
- conduct that is established to be accidental
- providing appropriate medical care to a child who is hurt
- not providing supervision where this was for good reason, and for a short period of time and where the risk of harm was reasonably perceived at the time to be low
- actions found to have been appropriate physical contact in classes such as sport, drama, etc.

- **Child**

Under the Child Protection (Offenders Registration) Act 2000, the Ombudsman Act 1974, the Child Protection (Working with Children) Act 2012 all children and young people up to the age of 18 years are defined as children. The Children and Young Persons (Care and Protection) Act 1998 includes children up to the age of 16 years.

- **Conviction of reportable conduct**

This means any conviction of a person, in NSW or elsewhere, of an offence involving reportable conduct, and includes a finding by a court that a charge for such an offence is proven even though the court does not proceed to a conviction.

- **Disqualified Person**

The Children's Guardian must not grant a Working with Children Check (WWC) clearance to the following persons ("disqualified persons"):

- a) a person convicted before, on or after the commencement of relevant legislation of an offence specified in Schedule 2, if the offence was committed as an adult,
- b) a person against whom proceedings for any such offence have been commenced, if the offence was committed as an adult, pending determination of the proceedings for the offence. See *Child Protection (Working With Children) Act 2012 – Schedule 2* for a list of offences that disqualify a person from receiving a clearance.

- **Employee**

An employee is any person who is employed by the College, whether or not they are employed to work directly with children, as well as anyone from outside the College who is engaged to provide services to children such as contractors, volunteers, students on placement, instructors of religion, sports coaches, visiting musicians, voluntary non-student members of theatrical production (Section 25A Part 3A of the *Ombudsman Act 1974*).

- **Grooming behaviour**

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 of gifts
- inappropriately showing special favours to a child but not to other children
- inappropriately allowing the child to overstep rules
- asking the child to keep this relationship to themselves.
- 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.

For the purposes of notification to the OCG , grooming behaviour constitutes a form of sexual misconduct and is notifiable.

- **Head of Agency**

The Head of Agency is the Head of College or in the absence of the Head of College, the Acting Head of College.

- **Internal investigation of an allegation**

This involves a process where the College:

- gathers all relevant facts
- makes a decision as to whether an allegation is sustained or not
- provides information to assist any relevant employment proceedings.

When undertaking an investigation, the College will be mindful of “The Association of Independent Schools NSW and The NSW/ACT Independent Education Union – Recommended Protocols for Internal Investigation and Disciplinary Proceedings” that are referred to below (Appendix i).

- **Mandatory reporting of a child or young person at risk of significant harm**

Section 27 of the *Children and Young Persons (Care and Protection) Act 1998* (see NSW Mandatory Reporting Guidelines) provides for mandatory reporting as follows:-

“(1) This section applies to:

(a) a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children, and

(b) a person who holds a management position in an organisation, the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children.

(2) If:

(a) a person to whom this section applies has reasonable grounds to suspect that a child is at risk of significant harm, and

(b) those grounds arise during the course of or from the person’s work, it is the duty of the person to report, as soon as practicable, to the Director-General the name, or a description, of the child and the grounds for suspecting that the child is at risk of significant harm.”

(“Department” means Community Services “Director-General” means the person for the time being holding office or acting as the Director-General of the Department (Helpline 133627).)

- **Neglect**

Neglect occurs when a child is harmed by the failure of a person whose job includes care responsibilities towards a child, to provide basic physical and emotional necessities of life, including failure of such a person to provide or arrange for the provision of adequate and proper food, nursing, clothing, medical attention or lodging for a child in that person’s care.

- **Office of Children’s Guardian (OCG)**

The OCG is responsible for providing or declining Working With Children clearances to applicants. This checking system came into place on 15 June 2013 and all new employees are subject to the clearance process.

Head of College and Head of College Professional Assistant are the two nominated contact people within the College who will be contacted by the Office of the Children’s Guardian if an employee becomes barred.

- **Physical assault**

Using common law principles, physical assault must include all three of the following elements:

- it is an act committed on or towards a child; and
- it involves either the application of force to a child or an act that causes a child to think that immediate force will be used on them; and
- it is either hostile or reckless (a reckless act is one where the person foresees the likelihood of inflicting injury or fear, and ignores the risk).

Actual physical harm does not have to occur in order for an assault to have taken place, i.e. the child does not have to be injured.

Physical contact which is an inevitable part of everyday life does not amount to an assault.

- **Reportable allegation**

An allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct must include:

- identification of a person who is a current employee of the College
- an alleged offence or description of offending behaviour that meets the definition of reportable conduct
- a person who was a child at the time of the alleged offence or behaviour described.

All allegations (including anonymous allegations) of reportable conduct must be reported to the Ombudsman.

Complaints that form the basis of less serious allegations i.e. non reportable conduct, will be dealt with in accordance with the relevant College Policy and the College other legal obligations.

- **Reportable conduct**

- 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 behaviour that causes psychological harm to a child, whether or not, in any case, with the consent of the child.

- **Risk Assessment**

Analysis of the facts and circumstances is made when the Head of College is made aware of allegations of reportable conduct to determine whether any measures need to be taken for the safety and welfare of all concerned.

- **Risk of Significant Harm**

Under Section 23 of the Children and Young Persons (Care and Protection) Act 1998 a child or young person is "at risk of significant harm" if current concerns exist for the safety, welfare or wellbeing of the child or young person because of the presence of any one or more of the following circumstances:

- a) the child's or young person's basic physical or psychological needs are not being met or are at risk of not being met,
- b) the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive necessary medical care,
- c) in the case of a child or young person who is required to attend school in accordance with the Education Act 1990 the parents or other caregivers have not arranged and are unable or unwilling to arrange for the child or young person to receive an education in accordance with that Act,
- d) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated,
- e) the child or young person is living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm,
- f) a parent or other caregiver has behaved in such a way towards the child or young person that the child or young person has suffered or is at risk of suffering serious psychological harm,
- g) the child was the subject of a pre-natal report under section 25 and the birth mother of the child did not engage successfully with support services to eliminate, or minimise to the lowest level reasonably practical, the risk factors that gave rise to the report.

Note: Physical or sexual abuse may include an assault and can exist despite the fact that consent has been given.

- **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. 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 (see definition above).

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.

The College Code of Conduct outlines the nature of the professional boundaries which should exist between employees and children/young people.

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 exhibitionism)
- 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.

Reference should also be made to the NSW Ombudsman website for further information on the above definitions.

- **Special care relationships**

Teachers along with certain other staff are included in the definition of special care relationships in Section 73 of the Crimes Act 1900 (see section headed “Staff Member” above).

- **Spent conviction**

Those offences included on a person’s criminal record which, because of the passage of time and legislative preconditions have been met, are no longer to be considered in any administrative decision making.

Sexual offences can never be “spent” for the purposes of an application for child-related employment in NSW (Criminal Records Act 1991, Section 15 (1A)).

- **Vexatious**

Where enquiries into the matter find that the allegation was made without substance and with the intent of being malicious or to cause distress to the person against whom the allegation was made.

- **Working With Children Clearance**

All employees (see definition) are required to obtain a Working With Children Check Clearance to be employed or continue employment at the College because of their direct responsibility for children.

An application needs to be commenced on the website of the OCG and once the WWC number has been received it should be sent to the Head of College Professional Assistant along with the staff member’s date of birth for verification.

5. Roles and Responsibilities

Head of Agency (Head of College is also the Head of Agency at St. Stanislaus’ College)

The Head of College as Head of a designated non-government agency is required to respond to all allegations against employees. Reportable allegations and convictions are to be notified to the Ombudsman within 30 days of the Head of College becoming aware of such allegations or convictions.

The Head of College, or Acting Head of College, should conduct investigations (which can include preliminary or other inquiries and assessments) into all allegations or convictions and take appropriate action as a result, including reporting to the Ombudsman’s office, as well as possibly the Office of the Children’s Guardian, the outcome of the School’s investigation into a reportable allegation or conviction.

Should the Head of College receive notice of an allegation against any employee, the responsibility is to put into place the formal process for responding to allegations.

The Head of College will be mindful of the College *Code of Conduct* which defines appropriate and inappropriate behaviour to assist staff and others to better understand the College expectations for all employees.

The Head of College is responsible for ensuring systems are in place for recording and responding to all allegations or convictions against an employee, including matters that are required to be notified to the Ombudsman, the Office of the Children's Guardian and Community Services. Responsibilities include:

- a) developing, disseminating and monitoring compliance of policies and processes.
- b) regularly reviewing policies and procedures.
- c) providing developmental opportunities and support for staff.
- d) establishing and maintaining appropriate staff recruitment, selection and screening processes. (see Recruitment Policy)
- e) establishing and maintaining appropriate procedures for dealing with allegations of staff misconduct.
- f) collaborating with other relevant agencies.
- g) supporting other organisations by providing prevention programs.
- h) providing information about child protection policies to parents and the community.

Head of College Professional Assistant

- Organises and maintains records of all Working With Children Checks (WWCC).
- Along with the Head of College is the nominated contact person to be contacted by the Office of the Children's Guardian if a worker becomes barred.
- Records all matters and procedures of Child Protection investigations and ensures all paperwork is completed as per policy.
- Maintains all confidential records pertaining to Child Protection investigations.
- Assists Head of College in responding to authorised requests for Child Protection documentation.

Deputy Head of College, Boarding Director, Year Co-ordinators, Counsellor (see Employee below)

- a) Manages incidents in accordance with this policy and other relevant employer and statutory requirements (risk assessments to be undertaken by Counsellor immediately a complaint or allegation is notified). Decisions taken regarding the risk assessment should in no way influence the finding that may occur as a result of investigations undertaken.
- b) Reports to FACS any child reasonably expected of being at risk.
- c) Reports to the employer allegations of child abuse against employees, which must ultimately be reported to the NSW Ombudsman's Office.
- d) Provides appropriate opportunities for staff to become familiar with relevant Child Protection policies and procedures, along with their own relevant responsibilities.
- e) Provides a summary of the Child Protection policy and procedures to casual employees and authorised volunteers.

Employees

All employees have a responsibility to report to the Head of College or to the Acting Head of College any situation where:-

- a. the employee is aware that there has been an allegation of reportable conduct; or
- b. the employee has formed a belief on reasonable grounds that a child is in danger of being subject to reportable conduct; or
- c. a child is at risk of significant harm.

It is important to realise that failure to report allegations of reportable conduct or a suspicion of reportable conduct, based on reasonable grounds, is possibly an offence under Section 316 of the NSW Crimes Act.

Teaching staff need also to be aware that under Section 73 of the Crimes Act a teacher who has sexual intercourse with one of their pupils who is aged between 16 and 18 is liable to imprisonment of up to eight years.

As a member of the College staff, employees are not to investigate allegations or suspicions of reportable conduct. Investigations must only be carried out by investigators specifically appointed for the purpose by the Head of College.

Employee responsibility is to report any allegations or evidence of reportable conduct only to the Head of College or Acting Head of College. Failure to maintain confidentiality will not only be a breach of this Policy, but may result in not being protected under the law (Section 29 *Children and Young Persons (Care and Protection) Act 1998*) from potential civil proceedings for defamation.

The Head of College or Acting Head of College will report any matter that has been notified, as required by the relevant legislation and the Memorandum of Understanding mentioned in the Legislative Requirement section below. The employee will be advised of the action taken. If it is decided that there are not “reasonable grounds to suspect” a child is at risk of significant harm and consequently the matter is not going to be reported by the Head of College, the employee, as the original notifier, will have an obligation under the legislation to report to FACS (Helpline 132 111) if the employee believes that reasonable grounds exist.

If a student discloses reportable allegations to an employee, the employee is obliged to report the disclosure as stated above but must not investigate the matter. Employees should refer to the “Guidelines for Assisting a Child who has Disclosed Reportable Allegations” that are attached.

Investigation of allegations or evidence of reportable conduct must only be carried out by investigators appointed by the Head of College whose duties will include informing parents or caregivers that a notification has been made. Employees should not make any contact with parents or caregivers regarding the notification unless specifically authorised to do so.

Employees are required to confer with the Head of College before responding to a request by FACS or any other officers to attend an interview with a child (victim). Employees cannot be compelled by FACS to attend such an interview and the advantages and disadvantages of attendance need to be carefully assessed by the Head of College before a decision is made.

Employees may be required to report in a detailed manner on any matter regarding reportable conduct about which you have notified or been notified. The confidentiality of such a report will be maintained unless otherwise required by a Court Order. Information relating to any matter of reportable conduct will need to be recorded in a signed statement.

Other employee responsibilities:

- a) participating in training initiatives designed to assist the recognition of abuse and neglect of children and young people, and the implementation of relevant policies and procedures.
- b) reporting to the Head of College or Acting Head of College any suspicion, on reasonable grounds, that a child or young person for whom the organisation is responsible, is at risk of significant harm.

- c) providing support, within the range of normal duties, to children and young people who have experienced mistreatment.
- d) maintaining appropriate confidentiality in relation to all incidents or allegations of reportable conduct or risk of significant harm of a child or young person.
- e) providing information that has been lawfully requested to support child protection issues and procedures.

Ombudsman

Under the Ombudsman Act, the Ombudsman must keep under scrutiny the systems agencies have in place for:

- a) preventing reportable conduct by employees, and
- b) handling and responding to reportable conduct allegations or convictions, involving those employees.
- c) If the matter is within the jurisdiction of the Ombudsman, the assigned investigation officer will:
 - conduct an assessment of notification of allegation,
 - monitor the investigation conducted by the College, or directly investigate the allegation,
 - investigate the complaints, and
 - audit the College systems.

Community Services (CS)

The role of Community Services includes, but is not limited to providing or arranging services to children, young people and parents when a request for assistance is received; receiving or assessing reports of abuse or neglect; and acting to maintain the safety of children.

The main purpose of an investigation by Community Services is to identify whether a child is at risk of harm and whether any care and support issues exist.

Community Services (previously known as the Department of Community Services – DOCS) is a division of Family and Community Services and has a broad role to play in the protection of children within our society and significant investigative powers to enable it to discharge its responsibilities.

The Head of College has a clear obligation under the *Children and Young Persons (Care and Protection) Act 1998* to report to CS any child who is considered to be at risk of significant harm and to assist that agency with its investigations. As mandated employees under relevant legislation, teaching staff will discharge their obligation to report children at risk of significant harm to CS by conveying the information upon which they base their concerns to the Head of College who is in turn obliged to inform CS.

CS will acknowledge safe receipt of notifications to its Helpline (132 111) and assign a case worker and reference number to the matter being reported.

Located at www.keepthemsafe.nsw.gov.au is an online interactive “Mandatory Reporter Guide” (also known as a decision tree) that will assist the Head of College to determine if a child should be reported as being at risk of significant harm to Community Services.

NSW Police Force

The main purpose of an investigation by Police is to obtain information upon which a sound and proper decision can be made about the validity of an allegation. This means:

- a) gathering all the relevant facts and making decisions as to whether on balance of probabilities, the allegation has been sustained/not sustained, and
- b) providing information to assist in any disciplinary proceedings.

The Joint Investigative Team (JIT) consists of a member of Community Services working with a member of the NSW Police Force to conduct an investigation.

Commission for Children and Young People (CCYP)

The Commission for Children and Young People makes background checking mandatory and oversees Working with Children Checks (WWCC).

The Commission for Children and Young People receives notification from the College in relation to:

- a) relevant disciplinary proceedings taken as a result of a reportable allegation or conviction concerning an employee, and
- b) applicants who have not been offered child-related employment as a result of appropriate assessment or screening.

The Office of the Children's Guardian (OCG)

The OCG is responsible for the employment screening for child related employment in accordance with the *Child Protection (Working with Children) Act 2012*. A Working With Children Check is a prerequisite for anyone in child-related work. It involves a national criminal history check and review of reported workplace misconduct findings. The result of a Check is either a clearance to work with children for five years, or a bar against working with children. Cleared applicants are subject to ongoing monitoring by the OCG, and any relevant new records which appear against a cleared applicant's name may lead to the Check being revoked.

Please refer to the <http://www.kidsguardian.nsw.gov.au/Working-with-children/working-withchildren-check> for further information on the Working With Children Check. All employees commencing are required to obtain a Check before they commence duties.

The OCG also receives notification of sustained findings against employees of serious physical assault and sexual misconduct and convictions involving children.

Procedures

This section of the policy outlines the procedure followed at the College. The Procedures Manual which accompanies this document provides detail of the various procedures to be followed.

6. Prevention

Measures to keep students safe from harm include:

- developing and reviewing strategies to minimise reportable conduct;
- requiring employees to sign their acknowledgment and understanding of this Policy to protect children;
- ensuring this Policy is dated and contains a date when it will be reviewed;

- adopting the attached “Code of Conduct” that assists staff in understanding appropriate and inappropriate behaviours;
- ensuring that all employees know and understand their Child Protection obligations defining each person’s current role within the organisation;
- conducting mandatory annual Child Protection training for all employees through SALT online;
- identifying people who are not suitable to work with children through implementing thorough employment procedures including reference checking, pre-employment screening and detailed questioning at interviews;
- providing information to families and the community on the Child Protection strategies that have been adopted by the College;
- training for employees to promote best practices and to ensure a safe environment for children and employees,
- raising awareness in the College community about Child Protection through appropriate sharing of information;
- encouraging members of the College Community to constructively contribute to ongoing review of this policy.

7. Risk Assessment

Risk Assessment is the overall process of risk identification, risk analysis and risk evaluation. It is proactive rather than reactive management. A range of related policies have been developed by the college in areas such as anti-bullying, anti-harassment, excursions, code of conduct, recruitment and email and internet usage to reduce the risks to the wellbeing of children. An area of particular focus at St Stanislaus’ College concerns the wellbeing of a large boarding community where boys from ages 12 to 18 are living away from home and the immediate contact of their parents and family friends. To reduce risk for our boarding community, St Stanislaus’ College has developed a range of policies and practices to protect the wellbeing of our boarders. The following College practices respond to the requirement to actively reduce the risk of harm.

- the creation of open and public areas for interviews with children;
- the regular education of students aimed at empowering them to come forward quickly and confidently should they have concerns about actions or practices on the part of other students, staff or members of the general community;
- a range of professional development activities which are regularly undertaken with staff to alert them to critical child protection issues;
- parents and other stakeholders are encouraged to raise issues of concern with relevant personnel that affect the wellbeing of students;
- the College Counsellor attends the College two evenings per week to support the boarding community;
- a range of processes and procedures is implemented in the management of the boarding house to safeguard the wellbeing of boarders. Such processes include matters such as day leave provisions, overnight leave provisions, who is authorised to enter dormitory spaces, the expectations regarding how the teaching staff should relate to boarders outside of day school hours, appointment of a House Parent for each year group of boarders and a range of other specific matters.

Risk Management

The process implemented by the College following an allegation against an employee is detailed in Appendix ii “Risk Management following an allegation against an Employee” Ombudsman NSW March 2012.

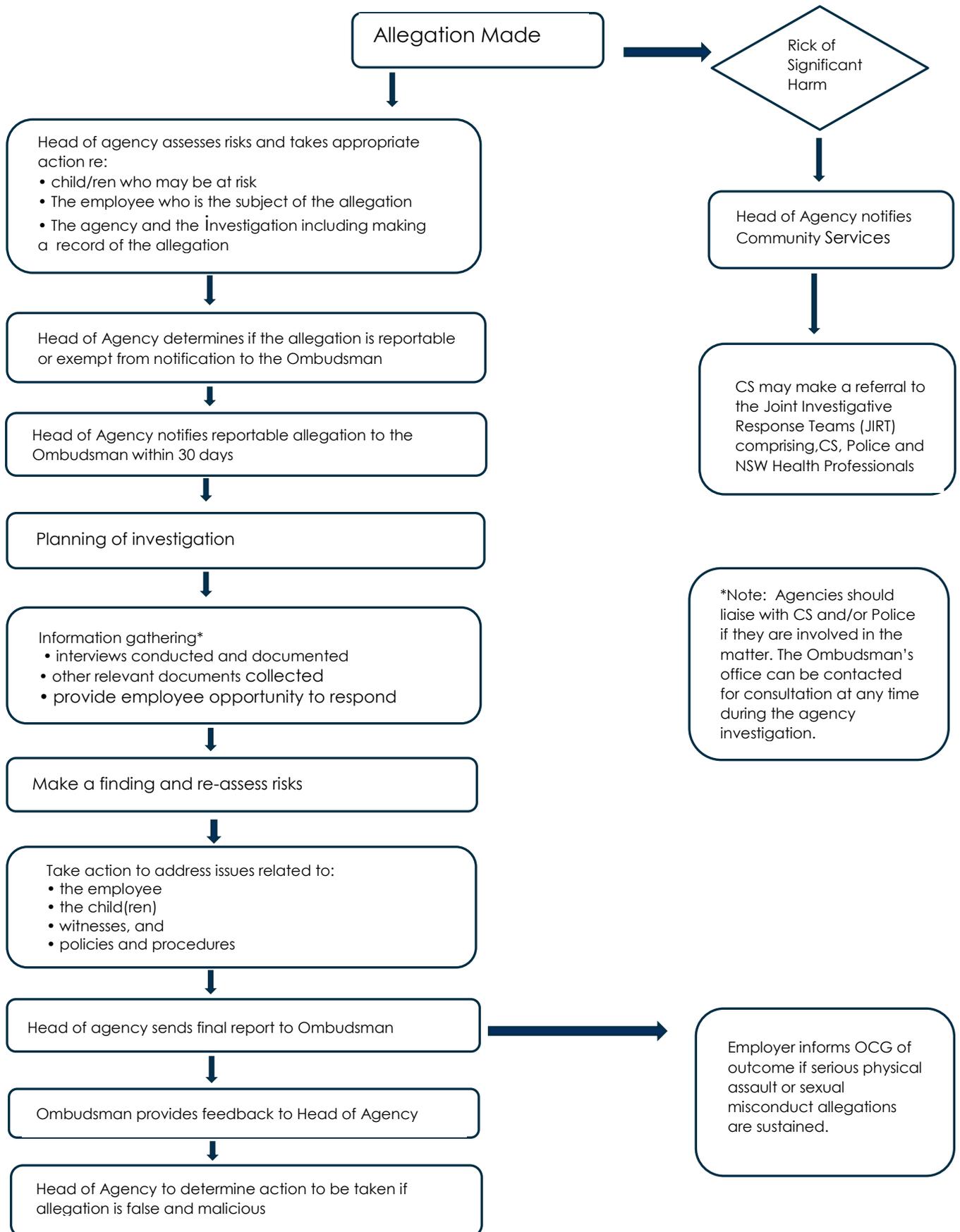
8. Students at Risk of Harm

Any employee at St Stanislaus' College who believes they have reasonable grounds to suspect that a child is 'at risk of significant harm', is required to ensure that such information is reported to the Department of Community Services through the Head of College. At St Stanislaus' College any employee who has reasonable grounds to suspect that a child is 'at risk of significant harm' should report such information promptly to the Head of College who will then make a report to the DOCS Helpline. Section 23 of the *Children and Young Persons (Care and Protection) Act* outlines the circumstances under which a child or young person could be considered to be 'at risk of significant harm'. Section 3.12 of the document "Child Protection in the Workplace" provides a summary outline of these reporting requirements.

For a student with suspected risk of harm:

- Notify the Head of Agency (Head of College or Acting Head of College) who will follow the following process
 - Go to www.keepthemsafe.nsw.gov.au
 - go to online Mandatory Reported Guide
 - Select the decision tree that most closely matches the concern(s) you have:
 - Answer the questions
 - Generate a decision
- The decision tree will advise to either:
 - Make a notification to the Helpline - Family and Community Services by ringing 133627
 - Monitor the situation and consult with a professional
 - If there are concerns ring the Helpline (133627) for advice
 - Head of College or Acting Head of College will ensure ongoing monitoring of situation and necessary referrals for ongoing support.

College Response to Allegations



9. Allegations Against Employees

Investigation Processes

The Head of College has oversight of all investigations that take place at St. Stanislaus' College.

The investigation process at St Stanislaus' College is informed by the detailed process outlined in the publication of the NSW Ombudsman, *'Child Protection in the Workplace. Responding to Allegations Against Employees (June 2004 3rd Edition), Section 5'* (Appendix iii). Copies of this publication may be found in the Teaching Staff Common Room, the Boarding Centre, the Business Office, from the Head of College Professional Assistant from the Office of the NSW Ombudsman and from the website www.ombo.nsw.gov.au.

A document from the NSW Ombudsman Practice Update 1/2010 *'Making A Finding'* can be found at the end of this policy (Appendix iv).

10. Documentation and Record Keeping

- a) All documents relating to all allegations against employees are confidential.
- b) Information regarding notifications to the Ombudsman are kept indefinitely and are stored in a secure location separate to the employee's record file.
- c) At agency level, the person responsible for keeping and storing the records is the Head of College.

The Head of College Professional Assistant is the delegated person within the Agency to maintain an accurate record of the details of an allegation, the subsequent risk assessments, the investigation and the action taken. These records are treated as highly confidential and are kept securely and permanently (in the Head of College Confidential Store located opposite the Head of College office). Records relating to information concerning allegations against an employee are required to be kept on a file separate to the employee's personnel file.

11. Rights of all Parties

- a) The decision making processes are in place to ensure the safety and the wellbeing of children and employees during the investigative process.
- b) Any allegation or conviction of reportable conduct will be forwarded to the Ombudsman (for employees of designated agencies, this also includes any allegations or convictions for reportable conduct outside work hours).
- c) Employees' rights will be upheld in the event of an allegation being made against them; for example:
 - Completing an investigation of an allegation against an employee. The Head of College will inform the employee of the substance of any allegation against them and provide the employee with a reasonable opportunity to put their case forward (The Head of Agency will decide the timing and the particular form this will take, ensuring the investigation is not compromised); If the finding is adverse, the employee will be allowed to add a dissenting statement.
 - Employees and parents have the right to complain to the Ombudsman if they are not satisfied with the College response to their complaint about the outcome or the way the Agency investigation was conducted.
 - Acting fairly and without bias
 - Conducting an investigation without undue delay

- Ensuring that the case is not investigated or determined by someone with a conflict of interest
- Encouraging all parties to maintain confidentiality during the investigation
- Ensuring that the outcome is supported by evidence.

12. Support Available

- a) Students who are involved or affected in any way will be supported through appropriate staff who may, with special support being provided by the Class Teachers, Tutors, Head of Boarding, House Parents, Year Coordinators, the nursing staff, the College Counsellors, the Deputy Head of College and the Head of College.
- b) Employees who have received disclosures, or who have been the subject of allegations, will be offered appropriate and timely support by the College Counsellor and/or an external and independent counsellor referred by the college for consultations.
- c) Regular staff training will occur at staff and other meetings. The induction process for new staff will focus on the area of Child Protection. Staff should also be aware and sensitive to the diverse cultural backgrounds of children in their care when implementing the policies of the College in relation to Child Protection.
- d) College Counsellor undertakes appropriate inservicing opportunities and act as a resource for community.
- e) Self Administered Legal Training (SALT) Online Child Protection Training.

Boarding Student Support

Boarding students require special consideration in the event that an allegation affecting a boarding student is made. Members of this community typically do not have day to day immediate and physical contact with their parents. In this context the College has a particular duty to ensure that parents or carers are quickly contacted and empowered to offer support to their sons or boarders in their care wherever appropriate and possible.

13. Processes to be followed at St Stanislaus' College in the event of any employee receiving information of behaviours by employees which may constitute a reportable allegation

- a) Any employee of St Stanislaus' College receiving or becoming aware of information that may constitute a reportable allegation is required to report that information promptly to the Head of College. The report would normally be made in person and should be confirmed by email to head@stannies.com. In the absence of the Head of College, the information should be reported to the Acting Head of College.
- b) On receiving information which may constitute a reportable allegation, the Head of College (or in the absence of the Head of College, the Acting Head of College) will promptly decide whether or not, on the basis of the information provided, the matter is reportable to the Ombudsman. The Head of College may seek to clarify the nature of the alleged behaviour with the person or persons making the allegation at the time the allegation is made in order to assist with determining whether the matter is reportable. (See Section 3.4 of the document *Child Protection in the Workplace* (Appendix v) produced by the NSW Ombudsman). The Head of College should ensure that a record is kept of the words used by the person or persons making an allegation. This should then preferably be put in writing by the person making the allegation or by the Head of College Professional Assistant. It should then be signed and dated by the person making the allegation with this record to be included in any subsequent investigation or enquiry related to the receipt of the information.
- c) If on the face of it:

- the alleged behaviour was reasonable for the purposes of discipline, management or care of children and in line with St Stanislaus' College Code of Conduct, then the matter is not reportable to the Ombudsman but needs to be recorded by the Head of College and dealt with as a complaint;
 - the alleged behaviour involves the use of physical force that, in all the circumstances, is trivial or negligible, the Head of College should cause the matter to be investigated and the result of the investigation recorded and responded to by the Head of College, or
 - the alleged behaviour constituted reportable conduct, ie sexual offences, sexual misconduct, assault, ill-treatment, neglect or behaviour that causes psychological harm, the Head of College must ensure that the reportable allegation is reported to the Ombudsman within 30 days of the Head of College becoming aware of the allegation. The Head of College will notify the Ombudsman by completing Part A of the notification form produced by the Ombudsman and cause the notification form to be forwarded by registered mail, hand delivery or courier.
 - the alleged behaviour involves a child being 'at risk of significant harm'. The Head of College is required to cause a report to be promptly made to the Helpline of the Community Services.
 - the alleged behaviour constitutes possible criminal behaviour. In circumstances where the behaviour may involve criminality, the Head of College must promptly report details of the allegation to the NSW Police Force.
- d. In the event that a reportable allegation is also being investigated by the Community Services or the NSW Police, the Head of College is required to liaise and co-ordinate with CS or the NSW Police regarding roles and responsibilities. The Head of College should seek advice from the investigating officers from these bodies before St Stanislaus' College takes any action that may jeopardise the investigation or the wellbeing of any witnesses.
- e. Whether a concurrent investigation occurs with the Community Services or the NSW Police or whether an agency only investigation occurs, the Head of College must ensure that an appropriate risk assessment (to be undertaken by the College Counsellor in the first instance) takes place. This will assess any risks posed by the employee to children in the care of St Stanislaus' College and take any necessary interim action to ensure the safety and wellbeing of the children including whether the employee's duties need to be changed during any investigation process.
- f. In the event that a reportable allegation has been received, following the risk assessment and the completion of the Part A of the Ombudsman notification form within 30 days of the Head of College becoming aware of the allegation, the Head of College is required to put in place an investigative process that complies with that outlined in Section 5 of the *Child Protection in the Workplace* document (June 2004) produced by the Office of the NSW Ombudsman. In the event that the investigation will be conducted internally, an appropriate experienced investigator will be appointed or in certain circumstances the Head of College may decide to use an independent investigator and should this be the case the College will follow the advice set down under 5.3 of the document "Child Protection in the Workplace".
- g. After the investigation has complied with the requirements set out in section 5 of the document "Child Protection in the Workplace", the investigator should present all the material in writing to the Head of College for a decision to be made on the matter. This includes all of the information gathered, both in support of and not in support of, the allegation against the employee. The investigators should make clear recommendations to the Head of College based on the requirements of the Ombudsman Act. The recommended finding should comply with the requirements outlined in 5.12.5 of the document "*Child Protection in the Workplace*". The Head of College is required then to make a decision as to whether as Head of Agency to accept or reject the outcome of the investigation and any recommendations made by

the investigator. Prior to making a finding, the fundamental requirement is that there should be an appropriate investigation of the allegation and procedural fairness for the employee.

- h. Once the Head of College has come to a conclusion on the basis of the report from the investigators, relevant persons should be advised in writing as set out in 5.12.5 of the document *“Child Protection in the Workplace”*. In the event that a finding is sustained, the letter to the employee should indicate that this finding is a preliminary finding and invite the employee to make comment on the preliminary finding. The employee’s responses should be considered by the Head of College prior to any sustained finding being confirmed. Any actions with respect to the making of a finding should be in accord with guidelines set out in section 5.12.6 of the document *“Child Protection in the Workplace”*. The Head of College is responsible for sending the final report and the results of the Agency Investigation to the Ombudsman.

14. What happens if an allegation is made against the Head of Agency?

In any case where information is received or a complaint is made against the Head of College that may need to be considered as a reportable allegation, the information should be referred to the Chair of the College Board of Directors who will then advise the Office of the NSW Ombudsman that such an allegation has been made and then refer the information or complaint to the Catholic Commission for Employment Relations Child Protection Unit to process the information or complaint in terms of section 3 and section 5 of the document *“Child Protection in the Workplace”*.

15. Employment Screening

All new staff are required to complete a Working with Children Check prior to commencement of duty. No staff will be permitted to commence employment without this check having been verified by the Head of College Professional Assistant and the check coming back ‘Cleared’.

16. Reporting to Community Services of a child or young person at Risk of significant Harm

At St Stanislaus’ College any employee who has reasonable grounds to suspect that a child is ‘at risk of significant harm’ should report such information promptly to the Head of College who will then make a report to the DOCS Helpline. Section 23 of the *Children and Young Persons (Care and Protection) Act* outlines the circumstances under which a child or young person could be considered to be ‘at risk of significant harm’. Section 3.12 of the document *“Child Protection in the Workplace”* provides a summary outline of these reporting requirements.

17. Notification to the Commission for Children and Young People about completed relevant employment proceedings

The Head of College is responsible for notifying the Commission for Children and Young People about completed relevant employment proceedings at St Stanislaus’ College Bathurst as per the requirements of the Commission for Children and Young People Act 1998. Guidelines for such notifications are set out in 1.4.3 of the document *“Child Protection in the Workplace”*.

18. Appendices

1. AIS & IEU Recommended Protocols for Internal Investigative and Disciplinary Proceedings – 2001
2. NSW Ombudsman – Risk management following an allegation against an employee.
- Fact Sheets
 1. Defining assault for the purposes of the reportable conduct scheme.
 2. Making a finding of Reportable Conduct.

3. Child protection: Responsibilities of heads of agencies.
4. OCG – Reporting certain misconduct involving children.

19. Helplines

- Child Protection Helpline 132 111 or 133 627 (Mandatory Reporters)
- Kids Helpline 1800 551 800 or www.kidshelpline.com.au
- Beyondblue info line 1300 22 4636
- www.youthbeyondblue.com
- Headspace, 253 George St, Bathurst. Phone 6338 1100 or www.headspace.org.au

20. Relevant Legislation

- *Ombudsman Act 1974* requires the Head of College as Head of a non-government school to respond to allegations against employees and to notify the Ombudsman of reportable allegations or convictions.
- *Child Protection (Working with Children) Act 2012* requires the College to use the Working With Children Check administered by the Office of Children’s Guardian (OCG) to screen people who apply to work in child-related positions in the College. The Head of College is also required to notify the OCG of certain sustained findings of reportable allegations
- Under the *Children and Young Persons (Care and Protection) Act 1998* mandated employees are required to report to the ‘Helpline’ (132 111) of Community Services (CS) any children and young people whom they suspect to be at ‘risk of significant harm’.
- *Child Protection (Working With Children) Regulation 2013*
- *Children and Young Persons (Care and Protection) Regulation 2012*
- *Child Protection Legislation Amendment Act 2015*
- *Crimes Act 1900*

NB It should be noted that in October 2005 the Association of Independent Schools entered a Memorandum of Understanding (MOU) with the Community Services concerning centralised reporting to CS.

In the event that a mandatory reporter complies with the procedures for centralised reporting of his or her employer (which procedures are pursuant to this MoU) and has no knowledge of any failure to relay the risk of significant harm report to CS, then CS will accept that the mandatory reporter has reported to CS in accordance with section 27, *Children and Young Persons (Care and Protection) Act 1998* and CS will not initiate any relevant prosecution for breach of that section.

The Head of College is accountable to relay a report of risk of significant harm to CS when staff employed within the College report risk of significant harm to the Head of College. Should the Head of College fail to relay the risk of significant harm report, CS may take action against the Head of College in accordance with Section 27, *Children and Young Persons (Care and Protection) Act 1998*.

Glossary (Keep them Safe website)

<p>Authorised Carers</p>	<p>Since authorised carers are considered to be employees under the Ombudsman Act 1974 (S25A) any allegation of reportable conduct and the findings of the agency's investigation should be notified to the NSW Ombudsman. Concerns about reportable conduct by authorised carers towards any child/young person in out of home care should also be reported to the Child Protection Helpline.</p>
<p>Apprehended Violence Order (AVO)</p>	<p>An Apprehended Violence Order (AVO) is an order made by a court that restricts the behaviour of the person against whom the order has been made. The purpose of an AVO is to protect a person from violence, harassment or intimidation in the future. An AVO usually states that a person cannot assault, harass, threaten, stalk or intimidate another person, or go within a certain distance of his/her home or workplace. Other orders can be included if necessary. In NSW there are two types of AVOs:</p> <ul style="list-style-type: none"> ▪ Apprehended Domestic Violence Orders (ADVO) are made when the people involved are related, living together or in an intimate relationship, or have been in this situation earlier. ▪ Apprehended Personal Violence Orders (APVO) are made when the people involved are not related and do not have a domestic or personal relationship, e.g., neighbours.
<p>Attachment</p>	<p>Attachment is an emotional bond to another person. Psychologist John Bowlby was the first attachment theorist, describing attachment as a 'lasting psychological connectedness between human beings' (Bowlby, 1969). Bowlby believed that the earliest bonds formed by children with their caregivers have a tremendous impact that continues throughout life.</p>
<p>Child</p>	<p>Age 0–15 years. As a mandatory reporter in NSW, you are <u>required</u> to report concerns that you have about the safety, welfare or wellbeing of a child.</p>
<p>Child Pornography</p>	<p>Child pornography² is material that depicts or describes (or appears to depict or describe), in a manner that would in all circumstances cause offence to reasonable people, a person who is (or appears to be) a child:</p> <ol style="list-style-type: none"> a. Engaged in sexual activity; b. In a sexual context; or c. As the victim of torture, cruelty or physical abuse (whether or not in a sexual context). <p>(2 Division 15A Child Pornography (91H) of the NSW Crimes Act 1900 defines a child as under 18 years.)</p>
<p>Child Prostitution</p>	<p>Child prostitution³ is any sexual service, whether or not involving an indecent act:</p> <ol style="list-style-type: none"> a. That is provided by a child (under the age of 18 years) for the payment of money or the provision of any other material thing (whether or not it is in fact paid or provided to the child/young person or to any other person); b. That can reasonably be considered as aimed at the sexual arousal or sexual gratification of a person or persons other than the child/young person; and c. Includes (but is not limited to) sexual activity between persons of different sexes or the same sex, comprising sexual intercourse (as defined

	<p>in section 61H) for payment or masturbation committed by one person or another for payment engaged in by a child. (3 Division 15 Child Prostitution (91C) of the NSW Crimes Act 1900 defines a child as under 18 years.)</p>
Class of Children/Young People	Two or more children or young people (Section 27(3) <i>Children and Young Persons (Care and Protection) Act 1998</i>)
Cognitive Delay	Cognitive delay usually refers to a developmental lag, meaning that an individual’s cognitive abilities do not match the expectations for his/her chronological age. It is a term most often used in describing children. Because children continue to grow and develop cognitively, it is not always clear whether or not they will catch up with respect to the delay. Sometimes development lags because of illness or malnutrition or other environmental factors and when the situation is rectified, the cognitive abilities rebound. However, it is also possible for delays to become permanent, in which case they are probably better thought of as an impairment or disability, although the term ‘delay’ is sometimes still used.
Designated Agency	<p>A designated agency in NSW is an agency accredited in accordance with the regulations under the <i>Children and Young Persons (Care and Protection) Act 1998</i> to provide out-of-home care services, and includes Community Services and Ageing, Disability and Home Care.</p> <p>In relation to reporting allegations against employees (as per the <i>NSW Ombudsman Act 1974</i>) designated agencies are the following:</p> <ul style="list-style-type: none"> ▪ Community Services ▪ Department of Education & Communities ▪ Ministry of Health (including Local Health Districts, statutory health corporations, the Ambulance Service of NSW and affiliated health organisations) ▪ Juvenile Justice ▪ Corrective Services ▪ NSW Sport and Recreation ▪ Disability, Ageing and Home Care ▪ Non-government schools ▪ Child care centres ▪ Agencies which provide substitute care to children, whether in foster care or in a residential care facility. <p>Further information is available on the Ombudsman website at http://www.ombo.nsw.gov.au/complaints/compwrkchildprotissues.html</p>
Developmental Milestone	<p>Developmental milestones are a set of functional skills or age-specific tasks that most children can do at a certain age range, and which are used to check on children’s development. Although each milestone has an age level, the actual age when a normally developing child reaches that milestone can vary.</p> <p>A booklet entitled <i>A Guide to Children’s Growth and Development</i> is available on the Community Services website at http://www.community.nsw.gov.au/docswr/_assets/main/documents/par_development.pdf</p>

Domestic Violence	Domestic violence refers to incidents of violence occurring in the family household where a child/young person is living.
eReporting Information	eReporting is a secure and convenient channel for reporting non-imminent suspected risk of significant harm reports to Community Services over the internet. This reporting method improves mandatory reporter accessibility to the Child Protection Helpline, and improves the quality of information reported through its structured template.
Household Member	A household member is any child/young person and adult who lives in a home, and all adults who have significant (regular and/or frequent) in-home contact with the child/young person, including those who have a familial or intimate relationship with any person in the home.
Informal Care Arrangements	<p>A care arrangement of a child/young person with an individual acting in a private capacity, is not, alone, grounds for a risk of significant harm report. However, whilst parents may relinquish care of their child/children to relatives or others without going through a formal process, such carers may have difficulty accessing assistance and/or dealing with services or other institutions, such as Births, Deaths and Marriages, Medicare and Centrelink.</p> <p>Possible offences under the <i>Children and Young Persons (Care and Protection) Act 2008</i> apply in relation to providing or arranging statutory, supported or voluntary care, as defined under the Act but these categories do not include private care arrangements. A report to Community Services and/or the Police is appropriate if it is suspected that the placement contravenes the Care legislation. Similarly adoption is a formal process governed by the <i>Adoption Act 2000</i>. Private adoptions are illegal and reportable to Community Services and/or Police.</p>
Mandatory Reporter	<p>A mandatory reporter in NSW is an individual required by under Section 27 of the <i>Children and Young Persons (Care and Protection) Act 1998</i> to report to the Child Protection Helpline when he/she has reasonable grounds to suspect that a child, or a class of children, is at risk of significant harm from abuse or neglect, and those grounds arise during the course of or from the person's work.</p> <p>Mandatory reporters include those who deliver the following services wholly or partly to children as part of their paid or professional work:</p> <ul style="list-style-type: none"> ▪ Health care (e.g., doctors, nurses, dentists and other health workers); ▪ Welfare (e.g., psychologists, social workers and youth workers); ▪ Education (e.g., teachers); ▪ Children's services (e.g., child care workers, family day carers and home-based carers); ▪ Residential services (e.g., refuge workers); ▪ Law enforcement (e.g., police). <p>The NSW legislation also mandates any person who manages an employee or volunteer from the above services to report suspected risk of significant harm. Agencies will generally have internal policies setting out the requirements for employees and their managers who are mandated reporters to report concerns about children. Some agency policies (such as Ministry of Health) require non-mandated reporters to report to the Child Protection Helpline, so practitioners</p>

	<p>should be familiar with the legislation as well as their agency’s policy on reporting suspected risk of significant harm.</p>
<p>Non-organic Failure To Thrive (NOFTT)</p>	<p>Failure to thrive (also called psychosocial failure to thrive) is defined as decelerated or arrested physical growth (height and weight measurements fall below the fifth percentile, or there is a downward change in growth across two major growth percentiles) associated with poor developmental and emotional functioning. Organic failure to thrive occurs when there is an underlying medical cause. NOFTT occurs in a child who is usually younger than 2 years old and has no known medical condition that causes poor growth.</p> <p>Psychological, social or economic problems within the family almost always play a role in the cause of NOFTT. Emotional or maternal deprivation is often related to nutritional deprivation. The mother or primary carer may neglect proper feeding of the infant because of preoccupation with the demands or care of others, her own emotional problems, substance abuse, lack of knowledge about proper feeding or lack of understanding of the infant’s needs. Organic failure to thrive is caused by medical complications of premature birth or other illnesses that interfere with feeding and normal bonding activities between parents and infants.</p>
<p>Parent/Carer</p>	<p>A biological or adoptive parent, legal guardian or any other adult with parental responsibility for meeting basic physical (such as food, clothing, shelter, supervision, and medical care) and emotional needs, and responding to the behaviour of a child/young person in his/her care.</p> <p>This includes young people who are biological parents of a child, as well as, for example, authorised foster and kinship carers and informal private care arrangements (see Glossary), but does not include those who are either paid or unpaid in positions such as, for example, baby sitters, family day care providers, pre-school, vacation care or youth camp workers.</p>
<p>Reportable Conduct under the Ombudsman Act 1974</p>	<p>Reportable conduct refers to the following:</p> <ul style="list-style-type: none"> ▪ 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 (within the meaning of Division 15A of Part 3 of the <i>Crimes Act 1900</i>); or ▪ Any assault, ill treatment or neglect of a child; or ▪ Any behaviour that causes psychological harm to a child, whether or not, in any case, with the consent of the child. <p>Reportable conduct does not extend to the following:</p> <ul style="list-style-type: none"> ▪ 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; ▪ 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 ▪ Conduct of a class or kind exempted from being reportable conduct by the Ombudsman under Section 25CA.

	<p>Note.</p> <p>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.</p> <p>Further information is available on the Ombudsman website at http://www.ombo.nsw.gov.au/complaints/compwrkchildprotissues.html</p>
SBC	Student Behaviour Committee at St. Stanislaus’ College
BSBC	Boarding Student Behaviour Committee at St Stanislaus’ College
Significant Harm Definition	<p>Members of the community and mandatory reporters who suspect that a child or young person is at ‘risk of significant harm’ (the statutory threshold) should report their concerns to the Child Protection Helpline. This new statutory threshold has replaced ‘risk of harm’ in the <i>Children and Young Persons (Care and Protection) Act 1998</i>.</p> <p>A child or young person is at risk of significant harm if the circumstances that are causing concern for the safety, welfare or wellbeing of the child or young person are present to a significant extent.</p> <p>What is meant by ‘significant’ in the phrase ‘to a significant extent’ is that which is sufficiently serious to warrant a response by a statutory authority irrespective of a family’s consent.</p> <p>What is significant is not minor or trivial, and may reasonably be expected to produce a substantial and demonstrably adverse impact on the child or young person’s safety, welfare or wellbeing.</p> <p>In the case of an unborn child, what is significant is not minor or trivial, and may reasonably be expected to produce a substantial and demonstrably adverse impact on the child after the child’s birth.</p> <p>The significance can result from a single act or omission or an accumulation of these.</p>
Young Person	Age 16–17 years. As a mandatory reporter in NSW, you may also report concerns you have about the safety, welfare, or wellbeing of a young person, but are not required to do so.

Appendix

1

The Association of Independent Schools N.S.W. and The NSW/ACT Independent Education Union

Recommended Protocols for Internal Investigative and Disciplinary Proceedings - 2001

Introduction

It is acknowledged that each case of alleged reportable conduct which requires internal investigation and possible disciplinary action will be quite different. These protocols have been compiled to advise how investigations and disciplinary proceedings may be conducted. They are guidelines only and in applying them one should always bear in mind the primary objectives of the relevant legislation. If adopted by a school this document should be provided to teachers who are the subject of an internal investigation into reportable conduct.

Outline of Obligations under the Legislation

Upon receipt of an allegation of reportable conduct against an employee, the head of agency should determine whether or not it is an allegation about reportable conduct or misconduct that may involve reportable conduct.

All allegations against employees that involve reportable conduct or misconduct that may involve reportable conduct must be reported within 30 days of receipt of the allegation to the Ombudsman. The allegations should also be reported to the Department of Community Services (DOCS) if there is a current concern for the safety, welfare and well being of the child. The head of agency will need to:

- conduct or cause to be conducted, an investigation of the allegation;
- decide as to whether on the balance of probabilities the allegation has been sustained or not sustained;
- decide on the disciplinary action, if any, to be taken against the employee.

At the conclusion of the investigation and the decision regarding disciplinary action, a complete report including the findings, disciplinary action decided upon and any other recommendations must be forwarded to the Ombudsman together with any information which the accused person requires to be included.

Completed relevant disciplinary proceedings should be reported to the Commission for Children and Young People unless the allegation was found to be false, vexatious or misconceived.

Risk Assessment

Upon the receipt of an allegation of reportable conduct against an employee, the head of agency is responsible for carrying out an initial risk assessment prior to the investigation of the allegation. The purpose of the risk assessment is to identify and minimise the risk:

- § to a child or children who are alleged to have been victims of the abuse;
- § to the employee against whom the allegation has been made;
- § to other children with whom the employee may have contact;
- § to the proper investigation of the allegation.

This may result, for example, in the employee being temporarily relieved of some duties, being required to avoid certain pupils or, in some special cases, being suspended from duty.

Any decision to take action as a result of a risk assessment is in no way an indication of the guilt of the employee concerned.

The factors which should be considered during the risk assessment include:

- § the nature of the allegation;
- § vulnerability of children;
- § nature of the position occupied by the employee;
- § the level of supervision of the employee;
- § disciplinary history of the employee;
- § safety of the employee;
- § any comments made by the employee.

Risk should be continually monitored throughout the investigation.

The Investigation

In conducting an investigation into allegations of reportable conduct, the head of agency should be guided by the following principles.

1. *Conflict of Interest and Appointment of Investigator*

All investigations must be conducted in an impartial, independent and objective manner and be open and transparent. The investigator must not show bias or favour to the alleged victim(s), the person the subject of the allegation, nor in outcomes which might affect the reputations of the particular agency.

In some instances the head of agency may call on an external expert to undertake the investigation. This may be the case where the agency determines that it does not have the expertise to satisfactorily conduct the investigation or in cases where a conflict of interest or bias may arise.

The mere perception of a conflict of interest by an accused person is not sufficient in itself to require the appointment of an external investigator. However, if there is a clear history of conflict between the proposed investigator and the employee it would be advisable for another investigator to be appointed.

2. *Confidentiality*

Heads of agency and persons conducting investigations should maintain a high level of confidentiality throughout the investigation phase. Action for defamation could result in situations in which agencies have published allegations of reportable conduct against an employee. The person making the allegation also has a right to protection, and if appropriate, confidentiality. In a limited number of circumstances it may be inappropriate to advise the accused person of the identity of the person making the allegation.

The employee should not discuss the allegations with students (including the alleged victim) nor with parents without the approval of the school.

Steps in the Investigative Process

A proper investigation usually requires that an employee against whom an allegation has been made, be told promptly the substance of the allegation and be given the right to reply to the allegation.

If DOCS or police are investigating the allegation, advice should be received from them about when to inform the employee about details of the allegation. Otherwise, the decision of when to inform the employee will depend on the protection of notifiers and witnesses, the quality of evidence to be obtained and the possibility of prejudicing the conduct of the investigation.

Where possible employees should be given advance notice of an interview with the head of agency or an appointed investigator, details of the allegation (sufficient to allow the employee to respond) and be advised that they may have a witness at the interview.

While it is desirable for an employee to be given reasonable notice before being required to respond to an allegation, what constitutes reasonable notice will depend on the circumstances of the situation.

Employees may wish to have someone support them during the interview process. The support person may be a friend on staff or the chapter representative. However, such a person is there for support only and as a witness to the proceedings, and not as an advocate or to take an active role in the proceedings.

A record should be kept of the meeting, this could be made by a tape recording, a full written record or short minutes. The form of record may be dependent on the seriousness of the allegation.

Listed below are fundamental steps in the investigative process. These may need to be varied on occasions to meet particular circumstances. The employer should normally:

- (a) clarify the allegation and determine that it is an allegation of reportable conduct;
- (b) make appropriate notifications to DoCS, police, Ombudsman;
- (c) carry out a risk assessment;
- (d) collect all available relevant information (ensure full documentation);
- (e) interview all relevant witnesses (ensure all interviews are adequately recorded);
- (f) make the employee fully aware of the allegations;
- (g) possibly give the employee access to relevant documents on which the employer is relying, unless such documentation needs to be kept confidential;
- (h) interview the person the subject of the allegations (ensure procedural fairness);
- (i) consider all the evidence and make a preliminary finding as to whether the allegation is sustained or not sustained.

Findings

At the conclusion of the investigation, the investigator will make a preliminary finding on the balance of probabilities that:

1. the allegation was false; or
2. the allegation was vexatious, that is, was made without substance and with the intent of being malicious or to cause distress to the person against whom the allegation was made; or
3. the allegation was misconceived, that is, whilst the allegation was made in good faith it was either without substance or a misunderstanding on behalf of the person making the allegation occurred or the incident would not reasonably be considered as reportable conduct (irrespective of the definition), sexual misconduct or an act of violence; or
4. the allegation was not sustained; or
5. the allegation was not one of reportable conduct, but might constitute a breach of professional behaviour or judgment which requires further professional disciplinary action; or
6. the allegation was sustained and the matter required disciplinary action.

A finding of 'not sustained' means that the investigator considers that there is insufficient evidence to determine that the alleged event occurred, on the balance of probabilities.

The employee should be told of the preliminary finding and given an opportunity to respond including, if they wish, in writing.

Disciplinary Proceedings

For the purpose of this recommended protocol disciplinary proceedings are defined as the action taken as a consequence of the findings arising out of the investigation. When conducting disciplinary proceedings the employer should have regard to procedural fairness. This will usually involve:

- giving the employee details of the final finding;
- informing the employee of the possible action the employer may take; and
- giving the employee a right to respond including, if they wish, in writing.

When the investigation has been completed

The employee is entitled to ask the Ombudsman to review the investigation and findings if the employee believes the investigation was unfair, biased, incomplete or suffered some other deficiency giving rise to an incorrect finding.

The employee must be advised if the employer has notified completed disciplinary proceedings to the Commission for Children and Young People.

If the completed disciplinary proceedings are notified to the Commission for Children and Young People, the employee is entitled to inspect the employer file in accordance with Freedom of Information Principles, subject to any exemptions which may apply under that Act.

Notification to the Commission for Children and Young People (CCYP)

The Commission for Children and Young People Act requires all completed investigations into allegations of reportable conduct to be reported to it. It is an offence under the Act to fail to report unless the allegation is found to be either:

- false (the alleged conduct did not occur);
- vexatious (without substance, malicious intent);
- misconceived (not reasonably be considered to be reportable conduct).

In the findings listed above only findings 4 and 6 need be reported to the CCYP.

Appendix

2

Risk management following an allegation against an employee

This fact sheet is intended to provide an overview of risk management issues in relation to allegations of a child protection nature against employees. It is not comprehensive and agencies should seek advice when in doubt about any of these issues.

What is risk management?

Risk management means identifying the potential for an incident or accident to occur and taking steps to reduce the likelihood or severity of its occurrence. Employers need to assess the inherent risks in their agency to children and young people for whom they have responsibility.

All employment situations do not carry the same risks; nor do all employees. Similarly, all children do not have the same vulnerability. Recognising and acknowledging the risks in employment situations is the first step towards effective risk management. Agencies should have a risk management plan in place that includes procedures to ensure that children are provided with a safe environment.

Risk assessment after an allegation is made

The head of agency is responsible for assessing the risk that an employee poses to a child(ren) once an allegation is made, during an investigation and at the end of the investigation so that a final decision can be made regarding what action, if any, needs to be taken regarding the employee to address that risk.

An agency's child protection policy should include information about what might happen to an employee:

- immediately following an allegation being made against them
- during the investigation of the matter, and
- at the end of the investigation.

A statement needs to be included in the policy that a decision to take action on the basis of a risk assessment should not influence the findings of the matter. Until the investigation is completed and a finding is made, any action, such as moving an employee to alternate duties, is not to be considered to be an indication that the alleged conduct by the employee did occur.

It is important to record the reasons why decisions are made to take, or not take, any action as a result of a risk assessment.

Initial risk assessment

One of the first steps after an allegation of a child protection nature is made against an employee is to conduct a risk assessment. The purpose of this initial risk assessment is to identify and avoid or minimise the risks to:

- the child(ren) who are the subject of the allegation
- other children with whom the employee may have contact
- the employee against whom the allegation has been made
- the employing agency, and
- the proper investigation of the allegation.

When an allegation is made, limited information may be available to inform this risk assessment. For example, the initial complaint or allegation may have been made anonymously or little detail about the allegation may have been provided. It is, therefore, important to review this initial risk assessment as further information comes to light during the investigation.

When taking action to address any identified risks, the agency must take into consideration both the needs of the child and the employee against whom the allegation is made.

Protecting children

The immediate response to an allegation should be one that ensures the safety of the child or other children. Consideration needs to be given to the following issues:

- does the child require protective intervention? Depending on the level of risk identified, a report to your industry Child Well Being Unit or to the Helpline of Community

Services should be made and advice obtained about what action (if any) Community Services intends to take and when, regarding the child and the employee

- whether any steps need to be taken to prevent further reportable conduct
- where possible, the child's daily circumstances should remain unchanged. Exceptions might be where the child is considered to be at risk of victimisation by peers or employees as a result of the allegations, or where it is difficult to ensure a child's safety because of the agency's inability to directly supervise the child and the employee. For example, in out of home care situations.
- support for the child(ren) involved should also be considered.

Employment related issues

When an allegation is received, the agency needs to consider the following issues:

- should the employee remain in their current position, be moved to another area or be suspended?
- factors to be considered in making this decision include:
 - › the nature and seriousness of the allegation(s)
 - › the vulnerability of the children the employee would be in contact with at work. For example, the age of the child(ren), their communication skills, or disability
 - › the nature of the position occupied by the employee. For example, their level of interaction with children
 - › the level of supervision available for the employee
 - › the availability of support for the employee on a day-to-day basis if their duties are unchanged. For example, if they are managing children with challenging behaviours in a classroom or living in out of home care
 - › the employee's disciplinary history
 - › other possible risks to the investigation
- if the employee remains in the workplace, a decision should be made about the duties that they will undertake and who will monitor and assess the risks associated with the employee having access to children in the care of the agency
- if Community Services and/or the police are involved, check with them to see if any action taken by the agency will interfere with their investigations. It might also be appropriate to discuss any proposed changes to the employee's duties.
- appropriate support for the employee who has had the allegation made against them should also be provided.

Maintaining confidentiality

Agencies should ensure that confidentiality is maintained following an allegation against an employee, and should in particular, take steps to ensure that:

- all parties are advised of the need for confidentiality during the investigation
- systems are in place to deal with any breaches of confidentiality (this could include the process of reporting any breaches to the head of agency, and the appropriate response to the media if it becomes aware of an allegation against an employee).

Ongoing risk management

When gathering information about an allegation, it is important to manage any new risks that emerge. Agencies should ensure that, on the basis of their ongoing risk assessment, appropriate support is being provided for:

- the child(ren) who were the subject of the allegation
- the employee who was the subject of the allegation, and
- other relevant parties (this may include parents or carers of the child, other children or other employees affected by the allegation, for example, a witness to the alleged conduct).

It is also important to:

- ensure that the employee the subject of the allegation is treated fairly and afforded procedural fairness, and
- address actual or potential conflict of interests.

Risk management at the conclusion of the investigation

At the completion of the investigation, a finding should be made in relation to the allegation and a decision made regarding what action, if any, is required in relation to the employee, the child(ren) involved and any other parties. A review of the investigation should then be conducted to ensure that all relevant risk issues have been considered. This might include looking at environmental factors and work practices that result in situations of unsupervised access to children by employees. This information will provide the agency with an opportunity to put in place measures to minimise any further risk of harm to children in its care. Such measures may include:

- training for one or more employees
- changing work practices in certain situations
- changes to the physical environment, or
- reviewing the child protection policy.

If you have any queries or comments, we are here to assist you. Call the Ombudsman's Employment Related Child Protection Division on 02 9286 1000.

Contact us for more information

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Fact Sheet

1

Defining assault for the purposes of the reportable conduct scheme

Assault

This guideline sets out the legal principles that apply when considering whether a person's conduct amounts to an assault for the purposes of the reportable conduct scheme.

Like most other forms of misconduct, assault has both a physical (or 'action') element and a mental (or 'attitude') element. You must not sustain a finding of assault unless you are satisfied that both the action and attitude elements have been satisfied.

This can be a difficult area of law to apply to a given situation, particularly because any form of touching can, depending on the context in which it occurs, constitute an assault.

Summary of principles

Either of the following types of conduct **may, depending on the circumstances**, amount to assault:

- A **Actual physical force**: the intentional or reckless application of physical force against an alleged victim without their consent.¹
- B **Apprehension of physical force**: intentional or reckless conduct that causes an alleged victim to apprehend imminent physical force without their consent. Criminal charges, in these cases, where there is no physical force applied, are less common than cases involving actual physical force.

Each type of conduct is considered separately below.

Not all conduct captured by A and B above will constitute assault. The context in which the conduct occurs will be crucial

A. Intentional or reckless physical force without consent

This is the most common form of assault. All of the elements that must be established – **physical force, lack of consent**,² and **intention or recklessness** – are explained below. The relevance of injury, aggression and hostility, and the defence of self-defence, are also explained below.

1. This is sometimes described as 'battery'. In addition, there are some circumstances where physical contact can be unlawful despite consent.
2. There are some circumstances where physical contact can be unlawful despite consent.

Refer to our *Defining Reportable Conduct* Factsheet for more information regarding the test for a sustained finding.

Physical force

The starting point is that any form of physical contact, no matter how slight, is capable of amounting to 'physical force'.³ The force can be applied either by part of a person's body (e.g. a hand or a foot), or with an object.

However, there is a range of ordinary everyday contact that does not give rise to assault.⁴ Whether or not the physical force amounts to ordinary everyday contact will depend on many things, including the age and characteristics of the people involved, their relationship, the context in which the contact occurs and the nature of the contact made. In each case, the test is whether the contact goes beyond generally acceptable standards of conduct.⁵ This will often be a question of degree or proportionality.⁶ Something may be considered ordinary everyday contact in one context, but not in another.

Examples:

For an adult to jump on another and snatch her shoulder bag is clearly unacceptable. Between 13-year-old schoolboys it might perhaps be considered 'as unremarkable as shaking hands': see *Rixon v Star City Pty Ltd* [2001] NSWCA 265 at [54]; (2001) 53 NSWLR 98 at 113.⁷

Throwing a basketball and hitting and injuring someone who tries but fails to catch it would generally not give rise to an assault. However, hitting and injuring someone by throwing a basketball at them unexpectedly, in an attempt to get their attention, might be an assault: see *Knapp v NSW* [2006] NSWDC 84 at [52].

3. The reason for including all physical contact is that the law cannot draw a line or formulate a single test that distinguishes between touching that is objectionable and touching that is not. The starting point is that all physical contact is prohibited: see *Secretary, Department of Health and Community Services v JWB (Marion's Case)* [1992] 175 CLR 218 at 233, 265-266.
4. *Collins v Wilcock* [1984] 1 WLR 1172 at 1174; *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 73; *Darby v DPP* (2004) 61 NSWLR 558 at [80] – [81]; *Horan v Ferguson* [1994] QCA 375; [1995] 2 QdR 490; *Rixon v Star City Pty Ltd* [2001] NSWCA 265 at [54]; 53 NSWLR 98 at 113.
5. *Collins v Wilcock* at 1178; *McElholum v Hughes* [2015] ACTSC 78; *Horan v Ferguson*.
6. *The Queen v Phillips* (1971) 45 ALJR 467 at 472; *Hutchison v Fitzpatrick* [2009] ACTSC 43 at [53]-[54].
7. However, in *Hutchison v Fitzpatrick* a 'tackle' that was intended by a defendant to be a friendly greeting between adults was found to be an assault where the plaintiff, who suffered from a disability that affected his balance, was knocked over and injured.

Where the physical force is something that amounts to ordinary everyday contact, a finding of assault cannot be made.

Without consent

The nature of the physical contact must be without consent.⁸ Consent can be expressed or implied. For example, consenting to participate in a soccer game would involve implied consent to some degree of physical contact. Punching someone during a soccer game, however, would not be something to which implied consent would be given.⁹

A person may, depending on their age or mental capacity, be incapable of consenting to physical contact. In those cases, the only person who may give consent will be the person's parent, carer or guardian.

Injury

Injury is not an essential element of assault, because it is not necessary that the conduct results in physical injury.¹⁰ At the same time, the existence of an injury does not necessarily mean that there has been an assault. However, the presence or absence of an injury, and the severity of any injury, will be relevant when deciding whether the conduct constituted an assault. This is because the presence or absence of an injury may go to whether the physical contact went beyond what would be acceptable in the course of everyday conduct.

Intention or recklessness

To constitute an assault, the physical force must be intentional or reckless. This means the person must either intend the physical force, or foresee the possibility of physical force, but proceed to act anyway.¹¹

The only thing the person needs to have intended (or have been reckless about) is the application of force.¹² They do not have to intend to act aggressively or with hostility or to have caused harm, nor do they need to be reckless as to those matters.

Example

The conduct of someone who makes physical contact with another by accidentally brushing past them will not amount to assault. That conduct could, however, amount to assault if it was not accidental (i.e. because the person either intended to make contact or was reckless about whether they made contact): see *Murphy v Spencer* [2013] WASC 256

While aggression or hostility is not necessary, the presence or absence of any hostility, aggression, malice or ill-will may be relevant. This is because its presence or absence may assist in distinguishing between ordinary everyday contact and assault.¹³ Something that would otherwise be ordinary everyday contact may amount to an assault if it is done in a hostile or aggressive manner.

Example

Opening a door to enter a room is 'something that constitutes conduct in the ordinary course of life. However, to open a door with vigour and force, knowing that it is being closed by someone on the other side and being indifferent as to whether a person, whom a defendant knows to be standing behind the door, or is aware of that likelihood, could be struck or injured, goes beyond the limits of permissible ordinary conduct': see *McElholum v Hughes* [2015] ACTSC 78 at [188]

Self-defence

Assault will not be established where a person has applied physical force in circumstances where:

- (a) the person actually believed that what they were doing was necessary by way of self-defence or defence of another, and
- (b) that belief was reasonably held.¹⁴

In deciding whether these requirements have been met, the degree of force used (and whether it was proportionate to the threat that the person was confronting) will be relevant. If the person uses too great a degree of force, this may mean that the person could not have reasonably held the belief that what they were doing was necessary.

8. Note that there are some exceptional circumstances where physical contact may amount to an assault even where there is consent.

9. This will turn on what could ordinarily and reasonably be contemplated as incidental to the game: *Pallante v Stadiums Pty Ltd* (No 1) [1976] VR 331; *Pallante v Stadiums Pty Ltd* (No.1)[1976]

10. *McIntyre v R* [2009] NSWCCA 305 at [42]; see also *Platt v Nutt* at 244-245; *Carter v Walker* [2010] VSCA 340 at [215].

11. *Vallance v The Queen* [1961] HCA 42; 108 CLR 56 at 61; *Blackwell v The Queen* [2011] NSWCA 93; (2011) 81 NSWLR 119 at [76]; *Carter v Walker* [2010] VSCA 340 at [215]; *Hall v Fonceca* [1983] WAR 309; *Murphy v Spencer* [2013] WASC 256.

12. *Cowell v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714 at 743 (NSWCA); *Carter v Walker* [2010] VSCA 340 at [215]; See also *Trevitt v NSW TAFE Commission* [2001] NSWCA 363 (assault occurred during a role play).

13. *Boughey v The Queen* [1986] HCA 29; (1986) 161 CLR 10 at 25; *Rixon* at 113, [52]; *Re F* at 73.

14. According to the standards of the hypothetical reasonable person standing in that person's place: *Zecevic v Director of Public Prosecutions (Vic)* [1987] HCA 26; 162 CLR 645; *R v Portelli* [[2004] VSCA 178; (2004) 148 A Crim R 282.

B. Intentional or reckless conduct that causes another person to apprehend imminent physical force against them without consent

Criminal charges in relation to this form of assault are less common than assault involving actual physical force.

Conduct

The conduct may be words or actions or both. The surrounding circumstances will be important here including; the demeanour of the person, the words spoken and the proximity of the parties.¹⁵

Apprehension

It does not matter that the person does not make physical contact, provided the apprehension of imminent physical force is created.

Imminence

This element is sometimes described as 'immediate', rather than 'imminent'. These terms have their ordinary meaning; the person must apprehend physical contact 'very shortly' or 'without delay'. This can be the most difficult element to determine – there is no precise time measurement that can be applied in all circumstances, and the context in which the conduct occurs will be important.¹⁶ Whether or not a person apprehends imminent physical contact will depend on the type of physical contact that they anticipate. For example, a person who receives a threat by telephone that he or she will be punched by the caller could not reasonably believe that a punch was imminent if the person is known to be some distance away.¹⁷ A person who receives a threat by telephone that they are about to be shot could, depending on the circumstances, reasonably apprehend that harm was imminent.¹⁸

However, causing someone to apprehend physical force at a point too far into the future will not be an assault.

Physical force

No actual physical force or interference is necessary; it is the apprehension of imminent physical force that gives rise to the assault.¹⁹ An apprehension of imminent physical force may be created by someone forming and shaking a fist, and 'it does not matter that the accused does not strike the blow or that he or she has no intention to do so'.²⁰ An alleged victim may reasonably apprehend imminent physical force even where the person creating the apprehension is incapable of making contact with them.²¹ The apprehension of imminent physical force must, however, relate to force of a kind that goes beyond generally accepted standards of ordinary everyday contact.²²

Intention or recklessness

The person must intend to cause the other person to apprehend immediate physical contact or be reckless as to whether the other person will apprehend immediate physical contact.²³ Recklessness is established where the person knows that it is possible that the person may apprehend immediate physical contact, but ignores the risk and proceeds to engage in it.²⁴ It is not necessary that the person intends to follow through and apply the physical force,²⁵ simply that they intend to create that apprehension in the other person's mind, or they are reckless about creating that apprehension.

15. See *R v Moore-McQuillan* [2014] SASCFC 113 at [40] and the cases cited in that decision.

16. Including the relationship between the victim and the offender: *Zanker v Vartzokas* (1988) 34 A Crim R 11

17. See however *R v Mostyn* [2004] NSWCCA 97 (a threat to strike the victim when it was impossible to do so may be capable of amounting to assault if it created an apprehension of immediate physical contact in the victim's mind).

18. *R v Gabriel* [2004] ACTSC 30.

19. *The Queen v Phillips* (1971) 45 ALJR 467 at 472.

20. *R v Gabriel* [2004] ACTSC 30 at [129].

21. A person who has an unloaded gun pointed at them can be the victim of an assault if they believe that the gun is loaded: *Brady v Schatzel* [1911] St R Qd 206. See also *R v Mostyn* [2004] NSWCCA 97.

22. see Section A: Intentional or reckless physical force without consent.

23. *NSW v McMaster* [2015] NSWCA 228 at [191], *R v Knight* (1988) 35 A Crim R 314 at 316-7; *R v Barker* [2014] ACTSC 374; *R v Gabriel* (2004) 182 FLR 102 at 1178-8, [130] (ACTSC); *Matsebula v Vandeklashorst* [2000] WASCA 141.

24. *Vallance v The Queen* [1961] HCA 42; 108 CLR 56 at 61; *NSW v McMaster* at [191]; *Fisher v Police* [2004] SASC 232 at [21]; *MacPherson v Beath* (1975) 12 SASR 174 at 177; *MacPherson v Brown* (1975) 12 SASR 184 at 188, 199; *Edwards v Police* (1998) 71 SASR 493 at 495.

25. *Rixon v Star City Pty Ltd* [2001] NSWCA 265 at [56]-[58].

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Fact Sheet

2

Making a finding of Reportable Conduct

At the conclusion of an agency's investigation of a reportable allegation under Part 3A of the *Ombudsman Act 1974*, the decision-maker should assess the evidence regarding the allegation(s) and any conclusions or recommendations made by the investigator, and make a finding in relation to each allegation. The finding should inform an agency's final risk assessment and any action taken to mitigate ongoing risks, including reporting any findings of workplace misconduct to the Office of the Children's Guardian (the Guardian).

The decision-maker¹ must assess the strength or weight of the evidence, when making a finding. There are some general considerations that can assist in determining how much weight to place on information and to determine a finding.

These considerations are not independent from one another, so evidence that satisfies one consideration may very well also satisfy others. The decision-maker should consider the reliability of the evidence; whether it is relevant to the alleged conduct; if accounts are consistent (over time, with other evidence, and more or less plausible); and whether there is any other evidence to corroborate or contradict an allegation.

Caution should be exercised when reaching a sustained finding in a matter that involves a criminal allegation – such as a sexual offence allegation, or a physical assault allegation – in the absence of a criminal conviction. In this regard, it is not necessary that reportable conduct be sustained to the criminal standard (i.e. beyond reasonable doubt). However, a sustained finding must be based on material that logically tends to show that all the facts necessary to establish the incident are made out to the reasonable satisfaction of the decision maker.

The decision maker should base their decision on clear and cogent evidence, and not guesswork, suspicion or rumour. The more serious the wrongdoing, the more care the decision maker must exercise when deciding whether they are satisfied that the conduct is sustained.

Please see our *Fact Sheet 11: Notifying and Identifying Reportable Conduct* for more guidance about evidentiary thresholds in each of the reportable conduct categories – sexual misconduct, physical assault, psychological harm, neglect and ill-treatment.

Available findings

For the purposes of the Ombudsman's employment-related child protection scheme, a finding in an agency investigation of a reportable allegation may be that the allegation is:

- sustained (i.e. a finding that the conduct occurred), or
- not sustained – insufficient evidence (i.e. there is some evidence of weight however there is insufficient evidence available to reasonably establish that the alleged conduct did occur), or
- not sustained – lack of evidence of weight (i.e. where the evidence is of such poor probative value or lacking in weight, such as to warrant a finding that, on the balance of probabilities, the conduct did not occur), or
- false (i.e. where inquiries into the matter show reportable conduct or an act of violence did not occur). Some of these matters may be vexatious, for example where inquiries into the matter show the allegation was made without substance and to cause distress to the person against whom the allegation was made, or
- not reportable conduct (i.e. where inquiries into the matter show the conduct was not reportable). For example, use of force that was trivial or negligible in the circumstances, conduct that was reasonable in the circumstances or accidental. This may include 'misconceived' matters, where inquiries into the matter show that, even though the allegation was made in good faith, it was based on a misunderstanding of what actually occurred and the incident was not reportable conduct.

1. The decision-maker should be the 'head of agency'. The head of agency is its most senior officer. For example, the chief executive officer, licensee, coordinator, director, or manager.

Notification to the Children's Guardian

The *Child Protection (Working with Children) Act 2012* and the *Child Protection (Working with Children) Regulation 2013* replaced the *CCYP Act* and its associated *Regulation* on 15 June 2013. The Act and the Regulation contains specific definitions of which agencies constitute a prescribed reporting body, what is a reportable finding, what conduct is required to be reported, and what constitutes 'child related work', for the purposes of any notification to the Guardian.

Certain agencies, including NSW Government agencies, public sector agencies and certain designated non-government agencies, considered to be reporting bodies² under the Guardian's jurisdiction,³ are required by s 35 of the *Child Protection (Working with Children) Act 2012* to notify the Guardian of any child-related worker⁴ against whom the reporting body has made a finding (a 'sustained' finding) that the worker has engaged in conduct specified in clause 2 of Schedule 1.⁵

In addition, those matters exempted from notification to the Ombudsman by virtue of a Class or Kind Determination with an agency or a sector, are likely not reportable on finding to the Guardian.

For further information, visit the office of the Children's Guardian website at <http://www.kids.nsw.gov.au>

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2. See s 35(4) of the *Child Protection (Working with Children) Act 2012* and Clause 25 of the *Child Protection (Working with Children) Regulation 2013* for a list of prescribed reporting bodies.
 3. See s 35 'Notification by reporting bodies of conduct constituting assessment requirement trigger' of the *Child Protection (Working with Children) Act 2012*.
 4. See s 6 'Child-Related Work' of the *Child Protection (Working with Children) Act 2012* and Part 4 'Exemption of workers and employers from Act' of the *Child Protection (Working with Children) Act 2012*.
 5. See Clause 2 of the *Child Protection (Working with Children) Regulation 2013*.

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Fact Sheet

3

Child protection: Responsibilities of heads of agencies

This fact sheet provides information to assist heads of agencies understand their responsibility to respond to 'reportable allegations' and 'reportable convictions' against employees and allegations which are exempt from notification to the Ombudsman, as set out under s.25 of the *Ombudsman Act 1974*.

The Ombudsman's child protection role

The NSW Ombudsman is responsible for monitoring the handling of reportable allegations and convictions against employees of all government and certain non-government agencies in NSW. The Ombudsman is also responsible for scrutinising the systems of these agencies for preventing and handling reportable allegations and convictions against employees.

There are three types of agencies that must notify the Ombudsman of reportable allegations or convictions against employees: designated government agencies, all other public authorities, and designated non-government agencies (such as schools, child care centres, out of school hours services and agencies providing substitute residential care).

All agencies in the Ombudsman's child protection jurisdiction must notify the Ombudsman about reportable allegations and convictions against employees that arise in the course of an employee's work. Designated agencies, whether government or non-government, must in addition report allegations or convictions against employees that arise outside the workplace.

Heads of agencies (or their delegates) are required to make a notification to the Ombudsman within 30 days of becoming aware of a reportable allegation or conviction. This reporting requirement enables the Ombudsman to determine our level of involvement in a matter at an early point in the investigation. We consider issues including the type of allegation/s being investigated, the nature of the risks arising, and how we might assist an agency to complete its investigation to a satisfactory standard.

At the end of the investigation, the head of agency must send a report to the Ombudsman that includes the agency's findings in relation to the allegations, details of any action taken and copies of documents on which the report is based. This enables the Ombudsman to determine if the investigation was carried out in a satisfactory manner.

Who is the head of agency?

The head of the agency is usually its most senior officer. For example, the chief executive officer, coordinator, director, or manager. In a privately owned child care centre, the head of agency role could be fulfilled by the licensee, centre director or authorised supervisor (as specified by the relevant regulations). In some instances, the head of the agency may not be obvious and the agency should contact the Ombudsman for advice. A head of agency may wish to nominate a contact person for day-to-day correspondence or inquiries.

For the purpose of the *Ombudsman Act 1974*, an employee of an agency is any person who is employed by the agency, whether or not they are employed to work directly with children, as well as any individual engaged by the agency to provide services to children, such as contractors, foster carers, volunteers, students on placement and instructors of religion.

Responsibilities of the head of agency

Heads of agency are expected to:

- ensure systems are in place for recording and responding to allegations or convictions of a child protection nature against employees. This includes reportable allegations and convictions and allegations that are exempt from notification to the Ombudsman.
- provide information, as the Ombudsman requires, about the type and operation of systems for providing a safe environment for children in the agency's care, and systems for handling and responding to reportable allegations and convictions made against employees (including allegations which are exempt from notification).
- make arrangements within the agency to require all employees to inform the head of agency (or delegate) of any allegation or conviction of a child protection nature against an employee, of which they become aware. These arrangements

- should include the requirement that employees notify the head of agency or delegate of any such allegation or conviction as soon as practicable.¹
- notify the Ombudsman of reportable allegations or convictions made against an employee of the agency, what action it intends to take and for what reason.
- provide to the Ombudsman on request, documentary and other information (including records of interviews) with respect to an investigation being undertaken.
- forward to the Ombudsman the results of an investigation, including copies of reports, evidence gathered and considered, the findings reached and action being taken or proposed to be taken as a result of an investigation.

If the agency is a reporting body under the *Child Protection (Working with Children) Act 2012* and the Child Protection (Working with Children) Regulation 2013, and the employee is not exempted under the Act, the head of agency should notify the Office of the Children's Guardian if they have made a sustained finding of sexual misconduct committed against, with or in the presence of a child, or serious physical assault of a child, under S.35 of the Act.

What does the head of agency need to report?

When an employment-related child protection allegation is made against an employee, the head of agency (or delegate) should consider whether there is reason to believe that it constitutes an allegation of reportable conduct (a reportable allegation or a reportable conviction).

Reportable conduct means:

- 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 behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child.

A **reportable allegation** means an allegation of reportable conduct against an employee. For an allegation to be notifiable to the Ombudsman, the following components are necessary:

- the person who is the subject of the allegation must be a current employee² of a designated agency or public authority, or have been an employee at the time the allegation was made (the person must be identified or identifiable either by

name or by other information including their description, work schedules and locations of the agency)

- the allegation must contain a description of behaviour that may constitute reportable conduct, and
- the child or young person who was alleged to have been involved in reportable conduct by an employee, must have been under 18 years at the time of the alleged incident or 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.

Reportable conduct does not extend to:

- 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 child and to any relevant codes of conduct or professional standards, or
- the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated by the agency and the result of the investigation recorded under workplace employment procedures, or
- conduct of a class or kind exempted from being reportable conduct by the Ombudsman.

Notifying the Ombudsman

When notifying the Ombudsman of a reportable allegation, we ask the agency to:

- Complete **Part A** of the Ombudsman's notification form, which is available on our website at www.ombo.nsw.gov.au and ensure that it is sent to the Ombudsman's office within 30 days of the head of agency becoming aware of the allegation.
- Provide details of the reportable allegation or conviction and what the agency proposes to do or has done.
- Provide copies of relevant material available at the time of notification.

If Community Services and/or police are already investigating a reportable allegation against an employee, the agency is still required to notify the Ombudsman of the allegation.

Agencies are not required to complete the investigation within 30 days of the head of agency becoming aware of the allegation. However, if the investigation has been completed within 30 days, Part B of the Ombudsman's notification form should also be completed and copies of relevant documents attached.

At the conclusion of the agency investigation

Once the head of agency is satisfied that the investigation has been concluded, they must, as soon as practicable, provide the Ombudsman with:

- a completed **Part B** of the Ombudsman's notification form, which is available on our website.
- any report prepared by or for them relating to the investigation, as well as copies of all statements and other documents which form the basis of the report.
- any comments that they may want to make about the report.
- the results of the investigation.
- advice of the action that has been taken, or will be taken (arising from the investigation), in respect to the reportable allegation or conviction.

What can you expect from the Ombudsman?

When we receive a notification, we will write to the agency to acknowledge receipt and provide a reference number and contact details. If the investigation has been completed at the point of notification, we will assess the information that the agency has provided and give feedback. If the investigation has not been completed, we will ask the agency to send us the final report when the investigation has been finalised.

The Ombudsman can:

- Monitor the progress of an investigation conducted by the agency, or an investigation conducted on behalf of the agency, concerning the reportable allegation or conviction. This means that we will have contact with the agency during the course of the investigation and may request information about the investigation.

- Conduct a direct investigation into any reportable allegation or conviction against an employee of an agency, regardless of whether or not it has been notified to us by the head of agency. If the Ombudsman decides to directly investigate a reportable allegation or conviction, the agency may be required to defer its own investigation. When we conclude the investigation, or we ask the agency to resume its own investigation, we will provide the agency with recommendations for action, as well as any necessary information relating to the recommendations.

Ombudsman staff may also observe interviews conducted by, or on behalf of, the agency and may confer with the people conducting the investigation about its conduct and progress. If asked, the investigators must provide the Ombudsman with any information relating to the investigation.

We will assess and respond to the agency's final report. If you do not understand our comments or are unhappy with the way that we have handled the matter, you can contact us to discuss your concerns.

The Ombudsman maintains records relating to all notifications of reportable allegations, regardless of the results of the investigation. All information is kept confidentially by the Ombudsman and is stored according to the State Records Act. The Ombudsman's complaint handling, investigation and reporting records are not publicly accessible, as they are exempt from disclosure under the *Government Information (Public Access) Act 2009* and our records cannot be requested or subpoenaed as evidence in a court.

If you have any queries or comments, we are here to assist you. Call the NSW Ombudsman's Employment Related Child Protection Division on 02 9286 1000.

1. See Part 3A of the *Ombudsman Act 1974* for a description of the obligations of Heads of Agency.

2. Under Part 3A of the *Ombudsman Act 1974*, an 'employee' is an employee of the agency, whether or not employed in connection with any work activities of the agency that relate to children, and any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

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.

Level 24, 580 George Street
Sydney NSW 2000

Email nswombo@ombo.nsw.gov.au

Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000

Facsimile 02 9283 2911

Toll free (outside Sydney metro) 1800 451 524

Tel. typewriter (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450

We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

Fact Sheet

4

Information for reporting bodies

Reporting certain misconduct involving children

April 2014



PLEASE NOTE: This information is provided to assist you to investigate and report misconduct involving children. If you require clarification on any point or assistance with the application of this information, please telephone the Office of the Children's Guardian on (02) 9286 7219.



Reporting bodies have a legal obligation to report findings of sexual misconduct and serious physical assault involving children by a child-related worker to the Office of the Children's Guardian. This guidance has been created to inform and support this process.

Reporting these misconduct findings is not intended to stop workers from giving care and support to children in need. It is important that guidance does not have the consequences of making workers reluctant to touch a child or to offer comfort or support to a distressed child.

Which bodies are reporting bodies?

Under section 35(4) of the [Child Protection \(Working with Children\) Act 2012](#) the following organisations are reporting bodies:

- (a) NSW Government agencies
- (b) a Department or public sector agency within the meaning of the [Government Sector Employment Act 2013](#)
- (c) a registration or other licensing authority constituted under an Act
- (d) a designated government agency or designated non-government agency within the meaning of Part 3A of the [Ombudsman Act 1974](#) that has been granted an exemption under section 25CA of that Act
- (e) any other employer or professional or other body that supervises the conduct of an employee prescribed by the regulations



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Under clause 25 of the [Child Protection \(Working with Children\) Regulation 2013](#) the following organisations are reporting bodies:

- (a) out-of-home care agencies accredited or provisionally accredited under section 181 of the [Children and Young Persons \(Care and Protection\) Act 1998](#)
- (b) members of the Islamic Council of NSW
- (c) organisations and ministries of Christian Brethren Assemblies in NSW
- (d) the Catholic Church in NSW, including organisations of dioceses, non-geographical dioceses operating in NSW and institutes of consecrated life and societies of apostolic life operating in NSW
- (e) Baptist churches, being members of the Baptist Union of NSW or the Association of Baptist Churches NSW
- (f) churches in NSW that are members of NSW Australian Christian Churches (Assemblies of God)
- (g) the Anglican Church in NSW, including organisations of dioceses

- (h) Seventh-day Adventist churches in NSW, including the North NSW Conference, the Sydney Conference and the South NSW Conference and associated organisations
- (i) Uniting churches in NSW, including NSW presbyteries
- (j) constituents of the NSW Jewish Board of Deputies
- (k) members of the Association of Independent Schools of NSW
- (l) the Scout Association of Australia, NSW branch
- (m) members in NSW of Christian Education National Ltd

What are reporting bodies required to do?

Under Schedule 1 of the [Child Protection \(Working with Children\) Act 2012](#), the conduct that must be reported is:

1. sexual misconduct committed against, with or in the presence of a child, including grooming of a child
2. any serious physical assault of a child.

Under the legislation, reporting bodies must investigate allegations of such conduct to make an informed finding as to whether or not the conduct occurred.

To determine whether or not the conduct meets the criteria, reporting bodies must consider the nature of the conduct itself and the context in which it occurred.

If the investigation results in a finding that sexual misconduct or serious physical assault occurred, the reporting body must report this finding to the Office of the Children's Guardian. Under the [Child Protection \(Working with Children\) Act 2012](#), **only** findings of sexual misconduct and serious physical assault must be reported, although the Ombudsman may report other misconduct to the Office of the Children's Guardian.

1. Sexual misconduct involving a child

The term 'sexual misconduct' includes sexual offences.

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.

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

What is sexual misconduct?

The term 'sexual misconduct' includes conduct that does not necessarily equate to a criminal offence (for example, criminal proceedings may not have been commenced or proceeded to a finding of guilt by a court).

For sexual misconduct to be reportable to the Office of the Children's Guardian, 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 standards 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 exhibitionism)
- 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

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 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 themselves.
- 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.

2. Serious physical assault of a child

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.

Reporting bodies should 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:

- actions for the discipline, management or care of children
- 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 reporting bodies are 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.

Serious physical assault

While reporting bodies are expected to investigate every allegation of physical assault, only findings that a serious physical assault occurred are reportable to the Office of the Children's Guardian for consideration in Working With Children Check assessments.

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)

In considering whether a serious physical assault has occurred, reporting bodies whose work involves regular restraint of children, should consider the context of events, including the child's age and vulnerability.

Generally, behaviour that does not meet the standard of a serious physical assault does not become a serious physical assault by means of it being repeated. The only exception to this is where an employer has developed legitimate concerns for the safety of a child or children and intervened with a worker (e.g. warnings, counselling etc) and the behaviour is repeated.

Findings of relevant misconduct involving children

A misconduct finding is made when the reporting body has completed an investigation and made a final determination that sexual misconduct or serious physical assault has occurred.

This is the time to report the finding, even if appropriate disciplinary action in respect of the misconduct has not yet been determined or review or appeal processes remain available.

How to report relevant misconduct involving children

To report misconduct, an employer must first register with the new Working With Children Check system to receive login details for the employer's organisation.

To register as an employer:

1. Go to www.check.kids.nsw.gov.au
2. Click the Start here button on the right hand side. A new screen will appear.
3. Under the *Employer registration* section, click *Register*.
4. A form will appear on screen. Fill in the required information and click *Submit*.
5. You will receive your login details via email shortly after completing step 4.

To submit a relevant misconduct finding in respect of a child-related worker:

Please contact the Office of the Children's Guardian on (02) 9286 7219 to request authority to do so. Once permission is granted, you will be able to submit your reports online using your employer login details.

Go to www.check.kids.nsw.gov.au

1. Click the Start here button on the right hand side. A new screen will appear.
2. Under the *Verify* section, click *Employer log in and verify*.
3. Enter your employer login details and click *Submit*.
4. Select the *Submit workplace report finding* tab across the top of the screen.
5. A form will appear. Fill in the required fields and click *Submit*.

If you need help with any part of this process, call the Office of the Children's Guardian on (02) 9286 7276.

Keeping records

A reporting body (or any successor) must keep all records of allegations, investigations and findings about a notification for at least 30 years, unless the records are given to the Office of the Children's Guardian. If a reporting body or any successor to a reporting body ceases to exist all

records must be lodged with the Office of the Children's Guardian before the body or successor ceases to exist.

Informing workers who are the subject of a relevant misconduct finding

A worker who is the subject of a relevant misconduct finding must be informed of that finding and that that his or her employer has a statutory obligation to report the misconduct to the Office of the Children's Guardian.

Workers are able to use the [Government Information \(Public Access\) Act 2009](#) (GIPA) to seek access to information held by government agencies about the recorded misconduct finding. They may do this even after they have left the reporting body's organisation, and cannot be charged any fees by the reporting body to access this information. This is stipulated in section 46(2) of the [Child Protection \(Working with Children\) Act 2012](#).

If a worker makes a GIPA request for these records to the Office of the Children's Guardian, the Office will refer the request to the reporting body in question for action, unless the information is held solely by the Office (in which case the Office will manage the request for information).

For more information about the GIPA Act, call the Office of the Information Commissioner on 1800 463 626, visit www.ipc.nsw.gov.au or download the fact sheet on [Ways to access government Information, available on the Information and Privacy Commission's website](#).

Potential consequences for the worker

As well as a national criminal history check, an application for a Working With Children Check involves a review of workplace records. Applicants who receive a clearance are subject to ongoing monitoring for a period of five years, which is how long a Working With Children Check clearance remains valid.

A new criminal or workplace record which appears against a worker's name during this five year period may trigger a risk assessment and in some cases result in a bar or interim bar against working with children, depending on the seriousness of the offence or conduct concerned.

Withdrawing a finding of relevant misconduct

A reporting body may amend or withdraw a notification of a finding of relevant misconduct if:

- the finding was quashed, withdrawn or amended
- there was an error in the notification or the finding
- the notification was wrongly made
- the person against whom the finding was made has died.

The Office of the Children's Guardian requires written notification of amendments or withdrawals of a finding of relevant misconduct. The representative of the reporting body must provide a statutory declaration as to the reasons for the amendment or withdrawal.

If you require guidance or support to withdraw a report, please call the Office of the Children's Guardian on (02) 9286 7276.

More information

For more information, visit www.check.kids.nsw.gov.au and refer to the [fact sheets and resources page](#) to find the following fact sheets:

- FACT SHEET: Risk assessment
- FACT SHEET: Assessment requirement triggers (Schedule 1)
- FACT SHEET: Disqualifying records (Schedule 2)
- FACT SHEET: Bars and appeals.

If you have a question, please email check@kidsguardian.nsw.gov.au.

See also:

[Child Protection \(Working with Children\) Act 2012](#)

[Child Protection \(Working with Children\) Regulation 2013](#)

Disclaimer: The material provided in this Fact Sheet for the guidance only. Every effort has been made to ensure that the information is accurate, current and not misleading. However, this cannot always be guaranteed and no warranty is given that the information is free from error or omission. Users should exercise their own skill and care with respect to the use of the material. The information is also not a substitute for independent legal or other professional advice and users should obtain appropriate professional advice relevant to their particular circumstances.

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