

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



Scan to view our [Online tutorials](#)

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.

The Office of the Children's Guardian does not guarantee, and accepts no legal liability whatsoever for any act done, omission made, loss, damage, cost or inconvenience arising from, connected to, or as a consequence of, using or relying on the material contained in this Fact Sheet.