

# ACT Ombudsman Practice Guide No. 2

## Identifying Reportable Conduct

**Reportable conduct<sup>1</sup> is defined in the *Ombudsman Act (the Act)*. This practice guide was developed by the ACT Ombudsman, in consultation with ACT Government agencies and employers covered by the scheme, to help identify behaviours that must be reported to the ACT Ombudsman. This information will also support employers to update their policies and help employees understand what constitutes reportable conduct.**

### Reportable conduct overview

Employers<sup>2</sup> must report allegations,<sup>3</sup> offences or convictions relating to child-related misconduct by an employee<sup>4</sup> to the Ombudsman. It does not matter whether or not the employee engaged in the conduct in the course of employment or whether a child consents to the conduct as long as the person was an employee at the time the employer became aware of the allegation. Reportable conduct<sup>5</sup> includes:

1. sexual offences and convictions where a child is a victim or is present
2. offences against the person, including physical offences and convictions, where a child is a victim or is present
3. conviction, or finding of guilt, under a territory law or a state or Commonwealth law, involving reportable conduct
4. offences against the *Education and Care Service National Law* (inappropriate discipline or offences relating to protecting children from harm)
5. ill-treatment of a child<sup>6</sup> (including emotional abuse, hostile use of force/physical contact, neglect and restrictive intervention)
6. psychological harm
7. misconduct of a sexual nature.

Reportable conduct includes allegations, offences and convictions relating to any of the above.<sup>7</sup> Each of these categories is considered below. This document is intended to be used as a guide and to develop consistency in application of the reportable conduct standard.

<sup>1</sup>See s 17E of the [Reportable Conduct and Information Sharing Legislation Amendment Act 2016](#) updated the [Ombudsman Act 1989](#) (the Act) when the scheme commenced on 1 July 2017.

<sup>2</sup> In this practice guide, the word 'employer' is substituted for the term 'designated entity' which is referred to in the Act. See s 17D for the definition of 'designated entity.'

<sup>3</sup> For purposes of this practice guide, the term allegation refers to express assertions that reportable conduct has happened or may have happened (including a statement or declaration with or without proof).

<sup>4</sup> The definition of employee includes all employees of a designated entity, whether or not they provide services to children. Contractors and volunteers are also employees but only if they provide services to children. For more information see *The ACT Reportable Conduct Scheme—An Introduction*, available on our website: [ombudsman.act.gov.au](http://ombudsman.act.gov.au)

<sup>5</sup> s 17E of the Act.

<sup>6</sup> For purposes of this practice guide, the word child includes children, a young person and young people and refers to an individual who is under 18 years old or a group of individuals who are under 18 years old.

<sup>7</sup> s 17E(1) of the Act.

**The reportable conduct scheme is allegation based.** If an allegation, on the face of it, suggests that reportable conduct has occurred or may have occurred, it must be notified to the Ombudsman. The threshold for notifying an allegation to the Ombudsman is lower than the threshold for making a finding that reportable conduct occurred. The scheme is designed to ensure that decision-making is transparent and open to scrutiny.

The ACT Ombudsman encourages employers to contact us as soon as possible upon learning of an allegation or conviction or reportable conduct, whether by formal notification<sup>8</sup> (*s 17G Notification*) or through telephone or email contact. The employer's duty to report is outlined in the *ACT Ombudsman Practice Guide No 5: Employer Responsibilities* which is available on our website: [ombudsman.act.gov.au](http://ombudsman.act.gov.au).

## What is not reportable conduct?<sup>9</sup>

According to the legislation, reportable conduct **does not include** behaviour that is:

- reasonable discipline, management or care of a child taking into account the characteristics<sup>10</sup> of the child and any relevant code of conduct or professional standard that at the time applied to the discipline, management or care of the child, or
- held to be trivial or negligible conduct after being investigated and recorded as part of workplace procedures, or
- prescribed by regulation.

Examples of behaviour that is **not considered reportable** include:

- touching a child to attract the child's attention, to guide a child, or to comfort a distressed child
- when a teacher raises his or her voice to attract attention or restore order in a classroom, or
- when there is accidental contact with a child.

Even conduct that is determined to be not reportable must still be considered by the employer when an allegation is made. When this occurs, a record must be made about why the conduct was considered not reportable. Employers must maintain these records which can be audited by the Ombudsman.

Under the Act, the Ombudsman may declare an entity or a matter exempt<sup>11</sup> from the duty to report. The Ombudsman has not made any exemptions.

## What is reportable conduct?

### 1. Sexual offences and convictions

An employee's charge, finding of guilt, or conviction relating to a sexual offence<sup>12</sup> committed **against, with, or in the presence of a child** is reportable to the Ombudsman. It does not matter whether the conduct is alleged to have occurred in the professional or personal capacity as long as the person was an employee at the time the employer became aware of the allegation. Sexual offences and convictions relate to offences in the *Crimes Act 1900*.

All allegations of an employee involving a child in a sexual activity that he or she does not fully comprehend, is unable to give informed consent to or that violates the law should be reported to police.

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<sup>8</sup> Employers must notify the Ombudsman within 30 days of learning of the allegation (see s 17(g)(2)).

<sup>9</sup> s 17E (2) of the Act.

<sup>10</sup> Characteristics of a child include the **age, health and developmental stage** of a child (see s 17E(3) of the Act).

<sup>11</sup> s 17G (3) of the Act.

<sup>12</sup> See Part 2-5 of the *Crimes Act 1900* as referenced in s 17E(1)(b)(iii)(A-D).

Caution should also be exercised when reaching a sustained finding of a sexual offence. The more serious the alleged wrongdoing, the more care the decision maker should exercise when deciding they are satisfied that the allegation is sustained. **ACT Policing should be contacted** if an employer is in doubt or considers the possibility that an offence has been alleged.

## 2. Offences against the person including physical assault

Offences against the person, including physical assault, relates to an offence against any of the provisions of the *Crimes Act 1900* listed in the Act.<sup>13</sup> Offences against the person are reportable conduct if they are committed **against, with or in the presence** of a child. Assault may include hitting, kicking or punching of a child.

A serious threat or fear of physical harm may also constitute an offence. Words or gestures can lead the child to apprehend the imminent application of physical force, regardless of whether the person actually intends to apply any force. Again, it does not matter whether the conduct is alleged to have occurred in the professional or personal capacity as long as the person was an employee at the time the alleged conduct was said to have occurred.

For an assault to occur, it is not necessary that the person act with hostility or that the child sustain an injury. However, the presence or absence of any hostility or injury may be significant when deciding whether the physical force used, or the apprehension created, constituted an assault. A range of variables should also be taken into account, having regard for the circumstances of each case. These variables may include matters such as the age, maturity, health or characteristic<sup>14</sup> of the child involved.

There is a range of physical contact that, because of the context in which it occurs, does not amount to assault. For example, an assault may not have occurred where there is reasonable force used to:

- exercise appropriate control over a child
- disarm a child seeking to harm themselves or others
- separate children who are fighting
- restrain a child from hurting themselves, others or damaging property
- provide self-defence or the defence of others.

In addition, the Ombudsman Act specifically outlines certain conduct which does **not** need to be reported.<sup>15</sup>

Caution should also be exercised when reaching a sustained finding of an offence against a person, including assault. The decision maker should exercise when deciding they are satisfied that the allegation is sustained. **ACT Policing should be contacted** if an employer is in doubt or considers the possibility that an offence has been alleged.

## 3. Convictions defined

A reportable conviction<sup>16</sup> is defined as a conviction, or finding of guilt, under a territory law or a state or Commonwealth law, involving reportable conduct; and entered against the person before or after the commencement of the Act. The Act requires any such conviction or finding of guilt against employees of a designated entity be reported to the Ombudsman whether the conduct is alleged to have taken place in the course of the person's employment or in any other setting.

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<sup>13</sup> See Part 2-5 of the *Crimes Act 1900* as referenced in s 17E(1)(b)(iii)(A-D).

<sup>14</sup> See s 17E(3) of the Act.

<sup>15</sup> See p. 2 of this document.

<sup>16</sup> See s 17D.

#### 4. Offences against the National Law

Reportable conduct also includes an offence against either of the following provisions of the *Education and Care Service National Law (ACT)*: s166 (Offence to use inappropriate discipline) or s167 (Offence relating to protection of children from harm or hazards).

#### 5. Ill-treatment of a child

Ill-treatment includes those circumstances where an employee treats a child in an **unreasonable and seriously inappropriate, inhumane or cruel manner**. This behaviour may be intentional or unintentional. The focus is on the alleged conduct rather than the actual effect of the conduct on a child.

Ill-treatment of a child can include:

- emotional abuse
- hostile use of force/physical contact towards a child
- inappropriate restrictive intervention
- making excessive and/or degrading demands on a child
- malevolent acts
- a pattern of hostile or unreasonable and seriously inappropriate, degrading comments or behaviour
- inappropriate forms of restrictive intervention.

In making a determination regarding ill-treatment, it may be important to consider relevant codes of conduct that outline the nature of professional conduct and practice by employees/workers which should occur when working with children/young people.

##### Emotional Abuse

Emotional abuse<sup>17</sup> may occur when treatment towards a child is **unreasonable and seriously inappropriate, inhumane or cruel**.

Examples of emotional abuse is conduct toward a child by an employee where the child is:

- isolated (e.g. placing a child in a cupboard as punishment)
- verbally assaulted
- subjected to a pattern of hostile or unreasonable and seriously inappropriate, degrading comments or behaviour
- harassed/being corrected in excess of what is reasonable
- humiliated or intimidated
- rejected
- frightened by threats of violence or exposure to violence
- treated in a malevolent or retaliatory manner
- bullied or treated with continual coldness
- alleged to have seen or heard the physical, sexual or psychological abuse of a person with whom the child or young person has a domestic relationship.

A medical diagnosis is not required to establish a causal link between an employee's conduct and emotional harm to a child.

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<sup>17</sup> See *Keeping Children & Young People Safe, November 2014*, for more indicators of emotional abuse. See also, s342 of the *Child and Young Persons Act 2008*.

### Hostile use of force/physical contact

Hostile use of force/physical contact<sup>18</sup> occurs when a person applies **unreasonable and seriously inappropriate, inhumane or cruel** force/physical contact against a child or causes a child to fear the imminent use of such force/physical contact. Decision makers may also consider whether the alleged conduct is an assault.

An allegation of hostile use of force/physical contact may be considered where:

- the alleged conduct results in the child being injured, beyond a type of injury like a minor scratch or graze (this can result from a single episode or repeated episodes)
- the force/physical contact had the potential to result in an injury that is more than a minor scratch or graze or the child was afraid<sup>19</sup> that injury might result
- the injury suffered may be minor, but the force/physical contact applied is associated with aggravating circumstances such as demeaning or threatening behaviour by the employee
- an object such as a ruler, book, marker or other object is used to gain a child's attention in a hostile or inappropriate manner (for example, throwing the object near the child)
- forms of corporal discipline are used by an employee towards a child (this does not include reasonable discipline of an employee's child in an employee's personal capacity).

It is important to consider the context in which allegations of hostile use of force/physical contact against a child are made to determine whether it constitutes reportable conduct. Factors that may be relevant include the age, health and developmental stage, physical ability or the cultural background of the child or children involved.<sup>20</sup> It may also be relevant to consider whether the use of force/physical contact was appropriate or if it was intended to:

- exercise appropriate control over a child
- disarm a child seeking to harm themselves or others
- separate children who are fighting
- move a child out of harm's way
- restrain a child from hurting themselves, others or damaging property provide self-defence or the defence of others.

### Inappropriate Restrictive Intervention

Inappropriate restrictive intervention includes the use of mechanical or physical restraints which result in the unreasonable limitation of a child's freedom of movement. It may also include seclusion or sole confinement of a child, directing a child to remain in an unreasonable physical position, or the unreasonable withdrawal of social interactions or privileges from a child. The restraint must be **unreasonable and seriously inappropriate, inhumane or cruel**.

When considering whether the restrictive intervention was reasonable, the circumstances of the case including the overall context of the conduct and the characteristics of the child/children involved should be considered.<sup>21</sup> In making a determination regarding restrictive intervention it may be important to consider relevant codes of conduct, employment policies and any legislated guidelines that outline the nature of professional conduct and

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<sup>18</sup> See *Keeping Children & Young People Safe, November 2014*, for more indicators of physical abuse which could indicate aggressive use of force/physical contact has occurred. See also, s342 of the *Child and Young Persons Act 2008*.

<sup>19</sup> Even if the harm or fear of harm was caused unintentionally, this may be reportable conduct if the person ought to have known their actions could result in inappropriate use of force or a fear of such force (i.e. the person acted recklessly). Reporting bodies may also consider an allegation of emotional abuse in this instance.

<sup>20</sup> See s. 17E(3) of the Act.

<sup>21</sup> See s 17E(3) of the Act.

practice by employees/volunteers which should occur when working with children.<sup>22</sup>

## Neglect

Neglect<sup>23</sup> of a child involves the actions or inactions (omissions) of an employee who has the responsibility to care for a child. Such actions may be intentional or unintentional. Neglect refers to a failure to provide a child with the basic needs for his or her physical/emotional/psychological and intellectual development. The following are categories of neglect:

- **Supervisory neglect** is an intentional or reckless<sup>24</sup> failure to adequately supervise a child that results in the death of, or significant harm to, a child/or
  - an intentional or reckless failure to adequately supervise a child, or a significantly careless act or failure to act, that involves a gross breach of professional standards, or
  - has the potential to result in the death of, or significant harm to, a child or expose a child to dangerous or life-threatening situations, which could result in physical injury or significant harm
- providing illegal drugs, restricted substances or alcohol to children may constitute supervisory neglect and may be a criminal offence
- **Carer neglect** is grossly inadequate care that involves depriving a child of the basic necessities of life: such as the provision of food and drink, clothing, critical medical care or shelter
- **Abandonment**, leaving a child alone for more than a reasonable period without provision of age-appropriate care, is also carer neglect
- **Failure to protect from abuse** is an obviously or very clearly unreasonable failure to respond to information strongly indicating actual or potential serious abuse of a child
- **Reckless acts** are acts or failure to act that involve a gross breach of professional standards and has the potential to result in the death of, or significant harm to, a child
- **Emotional neglect** refers to situations where the employee or caregiver is unresponsive to the child's emotional needs or is characterised by a lack of warmth, nurturance, encouragement or supports and results in significant harm or exposure to the risk of significant harm.

A single incident can constitute neglect if it falls within one of these categories. Neglect may be episodic, related to a particular crisis, or it may be chronic and persistent. Neglect may also be an ongoing situation of repeated failure of a caregiver to fulfil a duty or obligation resulting in actual harm to a child or where there is the potential for significant harm to a child.

## 6. Psychological harm

Behaviour or a circumstance that psychologically harms a child involves conduct that is obviously unreasonable or very clearly unreasonable and results in significant psychological harm or trauma to a child including anxiety, chronic depression or post-traumatic stress disorder or the exacerbation or aggravation of an existing psychological condition. The Ombudsman Act states that exposing or subjecting a child to behaviour, or a circumstance, that psychologically harms the child is reportable conduct.<sup>25</sup>

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<sup>22</sup> The Act outlines certain conduct which does not need to be reported as it does not constitute reportable conduct. See s 17E(2)(a,b). Also see p. 2 of this document.

<sup>23</sup> See *Keeping Children & Young People Safe, November 2014*, for more indicators of neglect. See also, s343 of the *Child and Young Persons Act 2008* for the definition of neglect.

<sup>24</sup> The word reckless has its common or accepted meaning: rash, careless, thoughtless, incautious, heedless, inattentive, hasty, precipitate, precipitous, impetuous, impulsive, irresponsible, ill-advised.

<sup>25</sup> See s 17E(b)(ii).

There needs to be a causal link between the inappropriate behaviour and the psychological harm. Additionally, the harm must be more than short lived or temporary.

For reportable conduct involving psychological harm to occur, the following elements must be present:

- an obviously or very clearly unreasonable or serious act or series of acts that the employee knew or ought to have known was unreasonable, **and**
  - evidence of psychological harm to the child that is more than transient, including displaying patterns of 'out of character behaviour', regression in behaviour, distress, anxiety, physical symptoms or self harm, **and**
  - an alleged causal link between the employee's conduct and the psychological harm to the child.

Psychological harm means that the harm is more than trivial or insignificant, but need not have a lasting permanent effect. When it is **alleged** that an employee's behaviour has caused psychological harm to a child, it may be necessary to obtain a psychological or medical assessment of the child to determine whether psychological harm can be established. However, a clinical diagnosis will not be required in every circumstance—particularly if the assessment itself may cause harm. For example, in certain serious and/or ongoing domestic violence cases<sup>26</sup>, it may be open to infer that a child has been psychologically harmed, in the absence of a clinical diagnosis of such harm.

## 7. Misconduct of a sexual nature

For behaviour to constitute reportable conduct, the alleged misconduct of a sexual nature<sup>27</sup> must have been committed against, with or in the presence of a child. This includes conduct that may not equate to a criminal offence. Misconduct of a sexual nature may include (but are not limited to) behaviours with a child such as:

- physical contact or speech or other communication of a sexual nature
- inappropriate touching
- inappropriate relationship with, attention or focus
- grooming behaviour
- sharing pornography
- sharing pornographic images
- voyeurism
- crossing professional boundaries.

Misconduct of a sexual nature includes a broad range of behaviours, some of which may be sexual and some may be in preparation for sexual activity. Misconduct of a sexual nature may also occur when an employee involves a child in sexual activity by using their power over the child and taking advantage of their trust.

Helping or inducing another person to engage in sexual misconduct against a child is also sexual misconduct and should be reported under the scheme.

There are three categories of sexual misconduct: crossing professional boundaries; sexually explicit comments and other overtly sexual behaviour, and grooming behaviour. Below are examples of behaviour that may be considered inappropriate and may suggest that sexual misconduct is occurring. The list is not exhaustive.

### Crossing professional boundaries

Crossing professional boundaries, includes behaviour that involves an inappropriate and overly personal or intimate relationship with, conduct towards or focus on a child or class of children. Persistent less serious breaches of

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<sup>26</sup> Situations where a child is present to witness assaults, such as may occur in domestic violence cases, may result in reportable conduct. See the definition of assault in this practice guide for more detail and noting that an assault can amount to reportable conduct if it is committed **against, with, or in the presence of a child.**

<sup>27</sup> See *Keeping Children & Young People Safe, November 2014*, for more indicators of sexual abuse and misconduct.

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. Communications directed to an individual child that are different or exclude other children may also be inappropriate.

Care should be exercised before making a finding of crossing professional boundaries. Codes of conduct that outline the nature of the professional boundaries which should exist between employees and children/young people can be particularly useful when considering whether a person has crossed these boundaries. For employees who either intentionally breach such codes or have demonstrated an inability to apply them appropriately, it may also be necessary to provide more detailed written advice about what constitutes appropriate behaviour to the employee.

### Sexually explicit comments and other overtly sexual behaviour

Sexually explicit comments and other overtly sexual behaviour are also examples of crossing professional boundaries and include a broad range of sexualised behaviour with or towards children.

It is not possible to provide a definitive list of unacceptable sexual conduct involving children, however, the following types of behaviour give 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 in relation to the adult's romantic, intimate or sexual feelings for a child
- exposure of a child to sexual behaviour of others including the display of pornography
- watching a child undress in circumstances where supervision is not required and clearly inappropriate.

### Grooming behaviour

Grooming behaviour may be found where there is evidence of a pattern of conduct where the employee gradually engages the child in sexual activity by using inducements, bribes, rewards or threats. Often there is use of a variety of controlling techniques toward a vulnerable subject in order to establish trust or to normalise sexually harmful behaviour. Grooming behaviour may also involve behaviour designed to prohibit exposure of the relationship.

Behaviour should only be seen as 'grooming' where there is evidence of a pattern of conduct that is consistent with preparing the alleged victim for sexual activity. The types of behaviours that may lead to a conclusion that grooming behaviour is occurring include 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 to other children
- inappropriately allowing the child to overstep rules
- asking the child to keep their relationship to themselves.

Testing boundaries may also lead to a conclusion that grooming behaviour is occurring. Examples of testing boundaries include:

- undressing in front of a child
- encouraging inappropriate physical contact (even where it is not overtly sexual)
- talking about sex or exposing a child to pornographic material
- sexualised behaviour including exhibitionism, voyeurism or 'accidental' intimate touching



Inappropriately extending a relationship outside of work or inappropriate personal communications (for example, e-mails, telephone calls, text messaging, social media and web forums) that explore sexual feelings or intimate or personal feelings with a child may also be indicators that grooming or crossing professional boundaries is occurring.

An employee 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. Contact with ACT Policing is advisable if such conduct is found to be occurring.

## Contact

We encourage early contact with the ACT Ombudsman. You can contact us prior to submitting an *s 17G Notification* using the details below.

### Further information:

Telephone: 02 6276 3770

Email: [act@ombudsman.gov.au](mailto:act@ombudsman.gov.au)

Website: [ombudsman.act.gov.au](http://ombudsman.act.gov.au)