

INFORMATION SHEET

Identifying Reportable Conduct

What types of conduct are reportable?

The Reportable Conduct Scheme includes the following types of 'reportable conduct':

- sexual offences (against, with or in the presence of, a child);
- sexual misconduct (against, with or in the presence of, a child);
- physical assault (against, with or in the presence of, a child);
- significant neglect of a child; and
- significant emotional or psychological harm to a child.

What are sexual offences?

A sexual offence is an offence of a sexual nature under a law of Western Australia, another State, Territory, or the Commonwealth committed against, with or in the presence of a child, such as:

- sexual penetration of a child;
- indecent dealings with a child;
- procuring, inciting or encouraging a child to engage in sexual behaviour or do an indecent act; and
- production, distribution or possession of child exploitation material.

An alleged sexual offence does not have to be the subject of criminal investigation or charges for it to be categorised as a reportable allegation of a sexual offence.

What is sexual misconduct?

Sexual misconduct includes misconduct against, with or in the presence of a child that is sexual in nature but does not include a sexual offence. Sexual misconduct may include (but is not limited to) behaviours such as:

- inappropriate touching;
- sharing pornographic images;
- speaking of sexual acts without a legitimate reason to do so;
- comments to a child that express a desire to act in a sexual manner towards the child, or another child; and
- grooming behaviour.

Sexual misconduct 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.

For example, grooming behaviour may be 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.

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; or
- asking the child to keep their relationship to themselves.

What is physical assault?

Physical assault can occur when a person intentionally or recklessly:

- applies physical force against a child without lawful justification or excuse - such as hitting, striking, kicking, punching or dragging a child (**actual physical force**); or
- causes a child to apprehend the immediate and unlawful use of physical force against them- such as threatening to physically harm a child through words and/or gestures and regardless of whether the person actually intends to apply any force (**apprehension of physical force**).

For conduct to be physical assault under the Scheme, the actions of the employee must be either **intentional** or **reckless**.

Intentional means that the employee engaged in the behaviour or conduct deliberately. In the case of actual physical force, this applies where the employee intentionally carries out the conduct or behaviour when physical contact was made with the child. An example of conduct that would likely constitute a physical assault is an employee deliberately striking a child in their care.

An apprehension of physical force is where an employee carries out a conduct or behaviour with an intention of making a child believe there would be actual physical force that could injure or harm them. An example of conduct that may cause a child to apprehend the use of physical force is where an employee threatens to strike a child in their care, causing the child to believe they are going to be harmed by the employee.

Reckless means the employee might not have intended to use actual physical force, or to make a child believe actual physical force would be used but was reckless about the impact their conduct or behaviour could have on a child. An example of conduct that may constitute a physical assault is an employee acting in a reckless manner that results in the employee unintentionally striking a child.

Investigations will often need to be undertaken before it is possible to determine whether or not the conduct or behaviour was reckless as it will frequently require an examination of all of the circumstances surrounding the incident.

What is significant neglect?

Neglect is a failure to meet the basic needs of a child. In deciding whether alleged conduct is significant neglect, it may be helpful to consider if:

- the worker or volunteer could have met the child's needs but failed to do so; and
- the failure was deliberate or reckless.

Examples of different types of neglect could include:

- **supervisory neglect:** This may occur when a person responsible for the care of a child is unable or unwilling to exercise adequate supervision or control of the child or young person.

- **medical neglect:** This may occur where there is a failure to seek or comply with appropriate or recommended medical treatment.
- **physical neglect:** This may occur where there is the failure to meet a child's physical needs including the provision of adequate and appropriate food, clothing, shelter or physical hygiene needs.
- **educational neglect:** This may occur when there is a failure to ensure that a child's formal education needs are being met.
- **emotional neglect:** This may occur where there is a failure to provide adequate nurturing, affection, encouragement and support to a child.

When is neglect 'significant'

The use of the word 'significant' refers to the impact on the child of the failure to act, not to the duration, severity or gravity of the outcome of the neglect. It is not necessary to establish whether any harm was suffered or whether any harm that did result could be treated, resolved or cured. It is the failure or failures that will be assessed for significance when considering whether conduct is reportable.

The Ombudsman defines 'significant' as a deliberate or reckless failure or failures that separately or together have had, or could have, considerable detrimental force or effect on the safety or wellbeing of the child who has been neglected.

While actual harm is not required, it is important to consider the possible harm or impact on a child as a result of the neglect to assess how significant the neglect is. The possible harm in question will be a consequence that a reasonable person would consider to be a likely result of the neglect.

For example, if a young child is locked in a hot car in summer, a reasonable person may conclude that this neglect could lead to this child suffering serious harm or possibly even death. Neglect that could lead to serious harm is likely to be significant neglect.

What is significant emotional or psychological harm to a child?

While a child can be significantly emotionally or psychologically harmed by behaviour, such as sexual offences, sexual misconduct, physical violence and significant neglect, other types of behaviours can also cause significant emotional and psychological harm to a child. Examples include:

- coercive or manipulative behaviour;
- hostility towards, or rejection of, a child;
- verbal abuse; and
- humiliation, belittling or scapegoating.

Identifying the elements

For reportable conduct involving significant emotional or psychological harm, the following elements must be present:

- a 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, chronic depression, post-traumatic stress disorder or the exacerbation or aggravation of an existing psychological condition, and
- an alleged causal link between the employee's conduct and the psychological harm to the child.

Further information regarding the 'clear link' and 'significant' elements is outlined below.

There must be a clear link between the behaviour and the harm

There must be a clear link between the alleged behaviour and the significant emotional or psychological harm. In deciding whether there is a clear link, it may be helpful to consider the likelihood that the child would have been harmed if the alleged behaviour had not occurred.

Significant emotional or psychological harm may also be caused where an existing mental health disorder, such as anxiety or depression, has been exacerbated.

A child may display physical or behavioural signs that suggest they may have experienced behaviour which has caused them significant emotional or psychological harm. These signs may include:

- suicidal action, suicidal ideation or self-harm;
- patterns of out-of-character, self-destructive, antisocial, or anxious behaviour;
- ongoing sleep disturbance, nightmares or bedwetting; and
- regression in behaviour.

The harm must be 'significant'

Allegations that are reportable under this category must concern significant emotional or psychological harm. To be considered significant under the scheme, the alleged harm must be more than trivial.

A professional psychological or medical assessment of the child may assist to determine whether they have suffered significant emotional or psychological harm.

However, a clinical diagnosis will not be required in every case, for example where:

- the alleged behaviour is so serious and/or occurred over such a sustained period, that it can be reasonably inferred that the child has been harmed, or
- assessment may unreasonably re-traumatise or otherwise further harm the child.

We encourage organisations to consult the Ombudsman if you need assistance to determine if the allegation involves significant emotional or psychological harm.

Does conduct that forms part of normal professional duties need to be notified?

Heads of organisations will not need to notify the Ombudsman about an allegation if:

- it is reasonable for the discipline, management or care of a child or of another person in the presence of a child, having regard to the characteristics of the child and any relevant code of conduct or professional standard that applied at the time; or
- it is trivial or negligible and that has been or will be investigated and recorded as part of another workplace procedure; or
- the conduct has been exempted by the Ombudsman from being reportable conduct.

For example, an employee restraining a child to prevent that child from hurting themselves or others would not need to be reported to the Ombudsman, as long as the employee's conduct was consistent with relevant codes of conduct or professional standards that applied at the time.

What is a reportable allegation?

A reportable allegation is any information that leads a person to form the belief on reasonable grounds that an employee (as defined under the Act) of an organisation covered by the Scheme has engaged in reportable conduct, whether or not the conduct is alleged to have occurred in the course of the employee's employment.

What is a reportable conviction?

A reportable conviction is, in summary, a conviction for an offence of a sexual nature committed against, with, or in the presence of a child. A conviction for an offence committed by a person includes:

- a court making a finding of guilt in relation to the offence;
- if there has been no formal finding of guilt before conviction, a court convicting the person of the offence;
- a court accepting a plea of guilty from the person in relation to the offence;
- a court acquitting the person following a finding under The Criminal Code section 27 that the person is not guilty on account of unsoundness of mind or an acquittal following an equivalent finding under a law of another State, a Territory or the Commonwealth; or
- a conviction that is a spent conviction (but does not include a conviction that is subsequently quashed or set aside by a court).

What must be notified to the Ombudsman?

Under the Scheme, both 'reportable allegations' and 'reportable convictions' need to be notified to the Ombudsman.

If you are unsure about the application of any of the definitions in this Information Sheet, we encourage you to seek the Ombudsman's advice.

Forming a belief on reasonable grounds

A reportable allegation is any information that leads a person to form a belief on reasonable grounds that an employee has engaged in reportable conduct or conduct that may involve reportable conduct, whether or not the conduct is alleged to have occurred in the course of the employee's employment. This includes where a reportable allegation is made against the head of the organisation.

The existence of some uncertainty or doubt about whether an employee engaged in reportable conduct or conduct that may involve reportable conduct does not prevent the reporting person from forming a belief on 'reasonable grounds' that the reportable allegation occurred.

A reporting person is not required to prove that a reportable allegation occurred.

A person is likely to form the belief on reasonable grounds if they:

- observed the child's behaviour;
- observed the conduct themselves;
- heard directly from a child that the conduct occurred; or
- received information from another credible source (including another witness).

Heads of organisations are required to notify the Ombudsman of reportable allegations even if they do not agree with or share the belief that the alleged conduct has occurred with the reporting person.

A reporting person does not have to be an employee of the entity. The head of the relevant entity must ensure that there is a system in place for enabling any person to report to the head of the relevant entity a reportable allegation or reportable conviction involving an employee of the relevant entity.

Further information regarding the obligations of employees to report can be found in the information sheet [About the Reportable Conduct Scheme](#). Heads of organisations should also ensure employees are familiar with their organisation's procedures for reporting, see information sheet [Responsibilities of the Head of an Organisation](#) for further information.

Where to get help

Organisations covered by the Scheme should contact the Ombudsman for clarification and guidance, and to talk through any issues of concern.

Telephone: (08) 9220 7471

Email:

reportableconduct@ombudsman.wa.gov.au

Website at www.ombudsman.wa.gov.au

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