

Child Protection - Reportable Conduct of Staff, Volunteers and Others

Reportable Conduct – Source of Obligation

The Ombudsman Act 1974 (NSW) (the Ombudsman Act) requires Pacific Brook Christian School to investigate and report to the NSW Ombudsman all allegations of Reportable Conduct that are made against "employees" at the School or any conviction of an offence involving Reportable Conduct as defined by the Ombudsman Act.

Reportable Conduct and Mandatory Reporting

In some cases, conduct that is Reportable Conduct which must be reported to the NSW Ombudsman must **also** be reported to the Department of Family and Community Services (FACS) and/or the Police in accordance with Mandatory Reporting procedures under the Children and Young Persons (Care and Protection) Act 1998 (NSW). A failure to make a report in accordance with this policy may amount to an offence under the Crimes Act 1900 (NSW).

However, it is important to understand that the Reportable Conduct obligation covered in this policy is separate and distinct from the Mandatory Reporting obligation (refer to **Child Protection - Mandatory Reporting**).

The Reportable Conduct threshold is much lower than the Mandatory Reporting threshold, so any matter involving a staff member that requires Mandatory Reporting must also be reported to the NSW Ombudsman under this policy.

Who is an Employee?

The Ombudsman Act defines an employee as:

- any employee of the School, whether or not the employment is in connection with any work or activities related to children, and
- any individual engaged by the School to provide services to children, including in the capacity of a volunteer

All staff members at the School are employees under the Ombudsman Act. The following people at the School are also considered employees for the purposes of Reportable Conduct:

- School Board directors
- the Principal
- Direct Contact volunteers
- Direct Contact contractors
- external education providers

What is Reportable Conduct?

Section 25A of the Ombudsman Act defines what type of conduct is, or is not, Reportable Conduct.

Reportable Conduct means:

- any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence, sexual touching or an offence involving child abuse material)
- any assault, ill-treatment or neglect of a child
- any behaviour that causes psychological harm to a child (whether or not, in any case, with the consent of the child).

A child is defined as a person under the age of 18 years.

What Conduct is Not Reportable Conduct?

Reportable Conduct does not extend to:

- conduct that is reasonable for the purpose of discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and 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 and the result of the investigation recorded under workplace employment procedures.

Some examples of conduct that would not constitute Reportable Conduct include touching a child to get their attention, to guide them or comfort them, a school teacher raising their voice to attract attention or restore order in a classroom, and conduct that is established to be accidental.

Key Definitions

The NSW Ombudsman has provided guidance on the meaning of key terms used in the definition of Reportable Conduct. Those terms are:

- sexual offence
- sexual misconduct
- assault
- ill-treatment
- neglect
- behaviour that causes psychological harm.

The definitions are provided by the NSW Ombudsman for the purposes of the Reportable Conduct scheme and they should not affect similar definitions provided in our **Child Protection – Abuse and Neglect Identification** and **Child Protection – Mandatory Reporting** policies.

Sexual Offence

A sexual offence is any criminal offence involving a sexual element that is committed against, with or in the presence of a child. Such offences include, but are not limited to:

- 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 (special care relationships as defined by the Crimes Act 1900 (NSW) including student/teacher relationships).

Sexual Misconduct

For sexual misconduct to constitute Reportable Conduct, the alleged conduct must have been committed against, with or in the presence of a child. The NSW Ombudsman identifies common forms of sexual misconduct as including, but not limited to:

- crossing professional boundaries
- sexually explicit comments and other overtly sexual behaviour
- grooming behaviour.

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.

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 Overtly Sexual Behaviour:

This may include, for example:

- sexualised behaviour including sexual exhibitionism
- inappropriate conversations of a sexual nature
- unwarranted and inappropriate physical contact with a child
- sexualised, romantic or otherwise personal correspondence and communications including via emails, social media, web forums and 'sexting'
- exposure of children to sexual behaviour including the display of pornography
- watching children undress in circumstances where supervision is not required and clearly inappropriate.

Grooming Behaviour:

For more information about the indicators of grooming behaviours refer to **Child Protection – Detecting, Reporting and Addressing Grooming Behaviours**.

Assault

The following types of conduct may, depending on the circumstances, amount to assault which constitutes Reportable Conduct:

- actual physical force – the intentional or reckless application of physical force against another person without their consent. For example: hitting, pushing or shoving
- apprehension of physical force – intentional or reckless conduct that causes another person to apprehend imminent physical force without their consent. For example, using words or gestures that lead the child to apprehend physical force.

The context in which actual physical force and apprehension of physical force occurs is crucial for determining whether in fact these types of conduct amount to assault. Injury is not an essential element of assault, and, alternatively, the existence of an injury does not necessarily mean that there was an assault.

For more information about the elements of assault, refer to "**Defining assault for the purposes of the reportable conduct scheme**", from the NSW Ombudsman.

Ill-Treatment

Ill-treatment is a term used to describe the circumstances where a person treats a child in an unreasonable and seriously inappropriate, improper, inhuman or cruel manner.

Examples of ill-treatment include:

- disciplining or correcting a child in an unreasonable and seriously inappropriate or improper manner
- making excessive and/or degrading demands of a child
- hostile use of force towards a child
- a pattern or hostile or unreasonable and seriously inappropriate, degrading comments or behaviour towards a child.

Neglect

Neglect includes either action or inaction by a person who has care responsibilities towards a child. In the School context, when considering whether a child has been neglected for the purposes of Reportable Conduct reporting, you must consider the person's responsibilities for the child and assess their action, or inaction, against their responsibilities.

The NSW Ombudsman identifies four categories of neglect:

- Supervisory Neglect
- Carer Neglect
- Failure to Protect a Child from Abuse
- Reckless Acts (or a Failure to Act).

Supervisory Neglect:

- an intentional or reckless failure to adequately supervise a child that results in the death of, or significant harm to, a child, or
- an intentional or reckless failure to adequately supervise a child, or a significantly careless act or failure to act that:
 - o involves a gross breach of professional standards, and
 - o has the potential to result in the death of, or significant harm to, a child.

Carer Neglect: grossly inadequate care that involves depriving a child of the basic necessities of life, for example food and drink, clothing, shelter and medical care/treatment.

Failure to Protect a Child from Abuse: an obviously or very clearly unreasonable failure to respond to information strongly indicating actual or potential serious abuse of a child.

Reckless Acts (or a Failure to Act): a reckless act, or failure to act, that:

Behaviour that Causes Psychological Harm

- involves a gross breach of professional standards, and
- has the potential to result in the death of, or significant harm to, a child.

Behaviour that causes psychological harm is conduct that is obviously or very clearly unreasonable and results in significant emotional harm or trauma to the child. Psychological harm can include the exacerbation or aggravation of an existing psychological condition, such as anxiety or depression.

For Reportable Conduct involving psychological harm, the following elements must be present:

- an obviously or very clearly unreasonable or serious act or series of acts that the employee knew or ought to have known was unacceptable
- 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
- an alleged causal link between the employee's conduct and the psychological harm to the child.

What happens when an Allegation of Reportable Conduct is made?

Initial Steps

Once an allegation of reportable conduct against an employee is received, the Head of Agency, who is the Principal, is required to:

- (a) determine on face value whether it is an allegation of reportable conduct;
- (b) assess whether Community Services or the Police need to be notified (ie, if reasonable grounds to suspect that a child is at risk of significant harm or a potential criminal offence). If they have been notified, seek clearance from these statutory agencies prior to the school proceeding with the Reportable Conduct investigation;
- (c) notify the child's parents (unless to do so would be likely to compromise the investigation or any investigation by Community Services or the Police);
- (d) notify the Ombudsman within 30 days of receiving the allegation;
- (e) carry out a risk assessment and take action to reduce/remove risk, where appropriate; and
- (f) investigate the allegation or appoint someone to investigate the allegation.

Investigation Principles

The School will:

- (a) be mindful of the principles of procedural fairness;
- (b) inform the person subject of the allegation (PSOA) of the substance of any allegations made against them and provide them with a reasonable opportunity to respond to the allegations;
- (c) make reasonable enquiries or investigations before making a decision;
- (d) avoid conflicts of interest;
- (e) conduct the investigation without unjustifiable delay;
- (f) handle the matter as confidentially as possible; and
- (g) provide appropriate support for all parties including the child/children, witnesses and the PSOA.

Investigation Steps

Process Sequence – Head of Agency (Principal)

- A signed written statement detailing the nature of the allegation will be sought by the Principal, where possible. Where the person making the allegation is unable or unwilling to sign a written statement, then the Principal is to record details of the allegation as reported using, as far as possible, the words used by the person making the allegation.
- The Principal must direct the person making the allegation to maintain confidentiality and provide them with a copy of this policy.
- The Principal shall advise the person making the allegation that counselling support is available.
- Upon receiving the allegation, the Principal shall, where required by law, notify the Police (sexual offences), FACS and the NSW Ombudsman promptly and report details of the allegation.
 - o Allegations of reportable conduct by employees or notification of any convictions against any employees for reportable conduct must be reported to the Office of the Children's Guardian within 30 days of the allegation being reported using the form provided.
- The Principal should advise the parents or care givers of the student(s) concerned as soon as possible after the allegations are reported, and the fact that the matter has been notified to FACS and the NSW Ombudsman.
- The Principal will advise the staff member against whom the allegation has been made:
 - o that the staff member can have a support person (including a lawyer) during the meeting;
 - o that an allegation has been made and that it is a reportable allegation;
 - o that a response is not required at the time of this interview;
 - o that counselling support is available for the staff member;
 - o the contact that the staff member will have with the student involved and other students and staff within or outside school hours and/or the nature of continued presence at the school during the investigation.
 - o This may involve a direction to undertake other duties at a different location or a direction to remain at home on pay.
- The Principal shall engage an independent investigator from the Association of Independent Schools of NSW (AIS) or an alternate independent investigator to conduct the investigation. The Principal (or delegate) may conduct a low level investigation provided there is no conflict of interest.
- The outcome of the investigation will be provided to the NSW Ombudsman and where required also to the Office of the Children's Guardian, by the Principal, in accordance with relevant legislation.

Risk Management: Risk Assessments

The Principal (or Executive Principal, where appropriate) is responsible for assessing the risk that the employee poses to students at three separate stages:

- after a reportable allegation is made
- during the investigation
- at the end of the investigation.

Stage One: After a reportable allegation is made

Immediately following an allegation, the Principal (or Executive Principal, where appropriate) will conduct a risk assessment which

considers:

- the nature and seriousness of the allegation(s)
- the vulnerability of the children who the employee would be in contact with while at the School – considering their age, communication skills etc
- the nature of the position occupied by the employee including the level of contact and interaction they have 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
- the employee’s disciplinary history
- other possible risks to the investigation.

These factors will assist the Principal (or Executive Principal, where appropriate) to make a decision about whether to move the employee into indirect contact work, or suspend them from work during the investigation. The decision the Principal (or Executive Principal, where appropriate) makes after the first risk assessment should not influence the final findings of the investigation.

Stage Two: During the investigation

New risks may emerge during the investigation into an allegation and it is important that such risks are managed. As part of managing the investigation, Principal (or Executive Principal, where appropriate) should ensure that appropriate support is provided for:

- the child(ren) who were the subject of the allegation
- the employee who was the subject of the allegation
- other relevant parties, including parents/carers.

Stage Three: At the end of the investigation

Refer to the **Making a Finding of Reportable Conduct** section of this policy.

Making a Finding of Reportable Conduct

Once the Principal (or Executive Principal, where appropriate) has concluded their investigation, the Principal or Executive Principal, as the decision-maker, should assess the evidence regarding the allegations of Reportable Conduct against the employee, as well as any conclusions or recommendations made by others involved in the investigation, and make a finding in relation to each allegation.

The Principal or Executive Principal’s finding will inform the School’s child protection risk assessment and any future action taken to mitigate ongoing risks.

When deciding whether the reportable allegation amounts to a finding of Reportable Conduct at the conclusion of their investigation, the Principal (or Executive Principal, where appropriate) must consider:

- the reliability of all evidence collected
- the relevancy of all evidence collected to the alleged conduct
- whether accounts of the alleged conduct are consistent over time and consistent with other evidence
- whether the evidence collected is plausible
- any other evidence that corroborates or contradicts the allegation.

Caution should be exercised when reaching a sustained finding of Reportable Conduct where the matter involves a criminal allegation, such as an allegation of sexual assault. The Principal or Executive Principal must take care to base their decision on clear and cogent evidence, rather than guesswork, suspicion or rumour. The more serious the alleged wrongdoing, the more care the Principal or Executive Principal should exercise in making their decision as to whether they are satisfied the alleged conduct has occurred.

For more information about evidentiary thresholds and examples of thresholds in each of the Reportable Conduct categories, refer to the NSW Ombudsman fact sheet **Child Protection: Notifying and identifying reportable conduct**.

Possible Findings to Be Made by the Principal

There are five possible findings that the Principal (or Executive Principal, where appropriate) can make following an investigation of a reportable allegation. These are:

- Sustained: finding that the alleged conduct did indeed occur
- Not Sustained: Insufficient Evidence: finding that there is some, but insufficient, evidence available to reasonably establish that the alleged conduct did occur
- Not Sustained: Lack of Evidence of Weight: finding that the evidence available is of such poor probative value, or lacking weight, that on the balance of probabilities the conduct did not occur
- False: finding that the alleged conduct did not occur
- Not Reportable Conduct: finding that the alleged conduct was not reportable – for example, conduct that was reasonable in the circumstances or accidental. This may also include ‘misconceived’ matters where allegations were made in good faith, however it was based on a misunderstanding of what occurred, and therefore the conduct is not reportable.

Disclosing Information about Reportable Conduct to Affected Children, Parents and Carers

Information can often be provided to the parent/carer of the child affected by reportable conduct allegations without the need to consider legal impediments. Section 25GA of the Ombudsman Act affords legal protection to the HOA, the Principal, and any person acting at the direction of, and with specific knowledge of, the Principal.

The following information can be disclosed to the child who was allegedly the subject of the reportable conduct and/or any parent, legal guardian or authorised carer of the child:

- information about the progress of an investigation
- the findings of an investigation
- any action taken in response to those findings.

Section 25GA removes legal impediments to disclosure but does not provide a list of information that may or may not be disclosed to the above parties. It is ultimately a matter of discretion whether a disclosure of information is appropriate in the circumstances.

For more information about matters to consider when disclosing information, refer to the NSW Ombudsman fact sheet **Providing advice about reportable conduct investigations to children, parents and carers**.

Impact on Working with Children Check

Where the investigation has led to findings against the employee, depending upon the seriousness of the allegations, the Principal will also need to notify the Office of the Children’s Guardian in relation to Working with Children Checks.

Refer to **Child Protection – Working with Children Checks**.

Crimes Act 1900 (NSW) Offences

There are various offences under the Crimes Act 1900 (NSW) (Crimes Act) which relate to the unique relationship between a student and persons who may be considered staff members and “employees” under this policy.

Those offences include:

- Section 66EB: Grooming a person for unlawful sexual activity with a child under the person's authority.
- Section 73A: Sexual touching – young person between 16 and 18 under special care.

The terms "under the person's authority" and "under special care" are defined differently under the Crimes Act:

- under the person's authority: means under the care, or under the supervision or authority, of the other person
- under special care includes:
 - a member of the teaching staff (a teacher, the Principal or deputy Principal or any other person employed at the School who has students at the School under their care or authority) of the School at which the victim is a student, or
 - a person with an established personal relationship with the student in connection with the provision of religious, sporting, musical or other instruction to the student.

Where the investigation has led to findings against the employee, which may constitute offences under the Crimes Act, the Principal (or Executive Principal, where appropriate) will need to notify the Police as a priority over the Pacific Brook Christian School's own internal investigation.

Staff Responsibilities

Staff must ensure:

- reports of employee misconduct are made as soon as possible to the Principal
- the Principal is notified of any convictions which relate to Reportable Conduct
- cooperation in any internal investigation
- confidentiality is maintained throughout the process
- records of all verbal and written communications are maintained and stored securely.

Implementation

All staff will be made aware of the policy through Annual Mandatory training which will involve:

- Staff meeting early Term One with presentation by the Principal. This meeting will cover areas of Child Protection and other Policies related to Student Duty of Care and Work Health and Safety. Minutes will be taken at the meeting and an attendance roll kept. Staff not attending will be expected to discuss this with their supervisor
- All staff will be asked to complete Training Modules in Complispace
- All staff will have to complete test Questions in Complispace in relation to Child Protection

New staff will be made aware of their Child Protection Obligations through:

- The Staff Induction Program conducted in Semester 1 and the Annual Mandatory Training Program

For new staff arriving during the year:

- Each staff member will meet with the Principal within the first week of employment
- Staff will then complete their Complispace training modules

Refer to the **Volunteer Management Policy** for the annual mandatory training of volunteers.

Our School publishes our **Complaints Handling Policy** and **Reportable Conduct of Staff, Volunteers and Others Policy** on the school website to ensure that stakeholders are aware of the School's guidelines and expectations regarding complaints or allegations of staff misconduct or reportable conduct, and how to make a complaint or report an allegation of misconduct or reportable conduct.

The School refers to the **Complaints Handling Policy** in our **JS Parent/Student Handbook** and **MS Parent/Student Handbook**.

Record Keeping

When a reportable allegation is made, it is important that the following information is documented:

- the allegation
- the School's initial response to the person making the allegation, the alleged victim(s) and the employee who is the subject of the allegation
- any communication with the Police or other authorities
- a plan detailing how the investigation is to be carried out including any notifications to Police or other authorities
- the Stage One risk assessments conducted by the Principal (or Executive Principal, where appropriate) and outlined above
- all interviews including details of questions and responses. Details should also include the location of the interview, who was present and start and finish times
- any decision made, either during or at the conclusion of the investigation, including the rationale, the position and name of the person making the decision and the date the decision was made
- any personal contact, discussions or emails with anyone about the matter (including dates, details of discussions, questions, advice, outcomes, the name and position of the person making the contact, and, where appropriate, the reason for the contact)
- a summary report that details the allegation, the investigation process, the findings in relation to each allegation (including the rationale for the finding), the final risk assessment (refer to the NSW Ombudsman fact sheet **Making a finding of Reportable Conduct**) (which includes any final decision about the employee and the factors that have been considered) and any subsequent action that is to be or has been taken.

Where possible, records should be verbatim and verified, signed and dated by all involved. Records should be kept separate, but linked by reference, to the employee's personnel file.

Records in relation to Child Protection are kept by the Principal or delegate and stored in the office of the Principal.

Discipline for Breach of Policy

Where a staff member breaches this policy, Pacific Brook Christian School may take disciplinary action, including in the case of serious breaches, summary dismissal (where appropriate).