



WAVERLEY COLLEGE

Child Protection - Reportable Conduct of Staff, Volunteers & Others

Reportable Conduct – Source of Obligation

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

Reportable Conduct & Mandatory Reporting

In some cases, conduct that is Reportable Conduct which must be reported to the NSW Ombudsman will **also** require reporting 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).

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 of Abuse & Neglect](#)).

The Reportable Conduct threshold is much wider than the Mandatory Reporting threshold and 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 College and any individual engaged by the College to provide services to children, including in the capacity of a volunteer.

Staff members are clearly employees under the Ombudsman Act. The NSW Ombudsman provides the following examples of other persons who would be an employee at the College:

- contractors;
- students on placement at the College;
- instructors of religion; and
- volunteers.

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 or an offence involving child abuse material); 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 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 college teacher raising their voice to attract attention or restore order in a classroom, or 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; and
- 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 the [Child Protection – Abuse, Grooming & Neglect Identification & Initial Notification Policy](#) or the [Child Protection – Mandatory Reporting of Abuse & Neglect Policy](#).

Sexual Offences

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; and
- deemed non-consensual sexual activity on the basis of special care relationships (special care relationships as defined by the Crimes Act 1900 (NSW) include 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; and
- grooming behaviour.

Crossing Professional Boundaries:

For more information about professional boundaries and expected appropriate behaviours of employees at the College, refer to the [EREA Child Safe Code of Conduct](#) which applies to a broad range of people as required by the definition of employee in the Ombudsman Act.

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; or
- 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 our [Child Protection – Detecting, Reporting and Addressing Grooming Behaviours Policy](#).

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; or
- 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; or
- a pattern of 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 College 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:

- involves a gross breach of professional standards;
and
- 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:

- 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

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; and
- An alleged causal link between the employee's conduct and the psychological harm to the child.

When & How Are Reportable Conduct Matters to be Reported to the Ombudsman?

The NSW Ombudsman must be notified of all reportable allegations and reportable convictions against College employees.

- *Reportable allegation* means an allegation of Reportable Conduct against a person or an allegation of misconduct that may involve Reportable Conduct.
- *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.

Any allegation of staff misconduct must be immediately reported to the Principal or Deputy Principal – Student & Staff Wellbeing and one of the College's Child Safety Officers. Should the matter involves the Principal or Deputy Principal – Student & Staff Wellbeing, the report must be made to the Regional Director via the EREA National Office at (03) 9426 3200.

Prior to making a report, Waverley College may call the NSW Ombudsman on the **Employment-Related Child Protection line** on **02 9286 1021** for guidance on how to manage the reporting process.

There are 2 stages of reporting. The Ombudsman must be notified:

- of the reportable allegation or conviction as soon as possible or within 30 days of Waverley College becoming aware of the allegation or conviction by lodging [Notification Form Part A](#);
- and
- of the findings of the investigation, as soon as possible once the investigation has been finalised by lodging [Notification Form Part B](#).

To maintain confidentiality, the forms must only be sent by registered mail, hand delivery, or courier to:

Attention – Employment Related Child Protection Division
NSW Ombudsman
Level 24
580 George Street
Sydney NSW 2000



Once a reportable allegation or conviction has been made (which does not require reporting to the Department of Family and Community Services under the [Mandatory Reporting obligations](#)) and the NSW Ombudsman has been notified, an investigation, by an investigator appointed by the Principal, will be conducted in such a manner as the particular circumstances demand. The Principal will ensure a risk assessment is conducted. Refer to Risk Management: Risk Assessments below.

It is important to note that an investigation must not be conducted in relation to an allegation that is the subject of Mandatory Reporting until clearance to do so is given by the Department of Family and Community Services or the Police, as this may compromise their investigations. When conducting an investigation principles of procedural fairness must be followed.

Investigations have the potential to create conflicts of interest. Conflicts may arise between an investigator's official duties and their private interests, which could influence the performance of the official duties. Investigators should be objective and impartial, and be seen as such. The College should manage any actual or perceived conflicts of interest. The NSW Ombudsman may intervene in an investigation or ask for further information during the course of the investigation.

Investigations of Reportable Allegations or Convictions

Risk Management: Risk Assessments

The Principal is responsible for ensuring a risk assessment is conducted in respect of:

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

These risk assessments should be conducted at three separate stages:

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

Stage One: After a reportable allegation is made

Immediately following an allegation, the Principal will ensure a risk assessment is conducted 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 College – 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; and
- other possible risks to the investigation.

These factors will assist the Principal to make a decision about whether to move the employee into direct contact work, or suspend them from work during the investigation. The decision the Principal 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 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; and
- 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 investigation has been conducted, the 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's finding will inform the College's child protection risk assessment and any future action taken to mitigate ongoing risks.

When deciding as to whether the reportable allegation amounts to a finding of Reportable Conduct at the conclusion of their investigation, the Principal 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, with other evidence;
- whether the evidence collected is plausible; and
- whether there is any other evidence to corroborate or contradict an 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 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 should exercise in making their decision as to whether they are satisfied the alleged conduct is sustained.

For more information about evidentiary thresholds and examples of thresholds in each of the Reportable Conduct categories, refer to the following publications from the NSW Ombudsman:

[Child Protection: Notifying and identifying reportable conduct.](#)

[Making a Finding of Reportable Conduct.](#)

Possible Findings to Be Made by the Principal

There are five possible findings that the Principal 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 following inquiries into the matter the alleged conduct did not occur;
- Not Reportable Conduct: finding that, following inquiries, the alleged conduct was not reportable – for example, conduct that was reasonable in the circumstances of 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, see the NSW Ombudsman publication:

Making a Finding of Reportable Conduct.

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 head of the Waverley College and any person acting at the direction of, and with specific knowledge of, the head of the Waverley College.

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; and
- 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 [Providing advice about reportable conduct investigations to children, parents and carers](#), from the NSW Ombudsman, March 2017.

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 Policy](#).

Workers' Responsibility

All employees are responsible to 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;
- co-operation in any investigation;
- confidentiality is maintained throughout the process; and
- records of all verbal and written communications are maintained and stored securely.



Implementation

This policy is implemented through a combination of:

- staff training;
- effective communication and incident notification procedures;
- effective record keeping procedures; and
- initiation of corrective actions where necessary.

Discipline for Breach of Policy

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

Related Policies

[Child Protection – Abuse, Grooming & Neglect Identification & Initial Notification](#)

[Child Protection – Mandatory Reporting of Abuse & Neglect Policy](#)

[Child Protection – Working with Children Checks Policy](#)

[Child Protection – Detecting, Reporting and Addressing Grooming Behaviours](#)

Key Reference

[Child Protection: Notifying and identifying reportable conduct](#)

[Defining assault for the purposes of the reportable conduct scheme](#)

[Making a finding of Reportable Conduct](#)



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