CHILD PROTECTION

REPORTABLE CONDUCT OF STAFF, VOLUNTEERS AND OTHERS

CSO Operational Policy

Catholic Schools Office
Diocese of Armidale

Child Protection - Reportable Conduct of Staff, Volunteers and Others

Reportable Conduct – Source of Obligation

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

Reportable Conduct and Mandatory Reporting

The Reportable Conduct obligation covered in this policy is separate and distinct from the Mandatory Reporting obligation under the *Children and Young Persons (Care and Protection) Act 1998 (NSW).*

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 of Abuse).

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.

Reporting to CSO Armidale

All allegations of child abuse or maltreatment, whether they involve Reportable Conduct or not, must be reported to the CSO Child Protection Officer within 24 hours of receiving the allegation.

Notification is to be made by emailing the Initial Child Protection Information Details and Exemption Notification Form via **childprotection@arm.catholic.edu.au**.

Who is an Employee?

The Ombudsman Act defines an employee as any employee of the School/College, whether or not the employment is in connection with any work or activities related to children and any individual engaged

by the School/College to provide services to children, including in the capacity of a volunteer.

Staff members are clearly employees under the Ombudsman Act. The following people are also employees at the School/College:

- School/ College Advisory Council members
- the Principal
- volunteers
- third party 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 Identification and Initial Notification and Child Protection – Mandatory Reporting of Abuse 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.

Crossing Professional Boundaries:

For more information about professional boundaries and expected appropriate behaviours of employees at the School/College, refer to our Code for Professional Conduct in the Protection of Children & Young People policy 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:

- crossing professional boundaries
- 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/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
- Career 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
- an alleged causal link between the employee's conduct and the psychological harm to the child.

When and How Are Reportable Conduct Matters Reported to the Ombudsman?

The NSW Ombudsman must be notified of all reportable allegations and reportable convictions against School/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 of a Child Protection nature, must be immediately reported to the Principal in the first instance. The Principal must then report the matter to the CSO Child Protection Team. However, should the allegation involve the Principal, the report is to be made directly to the Head of Human Resources & Capital Programs.

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

- as soon as practicable after becoming aware of the reportable allegation or conviction. The Head of Human Resources and Capital Programs will lodge the appropriate notification form, and
- of the findings of the investigation, as soon as possible once the investigation has been finalised by lodging the appropriate notification form.

Disclosure to Ombudsman of Information About Reportable Conduct

The Principal, the Head of Human Resources & Capital Programs or any other employee of the School/College may also disclose to the Ombudsman, or an officer of the Ombudsman, any information

that gives the Principal, Head of Human Resources & Capital Programs or other employee reason to believe that reportable conduct by an employee of the School/College has occurred.

Internal Investigations of Reportable Allegations or Convictions

Once an allegation of misconduct (which does not require reporting to FACS under the Mandatory Reporting Obligations) has been brought to the Principal's attention and the NSW Ombudsman has been notified, an internal investigation, led by the CSO will be conducted in such a manner as the particular circumstances demand. The CSO Child Protection Team will conduct a risk assessment. Refer to **Risk Management: Risk Assessments** below.

It is important to note that an internal 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 FACS or the Police, as this may compromise their investigations.

When conducting an internal investigation, principles of procedural fairness must be followed as outlined in the Responding to Allegations of Reportable Conduct and Allegations of Misconduct Made Against Employees: Procedure document.

Internal 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 School/ College manages actual or reasonably perceived conflicts of interest through our Conflicts of Interest Policy.

The NSW Ombudsman may intervene in an internal investigation or ask for further information during the course of the investigation.

Internal Investigation Processes Outline

To ensure that a person who is the subject of the reportable allegation knows what to expect during the School's/College's investigation processes, the following key steps must be taken.

Information Gathering:

The first step in an investigation is to gather all relevant information. This can be obtained from a range of sources:

- direct evidence or information can be obtained by speaking with those involved in the alleged incident (e.g. the child, witnesses or the employee)
- physical evidence can be obtained by collecting documents (e.g. rosters, emails), securing and inspecting objects (e.g. mobile phones, computers) and inspecting locations to check the relevant positions of parties and witnesses to the alleged incident (e.g. playgrounds,

classrooms). This process may include taking photographs and making drawings or diagrams of the location

- expert evidence can be obtained from people who have specialised knowledge in a specific field that the general public do not have, for example a medical practitioner may be relevant if they had examined a child or young person.

Where the Police or FACS have been involved, requests for information from, and the provision of information to these agencies will be made in accordance with Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998 (NSW).

Employee Response:

The point at which an employee is told about the allegation and given an opportunity to respond can be critical to the success of an investigation and can affect the degree and duration of stress experienced by the employee.

If the Police and/or FACS wish to interview the employee, the School/College must consult with the relevant agency about what should be disclosed to the employee.

When all relevant information has been obtained, the allegation will be formally put to the employee and the employee will be given an opportunity to respond, either at an interview or in writing. At an interview, the employee may wish to have a support person there, who may observe only and must not interrupt. The interview will be recorded verbatim where possible and all records will be verified as a true record of the interview by being signed and dated by all involved.

It may be necessary to re-interview the employee if new information or allegations come to light during the investigation.

Key Considerations:

To ensure that an investigation is properly conducted:

- everyone involved in the investigation should be reminded of the importance of confidentiality
- the parents/carers of any child involved should be advised and asked for permission to interview their child, if appropriate
- all interviews should be recorded verbatim where possible, and records should be verified, signed and dated by all involved
- any other allegations that emerge during the investigation process should be documented, together with details of any action taken by the School/College
- all relevant parties should be advised of the outcome of the investigation.

Risk Management: Risk Assessments

The Head of Human Resources & Capital Programs 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 CSO Child Protection Team 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/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
- other possible risks to the investigation.

These factors will assist the Principal (or the Head of Human Resources & Capital Programs, 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 Head of Human Resources & Capital Programs, 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, the CSO Child Protection Team 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/careers.

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 concluded t, the Head of Human Resources & Capital Programs, 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 Head of Human Resources & Capital Programs' finding will inform the School's/College'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 Head of Human Resources & Capital Programs 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 will 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 Head of Human Resources & Capital Programs 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 Head of Human Resources & Capital Programs 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 Head of Human Resources & Capital Programs.

There are five possible findings that the Head of Human Resources & Capital Programs 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, Head of Human Resources & Capital Programs and any person acting at the direction of, and with specific knowledge of, the Head of Human Resources & Capital Programs.

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 CSO as employer 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/College who has students at the School/College under their care or authority) of the School/College 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 Head of Human Resources & Capital Programs will need to notify the Police as a priority over the CSO's own 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.

Record Keeping

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

- the allegation
- the School's/College'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 CSO Child Protection Team 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.

All records created in accordance with this policy, including all allegations, outcomes of investigations and decisions to make or not make a reportable conduct report are maintained by **CSO Child Protection Team** and located **in a secure room at the CSO with restricted access**

Implementation

This policy is implemented through a combination of:

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

Discipline for Breach of Policy

Where a staff member breaches this policy, the CSO as employer may take disciplinary action, including in the case of serious breaches, summary dismissal.