



Reportable conduct: sexual offences and sexual misconduct

For the purposes of the child protection provisions in Part 3A of the *Ombudsman Act 1974* (the Act), 'reportable conduct' is defined in s.25A of the Ombudsman Act to include:

- any **sexual offence**, or **sexual misconduct**, committed against, with or in the presence of a child (including a child pornography offence).

The inclusion of the term 'sexual misconduct' in the definition of reportable conduct significantly extends the reach of the definition, so that reportable conduct includes a range of conduct beyond (but including) the more serious sexual misconduct that would ordinarily amount to a criminal sexual offence.

The purpose of this practice update is to facilitate a better understanding of the type of conduct that could be a sexual offence and/or sexual misconduct under Part 3A of the Ombudsman Act.

What is a 'sexual offence'?

The term 'sexual offence' encompasses all criminal offences involving a sexual element that are 'committed **against, with or in the presence** of a child'.

These offences include (but are not limited to) the following:

- indecent assault
- sexual assault
- aggravated sexual assault
- sexual intercourse and attempted sexual intercourse
- possession/dissemination/production of child pornography
- using children to produce pornography

- procuring children under the age of 16 years for unlawful sexual activity
- deemed non-consensual sexual activity on the basis of special care relationships¹.

A sexual offence will generally involve the police and/or the criminal courts.

What is 'sexual misconduct'?

(1) Crossing professional boundaries

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.

In this area of 'crossing professional boundaries' particular care should be exercised before making a determination of sexual misconduct. For example, an employee who, on an isolated occasion, engages in behaviour that involves little more than poor judgement could not be said to have engaged in sexual misconduct. However, **persistent** less serious breaches of 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.

¹ Section 73 of the *Crimes Act 1900* (NSW).

In relation to this area, relevant 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.

(2) Sexually explicit comments and other sexually overt behaviour

There is also behaviour involving sexually explicit comments and other sexually overt behaviour which can constitute sexual misconduct.² This conduct may include:

- inappropriate conversations of a sexual nature
- comments that express a desire to act in a sexual manner
- unwarranted and inappropriate touching
- sexual exhibitionism
- personal correspondence (including electronic communications, eg emails and text messages) with a child or young person in relation to the adult's sexual feelings for a child or young person
- exposure of children and young people to sexual behaviour of others including display of pornography
- watching children undress, eg in change rooms or toilets when supervision is not required or justified.

Once again, for sexual misconduct to be reportable, the alleged conduct must have been committed **against, with** or **in the presence** of a child.

² Some forms of this behaviour also involve crossing professional boundaries.

Level 24, 580 George Street
Sydney NSW 2000

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.



This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.

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Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

General inquiries: 02 9286 1000

Toll free (outside Sydney metro): 1800 451 524

Tel. typewriter (TTY): 02 9264 8050

Facsimile: 02 9283 2911

Email: nswombo@ombo.nsw.gov.au

Web: www.ombo.nsw.gov.au