

Information Sheet 9

Sexual misconduct under the Reportable Conduct Scheme

Sexual misconduct

The *Child Wellbeing and Safety Act (2005)* states that 'sexual misconduct, committed against, with or in the presence of, a child' is a type of reportable conduct. This information sheet provides guidance to assist organisations in deciding whether conduct or behaviour is considered as sexual misconduct under the Reportable Conduct Scheme (the scheme). As this guidance is of a general nature, it may not cover all possible situations. If further guidance is required, please contact the Commission to discuss your individual situation. This type of reportable conduct is intended to capture a broad range of misconduct of a sexual nature that can pose a significant risk to children, even if it falls below the criminal threshold.

Each allegation should be considered individually in order to determine whether the alleged conduct is sexual misconduct under the scheme. In deciding whether alleged conduct is sexual misconduct, it may be helpful to consider whether that conduct:

- amounts to misconduct
- is of a sexual nature, and
- occurred against, with or in the presence of, a child.

Misconduct

Conduct can be misconduct if it involves a departure from the accepted standards of the role performed by the worker or volunteer and the misconduct is intentional or seriously negligent.

It is important to note misconduct can be evidenced by a variety of behaviours including physical actions, in person communication and online communication (including email, social media, telephone, SMS, etc.).

Accepted standards

In order to identify the accepted standards of a role, it is important to identify the role that was being performed by the worker or volunteer at the time the alleged conduct took place.

The accepted standards of a role might be informed by applicable laws, policies, procedures, rules, professional standards and other guidelines. However, where there is no written guidance, it may be appropriate to take into account the commonly understood practices and responsibilities within a profession as well as community standards.

Importantly, a 'one off' incident that occurs as the result of an innocent mistake or poor judgment will not usually amount to misconduct. However, it is possible that a single instance can amount to misconduct. For example, if the conduct involves a substantial departure from the accepted standards or has serious consequences. Similarly, persistent less serious breaches can amount to misconduct, especially if the conduct continues to occur even though the worker or volunteer was aware, or should have been aware, that their behaviour was unacceptable.

Intention or serious negligence

'Intentionally' means to perform the conduct in a deliberate and voluntary way.



'Seriously negligent', in this context, means that:

- the conduct falls short of the standard of care exercised by a reasonable person with the characteristics of the worker or volunteer in all the circumstances; and
- the worker or volunteer was indifferent as to the wellbeing of those affected by their conduct.

Sexual nature

While it is not possible to list all of the different types of conduct of a sexual nature, it may be helpful to have regard to following factors including:

- the area of the body involved in the conduct,
- whether at least one of the reasons for the conduct was for sexual arousal or gratification, or
- whether the conduct was overly personal or intimate.

Area of the body

If the misconduct involves the genital or anal region, the buttocks, or breasts (either a child's or any other person's) this can indicate that the misconduct was of a sexual nature. However, it may be that another area of the body is involved in the conduct but, having regard to the circumstances of that body part's involvement, the conduct is considered sexual. It is not necessary that the misconduct involve an area of the alleged victim's body, but may involve an area of the body of the worker or volunteer or any other person or animal. For example:

- unwanted and inappropriate touching
- inappropriate conversations or communication about an area of the body or a sexual activity (including a desire to act in a sexual manner)
- exposure to sexual activity by others
- undressing or watching someone else undress.

If the conduct involves discussion or communication about a sex act then it is reasonable to conclude that that conversation concerns an area of the body that is sexual in nature.

Sexual arousal or gratification

If at least one of the reasons for the misconduct was for potential or actual sexual arousal or gratification, this can indicate that the misconduct was of a sexual nature. Such a finding should be made having regard not only to any reasons given by the worker or volunteer for their behaviour, but to all of the circumstances.

Grooming behaviour can be sexual misconduct. Grooming can involve the use of a variety of manipulative and controlling techniques used to build trust or normalise sexually harmful behaviour with the overall aim of facilitating exploitation or preventing disclosure (or both). Grooming can target those involved in gaining access to the child's life, including parents and other caregivers, colleagues and others in an organisation.

Some examples of some grooming behaviours include:

- initiating opportunities for unsupervised contact with a child or group of children
- spending inappropriate special time with a child
- inappropriately showing special favours to one child over others
- inappropriately allowing a child to overstep rules
- inappropriately giving gifts, money, alcohol or drugs
- asking the child not to tell anyone else about their conversations, activities or interactions.

Just because (for example) a worker or volunteer appears to favour one child or gives gifts to a child, does not necessarily mean that the conduct was grooming. To make a finding of sexual misconduct based on such behaviours, it will be necessary to find at least one reason for the behaviour was for potential or actual sexual arousal or gratification.

Grooming behaviour can also be a sexual offence. For example, communications intended to facilitate a sexual offence with a child under the age of 16 can be a sexual offence. If you are uncertain as to whether an allegation of grooming behaviour is a sexual offence, you should contact Victoria Police and the Commission for Children and Young People for guidance.

Overly personal or intimate

Even if the misconduct does not involve a part of the body, and the reasons for the misconduct did not involve potential or actual sexual arousal or gratification, misconduct may still be misconduct if it is overly personal or intimate.

Workers or volunteers from organisations that exercise care, supervision or authority over children can exercise power, influence or control over children. Mindful of this power imbalance, these workers and volunteers should always ensure that they maintain appropriate boundaries with children and not act in a manner that is overly personal or intimate.

Organisations investigating allegations of misconduct that is overly personal or intimate are encouraged to consider whether the misconduct was so personal or intimate in nature that:

- the alleged victim considered that the misconduct was sexual; or
- a reasonable person would regard the misconduct as sexual.

For example conduct that may be overly personal or intimate may include:

- communicating with a child outside of the usual channels of communication i.e. personal correspondence (including emails, social media and web forums) rather than sending letters home or talking with the parents
- having inappropriate conversations about former sexual partners or crushes
- inappropriately touching a child (even where the body part involved may not be overtly sexual, for example massaging a child in circumstances where that would not be part of the worker or volunteer's role).

Against, with or in the presence of a child

The sexual misconduct must either be:

- against a child (for example, a child is the victim or subject of the sexual misconduct), or
- with a child (for example, where the child is a participant in the sexual misconduct, but is not the subject of the sexual misconduct), or
- in the presence of a child (for example, a child witnesses sexual misconduct against an adult, where it was reasonably foreseeable that the sexual misconduct could be observed by a child).

Where to get help

The Commission encourages organisations covered by the Reportable Conduct Scheme to seek clarification, talk through issues of concern, or seek guidance by contacting the Commission:

- Telephone: (03) 8601 5281
- Email: contact@ccyp.vic.gov.au

You can also find more information on the Commission's website: www.ccyp.vic.gov.au

If you need an interpreter, please call the Translating and Interpreting Service on 13 14 50 and ask them to contact the Commission for Children and Young People on 03 8601 5281.