

CLASS OR KIND AGREEMENT

SECTION 33 (1), COMMISSION FOR CHILDREN AND YOUNG PEOPLE ACT 1998

1 Context for this Agreement

The Commission for Children and Young People does not condone violence towards children or neglect of children in any circumstances. This class or kind agreement does not condone such conduct. This class or kind agreement recognises that there are occasions when such conduct is not indicative of a carer's ongoing risk to children placed in their care, or to other children in other work environments.

2 Parties to this Agreement

This Agreement is between the Commission for Children and Young People and the Community Services Division of the Department of Human Services.

3 Who is covered by this Agreement

This agreement only covers authorised carers, however described, by the Community Services Division of the Department of Human Services.

4 What is covered by this Agreement

This Agreement sets out the kind of conduct that should not be reported to the Commission under the *Commission for Children and Young People Act 1998*. This Agreement needs to be read in the context of the Commission's *Working With Children Employer Guidelines* and the definitions in those Guidelines. The glossary at the end of this Agreement defines key terms used throughout the Agreement.

The Agreement covers all matters reported to the Commission in the past as well as current and future matters.

5 What must *not* be reported as a Relevant Employment Proceeding

The Community Services Division will not report as a "Relevant Employment Proceeding":

- § any matters where it has found no evidence that the conduct occurred
- § any conduct that does not meet definitions of a Reportable Conduct in the *Working With Children Employer Guidelines* (see Appendix for these definitions)
- § any conduct that is reasonable for the purposes of the discipline, management care of the child or children involved, having regard to the age, maturity, health or other characteristics of the child or children and to Departmental codes of conduct or professional standards
- § any conduct that involved minor or trivial use of physical force against a child or children, for example
 - isolated incidents of smacking;
 - minor and transitory restraint of a child;
 - pushing or pulling a child;

- reasonable self defence against acts or threats of physical contact by child or young person.
- § any conduct that involved reasonable physical force required to properly support a child or children, for example to disarm a young person seeking to harm himself or another; to separate young people who are in the act of fighting; or to move a young person from a place where he or she may be harmed
- § any conduct where neglect did not result in harm to a child; including
 - isolated incidents of sending a child to school without enough food or clothing;
 - leaving a child unkempt;
 - leaving a child unattended where there was no immediate danger or risk and the child was of sufficient age and capacity to be left alone;
 - isolated incidents of providing inappropriate accommodation.
- § any conduct that did not result in psychological harm requiring intervention; conduct that results in emotional distress without long term effects is not reportable.

6 What must be reported as a Relevant Employment Proceeding

The Community Services Division needs to report as a Relevant Employment Proceeding all completed employment proceedings where it finds:

- § that any sexual offence or sexual misconduct committed with, against or in the presence of a child occurred, or there is some evidence that it occurred (sex offences include child pornography, filming for indecent purposes, and grooming for sex offences)
- § that a carer committed a physical assault on a child, or there is some evidence that this occurred, **and** the assault is not exempted from reporting under part 4 of this Agreement
- § that a carer's neglect resulted in harm to a child, or there is some evidence that a child was harmed through neglect
- § that a carer committed an act of violence in the course of employment and in the presence of a child, or there is some evidence that this conduct occurred (this is where the child is not a victim of the violence)
- § that a carer supplied a prohibited drug to a child.

7 When to report a Category Two notification

The *Working With Children Check Guidelines 2004* establish two levels of notification. Category one matters are those where the employer has found that the reportable conduct occurred; Category two matters are those where the employer has found some evidence that the reportable conduct occurred, but the evidence is insufficient to prove it occurred. Matters notified as Category two do not count in background checks unless there are additional relevant records for the applicant. The Community Services Division should report as Category Two matters:

- a finding there is some evidence that conduct listed in part 5 of this Agreement occurred, but the finding is inconclusive

- a finding that a physical assault occurred or an act of violence occurred, but after investigation the Division determined that the conduct was not significantly detrimental to the child and might be considered within the range of normal parenting in a non-fostering family.

8 How to define outcomes of an investigation

When the Division has completed its investigation, it will need to determine both the outcome for the employee, and what external reports need to be made. The requirement to report matters to the Ombudsman is separate from the requirement to report to the Commission for Children and Young People. Reporting to the Ombudsman is not covered by this Agreement.

9 Rationale for this Agreement

Foster carers provide care to children as if they were family members. They care for their foster children in their own homes. While there is some training for foster carers, their parenting is largely unsupervised. They must make choices and decisions, like other parents, in complex and challenging relationships. The demands and pressures within family relationships, as experienced by authorised carers and the children placed with them are significantly different from those expected in a paid work environment. Conduct that would not be reportable to the Commission within a non-fostering family becomes reportable conduct in relation to fostered children.

The Community Services Division manages allegations of misconduct in keeping with its obligations under the *Ombudsman Act 1974*. The Division follows the procedures endorsed by the Ombudsman for the recording and investigation of allegations and complaints about its employees. The Ombudsman reviews the Division's overall recording and investigative practices. The Ombudsman has legislated powers of review to allow the examination of the Division's handling of individual matters and the systems used. These arrangements provide for the integrity of the Division's complaints management systems

SIGNED BY

**GAYE PHILLIPS
COMMISSIONER FOR CHILDREN
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**ANNETTE GALLARD
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COMMUNITY SERVICES DIVISION OF THE
DEPARTMENT OF HUMAN SERVICES**

DATE

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Appendix 1 Glossary

Act of violence (Section 5.5 Working With Children Employer Guidelines)

For an act of violence to be reportable, it must be an act or series of related acts that involve violent conduct;

- § are committed in the course of employment;
- § are committed in the presence of a child; and
- § result in injury, either physical or emotional, to the child.

An act of violence is not necessarily committed on, or directed at, a child. It also includes violent conduct towards property as well as violent conduct towards persons. For example, where an employee acts with violence towards another adult in the workplace in the presence of a child, this can result in a relevant employment proceeding. However, small and insignificant actions such as throwing a book on the ground or slamming doors do not constitute acts of violence and should not be reported.

A reportable act of violence does not include acts which are trivial or negligible. Some behaviour, such as a one-off incident of an employee hitting a desk in front of a child in anger, may be undesirable in the workplace. However, it does not constitute an act of violence.

In all instances the act of violence must result in injury, either physical or psychological, to the child.

Behaviour that causes psychological harm (Section 5.5 Working With Children Employer Guidelines)

There are three elements in a finding of behaviour that causes psychological harm. There must be:

- § significant emotional harm or trauma to a child;
- § inappropriate behaviour by the offender; and
- § a causal link between the behaviour and the harm.

The consequences of psychological harm are long-term and include feelings of guilt, distress, low self-esteem, depression, self-destructive behaviour and can result in delays to normal development, interpersonal relationships and learning development. Psychological harm is typically characterised by a consistent or repetitive pattern of behaviour by the employee. Isolated or minor incidents generally do not result in significant psychological harm or trauma.

Examples of behaviour that causes psychological harm may include repeated acts that degrade or belittle a child and isolating a child by continually denying them the opportunity to participate or restricting their freedom of movement.

The NSW Ombudsman document *Child Protection in the Workplace: Responding to Allegations Against Employees (June 2004, 3rd edition)* provides further assistance on what constitutes reportable conduct. It is available from the NSW Ombudsman's website at www.ombo.nsw.gov.au.

Completed Relevant Employment Proceedings (Section 39 (1A), *Commission for Children and Young People Act 1998*):

Relevant employment proceedings are taken to have been completed when a finding has been made by the employer as to whether the alleged reportable conduct, or the alleged commission of an act of violence, occurred or may have occurred, and a decision has been made by the employer as to what action (if any) is to be taken against the employee in respect of the finding.

Ill-treatment (Section 5.5 Working With Children Employer Guidelines)

Ill-treatment of a child occurs where a child is corrected or disciplined in excess of what is reasonable or appropriate for the situation.

Discipline may be considered excessive if it is a disproportionate response to a child's behaviour. Discipline can be considered inappropriate if it is unsuitable for the child for a specific reason such as the child's age, physical ability, developmental level or if the discipline violates community standards. You should consider whether the treatment may affect the long-term well-being of the child.

For example, locking a child in a cupboard as punishment for talking, or tying a child to a chair because they wandered, are excessive and inappropriate forms of discipline that would be regarded as ill-treatment.

Supplying prohibited drugs to a child is another example of ill-treatment.

Neglect (Section 5.5 Working With Children Employer Guidelines)

Neglect occurs when a child is harmed by the failure to provide basic physical and emotional necessities of life. For example, failure to provide or arrange for adequate and proper food, supervision, nursing, clothing, medical attention or lodging for a child. Generally neglect offences are linked to a person with care responsibilities for a child, such as a foster carer.

Neglect can be ongoing or a single significant incident. However, neglect typically develops as a pattern of behaviour that results in harm to a child over a period of time. For example, accidentally leaving a child locked in a room alone for a short period, and after all standard workplace procedures have been followed, is not considered to be neglect, though it may be inappropriate professional conduct. When considering whether a child is being, or has been, neglected, it may be useful to focus on the effect on the child. Incidents that do not suggest any impact on the long-term physical, emotional or intellectual well-being of the child are unlikely to constitute neglect.

Physical assault (Section 5.5 Working With Children Employer Guidelines)

Physical assault must include all three of the following elements:

- § it is an act committed on or towards a child; and
- § it involves either the application of force to a child or an act that causes a child to think that immediate force will be used on them; and
- § it is either hostile or reckless (a reckless act is one where a person would reasonably foresee the likelihood of inflicting injury or fear and ignores the risk).

A child does not have to be physically injured in order for an assault to have taken place. However, a child must be put in fear that they will be harmed as a result of the act.

Assault is a serious matter against a person in child-related employment. Physical contact which is part of a daily work relationship should not automatically be considered to be assault even if there is anger or emotion involved. Shouting at a child would not be considered as assault.

Physical contact which is an inevitable part of everyday life does not amount to assault. Physical assault does not include behaviour that is reasonable for the purposes of discipline, management or care of children, or the use of physical force that is trivial or negligible, but only if the employer is an agency to which *Part 3A of the Ombudsman Act 1974* applies and the matter is to be investigated and the result of the investigation recorded under workplace employment procedures.

Reportable conduct (Section 33(1), *Commission for Children and Young People Act 1998*):

- a) *Any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence) or*
- b) *Any assault, ill-treatment or neglect of a child, or*
- c) *Any behaviour that causes psychological harm to a child.*

Reportable conduct does not extend to

- a) *Conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or*
- b) *The use of physical force that, in all the circumstances, is trivial or negligible, but only if the employer is an agency to which Part 3A of the Ombudsman Act 1974 applies and the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or*
- c) *Conduct of a class or kind that is exempted from being reportable under the guidelines under section 35.*

Sexual misconduct (Section 5.5 Working With Children Employer Guidelines)

Sexual misconduct describes a range of behaviours or a pattern of behaviour aimed at the involvement of children in sexual acts. Some of these behaviours may include:

- § any sexual relationship with a child;
- § inappropriate conversations of a sexual nature;
- § comments that express a desire to act in a sexual manner with individual children or young people;
- § unwarranted and inappropriate touching of a child, or in the presence of a child;
- § sexual exhibitionism in the presence of a child;
- § personal correspondence (including electronic communication) with a child or young person in respect of the adult's sexual feelings for a child or young person;
- § deliberate exposure of children and young people to sexual behaviour of others including display of pornography;
- § possession of child pornography; and

- § patterns of behaviour aimed at engaging or 'grooming' a child as a precursor to sexual abuse.

Sexual misconduct includes '*grooming behaviour*', or patterns of behaviour aimed at engaging or 'grooming' a child as a precursor to sexual abuse. However, such abuse need not have happened for grooming to have occurred. The grooming process can include:

- § persuading a child that a 'special' relationship exists – spending inappropriate special time with the child, inappropriately giving gifts, showing special favours to them but not other children, allowing the child to overstep rules, etc.;
- § testing of boundaries – undressing in front of the child, allowing the child to sit on the lap, talking about sex, 'accidental' touching of genitals, etc.;
- § establishing relationships outside the employment relationship – grooming should not be assumed where such relationships are the result of a relationship established before employment; and/or
- § inappropriate personal correspondence, including electronic communication, with a child.

These behaviours may not indicate risk if they occur in isolation, but if there is a *pattern* of behaviour occurring, it may indicate grooming.