

## Child Care Insights

### A Reminder: Child Care providers in Victoria, now subject to the Victorian Reportable Conduct Scheme.

The new laws which applied from 1 January 2019, regulate the way in which employers in the child care industry identify, investigate and respond to all child safety allegations. The laws apply to all Victorian approved child care providers under the *Education and Care Services National Law Act 2010* (Vic) and any children's service under the *Children's Services Act 1996* (Vic); such as kindergartens, child care centres, after hours care services and occasional care service providers.

The Scheme is overseen by the Commission for Children and Young People (the Commission), and operates alongside existing Child Safety Standards and protection measures.

In addition to existing reporting requirements, the new laws impose responsibility for compliance with the Scheme on the individual who is the 'Head of Organisation' for a child care provider.

Reportable conduct includes any of the following:

- 1) **Sexual offences** which are actions against, with, or in the presence of a child, such as sexual assault, possession of child abuse material, 'grooming' a child in order to commit a sexual offence, or indecent acts. An employee/ volunteer does not need to be charged with, or found guilty of, a sexual offence for their behaviour to be reportable conduct.
- 2) **Sexual misconduct** which is defined as inappropriate behaviours of a sexual nature that are not necessarily criminal, such as physical contact or speech or other communication of a sexual nature. Sexual misconduct can capture physical actions, in person communication, and online communication including email, social media, telephone or SMS.

When considering whether the behaviour is of a sexual nature, factors to be considered include:-

- The area of the body involved in the conduct
- Whether the reasons for the conduct was sexual arousal or gratification; or
- Whether the conduct was overly personal or intimate.

3) **Physical violence** of an employee or volunteer committed against, with or in the presence of a child. This category includes both actual physical violence and apprehended physical violence:

- Actual physical violence is where an employee/ volunteer intentionally or recklessly uses physical force against, with or in the presence of a child, which can cause injury or harm to the child
- Apprehended physical violence occurs when an employee/ volunteer intentionally or recklessly engages in conduct or behaviour against, with or in the presence of a child could cause a child to think that physical force is about to be used against them or another person, regardless of whether the employee/ volunteer intended to apply any physical force.

4) **Behaviour of an employee or volunteer that causes significant emotional or physical harm to a child.**

Examples could include verbal abuse, coercive or manipulative behaviour, hostility towards or rejection of a child, humiliation, belittling or scapegoating a child. A child may display physical or behavioural signs of harm such as sleep disturbance, nightmares, antisocial or anxious behaviour, or self-harm.

5) **Significant neglect** of a child. This can occur if:-

- There has been a failure to meet the basic needs of a child, such as their wellbeing and safety
- The employee/ volunteer could have met the child's needs but failed to do so
- There is a sufficient connection between the child and the employee/ volunteer who failed to meet the basic needs of the child (for example some degree of direct care, supervision or responsibility for the child).
- The neglect was significant
- The failure was deliberate or reckless

To be **significant**, allegations must concern significant emotional or psychological harm or neglect that is more than trivial or insignificant, but need not be serious or have a lasting permanent effect.<sup>1</sup> The word 'significant' refers to the quality of the failure to act, not to the duration, severity or gravity of the outcome of the neglect. It is not necessary to establish whether any harm occurred or whether any harm that did result, could be treated, resolved or cured.

In assessing whether significant neglect has occurred, it may be useful to consider whether there has been a **deliberate, or reckless** failure to meet a child's basic needs, in circumstances where the

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<sup>1</sup> *Child Wellbeing and Safety Act 2005 (Vic)*.

employee/ volunteer could have chosen to meet the needs but did not. Examples include engaging in behaviour:

- even though he/she was aware that the behaviour could result in a failure to meet the needs of the child, or
- without caring whether the child's needs would not be met as a result.

Allegations must be reported and investigated even if the conduct:-

- occurred outside the workplace,
- was reported after the person left the childcare provider's employment, and
- regardless of whether the employee or volunteer works/ worked with children.

An allegation may not be reportable if the employee/ volunteer:

- has taken reasonable steps to protect a child from immediate harm
- has responsibility for discipline and has taken reasonable action in line with organisational policy
- is an appropriately qualified person, and has given medical treatment in good faith, such as administering first aid.

The obligations to report exist, regardless of the source of the allegations.

Systems must be in place to enable anyone to notify their concerns or allegations to a child care provider, and there must be clearly defined processes to investigate and report on allegations, and abuse prevention strategies in place.

There are strict requirements and time frames for investigation and reporting of allegations to the Commission.

The Head of Organisation must ensure:-

- the Commission is notified when a reportable allegation is made, within three business days of becoming aware of reportable conduct allegations.
- a fair and thorough investigation of the reportable allegation (this could include appointing an independent investigator)
- the Commission is provided with information or documents relating to the reportable allegation
- within 30 days, an investigation report is provided to the Commission, with detailed information on the allegation, the disciplinary or other actions proposed, and any response of the employee/ volunteer to the allegation
- provide a copy of the investigation findings to the Commission, and the reasons for disciplinary actions taken, or not taken.

A failure to notify the Commission of Reportable Conduct is an offence, and the Head of Organisation can be individually penalised.

If the Reportable Conduct involves suspected criminal behaviour, the Head of Organisation must notify both Victoria Police and the Commission before commencing an investigation. Heads of Organisations should be aware that other applicable laws and obligations may apply such as employment laws, and other reporting requirements of their regulators.

An earlier article by Meridian Lawyers [High stakes for organisational Heads as Victoria introduces new requirements](#) provides more detail on the Scheme.

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