



Protocol: Reporting inappropriate employee conduct to the NSW Ombudsman

This protocol sets out the requirements of the Ombudsman Act 1974 (NSW) in relation to dealing with reportable allegations and reportable convictions relating to employees. It also outlines the Archdiocese's expectations of employees, volunteers and religious appointees.

Key obligation

Under the *Ombudsman Act 1974* (NSW) (**Ombudsman Act**), the head of a designated government or non-government agency is required to report any reportable allegations or reportable convictions of employees to the NSW Ombudsman.

1 Application of the Ombudsman Act

- 1.1 Many non-government agencies that work with children in NSW must comply with obligations to report to the NSW Ombudsman certain types of conduct by employees and certain convictions affecting employees.

2 Who is the relevant head of agency?

- 2.1 Under the Ombudsman Act, obligations fall on the head of an agency.
- 2.2 The Archbishop of Sydney is head of agency for the Archdiocese.
- 2.3 In the Archdiocesan context, the Archbishop is "head of agency" for all parishes and agencies, including the Sydney Catholic Schools (**SCS**), Catholic schools and CatholicCare.
- 2.4 The Archbishop has delegated his responsibilities in this regard to the:
 - a) Executive Director of Catholic Schools, Sydney in respect of the CEO and schools;
 - b) Chief Executive Officer of CatholicCare in respect of CatholicCare; and
 - c) Vicar General in respect the parishes and other agencies of the Archdiocese.

3 Who is an employee?

- 3.1 Under the Ombudsman Act, an "employee" of an agency includes:
 - a) any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children; and
 - b) any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).
- 3.2 This is a very broad definition that covers many persons who would not traditionally be considered employees, such as contractors, volunteers, students on

placement and priests and other religious personnel. In addition, it covers persons who do not have a role that has any face to face or physical contact with children.

- 3.3 The breadth of this definition means that the conduct of persons such as Parish Priests or administrators (not traditional employees) and a parish financial administrator (not in a child-related role) may be reportable to the NSW Ombudsman.

4 Obligation to report

- 4.1 The Ombudsman Act requires that heads of agencies must notify the NSW Ombudsman of any reportable allegation or reportable conviction against an employee of the agency of which the head of agency becomes aware:

- a) A **reportable allegation** means an allegation of **reportable conduct** against a person or an allegation of misconduct that may involve reportable conduct.
- b) A **reportable conviction** means a conviction in NSW or elsewhere, of an offence involving **reportable conduct**. It includes a finding of guilt even if the court did not proceed to a conviction.

- 4.2 “**Reportable conduct**” includes:

- a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child, including a child pornography offence;
- b) any assault, ill-treatment or neglect of a child; and
- c) any behaviour that causes psychological harm to a child, regardless of whether the child has given consent.

- 4.3 Despite the fact that not all inappropriate conduct is reportable to the NSW Ombudsman, the NSW Ombudsman requires that all inappropriate conduct be investigated and properly dealt with.

5 Reportable allegations

5.1 Current allegations

All current reportable allegations must be reported to the NSW Ombudsman as soon as practicable and no later than 30 days after the Vicar General (as the Archbishop’s delegate) becomes aware of the matter.

5.2 Historical allegations

- a) In addition, certain historical reportable conduct must also be reported.
- b) An historical allegation arises where the Archdiocese becomes aware of allegations that relate to conduct or behaviour that is not recent.
- c) The Archbishop’s obligations to notify the Ombudsman extend to historical allegations if all of the following conditions are satisfied:
 - i) **Condition 1:** The Archbishop is aware of allegations that meet conditions 2 and 3 and has that awareness at any time after 7 May 1999 (commencement date of the relevant provisions).

- ii) **Condition 2:** The allegations are made against a current “employee”.
 - iii) **Condition 3:** The allegations relate to reportable conduct by the current employee.
- d) The nature of historical allegations means that the person against whom the allegations are made will often no longer be an “employee” of the agency. In determining whether the person is an employee or not, the following guidelines should be followed:
- i) If the identity of the person the subject of the allegations cannot be ascertained despite reasonable efforts to do so, no report is required as it cannot be verified that the person is currently an employee.
 - ii) The person can be identified and the other conditions are satisfied:
 - A) If the person is still an employee of the agency, the agency must make a report regardless of when the conduct is said to have happened.
 - B) If the person is no longer engaged as an employee at the particular parish or agency, but engages in other work for the Archdiocese, they are still a current employee, and the conduct is reportable.
 - C) If the person is no longer an employee and is not providing any ongoing services to the agency, no report to the NSW Ombudsman is required but other steps such as a report to the NSW Police may be appropriate. If the agency is aware that the person is an employee of another agency, the agency should consider raising this with the other agency and/or the NSW Ombudsman; and
 - D) If the person is no longer an employee, but does provide ongoing services to the agency that do not constitute “employment” in the sense required under the Ombudsman Act, no report to the NSW Ombudsman is required, but other steps such as a report to the NSW Police may be appropriate. As a matter of practice, the Archdiocese often still reports these types of matters.
 - e) It is irrelevant that the conduct might not have been reportable conduct at the time it occurred (either because it occurred before the commencement of the relevant parts of the legislation or for any other reason). The conduct must be assessed against the definition of reportable conduct applicable at the time of notification.

6 Reportable convictions

- 6.1 From time to time, the Vicar General (as the Archbishop’s delegate) may become aware that an employee has been convicted of a child related offence.
- 6.2 Depending on the nature of the conviction and the status and role of the employee, such a conviction may be a “reportable conviction” for the purposes of the Ombudsman Act.

- 6.3 In most cases where the Archbishop or his delegate becomes aware of a reportable conviction, it will be because of contemporaneous events and there will be little if any difficulty in identifying whether or not the conviction should be reported to the NSW Ombudsman.
- 6.4 Where the Archbishop or delegate receives information about a conviction that is vague or incomplete (for example where there is a rumour or other unsubstantiated report of a historical conviction), it may be difficult to determine whether or not the conviction is reportable. Options include seeking clarification from the relevant employee, taking other steps to verify the truth or otherwise of the information or simply reporting the information to the Ombudsman.

7 Exemptions

- 7.1 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;
 - b) 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; and
 - c) conduct of a class or kind that the NSW Ombudsman has ruled does not need to be notified.
- 7.2 Only the Vicar General (as the Archbishop's delegate) may apply to the NSW Ombudsman to make a determination that certain conduct of a class or kind arising at the parishes and/or agencies need not be notified.
- 7.3 **Importantly, a report is not required to be made to the NSW Ombudsman if it relates to a matter learned of by a priest or other religious appointee during confession.**

8 Archdiocese policy and procedure

8.1 Notification to Parish Priest (or administrator) or agency head

- a) The Archdiocese requires that all employees, volunteers, priests and religious brothers and sisters must immediately report all concerns and complaints involving any inappropriate or unsafe conduct by another employee, volunteer, priest or religious brother or sister towards or in the presence of children to their Parish Priest (or administrator) or agency head (whoever is relevant).
- b) Guidance can be sought from Safeguarding and Ministerial Integrity Office, the Parish Advisory Service and the Parish and Agency Child Protection Manual in this regard.
- c) (If that conduct constitutes a serious indictable offence, the relevant employee, volunteer or religious appointees must also immediately report the suspected offence to the NSW Police in accordance with the **Protocol: Reporting serious indictable offences to the NSW Police.**)

- d) No employee, volunteer or religious appointee should attempt to undertake their own investigation before reporting the matter.

8.2 Notification to Vicar General

- a) The Parish Priest (or administrator) or agency head (whoever is relevant) must then immediately report the matter to the Vicar General, regardless of whether:
 - i) there has been a formal complaint or allegation from the alleged victim or their parent or guardian; or
 - ii) the relevant allegation has been made anonymously or confidentially.
- b) A non-exhaustive list of matters that must be reported by Parish Priests (or administrators) and agency heads includes:
 - i) allegations or complaints of inappropriate or unsafe conduct towards or in the presence of children relating to members of the clergy, religious brothers or sisters;
 - ii) allegations or complaints of inappropriate or unsafe conduct towards or in the presence of children relating to themselves;
 - iii) allegations or complaints of inappropriate or unsafe conduct towards or in the presence of children relating to employees or volunteers of the parish or agency;
 - iv) historical complaints involving any of the above categories;
 - v) complaints involving any of the above categories where the child concerned may have "consented" to the alleged conduct; and
 - vi) complaints involving any of the above categories where there may be insufficient detail about either the alleged perpetrator or alleged victim to identify them.
- c) If the Parish Priest (or administrator) or agency head has concerns about whether the relevant conduct is reportable, they should contact:
 - i) Safeguarding and Ministerial Integrity Office; or
 - ii) the Parish Advisory Service.
- d) No Parish Priest (or administrator) or agency head should attempt to undertake their own investigation before reporting the matter.

8.3 Standing down of alleged perpetrator

- a) Once the matter has been notified to the Vicar General, he must immediately arrange for the alleged perpetrator to be stood down from their position.
- b) Depending on the circumstances, the Vicar General may exercise his discretion not to stand the alleged perpetrator down. If the Vicar General requires advice in this regard, he should contact the Archdiocese's General Counsel or external lawyers.
- c) If the alleged perpetrator is a member of the clergy, his faculties will be removed by formal letter from the Archbishop.

8.4 Notification to NSW Ombudsman

- a) The Vicar General must then determine whether the matter is required to be reported to the NSW Ombudsman.
- b) In making this determination, the Vicar General may seek advice from:
 - i) the General Counsel of the Archdiocese;
 - ii) external lawyers; or
 - iii) an appropriate contact person in the NSW Ombudsman's Office.
- c) If appropriate, the Vicar General will notify the NSW Ombudsman of the matter using the NSW Ombudsman's Form A.
- d) If the Vicar General chooses not to notify the NSW Ombudsman, or the NSW Ombudsman indicates the matter does not fall within his jurisdiction, the Vicar General will exercise his discretion to determine whether the steps in 8.6 and 8.7 below should still be completed. The Vicar General may choose to seek advice from any of the persons described in 8.4b) in this regard.

8.5 Investigation by the NSW Police

- a) If the matter has also been reported to the NSW Police (see 8.1c), the notification to the NSW Ombudsman will indicate that the Archdiocese will not take any action pending the conclusion of that investigation.
- b) If the NSW Police decide to proceed with an investigation and/or charge the offender, the matter is put on hold within the Archdiocese pending the outcome of the investigation/court proceeding.

8.6 Investigation by the Archdiocese

- a) If:
 - i) no investigation is commenced by the NSW Police; or
 - ii) the NSW Police conclude they will not investigate or seek to lay charges,the Vicar General must appoint an independent investigator to conduct an investigation into the matter.
- b) The investigator is usually appointed through the Professional Standards Office. Generally speaking, the investigator will interview the alleged perpetrator, the alleged victim and any other witnesses.
- c) Following the investigation, the investigator comes to a conclusion on the balance of probabilities.
- d) The NSW Ombudsman may monitor the progress of the investigation and observe (in person or by delegate) any interviews conducted during the investigation.

8.7 Outcome of investigation

- a) There are 5 possible findings at the conclusion of the investigator's investigation:

- i) sustained – a finding that the conduct occurred on the balance of probabilities;
 - ii) not sustained – insufficient evidence – a finding that there was insufficient evidence available to reasonably establish that the alleged conduct occurred;
 - iii) not sustained – lack of evidence – a finding that the evidence was lacking in weight and the conduct could not be shown to have occurred on the balance of probabilities;
 - iv) false – inquiries into the matter showed that reportable conduct did not occur; and
 - v) not reportable conduct – the conduct that occurred was not reportable.
- b) If the investigator deems the allegation is sustained, the perpetrator will be dealt with according to their position and the seriousness of the conduct:
- i) if an employee, their employment may be terminated;
 - ii) if a volunteer, they may be permanently stood down; and
 - iii) if a member of the clergy, their:
 - A) faculties may continue to remain removed; and
 - B) Commonwealth government certification to conduct weddings may also be revoked.
- c) If the investigator deems the allegation is not sustained, false or not reportable conduct, the matter will be referred to the Archbishop’s special advisory committee, who will deal with the matter in accordance with its own procedures.

8.8 Further notifications to the NSW Ombudsman and Children’s Guardian

- a) The Vicar General must then send the investigator’s report to the NSW Ombudsman, along with the NSW Ombudsman’s Form B.
- b) In Form B, the Vicar General must confirm the steps taken in the investigation and its outcome.
- c) If the allegation has been sustained, the Vicar General must then notify the Office of the Children’s Guardian of the outcome of the investigation.

8.9 Next steps

- a) The Vicar General will then take steps to meet with the victim and offer assistance to them.
- b) For some victims, this could include a referral to *Towards Healing*, if appropriate.

8.10 Requests from the NSW Ombudsman

- a) The Vicar General must comply with any requests for information from the NSW Ombudsman relating to procedures in place at the parishes and agencies

to prevent, respond to and handle reportable conduct, as this is a requirement under the Ombudsman Act.

- e) If the Vicar General is concerned about any request for information, he should seek advice from:
 - i) the General Counsel of the Archdiocese; or
 - ii) external lawyers.

Related documents

1. Guidance document: What conduct must be reported to the Ombudsman?
2. Flowchart: Reporting child protection concerns
3. Fact sheet: What conduct must be reported to the NSW Ombudsman?