

COMMISSION FOR CHILDREN AND YOUNG PEOPLE ACT 1998

SECTION 33 (1) CLASS OR KIND AGREEMENT

1. Preamble

Section 39 of the *Commission for Children and Young People Act 1998* obliges employers to notify the Commission “of the name and other identifying particulars of any employee against whom relevant employment proceedings have been competed by the employer (other than proceedings in which a finding is made that the alleged reportable conduct, or the alleged commission of an act of violence did not occur).”

Section 33(1) of the same Act defines relevant employment proceedings to include:

- *Reportable conduct by the employee, or*
 - *An act of violence committed by the employee in the course of employment and in the presence of a child.*
- whether or not, in any case, with the consent of the child.*

Section 33(1) further defines reportable conduct as:

- 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.*

This Class or Kind Agreement is endorsed by the Minister as an addendum to the Section 35 Guidelines.

2. Coverage

2.1. Employer

This Agreement is between the Commission for Children and Young People and the NSW Department of Juvenile Justice.

2.2. Employees

This Agreement covers only those employees of the Department of Juvenile Justice authorised to use force under the *Children (Detention Centres) Act 1987*, *Children (Detention Centres) Regulation 2005*, specifically clause 50, and associated Department procedures and guidelines relating to the use of force.

3. Rationale for coverage

Employees of the Department of Juvenile Justice work with offenders in detention and in the community subject to legal orders. They must manage young people who are unwilling participants in detention and related activities. On occasion these young people may exhibit violent behaviour that requires urgent and immediate intervention for the protection of themselves and others. It is important for the safety of young people and others that employees are not deterred by the statutory notification requirements from undertaking this aspect of their duties.

Employees of the Department of Juvenile Justice are more likely to be the subject of complaints and allegations than many other people in child-related employment because of the nature of their work and the nature of their clientele. Some level of protection for employees from this occupational hazard is desirable. On the other hand, these employees are working with some of our community's most vulnerable young people, and the community expects that these vulnerable young people are kept safe while in under the Government's care.

The Department of Juvenile Justice adheres to practices endorsed by the Ombudsman for the recording and investigation of allegations and complaints about its employees. The Ombudsman reviews the Department's overall recording and investigative practices, and may also review individual investigations and report to Parliament on issues of concern.

All allegations or complaints against employees are recorded and investigated by professional employees independent of the employees complained of. Investigators are required by the Department to notify conflicts of interest and step aside from investigations that involve employees personally known to them.

Every Juvenile Detention Centre is supported by independent Official Visitors who can report problems experienced by detainees and support them through complaints processes.

These arrangements provide for the integrity of the Department's complaints management systems.

4. Extent of coverage

4.1. Physical Assault, Acts of Violence & Neglect

This agreement covers conduct that involves the use of physical force including use of excessive force, and those low level neglect issues that arise from employees

falling asleep whilst working, failing to carry out checks or follow security procedures where no actual harm resulted.

Conduct involving sexual offences or psychological harm is not covered by this agreement.

4.2. Punishment

This agreement does not cover conduct that constitutes an offence under s.22 of the *Children (Detention Centres) Act 1987*. Section 22 provides that a detainee shall not be punished by being:

- a) *Struck, cuffed, shaken or subjected to any other form of physical violence,*
- b) *Dosed with medicine or any other substance*
- c) *Compelled to hold himself or herself in a constrained or fatiguing position*
- d) *Deprived of food or drink*
- e) *Denied the right to read or write letters or to make or receive telephone calls....*
- f) *Subjected to treatment of a kind that could reasonably be expected to be detrimental to his or her physical, psychological or emotional well-being,*
- g) *Subjected to treatment of a kind that is cruel, inhuman or degrading.*
- h) *Segregated in contravention of section 19, or*
- i) *Subjected to treatment of a kind forbidden by the regulations.*

Any findings that such behaviour occurred or may have occurred remain reportable conduct.

4.3. Conduct that is not reportable

The *Commission for Children and Young People Act 1998* already provides that “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” is not reportable. This Class or Kind Agreement reinforces the position that where an investigation finds that the conduct was reasonable, it is not reportable conduct.

Conduct that is authorised under Section 50 of the *Children (Detention Centres) Regulation 2005* is not reportable conduct. This means that the legitimate use of force by employees is not reportable conduct.

Examples of conduct that would not be reportable conduct are:

- use of reasonable physical force to disarm a young person seeking to harm himself or another;
- use of reasonable physical force to separate young people who are in the act of fighting;
- use of reasonable physical force to move a young person from a place where he or she may be harmed.

4.4. Application to past matters

This agreement applies to future allegations and to all existing matters where a finding has not yet been finalised.

5. Available Findings

Where an allegation is made against an employee regarding physical assault, or an act of violence, including allegations of use of excessive force the Department may make one of the following findings:

- (a) assault / act of violence / neglect occurred,
- (b) assault / act of violence / neglect did not occur,
- (c) there is some evidence that assault / act of violence / neglect occurred however the allegation is not sustained because of insufficient evidence,
- (d) inappropriate professional behaviour occurred
- (e) inappropriate professional behaviour did not occur
- (f) there is some evidence that inappropriate professional behaviour occurred, however the allegation is not sustained because of insufficient evidence.

Findings (a) and (c) are notifiable under the *Commission for Children and Young People Act 1998*.

The Ombudsman may, in accordance with s.25B of the *Ombudsman Act 1974*, audit findings of “inappropriate professional behaviour” made by any employer in relation to a completed relevant employment proceeding.

6. Notification to the Commission for Children and Young People

The *Commission for Children and Young People Act 1998* provides that where an employer finds that reportable conduct occurred, or there is some evidence it occurred, that conduct must be notified. 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.

This agreement clarifies the notifications required from the Department of Juvenile Justice under this statutory scheme.

- Category One**
- a finding that assault or an act of violence (including “excessive use of force”) occurred (for exceptions see Category Two)
 - a finding that an employee breached Section 22
 - a matter dropped to category two, but supplemented within two years by a further notifiable matter
- Category Two**
- a finding of excessive use of force occurred but the incident

was minor; and the Director General did not impose any disciplinary action

- a finding that excessive use of force occurred but the incident was minor; and the employee remains under a program of active and regular supervision as determined by the Director-General.
- a finding that there is some evidence that excessive use of force occurred, however the finding is inconclusive; and the allegation is of a serious nature.

- No notification**
- a finding that there is some evidence that an assault / act of violence / excessive use of force or low level neglect occurred, however the finding is inconclusive; and the allegation is not of a serious nature; the Department of Juvenile Justice will determine the seriousness of an allegation having regard to:
 - the degree of harm resulting from the alleged conduct;
 - the level of compliance with Department procedures;
 - the vulnerability of the child/ren involved;
 - the employment history of the employee(s) involved;
 - any other relevant consideration.

6.1. Records

The Department of Juvenile Justice will maintain a register of notification to allow it to carry out the requirements of this agreement for re-notifying Category two matters as Category one matters. This register will be made available to the Ombudsman for monitoring the implementation of this agreement.

The Department of Juvenile Justice will make all relevant documentation available to the Commission for Children and Young People on request for the purpose of category reviews, and monitoring of the operation of this Agreement.

SIGNED BY

GILLIAN CALVERT
COMMISSIONER FOR CHILDREN
AND YOUNG PEOPLE

DATE

JENNY MASON
DIRECTOR-GENERAL
DEPARTMENT OF JUVENILE JUSTICE

DATE