Guide for services: Reportable incidents in disability supported group accommodation

The NSW Ombudsman oversees disability services’ responses to ‘reportable incidents’ involving people with disability who live in supported group accommodation in NSW and keeps under scrutiny the systems for preventing, handling and responding to reportable incidents.

This is a guide for the Department of Family and Community Services (FACS) and funded providers about incidents that must be reported to the NSW Ombudsman under Part 3C of the Ombudsman Act 1974.

The Secretary or head of a funded provider must give the Ombudsman notice of a reportable incident, reportable allegation or reportable conviction of which the Secretary or head becomes aware.¹

The Secretary and head of a funded provider must make arrangements to require their employees to notify the Secretary or head of any reportable incident, reportable allegation or reportable conviction of which the employee becomes aware.²

There are two forms (Forms A and B) on the NSW Ombudsman website³ which need to be submitted by the Secretary or head (or their delegate) to comply with Part 3C of the Ombudsman Act.

Form A needs to be completed as soon as practicable (but not more than 30 days) after the Secretary or head of the funded provider becomes aware of the reportable incident.

Form B needs to be completed once FACS or a funded provider has completed an investigation into the incident, and determined what action will be taken arising from the incident.

Even though the police may be investigating an incident, the Secretary or head of a funded provider is still required to notify us of a reportable incident, to make inquiries, and to take relevant and appropriate risk management action. However, in relation to any potential criminal conduct, the head of agency will need to consult with police in relation to action they are taking to ensure that any police investigation is not compromised. In addition, for matters which involve alleged criminal conduct, it is important for the agency to notify our office as soon as possible, in order for our office to assess what support may be required.

1. Definitions of terms used in this guide

Apprehended Violence Order: The term Apprehended Violence Order has the same meaning it has in the Crimes (Domestic and Personal Violence) Act 2007.⁴

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¹ See section 25R(1) of the Ombudsman Act
² See section 25R(4) of the Ombudsman Act
³ See the NSW Ombudsman website: www.ombo.nsw.gov.au
⁴ See section 25(P)(3) of the Ombudsman Act
**Client:** Any person with disability in supported group accommodation, whether or not a child.

**Department:** Department of Family and Community Services.\(^5\)

**Employee:** Any individual engaged by the Department or a funded provider, or by another entity under a contract or other arrangement with the Department or funded provider, to provide services to people with disability (including in the capacity of a volunteer or contractor) that involves face-to-face or physical contact with, or access to the finances of, people with disability.\(^6\)

**Engaged:** A person is engaged by the Department or a funded provider when both the involved person and the organisation have agreed that the person will provide services for people with disability who reside in supported group accommodation.

**Funded provider:** An organisation receiving financial assistance under the *Disability Inclusion Act 2014* to provide supports and services for people with disability in supported group accommodation in NSW.\(^7\) (This includes relevant service providers who receive NDIS funding).

**Head:** The Secretary of a government department, or the chief executive officer or principal officer of a funded provider.

**Reportable allegation:** An allegation against a person of a reportable incident, or an allegation of behaviour that may involve a reportable incident.\(^8\)

**Reportable conviction:** A conviction (within the meaning of the *Criminal Records Act 1991*) of an offence involving a reportable incident.\(^9\)

**Secretary:** The Secretary of the Department of Family and Community Services.\(^10\)

**Supported group accommodation:** Premises in which:

a) a person with disability is living in a shared living arrangement (whether short-term or permanently) with at least one other person with disability, other than an arrangement in which one or more of the persons with disability is living with a guardian of the person or a member of the person’s family who is responsible for the care of the person, and

b) support is provided on-site:
   i) for a fee, or
   ii) whether or not for a fee if the support is provided as respite care.\(^11, 12, 13, 14\)

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\(^5\) See section 7(1) of the *Disability Inclusion Act 2014*

\(^6\) See section 25O of the Ombudsman Act

\(^7\) See section 25O of the Ombudsman Act

\(^8\) See section 25O of the Ombudsman Act

\(^9\) See section 25O of the Ombudsman Act

\(^10\) See section 25O of the Ombudsman Act

\(^11\) See section 22 of the *Disability Inclusion Act*

\(^12\) Respite care means short-term care for people with disability that is provided for the purpose of relieving families or carers from their caring responsibilities in the short-term before resuming their caring responsibilities at the end of the period of care.

\(^13\) Supported group accommodation does not include an assisted boarding house within the meaning of the *Boarding Houses Act 2012*.

\(^14\) See *Disability Inclusion Regulation* (s.9): Premises are prescribed not to be supported group accommodation if:
   a) the premises are not under the control, direction or management of a disability service provider, and
   b) support provided on-site for a fee in the premises is substantially under the control, direction or management of either or both of the following:
      i) one or more of the persons with disability living at the premises,
      ii) a guardian or member of the family who is responsible for the care of a person with disability who is living at the premises.
2. What type of incidents must be reported to the NSW Ombudsman?

This is an **allegation-based scheme**, which means that it is the nature of the alleged conduct (and not the findings of any inquiries) that will determine whether or not an incident ought to be notified to the NSW Ombudsman.

There are four categories of ‘reportable incidents’ involving people with disability who live in supported group accommodation that must be reported to the NSW Ombudsman:

a) Employee to client incidents,

b) Client to client incidents,

c) An incident involving a contravention of an apprehended violence order made for the protection of a person with disability, or

d) An incident involving an unexplained serious injury to a person with disability.

All reportable incidents must involve a person living in supported group accommodation.\(^{15}\)

**a) Employee to client incidents**\(^{16}\)

The Act requires the reporting of an incident involving any of the following in connection with an employee of the Department or a funded provider and a person with disability living in supported group accommodation:

i) **any sexual offence** committed against, with, or in the presence of the person with disability

ii) **sexual misconduct** committed against, with, or in the presence of the person with disability, including grooming of the person for sexual activity

iii) an **assault** of the person with disability, not including the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated under workplace employment procedures

iv) an offence under Part 4AA of the **Crimes Act 1900** committed against the person with disability (**fraud**, and other similar offences)

v) **ill-treatment** or **neglect** of the person with disability.

An alleged incident is only notifiable to the NSW Ombudsman if the person the subject of the allegation is employed or engaged by the Department or a funded provider at the time the allegation was made.

**What is a sexual offence?**

The term ‘sexual offence’ encompasses all criminal offences involving a sexual element that are committed against, with, or in the presence of a person with disability in supported group accommodation.

These offences include (but are not limited to):

- **Sexual assault** – this is a broad term describing all sexual offences. Sexual assault includes the specific offence involving a person having sexual intercourse with another person without their consent. Sexual assault also includes when a person is forced, coerced or tricked into sexual acts against their will or without their consent.

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\(^{15}\) For the definition of ‘supported group accommodation’ see section 22 of the Disability Inclusion Act

\(^{16}\) See section 25P(1)(a) of the Ombudsman Act.
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- **Aggravated sexual assault** – involves sexual intercourse with another person without their consent in circumstances of aggravation. Circumstances of aggravation can include the offender seriously injuring or threatening to seriously injure the person, breaking into a home to commit the offence, or the victim having a serious physical disability or cognitive impairment.

- **Indecent assault** – involves touching (or threatening to touch) a person’s body in a sexual manner without the consent of the other person. For example, it can include unwanted touching of a person’s breast, bottom or genitals.\(^\text{17}\)

- **Deemed sexual offences** – includes carer and exploitation offences under section 66F the *Crimes Act 1900* (NSW). Section 66F of the Crimes Act is designed to prevent the sexual exploitation of people with a cognitive impairment by their carers, or by anyone else who has knowledge of the person’s impairment and enters into a sexual relationship with the intent of taking advantage. Irrespective of the consent of a person, the Crimes Act prohibits sexual intercourse in the following circumstances:
  - between a person with a cognitive impairment and a person who is responsible for the care of that person (the ‘carer’s offence’; s.66F(2)), and
  - between a person with a cognitive impairment and any other person who has the intention of taking advantage of that person’s cognitive impairment (the “exploitation offence”; s.66F(3)).

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**What is sexual misconduct?**

For sexual misconduct to constitute a reportable incident, the alleged misconduct must have been committed against, with, or in the presence of a person with disability living in supported group accommodation, by an employee.

The term sexual misconduct is designed to address conduct that does not amount to a criminal offence. There are three categories of sexual misconduct:
- crossing professional boundaries
- sexually explicit comments and other overtly sexual behaviour, and
- grooming behaviour.

**Crossing professional boundaries**

Sexual misconduct includes behaviour that can reasonably be construed as involving an inappropriate and overtly personal or intimate:
- relationship with
- conduct towards, or
- focus on
  a person with disability, or a group of people with disability in supported group accommodation.

In the area of ‘crossing professional boundaries’, particular care should be exercised before making a finding of sexual misconduct. For example, an employee who, on an isolated occasion, ‘crosses professional boundaries’ in a manner that involves no more than poor judgement could not be said to have engaged in sexual misconduct. Also, in cases where an employee has ‘crossed boundaries’ in terms of their relationship with a client, this would not constitute sexual misconduct if there is evidence which shows that the employee did not seek to establish an improper relationship with the client.
However, a single serious ‘crossing of the boundaries’, or a course of less serious breaches of this type, may constitute professional misconduct – particularly if the employee either knew, or ought to have known, that their behaviour was unacceptable.

Codes of conduct that outline the nature of the professional boundaries which should exist between employees and clients can be particularly useful.

**Sexually explicit comments and other overtly sexual behaviour**

Sexual misconduct includes a broad range of sexualised behaviour with or towards people with disability living in supported group accommodation.

It is not possible to provide a complete and definitive list of unacceptable sexual conduct involving clients. However, the following types of behaviour give strong guidance:

- sexualised behaviour with or towards a client (including sexual exhibitionism)
- inappropriate conversations of a sexual nature
- inappropriate comments relating to sexual acts
- unwarranted and inappropriate touching of a client
- personal correspondence and communications (including emails, social media and web forums) with a client concerning the employee’s romantic, intimate or sexual feelings for the client
- inappropriate exposure of clients to sexual behaviour of others, and/or
- watching clients undress in circumstances where supervision is not required and it is clearly inappropriate.

**Grooming behaviour**

Behaviour should only be seen as ‘grooming’ where there is evidence of a pattern of conduct that is consistent with grooming the alleged victim for sexual activity, and there is no other reasonable explanation for that pattern. The types of behaviours that may lead to such a conclusion include (but are not limited to):

- Persuading a client or group of clients that they have a ‘special’ relationship with the employee, for example by:
  - inappropriately giving gifts
  - inappropriately showing special favours to them but not other clients, or
  - asking the client to keep the relationship to themselves.
- ‘Testing boundaries’, for example by:
  - undressing in front of a client
  - encouraging inappropriate physical contact (even where it is not overtly sexual), or
  - ‘accidental’ intimate touching.
- Extending a relationship with a client outside of work (except where it may be appropriate - for example, where there was a pre-existing friendship with the client’s family, or as part of regular social interactions in the community).
- Inappropriate personal communication (including emails, telephone calls, text messaging, social media and web forums) that inappropriately explores sexual feelings or intimate personal feelings with a client.

A staff member requesting that a client keep any aspect of their relationship secret, or using tactics to keep any aspect of the relationship secret, would generally increase the likelihood that grooming is occurring.
What is an assault?

An assault of a person with disability living in supported group accommodation includes any act by which a person intentionally inflicts unjustified use of physical force against a client. An assault can also occur if a person causes a client to reasonably fear that unjustified force will be used against them. Even if a person who inflicts, or causes the fear of, physical harm does not intend to inflict the harm or cause the fear, they may still have committed an assault if they acted recklessly (i.e. the person ought to have known that their actions would cause physical harm or the fear of such harm).

Assaults can include hitting, pushing, shoving, throwing objects, or making threats to physically harm a client.

When the use of physical force does not need to be reported

The Ombudsman Act specifically outlines certain circumstances involving the use of physical force which do not need to be reported:

- the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated under workplace employment procedures.\(^\text{18}\)

It is also important to consider the context in which physical force is used against a client to determine whether it constitutes an assault. For example, an assault has not taken place where there is use of necessary and reasonable force in the following circumstances:

- restraining a client when it is in accordance with an approved behaviour support plan authorised by a Restricted Practices Authorisation mechanism\(^\text{19}\)
- taking reasonable steps to disarm a person with disability seeking to harm themselves or others
- separating people with disability who are fighting
- moving a person with disability out of harm’s way
- restraining a person with disability from causing intentional damage to property
- self-defence, or the defence of others.

What is an offence under Part 4AA of the Crimes Act?

An allegation of fraud against an employee must be reported to the NSW Ombudsman. Where an allegation of fraud is made against an employee of FACS or a funded provider, this is a reportable incident.

Part 4AA of the Crimes Act 1900 (NSW) contains a range of offences relating to fraud, including:

- fraud (s.192E)\(^\text{20}\)

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18 See section 25P(1)(a)(iii) of the Ombudsman Act 1974
19 For more information, see the FACS Behaviour Support manual.
20 The Judicial Commission of NSW outlines that s.192E of the Crimes Act 1900 makes it an offence for a person who, by any deception, dishonestly obtains property belonging to another or obtains a financial advantage or causes any financial disadvantage. The offence can involve all or any part of a general deficiency in money or other property even though the deficiency is made up of any number of particular sums of money or items of other property that were obtained over a period of time: s.192E(3). The offence can be an alternative to a charge of larceny or an offence that includes larceny: s.192E(4). For further information see: [http://www.judcom.nsw.gov.au/publications/benchbks/criminal/fraud.html](http://www.judcom.nsw.gov.au/publications/benchbks/criminal/fraud.html)
• intention to defraud by destroying or concealing accounting records (s.192F)\textsuperscript{21}
• intention to defraud by false or misleading statement (s.192G),\textsuperscript{22} and
• intention by an officer of an organisation to deceive members or creditors by a false or misleading statement (s.192H).\textsuperscript{23}

What is ill-treatment?

Ill-treatment captures those circumstances where a person treats a client in a seriously inappropriate, improper, inhumane or cruel manner.

The focus is on the nature of the alleged conduct itself, rather than on the effect of the conduct on the person with disability.

Ill-treatment may include:

• behaviour management that is seriously inappropriate or improper and/or is the use of a restricted practice that has not been endorsed in a person’s Behaviour Support Plan, or is not in accordance with the plan authorised by Restricted Practices Authorisation mechanism
• making excessive and/or degrading demands of a person with disability
• hostile use of force towards a person with disability
• a pattern of seriously inappropriate, degrading comments or behaviour towards a person with disability.

In making a determination regarding ill-treatment, it is important to consider relevant codes of conduct that outline the nature of professional conduct and practice by employees which should occur when working with people with disability.

What is neglect?

Neglect includes an action or failure to act by a person who has care responsibilities towards a person with disability living in supported group accommodation. The nature of the employee’s care responsibilities provides the context against which the conduct needs to be assessed.

Supervisory neglect

• An intentional or reckless failure to adequately supervise or support a client that results in the death of, or significant harm to, the client.
• An intentional or reckless failure to adequately supervise or support a client that also:
  - involves a gross breach of professional standards,
  and
  - has the potential to result in the death of, or significant harm to, the client.

Carer neglect

Grossly inadequate care that involves depriving a client of the basic necessities of life, such as food, drink, shelter, clothing, medical care/treatment.

Failure to protect from abuse

An obviously unreasonable failure to respond to information which strongly indicates actual or potential serious abuse of a client.
Reckless act/failure to act

- A reckless act, or failure to act, that:
  - involves a gross breach of professional standards,
  and
  - has the potential to result in the death of, or significant harm to, a client.

Neglect can be a single significant incident where a caregiver fails to fulfil a duty, resulting in actual harm to a client, or where there is the potential for significant harm to a client. Neglect can also be an ongoing pattern of repeated failures by a caregiver to meet a client’s physical or psychological needs.

b) Client to client incidents

The Act requires the reporting of an incident involving an assault of a person with disability living in supported group accommodation by another person with disability living in the same supported group accommodation that:

i) is a sexual offence, or

ii) causes serious injury, including, for example, a fracture, burns, deep cuts, extensive bruising or concussion, or

iii) involves the use of a weapon, or

iv) is part of a pattern of abuse of the person with disability by the other person.

What is a sexual offence?

Reportable client to client sexual offences only relate to circumstances involving sexual assault.

These offences include (but are not limited to):

- **Sexual assault** – this is a broad term describing all sexual offences, for example when a person is forced, coerced or tricked into sexual acts against their will or without their consent. Sexual assault also describes a specific offence when a person has sexual intercourse with another person without their consent.

- **Aggravated sexual assault** – is sexual intercourse with another person without their consent in circumstances of aggravation. Circumstances of aggravation can include (but not limited to) the offender seriously injuring, or threatening to seriously injure the person.

- **Indecent assault** – is touching (or threatening to touch) a person’s body in a sexual manner without the consent of the other person. For example, it can include unwanted touching of a person’s breast, bottom or genitals.

What is serious injury?

Serious injury can include (but is not limited to) fractures, burns, deep cuts, extensive bruising, or concussion.

What is a weapon?

A weapon may include (but is not limited to):

- a firearm or knife,

- any thing that is made or adapted for attacking someone, or

- any thing that, in all of the circumstances, is used, intended for use, or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm.

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24 See Section 25P(1)(b) of the Ombudsman Act
What is a ‘pattern of abuse’ of a client by another client?

A ‘pattern of abuse’ occurs where there is repeated physical abuse and/or ill treatment and/or harassment of a client by another client.

Abusive conduct includes the following, alone or in any combination:

- abuse of a sexual or non-sexual nature
- physical force or inappropriate physical contact
- threats of physical force or threats of inappropriate physical contact, and
- conduct that causes physical harm or emotional distress to the victim.

c) Contravention of an apprehended violence order

The Act requires the reporting of an incident occurring in supported group accommodation and involving a contravention of an apprehended violence order made for the protection of a person with disability, regardless of whether the order is contravened by an employee of the Department or a funded provider, a person with disability living in the supported group accommodation or another person.26

d) Unexplained serious injury27

The Act requires the reporting of an incident involving an unexplained serious injury28 to a person with disability living in supported group accommodation.

3. Do incidents arising before the commencement of Part 3C need to be reported to the NSW Ombudsman?

When the Secretary or the head of a funded provider becomes aware of an incident, it must be reported (within 30 days) to the NSW Ombudsman. Therefore, if an incident occurred before the commencement date of the scheme, but the Secretary or head of agency becomes aware of the incident after the commencement date of the scheme, the incident must be reported to the NSW Ombudsman.

If you have any queries or concerns, please call the NSW Ombudsman’s Disability Reportable Incidents Division on 02 9286 1000.

27 See Section 25P(1)(d) of the Ombudsman Act
28 A serious injury includes, but is not limited to, a fracture, burns, deep cuts, extensive bruising or concussion.
Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (Inquiries section closes at 4pm).

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.