

16 March 2016

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By email: policyandcabinet@act.gov.au

Dear Mr James,

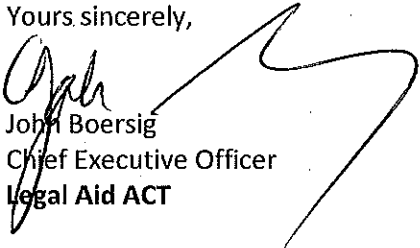
Comments on Discussion Paper: A Reportable Conduct Scheme for the ACT

Thank you for the opportunity to comment on the proposed Reportable Conduct Scheme (RCS) within the ACT.

Legal Aid ACT generally supports the introduction of an RCS. Legal Aid ACT believes that the scheme will significantly improve oversight where there have been allegations of abuse against children and young people. It is critical that designated agencies enact appropriate responses to the abuse or neglect of children. The NSW RCS has proven its success in improving responses to allegations of abuse - it should be looked to as a positive framework for the ACT.

As noted in our submission below, we believe stakeholders should be provided with further information and clarification around how some aspects of the scheme will operate in the ACT. Legal Aid ACT is concerned that the RCS as outlined may not have sufficient due process protections for people who have had allegations made against them. Particularly, Legal Aid ACT is concerned that the discussion paper has not given enough weight to the privacy of parties subject to an allegation and subsequent investigation, including the impact of the oversight body publicising or 'sharing' their findings. While the power granted to the oversight body will greatly assist in ensuring appropriate responses to allegations of abuse, it is necessary that the exercise of this power remains accountable. Legal Aid ACT would welcome the opportunity to contribute to further consultations regarding these issues once further details of the scheme are available.

Yours sincerely,



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i) **Potential Oversight Bodies**

On the basis of current information, Legal Aid believes the ACT Ombudsman is the most appropriate oversight body for the RCS.

The discussion paper proposes broadening the responsibility of either the ACT Ombudsman or the Child and Young Person Commissioner (CYPC) to adopt the oversight role.

Children and Young Person Commissioner – a new structure

As of 1 April 2016, the CYPC role will be consolidated with parts of the Public Advocate's functions within the Human Rights Commission.¹ Some functions of the role will be moved to the President of the Human Rights Commission. The President of the Commission has primary responsibility for oversight and systems advocacy.²

The RCS discussion paper does not reflect the imminent change within the Human Rights Commission. Accordingly, there is insufficient information available regarding how the oversight power would operate within the new structure of the Commission. For example, the procedure for complaints against a decision of the CYPC is not detailed in the discussion paper. Accordingly, Legal Aid cannot comment on the practicality of the oversight role operating in the context of the CYPC role.

Legal Aid notes that the oversight role will require a significant amount of resourcing and expertise. Particular expertise in privacy matters will be needed to ensure that disclosure of information under the scheme is conducted appropriately. At this point in time, there is insufficient information available regarding how this responsibility would be exercised by the CYPC. It is unclear whether appropriate resources and expertise would be available to ensure thorough investigations into allegations of abuse, and appropriate safeguards regarding privacy and review of decision making.

Given the structural change within the Human Rights Commission, it is difficult to comment on the suitability of the CYPC and Public Advocate role as an oversight body. Legal Aid ACT is willing to provide further comment when more information becomes available.

ACT Ombudsman

The NSW RCS can be looked to as a working model of oversight power vested in the Ombudsman. Replicating this in the ACT would assist in the smooth introduction of the RCS and provide a precedent for the operation of the scheme.

Investigations under the RCS are likely to affect the rights of individuals, and the powers granted under the RCS are of a more administrative nature than those normally held by the ACT Ombudsman. Before implementation of the RCS occurs, thought should be given to processes that ensure the accountability of decisions made by the oversight body. Particular regard should be given towards whether any findings made by the oversight body are reviewable.

¹ *Protection of Rights (Services) Legislation Amendment Bill 2015 (ACT) s 27B(b).*

² *Explanatory Statement to the Protection of Rights (Services) Legislation Amendment Bill 2015 (ACT) at 2.*

ii) Reportable Conduct

Reportable conduct should reflect section 342 of the *Children and Young People Act 2008*. Conduct below a criminal threshold should only be reportable when necessary for the protection of children and young people.

What is reportable conduct?

Under the proposed RCS, designated agencies would be required to report allegations of any reportable conduct to the oversight body. The oversight body would then be required to monitor the investigation and take further action as necessary. Reportable conduct would include 'child abuse' as defined by the *Children and Young People Act 2008* (ACT).

342 What is *abuse*?

In this Act:

abuse, of a child or young person, means—

- (a) physical abuse; or
- (b) sexual abuse; or
- (c) emotional abuse (including psychological abuse) if the child or young person has experienced the abuse or is experiencing the abuse in a way that has caused or is causing significant harm to his or her wellbeing or development; or
- (d) emotional abuse (including psychological abuse) if—
 - (i) the child or young person has seen or heard the physical, sexual or psychological abuse of a person with whom the child or young person has a domestic relationship, the exposure to which has caused or is causing significant harm to the wellbeing or development of the child or young person; or
 - (ii) if the child or young person has been put at risk of seeing or hearing abuse mentioned in subparagraph (i), the exposure to which would cause significant harm to the wellbeing or development of the child or young person.

This definition is to be read as encompassing both criminal conduct and conduct below a criminal threshold. The discussion paper suggests that the scope of 'reportable conduct' in the ACT would broadly reflect reportable conduct within the NSW scheme as defined in the *Ombudsman Act 1974* (NSW).

25A "reportable conduct" means:

- (a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the *Crimes Act 1900*)), or
- (b) any assault, ill-treatment or neglect of a child, or
- (c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the 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 matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or
- (c) conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.

Note: Examples of conduct that would not constitute "reportable conduct" include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental.

What conduct should be reportable?

The powers proposed to be granted to the oversight body may result in significant penalty to the person being investigated. For example, the oversight body has the discretion to refer findings about reportable conduct to other agencies. This may include professional registration bodies, the Working With Vulnerable People Unit, and the individual's employer. Such referrals may result in termination of the individual's employment, future restrictions on employment, and/or damage to the individual's reputation and standing within the community.

Conduct below a criminal threshold should be investigable where the conduct may be harmful to a child. However, investigable non-criminal conduct should be strictly defined to ensure that it only includes conduct that is necessary to meet the purpose of the scheme. For example, some conduct may be improper but non-serious – in this case, it may be more appropriately addressed within the agency or appropriate professional association and not by the oversight body

It is important to recognise that subjecting an individual to external investigation may subject them to significant stress, even where the allegation is unfounded. An expansive definition of 'reportable conduct' may place a burden on agencies and employees in complying with the scheme, in addition to unfairly broadening the circumstances where an individual may be subjected to the damaging impacts of an investigation.

Section 25A of the NSW *Ombudsman Act* provides that certain types of conduct (such as touching to comfort a distressed child) are exempt from reporting. Such provisions should be replicated in the ACT. More broadly, we support the categories of reportable conduct listed by the NSW Ombudsman in the *Child Protection Practice Update 2013*.³ A summary of these categories is available in Appendix 1.

iii) Information Sharing

Investigations should remain confidential until a finding is made. When a finding is made, information should only be shared where necessary. A high degree of sensitivity is needed in conducting investigations.

Confidentiality

The discussion paper notes that the oversight body will "report publicly on 'reportable conduct' investigations." It is unclear in this context what would constitute 'public' reporting. It is critical that any publicised information about an allegation of abuse maintains confidentiality so as to mitigate the consequences of stigma associated with the investigation. When a finding is made, information about

³ NSW Ombudsman, *Child Protection Practice Update 2013: Defining Reportable Conduct* (2013)

the allegation should only be disclosed to parties and agencies necessary to properly respond to the finding.

The NSW Ombudsman advises that confidentiality is maintained following an allegation against an employee. It recommends that agencies ensure that all parties know that confidentiality is to be maintained and that systems are put in place to deal with a breach of confidentiality.⁴ Limits are implemented on the type of information provided to each party within the investigation.⁵ Agencies may still take action to mitigate risks after an initial risk assessment, until a full investigation is made.⁶ This system appropriately accounts for confidentiality while ensuring rigour in investigation. It would be essential that the new ACT RCS uphold principles of privacy and confidentiality in the same way.

Working With Vulnerable People Check (WWVPC)

The RCS discussion paper notes that an investigation report will be provided to the WWVPC Unit when the report is sufficiently robust to satisfy re-assessment of a person's WWVPC Check. Legal Aid submits that in these circumstances, an investigation report should only be provided to the WWVPC Unit when the investigation is complete to ensure that all information is available.

While the oversight body can only refer information to the WWVPC Unit when they are satisfied the information is robust, the WWVPC Unit may still commence re-assessment if they are informed of the allegation through a different source. Legal Aid is concerned that this could lead to circumstances where an unnecessary duplicate investigation is being undertaken, placing additional stress on all parties involved. To mitigate this, the oversight body should co-operate with the WWVPC Unit to ensure investigations are not duplicated. Legal Aid proposes that actions by the WWVPC Unit should be restricted until the allegation is substantiated and an investigation report is finalised.

Other Agencies

The discussion paper notes that the oversight body would have discretion to share information with relevant bodies as appropriate. There are no clear limitations on the exercise of this discretion, nor is there a clear definition of when it will be appropriate to share information. The *Ombudsman Act 1989* provides limitations on when the Ombudsman may disclose information.

34 Disclosure of information by ombudsman

(1) Nothing in this Act precludes the ombudsman from disclosing information or making a statement to any person or to the public or a section of the public with respect to the performance of the functions of, or an investigation by, the ombudsman under this Act if, in the opinion of the ombudsman, it is in the interests of any agency or person, or is otherwise in the public interest, so to disclose that information or to make that statement.

(2) The ombudsman must not disclose information or make a statement under subsection (1) with respect to a particular investigation where the disclosure of that information, or the making of that statement, is

⁴ NSW Ombudsman, *Child Protection Fact Sheet: Risk management following an allegation against an employee*; 2.

⁵ NSW Ombudsman, *Managing Information Arising Out of an Investigation: Balancing Openness and Confidentiality* (2009), 5-7.

⁶ Above n 4, 1.

likely to interfere with the carrying out of that or any other investigation or the making of a report under this Act.

(3) The ombudsman must not, in disclosing information or making a statement under subsection (1) with respect to a particular investigation—

- (a) set out opinions that are, either expressly or impliedly, critical of an agency or person unless the ombudsman has complied with section 9 (6) in relation to the investigation; or
- (b) disclose the name of a complainant or any other matter that would enable a complainant to be identified unless it is fair and reasonable in all the circumstances to do so.

(4) This section has effect notwithstanding sections 9 (3) and 33.

9 Investigations

(6) The ombudsman must not make a report in respect of an investigation under this Act in which he or she sets out opinions that are, either expressly or impliedly, critical of an agency or person unless, before completing the investigation, the ombudsman has—(...)

(a) if the opinions relate to an agency—given the principal officer of the agency and the officer principally concerned in the action to which the investigation relates opportunities to appear before the ombudsman or before an authorised person, and to make such submissions, either orally or in writing, in relation to that action as they think fit; and

(b) if the opinions relate to a person—given that person an opportunity to appear before the ombudsman or before an authorised person, and to make such submissions, either orally or in writing, in relation to the action to which the investigation relates as the person thinks fit.

The collective effect of these provisions is to give a right of response to allegations and to provide a ‘fair and reasonable’ test on the disclosure of identifying information. Where a broad discretion to disclose information exists, it can be difficult to argue that a disclosure is *not* fair or reasonable. Given the potential weight of information discovered, and findings made by the RCS, strict procedures should limit information-sharing to circumstances where such sharing is strictly necessary to fulfil the objectives of the scheme.

iv) Review of Decisions made by the Oversight Body

Some powers granted by the RCS are of an administrative nature and may have significant consequences. The oversight body should implement thorough internal review procedures.

The Human Rights Commission Act 2005 and the *Protections of Rights (Services) Legislation Amendment Bill 2015* do not provide for review of decisions made by either a Commissioner or the President of the Human Rights Commission.

The Ombudsman Act 1989 does not provide for review of decisions made by the Ombudsman. The Ombudsman’s policy is to refer any requests for review of a decision to a senior officer not involved in the initial decision. The senior officer may uphold, amend or send back the original decision. No external review is available. Section 31 of the *Ombudsman Act* provides further restrictions on actions that can be taken against the Ombudsman.

The RCS would provide powers to the oversight body that are essentially administrative in nature. Under the scheme, the oversight body may make a finding that affects an individual’s WWVPC. They may also

refer findings or provide other information to ACT agencies including ACT Policing, the individual's employer, the Community Services Directorate and professional registration bodies.

Administrative decisions made by the oversight body are proposed to include:

- Making an investigation finding;
- Publication of information about an investigation;
- Requests for information and documents; and
- Sharing information with other agencies or stakeholders.

Legal Aid notes that in practice, the findings of an investigation by the oversight body are likely to be taken as 'fact', or given serious weight, by external agencies. Accordingly, the disclosure of such findings may have a serious impact on the livelihood and privacy of the person subject to investigation. With no legal right of review, decisions made by the oversight body, including decisions to publicise their findings or information discovered in the context of their investigation, may have significant 'unchecked' deleterious impacts on the individual concerned. It is of concern to Legal Aid that the current RCS proposal does not include provisions for review of the oversight body's actions.

Given that the proposed powers to be granted to the RCS are qualitatively administrative, the RCS should be correspondingly accountable. Decisions made by an agency that has relied upon information provided by the oversight body may be reviewable (e.g. termination of employment at the Fair Work Commission), but would be more costly and damaging than review at an earlier stage.

To mitigate this risk, the RCS should ensure that the oversight body has comprehensive internal review procedures, in addition to the availability of external review of decisions relating to the sharing or publication of information. Such review would contribute to the integrity of the new RCS by providing for proper review of the conduct of the oversight body. Legal Aid would be happy to provide further feedback regarding *which* decisions should be reviewable, once further details of the scheme are identified.

Appendix 1: Summary of Categories of Reportable Conduct in NSW

Reportable criminal conduct includes:

- Sexual offences including indecent assault, sexual assault, aggravated sexual assault, sexual intercourse, child pornography offences and grooming or procuring children for sexual activity.
- Physical assault, except where reasonable for the purpose of discipline, or where the force was trivial and the conduct is investigated internally.

Reportable conduct below a criminal threshold includes:

Sexual misconduct:

- Crossing professional boundaries by engaging in an overly personal or intimate relationship with, conduct towards or focus on a child or young person. This would be contingent on codes of conduct within an organisation.
- Sexually explicit comments or overtly sexual behaviour, including inappropriate conversation
- Unwarranted touching
- Exposing children and young people to sexual behaviour of others including pornography
- Personal correspondence and communication in relation to intimate feelings for the child or young person
- Watching children undress where supervision is not required
- Grooming behaviour, including spending inappropriate amounts of time with a child, inappropriate gift giving, asking the child to keep the relationship secret, etc.
- Inappropriately extending a relationship outside of work
- Testing boundaries e.g. 'accidental' touching, undressing in front of a child

Ill-treatment:

- Disciplining or correct a child in an unreasonable and serious inappropriate or improper manner,
- Making excessive/degrading demands of a child,
- Hostile use of force towards a child,
- A pattern of hostile or unreasonable and seriously inappropriate comments or behaviour toward a child.

Neglect:

- Intentional or reckless failure to adequately supervise a child, that results in serious harm or death of a child or is a gross breach of professional standards and could potentially result in serious harm or death to the child.
- Grossly inadequate care that involves depriving a child of the basic necessities of life
- Obvious or unreasonable failure to respond to information indicating actual or potential serious abuse of a child
- A reckless act or failure to act involving a gross breach in professional standards that has the potential to result in the death of or significant harm to a child.

Psychological harm:

- Behaviour that clearly unreasonable and results in significant emotional harm or trauma to a child. The harm must be more than transient and there must be a causal link between the behaviour and the harm. It will likely be necessary to obtain a psychological or medical assessment to determine whether harm can be established.