



The ACT's New Reportable Conduct Scheme

Briefing paper for Principals, Bursars, Business Managers and Governors of non-government schools.

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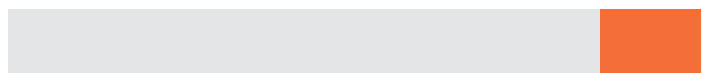


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1. Executive Summary

- ✓ The new ACT Reportable Conduct Scheme (the Reportable Conduct Scheme) was notified on 17 August 2016. The Reportable Conduct Scheme is established under the Ombudsman Act 1989 (ACT) (Ombudsman Act).
- ✓ The Reportable Conduct Scheme will commence on 1 July 2017.
- ✓ The introduction of the Reportable Conduct Scheme creates additional child protection reporting and information sharing obligations for schools and other organisations which exercise care, supervision or authority over children and young people.
- ✓ Under the Reportable Conduct Scheme, schools must report allegations of misconduct to the ACT Ombudsman (the Ombudsman). They must also share information with the Commissioner for Fair Trading and other entities that exercise supervision and care for children and young people.
- ✓ The Reportable Conduct Scheme is not intended to alter existing reporting requirements, and is designed to complement the mandatory reporting obligations under the Children and Young People Act 2008 (ACT) (CYPA).
- ✓ Compliance with the Reportable Conduct Scheme will enable a school to better identify and reduce the risk of child abuse and respond to allegations of child abuse or misconduct involving children.

2. Background

In order to appreciate the nature of the changes introduced by the Reportable Conduct Scheme, it is necessary to have a basic understanding of how they came about.

The Current Child Protection Framework in the ACT

Non-government schools in the ACT face an almost overwhelming myriad of legal and regulatory obligations and reporting requirements. Please refer to our briefing paper [Australian Capital Territory Child Protection Requirements for Non-Government Schools](#) for more information about the obligations applying to schools under the Education Act 2004 (ACT), the National Safe Schools Framework (NSSF), the CYPA and the Working with Vulnerable People (Background Checking) Act 2011 (ACT).

National and State Royal Commissions

The Explanatory Statement to the Reportable Conduct and Information Sharing Legislation Amendment Bill 2016 (ACT) (the Bill) which introduced the Reportable Conduct Scheme amendments to the Ombudsman Act, refers to the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), the NSW Special Commission of Inquiry and the Victorian Royal Commission into Family Violence. The Explanatory Statement refers to the work of the Commissions in relation to the legislative restrictions on sharing protected and sensitive information related to matters of child protection and how the restrictions don't lead to "timely, effective, and efficient sharing of information."

The Explanatory Statement states that evidence before the Royal Commission, and the findings of the NSW and Victorian Commissions "have all demonstrated that this kind of (restricted) information sharing regime is a barrier to the protection of children." The Bill introduces information sharing provisions to allow the transfer of information from the Ombudsman to the Commissioner for Children and Young People, the Commissioner for Fair Trading, relevant Directors-General, the Human Rights Commission, the Chief Executive Officer of the ACT Quality Teacher Institute and the Police.

It is worth noting that it is highly likely that the work of the Royal Commission will continue to shape child protection laws in Australia over the next 5-10 years. The Royal Commission has already flagged that its final recommendations will include a move towards harmonisation of child protection laws across Australia, as comparable to the adoption of harmonised workplace safety laws. Steps being taken towards harmonization can be seen in the introduction of the Reportable Conduct Scheme in the ACT, in parallel to similar schemes being developed in NSW and Victoria.

The Glanfield Review

The Board of Inquiry into System Level Responses into Family Violence in the ACT (the Board of Inquiry) was established in 2016 in response to the tragic death of a nine-year-old boy who was murdered by his father. Mr Laurie Glanfield AM was appointed as the Board of Inquiry, hence the reference to the Inquiry as the Glanfield Review. The Board of Inquiry released its Report in April 2016.¹

The Explanatory Statement refers to the fact that the Glanfield Review specifically recommended legislative amendment be made to clearly authorise information sharing and to foster a culture of appropriate information sharing and collaboration in the Territory.

Improved information sharing between organisations that provide services to children and young people is a key feature of the new Reportable Conduct Scheme.

3. The ACT's New Reportable Conduct Scheme: Key Changes and Definitions

Key Changes

The Bill amends the Ombudsman Act, the CYPA and the Working with Vulnerable People (Background Checking) Act 2011 (ACT) (WWVPA).

While each provision and Act amended has different overall aims, all are intended to strengthen the primacy of the best interests of a child or young person.

Amendments to the Ombudsman Act

The Ombudsman Act has been amended by creating a new Division 2.2A: Reportable Conduct, that expands the scope of the Ombudsman's authority to monitor the practices and procedures of 'designated entities' for preventing and dealing with reportable conduct by 'employees'.

The features of the Reportable Conduct Scheme established under the Ombudsman Act are the primary focus of this paper.

Amendments to the CYPA and WWVPA

Amendments to both the CYPA and WWVPA allow for the disclosure of protected or relevant information between government agencies including the Commissioner, the Ombudsman and the Chief Executive Officer of the ACT Teacher Quality Institute.

The amendments to the CYPA allow for 'reportable conduct information' to be requested and shared between 'designated entities'. Reportable conduct information means any information, including protected information, that is relevant to the protection of a child or young person or a class of child or young person against **reportable conduct**.

The amendments to the WWVPA will require 'designated entities' to comply with requests from the Commissioner for Fair Trading (the Commissioner) for *information or advice* that will assist in conducting a risk assessment for a person as part of obtaining a working with vulnerable registration. Interestingly, the WWVPA does not reference the prescriptive definition of 'reportable conduct information' included in the CYPA, but instead talks more generally about information and advice.

The amendments to the CYPA and WWVPA, although important elements of the Reportable Conduct Scheme, are not discussed further in this paper.

¹The Glanfield Review Report is available at: http://www.cmd.act.gov.au/data/assets/pdf_file/0010/864712/Glanfield-Inquiry-report.pdf

Key Definitions

The Ombudsman Act includes several new important terms which must be understood by schools to comply with their obligations under the Reportable Conduct Scheme. That said, many of the provisions in the Ombudsman Act are undefined, leaving their meaning open to interpretation. It is expected that the Ombudsman and other ACT authorities involved in the Reportable Conduct Scheme will release guidance which will provide further information on the meaning of new terms.

A **'designated entity'** means any of the following:

- ✓ an administrative unit that deals with the safety, welfare or wellbeing of a particular child or class of children;
- ✓ a health service provider;
- ✓ a government school or a non-government school;
- ✓ a provider of an education and care service;
- ✓ a childcare service;
- ✓ an approved kinship and foster care organisation;
- ✓ an approved residential care organisation; or
- ✓ any other entity prescribed by regulation.

The Bill highlights that the Ombudsman is also a designated entity.

An **'employee'** means a person who is:

- ✓ engaged to provide services to a designated entity under a contract of employment to which the entity and the person are parties; or
- ✓ engaged by a designated entity to provide services to children other than under a contract of employment.

The Act lists the following examples of who are employees: volunteers and out-of-home carers. In the school context, the following people would be employees:

- ✓ Board members;
- ✓ The principal;
- ✓ Staff members;
- ✓ Volunteers;
- ✓ Contractors;
- ✓ Students on placement;
- ✓ Religious instructors; and
- ✓ External education providers.

The **'head'** is defined as the:

- ✓ director-general of an administrative unit;
- ✓ head of a designated entity as prescribed by regulation; or
- ✓ chief executive officer, however described, of a designated entity.

What amounts to a **'chief executive officer'** is not explained. In the context of a school, the 'chief executive officer' would most likely be the principal, however the relevant person may be different depending on the structure and operation of the school. The Ombudsman can be contacted for advice if the "head" is not obvious².

'Reportable allegation' means an express assertion that reportable conduct has happened. The ACT Ombudsman advises that an allegation can take the form of an assertion, statement or declaration made with or without proof.

'Reportable conduct' is defined to mean conduct:

- ✓ engaged in by an employee of a designated entity, whether or not in the course of employment; and
- ✓ that results in any of the following, regardless of a child's consent:
 - *ill treatment or neglect* of the child;
 - exposing or subjecting the child to:

² Refer to [ACT Ombudsman Practice Guide: Employer Responsibilities](#).

- behaviour, or a circumstance, that *psychologically harms* the child; or
 - *misconduct of a sexual nature* that does not form part of an offence against the Crimes Act 1900 (ACT). This includes engaging in contact with a child as a preliminary step to obtaining the child's compliance in sexual activities;
- ✓ any of the following offences against the Crimes Act 1900 (ACT) for which a child is either present or a victim at the time of the conduct:
 - offences against the person (includes *assault*);
 - *sexual offences* (includes *grooming*);
 - *female genital mutilation*; or
 - *sexual servitude*.
 - ✓ either of the following offences against the Education and Care Services National Law (ACT):
 - use of *inappropriate discipline*; or
 - failure to take every reasonable precaution to *protect children from harm and hazards likely to cause injury*.

Reportable conduct does not include conduct:

- ✓ that is reasonable discipline, management or care of a child taking into account the *characteristics* of the child (including age, health and developmental stage of the child), and any relevant code of conduct or professional standard that at the time applied to the discipline, management or care of the child;
- ✓ if the conduct is investigated and recorded as part of workplace procedure—that is trivial or negligible; or
- ✓ prescribed by regulation.

The Ombudsman Act gives the following examples of conduct that is not reportable conduct:

- ✓ touching a child to attract the child's attention, to guide a child, or to comfort a distressed child;
- ✓ a teacher raising their voice to attract attention or restore order in a classroom; or
- ✓ accidental conduct.

The Act defines '**characteristics**' to include the age, health and developmental stage of the child and '**conduct**' to mean an act or an omission to do an act.

The Ombudsman's website³ defines '**ill-treatment**' to include emotional abuse, and inappropriate use of force and restrictive intervention. However, other key terms, such as '**neglect**' and '**psychological harm**' remain undefined in the Bill, and do not appear in the Ombudsman Act into which the definition of reportable conduct has been inserted.

'Reportable conviction' means, in relation to a person, a conviction or finding of guilt:

- ✓ for an offence, under a territory law or a State or Commonwealth law, involving reportable conduct; and
- ✓ entered against the person before or after the commencement of the Reportable Conduct Scheme.

'Reportable conduct information' means any information, including protected information, that is relevant to the protection of a child or young person or a class of children or young people against reportable conduct.

'Investigation', of a matter, means any inquiry or examination into the matter.

'Investigation information' means information:

- ✓ obtained as a result of an investigation into a reportable allegation or reportable conviction conducted by the Ombudsman or a designated entity; and
- ✓ about any of the following:
 - the progress, conduct or findings of the investigation; and
 - action taken as a result of the findings.

³ The information on the Ombudsman's website is available here: <http://www.ombudsman.act.gov.au/reportable-conduct-scheme>

4. The Reportable Conduct Scheme and a School's Obligations

The new Reportable Conduct Scheme requires schools to take steps to ensure that they meet their reportable conduct reporting obligations. The table below summarises those key obligations and what a school, or the head of the school, must do to comply with them. The key definitions explained above are relevant to the information in the table.

Ombudsman Act 1989 (ACT)	Requirement	What schools must do
Section 17F: Ombudsman must monitor designated entity	The Ombudsman may, by written notice, require the head of a designated entity to provide information about the entity's practices and procedures for the purpose of assisting the Ombudsman to carry out a function under this section.	Identify who the head of the school is. Document and effectively implement appropriate policies and procedures for investigating a reportable allegation or conviction and providing accurate and appropriate information to the Ombudsman.
Section 17G: Designated entity must report to ombudsman	The head of a designated entity must provide a written report to the Ombudsman about: <ul style="list-style-type: none"> ✓ any reportable allegation or any reportable conviction involving an employee of the entity; ✓ whether or not the entity proposes to take any action against the employee based on the allegation or conviction, and the entity's reasons for taking or not taking action; and ✓ any written submissions made by the employee to the head of the entity about the allegation or conviction that the employee asked the entity to take into account when deciding any action against the employee. <p>A report must be given to the Ombudsman within 30 days after the day the head of the entity becomes aware of the allegation or conviction, or another period allowed by the Ombudsman.</p>	Document and effectively implement appropriate policies and procedures for preventing reportable conduct by an employee and responding to such conduct. Document and effectively implement appropriate policies and procedures for investigating a reportable allegation or conviction and providing accurate and appropriate information to the Ombudsman within the timeframe allowed.
Section 17H: Disclosure of Information to and by ombudsman	The head, or an employee, of a designated entity may disclose any information to the ombudsman that the head or employee believes on reasonable grounds reveals: <ul style="list-style-type: none"> ✓ reportable conduct involving an employee of the entity; or ✓ a reportable conviction against an employee of the entity. 	Document and effectively implement a policy and procedures to communicate that any employee may disclose a reportable allegation to the Commission. This includes where the reportable conduct or reportable conviction involves the head of the school.
Section 17I: Ombudsman may monitor investigation	For the purpose of monitoring an entity's investigation under this section, the Ombudsman or an officer of the Ombudsman may: <ul style="list-style-type: none"> ✓ attend any interview conducted by or on behalf of a designated entity in its investigation; 	Document and effectively implement appropriate policies and procedures for investigating a reportable allegation or conviction and providing accurate and appropriate information to the Ombudsman.

Ombudsman Act 1989 (ACT)	Requirement	What schools must do
	<ul style="list-style-type: none"> ✓ confer with any person carrying out the investigation about the nature, conduct or progress of the investigation; and ✓ request information relating to the investigation by written notice given to the head of the entity. 	<p>It is a criminal offence for the school to obstruct the Ombudsman from monitoring an investigation.</p>
<p>Section 17J: Designated entity must report outcome of investigation</p>	<p>The head of a designated entity must, as soon as practicable after the end of an investigation by the entity into a reportable allegation or reportable conviction, provide the Ombudsman with:</p> <ul style="list-style-type: none"> ✓ a written report about: <ul style="list-style-type: none"> • the results of the investigation; • any action taken, or proposed to be taken, in relation to the reportable allegation or reportable conviction; and ✓ copies of all: <ul style="list-style-type: none"> • statements taken in the course of the investigation; • documents mentioned in the report; and ✓ any other information that the head of the entity considers relevant to the report. <p>After receiving the report and other information, the Ombudsman may request any additional information specified in the notice that the Ombudsman considers relevant to its functions under this section.</p>	<p>Document and effectively implement appropriate policies and procedures for investigating a reportable allegation or conviction and providing accurate and appropriate information to the Ombudsman.</p> <p>The Ombudsman’s website has information on factors the head should consider when conducting an investigation, including the weight given to evidence.⁴</p>
<p>Section 17L: Investigation information may be disclosed to child, parent and carer</p>	<p>The head of a designated entity may disclose investigation information to any of the following:</p> <ul style="list-style-type: none"> ✓ a child who is the subject of conduct that forms the basis of a reportable allegation or a reportable conviction into which an investigation was conducted by the designated entity; ✓ a parent of the child; or ✓ if the child has been placed with an out-of-home carer—the child’s out-of-home carer. 	<p>Document and effectively implement appropriate policies and procedures for sharing information about investigations conducted in relation to a reportable allegation or conviction.</p>

⁴ Refer to [ACT Ombudsman Making a finding of reportable conduct](#).

5. The Reportable Conduct Scheme and Other Reporting Obligations

The introduction of new reporting obligations under the Act increases the list of authorities in the ACT to which reports must be made by various members of a school in response to a child protection incident.

Depending on the type of conduct which occurs, the following authorities must be notified:

- ✓ Child and Youth Protection Services (CYPS) under the CYPA if the conduct meets the mandatory reporting criteria; and
- ✓ the ACT Teacher Quality Institute under the Teacher Quality Institute Act 2010 (ACT) (TQI Act) if the conduct involves a registered teacher.

The threshold for reporting allegations or convictions involving reportable conduct is broader than these other reporting obligations. This means that conduct that will be reportable conduct may not also be conduct that is subject to the mandatory reporting obligations under the CYPA.

Despite the various sources of reporting obligations which now exist in the ACT, it is important to note that the Reportable Conduct Scheme will not interfere with a school's reporting obligations to the ACT Police or CYPS. In all circumstances, allegations of criminal conduct must be reported to the ACT Police as the first priority.

Once the ACT Police have been notified and a child is not at risk of harm, the school should then consider its reporting obligations under other legislation.

6. Next Steps for Schools

The Ombudsman has released guidance and fact sheets for ACT schools to assess their preparedness to comply with the Reportable Conduct Scheme. The Ombudsman's website states that further information will soon be made available including templates for schools to use to make the reports required under Sections 17G and J of the Ombudsman Act.

It is recommended that schools understand their obligations under the Reportable Conduct Scheme as early as possible. While most schools will have policies and procedures in place that relate to child protection, specific compliance with the Reportable Conduct Scheme will require a review of a school's policies and procedures as well as its workplace systems. For example, a school's code of conduct should be reviewed to ensure that conduct which amounts to reportable conduct under the Ombudsman Act is included in the list of conduct which is unacceptable at the school. All staff members should be made aware of the code of conduct.

7. How CompliSpace Can Help

CompliSpace combines specialist governance, risk, compliance, and policy management (GRC&P) consultancy services with practical, technology-enabled solutions. We are the leading provider of student duty of care and child protection GRC&P services in Australia, working with leading non-government schools and educational authorities in all Australian states and territories.

Our team of lawyers and industry experts actively monitor changes to relevant laws and standards and deliver a full suite of online policies, procedures and governance programs that enable schools to continuously comply with their legal and regulatory obligations.

In response to the introduction of the Reportable Conduct Scheme, CompliSpace has developed detailed policies and procedures that address the provisions under the Ombudsman Act. The new policies and procedures are designed to integrate into a school's existing Child Protection Program and be tailored to the particular circumstances of each school. CompliSpace has also developed detailed online child protection training which includes information on the Reportable Conduct Scheme.

CompliSpace works with schools to tailor compliance and risk management systems to a school's individual needs and characteristics, ensuring meaningful compliance with their legal and regulatory obligations.

If you are looking to update your existing child protection content, contact us on:

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