

ACT Ombudsman Practice Guide No.5 Employer Responsibilities

This practice guide provides information to assist employers in understanding their responsibility when responding to 'reportable allegations' and 'reportable convictions' against employees.

Notifying the ACT Ombudsman

The ACT Ombudsman is responsible for monitoring the handling of reportable allegations and convictions against employees of all government and certain non-government entities in the ACT. The scheme requires that employers respond to and investigate allegations. The Ombudsman is also responsible for scrutinising the systems of these agencies for preventing and handling reportable allegations and convictions against employees.

Employers¹ that must notify the Ombudsman of reportable allegations or convictions against employees include:

- all ACT directorates
- a health service
- kinship and foster care organisations
- residential care organisations
- government and non-government schools
- child care services
- education and care service providers, including after school care.

When an allegation is made

An employer must report any allegation of reportable conduct arising after 1 July 2017. When notifying the Ombudsman of a reportable conduct allegation, an employer must:

- notify the Ombudsman using a *s 17G Notification* form, available on our website, within 30 days of the employer becoming aware of the allegation. We encourage early consultation and ask employers to contact the Ombudsman as soon as possible after learning of an allegation
- provide details of the reportable allegation or conviction and what the entity proposes to do or has done

¹ In this practice guide, the word employer is substituted for the term 'designated entity' which is defined in the Act. See s 17EA for the definition of 'designated entity.'

- provide copies of relevant material available at the time of notification. The employer is still required to notify the Ombudsman of the allegation even if Child and Youth Protection Services (CYPS) and/or police are already investigating a reportable allegation against an employee.

At the conclusion of the entity investigation

Once the employer is satisfied that the investigation has been concluded, they must, as soon as possible, provide the Ombudsman with:

- completed s 17J Report (or final report), including findings and recommendations
- any report prepared by or for them relating to the investigation, as well as copies of all statements and other documents which form the basis of the report
- any comments that they may want to make about the report
- the results of the investigation
- advice of the action that has been taken, or will be taken (arising from the investigation), in respect to the reportable allegation or conviction.

This enables the Ombudsman to determine if the investigation was carried out in a satisfactory manner and appropriate action taken.

Who is the employer and the employee?

It is the employer, or head of a designated entity, who is responsible for reporting to the Ombudsman (for example, the Chief Executive Officer for an organisation, or the Director-General for an ACT directorate). In some instances, the head of entity/employer may not be obvious and the entity should contact the Ombudsman for advice. An employer may wish to nominate a contact person for day-to-day correspondence or inquiries with the ACT Ombudsman and delegate actions required by the scheme.

For the purpose of the *Ombudsman Act 1989* (the Act) an employee² is any person engaged by a contract of employment to provide services to an employer under the scheme. The definition of employee also includes any individual engaged by an employer to provide services to children, such as volunteers, contractors, foster carers, students on placement and instructors of religion. This includes employees engaged by another organisation to provide services to children on behalf of the employer covered by the scheme, for example, through labour hire or subcontracting arrangements.

² see s 17D of the Act.

Responsibilities of the employer

Employers must:

- notify the Ombudsman of reportable allegations or convictions made against an employee, what action the employer intends to take and for what reason. Reports should be made as soon as possible but no later than 30 days after the employer becomes aware of the allegation. (See *s 17G Notification* on the website.)
- ensure systems, policies and procedures are in place for recording and responding to or investigating allegations or convictions involving reportable conduct against employees.
 - policies and procedures may include a code of conduct, managing and investigating complaints, misconduct, discipline, employee welfare and support
 - this includes allegations and convictions of reportable conduct that are exempt from notification to the Ombudsman.³
- provide information, as the Ombudsman requires, about the type and operation of the employer's systems to provide a safe environment for children in the employer's care, and systems for handling and responding to reportable allegations and convictions made against employees
- establish systems that require employees to notify the employer (or delegate), as soon as possible, of any concern, allegation or conviction of reportable conduct involving an employee, of which they become aware
- ensure ACT Policing and/or Child and Youth Protection Services are notified of allegations as appropriate in the first instance.
- provide to the Ombudsman on request, documents, updates and other information (including records of interviews) with respect to an investigation being undertaken.
- provide to the Ombudsman the results of an investigation, including copies of reports, evidence gathered and considered, the findings reached and action being taken or proposed to be taken as a result of an investigation.

What does the employer need to report?

When a complaint or allegation is made about an employee, the employer should consider whether it constitutes an allegation of reportable conduct (a reportable allegation or a reportable conviction).

Reportable conduct:

Employers covered by the scheme need to report allegations, offences or convictions relating to child abuse or child-related misconduct by an employee to the Ombudsman. It does not matter whether or not the employee engaged in the conduct in the course of employment or whether a child consents to the conduct. Reportable conduct includes:

- sexual offences and convictions where a child is a victim or is present
- offences against the person, including physical offences and convictions, where a child is a victim or is present
- conviction, or finding of guilt, under a territory law or a state or Commonwealth law, involving reportable conduct

³ Currently, no exemptions have been put in place by the ACT Ombudsman.

- inappropriate discipline or offences relating to protecting of children from harm in accordance with the provisions of the Education and Care Service National Law
- ill-treatment of a child (including emotional abuse, hostile use of force/physical contact, neglect and restrictive intervention)
- psychological harm
- misconduct of a sexual nature.
- Reportable conduct includes allegations, offences and convictions relating to any of the above.

A **reportable allegation** refers to an express assertion that reportable conduct has happened or may have happened (including a statement or declaration with or without proof). For an allegation to be notifiable to the Ombudsman, the following components are necessary:

- the person who is the subject of the allegation must be a current employee of a designated entity or have been an employee at the time the employer became aware of the allegation
- the employee must be identified or identifiable either by name or by other information including their description, work schedules and locations of the entity)
- the allegation must contain a description of behaviour that may constitute reportable conduct, and the child or young person who was alleged to have been involved in reportable conduct by an employee, must have been under 18 years at the time of the alleged incident or conduct.

A **reportable conviction** is defined as a conviction, or finding of guilt, 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 Act. Some common law convictions may also be reportable if related to similar conduct. More information is available in the ACT Ombudsman Practice Guide No 2: Identifying Reportable Conduct which is available on our website at ombudsman.act.gov.au.

What to expect from the ACT Ombudsman

When the Ombudsman receives a notification, we will write to the employer to acknowledge receipt and provide a reference number and contact details. (See *The ACT Ombudsman Practice Guide No. 1: How the ACT Ombudsman Responds to Notifications and Reports*).

If the investigation has been completed at the point of notification, the Ombudsman will assess the information that the employer has provided and give feedback in response. If the investigation has not been completed, we will ask the entity to send us the final report when the investigation has been finalised.

The Ombudsman will work with employers under the scheme to build on existing misconduct procedures and reporting obligations. The Ombudsman will:

- monitor employers' investigations and analyse trends
- share information with police and key organisations to better protect children from abuse
- take complaints about the handling of reportable conduct
- provide guidance and support to entities on best practice, including conducting investigations that are procedurally fair

- consider investigating an allegation or conviction in limited circumstances
- monitor the policies, practices and procedures of an employer for the prevention of child abuse and child related misconduct.

Ombudsman staff may also observe interviews conducted by, or on behalf of, the entity and may confer with the people conducting the investigation about its conduct and progress. If asked, the investigators must provide the Ombudsman with any information relating to the investigation. The Ombudsman will consider and respond to the employer's *s 17J Report*. If the employer does not understand the comments or would like to raise issues about how the matter was addressed, the employer may contact the Ombudsman to discuss concerns. (See *The ACT Ombudsman Practice Guide No. 9: How the ACT Ombudsman Assesses an Employer's Response/Investigation*.)

Contact

We encourage early contact with the ACT Ombudsman. You can contact us using the details below.

Telephone: 02 5119 5520

Email: act@ombudsman.gov.au

More information is available at ombudsman.act.gov.au

Please note: This document is intended as a guide only. For this reason, the information should not be relied on as legal advice or regarded as a substitute for legal advice in individual cases. To the maximum extent permitted by the law, the ACT Ombudsman is not liable to you for any loss or damage suffered as a result of reliance on this document. For the most up-to-date versions of cited Acts, please refer to legislation.act.gov.au.