

ACT Ombudsman Practice Guide No.9

How the Ombudsman Assesses an Organisation's Response/Investigation

This practice guide aims to help organisations understand how the ACT Ombudsman considers the organisation¹ response to allegations or convictions of a reportable allegation or conviction by an employee².

The ACT Reportable Conduct Scheme (the scheme) addresses organisation-related child protection. **The scheme is allegation³ based.** Organisations considered under the reportable conduct scheme must notify⁴ the Ombudsman of reportable allegations and convictions against employees.

What does the Ombudsman look for in a response?

The nature and circumstances of a reportable conduct allegation against an employee will vary. There will also be a variety of responses from the organisation depending on the nature of the conduct. The Ombudsman does not expect a complex or extensive investigation to every allegation raised. Organisations should ensure that information is collected to enable them to make a sound decision about how to respond to the alleged conduct of an employee. When an organisation's response⁵ into reportable conduct is assessed, the Ombudsman will look for clear and sufficient analysis to support actions taken by the organisation.⁶

Specifically the Ombudsman will consider the following aspects of the organisation's response:

- initial response
- planning
- inquiry and information gathering
- employee response
- making a finding
- taking action.

The organisation's responses to the allegation of reportable conduct or a reportable conviction should be outlined by the organisation in the *s 17J Report*, which is the final report by the organisation to the Ombudsman. An example template for an *s 17J Report* is available on our website: ombudsman.act.gov.au.

¹ The word 'organisation' is substituted for the term 'designated entity.' See s 17EA in the Act for the definition

² An employee includes certain contractors, volunteers, carers .See s 17D in the Act for the definition.

³ Allegation refers to express assertions that reportable conduct has occurred or may have occurred (s 17D of the Act).

⁴ See the s 17G Notification Form on our website.

⁵ For purposes of this practice guide, an organisation's response includes consideration of an allegation against an employee of child abuse or misconduct toward a child. Such a response may including investigating the allegation.

⁶ See the *Act Ombudsman Practice Guide No 5: Organisation Responsibilities* on our website.

Assessing the Organisation's Response

Overall response

After the *s 17J Report* is submitted, the Ombudsman will consider a range of factors in the organisation's overall response:

- Were Child and Youth Protection Services (CYPS), ACT Policing or any other regulators notified of an alleged offence or child at risk of abuse as appropriate?
- Was the allegation clearly defined, clarified and recorded correctly when it was initially received?
- Are there any procedural fairness considerations to address including:
 - informing people against whose interests a decision may be made of the substance of any allegations against them or the grounds for adverse comment about them
 - providing people with a reasonable opportunity to put their case, whether in writing or otherwise
 - hearing all parties to a matter and considering all submissions made
 - making reasonable inquiries or investigations before making a decision
 - ensuring that conflicts of interest are managed
 - acting fairly and without bias and
 - conducting investigations without undue delay (allowing for the pre-eminence of criminal and statutory child protection investigations).
- Did the organisation consider the risks to the child⁷ against whom the wrongdoing was allegedly committed (the victim), the employee who was the subject of the allegation, witnesses and the organisation?
- What frameworks were considered or put in place to ensure the safety of the child and the employee?
- Did the child against whom the wrongdoing was allegedly committed have any vulnerabilities? If so, were these aspects adequately addressed in the initial response?
- What action, if any, was taken in respect to the employee?
- Was any physical or electronic evidence (for example mobile phones or computers) secured at the outset?
- What type of support was offered to the child against whom the wrongdoing was allegedly committed?
- What type of support was offered to the employee who was the subject of the allegation?
- Was the organisation's overall response to the allegation prompt and timely?
- Were actual and potential conflicts of interest identified and addressed?

⁷For purposes of this practice guide and the scheme, the word child includes children, a young person and young people and refers to an individual or individuals under 18 years old.

- When did the organisation notify the Ombudsman?
- What attempts, if any, were made to share/seek information? (For example, with ACT Policing, CYPS, Access Canberra, Teacher Quality Institute, Children’s Education and Care Assurance, Human Rights Commission etc.) Are there any known employers, who are designated entities with whom information should be shared?

Planning

In addition to the overall response, the Ombudsman will look specifically at the planning that went into any response by the organisation to an allegation, including an investigation:

- Did the organisation plan how to proceed with the response to the allegation? Was this plan documented and reviewed if necessary?
- How was risk assessed? Was a risk analysis completed and updated during the response by the organisation to the allegations?
- In the response to the allegation by the organisation, were reasons stated as to the investigator’s decisions about who should, or should not, be approached for information? (For example, child witnesses or carers of a child).
- Was conflict of interest an issue for the investigator or decision maker? If so, how was that conflict managed?
- How did the employee identify and respond to any cultural or special needs of the child against whom the wrongdoing was allegedly committed or the employee who is the subject of the allegation?
- Were other factors considered (for example, confidentiality)?

Information gathering

The adequacy of an organisation’s response to an allegation of reportable conduct will be directly influenced by the information gathered and considered in relation to the allegation. The following aspects will be considered by the Ombudsman in this regard:

Working with children

- What steps were taken to ensure confidentiality when information, including information related to a child, was gathered?
- Were the risks to a child (including a class of children), the employee who was the subject of the allegation, witnesses and the organisation considered during the response/investigation, especially as new information came to light?
- If a child was interviewed, was this done appropriately and the conversation adequately documented?
- When a child is interviewed, were they provided with adequate support?
- If the decision was made not to interview a child, either victim or witness, was the reason clearly recorded? For example, if the child was already interviewed by CYPS or ACT Policing and these records were obtained.
- Were the parents or carers of the child (the alleged victim) informed as appropriate during each stage of the response/investigation?

- Did the organisation offer adequate assistance such as counselling, to the child against whom the wrongdoing was allegedly committed, their family, witnesses and the employee who was the subject of the allegation?

Considering information generally

- Were events occurring during the organisation's response to the allegation adequately and clearly recorded? (Examples of this type of information may include all actions, phone calls, e-mails, meetings, conversations and decisions).
- Were all the relevant people and witnesses that were identified in the response/investigation plan, or similar document, approached to provide oral or written evidence? If not were reasons provided?
- Was physical or electronic evidence secured and, if appropriate, forensically examined?
- Was the organisation's response or investigation process adequately and appropriately documented?
- Was information sought and/or obtained from any other sources? For example, were information sharing requests made as appropriate?
- Does the final report (see *s 17J Report* for a template) include copies of all relevant advice given or received internally and externally (such as CYPS and ACT Policing)?
- Was sufficient information gathered to make a reasonable finding on the balance of probabilities?

Employee Response

Procedural fairness requires that the employee be afforded all reasonable opportunities to make an informed response to the allegations made against them. This does not translate into a presumptive right for the employee to be informed of an investigation at its commencement.

The employee has the right to reply to the allegation. In addition, a final decision should not be reached before the employee has had an opportunity to make a statement in reply to any proposed adverse comments and findings. The Ombudsman will consider whether matters in respect to the employee who is the subject of the allegation are handled fairly and confidentially including:

- Did the organisation offer adequate assistance, such as counselling, union referrals and management support to the employee?
- Were the allegations put to the employee for response? Was a support person present when the allegations were put to the employee?
- Was the employee given sufficient detail about the allegation(s) so they could make an adequate response? Was adequate time provided to allow the employee to do so?
- Is there a signed records of interview with the employee and/or any written response made by them?
- Was the employee advised of the Ombudsman's role in employment-related child protection, including that a notification had been made?

Making a finding

At the conclusion of the organisation's response to an allegation of reportable conduct, the decision maker will make a finding as to whether allegations are sustained or not sustained.⁸ The Ombudsman will consider the following questions about the organisation's actions:

- Has the organisation demonstrated that it considered all relevant information before making a finding?
- If any information was not considered, were reasons provided for doing so? Were those reasons adequate to exclude some information?
- What standard was used to assess make the finding? Was the standard appropriate?
- Was the finding reasonable and supported by the available evidence?

Taking Action

After a finding is made, consequences and outcomes are considered by the organisation. The Ombudsman will consider the following questions about the organisation's actions:

- Was appropriate action taken at the conclusion of the organisation's response/investigation in relation to the employee? For example, were appropriate disciplinary or other actions taken? Perhaps no action was required?
- Is there sufficient evidence to support the action taken? Termination of employment or formal warnings should be supported by a thorough investigation of the reportable allegation against the employee.
- Where appropriate, were the organisation's policies, procedures and training regime reviewed and amended in light of the information received during the response/investigation?
- Did the organisation adequately inform the employee of the final outcome of the response/investigation and, if appropriate, to the child against whom the wrongdoing was allegedly committed or the child's parents/carer?

System issues

Under s 17EA of the Act, the organisation must have practices and procedures for the prevention of reportable conduct involving an employee and for dealing with reportable allegations or reportable convictions. The Ombudsman may assess the practices and procedures of an organisation as part of the review process around the response to an allegation of reportable conduct and make recommendations accordingly.

Contact

We encourage contact with the Ombudsman. We may be contacted using the telephone number on our website or email address: **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.

⁸ See the ACT Ombudsman Practice Guide No. 6: Making a Finding of Reportable Conduct: ombudsman.act.gov.au