

# ACT Ombudsman Practice Guide No. 9: How the Ombudsman Assesses an Employer's Response/Investigation

**This practice guide aims to help employers understand how the ACT Ombudsman considers employer<sup>1</sup> responses to allegations or convictions of a reportable allegation or conviction by an employee.**

The ACT Reportable Conduct Scheme (the scheme) commenced on 1 July 2017.<sup>2</sup> The scheme addresses **employment-related** child protection. The reportable conduct scheme is allegation<sup>3</sup> based. Employers considered under the reportable conduct scheme must notify<sup>4</sup> the Ombudsman about 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 employer depending on the nature of the conduct. The Ombudsman does not expect a complex or extensive investigation to every allegation raised. Employers need to 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 employer's response<sup>5</sup> into reportable conduct is assessed, the Ombudsman will look for clear and sufficient analysis to support actions taken by the employer.<sup>6</sup>

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

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

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

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<sup>1</sup> The word 'employer' is substituted for the term 'designated entity.' See s 17D in the Act for the definition of 'designated entities.' Broadly, 'reportable conduct' covers allegations or convictions of child abuse or misconduct toward children. For more information, see *The ACT Ombudsman Practice Guide No. 2: Identifying Reportable Conduct* on our website: [ombudsman.act.gov.au](http://ombudsman.act.gov.au)

<sup>2</sup> The [Reportable Conduct and Information Sharing Legislation Amendment Act 2016](#) updated the [Ombudsman Act 1989](#) (the Act) when the scheme commenced.

<sup>3</sup> For purposes of this practice guide, the term allegation refers to express assertions that reportable conduct has occurred or may have occurred (s 17D of the Act).

<sup>4</sup> See the s 17G Notification Form on our website.

<sup>5</sup> For purposes of this practice guide, an employer's response includes consideration of an allegation against an employee of child abuse or misconduct toward a child. Such a response may include investigating the allegation.

<sup>6</sup> See the *Act Ombudsman Practice Guide No 5: Employer Responsibilities* on our website.

## Assessing the Employer's Response

### Overall response

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

- 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 employer consider the risks to the child<sup>7</sup> against whom the wrongdoing was allegedly committed (the victim), the employee who was the subject of the allegation, witnesses and the employer?
- 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 employer's overall response to the allegation prompt and timely?
- were actual and potential conflicts of interest identified and addressed?
- when did the employer 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?

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

## Planning

In addition to the overall response, the Ombudsman will look specifically at the planning that went into any response by the employer to an allegation, including an investigation. Some of the factors which might be considered include:

- did the employer 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 employer to the allegations?
- in the response to the allegation by the employer, 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 employer'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 employer 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 employer 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 employer'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 employer'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 employer 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 employer's response to an allegation of reportable conduct, the decision maker will make a finding as to whether allegations are sustained or not sustained.<sup>8</sup> The Ombudsman will consider the following questions about the employer's actions:

- has the employer 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 employer. The Ombudsman will consider the following questions about the employer's actions:

- was appropriate action taken at the conclusion of the employer'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.

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<sup>8</sup> See the *ACT Ombudsman Practice Guide No. 6: Making a Finding of Reportable Conduct*: [ombudsman.act.gov.au](http://ombudsman.act.gov.au)

- where appropriate, were the employer's policies, procedures and training regime reviewed and amended in light of the information received during the response/investigation?
- did the employer 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 17F of the Act, the Ombudsman must monitor the practices and procedures of an employer, considered under the scheme, 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 employer as part of the review process around the response to an allegation of reportable conduct and make recommendations accordingly.

Alternatively, the Ombudsman may choose to monitor an entity's processes and procedures.

### **Contact us**

We encourage early contact with the Ombudsman. You can telephone us prior to submitting an s 17G *Notification*. We may be contacted using the details below.

#### **Further information:**

Telephone: 02 6276 3770

Email: [act@ombudsman.gov.au](mailto:act@ombudsman.gov.au)

Website: [ombudsman.act.gov.au](http://ombudsman.act.gov.au)