Office of the
Children's Guardian

Disclosing information to children, parents and carers

The NSW Reportable Conduct Scheme – Fact sheet 7

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The Reportable Conduct Scheme provides a framework for the oversight of how organisations respond to reportable allegations that have been made against their employees. It is set out in Part 4 of the Children's Guardian Act 2019 (the Act). The Scheme aims to ensure that reportable allegations are responded to in a way that ensures children are kept safe and employees are treated fairly.

This fact sheet explains heads of relevant entities' obligations under section 57 of the Act, which states that they must must disclose 'relevant information' to the following persons unless they are satisfied that the disclosure is not in the public interest:

- a child to whom the information relates,
- a parent of the child,

- if the child is in out-of-home care — an authorised carer that provides out-of-home care to the child.

'Relevant information' is defined to mean the following information relating to a reportable allegation or conviction considered to be a reportable conviction:

- information about the progress of the investigation,
- information about the findings of the investigation,
- information about action taken in response to the findings.

What does section 57 mean in practice?

The requirement to provide information to the parties specified in section 57 unless there are reasons not to acknowledge that these parties have a direct legitimate personal interest in being kept informed about reportable allegations involving them/their child.

Section 57 does not prescribe the amount of information you must disclose – only the type (about the progress, findings and action taken in response to the findings). It does make clear that the starting point is a rebuttable presumption in favour of disclosing the information.

At the same time, the legislation provides for you to act outside of this default position where you can demonstrate that it is not in the public interest to disclose information to those parties.

The public interest consideration applies to decisions regarding:

- whether to disclose information at all;
- when to disclose information;
- how much information to disclose; and
- how to disclose information.

A best practice model will involve a case-by-case and dynamic approach that considers all the relevant factors known to the entity at regular points in time. A point-in-time decision not to disclose information under section 57 should be revisited as circumstances change. You should clearly document all of these decisions, and any reviews of these decisions over time, and provide the documentation to the Children's Guardian if requested, or when providing the interim and entity reports.

What would constitute a public interest factor against disclosure?

Certain factors will always take priority over disclosing information under section 57 – such as the safety of the people involved and not compromising the investigation. When Police or DCJ are involved, it is imperative that you seek clearance from those agencies before disclosing relevant information.

The kinds of public interest factors that may weigh against disclosure of information – or the disclosure of information at a particular point in time – include that disclosure may:

- not be in the interests of the child's safety, welfare or wellbeing;
- jeopardise a current or future police investigation or other proceedings (such as a coronial inquiry, Children's Court proceedings, a statutory child protection response, the reportable conduct investigation);
- endanger a person's health or safety;
- result in a waiver of legal privilege;

- result in unfairness to the employee to an extent that is not outweighed by the interest of the relevant party; and
- enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained.

Note that this is not an exhaustive list. Note also that, even if one or more of these factors would be present if a full and detailed disclosure of information were to be made to the child or parent/carer, you should still consider whether a limited amount of information may be appropriate to disclose.

What factors are relevant to whether and how much information I disclose?

Decision-making in accordance with this requirement will be case-by-case and must take into account the nature of the reportable allegation and the particular circumstances of the relevant child. These circumstances are innumerable, but by way of example:

- If a child is in out-of-home care, release of information to a carer should comply with any guidelines or directions issued by the Department of Communities and Justice and also take into account whether the carer is the subject of the allegation or may be a witness in the investigation.
- If a child's parents are separated, consideration will need to be given to any court orders relevant to each parent and their contact with their child, or any AVOs that may be in place.
- If the relevant child is of an age to object to their parent or carer being informed of the matter, there would have to be compelling reasons to act against their wishes.
- Depending on the child's age and whether or not they themselves are the source of the reportable allegation, it may be appropriate to raise the intention to disclose to the child with the child's parent or carer in the first instance. However, this would not be appropriate if the parent of carer is the subject of the reportable allegation, or informing the parent or carer would otherwise not be in the public interest.

When should I disclose the information?

It is best practice to turn your mind to section 57 immediately on receipt of a reportable allegation, and provide information to involved parties at the earliest practicable time. When you provide relevant parties with initial information about a reportable allegation, this is a good time to provide a range of other information that will assist them to set their expectations about, and to understand, information that may be subsequently released to them. For example, it is helpful to explain the required process, the requirement to make a finding on the balance of probabilities, and what this means, and also that sometimes an investigation cannot be concluded but this is only permissible with the written exemption of the Guardian.

Does 'information' include documents?

Yes, compliance with section 57 may involve the release of documents, however this is not essential and will often be unnecessary and/or inadvisable. For example, meeting the objectives of section 57 would not generally involve the release of investigative material such as interview transcripts and statements or copies of evidence at any stage. However, there may occasionally be reasons to permit a relevant party to sight certain records in a redacted form at appropriate times.

How should I release information?

Again, section 57 does not prescribe a particular format or channel for the release of information. You may decide to release information orally or in writing, or by allowing someone to read a document. Unless it is not feasible, it is best practice to provide initial and final information in person, and to ensure adequate supports are in place when doing so.

Howsoever you disclose the information, it is important that you consider any support that should be made available – both at the time of the disclosure and on an ongoing basis as the investigation continues.

It is also important to take steps to maintain an appropriate level of confidentiality of the information that is disclosed. In this regard, you should explain to the recipient that:

- the information constitutes personal and private information that is protected by legislation,
- you are exempted from privacy legislation by section 57, however only insofar as you disclose the information to the recipient/s, and
- section 57 does not protect the recipient if they release the information to any other party.

How should I talk about findings to a child, parent or carer?

A child's disclosure may or may not be substantiated or 'sustained' after investigation. You may tend to believe the child's disclosure, but for various reasons, the available evidence falls short of the threshold required to make a sustained finding.

When conveying to a child or their parent/carer that their disclosure was not sustained, it is important to explain that it does not mean their disclosure was not believed. This is an easier conversation to have if the process and possible outcomes has been clearly explained to them at the outset. It can be constructive to focus on providing a summary of the inquiries made, the available evidence (within reason and considering the interests of others, including witnesses) and how this affected the ultimate outcome.

Also, if remedial or other risk management action has been taken, and/or steps have been taken to address any systems issues identified during the investigation, disclosing this information to the relevant parties can assist them to accept that the process was conducted fairly and reasonably and with an appropriate outcome.

Is it fair to give the details of disciplinary action against the employee?

When you are releasing information about management or disciplinary action at any stage of a reportable conduct response, it is important to carefully balance the competing interests of the employee and the involved parties. For example, it will often be appropriate to provide the specific details of action taken to manage risks to the child who is the victim in the matter, but it may suffice to provide only general information regarding global risk management action. As another example, it would be appropriate to inform relevant parties that formal action will be taken to address the conduct, but it would not be necessary to provide exhaustive detail about the related disciplinary proceedings.

What information can I disclose to a child indirectly affected?

Section 57 provides protection for information provided to the child to whom the information relates. While it may be possible and appropriate to release information to other children involved in the reportable conduct investigation – such as a child who made a report or a child who gave witness evidence – it is important to know that any such disclosure is not required nor covered by section 57.

What about third-party complainants?

If a third party is not one of the parties prescribed in section 57, then any release of information to that third party is not required and nor is it covered by section 57. However, the NSW Police Force and DCJ both have certain exemptions from some of the legal constraints on disclosure of personal information, meaning that broader information releases can be made by either or both of those agencies.

Should I tell the employee that I have released information about them?

It is best practice to alert the employee at the outset of a reportable conduct investigation about the process that will be undertaken, and this should include information about section 57. If the employee objects to information being provided to relevant parties, you should:

- give due consideration to the reasons put forward by the employee (along with any supporting evidence) and in particular whether they would amount to a public interest reason not to disclose relevant information,
- make any relevant inquiries to verify (or otherwise) the reasons provided, and
- fully document your decision-making with consideration to the employee's objections.

This is complicated – can I adopt a simple policy of never disclosing information?

The requirement to disclose information in accordance with section 57 is a new requirement. Under s 25GA of the Ombudsman Act 1974, disclosure of the information specified in section 57 was permitted, but not required. It is now mandatory to provide information in certain circumstances.

We understand that there are many complex factors to consider when complying with this new legislative requirement. You can contact the Reportable Conduct Directorate for advice and guidance with your decision-making under section 57.

The most important feature of your decision-making in this area is that it should be clearly documented. If you or your entity consistently fails to document sound public interest reasons for not disclosing information under section 57, we may use our inquiry, audit or investigative powers to consider the entity's systems for compliance with this provision. However, we use these powers as a last resort and our objective is to assist agencies to establish sound procedures in line with this new provision.

Office of the Children's Guardian

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