

Providing advice about reportable conduct investigations to children, parents and carers

A parent or carer has a legitimate interest in being told of the process that is being followed to investigate an allegation that their child was a victim of reportable conduct. Information can often be provided to the parent, carer or child without the need to consider legal impediments to disclosure. However, legal impediments – real or feared – may discourage the timely and appropriate release of information.

Section 25GA of the *Ombudsman Act 1974* (which commenced on 2 November 2015) aims to remove legal impediments to the Ombudsman or a designated agency providing information about a reportable conduct investigation to an alleged victim, parent or carer.

Section 25GA describes the type of information the Ombudsman or the head of a designated government or non-government agency may disclose. Disclosure in accordance with this section will not breach any law that otherwise prevents or restricts the disclosure of the information, and the disclosure will not incur liability for defamation or other civil liability such as liability for breach of confidence: section 25H.

Section 25GA operates alongside other laws that either require or authorise the disclosure of information (for example, the *Victims Rights and Support Act 2013*, discussed below). While section 25GA authorises the Ombudsman or an agency head to disclose information, it does not require them to do so.

This fact sheet provides guidance on section 25GA, and on other matters to consider in deciding whether to release information under section 25GA about a reportable conduct investigation. Section 25GA does not list any matters that may or must be disclosed, and ultimately it will be a matter of discretion whether disclosure is appropriate in the individual circumstances. The Ombudsman's office may have regard to the matters referred to in this fact sheet when dealing with complaints about agencies' disclosure (or non-disclosure) decisions.¹

1. The Ombudsman normally expects agencies to take the lead in handling reportable conduct matters and disclosing information to involved parties. The Ombudsman will generally only provide information to involved parties under s 25GA if this is desirable to achieve a particular statutory operational objective.

1. Key terms in section 25GA

1.1. Who can disclose information?

Disclosure can be made under section 25GA by the Ombudsman or the head of a 'designated' government or non-government agency. Designated agencies are agencies falling within the Ombudsman's reportable conduct jurisdiction under Part 3A of the Ombudsman Act. The 'head of an agency' is the chief executive officer or other principal officer. These terms are discussed more fully in the Ombudsman Fact Sheet – *Child Protection: Responsibilities of heads of agencies*.

Section 25GA provides legal protection only when information is released by the head of the agency. This would include the release of information by another officer at the direction of *and* with the specific knowledge of the head of agency. Section 25GA does not prevent the release of information by other agency staff, but the section does not provide legal protection in those circumstances.

1.2. Who can information be disclosed to?

Information can be disclosed to:

- the child who was allegedly the subject of the reportable conduct that forms the basis of the reportable allegation (a child is a person who was aged under 18 at the time of the reportable conduct)
- any parent of the child
- if the child is in 'out-of-home care', any 'authorised carer' of the child (those terms are defined in the *Children and Young Persons (Care and Protection) Act 1998*).

Those three groups of recipients are collectively referred to in this fact sheet as 'involved parties'. Depending upon the circumstances, it may be appropriate to release information to one involved party but not another. For example, it may be appropriate to disclose information to a child's parents, but not to the child, or to only one of the child's parents.

1.3. What information can be disclosed?

The following information can be disclosed:

- information about the **progress** of an investigation
- the **findings** of the investigation, and
- any **action taken in response** to those findings.

2. Matters to consider in deciding whether to release information

2.1. Striking a balance between competing interests

Section 25GA facilitates disclosure of reportable conduct information by removing legal impediments to disclosure. The underlying assumption is that disclosure of information to involved parties may, depending on the circumstances, be appropriate. Section 25GA recognises that involved parties in an investigation may have a direct personal interest in being kept informed.

There may, however be countervailing factors that make it inappropriate to release information in particular circumstances. Disclosure may jeopardise other proceedings that are underway – such as a police investigation or coronial inquiry. Disclosure may also endanger a person's health or safety, or result in a waiver of legal privilege. These and other public interest considerations that may weigh against disclosure are outlined below.

The interests of a person against whom an allegation is made also warrant consideration. The subject of an allegation must be treated fairly.

The range of matters to be considered in making a disclosure decision will depend on the circumstances. Relevant factors include the nature of the allegations, the individual circumstances of the alleged victim and his or her parents or carer; how much information should be provided; whether the same information should be provided to all parties; how the information is to be given to a party; whether the subject of an allegation has or should be informed of the disclosure; and what support and consultation options are available to all parties following the disclosure.

2.2. When release of information will be inappropriate

Information about a reportable conduct allegation should not be released to an involved party if doing so might:²

- prejudice a criminal, child protection, reportable conduct or other formal investigative process
- prejudice the prevention, detection or effective response to actual or possible criminal conduct, child abuse or other reportable conduct
- endanger, or possibly put at risk, the safety of the alleged victim or any other person (including the subject of the allegation)
- prejudice a coronial inquest or inquiry
- prejudice any proceedings in the Children's Court
- contravene any legal professional privilege or otherwise compromise any current or future legal proceedings
- enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained, or
- not otherwise be in the public interest.

The advice in this fact sheet is to be read subject to those limitations on releasing information.

2.3. Giving information to a parent or carer

The parent or carer of a child has a direct interest in being told that the child is an alleged victim of reportable conduct and of the nature of the reportable allegation. The parent or carer will also expect to be kept informed of the progress and findings of any investigation, and of any action that might be taken after the investigation is completed.

Special issues may arise that require an adjustment to normal disclosure practice. For example, the parent, carer, partner or a household member may be the subject of the reportable allegation. A tailored approach may also be required if the parents of a child are separated, or parents and step-parents have particular care or custody arrangements in place.

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 Family and Community Services (FACS) or the NSW Office of the Children's Guardian (OCG). Information about a reportable allegation should not be given to the parent of a child in out-of-home care except with the consent of FACS.³

2. These factors are based on those listed in s 245D(4) of the *Children and Young Persons (Care and Protection) Act 1998*.

3. The Ombudsman may independently decide to release information to a parent, pursuant to powers conferred by the *Ombudsman Act 1974* and the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

2.4. Giving information to a child

A parent or carer should generally be consulted before information is given (in reliance on section 25GA) directly to a child who is an alleged victim of reportable conduct. A tailored approach to consulting the parent or carer may be necessary depending upon matters such as the age of the child, their relationship to the parent or carer, any expressed views of the child about releasing information to other involved parties, and whether the parent or carer is implicated in the alleged reportable conduct.

Agencies to which s 25GA applies are advised to develop their own guidelines to govern the procedure for discussing this issue with involved parties, and in particular for providing information to a child. The guidelines should cover matters such as the nature of the information that can be given to a child (having regard to their age and individual circumstances), how information should be given, the role of the parent or carer, and procedures for consultation and counselling with the involved parties.

The policies or practices adopted by agencies should take account of the principle stated in section 9(2)(a) of the *Children and Young Persons (Care and Protection) Act 1998*:

Wherever a child or young person is able to form his or her own views on a matter concerning his or her safety, welfare and well-being, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child or young person and the circumstances.

This echoes a similar principle in Article 12 of the *United Nations Convention on the Rights of the Child*:

Children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account.

The expressed views of a parent or carer may not align with those statements of principle. The parent or carer may oppose information about a reportable allegation being given to a child, in circumstances where the head of agency is otherwise prepared to release the information. It is ultimately for the head of agency to decide on the course to be adopted, bearing in mind that section 25GA does not formally require disclosure but gives legal protection if disclosure is made. These are matters that can appropriately be addressed in the guidelines adopted individually by agencies or on a sector-wide basis.

3. Information that can be disclosed under section 25GA

3.1. The progress of the investigation

An involved party can be given information under section 25GA(1)(a) about the progress of the investigation. This might, but will not necessarily, include information of the following kinds:

- an acknowledgement that a reportable allegation has been received and is being investigated
- an outline of the investigative process that will be followed
- who will conduct the investigation
- the range of possible outcomes and findings
- other persons who have been notified of the allegation or given information about it
- when further information may be given to the involved party
- details of a relevant contact person for the investigation
- support that is available to the involved party.

Other matters that can be discussed with an involved party at this time include:

- the need for confidentiality while an allegation is being investigated
- the need for the investigator to work independently and impartially
- the fact that, until the investigation is completed, the allegation remains untested and unsubstantiated, and the subject of the allegation is entitled to be treated fairly
- expectations about how the investigation may progress and be finalised
- the types of information the involved party would like to receive
- legal or practical constraints that may inhibit disclosure of information
- risks to the child who is the subject of an allegation, and how these can be managed.

Information about the progress of an investigation should be given to an involved party at the earliest practicable time. It may be desirable to provide an update at a later stage, particularly if the investigation is taking a long time or has changed direction.

3.2. The investigation findings and action taken in response

At the close of an investigation, an involved party can be given information under section 25GA(1)(b) and (c) about the findings of the investigation and any action taken in response to those findings. This might, but will not necessarily, include the following kinds of information:

- the particular finding(s) that were reached in the investigation
- the reason or explanation for a finding
- if appropriate, why a different finding was not reached, or the available evidence did not sustain an allegation
- how the investigation was conducted, and whether it followed the course that was earlier advised
- the action that will be taken in response to a finding, and why that action was chosen.

Even where the Ombudsman or head of agency has decided to release information, he or she retains discretion over what is and is not released. Matters to take into account in deciding what information can be given to an involved party include the following:

- information should not be disclosed that may identify a witness without their consent
- information must not be disclosed that may prejudice an ongoing investigation or action being taken by police or other agencies in response to an allegation or finding
- an individual who was the subject of an allegation or finding should be treated fairly, having regard to whether the disclosure may unfairly and adversely affect their privacy, reputation, health and wellbeing, occupation or career
- adequate information should be given to involved parties to allow them to feel confident that the allegation was treated seriously and properly investigated
- the guidance provided in the *Charter of Victims Rights* (see 3.3).

3.3. Charter of Victims Rights

The *Victims Rights and Support Act 2013* establishes a *Charter of Victims Rights* that imposes disclosure obligations on police, government agencies and non-government agencies that are funded or authorised to provide support services to victims of crime. Agencies that are not subject to the Act may nevertheless find that the *Charter* provides helpful guidance on providing information to involved parties.

The *Charter* lists 18 rights of victims of crime (being persons who have suffered physical or psychological harm as a direct result of a criminal offence committed by another person). These rights aim to provide comprehensive protection for victims, by recognising a victim's right to physical safety and emotional well-being, to access counselling and legal and financial assistance, and to be consulted and informed about the investigation and enforcement actions. Some of the rights overlap with the disclosure principles that are discussed in this fact sheet. Examples include the right for a victim of crime:

- to be treated with courtesy, compassion, cultural sensitivity and respect
- to be told as soon as possible about services that may help, including counselling and legal services
- to be told by police about how a police investigation is going, a prosecution is proceeding and the trial process
- to be given information about how to make a complaint that a requirement of the *Charter* was not met.

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*).

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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We can arrange an interpreter through

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