

Submission by the Children in Care Collective Review of Victoria's Reportable Conduct Scheme

The Children in Care Collective appreciates the opportunity to provide feedback on the operation of the Reportable Conduct Scheme (the 'scheme') in Victoria.

The Children in Care Collective was formed in 2016 by a group of out-of-home care service providers and leading experts in working with children with complex needs in out-of-home care.

Members of the Collective, several of which provide out-of-home care services in Victoria, are: Allambi Care; Anglicare NSW South, NSW West and ACT; Anglicare Sydney; CareSouth; Key Assets; Life Without Barriers; Mackillop Family Services; Marist180; Pathfinders; Settlement Services International; Uniting NSW/ACT; Australian Centre for Child Protection (ACCP) - University of South Australia; Institute of Child Protection Studies (ICPS) - Australian Catholic University; Research Centre for Children and Families (RCCF) – University of Sydney.

The aim of the Collective is to share experience, discuss best practice informed by research, provide advocacy and learn from policy and practitioner experts in out-of-home care. The Collective seeks to address solutions to difficult systemic practice issues faced by the sector and to improve outcomes for children and young people with complex needs living in out-of-home care. The Collective's website is at <http://childrenincarecollective.com.au/>.

Our vision of success is that 'an effective and well-resourced service system supports children and young people with complex needs to grow up safely and well in out-of-home care, confident that their rights and wellbeing are protected and prioritised'. We believe the proper operation of a reportable conduct scheme in every state and territory is an essential component of a safe and accountable out-of-home care system.

Reportable conduct schemes- overall

The key purpose of a reportable conduct scheme remains unchanged since its inception in New South Wales more than 20 years ago. That is, ensuring the protection of children from abuse within institutions by embedding independent oversight as a key element of the child protection regulatory framework. As stated in the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (the 'Royal Commission'):

Independent oversight can help institutions better identify and manage risks to children. It can improve institutions' competency, transparency and accountability in complaint handling, and help create a consistent standard of practice across sectors. Further, independent oversight can assure the public that the institutions entrusted to care for children cannot minimise or ignore complaints, and that the leaders and employees of these institutions cannot operate with impunity. (Volume 7, Section 4.1, p242)

The strength of a reportable conduct scheme includes its capacity to identify and respond to current risks to children, high-risk situations and employees. It assists prevention through information gathering and sharing with relevant agencies.

Of relevance to the best operation of all reportable conduct schemes, we note the Royal Commission’s Recommendation 7.9 that state and territory governments should establish nationally consistent reportable conduct schemes. We also note the Royal Commission’s Recommendation 8.7 about the need for state and territory governments to develop nationally consistent information exchange provisions.

Ensuring consistency between the reportable conduct schemes in different states and territories and providing for the ready exchange of relevant information would simplify organisational processes and ensure resources can be directed to the safety and wellbeing of children and young people rather than complex administrative procedures. Consistency between schemes would also enable agencies themselves to more clearly identify any patterns or trends in reportable conduct within their agencies and take steps to strengthen their internal systems.

Where we have specific comments on the Victorian scheme, they are set out below.

Defining reportable conduct

Relevant Questions

1. Is the definition of ‘reportable conduct’ clear? What are the benefits or challenges of this definition?
6. Is ‘reportable allegation’ clearly defined? Is it consistently interpreted by people in your organisation?

The definitions of reportable conduct and reportable allegations are generally clear, and the information sheets published by the CCYP provide useful information. However, further guidance and clarity about identifying ‘significant neglect’ and ‘behaviour that causes significant emotional and psychological harm’ would be valuable since they are types of conduct that may be open to interpretation. Additional guidance on the differences between ‘sexual misconduct’ and ‘sexual offences’ would also be useful.

Relevant Question

2. How appropriate is it that conduct outside of the workplace is in scope for all employees? Has this created any benefits or challenges?

Notwithstanding agencies’ commitment to the objectives of the scheme in identifying and managing current risks to children, high-risk situations and employees, investigating conduct that occurs outside the workplace presents a number of challenges for agencies.

Challenges investigating conduct outside employment include limitations on the agency having knowledge of, or access to, other information or witnesses who could help substantiate the allegation. This may be the case, for example, where:

- an allegation is received via public notification or anonymously
- the person the subject of allegation has resigned from the agency
- the allegation relates to conduct which (allegedly) occurred in another jurisdiction.

If the employee resigns before reportable allegations can be investigated, in the absence of an employer/employee relationship the agency has no capacity to compel information. In this situation, it

may be more appropriate and viable to require agencies to notify the CCYP of allegations involving conduct outside employment. The CCYP could then consider whether it should undertake an own motion investigation, noting that the CCYP can conduct an own motion investigation in some circumstances, including where it is in the public interest, or where an entity or regulator is unable to investigate an allegation.

It is worth noting that as part of its statutory review of the NSW reportable conduct scheme, the NSW Children's Guardian is currently considering whether conduct outside employment should be excluded. Consultation with the NSW Children's Guardian would perhaps be profitable.

Relevant Question

3. Is the definition of 'employees' who are in scope of the Scheme clear and appropriate?

The definition of employees in scope of the scheme is generally clear. It would be helpful to provide some specific examples for certain types, for example 'officers' so that it is clear board and committee members are included.

Some difficulties are presented by the allocation of reportable conduct responsibilities to the entity that engages contract employees rather than to the agency where they are engaged to work. This approach can be problematic for timely and necessary sharing of information and access to witnesses and children. It can also pose challenges for ongoing risk management given that the out-of-home care agency has to rely on the vigilance of the contracting entity in dealing appropriately with an allegation of reportable conduct.

The CCC submits that the CCYP should consider the need for formal arrangements for joint responsibility and strategies for effective collaboration and cooperation between the relevant (contracting and engaging) entities in responding to such allegations. The CCYP could have an important role in facilitating and supporting such collaboration and cooperation.

Notification period

Relevant Questions

10. What are the benefits and challenges of the requirement for organisations to notify the Commission about a reportable allegation within three business days?

12. What are the benefits and challenges of the requirement for organisations to update the Commission about a reportable allegation within thirty days?

There are obvious benefits to the short time frame of three business days for notification of reportable allegations, including early initial risk assessment and early reporting to police and child protection authorities as necessary.

It is worth noting that a report under the *Children, Youth and Families Act 2005* (Vic), by a person in charge of an out-of-home care service, to the Department of Families, Fairness and Health (DFFH) of an allegation of abuse of a child by their carer, must also be made within three days after the person in charge receives or becomes aware of the allegation.

However, relevant details are not always available in this time frame. As the Discussion Paper notes, the notification time frame under the NSW reportable conduct scheme is seven business days.

The complexity of investigations often means that a 30-day update does not provide any additional information. Many reportable conduct matters, specifically in the areas of physical or sexual abuse matters, are on hold due to police involvement well past the 30-day update requirement.

Responding to allegations

Relevant questions

- 15.** Does the legislative environment provide an appropriate level of powers, information sharing and safeguards to ensure investigative practices are consistently rigorous, fair and proper? If not, how can these be improved?
- 42.** How is information sharing enabled and operating under the Scheme? For example, to what extent has information under the Scheme been disclosed to and from relevant organisations? What kinds of information? What were the benefits and outcomes?

Information sharing provisions, such as those set out in the *Child Wellbeing and Safety Act 2005* (Vic), are critical for the effective operation of the reportable conduct scheme and are also important for supporting the effective operation of the broader regulatory system for child protection, including the Working with Children Check program. The Victorian Child Information Sharing Scheme (CISS) enables proactive information sharing between prescribed organisations and agencies, and requires organisations to respond to information requests, for the purpose of promoting children’s safety and wellbeing.

However, information sharing under Victorian provisions is not as straightforward as it is in New South Wales. In the experience of CCC agencies with services in both states, the reportable conduct scheme in NSW seems to be better supported by a robust information exchange scheme under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). In Victoria, complex provisions for information sharing and confusion about their application have sometimes created obstacles to accessing critical information and delayed investigations, risk management and other responses.

The CCC submits that arrangements for sharing information related to children’s safety and wellbeing, including reportable conduct information, need to be simplified, with education for all relevant entities, government agencies, police and other statutory authorities on the relevance and proper application of information sharing provisions to protect children. We note the absence of provisions for inter-jurisdictional information exchange, and the importance of such provisions if jurisdictional reportable conduct schemes and broader regulatory systems are to work effectively to complement and support each other in achieving their objectives.

Relevant question

- 16.** What are the key learnings from conducting investigations? What are the challenges in conducting investigations?

Within the out-of-home care sector, one of the challenges is that it is often difficult to engage a child or young person in discussions regarding allegations and many don’t wish to provide further information or in fact wish to withdraw their allegation. When an investigation is concluded without evidence from the subject of the allegation and/or the young person, despite the agency’s best efforts, this may result in criticism from the endorsing authority, the DFFH Safeguarding and Oversight team in the first instance.

Relevant question

17. Are investigations concluding in a timely manner? If not, what are the drivers for the delays?

Many matters investigated by the police result in delays in reportable conduct investigations, perhaps inevitably. Accessing children and young people in out-of-home care who have moved to the care of another agency or have returned home can also be a source of delay. In addition, if the employee has resigned, their non-compliance with requests for interview or further information can also contribute to delays.

Regulatory landscape

Relevant Questions

31. What other regulatory frameworks are your organisation/s subject to? How do those frameworks interact with the Scheme?

32. Is there regulatory overlap in relation to requirements to report and respond to allegations of reportable conduct? To what extent is there regulatory overlap? What has been the impact of this?

The regulatory landscape in which the scheme operates is highly complex, with agencies subject to numerous concurrent and overlapping obligations and processes for response to allegations, incidents and risk of harm to children. The significant obligations for out-of-home care agencies to report and respond to such allegations, incidents or risks go beyond the more obvious regulatory schemes for the protection of children and arise by virtue of criminal and negligence laws, as well as through conditions attached to funding for human services.

Out-of-home care agencies may have to respond to a matter in accordance with obligations under the scheme, the CIMS and ss 81 -82 of the *Children, Youth and Families Act 2005* (Vic). There are different thresholds for each response. Additionally, such matters may have already been, or may still be, subject to other processes related to child protection and criminal justice responses.

The differences in the definitions and thresholds for reporting and investigating under the CIMS and the Scheme can create complexity for agencies responding to allegations, for example:

- emotional and psychological abuse (CIMS) / behaviour that causes significant emotional or psychological harm to a child (reportable conduct)
- poor quality of care; injury (CIMS) / significant neglect of a child (reportable conduct)
- physical abuse (CIMS) / physical violence against, with, or in the presence of a child (reportable conduct)
- sexual abuse (CIMS) / sexual offences (against, with or in the presence of a child (reportable conduct)
- sexual exploitation (CIMS) / sexual misconduct (against, with, or in the presence of a child) (reportable conduct).

Adding to this complexity, the available findings for the same matter, investigated under the CIMS and the scheme, may differ significantly. For example, possible CIMS findings are: substantiated; not substantiated – no further action; not substantiated – further action required. Possible reportable conduct findings are: substantiated; unsubstantiated – insufficient evidence; unsubstantiated – lack of evidence of weight; unfounded; conduct outside the scheme.

It is well known that multiple concurrent reporting, investigation and response processes have the potential to re-traumatise victims, and in some cases create unwarranted additional burden for persons the subject of allegations. Delays and complexities in investigation processes and outcomes in such cases may also compromise both procedural fairness and risk management.

The CCC, therefore, submits that the CCYP should liaise with other regulatory and oversight bodies to review and address unnecessary overlap and complexity in the oversight of investigations. In particular, the CCYP should pursue options for greater alignment between different definitions, thresholds and available findings under the scheme and other regulatory frameworks, such as the CIMS.

Relevant Question

39. Is the capacity, criteria and process for granting of exemptions appropriate?

The CCC submits that it is both appropriate and desirable that demonstrably competent agencies be granted exemptions from oversight for specified (non-serious) classes or kinds of conduct. As the Royal Commission noted in its consideration of class or kind exemptions, '[a]n oversight body under a reportable conduct scheme should have powers to ensure that the focus of its efforts are on serious matters and on institutions that have not demonstrated a satisfactory level of competence in complaint handling'.

In the experience of CCC agencies operating in New South Wales, arrangements for class or kind exemptions appear to have been successful in allowing the Children's Guardian to focus its resources more effectively, and to direct greater effort into supporting agencies' capacity building. It is noted that these regulatory arrangements are currently under consideration.

Conclusion

The Children in Care Collective would be pleased to continue to assist with the review of the operation of Victoria's Reportable Conduct Scheme.

Should you have any queries arising from this submission, please direct them to me at Rob.Ryan@lwb.org.au.

Yours sincerely



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Chair
Children in Care Collective
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On behalf of the Children in Care Collective:

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