

# Providing advice about reportable incident investigations to persons with disability and other involved parties

This fact sheet provides guidance on section 25WA of the *Ombudsman Act 1974*, and on matters to consider in deciding whether to release information under section 25WA about a reportable incident investigation.

A person with disability who is the alleged victim of a reportable allegation will have a legitimate interest in being told about the investigation of that allegation. It may also be appropriate that information is provided to a guardian, relative or close friend. Information can often be provided to these individuals 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 25WA of the *Ombudsman Act 1974* (which commenced on 2 November 2015) aims to remove legal impediments to the Ombudsman, the Secretary of the Department of Family and Community Services (FACS), or the head of a funded provider releasing information about reportable incident investigations. Section 25WA describes the type of information that may be disclosed, and who it can be disclosed to. Disclosure in accordance with this section will not breach any other law that prevents or restricts the disclosure of the information, and the person disclosing the information will not incur liability for defamation or other civil liability such as liability for breach of confidence: section 25X.

Section 25WA 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 25WA authorises the Ombudsman, Secretary, or head of a funded provider to disclose information, it does not require them to do so.

Section 25WA 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.<sup>1</sup>

## 1. Key terms in section 25WA

### 1.1. Who can disclose information?

Disclosure can be made under section 25WA by the Ombudsman, the Secretary of FACS, or the head of a funded provider that falls within the Ombudsman's disability reportable incidents jurisdiction under Part 3C of the *Ombudsman Act*. The 'head of a funded provider' is the chief executive officer or other principal officer of the provider.

Section 25WA 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 25WA 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:

- a) the person with disability who was allegedly the subject of the reportable incident or behaviour forming the basis of the reportable allegation
- b) any person nominated by the person with disability to receive the information
- c) if the Ombudsman, the Secretary, or the head of a funded provider has a reasonable belief that the person with the disability does not have the capacity to understand the information or to nominate a person under paragraph (b):
  - (i) a guardian (within the meaning of the *Guardianship Act 1987*) of the person with disability, or
  - (ii) a person who holds an enduring power of attorney in respect of the person with disability, or
  - (iii) a person who is authorised to make legal or financial decisions on behalf of the person with disability, or

<sup>1</sup> The Ombudsman normally expects agencies to take the lead in handling reportable incident matters and disclosing information to involved parties. The Ombudsman will generally only provide information to involved parties under section 25WA if this is desirable to achieve a particular statutory operational objective.

- (iv) a close friend or relative of the person with disability (being a friend or relative of the person who maintains both a close personal relationship with the person through frequent personal contact and a personal interest in the person's welfare and who does not provide support to the person wholly or substantially on a commercial basis).

Those groups of recipients are collectively referred to in this fact sheet as 'involved parties'.

### 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 25WA facilitates disclosure of reportable incident 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 25WA 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 reportable incident; the individual circumstances of the person with disability; how much information should be provided, and to whom; how the information is to be given to a party; and what support and consultation options are available to all parties following the disclosure.

Section 25WA provides that information about a reportable incident can be given directly to a person with disability, or instead to a guardian, relative, friend or other authorised person if the person with disability may not understand the information to be provided. In deciding what information to provide and to whom, regard should be had to a guiding principle of disability law and policy – namely, to promote the independence, choice and self-esteem of people with disability. This principle is stated in the Convention on the Right of Persons with Disabilities, and in Australian laws such as the *Disability Inclusion Act 2014* (NSW) and the *Disability Discrimination Act 1992* (Cth).

### 2.2. When release of information will be inappropriate

Information about a reportable allegation should not be released to an involved party if doing so might:<sup>2</sup>

- prejudice a criminal, reportable incident, child protection or other formal investigative process
- prejudice the prevention, detection or effective response to actual or possible criminal conduct, abuse or other reportable incidents
- 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 relating to the release of information is to be read subject to the limitations referred to above (2.2).**

## 3. Information that can be disclosed under section 25WA

### 3.1. The progress of the investigation

An involved party can be given information under section 25WA(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

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

- 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 person with disability who is the alleged victim, 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 25WA(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 or confirm 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, the Secretary, or the head of a funded provider 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.

## Further information

**If you have any questions or comments, we are here to assist you. Contact the NSW Ombudsman's Disability Reportable Incidents Division on (02) 9286 0907 or via any of the contact options below.**

## Resources

Our fact sheets can be accessed through our website.

- Identifying and responding to an unexplained serious injury
- Risk management following an allegation against an employee
- Defining assault for the purposes of the disability reportable incidents scheme
- How we assess an investigation
  - client to client incidents
- How we assess an investigation
  - employee to client incidents.

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## 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.

Level 24, 580 George Street  
Sydney NSW 2000

**Email** [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

**Web** [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

**General inquiries** 02 9286 1000

**Facsimile** 02 9283 2911

**Toll free** (outside Sydney metro) 1800 451 524

**National Relay System (NRS)** 133 677

Telephone Interpreter Service (TIS) 131 450

We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.