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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**Reportable Conduct and Information Sharing Legislation Amendment Bill 2017
EXPLANATORY STATEMENT**

**Presented by
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Introduction

This Explanatory Statement relates to the *Reportable Conduct and Information Sharing Legislation Amendment Bill 2017* as presented in the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. The Explanatory Statement does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview of the Bill

The purpose of the *Reportable Conduct and Information Sharing Legislation Amendment Bill 2017* is to further support the operation of the Reportable Conduct Scheme (the Scheme) in relation to information sharing and the promotion of child safety. The amendments will help support reportable conduct information sharing among entities with responsibility for the care and wellbeing of children and young people. These entities include the Ombudsman, the Commissioner for Fair Trading, ACT Government directorates, some statutory authorities with responsibilities that impact on children and young people, ACT Policing, and non-government designated entities.

Improving information sharing for child protection was a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) and the *Report of the Inquiry: Review into the system level responses to family violence in the ACT* (the Glanfield Report) which proposed wide information sharing powers similar to that available in NSW under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The Reportable Conduct Scheme represents an important step in addressing this recommendation.

The Bill also recognises children's services and other entities have a responsibility to coordinate in the interest of promoting the safety, welfare and wellbeing of children and young people. The amendments will support these entities to cooperate in good faith, ensuring relevant information can be shared. It also recognises these entities have a responsibility to protect the confidentiality of some information, but not to the extent that it may limit reasonable steps for the coordination of information that may identify risks to the safety of children.

Overview of human rights considerations

The amendments in this Bill have been carefully considered in the context of the recommendations of the Royal Commission and the Glanfield Report, and allow for more effective sharing of information between entities working towards the promotion of children's safety.

The Bill engages, supports and places limitations on, the following rights in the *Human Rights Act 2004* (the Human Rights Act):

- Section 9 (Right to life);
- Section 10 (Protection from torture and cruel, inhuman or degrading treatment etc.);

- Section 11 (protection of family and children); and
- Section 12 (Privacy and reputation).

Section 28 of the Human Rights Act allows the legislature to reasonably limit human rights by laws that can be demonstrably justified in a free and democratic society. In deciding whether a limit is reasonable, consideration must be given to the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose.

The amendments in this Bill have been developed consistent with the premise that governments not only have responsibility to ensure human rights are free from violation, but that governments are required to provide for the full enjoyment of rights, subject to any reasonable and justifiable limitations. Consideration of this responsibility supports the positive protection of the right to life, protection from torture and cruel, inhuman or degrading treatment, and the protection of children and young people, consistent with sections 9, 10, and 11 of the Human Rights Act.

The Bill also seeks to embody and express relevant international human rights standards for children and young people such as the *Convention on the Rights of the Child* (the Convention). For instance, the Convention requires states to act in the best interest of the child and undertake to ensure the child such protection and care as is necessary for his or her well-being (article 3). Article 3 of the Convention further requires states ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. Further, the Convention requires states to ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them (article 19) and that states should protect children from sexual abuse (article 34).

The limitation placed on the right to privacy and reputation by the amendments to the *Ombudsman Act 1989* and the *Children and Young People Act 2008* is reasonable for the reasons set out below.

Limitation on human rights – section 28(2) of the Human Rights Act

The preamble to the Human Rights Act notes that although human rights are necessary for individuals to live lives of dignity and value, few rights are absolute. However, they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society.

Section 28(2) of the Human Rights Act provides the framework that is used to determine the acceptable limitations that may be placed on human rights in the Territory. The section requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality requires that a limitation is necessary and rationally connected to the objective; the least restrictive in order to accomplish the object, and not have a disproportionately severe effect on the person to whom it applies.

The ACT Government acknowledges that the amendments in the Bill engage and limit the human rights of particular sections of the ACT community – children, young

people and a wide range of people working in organisations that provide services to children and young people and have responsibility for reporting allegations of misconduct against children and young people.

Human rights are therefore only subject to reasonable limits which are demonstrably justifiable. In determining if a limit is reasonable and demonstrably justifiable the following relevant factors are considered:

- the nature of the right affected
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose; and
- the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 11 (protection of family and children)

Section 11 of the Human Rights Act states that

(1) The family is the natural and basic group unit of society and is entitled to be protected by society; and

(2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The nature of the right affected (section 28(2) (a))

It is recognised that children have a fundamental right to life (article 6) and protection (article 3) as outlined in the *Convention on the Rights of the Child*.

The importance of the purpose of the limitation (section 28(2) (b)); the nature and extent of the limitation (section 28(2) (c)); the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (section 28(2) (e))

The proposed amendments in this Bill that omit and replace the previous signpost definition of *health service provider* with the narrower definition has the effect of excluding private health facilities (other than hospitals and ambulance services) from being subject to the Reportable Conduct Scheme. This will also prevent the heads of such entities from being able to request or provide information relevant to the safety, health or wellbeing of a child.

This change responds to concerns that the definition of *health service provider* went beyond the initial policy intent of seeking to be consistent with the scope of the NSW Reportable Conduct Scheme, as well as including types of entities providing health services that are considered both low risk to children in terms of scope and relevance to the purpose of the Scheme, and who have a limited capacity to comply with the regulatory requirements of the Scheme.

The Royal Commission into Institutional Responses to Child Sexual Abuse commissioned a research report into the risk factors for institutions, which indicated at present there is little data available regarding the prevalence of child sexual abuse in medical institutions. It did however find that a significant risk factor relates to a family's socio-economic status; that is, children from families with low socio-economic status are at greater risk of sexual victimisation. Given the significant cost barriers associated with accessing private health care, it is reasonable to project

that children from families with low socio-economic status are less likely to access the kind of private health services that this Bill excludes from the Scheme (e.g. occupational therapists, audiometrists etc.).

There have been significant changes to the NSW Reportable Conduct Scheme since its inception in 1999, which also may at first appear to weaken the protections for children and young people, but did however strengthen protections by enabling the Ombudsman to focus its resourcing, monitoring and oversight where it was needed. The first change, introduced with the *Child Protection Amendment Act 2003*, omitted the definition of child abuse and introduced the term *reportable conduct*, as it was found after review that:

The term "child abuse" raises strong emotions in the community, which in turn inhibits the effective implementation of the legislation.
The definition of "child abuse" does not describe clearly the type of behaviour that should be captured by the legislation and reported to the Ombudsman or the Commissioner for Children and Young People.
Teachers in particular have become increasingly confused about what actions are permissible in order to maintain effective classroom management and discipline.
The current legislation inappropriately captures some conduct...¹

The second change, introduced with the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009*, raised the statutory threshold for reporting from "risk of harm" to "risk of significant harm", after the Special Commission of Inquiry into Child Protection Services in NSW (the Wood Inquiry) found that many children who did not require statutory intervention of the State were being reported, using valuable resources and resulting in many other children and their families not receiving the support they needed. Hansard reports the three key objectives as:

first, to improve the statutory child protection system by focusing on children and young people at greatest risk;
second, to share the responsibility for child protection by creating a new system for accessing information, facilitating better interagency cooperation, and obliging agencies to take steps to coordinate with other agencies; and,
third, to streamline and improve oversight arrangements of the child protection system.²

The proposed amendments in this Bill that amends the definition of *health service provider* are in the same category as these changes to the NSW Reportable Conduct Scheme, as it will allow the Ombudsman to appropriately focus their resourcing, monitoring and oversight on the most vulnerable children and young people, thus enhancing the effective protection of children and young people.

Section 12 Privacy and reputation

Under section 12 of the Human Rights Act

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 September 2003, 3115 (Andrew Refshauge).

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 March 2009, 13036 (Linda Burney).

The nature of the right affected (section 28(2) (a))

Under the Human Rights Act, ACT residents have the right to privacy and the right to be protected from unlawful attacks on their reputation. This means that when reportable conduct information is shared, that information should be shared in such a way that does not compromise the privacy and reputation of either the complainant child or the alleged perpetrator of reportable conduct. Sharing reportable conduct information is necessary to protect the rights of children and young people, and this may limit related parties' rights to privacy and reputation.

The proposed amendments in the Bill allow the transfer of information between the ombudsman, the commissioner for children and young people, the commissioner of fair trading, relevant directors-general, the human rights commission, the chief executive officer of the ACT Teacher Quality Institute and the police. This will ensure people who need to share information about a child or young person can do so quickly and easily and are able to make decisions that promote the rights of the child or young person.

The importance of the purpose of the limitation (section 28(2) (b))

The Royal Commission has identified through its research and numerous case studies, the importance of effective co-ordination and exchange of information between service providers, regulator/oversight bodies, and other government and non-government agencies. For example *Case Study 2: YMCA New South Wales' response to the conduct of Jonathan Lord*, showed how information about seemingly isolated or insignificant incidents can, when considered cumulatively, paint a more complete and concerning picture.

In other research, including the *Discussion Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care*, the Royal Commission states: "Arrangements that allow sharing of what may appear, in isolation, to be low level concerns may be of benefit in protecting children in [out-of-home care] contexts."

The threshold provision for the sharing of information are modelled on existing provisions in legislation in NSW, which the Royal Commission argues will capture the low level concerns relevant to safety, welfare or wellbeing of a child that may contribute to the identification of significant risk to a child or a group of children.

Furthermore, in regards to the sharing of information, the Australian Law Reform Commission noted in a report on Australian privacy laws in 2008 that, "[r]ather than preventing appropriate information sharing, privacy laws and regulators should encourage agencies and organisations to design information-sharing schemes that are compliant with privacy requirements". As the Australian Law Reform Commission understood the issue, it was not so much that the two values were mutually exclusive but how best to ensure a system that could complement both.

Additionally, the *Report of the Special Commission of Inquiry into Child Protection Services* in NSW emphasised the importance of exchanging information for the purpose of ensuring the safety, welfare and well-being of a child or young person.

Finally, the recent *Glanfield Report* recommended reform to improve information sharing, finding that there is considerable room for improvement in relation to this issue, particularly in relation to the operations of child protection and family violence protection agencies. This report recommended legislative change to clearly authorise information exchange between relevant agencies and that the ACT foster an information sharing culture between agencies.

The nature and extent of the limitation (section 28(2) (c))

Information sharing provisions are governed by the principle that information about children and young people will be exchanged only where it is relevant to the safety, health or wellbeing of a child or class of child.

Organisations that have care responsibilities for children in the community are not restricted to government entities and the sharing of reportable conduct information will support organisations' capacity to put in place policies and procedures to protect children from harm. Given this, there is justification for allowing the sharing of reportable conduct information between government or nongovernment entities with care responsibility for children where there are sufficient protections in place to protect both the interests of the child or children of concern and any other person who is the subject of reportable conduct information.

The Bill places restrictions on both the requesting and providing parties to ensure the information is being used only for purposes of promoting the safety, health or wellbeing of a child, or a class of children. Protections and restrictions placed on the reporting and sharing of reportable conduct information support and protect the individual's right to privacy as codified at section 12 of the HRA, as discussed above.

The limitation is defined in terms of information obtained and shared about children and young people, which is disseminated to those who have responsibility for safeguarding and protecting the wellbeing of children and young people.

The relationship between the limitation and its purpose (section 28(2) (d))

The purpose of the limitation is to safeguard and protect the safety, health or wellbeing of children and young people. This will be achieved by ensuring that information can be obtained and disseminated in the interests of their safety, health or wellbeing.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (section 28(2) (e))

The ACT Government has concluded that, in balancing the respective rights of children and young people, these amendments do not unreasonably or unnecessarily limit the human rights of children, young people and their families. This is because people and organisations responsible for children and young people in care have a duty to ensure their safety and wellbeing. Consequently, there is a rational connection between the proposed amendments and the issues they aim to address.

Organisations that exercise the closest supervision and care for children and young people are required to comply with a range of privacy and information sharing

requirements contained in ACT and Commonwealth legislation before information can be exchanged.

These amendments represent a small and reasonable limitation on the right to privacy, which is greatly outweighed by the increased protections available to the rights of children to be protected from abuse and mistreatment.

What changes are provided for by the Bill?

The Bill amends the *Children and Young People Act 2008* and the *Ombudsman Act 1989*.

Minor technical amendments have been made to definition provisions of the Act, and additional information sharing provisions have been introduced.

Amendments to the Children and Young People Act

Definition of Reportable Conduct Information Sharing Entity (section 863A and section 863CA)

The Royal Commission has observed that the ACT's information sharing powers are fairly limited, noting that the information that can be shared under the reportable conduct scheme is circumscribed.

To address this, the Bill amends the definition of designated entity to enable entities to request from or disclose to each other, on their own initiative, information that relates to a reportable conduct allegation or investigation.

Amendments to the Ombudsman Act

The Bill amends the Ombudsman Act by making minor and technical amendments to definition provisions to better target those organisations who the community expects to mitigate risks to children and young people. The amendments also ensure that those employees engaged to provide services to children by an organisation contracted to the ACT Government are considered to be engaged by the entity.

Amendments also enable enhanced information sharing between designated entities and regulatory entities.

Who will these changes affect?

The definition and information sharing provisions will affect a range of people working in organisations that provide services to children and young people and who have responsibility for reporting, monitoring and oversight of allegations of misconduct against children and young people.

Organisations that exercise the closest supervision and authority over children are 'designated entities' under the scheme, and regulatory organisations that have responsibility for regulating services to children and young people are 'child safety information sharing entities' under the scheme.

Who and what informed these changes?

Stakeholders of the reportable conduct scheme have informed these changes, and include members of the Reportable Conduct Governance Group.

The Reportable Conduct Governance Group responsible for the implementation of the scheme is derived of representatives of government entities and independent authorities under the scheme. These members include all ACT directorates, the

Ombudsman, Public Advocate and Children and Young People’s Commissioner, ACT Policing, and the ACT Teacher Quality Institute. Input on implementation issues has been received from all members of this group.

Notes on Clauses

Part 1 Preliminary

Clause 1 Name of Act

This is a technical clause and sets out the name of the Act as the *Reportable Conduct and Information Sharing Legislation Amendment Act 2017*.

Clause 2 Commencement

This clause enables the Act to commence on the day after this Act's notification day.

Clause 3 Legislation Amended

This clause provides that the Act amends the following legislation:

- *Ombudsman Act 1989*
- *Children and Young People Act 2008*

Part 2 Children and Young People Act 2008

Clause 4 Division 25.3.3 heading

This clause introduces the new division heading of *Sharing reportable conduct information* to clarify that the types of information the provisions in the division apply to is reportable conduct information.

Clause 5 Definitions – div 25.3.3

Section 863A (1), definition of *designated entity, paragraph (a)*

Section 863A (1) expands the range of entities the Ombudsman may disclose information to that is relevant to the safety, health or wellbeing of a child or class of child, to include the director-general responsible for the delivery of health services and to the Commissioner for Fair Trading.

The rationale for this is to clarify that the ombudsman may share information not just with entities that exercise the closest supervision and care for children and young people, but also with entities that regulate service delivery for children and young people. This will facilitate enhanced information sharing.

Clause 6 Section 863A (1), new definitions

This section expands the range of entities that may share information to include regulatory entities.

Clause 7 Section 863B heading

This clause is a consequential amendment related to the expansion of entities that are empowered to share information under this division contained in clauses 5 and 6.

Clause 8 Section 863B (1)

This amendment increases the threshold for who may request reportable conduct information from a designated entity to the head of a designated entity. This alleviates concerns that information may be shared inappropriately.

Clause 9 Section 863B (1)

This clause is a consequential amendment related to the new definition of *child safety information sharing entity* in clause 6.

Clause 10 Section 863B (2)

This clause is a consequential amendment related to the amendment contained in clause 6.

Clause 11 Section 863B (2) (b)

This clause is a consequential amendment related to the amendment contained in clause 6.

Clause 12 Section 863C heading

This clause is a consequential amendment related to the amendment contained in clause 6.

Clause 13 Section 863C (1)

This clause is a consequential amendment related to the amendment contained in clause 6.

Clause 14 New section 863CA

A new section 863CA enables designated entities and regulatory entities to provide reportable conduct information to another entity on their own initiative where the head of the entity is satisfied that the information is relevant to a decision, assessment, investigation, or any other service in accordance with the receiving entity's functions, or to deal with risk.

As the provision of information under this provision is discretionary, the head of a designated entity may consider any of the criteria under section 863C (2) when deciding whether to provide the information.

This amendment enhances information sharing provisions in line with recommendations from recent federal and jurisdiction-level inquiries.

Clause 15 Sections 863D, 863E and 863F

This clause is a consequential amendment related to the amendment contained in clause 6.

Clause 16 Section 863G heading

This clause is a consequential amendment related to the amendment contained in clause 6.

Clause 17 Section 863G

This clause is a consequential amendment related to the amendment contained in clause 6.

Clause 18 Dictionary, new definition of *child safety information sharing entity*

This clause is a consequential amendment related to the amendment contained in clause 6, and provides the relevant definition for the purposes of the act and the relevant sections.

Clause 19 Dictionary, definition of *designated entity*

This clause is a consequential amendment related to the amendment contained in clause 6, and provides the relevant definition for the purposes of the act and the relevant sections.

Clause 20 Dictionary, new definition of *head*

This clause is a consequential amendment related to the amendment contained in clause 8, and provides the relevant definition for the purposes of the act and the relevant sections.

Clause 21 Dictionary, definition of *reportable conduct information*

This clause is a consequential amendment related to the amendment contained in clause 4, and provides the relevant definition for the purposes of the act and the relevant sections.

Part 3 Ombudsman Act 1989

Clause 22 Functions – investigating complaints under Act Section 5 (2) (I)

This amendment removes an existing limitation on the Ombudsman's power to investigate action taken with respect to persons employed in the public service.

Clause 23 Section 5 (2) (l), new note

This amendment clarifies that the Ombudsman has the authority to conduct a reportable conduct investigation involving an employee of a designated entity.

Clause 24 Section 5 (2) (o)

This amendment removes an existing limitation on the Ombudsman's power to investigate action taken with respect to action taken by an agency for the purpose or in the course of, or in the refusal of, providing a disability service, a health service, or a service for children and young people.

Clause 25 Section 5 (8), new definitions

This clause is a consequential amendment as a result of the amendments contained in clauses 17 to 19.

Clause 26 Definitions – div 2.2A

Section 17D (1), definition of *designated entity*

This provision clarifies the definition of designated entity to ensure that all ACT Government directorates are subject to the Reportable Conduct Scheme.

Clause 27 Section 17D (1), definition of *employee*

This amendment expands the scope of persons considered to be employees in order to ensure that where a person provides a service to a subcontractor engaged by a designated entity, that person will be considered to be engaged by the entity.

The rationale behind this amendment is to include an expanded range of employees as a result of modern employment relationships.

Clause 28 Section 17D (2) new definition of *reportable conduct*

This provision inserts the definition of reportable conduct into the definitions section of the division for clarity.

Clause 29 Section 17D (2)

This clause is a consequential amendment and relates to the amendments in clauses 26 and 30.

Clause 30 New Sections 17EA and 17EB

This clause amends the definition of a designated entity, in response to stakeholder concerns that the definition of health service provider was too broad, thus imposing regulatory burden on many entities with limited exposure to children and young people.

The amendment is also designed to ensure that the resourcing and organisational capacities of designated entities includes appropriate policies are put in place to prevent abuse and to respond to allegations of abuse.

Clause 31 Section 17H heading

This is a consequential amendment as a result of the amendment contained within clause 33.

Clause 32 Section 17H (2) and (3)

This is a consequential amendment as a result of the amendment contained within clause 33.

Clause 33 New Section 34A

A new section 34A enables the Ombudsman to disclose any information it receives if it is reasonably satisfied that it relates to the safety, health or wellbeing of a child or class of child to a range of designated entities and regulatory entities including the Chief Police Officer and the Commissioner of Fair Trading, in order to enhance information sharing provisions for the protection of children.

Clause 34 Dictionary, definition of *designated entity*

This clause is a consequential amendment as a result of the amendment contained in clause 30.