

## **Flying Minute: Draft Submission – Proposed Reportable Conduct Scheme for Western Australia (05-034-01-0104 TB)**

*By Tony Brown, Executive Manager Governance and Organisational Services*

**That the submission to the Ombudsman, Western Australia in respect to the Draft Reportable Conduct Scheme for Western Australia be endorsed.**

**RESOLUTION 195.FM/2021**

**CARRIED**

### **Executive Summary**

- The State Government is consulting on a proposed Reportable Conduct Scheme for Western Australia that will require relevant organisations to investigate and report employee misconduct involving children.
- The proposed Scheme was a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse and will provide independent oversight of how certain organisations prevent and handle allegations and convictions of child abuse involving employees.
- The Ombudsman released the *Parliamentary Commissioner Amendment (Reportable Conduct) Bill 2020* for consultation.
- WALGA's draft submission highlights that obligations imposed on a Local Government and the Chief Executive Officer (CEO) of a Local Government (as the head of a relevant entity) are significant. The Scheme introduces a complex and onerous reporting framework (more onerous than the reporting obligations under the *Corruption, Crime and Misconduct Act 2003*) that will require support and funding from the State and/ or Commonwealth Government to educate Local Governments on Scheme obligations.

### **Attachment**

- WALGA Draft Submission
- Ombudsman WA – Information about proposed Reportable Conduct Scheme
- Parliamentary Commissioner Amendment (Reportable Conduct) Bill 2020

### **Background**

The Royal Commission into Institutional Responses to Child Sexual Abuse Final Report was handed down in December 2017 and since that time the State and Commonwealth Governments have been implementing a number of the Recommendations. In 2018 the State Government passed the legislation required to establish the National Redress Scheme. In April 2020 WALGA State Council endorsed a Memorandum of Understanding with the State Government providing for Local Government to formally join the National Redress Scheme and all Local Governments have now passed Council resolutions to join.

During 2021 the State Government will be consulting on the Reportable Conduct Scheme, the development of an Independent Oversight System and the proposal for Local Governments to designate child safety officer positions from within existing staff profiles.

## Comment

The proposed Reportable Conduct Scheme is a scheme to report employee misconduct involving children. The Royal Commission found that organisations need to improve their responses to child abuse and recommended that State and Territory Governments set up schemes which oblige heads of organisations to notify an independent body of misconduct involving children by their employees, volunteers and contractors (reportable conduct).

The proposed Scheme will apply to organisations that exercise a high degree of responsibility for children and where there is a heightened risk of child abuse. These organisations will need to notify the Parliamentary Commissioner of allegations and convictions of child abuse involving their employees. The Parliamentary Commissioner can then review the findings made and the action taken by the organisation or undertake their own investigation.

Many Local Government Chief Executive Officers (CEOs) will lack the expertise and capacity to adequately and appropriately investigate allegations or convictions of child abuse involving an employee and will likely engage an independent investigator to conduct the relevant investigation.

The draft submission recommends a number of recommendations to address sector concerns and the draft submission was endorsed by the Governance and Organisational Services Policy Team at their 18 January 2021 meeting.

State Council consideration was requested by 27 January 2021 and the final submission is to be provided to the State Government by 31 January 2021.

## Flying Minute Outcomes

Total invited to Survey: 24  
Total Finished Survey: 19

Total "Endorse Recommendation": 14  
Total "Endorse Recommendation subject to comment": 5

Carol Adams OAM	Carol Adams OAM	Endorse Recommendation
Phillip Blight		
Julie Brown	Julie Brown	Endorse Recommendation
Ruth Butterfield	Ruth Butterfield	Endorse Recommendation
Karen Chappel	Karen Chappel	Endorse Recommendation subject to comment below
Cheryl Cowell		
Malcolm Cullen	Malcolm Cullen	Endorse Recommendation
Frank Cvitan	Frank Cvitan	Endorse Recommendation
Tony Dean	Tony Dean	Endorse Recommendation subject to comment below
Catherine Ehrhardt	Catherine Ehrhardt	Endorse Recommendation
Russ Fishwick JP	Russ Fishwick JP	Endorse Recommendation
Ronnie Fleay	Ronnie Fleay	Endorse Recommendation subject to comment below
Logan Howlett JP	Logan Howlett JP	Endorse Recommendation
Mark Irwin	Mark Irwin	Endorse Recommendation

Paul Kelly	Paul Kelly	Endorse Recommendation
Jenna Ledgerwood	Jenna Ledgerwood	Endorse Recommendation subject to comment below
Peter Long		
Cate McCullough		
Chris Mitchell JP	Chris Mitchell JP	Endorse Recommendation
Les Price	Les Price	Endorse Recommendation
Michelle Rich	Michelle Rich	Endorse Recommendation subject to comment below
Ken Seymour	Ken Seymour	Endorse Recommendation
Stephen Strange		
Doug Thompson	Doug Thompson	Endorse Recommendation

## Comments

### SECRETARIAT COMMENT

The *Parliamentary Commissioner Amendment (Reportable Conduct) Bill 2020* (Bill) is largely based on the legislation establishing the Reportable Conduct Schemes in NSW and Victoria. The Scheme was implemented in NSW in 1999, and in Victoria and the ACT in 2017. In preparing the submission WALGA has considered both the NSW and Victorian legislation and the intention of the Scheme as outlined in the Royal Commission's Final Report.

**Tony Dean** on 21/01/2021 at 21:58

Potential to be very significant for small councils.

### SECRETARIAT COMMENT

The significance of the Scheme for small Local Governments is acknowledged by the submission comments about the complexity and onerous nature of the Scheme. A further amendment to the submission regarding the request for funding has been made in paragraph 1 of the recommendations to ensure this appropriately acknowledges the limited resources of small Local Governments.

**Ronnie Fleay** on 23/01/2021 at 11:05

While I offer conditional support to the recommendation I am concerned that LG will end up with this onerous responsibility which will not be suitably funded in the long term. Some token funding & training may be given initially then, as often happens, LG is left with the responsibility as a matter of course.

This is a serious subject which needs to be managed by more appropriate authorities. I can see small regional LG's finding this difficult to manage from a resourcing & cost perspective. Perhaps our 'language' could be stronger suggesting LG sector can only support this direction if an absolute commitment of ongoing resources & costs are covered by Government.

### SECRETARIAT COMMENT

Please see our comments above. In addition to including stronger wording in the request for funding, the paragraph on funding has been relocated to appear at the top of the list of recommendations signifying its importance.

Jenna Ledgerwood on 25/01/2021 at 17:56

1. Support
2. Do not support. Councillors serve the LG and therefore should be held to the same rules. Just as WALGA wanted employees to have the same gift allowances.
3. Support
4. I challenge this assertion. FairWork constantly rule that if you are on the premises and working for the business you are under the rules of the Business. Making LG's the responsible party. That could be covered by ensuring that any contractors, sub- contractors, volunteers have at least been informed of the LGs rules of behaviour and they will also be reported if there are allegations against children in the community.
5. Put yourself in the hands of a predator for 7 days and tell me you are happy to wait for another 7 days. This should be immediate if we are serious about change. The templates suggested would make it possible to at least report for immediately with detailed information taking 7 days. But that person needs to be on the radar immediately.
6. No employee of the LG should do the investigation. Police and the Department have highly skilled professionals to question and investigate. This is not a layman's role, when it comes to children. Future lawsuits could follow if not conducted professionally.
7. If this were my child, I would expect immediate reporting and action and at the very least 24 hours to initially report the offence. I understand that investigation takes a longer period.
8. Support
9. Anonymous reporting allows for scurrilous reports and mischief making. Authorities do not give out the names of report unless it goes to Court in most cases. But I do support the names be held as confidential and blacked out in all documents on a need-to-know basis only.
10. 2003 Public Disclosure Act covers Legal Professional privilege
11. Support
12. This should include a requirement of employees of LG's having annual police checks. It is currently possible for a staff member to go to court on a charge, be guilty but not serve time in prison and then go back to work. The LG none the wiser. I think our community would request this if they knew some events that have transpired.
13. Support needs stronger wording.
14. At a high level I support training for all staff. However, I am unsure how this would work. The skills required are not a one- or three-day course, the Professionals involved in this abhorrent behaviour take months and years to perfect the skills required for these investigations.
15. Support On a final note, the comment that LG designated Child Safety Officers come from existing staff profiles suggests that LG's have staff sitting around waiting for work. This is generally not the case in the majority of LG's. As previously stated, this is specialized work which also is requires significant investigation into the person chosen, as this work has a debilitating affect on one's mental health and that is something that has not been discussed. There is once again potential for lawsuits if this is not a chosen path of employment.

## SECRETARIAT COMMENT

The comments raised have been addressed in order below.

**Paragraph 2:** The CEO of a Local Government is responsible for managing the conduct of employees, contractors and volunteers, but not Elected Members. The recommendation in the submission aligns with the responsibilities of a Local Government CEO.

**Paragraph 4:** Where a sub-contractor has regular interaction with children, for example if they are running a child care centre, it would appear that the sub-contractor would need to comply with the Bill in its own right. By reasonably limiting the definition of employee, the aim is to reduce the Local Government's liability. A Local Government can still educate and encourage any sub-contractor it



engages to comply with the Local Governments policies and procedures enacted to give effect to the Scheme.

**Paragraph 5:** The changes sought to section 19R(2) of the Bill are to allow a CEO to seek appropriate industrial or legal advice about the allegation where appropriate and it does not stop a CEO from making a report to the Commissioner in a shorter timeframe. If a CEO suspects an employee has engaged in criminal conduct, the Bill does not prevent the CEO from reporting the conduct immediately to police and suspending the employee from work to ensure the safety of the child is paramount. This is consistent with how a Local Government should currently manage an allegation of criminal conduct at work. Please also see our comments below in relation to the involvement of police.

**Paragraph 6:** The Bill in section 19T allows a Local Government to engage an external investigator and where allegations are serious, it would be appropriate for a Local Government to outsource the investigation to an appropriately qualified investigator. We suspect the option for an employee to investigate the reportable allegation or reportable conviction would only be utilised if the allegation was minor or did not require a child to be interviewed.

**Paragraph 7:** Amendments were made to this paragraph after consideration by the Governance Policy Team. The intention of paragraph 7 is to seek clarity on the timing for the Local Government to notify an employee, a child and the child's parent or guardian that the Commission has been notified of a reportable allegation or conviction. The recommendation does not intend to delay the CEO's reporting obligation. This paragraph has been amended for clarity.

**Paragraph 9:** After consultation with the Governance Policy Team, this recommendation was amended to seek clarity on whether a person can anonymously make a report to a Commissioner about an allegation against the CEO. There may be circumstances where an employee is concerned about adverse treatment when making a complaint against the CEO who is also responsible for making decisions about their employment.

**Paragraph 10:** The submission is seeking clarity on the operation of Bill and existing provisions in the *Parliament Commissioner Act 1971 (WA)* which will apply to the Scheme.

**Paragraph 12:** WALGA encourages Local Governments to conduct appropriate pre-employment checks, including police clearances for employees, as recommended in the WA Auditor's General Report 24: June 2018-19 titled 'Verifying Employee Identity and Credentials.' Further, the WA Working With Children Check Scheme is in operation to protect children and identify relevant criminal history of employees.

**Paragraph 13:** These comments are acknowledged and have been actioned. Please see our comments above and the amendments to the submission.

**Paragraph 14:** The submission is seeking training for organisations to implement the National Principles for Child Safe Organisations more broadly. We agree that a person investigating a reportable allegation or reportable conduct must be appropriately trained and qualified, and the ability to appoint an external investigator under the Scheme will ensure this.

**Paragraph 15:** We acknowledge the comments regarding designated Child Safety Officers. General comments around Child Safety Officers have been included in the submission to emphasise the need for funding and support from the State and Commonwealth Governments. The specific role of Child Safety Officers is not covered by this Bill and specific feedback on this issue is being collected in a survey administered by the Department of Premier and Cabinet.



In the report is the situation covered when the Police are investigating an employee, would this exempt the organisation ( CEO ) from an investigation or would that still be required.

#### **SECRETARIAT COMMENT**

Section 19N of the Bill allows the Commissioner to exempt a CEO of a Local Government from commencing or continuing an investigation where the matter is already being dealt with or investigated by another appropriate person or body, such as the police.

**Michelle Rich** on 27/01/2021 at 13:09

Misconduct involving children of a sexual nature is a criminal offence and given the Royal Commission into Institutional Responses to Child Sexual Abuse Final Report was dealing with this issue why is it proposed that relevant organisations are to investigate and report employee misconduct involving children and not report to the police to investigate?

#### **SECRETARIAT COMMENT**

Section 19I(2)(c) of the Bill clarifies that the Scheme is based on the principle that criminal conduct or suspected criminal conduct should be reported to the police. The Scheme also captures the reporting of non-criminal allegations involving children. Please see our comments above.



**30 January 2021**

Mr Chris Field  
Ombudsman Western Australia  
PO Box Z5386  
St Georges Terrace  
PERTH WA 6831

By email: [reportableconduct@ombudsman.wa.gov.au](mailto:reportableconduct@ombudsman.wa.gov.au)

Dear Mr Field,

### **Submission – Proposed Reportable Conduct Scheme for Western Australia**

Thank you for the opportunity to provide comment on the *Parliamentary Commissioner Amendment (Reportable Conduct) Bill 2020* (Bill) which is to establish a Reportable Conduct Scheme in Western Australia (Scheme) pursuant to the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).

The Western Australian Local Government Association (WALGA) is an independent, membership based organisation representing and supporting the work and interests of 139 Local Governments in Western Australia. WALGA provides an essential voice for over 1,200 Local Government Elected Members, approximately 22,000 employees and over 2.5 million constituents of Local Government in Western Australia.

WALGA's members are particularly interested in the Scheme for two reasons:

- The Scheme is an important response to the findings of the Royal Commission.
- The obligations imposed on a Local Government and the Chief Executive Officer (CEO) of a Local Government (as the head of a relevant entity) are significant. The Scheme introduces a complex and onerous reporting framework (more onerous than the reporting obligations under the *Corruption, Crime and Misconduct Act 2003 (WA)*) that will require support and funding from the State and/or Commonwealth Government to educate Local Governments on Scheme obligations.

### **Children and Young People**

WALGA's relevant Policy Position provides:

*3.6 The Local Government Sector supports the development and well-being of children and young people through strategic partnerships and a combination of services and facility provision. The Association advocates that the State and Commonwealth should continue to invest in the wellbeing of young West Australians.*

### **National Redress Scheme**

The National Redress Scheme acknowledges that many children were sexually abused in Australian institutions, recognizes the suffering they endured because of this abuse, holds institutions accountable for this abuse and helps people who have experienced institutional child sexual abuse gain access to counselling and psychological services, a direct personal response, and a redress-payment.

WALGA's relevant Policy Position provides:

### *3.10.2 WALGA supports Local Government participation in the State's National Redress Scheme, with full financial coverage by the State.*

In April 2020 WALGA State Council endorsed a Memorandum of Understanding with the State Government providing for Local Government to formally join the National Redress Scheme in order to receive legal, administrative and financial coverage from the State should a Redress claim be made against a Local Government. All Local Governments have now passed Council resolutions to join the National Redress Scheme.

#### **Relevance of Scheme to Local Government**

As Local Governments fall within the definition of 'an authority' in Schedule 2 of the Bill, the Scheme will apply to all Local Governments.

Many Local Governments provide services to children (or provide access to places where services are provided to children by third parties) through provision of:

- school holiday and long day care services
- library and museum services
- early childhood services and facilities
- recreation centres, community centres, swimming pools and sporting infrastructure
- youth centres and youth outreach services
- support for community groups and programs

For organisations covered by the Scheme, an 'employee' will include (relevantly for Local Government):

- any officer or employee of the organisation; and
- a volunteer, contractor or subcontractor who provides services to children.

Many Local Government CEOs will lack the expertise and capacity to adequately and appropriately investigate allegations or convictions of child abuse involving an employee and will likely need to engage an independent investigator to conduct the relevant investigation.

#### **Scheme: Recommendations**

WALGA makes the following Recommendations in relation to the proposed Bill and Scheme:

1. Adequate ongoing funding must be provided by the State and/or Commonwealth Governments for training and capacity building of Local Government CEOs and employees to comply with the requirements of the Scheme and the Recommendations of the Royal Commission more broadly.

WALGA is seeking funding not only for the implementation of the Scheme, but on an ongoing basis to ensure all Local Governments, including smaller Local Governments with limited resources and staff, are adequately resourced to comply with the complex reporting requirements imposed by the Scheme.

WALGA's advocacy position supports this recommendation in that the State Government must not assign legislative responsibilities to Local Governments unless there is adequate provision for resources required to fulfil its responsibilities.

Recommendations 3 and 4 from the Select Committee Inquiry into Local Government Final Report 2020 provide that the regulatory impact assessment process for any regulatory proposal giving new responsibilities to Local Governments should explicitly address the estimated cost borne by the Local Government sector to discharge those responsibilities and identify the resources the State Government will provide to Local Governments to meet that estimated cost.

2. WALGA supports the phased commencement of the Scheme proposed by the Ombudsman Western Australia which would apply to Local Governments in the second year of operation.

3. The Ombudsman Western Australia informs that the Scheme, arising from the Royal Commission, is only intended to report employee misconduct involving children. To ensure this intent is made clear, it is proposed the definition of 'employee' in section 19C of the Bill be amended or a new definition of 'officer' be introduced to expressly exclude Elected Members of a Local Government, who are not employees of Local Government. In doing so, the Bill will align with contemporary legislative drafting; for example section 4A of the *Work Health and Safety Act 2020 (WA)* expressly exempts a *local government member* from the meaning of 'officer'.
4. Clarity is sought around how reportable conduct allegations relating to employees or volunteers under the age of 18 are to be addressed.
5. The definition of 'contractor' in section 19C of the Bill be amended to exclude references to 'subcontractor' as it is overly onerous for Local Governments to train and monitor subcontractors on the requirements and reporting obligations under the Scheme. This is consistent with the definition of 'employee' in the Victorian *Child Wellbeing and Safety Act 2005 (Vic)*.
6. Section 19R(2)(g) of the Bill requires the head of a relevant entity to advise the Commissioner in writing of how they intend to proceed with the matter within 7 working days of being notified of the reportable allegation or conviction. This timeframe does not allow sufficient time for a Local Government to receive industrial and/or legal advice. We recommend this timeframe be extended to 14 working days for section 19R(2)(g) of the Bill.
7. Section 19T(1)(a)(ii) of the Bill provides that an employee of a relevant entity may investigate the reportable allegation or conviction. Notwithstanding that section 19T(1)(a)(iii) permits engagement of an external investigator, clarity is sought as to the skills and qualifications required by the employee to undertake the investigation given the potential nature of the allegations.
8. WALGA seeks clarification on the timing in which a Local Government is required to notify the parties (including an employee, a child and the child's parent or guardian) that a reportable allegation or conviction has been reported to the Commission.
9. That a provision similar to section 16ZE of the Victorian *Child Wellbeing and Safety Act 2005 (Vic)* be included in the Bill to prohibit a person from publishing information that would enable the identification of a person who notified the Commissioner of a reportable allegation or conduct, or the identification of a child in relation to whom a reportable allegation or a finding of reportable conduct was made.
10. WALGA seeks confirmation on what protections are offered to a person making a report to the Commissioner about a head of an entity under section 19Q(2)(b) of the Bill and whether the report can be made anonymously.
11. In some circumstances Local Governments will engage a law firm to conduct a workplace investigation into employee conduct and/or will seek advice from a law firm where an employee's employment may be terminated as this can expose a Local Government to industrial or legal claims from the employee. It is important that where legal advice is sought by a Local Government legal professional privilege is maintained. Clarification is sought on the operation of section 9(2) of the Bill which amends section 20(2B) of the *Parliamentary Commissioner Act 1971 (WA)* (Act), section 23A of the Act, and any other provision of the Bill and Act which may impact on the ability of a Local Government to claim legal professional privilege.
12. Given Local Governments often provide grant funding to organisations that deliver child related programs and services, further clarity is required as to the extent of their obligations to those organisations.
13. WALGA supports the amendments to the *Working with Children (Criminal Record Checking) Act 2004 (WA)* so that reportable conduct findings can cause an assessment or re-assessment of a person who has a Working with Children Check card.
14. Presently there is limited training available to assist organisations to implement the National Principles for Child Safe Organisations (which were endorsed by the Council of Australian

Governments in 2019). An accessible and appropriate training regime needs to be developed as a matter of priority.

15. Supporting materials such as template policies, procedures and fact sheets will need to be developed to assist Local Government CEOs and employees to meet their obligations under the Scheme.

### **Child Safety and Local Government**

An additional matter of importance for Local Governments is gaining an understanding of the extent to which they are notified or advised of incidents involving children that occur at facilities or infrastructure that they own and operate, but which may not be reportable conduct under this Scheme, to enable them to consider and improve aspects of child safety within their operations.

Presently, the State Government is also consulting on the establishment of an Independent Oversight System to support legal compliance with the National Principles for Child Safe Organisations, and the proposal that Local Governments designate child safety officers from existing staff profiles.

While the obligations of Local Government with respect to child safety are increasing, there is no commensurate increase in the provision of resourcing to Local Government to assist them to meet these requirements. Options for the provision of additional funding and support for Local Governments require exploration. One option worthy of consideration is for the State and/or Commonwealth Government to provide funding for a resource to be located within WALGA to provide dedicated child safety capacity building support to the Local Government sector.

WALGA appreciates your due consideration of our submission. Please contact Tony Brown, Executive Manager Governance & Organisational Services on 9213 2051 or [tbrown@walga.asn.au](mailto:tbrown@walga.asn.au) if you require any additional information.

Yours sincerely,

**Nick Sloan**  
**Chief Executive Officer**