

**This guide is intended to assist Foster and Kinship carers (Carers) understand their legal rights – and, importantly, their legal risks - when participating in the Independent Inquiry into Foster & Kinship Care.**

We recommend you read this Carer Guide carefully – particularly if you intend your submission to include:

- identifiable information about a child or young person in your care
- adverse allegations about the behaviour of another person (especially if that person is identifiable)
- information that might lead a reasonable person to suspect that a child or young person has been or might be at risk.
- a reference to a matter that has already been considered by the Ombudsman or ICAC.

Please note that this Carer Guide is general in nature and should not be treated as legal advice specific to your circumstances. It raises legal issues and risks. It is not intended to discourage you from making a submission. Rather it is intended to ensure that when you do make a submission you understand your rights and are not put in legal jeopardy. If you would like specific legal advice on the content of your submission, please ring us on 1800 732 272. We will do our best to source a lawyer to provide the specific advice you need. We have Memoranda of Understanding with a number of local legal services.

**Please note that CF&KC-SA has written to the Inquiry seeking its view on the content of this Guide and asking for its input on these legal issues. The inquiry has advised that it does not intend to provide input. We are therefore seeking the formal written advice of a barrister. We will share that legal advice with you when it becomes available.**

This guide covers

- Information about s81 and s152 of the CYPS Act - both of which relate to sharing information about children
- Information about s162 of the CYPS Act – which relates sharing information about proceedings in the Youth Court
- a reminder that your Carer Agreement might also impose some confidentiality obligations on you
- information about circumstances that have already been investigated by the Ombudsman or ICAC
- information about defamation
- Information about s31 of the CYPS Act – which relates to mandatory reporting
- Information about the Charter of Rights for Children and Young People.

Each of these issues is discussed in more details below.

## **S 81 of Children and Young People (Safety) Act 2017 - relating to sharing information given by agencies**

The Act says, in section 81,

*(1) A placement agency must provide to each approved carer with whom a child or young person is placed any information (including, to avoid doubt, any medical reports) held by the agency that is reasonably necessary to ensure—*

- (a) that the approved carer is able to provide appropriate care to the child or young person in all of their circumstances; and*
- (b) the safety of the approved carer and any other member of the approved carer's household.*

*(2) An approved carer who is provided with information under this section, and any other person who becomes aware of the information, must not disclose the information except—*

- (a) to a health professional for a purpose related to the examination, assessment or treatment of the child or young person; or*
- (b) to a child protection officer performing a function under this Act; or*
- (c) to a member of the approved carer's household; or*
- (d) with the consent of the child or young person; or*
- (e) in any other circumstances prescribed by the regulations.*

*Maximum penalty: \$10 000*

In lay terms this means:

- Your agency (i.e. Anglicare, Life Without Barriers, Aboriginal Family Support Services, A.C. Care, Centacare, Junction Australia, Key Assets, Lutheran Care, Time For Kids, Uniting Communities, Uniting Country SA, KWY, InComPro & DCP Kinship Teams) has an obligation to provide you with certain information (i.e. medical information) about a child in your care. This is usually done at the beginning of a placement so that a Carer has all the required and relevant information to properly care for the child.
- You can only pass on the information provided to you by the agency to a limited number of people (listed in the Act and regulations), namely:
  - a health professional for medical reasons
  - a child protection officer
  - a member of your household

- to a preschool, school or other educational service
  - with the authorisation of the Chief Executive
- You are also able to pass the information on with the consent of the child or young person.

CF&KC-SA's current understanding is that you remain bound by these restrictions when making a submission to the Inquiry as the Inquirer is not named in the list of people you to whom you can pass this information. We are seeking further legal advice about this.

If you have any questions about this section and how it applies in your circumstances, please contact CF&KC-SA on 1800 732 272.

### **s152 of the Children and Young People (Safety) Act 2017 - relating to sharing of information**

This section says:

#### **152—Sharing of information between certain persons and bodies**

*(1) This section applies to the following persons and bodies:*

- (a) the Department;*
- (b) the Commissioner for Children and Young People;*
- (ba) the Commissioner for Aboriginal Children and Young People;*
- (c) the Guardian for Children and Young People;*
- (d) the Child Death and Serious Injury Committee;*
- (e) the Child and Young Person's Visitor;*
- (f) a State authority;*
- (g) a Child and Family Assessment and Referral Network and its constituent members;*
- (h) any other person or body prescribed by the regulations.*

*(2) Despite any other Act or law, a person or body to whom this section applies (the "provider") may, in accordance with any requirement set out in the regulations, provide prescribed information and documents to another person or body to whom this section applies (the "recipient") if the provider reasonably believes that the provision of the information or documents would assist the recipient—*

- (a) to perform functions relating to children and young people; or*

*(b) to manage any risk to a child or young person, or class of children or young people, that might arise in the recipient's capacity as an employer or provider of services.*

*(3) Subject to this section, but despite any other Act or law, information or documents that do not directly or indirectly disclose the identity of any person may be provided by one person or body to whom this section applies to another without restriction.*

*(4) .....*

*(5) Information may be provided under this section whether or not the provider has been requested to provide the information.*

*(6) Despite section 164, the recipient of information or documents under this section must not disclose information or documents received under this section except—*

*(a) to another person or body to whom this section applies; or*

*(b) as may be authorised by the regulations.*

*(7) In this section—*

*"prescribed information and documents" means—*

*(a) information or documents relating to the health, safety, welfare or wellbeing of a particular child or young person, or class of children or young people; or*

*(b) any other information or document of a kind prescribed by the regulations for the purposes of this definition.*

CF&KC-SA's current understanding is that

- Carers are included under this section as they *provide services to children and young people for the Department* (Regulation 39(2)).
- Carers can share:
  1. *information or documents relating to the health, safety, welfare or wellbeing of a particular child or young person, or class of children or young people – only with the other people and agencies included in this section;*
  2. *information or documents that do not directly or indirectly disclose the identity of any person - with everyone (i.e. without restriction).*
- The Inquiry is not included under this section.
- Carers therefore cannot share with the inquiry *information or documents relating to the health, safety, welfare or wellbeing of a particular child or young person, or class of children or young people with the Inquiry.*

- Carers CAN share with the Inquiry *information or documents that do not directly or indirectly disclose the identity of any person.*

We are seeking further legal advice about this.

## **s162 of the Children and Young People (Safety) Act 2017 - relating to the Youth Court**

There are also restrictions in the Act about reporting on proceedings in the Youth Court. Significant penalties apply. So, if you are wanting to refer to individual proceedings, decisions or a Family Group Conference of the Youth Court in your submission we recommend you contact CF&KC-SA on 1800 732 272 for more detail on how this section applies in your circumstances.

## **Your Carer Agreement**

You may have signed a Carer Agreement with DCP or with an agency (i.e. Anglicare, Life Without Barriers, Aboriginal Family Support Services, A.C. Care, Centacare, Junction Australia, Key Assets, Lutheran Care, Time For Kids, Uniting Communities, Uniting Country SA, KWW, InComPro, DCP Kinship teams). This is effectively a contract, and you are therefore bound to comply with it. If the Carer Agreement places any restrictions on you (for example about sharing information) those restrictions may remain in place even when you are making a submission to the Inquiry.

If you have any questions about how the terms of your particular Carer Agreement might impact on your submission, please contact CF&KC-SA on 1800 732 272.

## **The Ombudsman and the Independent Commission Against Corruption (ICAC)?**

If you have previously submitted a complaint to the Ombudsman or ICAC you can still disclose the events and original details pertaining to that complaint.

However, under section 29A(3) of the *Ombudsman Act 1972* and section 54(3) of the *Independent Commission Against Corruption Act 2012* you are sometimes not permitted to disclose information you have received from the Ombudsman or ICAC.

You will usually be advised of this restriction in the letter you receive from the Ombudsman or ICAC. The letter will say something like

*The Ombudsman Act imposes certain obligations on my Office and others, including complainants and officers in a department, to keep information about my assessment confidential. However, if I consider that disclosure of that information is in the public interest, then I may authorise or require its disclosure. I confirm that the matter remains confidential.*

We have contacted the Ombudsman about these confidentiality restrictions. He has advised that these restrictions still apply even when you are making a submission to the Inquiry. A copy of the Ombudsman's response is included here.

Please note the Ombudsman has advised CF&KC-SA that

- confidentiality provisions do not cover the events that gave rise to a complaint. For example, if a complainant is unhappy with a decision or action by a department, that decision or action, and the complainant's views, are not caught by confidentiality.
- a person who has received confidential information and wants the confidentiality lifted can seek authorisation from the Ombudsman. This can be done in writing by post or to [ombudsman@ombudsman.sa.gov.au](mailto:ombudsman@ombudsman.sa.gov.au). When seeking an authorisation, it is helpful if the person explains:
  - what they are seeking to disclose, and the matter to which it relates
  - who the disclosure would be to
  - why they consider disclosure should be authorised.

If you would like more information on how this impacts of your particular submission, or would like help writing to the Ombudsman please contact CF&KC-SA on 1800 732 272.

## Defamation

The law of defamation is complicated and hard to summarise. More information can be found in the on line [Law Handbook](#) produced by the Legal Services Commission of SA.

CF&KC-SA's current understanding is that law of defamation does not apply to a submission sent only to the Inquiry. This is because

- s166(3) of the Act states that *A person who provides information or a document to an inquiry under this Act has the same protection, privileges and immunities as a witness in proceedings before the Supreme Court.*
- Witnesses in the Supreme Court cannot be sued for defamation in relation to evidence they give to the Court.

However, CF&KC-SA current understanding is that immunity only applies to the information you give to the Inquiry itself. If your submission includes adverse comments about another person, **and you share it with others (outside the Inquiry) personally or via social media** you may put yourself at risk of being sued for defamation.

If you would like more information on how the law of defamation impacts on your particular submission, please contact CF&KC-SA on 1800 732 272.

## **Mandatory reporting**

Section 31 of the Act states that some people have an obligation to notify DCP if *the person suspects on reasonable grounds that a child or young person is, or may be, at risk*. This is called mandatory reporting.

When preparing a submission, you should therefore carefully consider including anything that might lead someone reading the submission who is a mandatory reporter to believe a child has been, or might in the future, be at risk.

As examples:

- A comment such as *I was so upset by what the Department did that I had to leave my home for an hour, leaving my young children unattended* might lead to a mandatory report.
- Any comments about a child being exposed to family violence might also lead to a mandatory report.
- Any comment that a child being exposed to sexual abuse might lead to a mandatory report.

If you have any questions about how mandatory reporting obligations might impact your submission, please contact CF&KC-SA on 1800 732 272.

## **Charter of Rights for Children and Young People**

The Charter of Rights for Children and Young People in Care which is embedded in the Act, states that children and young people have the right to know and be confident that personal information about them will not be shared without good reason.

If your submission includes information personal to a child or young person, and if the child or young person in your care is of an appropriate age and developmental capacity, we recommend talking to them about what the Inquiry is about and what information you wish to provide to the Inquiry.

## **Finally**

CF&KC-SA recognise that the information in this Carer Guide can be daunting and off putting. We regret that, but we also know we would not be doing our job if we did not point this information out to Carers to protect Carer interests. We are confident that these legal issues should NOT interfere with a Carer making a submission. We have staff who can help.

So please get in touch if you have any concerns. We can talk you through this Guide. And we can help you with these issues generally.

## **Carer support**

For help with your submission generally – or for Carer support of any kind



**Email:** [support@cfc-sa.org.au](mailto:support@cfc-sa.org.au)

**FREE CALL:** 1800 732 272

## **Independent Inquiry into Foster and Kinship Care: Carer Legal Rights & Risks**

Carer Guide