

Redacted Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	[The complainant]
Department	Department for Child Protection
Ombudsman reference	2018/00537
Department reference	DCSI/18/05611
Date complaint received	20 February 2018
Issue	Whether the agency erred in its handling and resolution of a complaint concerning the care and protection of two children

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

The complaint is a prescribed child protection complaint for the purposes of the Ombudsman Act and the *Health and Community Services Complaints Act 2004*.

The complaint concerns the alleged failure of the Department for Child Protection to respond to concerns raised by the complainant in respect of the safety and wellbeing of her two children.

From 2006 until November 2016, Families SA was the agency delivering child protection functions within South Australia. The Department for Child Protection has now assumed those functions. Throughout this report, I have referred to both Families SA and the Department for Child Protection as '**the agency**'. Use of the term in the present tense should be taken to refer to the Department for Child Protection.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- considering information provided by the Health and Community Services Complaints Commissioner
- seeking an initial response from the agency
- reviewing the agency's full files concerning the children
- seeking further information from the agency
- considering:
 - the Ombudsman Act
 - the Health and Community Services Complaints Act
 - the *Children's Protection Act 1993*

- the *Children and Young People (Safety) Act 2017*
- the Charter of Health and Community Services Rights
- the agency's Complaints Management Framework and Complaints Management Procedure
- preparing a provisional report and seeking the views of the parties
- preparing this final report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 13 June 2018.
2. The complainant responded to my provisional report by way of email dated 25 June 2018. The complainant did not elect to comment on my provisional views, however further elaborated on her concerns about the welfare of the children. In the circumstances, I have supplied a copy of the complainant's submissions to the agency for consideration.
3. The agency responded to my provisional report by way of email from the Chief Executive Officer dated 6 July 2018. The agency indicated that it accepted my provisional views and did not wish to comment further in respect of the matter.
4. As such, my views remain as identified in my provisional report.

Background

5. The complainant is the mother of two children, [A], born [date], and [B], born [date].³
6. [A] and [B] live with their father in [location]. The complainant resides [interstate]. I understand that [A] and [B] visit their mother during school holidays pursuant to parenting orders made under the *Family Law Act 1975* (Cth).

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

³ My provisional report observed that [A] was born on [date] and that [B] was born on [date]. These are the dates of birth recorded in the agency's files. These dates of birth are also recorded in the filings relating to the family law proceedings and in the [interstate] records supplied to the agency. The mother in her response to my provisional report submitted that these dates are incorrect. I have amended this paragraph of my report accordingly.

7. It appears that the agency first came into contact with the family in approximately [date], when the father and [A] relocated to [location] from [interstate]. I understand that [B] was subsequently brought to live with the father in [location] in or around [date].
8. The complainant maintains that the father relocated the children surreptitiously and without her consent.
9. I do not propose to set out the extent of the agency's interactions with the father in this report. It is important, however, that I observe that I have reviewed the agency's full files concerning [A] and [B].
10. Between 11 November 2015 and 27 December 2017 the agency's Child Abuse Report Line (**CARL**) received approximately nine notifications raising allegations of neglect and inappropriate discipline within the father's home. It appears that these notifications were made by the complainant or, perhaps, one or more persons closely aligned with the complainant. The notifications do not credibly suggest that any of the notifier(s) have personally inspected the father's home.
11. It is the agency's established practice to assess each notification received under the Children's Protection Act so as to determine whether a response is merited. A notification may be 'screened out' as not requiring a response from the agency in the event that it satisfies certain criteria.
12. Each of the subject notifications was screened-out as not meriting an agency response.
13. On 4 October 2017 the mother made a complaint about the agency to the Health and Community Services Complaints Commissioner (**HCSCC**) under the Health and Community Services Complaints Act (**the HCSCC complaint**). At the time, the HCSCC had primary responsibility for investigating complaints relating to child protection. My Office has since assumed that responsibility.
14. I reproduce the pertinent passages of the HCSCC complaint below (verbatim):

Name of service:

Child abuse line/Family Sa

[...]

Years:

2

When did the incident occur?

Been ignored for almost 3 years

Details (e.g. what happened, what led up to the complaint, approximate dates and who was involved):

I've report very serious concern about 2 children which have been ignored

My main concerns are:

My 2 children welfare safety school theres allof.

[...]

Are there any immediate issues that need to be addresses so you can still use the service while your complaint is being assessed?

Actually do something about my kids being around abusive fathrr and girlfriend and whos neglecting them.

The scho ignoring my raised issue.

My children are being left alone with no supervision. The father and girlfriend are hitting the children. They are smoking inside my [age] son has a smokers cough. My [age] daughter comes up with nits bruises. And made to look after their father gf 2 year old child who almost drowned in her care. Which is recorded when she told me.

Both kids covered in bruises flea bit marks. Itchy bloody scalp from nits. My daughter recently dislocated her ankle which was done by the grandfather.

Father giving the daughter sleeping tablet which isn't prescribed to her. The hardley go to school or are on time. School refused to sort out this issue and denied any wrong doing my son cant read write etc they kids don't want to live with their father. Ive had my doctor and hospital ring child abuse line after they documented the reports noting was done. Are you friggin kidding me. Im going around in circles trying to protect my kids from the abuse neglect im so concerned they will ve killed the father girlfriend has strangled my son and threaten to kill him. She cant even look after her own child.

Both of them leave them in my children care while they go out or lock themselves in a room to play video games. Something needs to change now.

[The father and the father's partner] girlfriends are abusing these kids are child abuse line family sa are not doing nothing about it but ignoring all the issue raised. Will they only act once they kill or really hurt me children? Police have also been called on numerous times. Which they only speak to the father and not the kids not check on them. My son has called the police which they ignored and he is now so scared after coping so much abuse from the father once he found out.

Have you already tried to resolve your complaint directly with the service provider?

Yes

[...]

If yes, please tell us who you dealt with and what happened, if you have copies of letters between you and the service provider please provide them to HCSCC:

Im talking to a brick wall with them.

15. On 10 October 2017 an officer of the HCSCC wrote to the agency to supply it with a copy of the HCSCC complaint and to request that the agency attempt to resolve the complaint in the first instance:

Before accepting a complaint, the Health and Community Services Complaints Act 2004 requires HCSCC to be satisfied that a complainant has taken reasonable steps to resolve a matter with the service provider. If HCSCC has received a copy of the complaint but the service provider has not, HCSCC sends a copy of the complaint to the service provider to allow them to first attempt to resolve the complaint.

[...]

HCSCC has written to [the complainant] about the importance of dealing with you directly and that HCSCC would forward the enclosed complaint to you for a response to the complaint.

16. On 17 October 2017 the agency contacted the complainant to request further information about her complaint. It appears that on or about this date the agency also commenced a review of its interactions with the family and the subject notifications.
17. Following consideration of the matter, on 1 November 2017 the agency caused a notification to be made to CARL detailing the allegations raised in the HCSCC complaint. That notification appears to have been immediately screened out. The agency's case notes disclose a rationale for this action.
18. On 15 November 2017 the agency wrote to the complainant:

On behalf of the Department for Child Protection (DCP) I would like to advise that the investigation of your complaint received on 11 October 2017 has now been finalised.

The Complaints Unit has made a notification to the Child Abuse Report Line (CARL) on 1 November 2017 in regards to the information you provided in writing about your children, [B] and [A].

I am advised that the Complaints Unit has provided information to you in relation to the importance of continuing to document and report all suspected child abuse and neglect though the Child Abuse Report Line (CARL) [sic] on 131 478.

I trust that this process has addressed the issue(s) that your complaint raised. If you remain dissatisfied with the outcome of your complaint you have the right to refer matters to the:

- Health and Community Services Complaints Commissioner [...]
- Ombudsman SA [...]

If you do not contact the agency within 14 days of posting this letter, your complaint will be closed.

19. It appears that the agency also attempted to telephone the complainant to discuss the resolution of her complaint, however was unable to effect contact. I note that the complainant had previously submitted that she could not be contacted by telephone.

20. On 18 November 2017 the complainant made a further complaint to the HCSCC, apparently in response to the agency's 15 November 2017 letter:

Im very angry and frustrated that nothing from child service child abuse line and government of south Australia department for child protection has done nothing to help my 2 children from their abusive father and his partner.

21. On 23 November 2017 the HCSCC sought a response from the agency. The HCSCC subsequently ceded jurisdiction to my Office in respect of the matter on 9 February 2018.

22. On 20 February 2018 the complainant separately contacted my Office to raise her concerns:

i haven't heard nothing which is very frustrating and stressful. and ridiculous.

my to children who are constantly being abused neglected and no one is doing anything?

Response to my investigation

23. At my request, the agency provided my investigation with a copy of its full files concerning [A], [B] and the father.

24. The agency also responded to certain queries made on behalf of my investigation. I do not set out the agency's responses in this report. I confirm that I have considered the agency's submissions to my investigation.

Relevant law/policies

25. At all material times, section 19(1) of the Children's Protection Act has provided:

19—Investigations

(1) If the Chief Executive—

(a) suspects on reasonable grounds that a child is at risk; and

- (b) believes that the matters causing the child to be at risk are not being adequately addressed,

the Chief Executive must cause an assessment of, or investigation into, the circumstances of the child to be carried out or must effect an alternative response which more appropriately addresses the potential or actual risk to the child.

26. At all material times, section 58 of the Children’s Protection Act has provided:

58—Duty to maintain confidentiality

- (1) A person engaged in the administration of this Act who, in the course of that administration, obtains personal information relating to a child, a child’s guardians or other family members or any person alleged to have abused, neglected or threatened a child, must not divulge that information.

Maximum penalty: \$10 000.

[...]

- (3) This section does not prevent—
 - (a) a person from divulging information if authorised or required to do so by law; or
 - (b) a person from divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates; or
 - (c) a person engaged in the administration of this Act from divulging information if authorised or required to do so by his or her employer.

27. Section 164 of the Children and Young People (Safety) Act came into operation on 26 February 2018 and relevantly provides:

164—Confidentiality

- (1) Subject to this Act, a person engaged or formerly engaged in the administration, operation or enforcement of this Act must not disclose personal information obtained (whether by that person or otherwise) in the course of performing functions or exercising powers under this Act except—
 - (a) as required or authorised by or under this Act or any other Act or law; or
 - (b) with the consent of the person to whom the information relates; or
 - (c) in connection with the administration or enforcement of this or any other Act; or
 - (d) for the purposes of referring the matter to a law enforcement agency, or a person or agency exercising official duties under an Act relating to the care or protection of children and young people; or
 - (e) to an agency or instrumentality of this State, the Commonwealth or another State or a Territory of the Commonwealth for the purposes of the proper performance of its functions; or
 - (f) if the disclosure is reasonably necessary for the protection of the lawful interests of that person.

Maximum penalty: \$10 000.

[...]

- (4) The regulations may make further provision in respect of the disclosure of information obtained in the course of the administration of this Act.

28. Regulation 42 of the Children and Young People (Safety) Regulations 2017 came into operation on 26 February 2018 and relevantly provides:

42–Confidentiality

- (1) Pursuant to section 164(4) of the Act, personal information may be disclosed with the authorisation of the Chief Executive.

[...]

- (3) Pursuant to section 170(3)(c) of the Act, for the purposes of section 164 of the Act, information obtained in the course of the administration, operation or enforcement of the *Children's Protection Act 1993* (including, to avoid doubt, information obtained before the enactment of section 164 of the Act) will be taken to be information obtained in the course of performing functions or exercising powers under the Act (and an authorisation relating to such information under section 58(3)(c) of the *Children's Protection Act 1993* in force immediately before the commencement of this regulation will continue in accordance with its terms and will be taken to be an authorisation to disclose such information under the Act).

29. The Charter of Health and Community Services Rights is established in accordance with Part 3 of the Health and Community Services Complaints Act. The Charter provides for eight rights that apply to the provision or use of most health and community services within South Australia. These include:

5. INFORMATION – Right to be informed.

I have a right to open, clear and timely communication about services, treatment options and costs in a way that I can understand.

[...]

8. COMMENT – Right to comment and / or complaint.

I have a right to be listened to and to comment on, or make a complaint about services sought or provided to me. I have a right to have my complaint dealt with properly and promptly, and without retribution as a result of having made a complaint. I have a right to a representative of my choice to support and advocate for me when making a complaint. My feedback and complaints are managed openly to ensure improvements.

30. The agency has recently enacted a Complaints Management Framework and a Complaints Management Procedure. I understand that these documents were in draft form during the period relevant to my investigation. I note that the Complaints Management Procedure establishes local and centralised resolution procedures, both of which provide:

[T]he staff member managing the complaint will consider:

- what are the facts that can be determined?
- what issues remain in dispute
- what conclusions can be drawn based on the application of the legislation/policy/procedures to the facts
- what options are available to resolving the issue

This information should be provided to the complainant to the maximum extent possible within the requirements of legislative and other requirements regarding privacy and confidentiality.

Whether the agency erred in its handling and resolution of a complaint concerning the care and protection of two children

31. I have considered the terms of the HCSCC complaint and the agency's 15 November 2017 letter to the complainant.

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32. I consider that on a proper reading the HCSCC complaint raised two substantive issues:
- the alleged failure of the agency to adequately respond to notifications made by the complainant
 - the complainant's continued concerns about the safety and wellbeing of [A] and [B] while in the father's care.
33. I note that on receipt of the HCSCC complaint an officer of the agency undertook a review of the agency's records concerning the children. It appears that this involved an assessment of the agency's response to those notifications. That was plainly appropriate in the circumstances.
34. I also do not criticise the agency's making of a notification to CARL. It was important that the agency assess the information within the HCSCC complaint so as to determine whether a child protection response was warranted under section 19(1) of the Children's Protection Act.
35. The making of a notification to CARL did not, however, address the first issue raised by the HCSCC complaint, which concerned the agency's assessment of and response to prior, similar notifications.
36. The 15 November 2017 letter to the complainant did not refer to the first issue raised by the HCSCC complaint. It did not suggest that the agency had reviewed its records concerning the family, nor did it seek to affirm or explain its assessment of the prior notifications made by the complainant.
37. The 15 November 2017 letter also did not disclose whether the agency intended to take any action in response to the notification made on the complainant's behalf. At the time the letter was sent, it was reasonably clear that no such action was to be taken.
38. In her subsequent communications with the HCSCC, the complainant expressed apparent frustration at the agency's response to her complaint:
- [W]ho did you complain to:**
[...] Child abuse [...]
- What happened?**
All fallen on deaf ears. Going in circles.
39. That frustration is in some ways understandable. A central aspect of the HCSCC complaint was the perceived lack of action by the agency in response to notifications made by the complainant. Plainly, the making of another notification on the complainant's behalf, absent further action, was not capable of resolving this issue. It may, in fact, have appeared insensitive to the complainant's concerns.
40. I have so far refrained from commenting on the merits of the agency's assessment of the various notifications concerning the children. In the circumstances, I simply note that the agency's case notes disclose a discernible rationale in respect of its decision not to investigate each notification; however that rationale appears never to have been communicated to the complainant.
41. Both the Children's Protection Act and the Children and Young People (Safety) Act prohibit the disclosure of certain information by officers of the agency. This may present practical difficulties to the agency in respect of its communications with complainants. I simply note that the 15 November 2017 letter to the complainant did not advert to any such difficulties.

42. In any case, I do not consider that the relevant provisions would have operated to prevent the agency from providing some very general information about its assessment processes, nor do I consider that the agency was precluded by these provisions from disclosing that the complaint had caused it to review its records concerning the family.
43. The agency's Complaints Management Framework and Procedure were not yet in effect during the period in question. I query, however, whether the agency's response to the HCSCC complaint would have satisfied its obligation to communicate relevant information to the complainant 'to the maximum extent possible', etc, under the Procedure.
44. On the information before me, I consider that the agency's omission, in its communications with the complainant, to address the complainant's concerns regarding its assessment of prior notifications concerning the children was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Opinion and recommendation

It is my final view that the agency's omission, in its communications with the complainant, to address the complainant's concerns regarding its assessment of prior notifications concerning the children was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2)(e) and (f) of the Ombudsman Act that the agency cause a letter to be sent to the complainant (including, where necessary, by seeking relevant authorisation from the Chief Executive Officer) that:

- acknowledges the complainant's concerns regarding the agency's assessment of the relevant notifications concerning [A] and [B]
- explains the agency's assessment process
- identifies in general terms the agency's cumulative assessment of the notifications and the reasons for that assessment.

At which time the complainant will be in a position, if she so wishes, to make a further complaint to my Office in respect of the agency's assessment.

In accordance with section 25(4) of the Ombudsman Act, the Department for Child Protection should report to me by **21 August 2018** on what steps have been taken to give effect to the recommendation above; including:

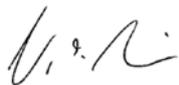
- details of the actions that have been commenced or completed
- relevant dates of the actions to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided.

Comment

It does not appear to me that there is any impediment to the agency contacting the father to seek his consent to conduct a home visit.

Although I do not formally recommend as such, the agency may wish to consider whether this presents an alternative means of resolving the complainant's substantive concerns.



Wayne Lines
SA OMBUDSMAN

10 July 2018