

Request for Statement – TAS – 103 AYDC

This statement and associated attachments have been prepared by Peter Graham, Registration to Working with Vulnerable People.

This statement has been prepared in response to RFS-TAS-103 AYDC of 1 August 2022.

The statement below outlines:

- the Registration to Work with Vulnerable People scheme in Tasmania;
- the relevant legislative context;
- an overview of risk assessment/additional risk assessment process;
- outcome of reportable behaviour relating to AYDC matters;
- consideration of AYDC matters;
- challenges faces relating to AYDC matters;
- Tasmanian RWVP scheme relative to schemes in other jurisdictions; and
- opportunities to further strengthen the RWVP scheme.

An attachment responding to the specific questions put by the Commission of Inquiry is Attachment I. This document has as an appendix documents relating to decisions taken by the Registrar relating to additional risk assessment outcomes. Any other document referenced can be provided on request.

Registration to Work with Vulnerable People scheme in Tasmania

The *Registration to Work with Vulnerable People Act 2013* (the Act) establishes Tasmania's screening and monitoring scheme for people who work or volunteer with vulnerable people, including children.

It does this by requiring individuals who undertake certain 'regulated activities' to hold Registration to Work with Vulnerable People (RWVP).

Regulated activities relating to children were progressively added to the scheme between 2014 and 2017. These include childcare services, child education services, child transport services, youth justice services and child health services.

As at 31 July 2022, 147, 878 people hold an RWVP.

Since the establishment of RWVP in 2014, 2,204 people have had their application for registration rejected or have withdrawn their application following engagement with the RWVP unit regarding their past conduct.

A further 397 have had their registration suspended, cancelled or have surrendered their registration following engagement with the RWVP unit regarding conduct reported to the Registrar.

Relevant legislative context

Youth justice services have been a regulated activity for the purposes of the Act since 1 October 2015. A Youth justice service is defined as an activity conducted specifically for, or a service provided specifically to, a youth under the *Youth Justice Act 1997*.

State Service agencies and Tasmania Police have had an obligation to notify the Registrar of reportable behaviour since 27 November 2015 (s 53A). Reportable behaviour is behaviour which poses a risk of harm to vulnerable people whether by neglect, abuse or other conduct.

To obtain or renew an RWVP, a risk assessment of the applicant is undertaken. This risk assessment considers the applicant's prior conduct based on information contained in a National Criminal History Check and information otherwise held by the Registrar from Tasmania Police or State Service agencies. The purpose of the risk assessment is to determine if an applicant poses an acceptable risk to vulnerable persons.

If the Registrar believes on reasonable grounds that there is new, relevant information about a registered person, the Registrar is to conduct an additional risk assessment for the person taking into account that information (s 46(2)).

The purpose of an additional risk assessment is to determine if a person poses an unacceptable risk to vulnerable people.

If the Registrar determines to undertake an additional risk assessment, the Registrar has grounds for an immediate suspension while the additional risk assessment is undertaken (s 49 (2)).

The Registrar has grounds to cancel a person's registration if the Registrar has conducted an additional risk assessment and is satisfied that the person poses an unacceptable risk of harm to vulnerable persons (s 49). The Registrar must provide the registered person with ten working days to provide reasons as to why the registration should not be cancelled (s 50). The Registrar must consider any reasons provided by the registered person before determining whether to cancel registration (s 51).

Overview of risk assessment/additional risk assessment process

The risk assessment is the primary mechanism for screening and monitoring the suitability of a person to attain or retain an RWVP.

Screening

On application, a risk assessment is undertaken and considers an individual's past conduct. This includes information from a National Criminal History Check and any other relevant information held by the Registrar, such as reportable behaviour provided by reporting bodies or regulatory outcomes from registration bodies in other jurisdictions shared through the National Reference System (NRS).

A risk assessment is undertaken in line with the Registration to Work with Vulnerable People (Risk-Assessment for Child-related Activities) Order 2014¹ (the Risk Order). The Risk Order outlines the matters to be considered when undertaking a risk assessment. This includes:

- the nature, gravity and circumstances of the offence, misconduct or relevant conduct;
- the length of time that has passed since the matter occurred;
- the vulnerability of the victim at the time of the matter occurring, including the age of the victim, the age difference between the applicant and the victim and the nature of the relationship between the applicant and victim
- the applicant's criminal, misconduct, disciplinary or other relevant history, including whether there is a pattern of concerning conduct;
- the applicant's conduct since the matter occurred; and
- all other relevant circumstances in respect to the offending.

The Risk Order includes a schedule of offences, which oblige the Registrar to propose a negative outcome where an applicant has been charged or convicted of the said offence provided certain qualification are met (i.e. the offender is an adult and the victim is a child)².

The outcome of a risk assessment is either positive (the applicant poses an acceptable risk to vulnerable people) or negative (the applicant poses an unacceptable risk to vulnerable people). The legal standard for a risk assessment outcome is the balance of probabilities.

During the period that a risk assessment is undertaken, the Registrar can also put in place an interim bar if the Registrar reasonably suspects the applicant will be refused registration. An interim bar prevents an applicant from engaging in a regulated activity during the period the application is assessed, even where other conditions are met, such as a risk management plan being in place.

Monitoring

During the period of registration, the Registrar is to undertake an additional risk assessment where the Registrar believes on reasonable grounds that there is new relevant information about a registered person. An additional risk assessment is typically driven by reportable behaviour provided by reporting bodies. In a small number of cases, it has also been driven by outcomes provided through the NRS.

An additional risk assessment is also undertaken in line with the Risk Order.

The outcome of an additional risk assessment is either positive (the registered person poses an acceptable risk to vulnerable people) or negative (the registered person poses an unacceptable risk to vulnerable people). The legal standard for a risk assessment outcome is the balance of probabilities.

¹ The Risk Order referenced relates to Child-related activities only. Separate risk orders exist for NDIS related activities.

² The scheduled offences are not relevant in the context of AYDC as there has not been any criminal charges.

If the Registrar determines to undertake an additional risk assessment, the Registrar has grounds for an immediate suspension while the additional risk assessment is undertaken.

Outcome of reportable behaviour relating to AYDC matters

As a result of notifications from reporting bodies made pursuant to reportable behaviour obligations under the Act, the Registrar has received more than 300 allegations of relevant behaviour relating to current and past employees of AYDC. The majority of this information has been provided by DCT and drawn from state and national redress scheme applications and civil claims. A small number of notifications has also come from Tasmania Police.

These notifications contain varying levels of detail and particulars regarding the alleged conduct and the perpetrator. The RWVP Unit has taken appropriate steps to verify the identity of the alleged perpetrators to enable records to be cross-checked against the RWVP register.

From these notifications, the Registrar has identified 69 persons of interest with sufficient particulars and allegations of relevant conduct at AYDC. This includes people who are alleged to have committed the relevant behaviour, observed relevant behaviour or who are otherwise mentioned in the statements surrounding allegations.

Of the persons of interest, it has been possible for the Registrar to determine that 33 have held an RWVP at some point in time, including 28 who held registration at the point of notification of the alleged conduct. As a result of these notifications, the Registrar initiated 28 additional risk assessments and sought appropriate records from reporting bodies.

As at 15 August 2022:

- 10 of the 33 are no longer registered, including:
 - three who have been subject to some form of active exclusion (suspension, cancellation, interim bar) by the Registrar;
 - two for which their registration expired while the additional risk assessment was underway;
 - one for which their registration has expired following a positive additional risk assessment; and
 - four where the Registrar was not notified of relevant conduct until after the expiry of Registration.
- 23 of 33 remain registered, including:
 - two which have been subject to a proposed negative notice and are suspended;
 - five which have been subject to a positive additional risk assessment; and
 - 16 which continue to be subject to an additional risk assessment.

A table outlining the status of the 69 persons of interest relating to AYDC is at Attachment 2.

Consideration of AYDC matters

Other than one matter in 2016³, the RWVP Unit did not receive reportable behaviour relating to AYDC until late 2020.

In August 2020, there were general discussions between the RWVP Unit and the Department of Communities Tasmania regarding reportable behaviour obligations. At this time, DCT indicated that it had allegations relating to conduct of current and former AYDC employees from redress and civil claims being dealt with by the Department.

During the period of September – November 2020, reportable behaviour was provided relating to three⁴ then current AYDC employees. This information related to allegations of a physical or sexual nature against one or more former detainees at AYDC. All three employees were stood down in November 2020 while an Employment Direction 5 investigation was undertaken.

In two of the cases, the level of detail included in the allegations was limited in nature and lacked particulars. Additional risk assessments, without suspension, were commenced for these employees. In the remaining case, due to the volume and gravity of the alleged conduct and the existence of some corroborating evidence, an additional risk assessment with suspension was commenced.

At the time, the Registrar wrote to the Secretary of Communities and requested that the Registrar continue to be updated as the investigations progressed.

In December 2020, further discussions were held between the RWVP Unit and DCT relating to reportable behaviour obligations and the information held by DCT from civil claims and state and national redress schemes. At this time, a spreadsheet which has been prepared by DCT was shared with the RWVP Unit.

This spreadsheet contained more than 300 allegations of a physical and sexual nature against current and former AYDC staff during the period 1955-2010. The allegations had been sourced from state and national redress schemes and civil claims. Much of the conduct was not attributed to individual staff members and lacked insufficient identifying particulars to determine perpetrators. It is understood by the RWVP Unit that this conduct would form the basis of future reportable behaviour notifications from DCT.

From this time, DCT provided reportable behaviour relating to the conduct of AYDC staff. However, it became clear in February 2021 there was an apparent reluctance within parts of DCT to share records from the redress scheme under reportable behaviour obligations in the RWVP Act.

³ This related to conduct by a **Walter**, which led to a proposed negative notice and was ultimately resolved with a positive outcome following the provision of an Employment Direction 5 outcome from the Department of Health and Human Services.

⁴ This related to **Stan**, **Ira** and **Lester**. **Stan** and **Ira** were subject to an additional risk assessment without suspension, **Lester** was subject to an additional risk assessment with suspension.

In response in March and April 2021, the RWVP Unit commenced a full review of the previously provided spreadsheet with a view to manually logging the conduct as reportable behaviour and commencing additional risk assessments. Based on this review, it was only possible to satisfactorily identify eight people as registered persons due to the lack of particulars and identifying information. Of these, four were already subject to additional risk assessments and one had surrendered their registration. Three⁵ further additional risk assessments were commenced.

In an attempt to verify the identities of the remaining records included in the spreadsheet, requests were sent to DCT for personal information, such as clarifying names or date or birth. As a result of this exercise only a further two registered persons were identified and additional risk assessments commenced.

Over the period from May 2021-present, DCT provided reportable behaviour relating to a further 14 current and former staff relating to conduct which occurred at AYDC. In each case, an additional risk assessment was commenced and records sought from reporting bodies.

In the majority of cases, DCT has been able to provide limited relevant additional information beyond the conduct included in the National Redress Scheme application. Given the lack of information, including particulars, the majority of risk assessments remain open, many awaiting the outcomes of Employment Direction 5 investigations.

In the four cases where cancellation was proposed, the Registrar was able to reach the conclusion that, on balance, the individuals posed an unacceptable risk to vulnerable people due to the volume and consistency of allegations against the individuals involved.

Challenges faced relating to AYDC matters

The primary source of allegations of conduct of current and former staff at AYDC has been the National Redress Scheme.

When compared to the information typically available to the Registrar when undertaking an additional risk assessment, including records from Tasmania Police or Children and Youth Services⁶, such information often lacks the detail and particulars necessary to conclude a risk assessment/additional risk assessment.

The information provided to the National Redress Scheme is collected for a different purpose and is tested against a lower legal standard for a successful outcome. As such, the reports often contain limited particulars, lack clarity with regard to allegations and might not attribute conduct to any individual. For example, it is not uncommon for allegations provided in redress to be limited to a few sentences or a paragraph. Further, due to the lower legal standard, the allegations are often not tested in any way. This is appropriate for the purposes of the National Redress Scheme but can limit its usefulness in a risk assessment. The consequence of this is that there may be allegations which suggest conduct of the most serious kind but for which limited particulars exist.

⁵ This related to **Lionel** [REDACTED] and [REDACTED].

⁶ Children and Youth Services provide relevant reportable behaviour collected from people with mandatory notification requirements under the *Children, Young People and Their Families Act 1997*.

Claimants to the National Redress Scheme have also typically declined to participate in or provide statements to Tasmania Police investigations relating to the alleged conduct. This, while understandable, further limits the ability for relevant information to be collected or for an appropriate criminal justice response. In the context of the alleged conduct of current and former staff, there are only two cases⁷ where Tasmania Police provided information which was in addition to any information provided by DCT records.

There have also been challenges in accessing information from DCT relating to conduct of employees at AYDC. It is clear that DCT have found the scale of historical allegations at AYDC, and the obligations placed on them, to be overwhelming.

Throughout the period of late 2020 – present, it has been the Registrar’s view that DCT has not recognised the scale of the challenge and put appropriate systems, processes and resources in place to ensure it was in a position to meet its obligations under the Act.

This resulted in significant frustration, particularly during 2021, as the Registrar was in receipt of allegations of a grave nature (albeit with limited particulars) and there appeared to be no urgency from DCT to locate and share relevant information.

Some of the challenges included:

- Responses to requests for information not being responded to in a timely way. More than 80 requests for information were made or followed up under the Act, some which took up to a year for a response.
- The challenge for DCT locating historical records relating to AYDC given that DCT had only be established in 2018 and many historical records continue to be held by the Department of Health.
- Transfer of responsibility for responding to these matters multiple times within DCT between People and Culture, Legal Services, Records and program areas within DCT, with a sense that no area particularly saw themselves as accountable.
- A lack of urgency in appointing investigators to undertake Employment Direction 5 investigations. For example, one of staff stood down in November 2020 was yet to have allegations put to him in July 2021.
- A lack of continuous disclosure from Employment Direction 5 investigations, despite a request to the Secretary, DCT in November 2020 for continuous disclosure during the investigations.
- No investigation into allegations where the alleged perpetrator is a former staff member.

In outlining these challenges, it is important to note the important and helpful role played by DCT staff, particularly at officer level who attempted to meet their obligations under the Act. It is also important to acknowledge that for many of these staff, there was a strong desire to provide records in the interests of keeping children safe.

To provide a sense of these frustrations, in July 2021, the Registrar considered whether enforcement action was necessary to compel the production of records. The Registrar

⁷Stan [redacted] and Walter [redacted]

ultimately decided that such a step was premature and instead insisted on regular meetings with relevant executives at DCT to act as a clearinghouse for information relating to AYDC.

As at 15 August 2022:

- 16 current or former staff remain subject to an additional risk assessment.
- No negative Employment Direction 5 outcomes have been provided to the Registrar relating to AYDC staff.

Tasmanian RWVP scheme relative to schemes in other jurisdictions

Tasmania's RWVP scheme meets the National Standards for Working with Children Checks (National Standards) agreed by Australian governments in response to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

It also exceeds these standards in three key ways:

The breadth of reporting obligations: In Tasmania, State Service agencies and Tasmania Police have a responsibility to notify the Registrar of reportable behaviour. Reportable behaviour is any behaviour which may pose a risk of harm to vulnerable people, whether by neglect abuse or other conduct. This reporting obligation provides the Registrar with significantly more information than is contemplated by the National Standards, which typically require reporting bodies to provide the Registrar (or equivalent) with findings of misconduct investigations and, in the case of Police, criminal history information.

The information available to the Registrar when undertaking a risk assessment: In addition to the matters included in the National Standards for Working With Children Checks (relevant criminal history, findings of misconduct), the Registrar is able to consider criminal intelligence and information provided by agencies through reportable behaviour obligations when undertaking a risk assessment/additional risk assessment. This includes allegations which have yet to be tested by an investigation.

The power to suspend a registered person while an additional risk assessment is undertaken: The Registrar has a general power to suspend a registered person while a risk assessment is undertaken. While similar powers exist in the schemes of some jurisdictions, the triggers for additional risk assessments in those jurisdictions are significantly higher because of the information available and able to be used by the Registrar to initiate an additional risk assessment.

Taken together, these differences in Tasmania's scheme are significant, and can allow the Registrar to act earlier than would otherwise be the case in another jurisdiction. For example, the Registrar has issued suspension notices in cases where by virtue of the volume and similarity of allegations, and the presence of sufficient particulars, prior to police or employee conduct investigations laying charges or making findings. Such a scenario would not be possible in other jurisdictions.

These differences do not, however, overcome the challenges outlined above where allegations lack specificity, are isolated in nature and there are not timely investigatory outcome. In such cases, the Registrar has not considered it to be appropriate to suspend registration while an additional risk assessment is undertaken.

Opportunities to further strengthen the RWVP scheme

Improving understanding of mandatory reporting and reportable behaviour obligations

When a State Service agency becomes aware of child sexual abuse in a state run or funded service, the Registrar should receive three notifications.

Firstly, it would be reported by Tasmania Police in the form of criminal intelligence or charges. Secondly, it would be reported by Children and Youth Services as a result of a mandatory notification under the *Children, Young Persons and Their Families Act 1997*. Thirdly, it would be provided directly to the Registrar from the relevant agency under the Act.

While there has been some improvement in recent years, this is still not routinely the case. For example, of the alleged conduct which has occurred at AYDC, there has not been corresponding reports from CYS and request to CYS about individuals from AYDC named in allegations has only returned matters unrelated to AYDC staff.

This is not, however, something that is limited to DTC. It is clear that across the State Service there is varied understanding of these obligations. The establishment of the Child Safe Organisations Framework offers an opportunity to raise awareness relating to mandatory notification and reportable behaviour obligations.

Child Safe Organisations Framework and Reportable Conduct Scheme

The Child Safe Organisations Framework offers a significant opportunity to reinforce the obligations of agencies with regard to child safety, including for mandatory reporting and reportable behaviour under the Act. It also offers the opportunity to expand the scope of organisation which have responsibilities to provide reportable behaviour to the Registrar to include non-government organisations that deliver services or undertake activities with children.

The Reportable Conduct Scheme offers a significant opportunity for oversight and accountability of organisational investigations into allegations relating to child safety, and will provide the Regulator with the ability to initiate investigations where agencies lack the capacity or will to undertake investigations. It will be important that any scheme create clear expectations on the timeliness and scope of investigations, the continuous disclosure obligations for organisations while investigations are undertaken. It is also important that the scheme placed obligations to investigate all relevant allegations, including those that relate to former employees.

Review of historical complaints and employment direction investigations within agencies

There has been a welcome increase in reportable behaviour provided to the Registrar in recent years from State Service agencies relating to the conduct of their current and former staff. This has been driven by improved understanding of the obligations of reporting bodies to notify the Registrar of behaviour which poses a risk to vulnerable people, including an awareness campaign undertaken by the RWVP Unit in early 2021 in line with the commencement of related legislative amendments. To give an indication of this, reportable

behaviour from State Service agencies (other than Tasmania Police and CYS) has increased from seven reports in 2020, to 103 reports in 2021 and 73 reports year to date in 2022.

This increase in reportable behaviour predominantly relates to behaviour that agencies have become aware of at the time it was reported (i.e. current employee conduct issues) or drawn from redress or civil claim processes. State Service agencies (other than CYS and Tasmania Police) have not undertaken a systemic review of past complaints or investigations to determine what information should be reported to the Registrar. It is likely that such records held by agencies would contain information that would meet the definition of reportable behaviour.

Statutory guidance regarding the use of the suspension power

Under the Act, the Registrar is to conduct an additional risk assessment of a registered person if the Registrar believes on reasonable grounds that there is new, relevant information about a registered person.

If the Registrar determines to undertake an additional risk assessment, the Registrar has grounds for an immediate suspension while the additional risk assessment is undertaken.

Beyond providing that the Registrar has grounds to suspend a registered person while an additional risk assessment is undertaken, the Act provides no further statutory guidance regarding when such an action should be taken. Further, the Act does not provide a review mechanism to a suspension, similar to that provided for a cancellation or interim bar.

It has been the practice of the Registrar that this power is been used when:

- the Registrar becomes aware of conduct that would likely preclude registration (i.e. a scheduled offence); or
- the Registrar is confident that adequate information exists to be satisfied that the registered person poses an unacceptable risk to vulnerable people (i.e. the test to cancellation) but considers it desirable that registration be suspended while the proposed cancellation process takes place due to attendant risks.

This approach seeks to recognise the purpose for which the suspension power has been provided while recognising that the proposed cancellation process has been designed to provide registered persons with an element of procedural fairness in a system that preferences the interests of child safety above their own rights.

It also recognises that, where suspension is used, it provides ground for the termination of employment where the registered person requires an RWVP. While this may be a desirable outcome, it also means that any employment direction investigation would also cease without making findings.

The existence of such a power, the absence of clear legal test and the lack of appeal mechanism has caused confusion and had unintended behavioural responses from agencies. At different times, there has been significant pressure placed on the Registrar by agencies, including DCT, to suspend a registered person subject to an additional risk assessment.

Notwithstanding these concerns, it is clear that the suspension power, used appropriately has played an important role in removing people from settings where they may cause further harm. As such, there is a need for the Act be amended to provide clear statutory guidance for when the suspension power should be used.

Review of decisions taken by the Registrar

In passing the Act, the Parliament has prioritised the safety and protection of vulnerable people over that of the individual. For example, it is possible for an individual to be denied registration or have their registration suspended based on information that has not been investigated or tested in a court. These infringements on the rights of the individual are considered necessary in order to uphold a vulnerable person's entitlement to safety.

To maintain community confidence in the RWVP scheme, it is important that these powers are used appropriately and that individual's subject to negative outcomes have access to timely and cost effective review mechanisms.

Effective review mechanisms are also useful in providing timely and effective feedback to decision makers, such as the Registrar, and enhance the understanding of Act within the community and legal profession.

The Act does enable certain negative notices to be reviewed by the Magistrate's Court (Administrative Appeals Division). Despite this, the number of reviews sought has been low (approximately five during the life of the scheme), with only one resulting in a review of the outcome. It is understood that cost has been seen as an important factor in reducing the number of reviews. In addition, decisions relating to suspension are not able to be reviewed under the Act.

The establishment of the Tasmanian Civil and Administrative Tribunal provides an opportunity to reduce the barriers to accessing review of administrative decisions.