

Protecting Victoria's Vulnerable Children Inquiry

SUBMISSIONS OF THE SUITABILITY PANEL

The Suitability Panel

1. The Suitability Panel (the Panel) is established under Division 5 of Part 3.4 of the *Children, Youth and Families Act 2005* (the Act)¹. Its role is to hear and determine allegations of physical or sexual abuse made against an out of home carer. Where such a finding of misconduct is made, the task of the Panel is to determine whether or not the out of home carer poses an unacceptable risk of harm to children and, if so, to disqualify the carer from registration as such. An out of home carer who has been disqualified by reason of an adverse finding may apply to the Panel to have that disqualification removed.

Out of home carers

2. The Act establishes a scheme for the registration of out of home carers,² whether as a foster carer or as a person employed or engaged by a Community Service Organisation (CSO).³
3. Out of home carers to whom the Act relevantly applies are persons who are or were registered out of home carers or residential care workers, and persons who, without being registered as such, were persons into whose care a child was placed by a CSO. The effect of this extension appears to be to bring within the scope of the Act persons who acted as carers before the introduction of the registration requirement.⁴
4. There is an accreditation process for out of home carers.⁵ Where a CSO approves a person as a foster carer or employs or engages a person as a carer or provider of services at a residence managed by the CSO, the CSO is required to notify the Secretary and provide prescribed information.⁶ A CSO is also required to notify the Secretary of any revocation of approval or termination of employment or engagement as a carer.⁷

¹ Division 5 of Part 3.4 came into force on 23 April 2007. Unless specifically stated, all references to statutory provisions in this submission to references to the Act

² See s. 80.

³ There are 39 CSOs in Victoria funded by the Department of Human Services. Sixteen of these organisations provide home-based care and residential care, 20 provide home-based care only and 4 provide residential care only. As to CSOs, see also the Ombudsman Victoria - *Own motion investigation into Child Protection – out of home care*, May 2010.

⁴ It is to be noted that the jurisdiction of the Panel extends to conduct that pre-dated by 3 years the date of the giving of Royal Assent to the Act – sub-s.82(2).

⁵ See Ombudsman Victoria - *Own motion investigation into Child Protection – out of home care*, May 2010 and s. 77 of the Act.

⁶ s.78

⁷ S.79

The Carer Register

5. A register of all Victorian carers is required by the CYFA to be maintained by the Secretary, Department of Human Services (the Secretary). The Register may not contain a record of information in respect of a disqualified person, but the Panel's understanding is that the Secretary maintains a separate list of disqualified carers and has a system which identifies a carer who is under investigation.
6. Removal of a person from the Register occurs only in two circumstances - where the CSO notifies the Secretary that the person has ceased to be approved, employed or engaged as an out of home carer, as noted in para. 4 hereof; and where the person is disqualified by the Panel.⁸

Referral of matters to the Suitability Panel

7. The process by which an allegation of physical or sexual abuse may come to the Suitability Panel for determination is by referral from the Secretary.⁹ The means by which allegations of physical and sexual abuse may come to the notice of the Secretary are by way of the statutory reporting requirement imposed upon CSOs¹⁰ or by a report of "any person"¹¹ who may act as an informant.
8. There may be substantial delays between the notification to the Secretary by a CSO of conduct by an out of home carer that may amount to physical or sexual abuse, the conduct of the investigation and report by an authorised investigator, and the Secretary's referral to the Panel. In more serious cases, such delays may be compounded by Police investigations.¹²

Structure and Operation of the Suitability Panel

9. The Panel comprises a Chairperson, who is required to be legal practitioner, and other persons with qualifications and experience in law, social work, psychology and the treatment of sex offenders and in any other discipline required for the Panel to perform its functions.¹³
10. The Panel conducts a formal hearing into each notification, at which time it is constituted by the Chairperson and two other members who are appropriately qualified with respect to the matter in issue. The Secretary is nominally a party to the proceeding, and officers of the Department regularly attend to observe hearings. The Panel's approach is broadly inquisitorial and it

⁸ s.80(5)

⁹ See particularly ss. 96 and 101 of the Act

¹⁰ s.81

¹¹ s. 82

¹² During the period between the s.81 report to the Secretary and the determination of the Panel, the carer will generally have been either suspended or dismissed. The Department will have also noted administratively (though not on the Register) that the carer is under investigation.

¹³ *ibid.*, s.99. The Panel currently comprises persons with experience and qualifications in law, psychology, social work, criminal investigation many of whom have had substantial decision-making experience in other administrative tribunals.

receives evidence from witnesses and the carer and on occasion will instruct Counsel to assist. The Panel has the power to require the production of documents and the attendance of persons at hearing.¹⁴ Parties are entitled to be represented at the hearing, though this is rare.

11. Where the Panel finds that an out of home carer or the foster carer has committed misconduct, in the nature of physical or sexual abuse of a child, and poses an unacceptable risk of harm to children, the only disposition available to the Panel to make an order to the effect that the person be disqualified from registration under the Act.
12. A carer who has been deregistered by the Panel may apply to again be registered. Unless there are exceptional circumstances, no such application may be made to the Panel for the period of 12 months following disqualification.¹⁵
13. Decisions of the Panel are reviewable in the Victorian Civil and Administrative Tribunal (VCAT).¹⁶
14. Since it commenced operation, the Suitability Panel has heard and determined 14 matters, 11 of which involved allegations of physical abuse, 3 of sexual abuse and 1 both physical and sexual abuse. Four matters were found by the Panel to be proven and in 3 of those the carer was disqualified.

Physical and Sexual Abuse

15. Physical abuse and sexual abuse are not defined in the Act. The Panel has adopted, as its working definitions of those terms, the following:

Physical abuse

- *Non-accidental physical contact or the threat of physical contact to a child that causes or is likely to cause more than minimal or transient adverse physical or emotional consequences for the child*

Notes:

- *Physical abuse of a child can occur regardless of the intention of another person.*
- *Actual or inferred intention of a person may be relevant as a matter to be taken into account in deciding whether or not physical abuse has occurred but does not of itself determine whether or not physical abuse has occurred.*

¹⁴ By virtue of s.117 of the Act, the Panel may exercise such powers as are available under what is now the *Evidence (Miscellaneous Provisions) Act 1958*

¹⁵ s.110

¹⁶ *ibid.*, s.118. At the time of writing, no decision of the Panel has been the subject of VCAT review.

Sexual abuse

- *Sexual or indecent conduct by an adult toward a child or exposure by an adult of a child to sexual or indecent conduct*

Notes:

- *Sexual abuse involves a sexual or indecent element.*
 - *Sexual abuse may involve exposure of a child to sexual or indecent conduct.*
 - *Failure to avoid behaviour, failure to protect a child from sexual or indecent behaviour or exposure of a child to the risk of such behaviour can amount to sexual abuse of the child.*
 - *Sexual abuse of a child can occur regardless of the intention of another person*
 - *Sexual abuse of a child can occur whether or not the alleged behaviour is engaged in for sexual gratification.*
 - *Sexual abuse of a child can occur whether or not a power imbalance exists between the child and another person.*
16. No guidance from VCAT or the Supreme Court as to the content or construction of those terms is so far available. The Panel applies the working definitions noted above. These working definitions are typically adopted and applied by authorised investigators in assessing matters and determining the outcome of their investigations.

Limitations of the Panel's jurisdiction

Physical and sexual abuse is an insufficient test of fitness to be an out of home carer

17. The Panel's jurisdiction is enlivened only when an allegation of physical or sexual abuse is referred by the Secretary, following an investigation by an independent, authorised investigator.¹⁷ The experience of the Panel is that these criteria are insufficient to ensure that only fit and proper persons remain on the register. In the Panel's experience there have been matters in which a finding of physical or sexual abuse could not be substantiated, but where there have been features of the carer's conduct and performance which may be thought to render them unfit to remain on the register. The Panel has no authority, absent a finding of physical or sexual abuse, to decide that a person should be disqualified from acting as an out of home carer. The consequence is that, where a person is found not to have engaged in physical or sexual abuse of a child it is open to the person to seek and obtain engagement or employment with any CSO, despite that there may be compelling reasons why the person should not be so engaged or employed.
18. It is submitted that the present limitation upon the jurisdiction of the Panel requires reconsideration. In particular, the Panel is concerned that conduct which

¹⁷ See ss.89 to 93.

does not involve the direct or indirect application of force to a child may not constitute "physical abuse" of the child.

19. The Panel has encountered situations of serious neglect and abuse in the care of a child that may result in the child indirectly suffering physical harm as a result of the conduct, or being placed in real danger of physical harm. The following are instances of conduct which have been the subject of evidence before the Panel, but which may not be caught by the term "physical abuse":

[REDACTED]

20. The existence of circumstances such as these do not enliven the jurisdiction of the Panel as it currently expressed. Out of home carers who demonstrate any of the above characteristics may continue to be approved, engaged or employed by a CSO. There is presently no mechanism by which a CSO, not being the current or former employer of a carer, may become aware of the allegations that are made against the carer, or the evidence that may be given to the Panel. All that a potential employer CSO is likely to know is that the person's name is on the register of out of home carers.

21. It is submitted that a broadening of the scope of the Panel's jurisdiction to encompass such conduct as described, whether by extension of the definition of "physical abuse" or in some other way, would ensure that persons who do not satisfy appropriate standards of probity, discretion and responsibility are not permitted to be registered, or to continue to be registered, and be approved, engaged or employed as out of home carers.

Conduct in the course of employment or engagement provides a limited basis for assessment of suitability

22. A further limitation upon the jurisdiction of the Panel is that it may only deal with allegations of physical or sexual abuse by carers who engage in such conduct in the course of their employment or engagement. That limitation does not apply to

foster carers who are, in effect, in *loco parentis* and not engaged pursuant to a contract of employment.

23. Circumstances have arisen in which it was necessary for the Panel to determine whether, at the time of the alleged physical assault, the out of home carer was acting in the course of their employment. The conduct in issue entailed:

[REDACTED]

24. Had the carer not been acting in the course of employment at the time, the Panel would have had no jurisdiction in the matter and would not have been able to make a finding of misconduct within the statutory parameters or determine that the carer be disqualified, despite that the conduct may be thought to demonstrate a *prima facie* unfitness for engagement or employment as an out of home carer.

25. Further, the Panel has no jurisdiction with respect to a carer where the impugned conduct of the carer occurs when they are off duty and pursuing their private lives away from their place of work. Circumstances have arisen in which, in pursuit of their private lives and pastimes, a carer may engage in conduct that demonstrates that they are not fit and proper persons to be on the register of out of home carers. Thus, where a carer in his or her own time:

[REDACTED]

the person may be thought to be unsuitable for registration, as likely to expose a child to harm, but is clearly beyond the scope of the jurisdiction of the Panel. The instances given are drawn from matters coming before the Panel, but there is clearly a wide scope of private conduct that is likely to demonstrate unsuitability for the role of an out of home carer.

Training and Support of out of home carers

26. A further matter which has been of concern to the Panel, with respect to both foster carers and out of home carers, is that they sometimes appear to lack sufficient training or support for the tasks for which they are required to perform.
27. In the context of residential care, and particularly in the management of challenging behaviours, there have been circumstances in which the Panel has been inclined to the view that the poor performance of a carer in the management of a child or children in their care is attributable to a lack of adequate training and, on occasion, lack of support or supervision by the CSO. The adequacy of training and support are considerations relevant to the Panel's consideration in determining whether or not a person who has engaged in misconduct ought to be found to pose an unacceptable risk of harm to children.

Proposals for amendment of the Act

28. In light of the above discussion the Panel makes the following submissions and proposals for legislative change.
29. As noted, the confinement of the Panel's jurisdiction to physical and sexual abuse excludes from coverage a considerable range of conduct which amounts to serious neglect and harm, actual or potential.
30. The Panel submits that the Inquiry may wish to consider whether it is appropriate for Government to develop a more comprehensive system of registration and discipline of foster and out of home carers.
31. The interests of children in care must unquestionably remain the paramount consideration, but the Panel acknowledges that disqualification may deprive a carer of their livelihood, and that it is notoriously difficult to attract persons to perform the roles of foster or other out of home carer.
32. The Panel proposes that the Act be amended in such a way as to provide that foster carers and out of home carers be required to be registered pursuant to statutory requirements, but that their ability to remain upon the register be subject to a more comprehensive oversight of their suitability and conduct, rather than that the formal process for their removal be wholly dependent upon whether or not they have physically or sexually abused a child in their care. A system akin to that which operates in respect of the registration and licensing of occupations and professions is proposed for consideration.
33. In substance, the Panel proposes that the central determinant for continued registration is whether the person is a fit and proper person for the task to be undertaken. The vehicle for achieving this may be enact an expansive definition of "misconduct", "serious misconduct" or "fitness" that would comprehend the types of behaviours referred to above.¹⁸ This would allow the Panel to deal with cases in which egregious conduct both within the course of employment and outside the course of engagement or employment could be taken into account. Physical and sexual abuse of a child would continue to be prominent matters.
34. Whilst the Panel, envisages that matters would come to the Panel by notification from the Secretary, following appropriate investigation, the scope of the investigation and the Secretary's consideration would be within the broader framework of conduct that may amount to misconduct, serious misconduct, or unfitness.
35. The Panel also submits that it is desirable that there be dispositions available to the Panel other than solely to determine that the carer be disqualified, with the effect that his or her name be removed from the register. There may be cases in which the carer might benefit from a course of study or training to better fit them for the role as an out of home carer. It may not be appropriate to disqualify a

¹⁸ By way of example, the Panel draws attention to the provision made with respect to the registration and discipline of teachers under Part 2.6 of the *Education and Training Reform Act 2006*.

carer where the carer's conduct was contributed to by lack of training and support. But it may also not be appropriate to return the carer to his or her former position without an assurance that such training and support has or will be provided.

36. Therefore, the Panel submits that it is desirable that dispositions short of disqualification should be available to the Panel. In particular, dispositions that allow the Panel to suspend a carer's registration for a period time, subject to conditions such as a requirement that the carer to undertake a programme of education and training or obtain access to some other form of support or counselling. Such suspensions could be reviewed upon evidence of the completion of the further training, support or counselling.
37. Additionally, it is submitted that it would also be appropriate for the Panel to be authorised to impose restrictions upon the type of care situations that a carer may engage in as a condition of their registration, and for such restrictions to be reviewed at some point of time. For instance, it may be that a person may not have the appropriate temperament or other qualification to engage in residential care or with certain types or classes of carees.
38. Subject to the Panel having the discretion to suspend a carer, rather than deregister the carer, it would be appropriate for the Panel to review disqualification decisions in a manner similar to that currently provided.¹⁹

¹⁹ In s.110