


Re: Fw: Ombudsman Obligations 
James Condon to: Luke Geary

16/09/2013 01:25 PM

Luke,

Nothing further needed at this time.

Thank you for your follow up.

James

I pray that you may enjoy good health and that all may go well with you , even as your soul is getting along well . (3 John 2)



James Condon

Commissioner

The Salvation Army | Australia Eastern Territory
 140 Elizabeth St, Sydney NSW 2000 | PO Box A435, Sydney
 South NSW 1235

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 Luke Geary

Hi James, Further to my email below and my...

15/09/2013 09:30:42 PM

From: Luke Geary/AUE/SArmy
 To: James Condon/AUE/SArmy@AUE,
 Date: 15/09/2013 09:30 PM
 Subject: Fw: Ombudsman Obligations

Hi James,

Further to my email below and my email to you on Thursday evening, I confirm my verbal advice to you that having considered the issue of the historical nature of the matters regarding Colin's offence, I do not believe that it was required to be reported to the Ombudsman. I confirmed this was my opinion to Colleen about 2 weeks ago and together we tried to call the Ombudsman to have him confirm that TSA was not required to report matters prior to Young Hope's certification with the Children's Guardian. The Ombudsman has not returned my call.

Do you want me to do anything else regarding this? Is there any point me chasing the Ombudsman again to confirm my opinion?

Best regards,
 Luke

Luke Geary

Salvos Legal | Managing Partner

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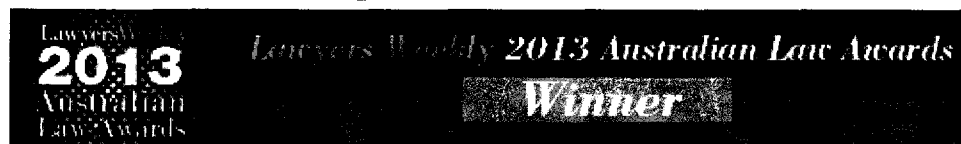
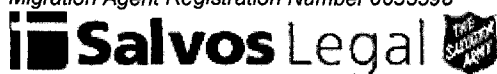
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----- Forwarded by Luke Geary/AUE/SArmy on 15/09/2013 09:27 PM -----

From: Luke Geary/AUE/SArmy
 To: James Condon/AUE/SArmy@AUE
 Date: 27/08/2013 10:45 PM
 Subject: Ombudsman Obligations

Hi James,

Further to our discussions, in my opinion, The Salvation Army (New South Wales) Property Trust is a designated agency within the meaning of s.139 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) [because of the work engaged in by it through Young Hope, as an out of home care provider accredited by the Children's Guardian]. As a consequence, in my opinion, The Salvation Army (New South Wales) Property Trust is a designated non-government agency within the meaning of s.25A of the *Ombudsman Act 1974* (NSW) and is therefore required to report to the Ombudsman (in accordance with s.25C):

(1) *The head of a designated government or non-government agency must notify the Ombudsman of the following:*

- (a) *any reportable allegation, or reportable conviction, against an employee of the agency of which the head of the agency becomes aware,*
- (b) *whether or not the agency proposes to take any disciplinary or other action in relation to the employee and the reasons why it intends to take or not to take any such action,*
- (c) *any written submissions made to the head of the agency concerning any such allegation or conviction that the employee concerned wished to have considered in determining what (if any) disciplinary or other action should be taken in relation to the employee.*

A 'reportable allegation' is defined by s.25A as:

reportable allegation means an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct.

reportable conduct means:

- (a) *any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the *Crimes Act 1900*)), or*
- (b) *any assault, ill-treatment or neglect of a child, or*
- (c) *any behaviour that causes psychological harm to a child, whether or not, in any case, with the consent of the child. Reportable conduct does not extend to:*
 - (a) *conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards, or*
 - (b) *the use of physical force that, in all the circumstances, is trivial or negligible, but only if the matter is to be investigated and the result of the investigation recorded under workplace employment procedures, or*
 - (c) *conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA.*

Note.

Examples of conduct that would not constitute reportable conduct include (without limitation) touching a child in order to attract a child's attention, to guide a child or to comfort a distressed child; a school teacher raising his or her voice in order to attract attention or to restore order in the classroom; and conduct that is established to be accidental.

The obligation to report ultimately falls on (probably) you, as the effective Chief Executive equivalent

The obligation to report ultimately falls on (probably) you, as the effective Chief Executive equivalent of the Property Trust, pursuant to s.25C(1) and is required by s.25C(2) to take place within 30 days of you becoming aware of the relevant reportable conduct. The time for this effectively started to run as soon as Young Hope became accredited with the NSW Children's Guardian (which was on or about 5 September 2012). This means that as Cpt. Michelle White has correctly identified, this is urgent and irrespective of what is decided to take place with respect to Colin's continuation of Officership, needs to be notified to the Ombudsman straight away.

There is only one possible technical legal argument that would escape having to notify to the Ombudsman. The argument is essentially based on the *Ellis* case, which would run as follows:

- Colin is an Officer, not an employee
- Officers are not engaged by *The Salvation Army (New South Wales) Property Trust* but rather through their spiritual covenant with the worldwide unincorporated association known simply as *The Salvation Army*
- The worldwide unincorporated association known as *The Salvation Army* and *The Salvation Army (New South Wales) Property Trust* are separate legal personalities
- Given the unincorporated association known as *The Salvation Army* is not accredited with the NSW Children's Guardian, it is therefore not a designated agency under s.139 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and as a consequence, it is therefore not a non-government agency within the meaning of the *Ombudsman Act*.
- Given the unincorporated association known as *The Salvation Army* is not a non-government agency within the meaning of the *Ombudsman Act*, it has no reporting obligations under that Act.

Having considered the matter carefully, I think that the *Ellis* style technical argument above is fatally flawed. I form this view because of the definition of the word 'employee' in s.25A of the *Ombudsman Act*, which states:

employee of an agency includes:

- (a) any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and
- (b) any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

Furthermore, I think that argument is flawed because the definition of a 'designated agency' in s.139 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) includes an expanded definition of an organisation to include "(or branch or other part of an organisation)". I believe that the point of those words was to catch 'related entities' engaged in out of home care so that technical defences of the kind referred to above, cannot be run.

There is no 'time limit' as to the relevance of reportable conduct within the *Ombudsman Act*. It is therefore assumed that it is irrelevant when the reportable conduct occurred (in my opinion, even if it occurred prior to the Children's Guardian accrediting Young Hope as an out of home carer agency). The fact of the conduct occurring some 20 years ago would of course be relevant to the investigation outcome but not, in my opinion, whether the conduct is required to be reported.

I am therefore of the view that this is reportable conduct which must be reported by you, as soon as possible (well frankly, the report is overdue and you could get in trouble for not reporting it - possibly a fine of up to \$1,100).

Please let me know if you would like to discuss this at any time in person or over the phone. I am happy if you would like to share this with Colleen and am also happy for her to speak with me about it, in case she has any different views (including especially, if I am wrong).

Best regards,
Luke

Luke Geary
Salvos Legal | Managing Partner

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