

Strengthening the oversight of workplace child abuse allegations

A Special Report to Parliament
under s.31 of the
Ombudsman Act 1974

February 2016

Strengthening the oversight of workplace child abuse allegations

A Special Report to Parliament
under s.31 of the
Ombudsman Act 1974

February 2016

ISBN 978-1-925061-75-8

© Crown Copyright, NSW Ombudsman, February 2016

This work is copyright, however material from this publication may be copied and published by State or Federal Government Agencies without permission of the Ombudsman on the condition that the meaning of the material is not altered and the NSW Ombudsman is acknowledged as the source of the material. Any other persons or bodies wishing to use material must seek permission.

Contents

- Chapter 1. About this report**..... 1
- Chapter 2. The Ombudsman’s role in overseeing reportable conduct** 3
- Chapter 3. Why the scheme is effective**..... 5
 - 3.1. Identifying and acting on child protection risks..... 5
 - 3.2. The intersection of our reportable conduct function with the Working With Children Check..... 9
 - 3.3. Practice development initiatives 11
 - 3.4. Capacity building 12
 - 3.5. Identifying systemic issues impacting on the child protection system 13
 - 3.6. Future challenges 13
- Chapter 4. The Solicitor General’s advice regarding the meaning of ‘substitute residential care’**..... 14
 - 4.1. Why we sought advice on the reach of our jurisdiction 14
 - 4.2. The Solicitor General’s first advice..... 14
 - 4.3. The Solicitor General’s second advice..... 14
 - 4.4. Implications of the Solicitor General’s advice..... 15
- Chapter 5. Our consultations with affected agencies regarding the Solicitor General’s advice** 16
 - 5.1. Supporting the sector to fulfil its reportable conduct obligations 16
 - 5.2. What ought to be the reach of the Ombudsman’s reportable conduct jurisdiction?..... 17
 - 5.3. Concluding remarks 19
- ANNEXURE** 20

(THIS PAGE IS INTENTIONALLY BLANK)

Chapter 1. About this report

The NSW Ombudsman's reportable conduct jurisdiction commenced over 16 years ago, when a scheme was established for independent oversight of the handling of child abuse and neglect allegations against the employees of thousands of government and non-government agencies.

The reportable conduct scheme remains a unique jurisdiction in Australia,¹ not least because of the oversight it brings to both government and non-government organisations in their handling of child abuse, neglect and ill treatment allegations made against their employees.²

The primary purpose of this report is to bring to Parliament's attention the practical implications of advice we received from the Solicitor General which substantially expands the number and type of agencies and individuals now deemed to fall within our reportable conduct jurisdiction.

We had originally sought advice from the Solicitor General as to whether a particular agency, which operated five day residential therapeutic care camps for children, was 'providing substitute residential care to children'. This issue needed to be clarified because agencies which provide substitute residential care to children are regarded as 'designated non-government agencies' under Part 3A of the Ombudsman Act. It is this part of the Act which establishes the reportable conduct scheme and it requires 'designated agencies' to notify the Ombudsman's office of specific types of child abuse and ill treatment allegations (reportable allegations) which are made against their employees and relevant volunteers.

Up until receiving the Solicitor General's advice, we had applied a narrower definition of 'substitute residential care' in determining whether agencies fell within our jurisdiction. The Solicitor General, however, took a broader view of the meaning of the term, noting that:

On its face the notion of 'substitute residential care' in the case of children would appear to extend to any arrangement – even for a period of days and nights – where an organisation has the care and control of children of a kind that would otherwise be provided by parents or caregivers, were a child in his or her place of residence.

In addition, the Solicitor General provided a list of indicators relating to whether substitute residential care is being provided including:

- the camps extending beyond two nights' duration
- the camps being provided in fixed accommodation (that is, the campers sleep in rooms/cabins/dorms rather than temporary or improvised accommodation such as tents or bivouacs)
- the camps providing food and other care services, and the camps providing supervision and support by adults for the purposes of supporting a child's physical, emotional and psychological well-being (and in circumstances where their parents/usual caregivers are not present).

Since receiving the advice, we have been working with a broad range of affected organisations which run camps – including religious denominations, organisations in the recreational camping sector, and sporting associations. Later in this report, we discuss the feedback provided to us by stakeholders about the practical impact of the advice.

The most consistent theme to emerge is that stakeholders believe there would be merit in Parliament reconsidering what ought to be the reach of the Ombudsman's reportable conduct jurisdiction. In this regard, it is significant that both the NSW Catholic and Anglican Archbishops and Bishops, wrote to the NSW Attorney-General late last year requesting legislative changes to expand the reach of the Ombudsman's jurisdiction over their denominations.

This report highlights that there is a compelling case for Parliament to review the reach of the reportable conduct scheme for a number of reasons.

Firstly, the wide range of organisations now deemed to be within the scheme has significant public policy and practical implications that warrant Parliament's consideration.

1. In 2013, our Community and Disability Services Commissioner, Steve Kinmond, gave evidence about the operation of the NSW reportable conduct scheme to the Victorian Parliamentary Inquiry into the handling of child abuse by religious and other organisations. In its report – *Betrayal of Trust* – the Inquiry endorsed the NSW scheme. We understand that other jurisdictions are now also considering the scheme.

2. '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).

Secondly, under the current scheme, different organisations which essentially perform the same role in working with children will either fall within or outside of the reportable conduct scheme based on their particular legal structures, rather than because of the nature of their work with children. Stakeholders have argued that this does not represent a sound basis for determining whether an entity ought to fall within the reach of the scheme.

Thirdly, the impact of applying the Solicitor General's advice is such that our jurisdiction is being determined by factors extraneous to risks to children, such as whether or not an organisation's camps use tents or fixed structures, and distinctions between whether camps are held for a weekend or longer. Again stakeholders have argued that these factors do not represent a solid platform for determining the coverage of the reportable conduct scheme.

Fourthly, our consultations with stakeholders have highlighted the disjunct between the coverage of the reportable conduct and Working With Children Check schemes. We discuss the risks to children associated with this lack of alignment.

We have also sought to highlight a number of important practical considerations. In particular, we note that if Parliament is of the view that a broader range of organisations should fall within the reportable conduct scheme, there will be a need to consider whether the affected organisations – particularly those with low revenue streams – are adequately resourced to fulfil their responsibilities under the scheme. And, as we discuss later in this report, the demand on our own resources will be influenced by the number of organisations deemed to fall within our jurisdiction.

Chapter 2. The Ombudsman's role in overseeing reportable conduct

Our employment-related child protection jurisdiction involves our office overseeing the handling of reportable child protection allegations that are made against employees and certain volunteers of thousands of government and non-government agencies in NSW.

Part 3A of the *Ombudsman Act 1974* (the Act) involves the Ombudsman:

- receiving and assessing notifications concerning reportable allegations or convictions against an employee
- scrutinising agency systems for preventing reportable conduct by employees, and for handling and responding to allegations of reportable conduct and convictions
- monitoring and overseeing agency investigations of reportable conduct
- responding to complaints about inappropriate handling of any reportable allegation or conviction against employees
- conducting direct investigations concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable notification or conviction
- conducting audits and education and training activities to improve agencies' understanding of, and responses to, reportable allegations, and
- reporting on trends and issues in connection with reportable conduct matters.

Under Part 3A of the Act, an 'employee' is defined broadly as including any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, as well as any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).

All public authorities are subject to the requirements of Part 3A if the reportable conduct arises in the course of a person's employment. Some public authorities are 'designated agencies' and also need to notify reportable allegations if they arise from conduct that takes place outside of employment.³ Certain non-government organisations are also 'designated non-government agencies'⁴ – including non-government schools, approved children's services and agencies providing substitute residential care – these agencies are also subject to Part 3A requirements and must notify reportable allegations that arise both within and outside of employment.

When an allegation of 'reportable conduct' is made against an employee of a relevant government or non-government agency, the head of agency is required to notify the Ombudsman of any reportable allegations or convictions involving their employees as soon as practicable, and the 'notification' must be made in any event, within 30 days of the head of agency becoming aware of the allegation or conviction.⁵

Section 25A of the Act defines 'reportable conduct' as:

- (a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence), 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.

The provision also specifies that reportable conduct does not extend to:

- (a) conduct that is reasonable for the purposes of 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

3. Section 25A defines 'designated government agency' and includes, but is not limited to, the following agencies: the Departments of Education, Family and Community Services, Health, and Justice.

4. Section 25A defines 'designated non-government agency' and includes the following types of agencies: a non-government school within the meaning of the *Education Act 1990*; a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*; an approved education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011*; an agency providing substitute residential care for children, or any other body prescribed by the regulations for the purposes of this definition.

5. Section 25C requires the head of agency to 'make arrangements within the agency to require employees of the agency to notify the head of agency of any such reportable allegation or conviction of which they become aware'.

-
- (b) the use of force that, in all 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 25C of the Act.

Historical allegations of child abuse only fall within our reportable conduct jurisdiction if the involved individual is an 'employee' of a relevant agency at the time when the allegation becomes known by the head of agency.

We encourage agencies to notify us at the earliest possible opportunity, whether by way of formal notification or through telephone contact, so that we can play an early role in guiding agencies through their initial response. Agencies are expected to respond to allegations by conducting an investigation, and undertaking any risk management or other action which may be required.

Upon receipt of a notification, the role we play varies depending on the circumstances. We may actively monitor the progress of an investigation, in which case we will require the agency to provide us with relevant documents and information about the investigation. We also have the power to observe interviews conducted by or on behalf of an agency, and confer with those involved in conducting the investigation. At the end of their investigation, the involved agency must provide us with a range of information, such as the report and advice on any action taken as a result of the investigation. We also have the power to directly investigate any reportable allegation, or to directly investigate an agency's handling of a reportable allegation.

Chapter 3. Why the scheme is effective

Over time, many of the agencies we oversight have increased their competency in handling reportable allegations. As a result, we have entered into over 20 'class or kind' determinations with various agencies which exempt them from having to notify us of less serious forms of alleged reportable conduct.⁶

By using class or kind determinations, we have been able to reduce the number of less serious matters we oversight. This has allowed us to focus on supporting agencies in their handling of the most serious cases.⁷ Today, we handle around 1,300 notifications a year. It is largely due to these class or kind determinations that notifications involving serious criminal allegations now make up a substantial proportion of our work.

We currently have 402 open cases involving matters where the alleged conduct is, or has been, the subject of a police investigation. Of these matters, 134 concern individuals who have been charged with criminal offences relating to children, the majority of which relate to sexual offences. Of the allegations that are notified to our office, almost a quarter of them result in a sustained finding.

Our operating environment has allowed us to build a strong and constructive relationship with the NSW Police Force, based on a shared commitment to ensuring child sex offenders and others who commit crimes against children are identified and prosecuted.

In this chapter we discuss the various ways we work with other stakeholder agencies, including how we:

- work together in identifying and acting on child protection risks
- strengthen the Working With Children Check screening process
- join with others on practice development initiatives, and
- help build the capacity of agencies/sectors to meet their responsibilities under the reportable conduct scheme.

3.1. Identifying and acting on child protection risks

Our office is in a unique position to contribute to identifying child protection risks through our direct access to the policing and child protection databases combined with our own reportable conduct database. This access often provides us with a 'helicopter' view of critical information which is not readily accessible to other agencies. In fact, our office is often the only agency with access to the most key information about a particular matter, and in these circumstances, we take an active role in ensuring information is shared with the right parties and that appropriate action is taken.

For example, when new notifications are received, we check the Police and Community Services databases and assess the adequacy of the response to any risk which we can identify from analysing the totality of the information we review. Our immediate priority is to assess whether the information meets the threshold for a report to Police and/or Community Services and, if so, establishing whether or not this has already occurred. Where additional action is required, we make telephone contact with the involved agency to explain our concerns and canvass potential options for strengthening the response.

The timely reporting of criminal allegations to Police, and where appropriate, the reporting of risk of significant harm (ROSH) concerns to Community Services, are critical to ensuring that any criminal and/or child-protection responses, are not compromised. In this regard, we work closely with employers who have not recognised their responsibility to refer allegations, or certain evidence, to the police, guiding them through the process, and ensuring that their workplace response to these matters does not compromise any police investigation. Increasingly, we fulfil this critical role at an early stage of our oversight of matters because of the imperative to act promptly when children are at risk. We also work closely with the Children's Guardian and employers to ensure that critical child protection information is identified, appropriately shared and managed.

A number of peak bodies and agencies within our jurisdiction have spoken of the benefits of our role in facilitating the provision of information to Police, Community Services and other agencies, and have regularly sought advice and support from our office in liaising with these agencies on their behalf. For example, the peak child and family bodies

6. Section 25A(C) of the Ombudsman Act states that reportable conduct does not extend to conduct of a class or kind exempted from being reportable conduct by the Ombudsman under section 25CA. Under section 25CA, the Ombudsman may exempt any class or kind of conduct of employees of an agency from being reportable conduct.

7. NSW Ombudsman, Annual Report 2005-2006.

and religious denominations have noted the practical support we provide to them, including our capacity to leverage off our solid and constructive working relationship with Police to drive strong outcomes in this complex and critical area of practice.

Our collaborative approach was recently acknowledged by the Most Reverend Peter Comensoli, the Bishop of Broken Bay Diocese, in a letter to our Community and Disability Services Commissioner. He wrote:

The Diocese of Broken Bay is very supportive of the work that the NSW Ombudsman's Office undertakes in providing assistance and advice in relation to matters of risk and reportable conduct in relation to employment-related child protection across the areas in which the Diocese works and ministers. As you know, the Diocese has a large range of responsibilities for children and persons with disabilities in parishes, schools, foster care, and after school care.

I am aware of the many improvements which have been made in systems and processes to minimise risks to children, and now, people with disabilities, including the assessment, monitoring and responses to risks to these groups with a focus on creating safer environments. Many of the improvements have occurred through successful collaborative working arrangements between your Office, our Diocese and the Catholic Church in NSW.

We are grateful for your consultative approach to finding effective ways for preventing and responding to employment-related child protection and look forward to an ongoing strong relationship between your Office, our Diocese and the wider Catholic Church.

The support we provide to agencies also includes our most experienced investigators regularly liaising with senior police from local area commands and the Child Abuse Squad. In addition, we routinely refer detailed briefings to Police which often results in the commencement and/or enhancement of police investigations and the preferment of criminal charges.

The following case studies provide examples demonstrating the role our office plays in oversighting criminal allegations of reportable conduct and in referring these allegations and other critical risk-related information to both Police and Community Services.⁸ They also highlight the types of outcomes which have resulted from strong policing responses.

Case study 1

A small independent school sought advice about how to notify us of a reportable allegation. The allegation concerned a student's disclosure that she had been indecently assaulted on more than one occasion by a teacher at the school.

The school told us that it had reported the allegations to the Community Services Helpline and had arranged to interview the teacher later that day.

Based on the information provided to us by the school, it was apparent that the student's disclosure met the threshold of a potential criminal offence. We warned the school that interviewing the teacher could potentially compromise a criminal investigation by Police. We advised the school to postpone further action pending advice from Community Services and/or the NSW Police Force (NSWPF). As a result of our advice, the school cancelled the interview and initiated contact with Police.

Two days later, the student was interviewed by members of the NSWPF's Child Abuse Squad (CAS) and made clear and consistent disclosures. The teacher was arrested, interviewed and charged with several counts of indecent assault. After further investigation by the CAS, the teacher was charged with offences against two additional victims.

Shortly after the CAS had interviewed the teacher, the school informed us that it intended to distribute a letter to members of the school community advising them of the charges that had been laid.

We advised the school to liaise with the CAS before sending the planned letter. This enabled a controlled message to be sent to the school community. As the CAS held information indicating that there may be additional victims, this was particularly important.

The teacher was convicted of five counts of indecent assault relating to two of the alleged victims. He is currently serving a custodial sentence.

8. Community Services is part of the Department of Family and Community Services.

Case study 2

Around 16 years ago, we received a number of notifications alleging that a teacher had abused four students in the late 1970s and 1980s. The allegations were investigated by the NSW Police Force (NSWPF) at the time and the teacher was charged; however, the charges were later withdrawn. Several years ago, we received notifications alleging similar abuse by the teacher against two additional students.

As a result of reviewing information on the NSWPF database (COPS), we were aware that Police were in the process of investigating the more recent allegations but that the investigation was experiencing problems. One of the victims who had come forward had made a statement to police but had stated he was not willing to participate in a criminal prosecution. However, he had indicated that he would reconsider if other victims came forward. The other victim who had come forward was experiencing difficulty making a statement to Police.

We subsequently asked Police for information about the status of their investigation of these more recent allegations. They told us their investigation was on hold because of the reluctance of the available witnesses. After receiving this advice, we liaised with the Department of Education, which had been in contact with one of the victims who had come forward. Education was subsequently able to support this victim in completing his statement to Police.

At around the same time, we were notified of additional allegations of similar conduct by the teacher against yet another victim. We informed Police of this additional information and provided details of possible witnesses. As a result, Police re-commenced their investigation.

The teacher was arrested and charged with a range of offences against multiple victims. He was later convicted of more than ten child sex offences and received a lengthy custodial sentence.

Case study 3

A social organisation made a notification to our office that a man was engaging in grooming-type behaviours with children. At the time, the man was engaged to transport children to one of the organisation's programs, and was also informally involved in some of their other youth programs. The organisation suspended the man pending investigation of the allegations.

We decided to monitor the investigation into the allegations. As a result of our review of records on the NSWPF database (COPS), we identified that the man had two completely separate, unlinked police profiles under slightly different names. One profile, created a number of years earlier, contained information relating to child sexual assault allegations against the man. The Joint Investigation Response Team (JIRT) had commenced an investigation at the time but the victim's parents were not willing to pursue the matter and it was closed.

We obtained the details of the historical matter and identified some similarities to the current allegations. We also identified that a piece of evidence had been seized by Police and sent for forensic testing as part of its investigation into the earlier allegations, but that the case had been closed before the results were returned and the results were not recorded in COPS.

We wrote to the NSWPF to advise them of the unlinked profiles; the current allegations against the man; the similarities with the earlier matter; and the existence of potentially relevant forensic evidence. We also noted that the alleged victim in the earlier matter was now an adult.

In addition, as information on Community Services' database suggested that other agencies which work with children may have engaged the man's services, we contacted the relevant agencies. In response, they confirmed that the man had previously been engaged as a volunteer. We provided this information to Police.

The Police investigation of the most recent allegations determined that the man's conduct did not meet the criminal threshold. However, the Police reopened their investigation into the historical matter. The Child Abuse Squad (CAS) retrieved the results of the forensic testing and discovered that unknown male DNA had been detected. The CAS then contacted the alleged victim, who indicated a willingness to pursue the matter criminally and to assist the Police investigation. We continued to liaise with the CAS throughout its investigation. After becoming aware through other sources that the man may have been actively seeking other child-related employment and had applied for a new Working With Children Check, we ensured the Office of the Children's Guardian liaised with the NSWPF.

As a result of the Police investigation, the man was charged with a number of child sexual offences relating to the historical matter, and as a result, he is currently disqualified from working with children.

Case study 4

We received a complaint from a woman about the contact arrangements for her two grandchildren in out-of-home care (OOHC). She also raised concerns about the management of her grandchildren's earlier placement, and the events surrounding the urgent removal of the children from this placement during the previous year.

As a result of our review of records on the Community Services database we identified that, at the time the two children were placed with the carers, Community Services held information which raised serious concerns about the male carer's suitability as a foster carer. This included a number of reports some years earlier that the man had attempted to sexually assault a child relative. These reports had been closed without investigation, and we could find no evidence that Community Services had provided this information to either the OOHC agency or Police.

The records also indicated that the urgent removal of the complainant's grandchildren had resulted from a report to the Helpline that the man had sexually assaulted two of his other relatives when they were children. It was also reported that the man's wife had been made aware of the abuse some months earlier. Community Services advised us that it did not refer the report to the JIRT as it contained no specific information about abuse towards children in the man's care, and related to relatives who were now adults. A few days after the Helpline report, Community Services removed the two children who were the subject of the complaint to our office, and advised the OOHC agency of the nature of the allegations against the man. The allegations should also have been notified to our office but had not been.

The man relocated interstate shortly after the children's removal. We could find no evidence that Community Services had provided this information to the NSWPF or to authorities in the other jurisdiction. We raised this with Community Services, who as a result, made an interstate risk of harm report.

One of the complainant's grandchildren subsequently disclosed that she had been sexually abused by the man while she was in his care. The man was charged by NSWPF; however the charges were subsequently withdrawn after the alleged victim decided that she did not want to proceed. NSWPF exchanged details of the records they held about the man with Police in a number of other jurisdictions.

Our investigation of this and other similar cases resulted in Community Services working with our office to implement changes to the Mandatory Reporter Guide and the Helpline Tool to ensure that there is adequate guidance in relation to the reporting of, and response to, historical allegations that relate to risks which an individual might pose to children more generally.

This case also informed work between our office, Community Services, the Office of the Children's Guardian (OCG), and OOHC peak organisations to ensure that, as part of their probity checking process, OOHC agencies consistently seek, and are provided with, relevant information held by Community Services. This work also informed the development of the OCG's Carers Register, and associated legislative changes which came into effect in 2015.

Case study 5

A number of students made complaints about the conduct of a teacher employed at a large tutoring company. The allegations were of a nature that would have required notification to the Ombudsman, as reportable allegations of sexual misconduct, had the company been subject to the reportable conduct scheme. (Tutoring companies are not designated non-government agencies under Part 3A of the Ombudsman Act.)

Some months later, one alleged victim of the man's conduct who had not complained to the tutoring company, but was aware that others had, made a report about the teacher to Police when she discovered that he was still teaching at the company and possibly elsewhere. The allegations did not reach the criminal threshold and Police referred the information to the Department of Education. The Department identified that the man was on its list of casual teachers approved to teach within Departmental schools. Although the man had never been engaged to teach in a school, his presence on an approved casual list meant that the Department was required to notify our Office.

We subsequently identified through our routine intelligence checks that the man was actively teaching in an independent school. We facilitated an exchange of information to that school, which also notified us and took the lead in the reportable conduct investigation. We contacted the tutoring company and learnt that the man had since been dismissed due to similar concerns regarding his conduct towards female students. Prior to his dismissal, the company spoke to him informally about the concerns. However, because the tutoring company

does not fall within the Part 3A scheme, there was no rigorous, transparent or fair investigation of the allegations of the type we would otherwise require. As a result, there was minimal documentation relating to the matter, and the concerns about the man's conduct were not reported to the OCG by the tutoring company.

The independent school recently made a finding of sexual misconduct in relation to the man, dismissed him and made a report to the OCG.

Case study 6

A Community Services manager sought our advice about a report made to the Child Protection Helpline two weeks earlier by a carer engaged by an OOHC agency involving a child in his care. The carer reported that an incident had occurred that involved indecent contact between him and the child, however he reported that the incident had been initiated by the child and had occurred while he was asleep. During the call, the carer's wife also reported that the child had begun to display sexualised behaviours six months after the placement commenced.

We reviewed Community Services' database (KiDS) and the NSWPF database (COPS) and could not find any information to indicate that the OOHC agency had taken any action in response to the incident. We were concerned that despite the alleged incident having occurred two weeks earlier, it did not appear that the matter had been referred to Police. We advised Community Services to contact the Joint Investigation Response Team (JIRT) to discuss the Helpline report.

Later that day, Community Services advised us that JIRT had accepted the matter for investigation, and that the Helpline report had been upgraded to require a response within 24 hours. JIRT officers interviewed the child who made disclosures of sexual assault.

As a result, the child was removed from the placement and the carer was charged and convicted of indecent assault.

3.2. The intersection of our reportable conduct function with the Working With Children Check

The allegation based system, which triggers a notification under Part 3A of the Ombudsman Act, complements the current WWCC system in a number of ways.

3.2.1. Assessing the quality of employer investigations and related findings

Under section 35 of the *Child Protection (Working with Children) Act 2012*, a reporting body must notify the Children's Guardian of the details of any child-related worker, where the body has made a finding that the worker has engaged in sexual misconduct committed against, with, or in the presence of a child; or any serious physical assault of a child.

In determining whether an investigation into a reportable allegation has been properly conducted, and whether appropriate action has been taken in response, we check to see whether, as required under the Working with Children Act, relevant misconduct findings have been notified to the Office of the Children's Guardian (OCG).

Another important part of our oversight is assessing the quality of the agency investigation and the validity of the related findings. Both of these elements need to be properly addressed so that they can be relied upon by the OCG for the purposes of informing the WWCC screening process. However, there is currently no mechanism to oversight the quality of investigations carried out by those reporting bodies under the Working With Children Act that are not covered by the reportable conduct scheme. This is because organisations outside of our scheme handle their own investigations and provide their findings to the Office of the Children's Guardian without the benefit of independent scrutiny of the quality of their investigations.

We discuss this issue of the lack of alignment between the reportable conduct and WWCC schemes further in Chapter 5.

3.2.2. Our Notification of Concern function and Chapter 16A information referrals

In June 2013, we were required to commence a new legislative function to support the then new WWCC. Schedule 1, Clause 2A of the Working With Children Act, enables the Ombudsman to make a 'notification of concern' to the Children's Guardian if we form the view, as a result of concerns arising from the receipt of information by our office in

the course of exercising our functions, that 'on a risk assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to the safety of children'. It is also important to note that this clause is not limited to matters arising from the exercise of our functions under Part 3A. If sufficient concerns arise from information which we have received from exercising any of our wide-ranging functions, we can refer the matter to the Children's Guardian.

Under the legislation, both section 35 referrals and Schedule 1, Clause 2A referrals by our office trigger a 'risk assessment' by the Children's Guardian in relation to whether the involved individuals pose a risk to children. Under this function, the information we supply to the OCG about individuals who pose a risk to children triggers formal risks assessments by the OCG of that person's suitability to work with children.⁹ Through this function, we have helped identify individuals of concern whose histories would not have been scrutinised under the WWCC processes if not for the information we have supplied.

The following case studies illustrate the role our office plays in ensuring that information that we receive in the course of exercising our functions is shared with the OCG to enable the Children's Guardian to make an informed assessment of an individual's eligibility for child-related work.

Case study 7

A foster care couple resigned from their out-of-home care agency over disputes about their care of children. They indicated that they intended to transfer to another out-of-home care agency. At around that time, a child formerly in the couple's care disclosed that the male carer had been sexually abusing him. Because the man was no longer an 'employee', the disclosure was not notified to us under reportable conduct jurisdiction. However, we became aware of the disclosure through a separate complaint to our office which was made under our community services jurisdiction.¹⁰

After accessing the Police COPS database, we identified that the child's disclosures had been investigated. We also learnt that the man had been the subject of another investigation into child sexual assault, several years earlier. The disclosures by the unrelated victims were very similar. The OOHC agency had not identified the earlier matter during the carer assessment process because their review of records had been inadequate. Our inquiries with the OCG revealed that the man had applied for and received a WWCC. However, the check had not yet been verified by his employer. We conducted a full intelligence check and issued the OCG with a Notification of Concern.

Case study 8

In 1990, before our employment-related child protection scheme was in place, a man was engaged by a school body to provide services to children during a school event. A number of allegations were raised about the man engaging in conduct of an inappropriate sexual nature towards children during the event, which resulted in a report to Police. A Police investigation ensued; however, the parents of the children chose not to pursue criminal action after being satisfied by reassurances offered to them that the man would never again be re-engaged to work with children by either the school or the body to which the school belonged.

Recently, a representative of the same school body identified documentation relating to the 1990 allegations during a review of archived records. A senior staff member of the school body, who was involved in this archival review, visited the school soon after for unrelated purposes, and discovered that the subject of the allegations was on the premises and was interacting with children one-on-one.

The senior staff member made inquiries of the school executive regarding the nature of the man's business at the school and whether he had been probity-checked. The executive replied that the man was not required to be probity-checked, as he was engaged to present a training session to staff not students. The executive indicated that he had been recommended highly by a number of other schools.

The senior staff member then made contact with our office immediately to discuss his concerns about the man's presence at the school, including that the man may have been obtaining entry to schools to provide a service to adults, and using it to gain access to children. The staff member provided us with copies of the school's records,

9. These referrals are known as Notifications of Concern.

10. *Community Services (Complaints, Reviews and Monitoring) Act 1993*

acknowledging that the matter was not within our reportable conduct jurisdiction but sought our assistance to manage the potential risks to the broader class of school children in NSW that the man may have been able to access.

The approach coincided with the commencement of our Notification of Concern function under the new WWCC in June 2013. Consistent with that function, we identified significant information holdings of concern relating to the man, which gave rise to questions about his suitability to work with children. We also identified that he was actively advertising his services to schools and the broader community, and that while these services were primarily directed towards teaching staff and parents, some were advertised as being for children.

We compiled the holdings into a Notification of Concern to the OCG. As our inquiries had confirmed that the man was not in possession of a new WWCC, we suggested that the OCG take action to compel him to apply for a WWCC. As a result, the OCG issued the man with an early application notice, which ultimately resulted in the man being barred from working with children in NSW.

Under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*, our office, and other agencies, can also refer information to the Children's Guardian to assist her in developing profiles of individuals where there is some information indicating possible emerging risk.¹¹

We routinely provide information to the OCG under Chapter 16A to inform its administration of the WWCC. In this regard, it is worth noting that many of our Chapter 16A referrals relate to persons for whom a risk assessment trigger already exists, but we hold additional relevant information that may not be known to the OCG. This practice recognises that our office may not hold or have access to every piece of information about an individual that may be relevant to a WWCC risk assessment. Similarly, the information held, or that is otherwise accessible by the OCG, about persons applying for child-related work can be complemented in significant ways by the Ombudsman's holdings.

To illustrate, since the new WWCC commenced in June 2013, we have made around 500 releases of information to the OCG under Chapter 16A and more than 40 Notifications of Concern. As well, we have responded to more than 246 requests for information by the OCG, and have issued the OCG with more than 113 requests for information under Chapter 16A.

This data is evidence of the strong and effective business relationship between our office and the OCG, which is critical to ensuring that we both carry out our distinct, but related, functions in a complementary and productive manner. We believe that these two legislative functions working together make the screening system in NSW the strongest in Australia.

3.3. Practice development initiatives

We have implemented a range of policy and practice changes in recent years to strengthen our support for agencies in their handling of reportable conduct allegations. Key initiatives include:

- Providing agencies within our jurisdiction with a 'guarantee of service from the Police', by settling with the Police Commissioner, Standard Operating Procedures which outline the responsibilities of Police in providing practical support to employing agencies dealing with criminal reportable conduct allegations.
- Providing enhanced guidance to agencies on critical and challenging practice issues by publishing a range of factsheets and practice updates. For example, in 2010, we revised our reportable conduct definitions, prompted in large part by the difficulties agencies were facing in investigating, and making appropriate findings in relation to, alleged sexual misconduct. Our revised definition makes it clear that, in addition to sexually explicit comments or behaviour, sexual misconduct can include boundary breaching behaviour, such as an inappropriate and overly personal or intimate relationship with, or conduct towards, a child or young person. The revised guidelines have allowed employers to be able to pursue broader lines of inquiry and examine the nature of inappropriate relationships without the need to establish 'grooming'. This has also resulted in clearly unacceptable behaviour towards children and young people to be both identified and dealt with.
- Promoting and strengthening the mechanisms for greater interagency collaboration and information exchange, including actively promoting and utilising Chapter 16A in relation to reportable conduct matters.

11. Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* allows government and 'prescribed' non-government agencies within NSW to exchange information relating to the safety, welfare or wellbeing of a child or young person.

- Ongoing enhancement of the evidence base in relation to reportable conduct related matters – including data relating to victims and offenders; sector-specific data relating to allegation types and reporting rates; and a range of qualitative indicators relating to the overall handling of matters.
- The development of new training packages to provide agencies with the knowledge and skills to deal with the most serious types of reportable conduct matters, particularly those involving allegations which require a well co-ordinated, interagency response. Since establishing a cross-office community education and training unit in late 2009, we have delivered 78 child protection workshops¹² to more than 1,500 stakeholders; 34 of which were delivered by the Deputy Ombudsman to almost 725 participants. 97% of participants rated the workshop as excellent and said they would recommend it to others.

3.4. Capacity building

We have also undertaken a range of capacity building initiatives with sectors which are, for understandable reasons, less equipped to respond to their legislative responsibilities under the reportable conduct scheme. Over the last few years, we have focussed our attention on strengthening the early childhood, Aboriginal out-of-home care (OOHC), religious, sporting/recreation and community sectors. This work has included regular meetings with agencies/sectors to discuss emerging issues, hosting information forums, and supporting agencies, in a practical way, through engagement with both individual cases and related systems issues. The case study below highlights the potential 'return on investment' from this type of capacity building work.

Case study 9 – Strengthening the capacity of the Aboriginal OOHC sector

The transfer of statutory OOHC responsibilities to the non-government sector has led to a significant expansion in the number of Aboriginal OOHC agencies. This meant that it was critical for us to develop that sector's capacity to identify and adequately respond to allegations of child abuse. In responding to this challenge, we undertook a range of activities to help Aboriginal OOHC care agencies to meet their child protection legislative obligations. This included visiting a significant number of Aboriginal OOHC agencies over the past two years to promote awareness of the reportable conduct scheme, our role and the responsibilities of Aboriginal OOHC agencies.

In addition, we delivered tailored employment-related child protection workshops for Aboriginal providers, and arranged for local police crime managers to attend the workshops to discuss how the agencies can work with Police when handling serious allegations. Aboriginal agencies have participated in our training courses on handling reportable conduct more so than mainstream OOHC agencies, which is largely due to the pivotal role played by AbSec, the peak Aboriginal child and family body, in funding and promoting this training.

We have also provided the AbSec Board with regular data relating to notification rates for employment-related child abuse allegations by their member agencies to reinforce reporting obligations and the need to promptly address the risks of agencies failing to report allegations. As a direct result of these activities, the notifications received from Aboriginal agencies more than tripled from 2013-14 to 2014-15.

In December 2014, we also hosted a forum in partnership with AbSec to strengthen understanding of the respective responsibilities of Aboriginal OOHC agencies and the NSWPF in responding to reportable allegations under Part 3A of the Ombudsman Act and to build closer relationships between Police and Aboriginal communities.

The forum was attended by 160 participants from Aboriginal OOHC agencies, Police, FACS, the OCG, and the Association of Children's Welfare Agencies (ACWA). A range of presenters provided participants with information about key components of the reportable conduct scheme and agency responsibilities. The forum also gave local police and Aboriginal OOHC agencies an opportunity to develop relationships, share information, and discuss ways of working together in the future.

To sustain the momentum generated by the forum, a number of the outcomes and commitments will be built into the monitoring and accountability framework for the NSWPF's Aboriginal Strategic Direction (ASD). For example, Police will invite their local Aboriginal OOHC agencies to participate in their Police Aboriginal Consultative Committees across the state (PACC). In addition, 'strengthening the relationship between Aboriginal OOHC

12. Our introductory workshop, *Responding to child protection allegations against employees*, provides an overview of employer obligations under the Ombudsman Act, and covers the steps involved in the investigation process, risk assessment and risk management. Our advanced training course, *Handling serious child protection allegations against employees*, is designed for senior management and investigators and focuses on how to handle allegations that may involve criminal conduct, equipping participants with specialist and practical knowledge to help them deal with some of the more complex challenges associated with more serious allegations.

agencies and police commands' will be a standing agenda item for the Police Aboriginal Strategic Advisory Committee (PASAC) forum, so that good practice and systemic concerns can continue to be identified and acted upon. Both our office and AbSec are members of the PASAC.

We are also currently working with AbSec to develop and deliver a tailored package for agency staff and foster carers in collaboration with Police on handling disclosures of sexual and serious physical abuse by children in care.

3.5. Identifying systemic issues impacting on the child protection system

Importantly, our reportable conduct jurisdiction is also informed, and enhanced by, our broader functions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS-CRAMA). The Act requires our office to review and inquire into the delivery of community services. Our dual Part 3A and CS-CRAMA oversight functions have been in place for over 14 years.

Our reportable conduct jurisdiction, combined with our broader child protection/community services jurisdiction, has allowed us to advocate for change to child protection and out-of-home care practice in critical areas such as:

- successfully advocating for the introduction of streamlined information exchange provisions in NSW during the Special Commission of Inquiry into Child Protection Services¹³
- providing overwhelming evidence of the need for legislation to enable critical child protection information to be provided across state/territory borders based on a consistent set of principles that serve to protect children
- playing a pivotal role in recent changes to substantially improve the screening of foster carers, as well as other household members in foster care placements
- working with the OCG in identifying potential gaps in the WWCC system, and
- providing strong evidence of the need for Community Services to substantially improve its policy and practice in relation to its staff reporting criminal child abuse allegations to Police.

3.6. Future challenges

The most significant challenge we currently face is the need to maintain, within existing resources, a high level of scrutiny over the handling of the most high-risk allegations of reportable conduct. This is particularly challenging given that, over the past two years, we have seen a 33% increase in the number of matters we have to deal with.¹⁴

Our need to maintain close scrutiny of cases and practical support to involved agencies also has to be carried out along with our relatively recent additional responsibilities, associated with our Notification of Concern function under the WWCC; the requirement to oversight reportable conduct involving persons who reside with authorised foster carers for three weeks or more; and our responsibilities arising from the implementation by the OCG of the Carers register in 2015.¹⁵

And, as we discuss in the next chapter, the demands on our resources will continue to increase as a result of the Solicitor General's advice regarding the meaning of 'substitute residential care for children' and subsequent expansion in what is now deemed to be within our jurisdiction. Responding to the advice has involved extensive consultations with affected agencies, has required us to undertake a significant amount of awareness raising and capacity building activities, and at the same time, has necessitated the handling of a greater number of notifications from a largely inexperienced sector.

13. Justice Wood's finding on this issue followed a recommendation that we made to His Honour for a legislative provision of this kind, in Part 3 of our submission to the Wood Special Commission of Inquiry into Child Protection Services in NSW dated April 2008.

14. In 2014-15, we received 1,425 new matters – 1,305 notifications of reportable allegations and 120 complaints. Over the last two years, the number of matters we have had to deal with has increased by 33%. NSW Ombudsman Annual Report 2014-2015.

15. The NSW Carers Register came into operation on 15 June 2015. It was set up to improve the process of authorising prospective carers and their household members, and to improve information sharing between OOHCC providers. The register will play an important role in the NSW child protection system, and is designed to complement the existing WWCC and reportable conduct schemes. The register will help protect children in care by identifying at the outset applicants whose past history contains information that might indicate a risk to children. We will play an ongoing role in flagging critical matters on the register to facilitate and ensure effective interagency exchange of information.

Chapter 4. The Solicitor General's advice regarding the meaning of 'substitute residential care'

4.1. Why we sought advice on the reach of our jurisdiction

Under section 25A(c) of the Ombudsman Act, agencies providing substitute residential care to children are 'designated non-government agencies'. These agencies must notify reportable allegations relating to their employees and certain volunteers that arise both within and outside of their employment.

We were prompted to seek advice from the Solicitor General about the meaning of the term 'substitute residential care for children', after receiving an inquiry in June 2013 from a family member of a child who had allegedly been sexually abused whilst attending a five day residential therapeutic camp.

If the residential camps operated by the organisation could be said to fall within the meaning of 'substitute residential care' in the Ombudsman Act, then the organisation would have obligations under Part 3A of the Ombudsman Act in relation to responding to allegations of reportable conduct by its employees.¹⁶

The term 'substitute residential care for children' is not defined in the Ombudsman Act and has not previously been the subject of judicial consideration.¹⁷

Up until mid-2013, our office had applied a narrower definition of substitute residential care in determining whether agencies fell within our jurisdiction.

In view of the implications of the Solicitor General's advice, we sought his opinion as to the reach of our jurisdiction in relation to substitute residential care more generally.

4.2. The Solicitor General's first advice

In his August 2013 advice,¹⁸ the Solicitor General noted that the intention of the legislation is to protect children in circumstances where they may be outside of their normal home environment. He advised that:

On its face the notion of "substitute residential care" in the case of children would appear to extend to any arrangement – even for a period of days and nights – where an organisation has the care and control of children of a kind that would otherwise be provided by parents or caregivers, were a child in his or her place of residence.

With regard to the specific question of whether the organisation that prompted us to seek advice fell within our jurisdiction, the Solicitor General provided the following advice:

Given the view expressed in relation to the meaning of "substitute residential care" generally in the context of the relevant legislative provisions, it follows that the 5-day residential camps conducted by [the organisation], involving the provision of overnight accommodation, food and presumably other care services to children over a period of several days, without the presence of supervision of the attendees' parents or usual caregivers, would, in my view, fall within the meaning of this term in s 25A(1) of the Act.

4.3. The Solicitor General's second advice

In light of the practical implications of his advice, we joined with the Department of Premier and Cabinet in seeking clarification from the Solicitor General on specific issues related to his initial advice. In particular, we were interested in exploring more fully which types of circumstances and organisations (such as sporting associations, social clubs, churches and other religious bodies) would fall within the definition of 'an agency providing substitute residential care for children'.

We also asked the Solicitor General to clarify related issues such as whether the mere fact that an organisation has run a camp in the past will, in and of itself, bring the involved entity within our jurisdiction, and whether the frequency with which an organisation conducts camps was relevant to determining whether it is providing 'substitute residential care for children'.

16. See page 1 for definition of employees.

17. Advice provided by the Solicitor General to the NSW Ombudsman dated 7 February 2014.

18. Advice provided by the Solicitor General to the NSW Ombudsman dated 12 August 2013.

The Solicitor General specifically noted that:¹⁹

I do not think that all “accommodation arrangements” for a child at a place other than his or her usual home by a parent or relative of the child will constitute ‘substitute residential care for children’. The mere provision of accommodation, especially of a temporary kind, or for a very short time, would not seem to me to be sufficiently comparable to the attributes of care provided to a child at his or her usual place of residence as to fall within the term. I think the Ombudsman’s definition should be qualified by reference to the provision of accommodation of a residential kind together with food and other care and support of a type ordinarily provided to children in a home environment, by persons other than a child’s parents or relatives.

The Solicitor General went on to state that ‘duration [of a camp] by itself is not determinative of whether an agency is providing substitute residential care for children’. In this context, he specifically drew attention to camps accommodating children in tents or bivouacs, and noted that he doubted ‘this type of accommodation could fairly be described as ‘residential’, even if a child stays in such accommodation for seven nights. He further clarified that:

... if the organisations in question routinely provide camps for children over a period of seven nights, using permanent accommodation facilities [our emphasis] and along with food and other care services, then as with the [relates to a specific agency] camps that were the subject of my previous advice, it is likely that the entities running such camps are providing substitute residential care for children.

The Solicitor General also noted that single night or weekend religious camps run by smaller religious organisations, such as local churches, did not constitute substitute residential care. He went on to provide a list of indicators as to whether an agency could be deemed to be providing substitute residential care for children. These included:

- the camps extending beyond two nights’ duration
- the camps being provided in fixed accommodation (that is, the campers sleep in rooms/cabins/dorms rather than temporary or improvised accommodation such as tents or bivouacs)
- the camps providing food and other care services, and
- the camps providing supervision and support by adults for the purposes of supporting a child’s physical, emotional and psychological well-being (and in circumstances where their parents/usual caregivers are not present).

The advice also clarified that the mere fact that an organisation had run a camp in the past on an intermittent basis, and might provide camps in future without any commitment to do so, could not be said to be providing substitute residential care.

4.4. Implications of the Solicitor General’s advice

The implications of the Solicitor General’s advice are far-reaching and bring within our reportable conduct scheme a large number of social and religious organisations in this state. Many of these organisations employ a vast number of individuals and rely heavily on a volunteer base to run their valuable activities that benefit many thousands of children and young people.²⁰

The extent of the impact of the advice is clear when one considers the significant number of organisations in NSW that run camps for children – including churches and other religious bodies, Christian non-denominational organisations, sporting and recreation/adventure/community organisations, artistic/music/cultural clubs, and organisations that promote children’s health and wellbeing.

19. Advice provided by the Solicitor General to the NSW Ombudsman dated 7 February 2014.

20. Advice sought by the Department of Premier and Cabinet and the Ombudsman’s Office on 10 December 2013.

Chapter 5. Our consultations with affected agencies regarding the Solicitor General's advice

Over the last two years, we have consulted extensively with a significant number of organisations that are now deemed to fall within our jurisdiction (see Annexure).

An important part of our discussions has involved identifying both the common and unique challenges faced by various sectors in implementing their legislative obligations within the reportable conduct scheme.

Given the large number of affected organisations, we have targeted our engagement strategy towards consulting the largest organisations and peak bodies in the religious and sporting and recreation/community sectors.²¹ So far, we have met with 35 agencies affected by the advice, several on multiple occasions, including 28 religious organisations/denominations and seven major organisations in the sporting and recreation/community sector. We also engaged Safe Ministry Resources Pty Ltd to conduct consultations with the religious sector which meant an additional five Christian church denominations were consulted through this process.

The following issues have arisen from our consultations.

5.1. Supporting the sector to fulfil its reportable conduct obligations

Many of the organisations we have consulted have taken active steps to comply with the reporting and investigative obligations under the reportable conduct scheme. We are particularly encouraged by those agencies which have contacted us to seek advice and assistance on handling sensitive, high-risk matters.

For example, after our meeting with representatives of a large Church, they readily acknowledged that their youth camps met the definition of substitute residential care and committed to notifying us of reportable allegations made against its employees. The Church has already sought our help to obtain information from Police to inform its handling of a number of high-risk cases. In relation to these cases, we have facilitated discussions between Police and the Church which have been focussed on identifying risks to children and the related action required to deal with the identified risks.

Over the past year, we have also worked closely with a large sporting and recreational body which has also alerted us to a number of serious child abuse allegations involving its members. In each case, we have also been in a strong position to ensure that the organisation receives relevant police and other information that is sufficient for the organisation to identify and manage risks to children. In addition, we have carried out a range of other activities with the body to help build its knowledge of the scheme and its capacity to respond to child abuse allegations, including reviewing and amending its child protection policies and arranging for targeted education and training for all of its key leaders from across the state.

Our involvement to date with these new and emerging sectors has brought to light the variable capacity of different agencies and religious bodies in demonstrating the core competencies which are integral to adequately identifying and responding to serious child abuse and ill-treatment allegations made against staff and relevant volunteers. As a result, our office has been playing, and will continue to play, a critical role in raising awareness of agencies' responsibilities under the scheme, providing 'hands-on' practical assistance to agencies to respond to allegations as they arise, building organisational capacity to implement robust systems to prevent child abuse, and providing training to build relevant knowledge and skills. Although a number of the bodies we have consulted have raised questions about the Solicitor General's advice, the vast majority have acknowledged the benefits that independent scrutiny and support bring. However, a number of organisations with low revenue streams have highlighted the challenge for them in being able to sustain consistent and rigorous response, particularly in connection with complex and serious cases.

In this regard, some of the larger bodies have agreed to explore together options for better resourcing the sector in this critical area. In relation to the sporting and recreation/community sector, we believe that there would be merit in Government exploring with relevant stakeholders whether there would be a benefit in establishing a single entity, similar to a peak body, to conduct certain complex investigations; provide advice on risk management; develop policies; and deliver training, as opposed to funding a large and disparate number of individual organisations for this purpose.

21. We have also sought support from the Office of the Children's Guardian to alert us to any matters it becomes aware of through its Working With Children Check function involving an agency within our jurisdiction by virtue of the Solicitor General's advice, where it appears that the agency might not have met its Part 3A obligations. These alerts enable us to make prompt contact with the agency to explain our role and the agency's obligations under the scheme.

We also believe that the overall costs associated with establishing such an entity would be relatively modest, particularly when weighed against the risk of many of these bodies remaining under-resourced in relation to their capacity to handle very complex and serious allegations.

Against a background of a 30% increase in our reportable conduct notifications across the board, as well as a likely further increased workload resulting from the extension of our substitute residential care jurisdiction – our office will face significant resourcing challenges of its own in seeking to respond appropriately to the demands of the new and emerging sectors within our existing resources.

5.2. What ought to be the reach of the Ombudsman’s reportable conduct jurisdiction?

Another significant issue which has been brought into sharp focus during our consultations about the ‘camps advice’ is that the legislation, particularly as it relates to substitute residential care, results in an inconsistent and incoherent coverage of various sectors.

There has been a consistent view put forward by those we have consulted that, the impact of adopting the Solicitor General’s recent advice regarding the meaning of substitute residential care, results in the coverage of the reportable conduct scheme being determined by factors extraneous to risks to children; such as, whether or not an organisation’s camps use tents or fixed structures, and distinctions between whether camps are held for a weekend or longer.

It is also important to note that some church denominations operate under a single legal entity, whereas other denominations are structured so that each local church and/or diocese are their own legal entities. The practical effect of this is that if a local church, operating within a denomination comprised of a single legal structure, provides camps which fall within the parameters of the Solicitor General’s advice, the entire denomination falls under the reportable conduct scheme. Conversely, where a local church of a denomination that runs a relevant camp is a separate legal entity from the ‘parent’ entity of the same denomination, then only that local church is deemed to fall under the scheme.

These issues are relevant to recent correspondence sent to the NSW Attorney-General by the NSW Catholic and Anglican Archbishops and Bishops.

On 24 November 2015, the Most Reverend William Wright, Bishop of the Catholic Diocese of Maitland-Newcastle, wrote to the NSW Attorney-General on behalf of the leaders of the 11 NSW Catholic Dioceses. He noted that:

While our schools and out-of-home care services have been subject to Part 3A of the [Ombudsman Act], thus affording enhanced protection for children in those circumstances, it has been an anomaly that the core of our churches, our parishes and various communities of faith, have been largely excluded from the scrutiny and support of the Ombudsman’s office with consequent potential risk implications for children.

We are aware that this apparent gap in the legislative protection of children at a parish level was recently and particularly exposed in the context of the issue of children attending parish sponsored or auspiced residential camps.

Bishop Wright also called for closer alignment of the reportable conduct and WWCC schemes, noting that:

We believe the Child Protection (Working with Children) Act 2012 and 2013 Regulation, provides a mechanism for the scope of the Employment Related Child Protection Division of the Ombudsman’s Office to be aligned with that of the Office of the Children’s Guardian, so that all, and not simply some, ‘child-related workers’ under our jurisdiction would fall within the scope of Part 3A of ‘the Act’, through specific amendments to section 25A (Definitions) of ‘the Act’...

Therefore, we respectfully request you initiate the requisite legislative changes to promote the passage of the proposed amendments through the Parliament so as to ensure that the children of our parishes in New South Wales enjoy the same protections as those receiving educational and welfare services.

Similarly, on 22 December 2015, with the support of the other six Bishops of the Anglican Dioceses in NSW, Dr Glenn Davies, the Anglican Archbishop of Sydney, also wrote to the Attorney-General. The Archbishop noted that:

Many thousands of children participate in the activities of almost all of the 2,870 parishes across the Anglican Diocese of Sydney each week. Over 1,200 licensed clergy and church workers and 14,000 volunteers have obtained a Working With Children Check to engage in child-related work in our parishes. We are just one Anglican Diocese of seven in NSW, representing one denomination among many in the State.

It is my considered opinion that the use of the definition of 'child-related work' in the Child Protection (Working With Children) Act 2012 and the Regulations that determine when a Working With Children Check is required could provide a sound basis for appropriately extending the reportable conduct scheme to apply to matters in a parish context.

With respect, I therefore ask you to consider proposing amendments to the Ombudsman Act which would rectify this situation and provide more consistent protection for children across NSW.

It is significant that the NSW leadership of both these Churches have requested legislative changes to expand the Ombudsman's jurisdiction over their denominations. In relation to both these denominations, without legislative change the Ombudsman's jurisdictional reach will remain limited to the particular legal entity within these denominations which are deemed to be running the relevant types of camps. By contrast, because of their centralised legal structures, the Salvation Army, the Lutheran Church and the Presbyterian churches, already regard their whole denominations as falling under the jurisdiction of the reportable conduct scheme.

From the recent correspondence from the Catholic and Anglican leaders, it is also clear that they believe that there are tangible benefits in bringing under the reportable conduct jurisdiction, all of their key activities involving children because of the benefits stemming from our independent scrutiny and support, as well as achieving better alignment between the reach of the reportable conduct and Working With Children Check schemes. It is worth noting that, when the WWCC and reportable conduct schemes were first introduced 16 years ago, they were designed to be complementary.

Against the background of the call by Church leaders to expand the coverage of the reportable conduct scheme, it is worth returning to the comments of His Honour Justice Wood, who in handing down his 1997 report into the Royal Commission into the NSW Police Service, recommended the implementation of dual schemes to screen and oversee the conduct of 'employees' working with children.²²

Justice Wood observed that:²³

Quite apart from the many government agencies and institutions which provide services to children in the fields of education, health, welfare, housing, correction and the like, there are many non-government organisations, services and facilities involved with the day-to-day care and management of children, or who have routine contact with them. They include:

- refuges, shelters, charitable organisations and the like providing housing and welfare support, or substitute care;*
- foster care agencies;*
- non-government schools and the Catholic education system;*
- churches, choirs, fellowship and Christian groups;*
- youth groups;*
- sporting and recreational associations and facilities;*
- the Scouting movement; and*
- child-care and outside school hours care services.*

Many of these bodies are not subject to notification requirements, are staffed by volunteer and untrained workers, have no monitoring processes for staff selection or membership, have no protocols or guidelines for responding to child sexual abuse or to complaints of such conduct involving their own members, and are inadequately qualified to deal with such matters. Evidence led before the Commission, and cases within the criminal justice system, both historically and currently, reveal that each has been the subject of complaints of this type, many of which have been of a most serious kind, and later established to the criminal standard of proof.

Therefore, it is clear that Justice Wood envisaged bodies from across the religious and sporting and recreation/ community sectors to be covered by both schemes.

22. In 1995, the Royal Commission into the NSW Police Service (Wood Royal Commission) commenced. The initial scope was broadened to include an investigation of the alleged protection of paedophiles by NSW Police.

23. The Hon Justice JRT Wood, *Royal Commission Into The New South Wales Police Service, Final Report Volume IV: 'The Paedophile Inquiry'*, August 1997 (from Chapter 2: Dealing With Child Sexual Abuse And Protection: An Overview, at clauses 2.57 and 2.58)

5.3. Concluding remarks

In light of the significant implications associated with a broader range of organisations now deemed to be within our jurisdiction as a result of the Solicitor General's advice, we believe there is a compelling case for Parliament to review what ought to be the reach of the reportable conduct scheme for the following reasons:

- We believe that the nature of 'organisations' involvement with children, rather than their particular legal structures, should determine whether they fall within our reportable conduct jurisdiction.
- We believe there are no sound public policy reasons for allowing the coverage of the reportable conduct scheme to be determined by factors extraneous to risks to children, such as whether or not an organisation's camps use tents or fixed structures, and distinctions between whether camps are held for a weekend or longer.
- We support the view of key stakeholders that there is a need to better align the coverage of the reportable conduct and Working With Children Check schemes. A review of the coverage of both schemes provides the opportunity to consider whether other legislative amendments are required which are relevant to child protection practice in this area.²⁴

And finally, if Parliament is of the view that a broader range of organisations should fall under the reportable conduct scheme, there is a need to consider whether they are adequately resourced to fulfil their responsibilities.

24. We would be willing to provide details of the matters worth considering – for example, whether amendment is required to clarify the reach of the prescribed body definition in Chapter 16A of the Children and Young Persons (Care and Protection) Act; and whether the term 'sexual misconduct' should be defined in Part 3A of the Ombudsman Act.

ANNEXURE

Below, we have listed the agencies in both the religious and sporting and recreation/community sectors which were consulted between 2014 and 2016 regarding the Solicitor General's advice.

Religious sector

The Baptist Churches of NSW and ACT

C3

Churches of Christ in NSW

Congregational Federation NSW

The Four Square Church in NSW

Good Shepherd Sisters (representing CLRI NSW)

Hillsong Church

The International Network of Churches (formerly Christian Outreach Centre)

Jewish House

Lutheran Church of Australia NSW District (along with Lutheran Education VIC, NSW & TAS)

The NSW Ecumenical Council, which comprises the following organisations:

- The Anglican Church NSW Dioceses
- Antiochian Orthodox Church
- Armenian Apostolic Church
- Assyrian Church of the East
- Bruderhof Australia
- Congregational Federation of NSW
- Coptic Orthodox Church
- Ethiopian Orthodox Tewahdo Church
- Greek Orthodox Church
- Indian Orthodox Church
- Lutheran Church of NSW/NSW District
- Mar Thoma Church
- Religious Society of Friends
- The Salvation Army Australia
- Syrian Orthodox Church and
- Uniting Church Synod of NSW & ACT

Presbyterian Church of Australia – NSW Branch

The Roman Catholic Church in New South Wales, including its Professional Standards Office

The Safe Church Network, which comprises the following organisations/denominations and observer churches:

- the Anglican Church
- the Baptist Churches of NSW and ACT
- the Coptic Orthodox Church
- the Greek Orthodox Church
- the Holy Catholic Assyrian Church of the East
- the Lutheran Church in Australia
- National Council of Churches in Australia
- the Presbyterian Church of Australia
- the Religious Society of Friends (Quakers)
- the Roman Catholic Church
- The Salvation Army Australia
- the Uniting Church in Australia

The Salvation Army Australia

Schoenstatt NSW

The Seventh-day Adventist Church of Australia in NSW

Sisters of Mercy Parramatta (representing CLRI NSW)

The Uniting Church of Australia – NSW and ACT Synod

Youthworks

Sporting and recreation/community sector

Australian Defence Force Cadets

Christian Venues Association

National Accommodation, Recreation and Tourism Accreditation Incorporated

Outdoor Recreation Industry Council

Scouts Australia NSW

Surf Life Saving NSW

YMCA NSW

A thick teal wavy line runs horizontally across the top of the page. On the right side, there is a large, light blue circular graphic composed of several overlapping, curved segments, resembling a stylized flower or a partial circle.

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
Tel. typewriter (TTY): 133 677
Facsimile: 02 9283 2911
Email: nswombo@ombo.nsw.gov.au

www.ombo.nsw.gov.au