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Royal Commission into Institutional Responses to Child Sexual Abuse
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Dear Commissioners

NSW Ombudsman response to Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper concerning Out-of-Home Care March 2016

The NSW Ombudsman welcomes the opportunity to make a submission to the Royal Commission in response to the abovementioned Consultation Paper.

Several matters discussed in the Consultation Paper are directly relevant to our oversight of reportable conduct allegations under Part 3A of the *Ombudsman Act 1974*, and our broader child protection function to monitor and review the delivery of community services under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

As the Commission is aware, we previously addressed a range of issues relating to out-of-home care in our response to Issues Paper 4, including:

- systems for monitoring and oversighting allegations of abuse of children in out-of-home care;
- the need for robust carer assessment processes; and
- related systems, policies and practices to prevent and respond to child abuse.

In addition, various submissions and statements of information we have provided to the Commission discuss issues canvassed in the Consultation Paper such as regulation and oversight, and information sharing – where relevant, we have referred to these submissions and statements throughout this submission. For convenience, copies of our relevant submissions and statements are also attached.

This submission does not seek to address each area of the Consultation Paper, particularly where earlier submissions have already put forward our views. Instead, it focuses on issues where we have additional information to provide.

1. Data limitations

The Consultation Paper suggests there is a need for improved national data about sexual abuse of children in out-of-home care because 'the data currently collated at a national level is incomplete, subject to a significant number of caveats and not comparable across jurisdictions'. We agree with that observation and support any move towards national consistency in relation to the collection and reporting of data relating to abuse of children in out-of-home care.

As the Commission is no doubt aware, the Council of Australian Governments (COAG) recently agreed in-principle to the ACT Chief Minister's proposal for a nationally harmonised reportable conduct scheme to improve oversight of responses to allegations of child abuse and neglect.[1] We note that in addition to multiple other benefits, this development also provides a significant opportunity for the improved collection of national data about sexual and other forms of abuse in out-of-home care.

1.1. The Commission's proposed six-point data collection model

In the Consultation Paper, the Commission has proposed a six-point model for nationally consistent collection of data about sexual abuse in out-of-home care, to 'improve the understanding of the extent and nature of child sexual abuse in OOHC'.[2] The Commission has sought submissions on the proposed data model.

In relation to Points 1 and 2 of the model, we support the Commission's proposal to extract unit record data for each child; as well as incident and relationship data. Our current data capture practices allow data to be captured in this way for all reportable conduct allegations notified to our office under the Part 3A scheme.

In relation to Point 3 of the model – we support the Commission's proposed demographic descriptors – including:

- Disability (including type of impairment);
- Mental health;
- Aboriginal or Torres Strait Islander background; and
- Culturally and linguistically diverse background.

On 1 January 2016, we introduced an enhanced data capture process across our Human Services Branch, including in relation to our reportable conduct oversight under Part 3A. Upon completion of all matters, our case officers now record data against a significantly more comprehensive range of indicators, including victim/offender demographic data; whether allegations have been sustained; outcomes of any related criminal proceedings; information relating to victim support (consistent with Point 5 of the Commission's model); and the manner in which we have added value to investigations – for example, by facilitating information exchange between involved agencies and/or identifying critical information to prompt or inform criminal investigations. A copy of our data specifications is attached (Annexures 1a and 1b).

We have also recently revised our business rules for data collection concerning people with disability. In December 2015, we updated our Part 3A notification form, used by the agencies within our jurisdiction, to facilitate the capture of more nuanced data about the disability status of alleged victims. Following consultation with the NSW education sector, the Department of Family and Community Services (FACS) and People With Disability, it was agreed that we would align our disability categories with the four categories used by all schools for the *Nationally Consistent Collection of Data on School Students with Disability* (NCCD) – these are physical; cognitive; sensory; and social/emotional.

The categories are based on the disability definitions contained in the *Disability Discrimination Act 1992*. While data of this type will not be captured in accordance with the NCCD categories for alleged victims below school age or in matters involving agencies that do not play a broader role in providing services to the alleged victim, the categories provide a simple and consistent way for us to capture data relating to alleged victims from across the various sectors within our jurisdiction.

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[1] COAG Communiqué, 1 April 2016.
[2] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care*, March 2016, p 46.

As we suggested in our January 2014 submission in response to the Commission's Issues Paper 4 – *Preventing sexual abuse of children in out-of-home care* (attached at Annexure 2), although collecting consistent, high-level data about sexual abuse in out-of-home care would certainly be a valuable exercise, the data should be broken down by agency, so that it is operationally useful. This type of data is also useful to inform research and ongoing practice improvements. For these reasons, we suggest that in relation to point 4 of the proposed data model, data should be disaggregated not only by placement type, but also by placement provider (although we acknowledge that the public reporting of such data is a separate issue).

In relation to Point 6 of the model – 'Data should include police reports, and outcomes of criminal and civil justice responses' – we agree with that proposal, but suggest that when jurisdictions outside NSW roll-out their own reportable conduct schemes, the data collected should also include the outcomes of reportable conduct investigations. Our office records criminal justice outcomes in relation to all reportable allegations of a criminal nature that we oversight.

Further, as we noted in our 2014 submission in response to Issues Paper 4, in developing a consistent national approach in the area of sexual abuse in out-of-home care, it will be necessary for child protection departments to align their definitions of 'sexual abuse' and 'substantiation'. In our view, this should be a priority during the establishment not only of a nationally consistent data collection scheme, but also during the roll-out of any reportable conduct schemes outside of NSW.

We also note that Commission has expressed the view in Chapter 2 of its paper that, in the out-of-home care context, there is a need for improved data collection in relation to both the sexual exploitation of children and child-to-child sexual abuse. It is unclear whether the Commission's six-point model is intended to cover child-to-child abuse; however, we would argue that data should also be collected about allegations of this type, including the outcomes of any investigation of those allegations. We discuss this issue further in section 2.

Finally, we note that survivors of child sexual abuse are not always able to disclose at the time of the alleged abuse, and often choose not to do so until they become adults. Under the NSW reportable conduct scheme, all allegations of sexual abuse against a currently engaged carer are reportable to our office, even if the alleged victim has left that individual's care, or is now an adult. We therefore suggest that data collection should not be confined to disclosures made by children currently in care, but should also encompass historical disclosures by adults (we note that this issue will be addressed if nationally consistent reportable conduct schemes are implemented).

2. Child sexual exploitation and child-to-child sexual abuse

Chapter 2 of the Consultation Paper observes that child-to-child sexual abuse, and child sexual exploitation, require further attention.

The Commission has sought submissions on *'*what changes may be required in OOHC to address these issues*'*. I have commented below on what may be seen as shortcomings or gaps in the current oversight scheme in NSW.

2.1. The current reporting scheme in NSW

Currently in NSW, serious child-to-child sexual abuse in out-of-home care, and in other institutional settings, is not comprehensively covered by the reportable conduct scheme, or by any other formal reporting scheme. In my evidence to the Commission at the hearing into Case Study 29 on 1 July 2015, I raised my concerns about the lack of a formal reporting scheme in NSW for child-to-child abuse. I subsequently canvassed this issue with FACS, the Association of Children's Welfare Agencies (ACWA) and the Aboriginal Child, Family and Community Care State Secretariat NSW (AbSec).

Under Part 3A of the Ombudsman Act, the Ombudsman is only notified of a subset of alleged incidents of child-to-child abuse; that is, any incident where neglect on the part of a carer or other worker is alleged to have contributed to this form of abuse occurring.

Some child-to-child abuse incidents will be the subject of a police report, and may or may not receive a further response via the criminal justice system. Some of these incidents will also be the subject of a 'risk of significant harm' report to FACS. However, there is currently no legislative requirement to report this type of incident to our office or another body to allow oversight of the handling of such matters; nor is there any centralised, systematic data capture about the incidence of child-to-child abuse in NSW.

By way of contrast, Part 3C of the Ombudsman Act does require certain disability accommodation providers to notify the Ombudsman of allegations of client-on-client abuse, breaches of apprehended violence orders, and unexplained serious injuries. Under section 25P(1) of the Act, a 'disability reportable incident' includes:

> *b) an incident involving an assault of a person with disability living in supported group accommodation by another person with disability living in the same supported group accommodation that:*
>
> *i) is a sexual offence, or*
> *ii) causes serious injury, including for example, a fracture, burns, deep cuts, extensive bruising or concussion, or*
> *iii) involves the use of a weapon, or*
> *iv) is part of a pattern of abuse of the person with disability by the other person, or*
>
> *c) an incident occurring in supported group accommodation and involving contravention of an apprehended violence order made for the protection of a person with disability, regardless of whether the order is contravened by an employee of the Department or a funded provider, a person with disability living in the supported group accommodation or another person, or*
>
> *d) an incident involving an unexplained serious injury to a person with disability living in supported group accommodation.*

The disability reportable incidents scheme was introduced in December 2014. Part 3C was largely modelled on the Part 3A legislation which came into operation 16 years ago. However, the more recent Part 3C legislation departs from the Part 3A model, in that it requires the notification of incidents of client-on-client abuse, in recognition of the special vulnerability of people with disability. In the first 12 months of the scheme's operation, 36% of matters notified to our office involved client-on-client abuse.

Given that children and young people are also a vulnerable group – particularly those in out-of-home care – our view is that a similarly centralised approach should be introduced within NSW, to govern the identification, reporting and response to alleged serious child-to-child abuse incidents. To ensure that only more serious incidents are reported, the threshold could be, for example, all reports which meet the criteria for a report to the Joint Investigation Response Team.

We also consider it important that, whatever body might be responsible for receiving such notifications, it should have the requisite investigative powers to examine how **all** relevant agencies are responding to reports of child-to-child abuse (and not just the involved out-of-home care providers).

2.2. Therapeutic responses

In addition to the issue of the lack of adequate reporting and oversight arrangements in NSW concerning child-to-child abuse in out-of-home care, it is important to emphasise, as I observed during

my evidence to the Commission at the hearing into Case Study 29, that this type of abuse raises important issues relating to behaviour management strategies, casework practice and therapeutic interventions.

In this regard, the Commission has outlined in its Consultation Paper the role of specialist treatment programs for children that aim to treat children who display sexually harmful behaviours. The Consultation Paper highlights two innovative approaches for responding to child-to-child sexual abuse – the Therapeutic Treatment Orders (TTOs) legislative scheme in Victoria; and the New Street Adolescent Services in NSW.[3]

As we noted in our January 2014 submission to the Commission's Issues Paper 4, during 2009 to 2012 our office undertook an audit of the implementation of the *NSW Interagency Plan to Tackle Child Sexual Assault*. In conducting our audit, we examined the underlying causes of Aboriginal child sexual abuse, as well as the adequacy of the systems for responding to sexual abuse for all children.

While, as the Commission is aware, comprehensive data relating to the prevalence of sexually harmful behaviours by children and young people is not currently available, we found that – over the five year period of 2007-2011 – 900 juveniles were on average implicated as suspects in sexual abuse offences each year. Over the same five year period, 16% of the sex offences that juveniles were suspected of committing led to a charge. As part of our findings, we identified an urgent need for NSW to review its current arrangements for providing therapeutic treatment for children and young people with problematic and abusive sexual behaviours, and highlighted the limited capacity and geographical reach of existing specialist treatment programs.

As part of our audit, we also examined both the Victorian scheme and the NSW New Street Services in detail. Our final audit report, *Responding to child sexual assault in Aboriginal communities* (December 2012) recommended that NSW Health review the New Street Services – including the capacity of the program to meet demand across NSW, together with the adequacy of the level of funding allocated to the existing Rural New Street Western Service.[4]

As we noted in our submission to the Commission's Issues Paper 10, NSW Health responded by commissioning an evaluation of New Street in 2014. In June 2015, the NSW Government advised us that an additional New Street Service was to be established; and that NSW Health was developing New Street service standards to ensure that the model is being delivered at a consistently high standard as it is expanded.[5] However, we regularly receive feedback that demand still outstrips capacity, and that the New Street Services have limited geographical coverage – limitations which are recognised in the Commission's Consultation Paper.

Particularly in light of the New Street Services only being available for children aged 10-17 years, our final audit report recommended that the Ministry of Health – in consultation with Local Health Districts – review the capacity to meet the demand for counselling services for children aged under 10 years who display sexually abusive behaviours.[6] While the government has advised us of considerable work undertaken to develop a data collection solution for Sexual Assault Services which will better capture demand for these services,[7] we are not aware of any work that has been undertaken to increase the availability of services for this cohort.[8]

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[3] New Street Services is NSW Health's therapeutic program for responding to children and young people aged 10-17 years who have demonstrated sexually harmful behaviours.
[4] NSW Ombudsman, *Responding to child sexual assault in Aboriginal communities*, December 2012, Recommendation 66.
[5] NSW Government, *Responding to Child Sexual Assault in Aboriginal Communities: NSW Government's Progress Report to the 2012 Ombudsman's Report*, June 2015.
[6] NSW Ombudsman, *Responding to child sexual assault in Aboriginal communities*, December 2012, Recommendation 69.
[7] NSW Government, *Responding to Child Sexual Assault in Aboriginal Communities: NSW Government's Progress Report to the 2012 Ombudsman's Report*, June 2015.
[8] At the time of our audit report there was only one NSW Health specialist service for children aged under 10 years who exhibit problem sexual behaviours – the Sparks Program – which provides assessment and treatment to children and families in and around the Hunter region.

We also recommended that all agencies and services with relevant responsibilities develop and implement an integrated service response framework for children and young people who engage in sexually abusive behaviours; and that in doing so, consideration should be given to adopting elements of the scheme introduced by the Victorian Government in 2007 for identifying and diverting young people into treatment.[9] We understand that NSW Health has now recommended that a combined interagency review consider whether a similar model to the Victorian scheme could be established in NSW. The Commission may wish to pursue the response to this recommendation.

We welcome the Commission's advice that it is continuing its research and examination of this important area of work, particularly in light of the reported extent of child-to-child abuse in an institutional setting and in the community more broadly.

3. Information Sharing

The Commission has sought submissions on ways to improve information sharing in the out-of-home care context. Among other things, the Commission has suggested that nationally consistent arrangements for intra-jurisdictional and inter-jurisdictional information exchange 'could be modelled on Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW)'.[10]

We strongly support both the proposal for consistent information sharing provisions across all states and territories, and for modelling those provisions on Chapter 16A. In this regard, we draw the Commission's attention to the relevant section of Part 2 of our February 2015 statement in response to Case Study 23 (attached at Annexure 3), in which we outlined the significant benefits resulting from the introduction of Chapter 16A, as well as certain impediments to information sharing, including the sharing of child protection information across state and territory borders, and sharing information obtained through the administration of the Working with Children Check (WWCC).[11]

On a minor note, we agree with the Commission's observations in the Consultation Paper that the wide range of prescribed bodies that Chapter 16A applies to provides good coverage in NSW; however, as we noted in our recent special report to Parliament, *Strengthening the oversight of workplace child abuse allegations* (attached at Annexure 4), in light of the issues raised in that report about the reach of the reportable conduct scheme, it would be worth considering whether amendment is required to clarify the reach of the prescribed body definition in Chapter 16A.

4. Regulation and oversight mechanisms

In Chapter 4 of the Consultation Paper, the Commission has outlined the components of the regulation and oversight systems for out-of-home care – namely the accreditation of service providers; carer authorisation or registration; carers registers; mandatory reporting; official visitor schemes; and reportable conduct schemes. Submissions have been sought on various aspects of these components.

I note that we have previously provided comprehensive information to the Commission outlining our views on the operation of the various regulatory and oversight mechanisms – particularly in our January 2014 submission on Issues Paper 4; in my evidence of 1 July 2015 to the public hearing on Case Study 29; and in my statement and evidence last month in relation to Case Study 38 (attached at Annexure 5). As such, while we have not addressed each of these aspects below, we have provided further information regarding the operation of the Carers Register in NSW (which at the time of our January 2014 submission was not yet operational); recent legislative amendments in NSW relevant to our oversight as it relates to authorised carers; and the operation of the NSW reportable conduct scheme.

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[9] NSW Ombudsman, *Responding to child sexual assault in Aboriginal communities*, December 2012, Recommendation 65.
[10] Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care*, March 2016, p 78.
[11] See also our submission in response to the Commission's *Working with Children Check Issues Paper* (August 2013).

In addition to considering the individual aspects of the regulation and oversight systems in each jurisdiction, the Commission has also indicated that it would welcome submissions on 'whether the operation of different oversight bodies with similar, related and intersecting functions may create confusion about where particular complaints or concerns should be raised and how they will be addressed'; as well as 'how any potential areas of duplication might be addressed'.

As we have previously advised the Commission, we believe that the separate but complementary oversight functions in NSW carried out by different agencies are one of the key strengths of the system in this state. I note that this point was canvassed during the evidence I provided at the public hearing into Case Study 38. While there is a risk that the existence of multiple oversight agencies may create confusion either for employers or the general public, it is our experience that each of the bodies in NSW has a specific role and focus.

In our view, a reportable conduct scheme provides the oversight body with a helicopter view of 'who needs to know what', and we play a key role in ensuring relevant information is shared and acted on. In addition, as is evident from Chapter 3 of our February 2016 special report to Parliament, the close ongoing liaison between our office and the WWCC function has led to significant positive outcomes.

The need to consider confusion and duplication, particularly in the context of any reforms to the oversight system, is nonetheless an important consideration. It will be important, for example, that any work to improve the response to allegations of child-to-child abuse is executed in such a way as to capitalise on the existing oversight mechanisms in place and minimise any unnecessary duplication.

4.1. Carers registers

The Commission has sought submissions on carers registers, and their practical effect.

The recent establishment of the NSW Carers Register is a highly significant development in the regulation of out-of-home care in NSW. As the Commission is aware, foster caring is a particularly high-risk form of child-related employment because it occurs in a domestic setting, and much of the work takes place without supervision. The Register is an important component of the system in place to enhance the protection for children in care by helping to identify applicants who are unsuitable to be authorised as foster carers.

We played an active early role in the establishment of the Carers Register in NSW. In 2010, we began investigating the adequacy of FACS' actions to promote information exchange with other designated out-of-home care agencies for the purposes of authorising carers. We did so because we knew of cases where FACS had not shared relevant risk information about foster carers with that carer's employing agency at the time of assessment. The failure to share information had resulted in actual significant harm, or risk of significant harm, to children later placed with those carers. Following our investigation, from 2011 onwards, we took part in an interagency working group set up by the Children's Guardian to develop the Register.

The Register commenced operation on 15 June 2015 and is administered by the Children's Guardian. Out-of-home care providers and the Ombudsman can access it directly. Out-of-home care providers are required by law to enter certain information onto the Register, including:

- a carer's application and authorisation history (including application refusals, cancellations and suspensions of authorisation),
- associations between carer households,
- carer household composition, including whether any household members over the age of 16 have been cleared to work with children,
- prospective carers' relationships (past and present) with other designated agencies,
- addresses, dates of birth and cultural background,
- reportable allegations against a carer.

The Register is designed to complement the existing background checking and the holdings which form part of the reportable conduct scheme. It fills certain information gaps that previously existed during the assessment and authorisation of carers, by centrally recording risk information about carers and allowing out-of-home care agencies to access this information as needed, and to share information with each other. Not all risks can be identified by the WWCC and criminal record checking alone, for example:

- The WWCC will consider a 'finding of misconduct' reported by an employer, in the category of 'sexual misconduct' and/or 'physical assault'. However, some high risk carers will have been the subject of a reportable conduct investigation that did not result in a sustained finding of sexual misconduct or serious physical assault, but where a degree of risk was nevertheless identified.
- Some carers may have been investigated for a relevant criminal allegation, but this may not have resulted in a charge of the kind that will be detected during a criminal record check. If the criminal allegation was also reportable, it will now be flagged on the Register and prospective employers will know to seek further information from the prior employer, police and FACS.
- Some carers will have risks associated with members of their extended family or their household. The Register records information about all the members of a person's household and whether those aged over 16 have a clearance to work with children. It also allows for other risk information about household members to be flagged.
- The Ombudsman may be aware of information that is unlikely to become known to a prospective employer through standard probity checking or through contacting any previous out-of-home care providers who have employed the individual. For example, we may be aware of risk information about a carer who has other child-related work in a different sector, or we may know about previous criminal investigations in a setting other than out-of-home care. In these circumstances, we can place a flag on the Register, advising the prospective employer to contact the Ombudsman for further information.

As noted above, the Register has improved the protection of children by helping to identify 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.

4.2. Carer authorisation

The Commission has sought submissions on whether existing checks for the authorisation of carers and carer households are adequate; and what minimum checks and assessment should be required for authorisation of kinship/relative carers.

Our January 2014 response to Issues Paper 4 included a strong focus on the need for improved carer screening practices in NSW – including the need to ensure that the assessment of carers also extends sufficiently to an assessment of the suitability of their household members and close associates; and, notwithstanding the need to have appropriate interim provisions to enable emergency placements, the need for relative/kin carers and members of their household to undergo the same level of checking as other authorised carers.

Since that time, the legislative amendments related to the introduction of the NSW Carers Register have – as outlined above – significantly strengthened the processes in NSW both in terms of the exchange of information about carers and carer applicants; and also by providing a mechanism through which the Children's Guardian can review whether agencies are completing appropriate probity checking and assessment processes prior to the authorisation of a carer (including relative/kin carers).

In addition, the Ombudsman Act was recently amended by the insertion of section 25AAA. This amendment, which commenced on 2 November 2015, has the effect of extending Part 3A to also cover persons who reside with authorised carers.

Section 25AAA(1) provides that 'this Part applies to an individual (other than a child) who resides for 3 weeks or more on the same property as an authorised carer in the same as this Part applies to an employee and in any such case the individual is, for the purposes of this Part, taken to be an employee of the designated agency that authorised the authorised carer'. Under section 25AAA(2), 'reside on a property' has the same meaning as in the *Child Protection (Working With Children) Act 2012*.

Prior to the amendment, while an adult household member was required to hold a WWCC, there was no requirement for out-of-home care agencies to notify us of allegations of (for example) sexual abuse by a household member – unless the alleged abuse involved an allegation of neglect by the authorised carer. The amendment, which was partly in response to our advocacy on this issue, is a significant development in terms of ensuring that these matters are the subject of appropriate investigation and response.

4.3. Reportable conduct schemes

The Commission has sought feedback about the value of reportable conduct schemes, and whether such schemes should be established in all states and territories.

We believe that reportable conduct schemes are an essential component of the framework for employment-related child protection. Our numerous submissions and statements to the Commission, including most recently my March 2016 statement in relation to Case Study 38, provide evidence of the value of the scheme. In addition, our February 2016 report to Parliament includes an overview of the reasons for the effectiveness of the NSW scheme.

As we have previously outlined, the reportable conduct scheme (together with our broader functions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*) allows us to play a proactive role in identifying and responding to individuals who may pose a risk to children. As detailed in our statement on Case Study 38, this adds significant value both in terms of enhancing criminal investigative responses, and in ensuring that appropriate child protection responses occur in circumstances where a matter does not result in a criminal charge and/or conviction.

In addition, the NSW reportable conduct scheme has added value in the following ways:

- Promoting agencies to establish systems to prevent, detect, and respond to abuse;
- Facilitating the systematic identification and reporting of abuse;
- Creating a centralised database of intelligence holdings about individuals and agencies, which informs the WWCC and employment decisions;
- Enhancing risk management of individuals the subject of allegations;
- Feeding critical information into the policing systems, as a result of our unique access to Police and FACS databases;
- Facilitating ongoing practice development across different sectors, and capacity building both within and across sectors; and
- Allowing the identification of important systems issues (for example, we successfully advocated for more efficient and effective information sharing provisions; the need to improve the screening of foster carers and household members – resulting in the introduction of the NSW Carers Register; and the need for FACS to improve its policy and practice in relation to its staff reporting criminal child abuse allegations to Police).

As the Commission is aware, on 26 February 2016, we hosted a Reportable Conduct Forum in Sydney. The forum brought together almost 800 representatives from across the education, out-of-home care, disability, early childhood, religious, sporting and recreation sectors. The presentations

from each of the sectors explored the strengths and weaknesses of the NSW reportable conduct scheme over its 16 years of operation.

During the course of the forum, we collected feedback by way of Event poll from those who attended.[12] Overall, we found that the most significant theme to emerge was a strong call for a nationally consistent approach to reportable conduct, and related to this, improved information exchange, including across state borders.

In the context of the recommendations made by the Commission in its August 2015 Working with Children Checks Report (in particular, regarding the need for a national model for WWCCs which includes checking of disciplinary and/or misconduct information) the need for nationally consistent reportable conduct schemes is particularly critical.

As the Commission is aware, the reportable conduct scheme in NSW feeds into the WWCC scheme in a number of ways. For example, the scheme ensures that any workplace records that are notified to the Children's Guardian for the purpose of informing the WWCC, have been the subject of independent oversight.

As we have previously advised the Commission, because of the inextricable link between the WWCC and reportable conduct schemes in NSW – both of which are significantly enhanced by the information sharing provisions in Chapter 16A – there is a clear need for the question of a nationally consistent reportable conduct scheme to be addressed prior to (or in conjunction with) the establishment of a nationally consistent WWCC scheme which includes an assessment of workplace records. In the absence of comparable reportable conduct schemes being developed in other jurisdictions, while it will be possible for legislation relating to WWCCs to be substantively harmonised, the efficacy of the WWCC processes will, in practice, still vary between jurisdictions.

In this regard, the announcement by both the Victorian and ACT Governments that they intend to establish their own reportable conduct schemes, modelled on the NSW scheme, is very encouraging. More recently, the announcement (as noted earlier) that COAG has agreed in-principle to work towards harmonising reportable conduct schemes, similar to the current model in operation in NSW and the schemes announced in the ACT and Victoria, is a very significant development.

We have recently provided advice to the Victorian Department of Health and Human Services (DHHS) and key Victorian agencies to inform their work to establish a reportable conduct scheme; and have also had a range of discussions with representatives from the ACT Government responsible for implementing a reportable conduct scheme in that jurisdiction. In light of the COAG announcement, we will continue to actively provide relevant stakeholders with advice and assistance in relation to the operation of the scheme in NSW.

4.3.1. The reach of the NSW reportable conduct scheme

Notwithstanding the value of the NSW reportable conduct scheme, there remain areas where we believe there is scope for further strengthening of the scheme. The primary purpose of our February 2016 report to Parliament was to bring to Parliament's attention the practical implications of the Solicitor-General's advice on *'substitute residential care'*; and to put before Parliament the views expressed by key stakeholders affected by that advice regarding the need to clarify the reach of the Ombudsman's jurisdiction.

We previously provided the Commission with a copy of the Solicitor-General's advice on 17 March 2014. Inter alia, the advice states that:

[12] Since the forum, we have prepared summaries of the main themes identified during each of the panel sessions, as well as the key issues that emerged from the audience feedback. In addition, we have compiled the 'raw' feedback from Event poll into common themes. These summaries, together with copies of all presentations given on the day, have been uploaded to the reportable conduct forum page on our website, and are accessible at: http://www.ombo.nsw.gov.au/training-workshops-and-events/community-education,-events-and-forums/reportable-conduct-forum-/reportable-conduct-forum-

> *'[O]n its face the notion of "substitute residential care" in the care of children would appear to extend to any arrangement where an organisation has the care and control of children of a kind that would otherwise be provided by parents and caregivers, were a child in his or her place of residence'.*

Up until receiving this advice, we had applied a narrower definition of 'substitute residential care' in determining whether agencies fell within our jurisdiction.

In our subsequent consultations with organisations that run camps – including religious denominations, organisations in the recreational camping sector, and sporting associations – we consistently received feedback that stakeholders believe there would be merit in Parliament reconsidering what ought to be the reach of our reportable conduct jurisdiction. In this regard, a number of stakeholders indicated that there is a need to better align the coverage of the reportable conduct and WWCC schemes.

We also received consistent feedback from stakeholders that they valued the support provided by our office in the context of the reportable conduct scheme, and as such, they believed the reach of the scheme should be extended. For example, in 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...*

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, as we noted in our February report, 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 WWCC 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.[13]
- If Parliament takes the view that a broader range of organisations should fall under the reportable conduct scheme, then there will be a need to consider whether they are adequately resourced to fulfil their responsibilities.

We are currently awaiting advice from Parliament in response to our report. We will continue to proactively work with organisations in those sectors affected by the Solicitor General's advice in order to raise sector awareness of relevant issues and build capacity to respond to allegations of reportable conduct.

[13] As noted in our report to Parliament, matters that we believe are worth considering include 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.

I trust that the information provided is of assistance to the Commission. If it would be of assistance, we are more than happy to further discuss with the Commission any of the issues we have highlighted or any other aspect of our work.

In this regard, please do not hesitate to contact me or Ms Julianna Demetrius on (02) 9286 0920. Ms Demetrius will be on leave from 15 April – 13 May inclusive.

Yours sincerely

Steve Kinmond
Deputy Ombudsman
Community and Disability Services Commissioner

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