



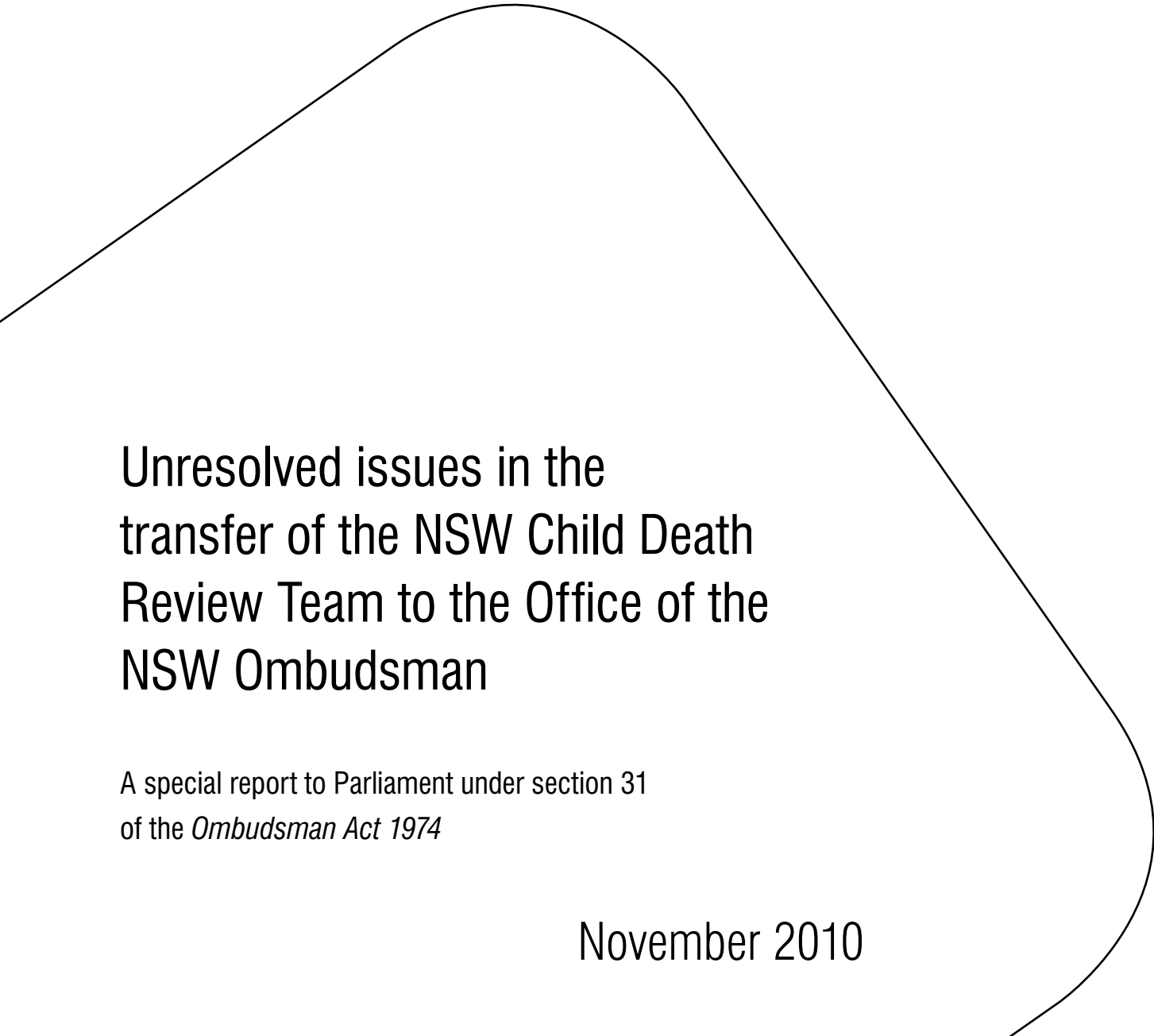
NSW Ombudsman

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# Unresolved issues in the transfer of the NSW Child Death Review Team to the Office of the NSW Ombudsman

A special report to Parliament under section 31  
of the *Ombudsman Act 1974*

November 2010



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Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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November 2010

The Hon Amanda Fazio MLC  
President  
Legislative Council  
Parliament House  
Sydney NSW 2000

The Hon Richard Torbay MP  
Speaker  
Legislative Assembly  
Parliament House  
Sydney NSW 2000

Dear Madam President and Mr Speaker

I submit a report pursuant to s.31 of the *Ombudsman Act 1974*.

I draw your attention to the provisions of s.31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make it public forthwith.

Yours faithfully



Bruce Barbour  
**Ombudsman**



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## 1. Introduction

In April 2009, the NSW Parliament passed legislation that would transfer responsibility for the NSW Child Death Review Team from the Commission for Children and Young People to the NSW Ombudsman.

This report details the issues that have arisen in implementing this decision of Parliament, and the difficulties experienced by my office in working to achieve a new and effective system for reviewing and learning from the deaths of children in NSW.

I believe the Parliament, having determined that my office is best placed to undertake the administration of the Child Death Review Team, should be made aware of these issues and the lack of progress that has been made to effect its decision.

## 2. Background

The Special Commission of Inquiry into Child Protection Services in NSW (the Inquiry), headed by Justice James Wood, made its final report public on 24 November 2008.

Among more than 100 recommendations, the Inquiry recommended a number of changes to the system of child death reviews in NSW:

- The relevant legislation, including Part 7A of the *Commission for Children and Young People Act 1998*, should be amended to make the NSW Ombudsman the convener of the NSW Child Death Review Team, and the Commissioner for Children and Young People, a member of the Team rather than its convener. The secretariat and research functions associated with the Team should also be transferred from the Commission for Children and Young People to the NSW Ombudsman (recommendation 23.1).
- Community Services should review the death of any child or young person about whom a report was made within three years of that death, or where such a report was made about a sibling of such a person, within six months of becoming aware of the death (recommendation 23.2).
- The *Community Services (Complaints, Reviews and Monitoring) Act 1993* should be amended by:
  - repealing (35(1)(b)) and (c) – these sections relate to the death of a child or young person about whom a report of risk of harm was made to Community Services in the three years prior to their deaths (35(1)(b)), or the sibling of a child so reported (35(1)(c));
  - replacing the requirement for an annual report in s.43 with a requirement that a report be made every two years (recommendation 23.3).

In summary, these recommended changes meant that the NSW Ombudsman would have responsibility for supporting the review and annual reporting of all child deaths in NSW, alongside my specific responsibilities for reviewing, and reporting biennially on, the deaths of children due to, or suspicious of, abuse or neglect, or children in care. I would no longer review the deaths of children on the basis that they, or their sibling, had been the subject of a risk of harm report to Community Services in the three years prior to their death. Children or siblings of children who have been the subject of such reports would only be reviewed by my office if they also met the revised criteria for a reviewable death.

The recommendations were made on the basis of the Inquiry's conclusions about the importance and relevance of continuing a reviewable death function; the need to eliminate duplication of effort between the Ombudsman and the Commission for Children and Young People; and the benefits that would be provided through integrating the review of all child deaths in NSW. The Inquiry also sought to remove the term 'known to Community Services' from reviewable deaths to ameliorate escalation in the mind of the public that all child deaths could have been prevented by Community Services, when this was not the case.<sup>1</sup>

In March 2009, the NSW Government responded to the Commission's 111 recommendations. The Government supported 89 recommendations in full and 17 in principle or in part. Only five recommendations were not supported, including recommendation 23.1, which recommended the transfer of the Child Death Review Team from the Commission for Children and Young People to my office. The Government's response stated that:

*The Child Death Review Team's research role is better suited to the Commission, with the Ombudsman focusing on reviewable deaths.*<sup>2</sup>

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1 Wood, Hon James AO QC 2008 *Report of the Special Commission of Inquiry into Child Protection Services in New South Wales* pp.916–922.

2 NSW Government 2009, *Keep them safe: A shared approach to child wellbeing*, p.90.

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The issue subsequently generated media interest, public debate, and debate in the Parliament.

As Ombudsman, I did not believe it was appropriate for me to engage in this debate. I raised my concerns directly with the government. In declining an invitation from the Member for Goulburn to address crossbench members on the matter, I stated in a letter my view that Mr Wood's three recommendations relating to the reviews of child deaths should be considered as a reform package to be implemented in conjunction with one another. I said the important links between the three proposals provided for balanced improvement to oversight of child protection services through the avenue of reviewing child deaths. I noted that not implementing the proposals as a package would, in my view, result in less efficient and effective oversight and greater duplication between my office and the Child Death Review Team. I also confirmed that my office had significant research capacity to support the broader role of the Child Death Review Team. My letter was referred to and quoted from in Parliament by the Member for Goulburn.

Following debate in the legislative Council on the *Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009*, an amendment was passed giving effect to the Commission's recommendation 23.1, resulting in all three recommendations relating to child death reviews being passed by Parliament and receiving assent in April 2009.

Amendments to change the definition of, and reporting timeframe for, reviewable deaths were proclaimed in July 2009. My office has been operating under these changes since then, and we are at present preparing our first biennial report.

The legislative amendments required to transfer the Child Death Review Team – schedule 3 (ss.12–19) – have not yet been proclaimed.

Negotiations to transfer the Team to my office have not been smooth.

### **3. Issues in the transfer of the Child Death Review Team to the Ombudsman**

At the outset, securing adequate funding for my office to support the important work of the Team was difficult. This is a significant role for my office, and a critically important function for NSW, and the \$221,000 funding per annum that was initially offered to my office to perform the role was simply not adequate. Much of my negotiations with government in the latter part of 2009 focused on securing an appropriate level of funding to properly support the work of the Team. This was finally resolved in March 2010, and that being the case, I do not intend to traverse these matters.

A second and significant area of concern which I raised with the government relates to anomalies and administrative complexities arising from the legislative amendments contained in the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (the Wood Act).

I formally advised the Department of Premier and Cabinet that I had concerns about the legislation in September 2009.

In late September, I received a letter from the Department on a number of issues. In relation to the Child Death Review Team, the letter acknowledged my concerns, but stated:

*The current composition of the team and arrangements for Parliamentary oversight should be retained, consistent with Parliament's decision regarding the transfer.*

In October, I met with staff from Premier and Cabinet to discuss these issues, and in early November 2009, I wrote to the former Director-General of the Department detailing the anomalies and problems posed by the legislation. My letter proposed amendments to resolve these issues.

The issues I raised in my letter are summarised below. Annexure 1 details my proposals.

#### **Changes affecting the independence of the Ombudsman**

Under the Wood Act, the legislation governing the Child Death Review Team will remain within the *Commission for Children and Young People Act 1998*. The purpose of that Act is primarily to provide for the functions of the Commission. It is undesirable to create confusion by having it provide for functions to be undertaken by the NSW Ombudsman.

In addition, retaining the Child Death Review Team within the Commission's Act will significantly impact on the independence of my office. Under the current proposals, the Ombudsman, as Convenor of the Team:

- must provide draft reports of child death reviews to the Minister for Youth for comment prior to tabling in Parliament
- must seek the approval of the Minister for Youth in order to undertake research on child deaths, including research about reviewable deaths
- cannot determine remuneration and allowances for appointed 'expert advisers' to the Team – this must be determined by the Minister for Youth
- would require reports of the Child Death Review Team to be dealt with as if they were reports of the Commission for Children and Young People, including the requirement to provide draft reports to the Minister for Youth
- would require the Minister for Youth to review the validity of the policy objectives of the Child Death Review Team, rather than the oversighting body, the Parliamentary Committee.

It is clear that such requirements are not compatible with, and would have the effect of undermining, the independence of my office.

In addition, retention of Part 7A in the Commission's Act would result in oversight of my office's work by two Parliamentary Committees, the Parliamentary Joint Committee on Children and Young People and the Parliamentary Joint Committee on the Police Integrity Commission and the Ombudsman. The former committee's primary role is to monitor and review the functions of the Commission – which is defined under the Act as inclusive of the Child Death Review Team – and to examine its annual and other reports. Under the Ombudsman Act, the latter committee must monitor and review the functions of the Ombudsman under **any** Act, and review annual reports made by the Ombudsman under **any** Act.

Oversight by two Parliamentary Committees creates unnecessarily duplication, and potential anomalies – I would be reporting on different but complementary aspects of my work relating to child deaths to each Committee. I do not believe this was an intended outcome of the vision of either Justice Wood or Parliament.

I have, since my letter to the Department of Premier and Cabinet last November, sought from government an amendment to transfer the relevant sections of the Commission for Children and Young People Act, which fall under Part 7A, to an Act that I administer, the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. This Act in part provides for the other reviewable deaths work of my office.

Importantly, the change I have suggested was supported when I first raised it with the (then) Commissioner for Children and Young People, Ms Gillian Calvert, and the Child Death Review Team. Ms Calvert advised me in August 2009:

*The Team supports the proposal that the legislative provisions governing the Team should be transferred from the Commission for Children and Young People Act 1998 to the Community Services (Complaints, Reviews and Monitoring) Act. This would resolve the unintended duplications and administrative complexities arising from the Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009.*<sup>3</sup>

It was also supported by Ms Gaye Phillips during her short term as Commissioner for Children and Young People.

The change was also supported by the Joint Parliamentary Committee on Children and Young People, in its correspondence to the Chair of the Committee on the Office of the Ombudsman and Police Integrity Commission, dated 1 September 2009.

I do not believe it was the intent of Justice Wood's recommendations to adversely affect the Ombudsman's independence or efficiency. Indeed his report states the contrary, that:

*the independence of the Ombudsman is a key cornerstone of public accountability in NSW.*<sup>4</sup>

In my view, the anomalies and inefficiencies should have been identified in the process of drafting the legislation and addressed at this point. Regardless, it is critical that the independence of my office be maintained, and this is why I have repeatedly advised government of the need to ensure the governing legislation for the Team is appropriately placed within the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. This is both the simplest and most appropriate way to proceed.

<sup>3</sup> Correspondence dated 26 August 2009.

<sup>4</sup> Wood, Hon James AO QC 2008 Report of the Special Commission of Inquiry into Child Protection Services in New South Wales p.952.



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## Changes affecting the efficiency and effectiveness of child death reviews

In addition to my concerns about independence, there are a number of anomalies that will make the work unnecessarily difficult and inefficient.

### Reporting periods

The Wood Act changed the reporting period for reviewable child deaths, from calendar year to financial year reporting. The reason for this change is unclear.

The reporting cycle of the Child Death Review Team is the calendar year. Community Services' Child Death Reviews and Critical Reports Unit also works to a calendar year. Most relevant population data is calendar year. The proposed amendment will therefore create an anomaly and introduce significant administrative complexity in coordinating the work of the Child Death Review Team and reviewable child deaths. This may also impact on other offices, such as the Office of the Coroner. It will also potentially undermine Justice Wood's key concern that there be one child death register in NSW.

I have advised the government that reviewable deaths should report on a calendar year basis, as was previously the case. This would align the timing of all child death review work in NSW.

### Exchange of information

One of the existing requirements for the Team that will be omitted under the current proposals is a section which allows for disclosure of records made by the Convenor of the Child Death Review Team for the purpose of:

*Providing information to the Ombudsman concerning the death of a child that is relevant to the exercise of any of the Ombudsman's functions.*

While the new convenor of the Team will be the Ombudsman, the Team itself is a separate entity to the Ombudsman's Office. Removing this section would result in uncertainty in relation to the exchange of information between the Team and the office of the Ombudsman.

I have advised government that the Team should be provided with the legal right to pass on records directly for the purpose of reviewable child deaths, and 45U(1)(c) in the Commission for Children and Young People Act currently provides for this.

### Administration within the Ombudsman's Office

My functions under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* are carried out by a statutory Community Services Division headed by the Community and Disability Services Commissioner. Staff supporting the work of the Child Death Review Team would be situated within the Community Services Division. I have advised government that in this context, it is prudent and sensible that the Commissioner, who is also a Deputy Ombudsman, be a statutory member of the Team, in the same way the Wood Act has included the Commissioner for Children and Young People as a member.

## 4. Response from the government to date

In early December 2009, because arrangements had not been progressed, I wrote again to the Department's Director-General requesting a delay in proclamation. This was to provide some surety to both my office and the Commission for Children and Young People, and to avoid the significant difficulties that a transfer mid way through a reporting period would pose.

I received no formal reply to my letter, however the legislation was not proclaimed.

Between December 2009 and August 2010, my staff and I have repeatedly engaged with relevant parties seeking a resolution to these issues. This has included meetings with senior staff of the Department of Premier and Cabinet, followed up by email and phone contact as well as correspondence with the Premier. We have also met with the Commission for Children and Young People and with members of the Child Death Review Team and have kept them informed of developments.

On 23 August 2010, I wrote to the Director-General of the Department of Premier and Cabinet, setting out my concern that basic and necessary legislative amendments had not been progressed. I asked that the issues be dealt with as a matter of urgency, and that appropriate amendments be put forward in the current session of Parliament. I also advised that if the matter was unable to be dealt with promptly, my intention would be to bring the issue to the attention of Parliament.

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In mid September, my office again sought information from the Department of Premier and Cabinet about the progress of legislative amendments. We were advised that the issues were before the respective Ministers and could not be progressed until advice from the Ministers was received.

On 29 October, I received a phone call from a Deputy Director-General of the Department of Premier and Cabinet advising that our proposals for legislative amendment had been considered by Cabinet. I was advised that Cabinet had not endorsed all of my proposals, and had agreed only to some amendments to deal with the anomalies I had raised. I asked for that advice to be provided to me in writing, along with reasons to assist me to understand the basis for the decision.

On 2 November 2010, I received a letter from the Director-General of the Department of Premier and Cabinet confirming the advice I had received. The letter states in part:

*The legislative changes you have requested were considered by Cabinet on 25 October 2010.*

*Cabinet approved proposals involving minor legislative change for inclusion in the current statute law program. These amendments are to:*

- *replace 'determined by the Minister' with 'determined by the Convenor' in section 45O of the Commission for Children and Young People Act 1998;*
- *repeal item [18] of Schedule 3.1 of the Children Legislation Amendment (Wood Inquiry Recommendations) Act; and*
- *amend section 43 of the Community Services (Complaints, Reviews and Monitoring) Act 1993 to align reporting with the calendar year rather than the financial year.*

*In addition, Cabinet approved the necessary legislative amendments to clarify that the CCYP is able to share information with the Ombudsman for the purpose of his child protection functions under Part 3A of the Ombudsman Act.*

*The other proposals for legislative change that you had sought were not endorsed by Cabinet.*

No reasons were provided to assist in understanding the basis of the decision and the amendments do not deal with my significant concerns about the independence of my office and the appropriate legislation in which this function should sit.

The Child Death Review Team has recently tabled its 2010 annual report to Parliament. My staff and I have consistently advised the Department of Premier and Cabinet that in order to ensure a smooth transition and to minimise disruption to data and research endeavours, transfer should occur immediately following tabling of the annual report.

The Commission for Children and Young People has advised me that it has suspended staff recruitment pending the transfer. My office has recruited staff and has restructured to accommodate the work of the Team.

The government's actions to resolve problems inherent in the legislation to transfer the Team have been at best inadequate. The government's failure to effectively address these issues raises questions about its commitment to a comprehensive and unified approach to the review of child deaths in NSW. My proposals are straight forward and practical. They go only to ensuring the effectiveness of the work and preserving the independence of the Ombudsman. It is difficult to think of any reasonable basis to justify the retention of the Child Death Review Team function, convened and administered by the Ombudsman, in legislation which relates to the Commission for Children and Young People.

Indeed the Child Death Review Team, two previous convenors and the Joint Parliamentary Committee on Children and Young People have supported the function being relocated into the *Community Services (Complaints, Reviews and Monitoring) Act 1993* legislation.

It is critical that these remaining issues are resolved promptly. It is not in the interests of my office, the Child Death Review Team, the Commission for Children and Young People or government to proceed to proclaim this legislation without dealing with its flaws.



Bruce Barbour  
**Ombudsman**

## Annexure 1

Following are the detailed proposals put forward by the Ombudsman to resolve anomalies and inefficiencies arising from provisions for the transfer of the Child Death Review Team (CDRT) to the Ombudsman within the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (Wood Act):

1. The legislation governing the CDRT (*Part 7A Commission for Children and Young People Act 1998*) be transferred from that Act to the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS-CRAMA).

The rationale for this change is that the Commission for Children and Young People (CCYP) will no longer have a role in CDRT, beyond the Commissioner being a member of the Team. As the Ombudsman will become Convenor of the Team and as the office of the Ombudsman will provide support to the team, legislation for the Team should link directly to this office. CS-CRAMA would be the appropriate legislation to contain provisions relating to the Team. CS-CRAMA currently provides for reviewable child deaths and given the similarities in the intent of both functions, the CDRT provisions could be incorporated as part 6A in this Act.

Transferring Part 7A of the Commission for Children and Young People Act will resolve a number of other issues that would otherwise require legislative amendment. In particular:

- Section 25 of the Commission for Children and Young People Act – as applied by 45S(1) of the Act – requires draft reports of the CCYP, including those relating to child death reviews, to be provided to the Minister for comment prior to tabling in Parliament. This would not be appropriate for the Ombudsman's office.
  - Should Part 7A remain in the Commission for Children and Young People Act, oversight of the Ombudsman's work in the exercise of CDRT functions would continue to sit with the Parliamentary Committee on Children and Young People. This would result in two Parliamentary committees overseeing the Ombudsman's work. The Ombudsman would be unable to report fully to either committee on issues such as child protection and child deaths, and therefore neither committee would achieve a holistic understanding and full scrutiny of the work and achievements of the office in these areas.
2. Linked to the above, and pursuant to s.12(2) CS-CRAMA, the Ombudsman's functions under that Act are carried out by the Community and Disability Services Commissioner. Staff supporting the CDRT would be situated within the Community Services Division, which is established under s.12(1) CS-CRAMA. In this context, it is essential that the Commissioner, who is also a Deputy Ombudsman, be a statutory member of the Team, in the same way the Wood Act has included the Commissioner for Children and Young People as a member.

Further amendments to provisions within part 7A of the Commission for Children and Young People Act are critical in order to preserve the independence of this office and/or to ensure administrative efficiency:

3. 45N(1)(d): Delete 'with the approval of the Minister'. This would enable the Team to undertake research without requiring the approval of the Minister.
4. Delete 45N(2)(a) and (b). This will enable the Team and the Ombudsman to appropriately manage research in light of the Ombudsman's role in reviewable child deaths.

5. 450(2): Replace 'determined by the Minister' with 'determined by the Convenor'. This will enable the Ombudsman to determine appropriate remuneration and allowances without requiring approval of the Minister.
6. 45S: This section is not relevant to the work of the CDRT once transferred to the Ombudsman's office.
7. 45X(1): Replace 'the Minister is to review' with 'the Parliamentary Joint Committee is to review'. Review of the validity of the objective of Part 7A would appropriately sit with the overseeing Committee.
8. Schedule 3.1[18] of the Wood Act, which will omit 45U(1)(c), not be proclaimed. The section allows for disclosure of records made by the Convenor for the purpose of: *'Providing information to the Ombudsman concerning the death of a child that is relevant to the exercise of any of the Ombudsman's functions.'* While the convenor of the CDRT is the Ombudsman, removing this section would result in uncertainty in relation to the exchange of information between the CDRT and the office of the Ombudsman. Ideally, the CDRT should be able to pass on records directly for the purpose of reviewable child deaths, and 45U(1)(c) currently provides for this.
9. Schedule 3.2[3] and [4] of the Wood Act include provision for changes to the reporting period for reviewable child deaths under CS-CRAMA. The schedule provides for financial year reporting. The reporting cycle of the CDRT is calendar year. Subsequently, the proposed amendments will create an anomaly and introduce significant administrative complexity in coordinating the work of the CDRT and reviewable child deaths. This may also impact on other offices, such as the Office of the Coroner. Any references to financial year reporting proposed for s.43 CS-CRAMA should be replaced with calendar year, to ensure alignment with the CDRT.



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