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The Hon. Justice Peter McClellan
Chair, Royal Commission into Institutional Responses to Child Sexual Abuse
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Issues paper 8: Experiences of police and prosecution responses

Dear Mr McClellan,

Thank you for the opportunity to provide a submission in response to the Royal Commission's *Issues Paper 8: Experiences of police and prosecution responses to institutional child sexual abuse*. I note that the Commission has invited feedback from those with professional experience of police and prosecution responses about:

- reporting institutional child sexual abuse to police
- how police responded to the report
- the police investigation process
- interacting with prosecutors, if charges were laid
- preparation for court, and
- the trial and any sentencing or appeal processes.

Our submission does not address questions 1-7 in the issues paper as these questions are directed at individuals with personal experience of child sexual abuse allegations.

Introduction

Our submission is informed by our detailed knowledge and experience of the systems in NSW for responding to child sexual abuse. It particularly draws on our experience in relation to keeping under scrutiny systems for preventing and responding to employment-related child protection as well as our auditing (between 2009 and 2012) of the implementation of the *NSW Interagency Plan to Tackle Child Sexual Assault* (Interagency Plan).

An important component of our audit of the implementation of the Interagency Plan was examining the operation of the Joint Investigation Response Team (JIRT), which typically responds to allegations of child sexual assault (and serious cases of child abuse and neglect)

in NSW. In addition to considering the effectiveness of the partnership overall, we particularly focused on the operation of the Child Abuse Squad – the policing arm of the JIRT.[1]

We made several observations and recommendations aimed at strengthening the resourcing and accountability of the JIRT and Child Abuse Squad. Our review included a detailed analysis of a number of individual child sex offence matters which proceeded to court, and we also examined several other aspects of the criminal justice system's response to child sexual abuse, including the adequacy of victim support and special provisions for vulnerable witnesses attending court. The findings and recommendations of our audit are therefore directly relevant to the questions posed by the Commission in Issues Paper 8.

We have detailed our employment-related child protection function in previous submissions to the Commission – most recently in Part 1 of our February 2015 statement of information provided to the Commission in relation to its public hearing about Knox Grammar School.[2] Briefly, Part 3A of the *Ombudsman Act* requires us to keep under scrutiny the systems that government and certain non-government agencies in NSW have for preventing reportable conduct[3] and handling reportable allegations and convictions involving their employees.

Our oversight of employment-related child protection places us in a unique position to contribute to identifying child protection risks through our direct access to policing and child protection databases combined with our own reportable conduct holdings. Our role also gives us insights into operational and systemic issues impacting on the capacity of police to respond effectively to child sexual abuse.

In this submission, we highlight the role we play in ensuring that criminal allegations of child abuse, and related critical 'intelligence', are promptly reported to Police and the strong response by Police in acting on identified concerns. We have also provided a number of case studies to illustrate the nature of our work in referring criminal allegations and other critical risk-related information to Police, and the positive outcomes which have resulted. **While de-identified, the case studies contain highly sensitive information and include matters that in some cases are still before the Courts** (see Annexure 1). **The case studies contained in Annexure 1 are provided to the Commission on a confidential basis and we request that they not be tabled publicly.**

[1] In response to recommendation 18.1 of the Special Commission of Inquiry into Child Protection Services, the *Community Services (Complaints, Reviews and Monitoring) Act 1993* was amended in November 2009 to require the NSW Ombudsman to audit the implementation of the *NSW Interagency Plan to Tackle Child Sexual Assault*. Our final audit report was tabled in Parliament in January 2013 and is available on our website.

[2] Submission to the Royal Commission on Case Study 23, hearing into Knox Grammar School, February 2015. See also our submission in response to Issues Paper 1, Working with Children Check, August 2013; and our submission in response to Issues Paper 4, Preventing sexual abuse of children in out-of-home care, January 2014.

[3] Section 25A of the Ombudsman Act defines a "reportable allegation" as an allegation of reportable conduct against a person or an allegation of misconduct that may involve reportable conduct. Section 25A of the Ombudsman 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.*[3]

In addition, we would be willing to provide the Commission with copies of briefings we have referred to the Police which illustrate the type of information and analysis we are able to provide as a result of our direct access to policing and child protection databases.
The strong working relationship which has been established between the NSW Police Force and our office is a key strength of the reportable conduct system in NSW. As we discuss later in this submission, enhancements to the Child Abuse Squad's resourcing, operational structure and accountability mechanisms over the last three years has significantly increased the Squad's capacity to respond to serious child abuse. (This is evidenced by the marked increase in the arrest rate for child sexual abuse matters in NSW over recent years.)

Observations in response to questions 8 and 9

Against the background of the discussion above, our responses to the questions 8 and 9 of the Royal Commission's Issues Paper are detailed below.

Q8. What are your observations of, and suggestions for improvements or reforms to, police processes for receiving reports of allegations, and investigating and responding to reports in relation to allegations of child sexual abuse in an institutional context?

Most attrition of child sexual assault matters through the criminal justice process occurs during the 'report to investigation' stage – that is, the period of time after a report has been made to police, and during the investigation stage, but prior to a suspect being charged.[4] It is important to have an understanding of operational challenges impacting on the investigation process as these challenges are likely to contribute to the rate of attrition.

As noted in the introduction to this submission, allegations of child sexual assault (and serious cases of child abuse and neglect) are typically handled in NSW by the JIRT, which aims to provide a collaborative, interagency response to reports of serious child abuse through the joint investigation of cases by the NSW Police Force (Police) and Community Services, with support from NSW Health. Formally established in 1997, the JIRT model was founded on the recognition that an effective response to serious child abuse requires the involvement of multiple agencies in order to address the safety requirements and therapeutic needs of the child, while the criminal investigation is conducted. The value of the JIRT model was recognised by the Special Commission of Inquiry into Child Protection Services in NSW in 2008, which supported its continuation.[5]

Our audit of the implementation of the Interagency Plan closely examined the operation of the JIRT and its police arm – the Child Abuse Squad – during 2011-2012. Our final audit report in December 2012 made several recommendations aimed at strengthening the capacity of both the CAS and the JIRT to receive, investigate and respond to reports of child sexual assault.

The operation of the Child Abuse Squad

Prior to our audit of the Interagency Plan, a comprehensive review of the JIRT model in 2006 had identified a range of problems impacting on the efficiency and effectiveness of the partnership, including:

[4] Our audit found that due to a lack of alignment between the way that data about child sexual assault matters is captured by local area commands and JIRTs, valuable data relating to the reasons for this attrition is not being consistently captured and analysed by the NSW Police Force, nor is it readily available to the Bureau of Crime Statistics and Research to utilise for public reporting purposes.
[5] *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, Volume 1, p.321.

- inconsistent application of the JIRT criteria
- delays in interviewing children
- an over-reliance on the need for a disclosure from the victim
- a lack of reliable and accessible data on JIRT processes and outcomes
- a lack of timely referral to forensic medical services and to other allied health services, such as counselling
- difficulties in engaging Aboriginal children, and
- the need for more integrated decision-making and input from partner agencies.

As a result of that review, a program of reforms was initiated and this was endorsed by Justice Wood in his report of the Special Commission of Inquiry into Child Protection Services. Our review of the JIRT identified that a number of positive developments had occurred since the 2006 review. However, we also found that a range of issues continued to adversely impact on the effectiveness of the JIRT program. The majority of the problems which we identified stemmed from chronic state-wide staffing shortages across the JIRT partnership and weaknesses in relation to accountability, data collection and case management systems in the monitoring of, and reporting on, JIRT outcomes. We also identified specific issues relating to the resourcing and productivity of the Child Abuse Squad (CAS) at that time.

Our audit identified a failure to match the significant increase in JIRT workload – an outcome largely attributable to the successful establishment of the JIRT Referral Unit (JRU) in 2008 – with an appropriate increase in resources. The JRU's role is to conduct joint assessments of all referrals to JIRT to ensure consistency of decision-making about acceptance and rejection – prior to the JRU's creation, reports were assessed by individual JIRT teams. Since 2005, our office had raised concerns with Community Services relating to inconsistent decision-making across the JIRTs, particularly in the context of initial assessment decisions.

As we noted in our final audit report, during the JRU's initial nine month trial period, 64.5% of all referrals (relating to both physical and sexual abuse) were accepted by JIRT compared to 56% before the trial. A review of the trial predicted that the 8.5% increase in the acceptance rate would continue to increase.

While the introduction of the JIRT Referral Unit (JRU) has been one of the most successful developments resulting from the 2006 review of the JIRT, it led to a much higher than anticipated increase in the number of cases accepted by the JIRT. Our examination of JRU data showed that between 2009 and 2011, the acceptance rate increased by 25% from the pre-JRU period. However, the resulting increase in workload has not been matched by an increase in resources.

In various ways, these resourcing problems have impacted on core practice issues which go to the heart of the JIRT partnership: for example, the ability of Police and Community Services JIRT staff to meet their commitment to jointly interview children and to conduct local planning and response briefings and debriefing meetings for individual cases.

Given that the accepted referral rate appeared to have stabilised at the time of our review, we recommended that it would be timely for the level of JIRT resourcing against current demand to be reviewed. We noted that this review would need to consider the current resources of the three partner agencies.

We highlighted that it would be counter-productive to examine resourcing without also examining productivity. In the case of the CAS, this fact was well illustrated by our examination of police workload and outcome data during our review, which highlighted significant performance variance across the JIRTs in areas such as child interview and arrest rates. After presenting our initial findings to the CAS, the then recently appointed CAS

Commander acknowledged the significant performance challenges the squad faced and decided to develop clear performance measures for individual squads as part of a suite of reforms she was implementing resulting from her review of the squad's overall operations.

In addition to these reforms, we recommended that Police should seek to enhance the monitoring systems of the individual JIRT teams; consider the sufficiency of the supervisory JIRT positions; develop strategies for making JIRT a more attractive operational policing unit; and consider the scope for local area commands carrying out increased work in relation to serious cases of child abuse.

Since that time, a range of positive initiatives to improve productivity and performance have been introduced, including:

- The allocation of four new Inspectors to support the Commander to implement a range of systems to address identified problems.
- An annual team development process to review the performance of individual squads and to promote best practice.
- Inspectors tasked with tracking the performance of the squads within their area of responsibility; increasing their mentoring activities with individual squads, and conducting more regular field visits for this purpose.
- The establishment of a Child Abuse Response Team to provide support to squads in relation to complex and protracted investigations, and a commitment by the State Crime Command to supply additional support when necessary.

At the time of concluding our audit in December 2012, we noted that there had been a significant increase in the use of pro-active investigative measures by the CAS (for example, search warrants and covert techniques). The most profound increase occurred during 2012. By the end of that year, the use of proactive investigative measures was four times higher than it was in 2009.

Notwithstanding these improvements, we found that the CAS would continue to experience significant resource challenges with an associated impact on performance. For this reason, we emphasised that, in addition to identifying further improvements in productivity, consideration also needed to be given to increasing the resources of Police to deal with these serious child abuse matters. In this regard, we noted the need to consider the adequacy of the allocation of supervisory CAS positions, as well as the potential for local area commands to play a greater role in dealing with serious child abuse cases in certain circumstances. We also cautioned that improvements to the productivity of the CAS would inevitably place a greater resource burden on its JIRT interagency partners. For this reason, in addition to our recommendations in relation to the review of the CAS, we recommended that a comprehensive review of the JIRT program be carried out.

The review of the CAS resulted in the allocation of an additional 30 staff in March 2013.[6] The impact of these additional resources has been significant. During 2014, the number of interviews conducted by the CAS was more than 50% higher than the number conducted in 2012,[7] and by 3 December 2014 the CAS had made 733 arrests during the calendar year, compared to 455 in 2012 – an increase of more than 60%.[8]

A review of FACS' JIRT resourcing – undertaken in response to our report – also led to an

[6] 27 of these positions were filled between May and December 2013 – the remaining three positions were filled in January, February and August 2014. (Information provided by the NSW Police Force, 20 January 2015.)

[7] This was despite a fall of around 1% in the number of cases managed by the CAS over the same time period. (Information provided by the NSW Police Force, 20 January 2015.)

[8] Information provided by the NSW Police Force, 20 January 2015.

extra 10 caseworker positions being allocated in 2014. Most recently, in March 2015 the NSW Government announced that a further 50 investigators and four specialist intelligence and support staff would be allocated to CAS.

While it is pleasing to see the outcomes achieved from the additional resourcing, it needs to be recognised that the further resourcing burdens on all JIRT partner agencies – which are inextricably linked with these impressive results – will need to be carefully assessed.

In addition to reviewing the resourcing and productivity of the JIRT, we recommended in our 2012 audit report that the JIRT partners should establish a solid framework (and related evidence base) for better ongoing monitoring of the performance of the key components of the JIRT model, with particular attention being given to:

- Enhancing the JIRT program's case management information system(s).
- Effectively utilising the CAS's state-wide workload analysis reports.
- Continuing to strengthen the role of the JIRT State-wide Management Group in relation to its audit role and its leadership, and evaluation of, cross-agency JIRT-related development initiatives.
- Enhancing the output/performance data currently reported to the respective heads of the partner agencies by the JIRT State-wide Management Group.

A significant initiative since our audit has been the development of a cross-agency database to improve data collection and performance monitoring across the JIRT partnership.

Reporting child abuse allegations to Police – critical issues

Police can only investigate allegations of criminal activity, including child sexual abuse, of which they have knowledge. As the Royal Commission is aware, my office has been drawing attention for some time to the systemic failure of agencies to appropriately report criminal allegations of child abuse to police. This failure, including a failure to report (and otherwise respond to) historical allegations of child sexual abuse, occurs in a range of contexts, including agencies' handling of reportable allegations as well as the receipt of risk of significant harm reports and case management by Community Services. The failure can have serious consequences for the capacity of police to fulfil their mandate to investigate child sexual assault and by extension, of the courts to prosecute offenders.

An important part of our reportable conduct oversight role involves working with Police, Community Services and other agencies to address a range of systemic issues identified through our employment-related child protection function as well as carrying out our responsibilities under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. In this section, we discuss a number of practice issues which are relevant to the Commission's interest in the 'processes for police to receiving reports of child sexual abuse'.

- **Our processes for identifying and referring criminal allegations to Police**

Our February 2015 statement of information to the Royal Commission detailed the increasingly proactive approach we take to advising and supporting agencies to report criminal allegations of reportable conduct to police, and provides examples of our own use of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* to ensure that critical intelligence about risks posed to children is made available to the Police.

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 holdings – this access often provides us with a 'helicopter' view of critical information which is not readily accessible to other agencies. Our office is often the only agency with access to all relevant information about a particular matter, and in these circumstances, we take an active role in ensuring information is shared with appropriate parties and appropriate action is taken. When new notifications are received, we check these databases and assess the adequacy of the response to any risk which we can identify from analysing the totality of the information we review. Where additional actions are required, we make telephone contact with the involved agency to explain our concerns and canvass potential options for strengthening the response.

We also 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. To mitigate risks to children, we also liaise closely with Community Services, the Children's Guardian and employers to ensure that critical child protection information is identified, appropriately shared and managed.

Notifications involving serious criminal allegations now make up a significant proportion of our work; we currently have 120 open matters concerning individuals who have been charged with criminal offences relating to children. The support which we provide to agencies 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. Our experience is that Police are very supportive of our approach and responsive to the information we provide. On a number of occasions our referrals have brought about or enhanced criminal investigations that have ultimately resulted in the preferment of criminal charges.

For example, in recent months, two of the matters where we provided formal briefings of information to Police have directly resulted in a total number of 12 child sexual abuse charges – including three charges of aggravated sexual assault – being laid against two offenders in relation to three alleged victims. In a third recent matter, 39 child sexual assault charges were laid against a single offender after we identified critical information as a result of conducting intelligence checks following receipt of a reportable conduct notification. We encouraged the reporting agency to refer the matter to Police, with whom we then liaised to facilitate a prompt response. This resulted in the police investigation which led to the charges being laid. The subject of allegation has indicated an intention to plead guilty.[9]

A number of sectors and agencies within our jurisdiction have spoken of our beneficial 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 and religious denominations have noted the practical support that 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).

[9] Annexure 1 includes case studies that illustrate our practice in this area as well as the associated positive outcomes achieved. As noted at the outset of this submission, we are also happy to provide the Commission with examples of some of our briefings to Police on request.

As a practical illustration of our strong relationship with Police, we have attached a copy of the Standard Operating Procedures that we developed, which essentially provide a guarantee of service in relation to the ongoing support and advice Police should provide to agencies in relation to child-related employment investigations which are also the subject of police attention (see Annexure 2).

Police also provided substantial support to our December 2014 forum for Aboriginal out-of-home care agencies and police. The forum brought Aboriginal OOHC agencies together with senior and local police from across the state. The forum was a success – with 160 participants coming together to build working relationships and gain a better understanding of each other's respective responsibilities in relation to protecting children from abuse, and to discuss practical ways of working together at a local level. The outcomes from the forum will be built into the monitoring and accountability framework for the NSW Police Force's *Aboriginal Strategic Direction*.

- **Reporting historical allegations to Police**

Since March 2010 we have raised concerns with Community Services about its failure to identify whether there may be current risks to any child or a 'class of children' when considering historical reports of child abuse made by victims who have since become adults. This is particularly critical in circumstances where the alleged offender is engaged in child related work or has direct contact with children in some other capacity.

As we noted in our April 2014 report to Parliament on the child protection system,[10] by 2013 Community Services had followed our advice and amended the Mandatory Reporter Guide (MRG) and Helpline Tool (used by Community Services staff in assessing whether reports meet the ROSH threshold) to provide adequate guidance about the appropriate handling historical reports of child abuse. The guidance includes a definition of 'class of children'.

- **Developing clear guidance for child protection workers to identify the type of criminal allegations that should be referred to Police**

As we observed in our 2014 report on the child protection system, since 2009 we have also been raising our concerns with Community Services about the failure by caseworkers to report allegations of criminal child abuse to police.

In November 2014, we were advised by FACS that an updated casework practice procedure had been developed to inform the referral of serious indictable matters to police. While this is a positive step, we have recently advised FACS that we have concerns about certain aspects of the procedure's guidance in relation to reporting matters to police. In particular, we do not believe the threshold for reporting a matter to police should be *knowledge* or *belief* that a 'serious indictable offence' has been committed. Our concern is that the term 'serious indictable offence' is unlikely to be well understood by FACS staff, and that the procedure currently provides incomplete guidance in this regard. In addition, there are serious child abuse allegations that fall short of alleging a serious indictable offence. Further, we do not believe it should be the role of FACS staff to determine the likelihood that an allegation of abuse is true prior to reporting it to police.

[10] NSW Ombudsman, *The NSW child protection system: Are things really improving?* April 2014.

At the time of writing, FACS was considering our most recent feedback. We will continue to work with FACS to ensure that clear and practical guidance is provided to caseworkers about when to report matters to police.

In March this year, FACS also advised us that pending a longer term IT solution, they have collaborated with the NSWPF to develop an interim process enabling FACS staff to notify serious indictable offences to police by sending a 'FACS Crime Report' to a designated email address within the Child Abuse Squad. Where reports of serious indictable offences are assessed as meeting the JIRT criteria, these are referred directly to the JIRT Referral Unit and a FACS Crime Report is not made. We will monitor the effectiveness of this initiative.

- **'Blind reporting' – reporting of historical allegations to Police by non-government organisations**

In our September 2013 submission to the Royal Commission in response to the *Towards Healing Issues Paper*, and in the systemic issues schedule which we provided to the Royal Commission in May 2013,[11] we outlined our concerns about agencies following a process of 'blind reporting' when reporting historical allegations to police.[12] Our systemic issues schedule also highlighted the potential significant consequences of a victim's details being withheld from police (or other agencies), in circumstances where the historical allegations identify a potential current risk of significant harm to a class of children.

Of relevance to this issue, we understand that, in August 2014, Police developed a protocol for non-government agencies to use when notifying them of historical allegations. The purpose of this protocol was to facilitate the systematic provision of information to police by agencies of reports of historical allegations of child sexual abuse, particularly in light of the significant increase in volume of such reports which it has received since the commencement of the Royal Commission.

It is positive that police are seeking to develop clear processes with agencies to ensure greater consistency in the way in which it receives reports, and to ensure that a more streamlined process is available to agencies to provide information about historical allegations.

We note however that while the intention of the protocol is to facilitate the provision of information from victims of historical abuse, certain aspects of the protocol do not align with our views on the issue of blind reporting. In particular, we are concerned that the protocol appears to permit agencies to follow a process of blind reporting, as it does not give sufficient guidance to agencies on what they should do in circumstances where a victim has made a disclosure of an alleged serious criminal offence, but has indicated that they do not want to make a report to police.

It is our view that the process of blind reporting of serious indictable offences is inconsistent with section 316 of the *Crimes Act 1900 (NSW).*[13]

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[11] *Systemic issues relevant to the handling of sexual abuse/sexual misconduct allegations and related cases*, NSW Ombudsman, May 2013

[12] Blind reporting refers to the reporting to police of the details of an alleged offence and offender, whilst withholding information about the identity of the alleged victim.

[13] S316(1) of the *Crimes Act 1900* states that: *If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.*

As the Commission would be aware, the Police Integrity Commission (PIC) has also recently examined a range of relevant issues as part of Operation Protea, its investigation into the Catholic Church Professional Standards Resource Group; and related agreements between the NSWPF and the Catholic Church about the handling of complaints of abuse committed by Catholic Church personnel or employees. In its final investigation report, released on 18 June 2015, the PIC states its view that "in general, blind reporting contravenes s316."[14] The PIC has indicated that it considers "...there is an urgent need for a reconsideration of blind reporting and of s316 of the Crimes Act, including whether it should be repealed or substantially amended."[15]

Members of the Sex Crimes Squad have indicated to us that they will consider the need to amend the protocol in the context of our concerns, as well as the findings from the PIC's investigation. In this regard, we note that the PIC has recommended that the Police Force should reconsider the practice of blind reporting.

Against this background, we look forward to the opportunity of having further discussions with Police about how they can best support agencies to meet all of their relevant obligations to report significant criminal child abuse allegations to police; whilst also ensuring that Police they have clear and sensitive processes for approaching victims in circumstances where they have indicated they did not want to make a report to police.

In relation to PIC's proposal for consideration of whether s316 of the Crimes Act should be repealed, we note that within this section there is scope for individuals to mount a defence of "reasonable excuse" for failing to report information which is material to the commission of a serious indictable offence. In addition, we note that there is a broad range of professions in which a failure to report information which is material to the commission of a serious indictable offence cannot lead to the laying of a charge unless this is approved by the Attorney General. Therefore, we believe that any consideration of whether there is a need to amend or repeal s316 should take into account the fact that there is considerable scope that already exists in the legislation for charges not to be brought against individuals for failing to report information which is material to the commission of serious indictable offences in appropriate circumstances. In this regard, it appears that the fundamental issue which needs to be considered relates to much more clearly determining in what circumstances it is not acceptable to fail[16] to report information which is material to the commission of serious indictable offences – including when these offences are committed against children – before reaching a conclusion about whether an amendment or repeal of s316 is required.

I note that this issue has some relevance to evidence which has been heard by the Commission in connection with Case Study 27. We would welcome discussing with the Commission issues pertaining to s316 – and related matters pertaining to blind reporting.

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[14] Police Integrity Commission, *Protea Report 2015*, pxi.

[15] Police Integrity Commission, *Protea Report 2015*, pxxv).

[16] We note the PIC's view that under section 316, *"there will not be a reasonable excuse for a failure to communicate some material information in a case, on the basis that the case is one of a large number of cases falling within the same broad class, which are to be dealt with similarly, regardless of the circumstances of the individual case. Nor would an apprehension that, if blind reporting were not permitted the flow of information to police might be reduced, amount to reasonable excuse for a general withholding of information about the complainant, regardless of the circumstances of the individual case."* (*PIC, Operation Protea 2015*, p189). In this regard, we note further that in creating a new offence under s327(2) of the *Crimes Act 1958* of failing to report to police a sexual offence committed by an adult against a child under the age of 16 years, Victoria has sought to define specific grounds(s327(3)) on which a person has a "reasonable excuse" for failing to comply with s327(2). Additionally, subsections 5 and 7 of s327 establish the grounds on which an individual does not contravene s327(2).

9. What are your observations of, and suggestions for improvements or reforms to, prosecution processes in relation to charges relating to child sexual abuse in an institutional context?

Given the small proportion of child sexual assault matters that proceed to court, and the impact of relevant court outcomes on the willingness of other victims to report their abuse, it is critical that the system in place for prosecuting these matters is as robust as possible. We examined the processes in NSW for prosecuting child sexual offences as part of our audit of the implementation of the *NSW Interagency Plan to Tackle Child Sexual Assault*.

The Office of the Director of Public Prosecutions (ODPP) is responsible for prosecuting all child sex offences in NSW courts. There is also a specialist Witness Assistance Service (WAS) within the ODPP, which provides a range of supports for victims and witnesses during the prosecution period. At the time of our audit, child sexual assault and sexual assault cases accounted for approximately one quarter of ODPP solicitors' caseloads, and for more than half of the referrals to the WAS. Given their critical role in the prosecution of sexual assault cases, on multiple occasions we met with senior ODPP and WAS staff, who provided us with valuable advice. We also had the benefit of consulting with the three Assistant Directors-General of the then Department of Attorney General and Justice. In addition, we conducted a detailed review of 27 cases[17] prosecuted by the ODPP involving 45 Aboriginal children and 30 defendants. We reviewed all of the information held by the ODPP relating to these cases, including the WAS files.

While there is a need for the criminal justice system to be responsive to the particular needs of Aboriginal people and children, our audit revealed that there are improvements required across the system more generally. As we observed in our final audit report, the nature of child sexual offences, including the fact that the prosecution may be dependent on a child victim as the only witness to the offence, and the delay which often occurs between the offence and its reporting to police, means that these offences are often inherently difficult to successfully prosecute. In addition, the prosecution process can be extremely traumatic for victims, whose evidence almost invariably forms the basis of the prosecution case.

The number of defendants who have had charges dismissed or withdrawn with no hearing provides an indicator of those matters which dropped out of the system during the prosecution stage. Data provided to us during our audit by the NSW Bureau of Crime Statistics and Research showed that of the 6,851 defendants in the NSW Children's, Local, District and Supreme Courts between 2007-2011 who had at least one sex offence in their matter, 1,281 (19%) had all charges dismissed without a hearing or trial. The proportion of defendants with this outcome was higher for defendants charged with sex offences against children (21%) than for defendants only charged with sex offences other than against a child (17%).[18]

In recent years, a number of measures have been put in place in NSW to support victims of child sexual abuse during the prosecution process, including the availability of remote witness facilities in more than 80 locations around the state; the implementation of court processes designed to better prioritise child sexual assault matters; the provision of additional, updated resources to help and support victims of crime; and an

[17] A 'case' may involve more than one child complainant and/or defendant.

[18] NSW Ombudsman, *Responding to child Sexual assault against Aboriginal children*, 2012. p137.

independent review of court support services. Notwithstanding these initiatives, our report outlined a number of areas where further investment or reform is required in NSW, including the need for:

- Further work to ensure that the reasons for the attrition of child sexual abuse matters from the criminal justice system are better understood, reported on, and where possible, addressed.
- Additional funding to expand the WAS to enable it to consistently provide appropriate specialist support to victims when required. We found that without both an enhancement to the service of some kind, and an increase in the security of the ongoing funding for the service, it will become increasingly difficult for the WAS to provide comprehensive support to vulnerable witnesses and victims, which will in turn have a significant adverse impact on the prosecution process.
- A review of the current case management processes for sexual offence cases heard in both the District and Local Courts in order to determine the extent to which improvements can be made to these processes to minimise delays and encourage earlier guilty pleas.
- Expansion of remote witness facilities and audio-visual links, to ensure that high quality facilities are available across the state to be used by victims and other witnesses. As well as the direct benefits to victims in not having to face the perpetrator, our consultations with defence lawyers highlighted the impact that the availability of alternative facilities for giving evidence have on the likelihood of a defendant entering an earlier guilty plea. We were told that it is not uncommon for a defendant to hold off entering a guilty plea based on the likelihood that the victim would be too afraid to give evidence in person at their hearing or trial.
- Legislative reform to enable an option for a child's entire evidence – including any cross-examination and re-examination – to be pre-recorded at a pre-trial hearing.
- The creation of a registered intermediary scheme to facilitate better communication between victims and the police or court. In a number of international jurisdictions, as well as in Western Australia, an appropriately skilled 'intermediary' can be accessed to assist a vulnerable witness in giving evidence.[19] The use of intermediaries not only has the capacity to make the investigation and court process less stressful for vulnerable witnesses, it also has the potential to improve the justice outcomes through enabling witnesses to give evidence who may not otherwise have been considered capable of doing so.
- Improved guidance about the communication standards expected between police and victims of child sexual assault and the obligations of JIRT agencies under the Charter of Victims Rights.
- Consideration of an automated system, similar to that which already exists in Western Australia, for referring victim information immediately upon

[19] In England and Wales, for example, a register of professionals including speech and language therapists, psychologists, and mental health professionals, exists to provide individuals who can assist both in relation to police interviews and the court process by helping a vulnerable witness to understand the questions that are being posed to them.

referral of cases by police to the ODPP – and, in the interim, a clear joint protocol and education strategy for staff from both agencies.

- Legislative reform to create a presumption in favour of joining trials for sexual assault where matters involve multiple victims.

Our report also highlighted the need to ensure that consideration of sentencing reform in this area, particularly in relation to minimum mandatory sentencing, takes into account the role that processes around charge negotiations often play in child sexual assault matters.

In order to obtain a conviction without requiring the involvement of the victim during a trial, prosecutors will often seek to have the defendant enter a guilty plea. While charge negotiations may result in the sentence received by the offender being reduced, this is often considered to be a better outcome for the victim than having to go through the traumatic process of a trial or hearing.

In this context, our final audit report noted that while the introduction of minimum mandatory sentences may result in an increase in the sentence severity for those offenders who are convicted, there is a very real risk that it could simultaneously result in a decrease in the number of offenders who are convicted, as fewer offenders may be willing to plead guilty. We emphasised that this risk should be weighed up in any consideration of sentencing reform in this area, particularly as the issue of low conviction rates was identified in our consultations as a further issue that undermined victims' satisfaction with the criminal justice system.

The NSW Government has indicated its support for the majority of our recommendations and we are awaiting advice on the status of the progress made in implementing them. We are however aware of a number of relevant developments that have occurred since our report was issued. These include the establishment of a new victims of crime scheme as a result of the passage of the *Victims Rights and Support Act 2013*[20], a range of improvements to the processes for referral by police of victim information to the ODPP, and an announcement by the NSW Government in March 2015 that it will increase the maximum penalty for sexual intercourse with a child under 10, and include additional child sexual assault offences in the standard non-parole period scheme.

The NSW Government has also announced that it will pilot a range of supports for child sexual assault victims in NSW, including allowing for the pre-recording of a child's cross-examination, and the introduction of 'Children's Champions' to support child witnesses through the trial process. The details of these initiatives are not yet known, but they appear to be positive steps.

However, minimising the re-traumatising effect of the prosecution process on victims and maximising the opportunity for the successful prosecution of child sex offenders requires a comprehensive response to all of the issues identified in our report. In this regard, I refer the Commission to the full text of *Chapter 12: Improving the criminal justice system process for victims* of our final audit report, including recommendations 42-55.

[20] Including a provision enabling the Victims Commissioner to accept claims from victims of child sexual assault for recognition payments, out of pocket expenses (up to $5000) and expenses for attending related criminal proceedings (up to $5000) more than 10 years after the victim turns 18 years old (previously, such claims could not be made more than 10 years after the victim reached adulthood).

I trust that our submission is of assistance to the Royal Commission. If you require further information, please do not hesitate to contact Ms Julianna Demetrius on 9286 0920.

Yours sincerely

Bruce Barbour
Ombudsman

Steve Kinmond
Deputy Ombudsman and Community and Disability Services Commissioner