



NEW SOUTH WALES

SOLICITOR GENERAL

SG 2013/19

**QUESTION OF MEANING OF TERM "SUBSTITUTE RESIDENTIAL CARE FOR CHILDREN" IN SECTION 25A(1) OF OMBUDSMAN ACT 1974**

I have been asked by the NSW Ombudsman to advise as to the meaning of the term "substitute residential care for children" in s 25A(1) of the Ombudsman Act 1974 ("the Act") in relation to a program conducted by [REDACTED]

**Background**

[REDACTED] conducts what are described as "5-day residential camp for young people whose lives have been impacted by the effects of trauma and abuse". These programs are conducted for young persons between the ages of 8 and 17 years – without the presence of the young person's parents or caregivers – with "supervision provided 24 hours a day by trained carers, assisted by a qualified and experienced child counsellor".

**Relevant legislative provisions**

Under s 25C(1) of the Act the head of a "designated government or non-government agency" must notify the Ombudsman of the following:

- (a) any reportable allegation, or reportable conviction, against an employee of the agency of which the head of the agency becomes aware,
- (b) whether or not the agency proposes to take any disciplinary or other action in relation to the employee and the reasons why it intends to take or not to take any such action,

- (c) any written submissions made to the head of the agency concerning any such allegation or conviction that the employee concerned wished to have considered in determining what (if any) disciplinary or other action should be taken in relation to the employee.

The definitions of "reportable allegation" and "reportable conviction" are premised under s 25A(1) on a notion of "reportable conduct" which in turn means:

- (a) any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the Crimes Act 1900)), or
- (b) any assault, ill-treatment or neglect of a child,
- (c) any behaviour that causes psychological harm to a child,

whether or not, in any case, with the consent of the child.

The same provision defines "child" as a person under the age of 18 years and a "designated non-government agency" as any of the following:

- (a) a non-government school within the meaning of the Education Act 1990,
- (b) a designated agency within the meaning of the Children and Young Persons (Care and Protection) Act 1998 (not being a department referred to in paragraph (a) of the definition of *designated government agency* in this subsection),
- (b1) an approved education and care service within the meaning of the Children (Education and Care Services) National Law (NSW) or the Children (Education and Care Services) Supplementary Provisions Act 2011,
- (c) an agency providing substitute residential care for children,
- (d) any other body prescribed by the regulations for the purposes of this definition.

The Ombudsman may monitor the progress of an investigation by a designated government or non-government agency concerning a reportable allegation or reportable conviction against an employee of an agency: s 25E(1). The head of the agency in question must provide the results of an investigation to the Ombudsman: s 25F(2). The Ombudsman may conduct his own investigation into a reportable allegation or reportable conviction against an employee of a designated government or non-government agency or into the handling of relevant agency's response to any such reportable allegation or reportable conviction: s 25G(1) and (2).

#### Ombudsman's practice in relation to substitute residential care for children

The Ombudsman has taken the view that the following services amount to "substitute residential care for children" for the purposes of the above provisions of the Act:

- out-of-home care (including home-based foster care) provided under the Children and Young Persons (Care and Protection) Act 1998.
- short term refuge accommodation for young persons (generally funded through the Supported Accommodation Assistance Program by Community Services NSW). Refuge services that provide accommodation to adult clients with accompanying children are also regarded as falling within the meaning of 'an agency providing substitute residential care for children'.
- medium (from six months) to longer term accommodation supporting the provision of treatment programs to young people. For example, Youth Off The Streets Limited provides medium to long term accommodation to young persons from 13 years up to 18 years of age to support their engagement in therapeutic behavioural programs; the young persons are referred to the program through the Department of Family and Community Services where parental responsibility has been allocated to the Minister, or who are in the care of the Director-General.
- agencies that provide out-of-home respite accommodation for children with disabilities (for example, Margaret House Respite Care Services operated by St Vincent de Paul Society and Sylvanvale Overnight Respite operated by Sylvanvale Disability Services).

General meaning of “substitute residential care” in the case of children

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

Not all forms of out of home care for children will be a substitute for “residential” care: whether a particular form of care falls within the statutory term will depend on the attributes of the care provided by the relevant agency. The ordinary meaning of the adjective “residential” would appear to involve some connection between the place or thing so described and the attributes of a residence. The Macquarie Dictionary defines “residential” as “1. having to do with residence or residences 2. adapted or used for residence: a residential district 3. (of a hotel, etc) catering for guests who stay permanently or for extended periods.” The Oxford English Dictionary relevantly defines the word as “1.a. Serving or used as a residence; in which one resides; providing accommodation in addition to other services; 2. Connected with, entailing, or relating to, residence or residences.”

The word “residence” refers to a specific place, the identification of which for a particular person at any given time will require consideration of a wide variety of circumstances potentially including the duration of the person’s connection with the place and, in the case of a child, the place of residence of the child’s caregivers; see LK v Director-General, Department of Community Services (2009) 237 CLR 582 at 592 [23], 594 [27], considering the expression “habitual residence”. Consistent with the above definitions of the word “residential”, however, I do not think that the duration of the care in question should be determinative when establishing whether an agency provides “substitute residential care for children” for the purposes of the Act. Whether or not an agency provides such care will depend on a comparison of the attributes of the care provided with the attributes of a residence. This meaning would also accord with the ostensible intention of the legislation, that is, the protection of children in circumstances where they may be outside a normal home environment.

**Question of [REDACTED] programs**

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

Please do not hesitate to contact me in relation to any of the matters raised in this advice.

**MG Sexton SC**

12 August 2013

**NSW Ombudsman (Mr Timothy Lowe)**

**Acting Director General**

**Assistant Director General, Legislation, Policy and Criminal Law Review**