



NEW SOUTH WALES

SOLICITOR GENERAL

SG 2014/1

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

I have been asked by the Crown Solicitor, who acts for the NSW Ombudsman and the Department of Premier and Cabinet, to advise as to the meaning of the term "substitute residential care for children" in the definition of "designated non-government agency" appearing in s 25A(1) of the Ombudsman Act 1974 ("the Act").

I have previously provided advice to the NSW Ombudsman on this subject (SG 2013/19) and am now asked to advise in relation to eight additional questions.

**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 term "substitute residential care" in paragraph (c) of the definition of "designated non-government agency" in s. 25A(1) should be construed according to its ordinary meaning. A document published by the Ombudsman entitled "Child protection in the workplace" (3<sup>rd</sup> ed, 2004) states (p 23) that "the Ombudsman ... defines ["substitute residential care"] as 'an agency providing accommodation arrangements for a child at a place other than the usual home of the child and by a person other than the parent or relative of the child'. ... It also includes agencies providing accommodation and support for children including accommodation in refuges, foster care, host family care, residential care or respite residential care."

### **Answers to questions posed in the observations of the Crown Solicitor**

I have set out below my answers to the eight specific questions set out in the observations provided by the Crown Solicitor.

#### **1. Ordinary or technical meaning of "substitute residential care" for children**

The term "substitute residential care" is not defined in the Act, and has not received judicial consideration. I have previously advised (SG 2013/19) that "on its face the notion of 'substitute residential care' in the case of children would appear to extend to any arrangement – even for a period of days and nights – where an organisation has the care and control of children of a kind that would otherwise be provided by parents or caregivers, were a child in his or her place of residence."

I am instructed that it may be that the words "substitute residential care" in s 25A(1) of the Act were intended to invoke specialised uses of the terms "substitute care" and "residential care" in the community services and child protection sector. My instructions state that "'substitute care' often refers to children in out-of-home care, and includes both foster care

and residential care. 'Residential care', in contrast with the family-based environment of foster care, often refers to children in the care of residential institutions." I am further instructed that at the time s 25A(1) was inserted into the Act (by the Ombudsman Amendment (Child Protection and Community Services) Bill (No 3) 1998), these two terms were in common use in the sectors community services and child protection sectors.

I am briefed with a number of documents prepared by government agencies since 1996 providing definitions of "residential care", namely, a Community Services Commission report entitled "Who cares? Protecting people in residential care" (September 1996, referring to a 1995 definition of "residential care" by the Australian Institute of Health and Welfare stating that "residential care includes various forms of residential substitute care"); a Department of Community Services research report entitled "Models of service delivery and interventions for children and young people with high needs" (September 2006); a NSW Children's Guardian information sheet entitled "Residential Care Staff Recruitment, Selection, Training and Supervision" (August 2010); and an Australian Institute of Health and Welfare Report "Child protection Australia – 2011-12" (2013). None of these appear to provide definitions of "substitute care", although the 1996 Community Services Commission report refers (p 23) to "most" children in substitute care being in foster and kinship care, before stating that these forms of care fall outside the inquiry (implying that they were not regarded as types of residential care). Nor do any of these documents use the term "substitute residential care".

The common element of these definitions of "residential care" appears to be that such care involves the provision of accommodation, food and other support services, in a particular location. In the context of children, these definitions refer to care being provided by persons other than the child's parents. There is some suggestion in these documents that "residential care" for children does not encompass foster care, although the 1995 Australian Institute of Health and Welfare definition of "residential care" (quoted in the 1996 Community Services Commission report) includes "family group homes" where children are cared for by "resident substitute parents", an arrangement which may be similar or identical to foster care.

In order for a court to draw the conclusion that "substitute residential care" in s 25A(1) has a specialised or technical meaning, it would need to be satisfied by way of evidence (generally expert evidence) that the term has such a meaning in a particular field of endeavour, before

determining whether the words used bear their ordinary or technical meaning in the relevant statutory context: see Markell v Wallaston (1906) 4 CLR 141 at 150 per O'Connor J. As a general matter, it may be more difficult to establish a technical meaning which limits the ordinary meaning of a term in a specialised way than one which extends the ordinary meaning of an expression, see DC Pearce and RS Geddes, Statutory Interpretation in Australia (7<sup>th</sup> ed, 2011) at [4.15].

The second reading speech and explanatory memorandum for the Bill which inserted s 25A into the Act are of little assistance in relation to this issue, effectively reciting the statutory language without explanation (the second reading speech refers to “residential substitute services”, but I do not think the reversal of the words “residential” and “substitute” throws significant light on the issue).

Part 3A of the Act is concerned with aspects of child protection, one of the areas of activity in relation to which “substitute residential care” is said to potentially have a technical meaning. This would strengthen an argument that its technical meaning should be followed, were such a meaning able to be established. The documents with which I have been briefed do not, in my view, indicate the existence of a technical meaning for the term “substitute residential care” which, as noted above, is not used in those documents. If “substitute care” has a specialised meaning in the child protection sector of the kind specified in my instructions (as noted above, the documents with which I am briefed do not define “substitute care”), there would seem to be substantial overlap between it and “residential care”, rendering less likely the establishment of a technical meaning for “substitute residential care”.

It is possible that the term “residential care” has a technical meaning, which could play a role in determining the meaning of an element of the compound phrase “substitute residential care for children”, even though the phrase, taken as a whole, does not have a technical meaning: see Collector of Customs v Agfa-Gavaert Ltd (1996) 186 CLR 389 at 400.

I am not presently persuaded that the documents with which I have been briefed demonstrate that at the time it was enacted, “residential care” had a technical meaning which was adopted in s 25A(1). All but one of those documents post-date the enactment of s 25A(1) and although it is possible to identify common elements in the definitions, they differ in several respects. The extrinsic materials concerning the insertion of s 25A do not appear to use the expression in a technical sense. Adoption of a technical meaning of “residential care” for the

purposes of construing s 25A(1) would probably tend to have a narrowing effect on the ordinary meaning of the composite phrase in which it is found, leading to a narrowing of the Ombudsman's jurisdiction, discussed further below.

It may be that expert evidence or a more extensive review of specialist child protection literature would reveal a common understanding of the term "residential care" in the child protection sector at the relevant time. However, even if I am incorrect and the words "residential care" do bear a technical meaning in s 25A(1), there may not be a fundamental difference between the common elements of the potential technical meaning identified above and the ordinary meaning of the term "residential care" discussed in my previous advice – with the exception of whether the term encompasses care provided by a child's parents. As the High Court pointed out in its joint judgment in Agfa-Gavaert (at 401):

Trade meaning and ordinary meaning do not necessarily stand at opposite extremities of the interpretive register. Professor Glanville Williams has described the distinction between primary (ordinary) meaning and secondary (trade) meaning as the distinction between, on the one hand, the 'most obvious or central' meaning of words, and on the other hand, 'a meaning that can be coaxed out of the words by argument'.

Turning to the meaning of the compound phrase "substitute residential care for children", if, contrary to the view expressed above, "residential care" bears a technical meaning of the type discussed and assuming "substitute" bears its ordinary meaning, the meaning of the phrase would be limited to the provision of an alternative to (or stand-in for) the "residential care" ordinarily given to a child by persons other than the child's parents. Alternatively, and consistent with the approach adopted in my previous advice, the adjectives "substitute" and "residential" could be read sequentially as descriptors of the type of care provided by a relevant agency. In other words, an agency would provide substitute residential care for children if it had the care and control of children of a "residential" kind that would otherwise be provided by a parent or other caregiver. I prefer the latter construction, which, as noted in my previous advice, accords with the ostensible intention of Pt 3A of the Act.

The former construction of the compound phrase is narrower, and would condition an agency's inclusion within the Ombudsman's child protection jurisdiction not only on the agency's own activities, but also on whether or not children to whom it provided services were ordinarily in "residential care", a circumstance which may well vary over time and

produce uncertainty as to the extent of the jurisdiction. It seems to me that this may be an absurd result, in the sense that it is impracticable or artificial: see Agfa-Gavaert at 401. It may also lead to a more significant overlap between paragraphs (b) and (c) of the definition of “designated non-government agency” in s 25A(1) than would the latter construction, giving paragraph (c) less work of its own to do (that would only follow, however, insofar as a “designated agency within the meaning of the Children and Young Persons (Care and Protection) Act 1998” (paragraph (b) of the definition) is a provider of residential care – in the technical sense discussed above – as an aspect of its accredited functions “arrang[ing] the provision of out-of-home care”: see the definition of “designated agency” in s 139(1) of the Children and Young Persons (Care and Protection) Act 1998).

The broader statutory context in which the relevant phrase appears is also relevant to its construction. It will be recalled that in Botany Council v Ombudsman (1995) 37 NSWLR 357 Kirby P (with whom Sheller and Powell JJA agreed) said (at 367-368), while referring in that case to the Ombudsman’s power of external review of a decision under the then Freedom of Information Act 1989 but also more generally:

Those powers [of external review], as the Ombudsman Act reveals, are, as they ought to be, extremely wide. They are not powers which the Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability ... Sadly, the experience of the past (and not only the past) has been of the occasional misuse and even oppressive use of administrative power. One modern remedy against such wrongs has been the creation by parliaments in all jurisdictions of Australia the office of Ombudsman. Whilst it may be expected that the Ombudsman will conform to the statute establishing his office, a large power is intended. The words of the Ombudsman Act should be an given ample meaning.

It seems to me that the latter, broader construction of “substitute residential care for children” set out above more closely accords with the Court of Appeal’s dictum.

I am specifically asked to advise as to whether the term relates only to children who do not usually reside with their parents. In accordance with my analysis above, I do not think the term is so limited.

I am also asked to advise as to whether the term should be interpreted in accordance with the Ombudsman's definition in "Child protection in the workplace" (3<sup>rd</sup> ed, 2004), set out above, or whether that interpretation should be qualified in any way. I do not think that all "accommodation arrangements" for a child at a place other than his or her usual home by a person other than a parent or relative of the child will constitute "substitute residential care for children". The mere provision of accommodation, especially of a temporary kind, or for a very short time, would not seem to me to be sufficiently comparable to the attributes of care provided to a child at his or her usual residence as to fall within the term. I think the Ombudsman's definition should be qualified by reference to the provision of accommodation of a residential kind together with food and other care and support of a type ordinarily provided to children in a home environment, by persons other than a child's parents or relatives.

## **2. Question of organisations providing residential camps**

I am asked to advise whether [redacted] are providing substitute residential care for children within the meaning of Pt 3A. I am instructed that these organisations "routinely provide camps of up to seven nights for children and young people under 18 who are not accompanied by their parent or usual caregiver".

It is not possible to advise definitively in relation to these organisations without more information as to the nature of the accommodation and care provided at the camps in question. I maintain the view expressed in my previous advice that duration by itself is not determinative of whether an agency is providing substitute residential care for children. For example, [redacted] camps may well feature accommodation in tents and bivouacs, in varying locations over the course of a seven night period, and I doubt that this type of accommodation could fairly be described as "residential", even if a child stays in such accommodation for seven nights.

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



care for children.

### **3. Organisations providing single overnight camps**

I am asked whether sporting organisations or social clubs providing single overnight sports or social camps for children are providing substitute residential care for children. While duration is not determinative in most circumstances, I do not think that provision of care to a child for a single night for sporting or social purposes is sufficiently comparable to the provision of care at a child's residence as to fall within the meaning of "substitute residential care". Accordingly, in my view the entities providing such camps are not providing substitute residential care to children for the purposes of the Act.

### **4. Religious organisations providing weekend or single overnight camps**

I am asked to advise whether religious organisations such as [REDACTED] which I am instructed "routinely provide camps or retreats of three or four nights duration for children and young people". I am also asked to advise in relation to single overnight or weekend camps provided by smaller religious organisations such as local churches.

Consistent with my answer to question three above, I do not think that local churches providing weekend or single overnight religious camps for children and young people are providing substitute residential care to children.

The position may be different in relation to the provision of longer camps by organisations such as [REDACTED] (which I am instructed runs over 60 camps each year). The nature of the accommodation and care provided at such camps will again be relevant to the analysis, such that it is once again impossible to advise definitively in the absence of further instructions, but it may well be that these organisations are providing substitute residential care to children, if their camps of three or four nights duration involve the use of permanent accommodation and the provision of food and other care services.

### **5. Does the fact that an organisation has run a camp in the past bring the involved organisation within the Ombudsman's Part 3A jurisdiction?**

I am asked whether the mere fact that an organisation has run a camp in the past will, of itself, bring the involved entity within the Ombudsman's Pt 3A jurisdiction. In particular, if

an organisation has provided camps in the past on an intermittent basis, and might provide camps in the future – without any commitment to do so – I am asked whether it could be said that it provides substitute residential care to children.

Paragraph (c) of the relevant definition in s 25A(1) refers to an agency “providing” substitute residential care. I do not see any basis for reading the word “providing”, couched in the present tense, as encompassing agencies which “have provided” care of the relevant type in the past. Accordingly, the mere fact that an organisation has run a camp in the past will not, in my view, bring it within the Ombudsman’s Pt 3A jurisdiction. It would be necessary for an agency to be providing substitute residential care to children as part of its current activities in order to fall within the definition. I do not think that an organisation which might provide camps in the future, but has no present commitment to do so, could be said to be providing substitute residential care to children.

**6. What care must be provided at a camp in order for it to be considered a provision of substitute residential care for the purposes of Part 3A?**

I am asked to advise as to the nature of the care that must be provided at a camp in order for substitute residential care to be provided for the purposes of Pt 3A. This question is posed in the context of faculties and societies within universities providing “orientation camps” for new students, some of whom are less than 18 years of age. By way of example, I am instructed that [REDACTED] three day, two night orientation camp includes meals, accommodation and activities. I understand that [REDACTED] is a student-run organisation.

It seems to me that, in order for care to be comparable to that provided to a child in his or her residence, it should involve supervision and support by adults for the purpose of supporting a child’s physical, emotional and psychological wellbeing.

In the case of student-run university orientation camps such as that organised by [REDACTED], while some students attending may be less than 18 years of age, the majority of students presumably will be adults, and the activities provided would logically be focused on introducing students to the adult environment of the [REDACTED] faculty. For example, it may well be that alcohol is provided to attendees (including in the context of organised activities), and that supervision is of a limited kind, provided by student leaders who may well be close in age to the new students attending. The presence of students below 18 years

of age is likely to be almost entirely incidental to the purposes and activities of student-run university orientation camps, and the level of supervision provided to attendees below the age of 18 may be indistinguishable from that provided to adult attendees. In my view, activities at such camps are not likely to be provided for the purpose of supporting the physical, emotional and psychological wellbeing of any children attending. While it is not possible to advise definitively in the absence of more detailed information about the care provided at [redacted] orientation camps, I do not think that the [redacted] falls within paragraph (c) of the definition of "designated non-government agency" by virtue of its orientation camp.

#### 7. Organisations running supervised overseas programs for school leavers

I am asked to advise as to whether organisations based in NSW providing supervised trips overseas for school leavers ("schoolies trips") fall within paragraph (c) of the definition of "designated non-government agency". I am instructed that an organisation named [redacted] provides trips for school leavers aged 16 to 19 years of age, arranging food, accommodation, security and a "crew member" in Fiji, Vanuatu, Indonesia, Thailand and Cambodia as part of a trip of at least seven days duration.

Taking the particular case of [redacted] first, I do not think that it provides substitute residential care to children, whether or not the Act has extraterritorial operation. As I understand it, the accommodation and meals for school leavers on such trips are in hotels, which may or may not be exclusively reserved for the use of those on trips arranged by [redacted]. It is questionable whether [redacted] itself provides these aspects of the trips, as opposed to serving as a travel agent facilitating the provision of services by other (presumably overseas) entities. I note that the "Terms and Conditions 2014" document on the [redacted] website states (p 4) that [redacted] acts as a tour operating company and is not a carriers [sic], hoteliers, or provider of other services such as sightseeing tours and adventure activities". In any event, I do not think that hotel accommodation will generally be comparable to the provision of care at a child's residence. While "crew members" may be employees or contractors of [redacted] a review of the "Information for Parents" section on the [redacted] website indicates that the role of "crew members" is limited to facilitating transfers from airports to resorts and being on call in case of emergency. In accordance with my answer to question six above, I do not think that such a limited provision of care and supervision is sufficient for the purposes of

paragraph (c) of the definition of "designated non-government agency" in s 25A(1) of the Act.

As to the more general question of whether supervised resort programs for school leavers taking place outside NSW involve the provision of substitute residential care for children, it may be that some of the factors considered above in relation to [REDACTED] would be applicable, such that organisations arranging such trips may not be providing substitute residential care to children.

If the nature of the accommodation, services and care provided was such as to otherwise fall within paragraph (c) of the definition of "designated non-government agency", a question would arise as to the operation of s 12 of the Interpretation Act 1987 on that paragraph. Section 12(1)(b) of the Interpretation Act provides that, in any Act, "a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales". The phrase "in and of" New South Wales has been said to "import[] both situation and a close identification of the matter or thing with New South Wales": Wanganui-Rangitekei Electric Power Board v Australian Mutual Provident Society (1934) 50 CLR 581 at 607 per McTiernan J. As a general matter of statutory interpretation, legislation is presumed not to have extraterritorial operation, although this is of course subject to contrary legislative intention.

Applying s 12 of the Interpretation Act, on its face the phrase "substitute residential care for children" constitutes a "matter or thing", with the result that it must be provided within New South Wales in order for its provision to be caught by paragraph (c) of the definition of "designated non-government agency", even if the agency providing it can be shown to be sufficiently closely identified with New South Wales. On the other hand, the purpose of s 25A(1) of the Act is, inter alia, to define "designated non-government agency", and the remainder of the paragraphs of the relevant definition would seem to embrace agencies wherever their activities are conducted (for example, a non-government school would remain a "designated non-government agency" for the purpose of the Act, whether or not its activities included taking students on educational trips overseas). While the matter is not free from doubt, it is not clear to me that the statutory context of paragraph (c) of the definition in question is sufficient to displace the presumption against extraterritorial operation, particularly where paragraph (c) is the only part of the relevant definition fastening on the activities of an agency, rather than its statutory designation. Despite the protective purpose of

Pt 3A and the broad construction which may be accorded to the Act in view of dicta in Botany Council v Ombudsman, it is also not evident that the operation of the Act would be rendered ineffective if the Ombudsman's Pt 3A jurisdiction was not extended in this way.

#### 8. Question of identification of organisations to be treated as care providers

I am asked to advise as to any legislative or other mechanism that could provide clarity in connection with the question – assuming the existence of substitute residential care - of which organisation or entity should be regarded as the provider of that substitute residential care, particularly where a camp/retreat is organised by a local church or parish rather than a distinct legal entity. In particular, I am instructed that there is a concern that agencies should not be able to avoid their responsibilities to the Ombudsman under Pt 3A by creating, for example, a separate legal entity outside NSW to provide residential camps with a view to circumventing the Ombudsman's jurisdiction.

While this question raises policy issues as to how best to maximise compliance with Pt 3A, as well as matters more appropriately addressed by Parliamentary Counsel, it seems to me that a statutory deeming provision of some kind may assist. It may be that, for example, the body employing or engaging the relevant caregivers could be deemed to be providing the substitute residential care for children. Alternatively, liability might be attached to the individual exercising overall administrative control over the provision of substitute residential care. In the case of some organisations there may be no distinct legal entity at any level of their operation. Similar issues may arise in other contexts in which religious organisations without distinct legal personality conduct activities requiring registration or licensing, and it may be that assistance could be derived from consideration of the operation of those schemes by New South Wales government agencies.

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

**MG Sexton SC**

7 February 2014

**Director General**

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

**Crown Solicitor (Ms Emily Howes)**