

**Submission  
No 122**

## **INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES**

**Organisation:** Ombudsman New South Wales

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General Purpose Standing Committee No. 2  
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Dear Ms Foley

**NSW Ombudsman submission on the Legislative Council inquiry into elder abuse in NSW**

Thank you for the opportunity to provide information to the Legislative Council General Purpose Standing Committee No 2 to inform its inquiry into elder abuse in NSW.

We have focused on providing key information to the Committee about work our office is currently undertaking in relation to the abuse and neglect of people with disability that is directly relevant to the issues being examined in this inquiry, including:

- mandatory reporting
- client-to-client (or peer-to-peer) abuse
- current work to improve the prevention of, and effective response to, the abuse and neglect of vulnerable communities, and
- interagency safeguarding mechanisms.

To assist the Committee, we have attached and provided links to relevant documents, including more detailed information relating to the operation of our mandatory reporting scheme; and guidance we have developed to improve outcomes for people with disability in relation to matters of abuse and neglect.

We would be pleased to provide additional information to the Committee if required, and to meet with Committee representatives to discuss our submission and our current work, if needed.

If you have any questions, please contact Kathryn McKenzie, Director Disability, on 9286 or email

Yours sincerely

Professor John McMillan  
**Acting Ombudsman**

31 March 2016

Steve Kinmond  
**Community and Disability Services Commissioner**  
**Deputy Ombudsman**

31 March 2016

## Our role in relation to services and supports for people with disability

Under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, the responsibilities of our office include a range of key functions targeted at improving the delivery of services to people with disability in NSW, including:

- receiving and resolving complaints about community services, and assisting people with disability to make complaints
- reviewing the patterns and causes of complaints about community services, and making recommendations to improve how services handle and resolve complaints
- monitoring and reviewing the delivery of community services, and making recommendations for improvement
- inquiring into matters affecting people with disability and community services, and reviewing the situation of people with disability in residential care
- reviewing the causes and patterns of the deaths of people with disability in residential care, and making recommendations to reduce preventable deaths, and
- coordinating the Official Community Visitor scheme.

Since 3 December 2014, NSW has had a scheme for the mandatory reporting of allegations relating to the abuse and neglect of people with disability who live in<sup>1</sup> supported group accommodation<sup>2</sup> (under Part 3C of the *Ombudsman Act 1974*) – known as the Disability Reportable Incidents scheme.

All of our functions apply to the National Disability Insurance Scheme (NDIS) sites in NSW.

### Mandatory reporting

In our view, a reporting and independent oversight system is an important and necessary component of a comprehensive framework for preventing, and effectively responding to, abuse, neglect and exploitation of more vulnerable members of the community, including some older people and some people with disability – and is fundamental to enabling a genuinely person-centred approach to supports.

Part 3C of the *Ombudsman Act* requires and enables the Ombudsman to:

- **receive and assess notifications** concerning reportable allegations or convictions

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<sup>1</sup> While the scope of the scheme is focused on people with disability living in supported group accommodation, the incident does not necessarily need to have occurred in the accommodation itself. For example, the scheme includes reportable incidents that occur in day programs providing support to people who live in supported group accommodation.

<sup>2</sup> Section 22(1) of the *Disability Inclusion Act* defines supported group accommodation as: ‘premises in which:

- (a) a person with disability is living in a shared living arrangement (whether short-term or permanently) with at least one other person with disability, other than an arrangement in which one or more of the persons with disability is living with a guardian of the person or a member of the person’s family who is responsible for the care of the person, and
- (b) support is provided on-site:
  - (i) for a fee, or
  - (ii) whether or not for a fee if the support is provided as respite care.’

Under section 9(1) of the *Disability Inclusion Regulation 2014*, premises are prescribed as ‘supported group accommodation’ to the extent that the premises are premises in which on-site support (whether or not as respite care) is provided by:

- (a) the Secretary under s25 of the Act, or
- (b) an eligible entity provided with financial assistance by the Secretary under s29(1) of the Act.

- **scrutinise agency systems** for preventing reportable incidents, and for handling and responding to allegations of reportable incidents
- **monitor and oversight** agency investigations of reportable incidents
- **respond to complaints** about inappropriate handling of any reportable allegation or conviction
- **conduct direct investigations** concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable incident or conviction
- **conduct audits and education and training** activities to improve the understanding of, and responses to, reportable incidents, and
- **report on trends and issues** in connection with reportable incident matters.

Within 30 days of becoming aware of a reportable allegation or reportable conviction, the Secretary of Family and Community Services (FACS), or head of a funded provider, must give the Ombudsman notice of the allegation and/or conviction. Under Part 3C, a reportable incident involves any of the following:

- (a) an incident involving any of the following in connection with **an employee of FACS or a funded provider and a person with disability** living in supported group accommodation:
  - (i) **any sexual offence** committed against, with, or in the presence of, the person with disability
  - (ii) **sexual misconduct** committed against, with, or in the presence of, the person with disability, including grooming of the person for sexual activity
  - (iii) **an assault** of the person with disability, not including the use of physical force that, in all the circumstances, is trivial or negligible (but only if the matter is to be investigated under workplace employment procedures)
  - (iv) **an offence under Part 4AA of the NSW Crimes Act 1900<sup>3</sup>** committed against the person with disability
  - (v) **ill-treatment or neglect** of the person with disability
- (b) an incident involving an **assault of a person with disability living in supported group accommodation by another person with disability** living in the same supported group accommodation that:
  - (i) is a **sexual offence**
  - (ii) causes **serious injury**, including, for example, a fracture, burns, deep cuts, extensive bruising or concussion
  - (iii) involves the **use of a weapon**, or
  - (iv) is part of a **pattern of abuse** of the person with disability by the other person
- (c) an incident occurring in supported group accommodation and involving a **contravention of an apprehended violence order (AVO)** made for the protection of a person with disability
- (d) an incident involving an **unexplained serious injury** to a person with disability living in supported group accommodation.

Further details about the disability reportable incidents scheme, data from the scheme, and information about current areas of focus for sector improvement are provided in the attached documents, including:

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<sup>3</sup> Section 4AA of the Crimes Act includes fraud and other similar offences. It includes where a person, by any deception, dishonestly obtains property belonging to another or obtains a financial advantage or causes any financial disadvantage.

- A. Submission to the Senate Community Affairs References Committee's Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings
- B. Presentation briefing to the Senate Community Affairs References Committee on the Disability Reportable Incidents scheme
- C. Transcript of evidence provided by the Deputy Ombudsman and Public Guardian at the Senate Community Affairs References Committee hearing 26 August 2015
- D. Data on the Disability Reportable Incidents scheme as at 22 March 2016
- E. Draft Resource Guide on the initial and early response to abuse or neglect in disability services
- F. Draft Joint Protocol to reduce the contact of people with disability in supported accommodation with the criminal justice system

Further information about our work in relation to the disability reportable incidents scheme, and regarding people with disability more broadly, can also be found in our Disability e-News Update newsletters, available on our website.

### **The nature of our oversight of serious incidents**

In relation to mandatory reporting schemes, it is important to fully appreciate what is required to meaningfully and effectively respond to serious incidents and to facilitate appropriate action. Reporting is not sufficient on its own, and there is no place for passive oversight. Our extensive work in relation to employment-related child protection (the 'reportable conduct scheme'),<sup>4</sup> and more recent activity in relation to disability reportable incidents, demonstrates the importance of a hands-on, comprehensive, and proactive approach to overlooking, and responding to, reportable allegations and incidents. In this regard, we encourage agencies to notify us at the earliest possible opportunity so that we can play an early role in guiding them through their initial response.

In addition, agencies are expected to respond to allegations by conducting an investigation, and undertaking any risk management or other action that may be required. Upon receipt of a notification, the role we play varies depending on the circumstances. We may actively monitor the progress of the investigation, in which case we may require the agency to provide us with relevant documents and information about the investigation. We also have the power to observe interviews conducted by or on behalf of an agency, and confer with those involved in conducting the investigation. At the end of their investigation, the involved agency must provide us with a range of information; such as the report and advice on any action taken as a result of the investigation. We also have the power to directly investigate any reportable allegation, or to directly investigate an agency's handling of the reportable allegation/incident.

In relation to our child protection reportable conduct oversight work, many of the agencies we oversight have, over time, increased their competency in handling reportable allegations. As a result, we have entered into over 20 'class or kind' determinations with various agencies, which exempt these agencies from having to notify us of less serious forms of alleged reportable conduct. This reduced the number of notifications by over 50%. As the competency of disability agencies to deal with disability reportable incidents improves, we anticipate that we will also be in a position to exempt from notification to our office significant numbers of disability incidents.

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<sup>4</sup> The reportable conduct scheme is outlined in Part 3A of the Ombudsman Act.

It is largely due to these class or kind determinations that notifications involving serious criminal allegations now make up a significant proportion of our child protection work; for example, we currently have 120 open matters concerning individuals who have been charged with criminal offences relating to children. The support we provide to both disability and child and family agencies includes our most experienced investigators regularly liaising with senior Police from local area commands, specialist squads and senior Police executives. In addition, we routinely refer detailed briefings to the Police, which often results in the commencement and/or enhancement of police investigations and the preferment of criminal charges. To mitigate risks, we also work closely with FACS, employers and other stakeholders to ensure that critical risk related information is identified, appropriately shared, and managed.

Our office is in a unique position to contribute to identifying risks through our direct access to the policing and child protection databases combined with our own reportable conduct/incident holdings – this access often provides us with a ‘helicopter’ view of critical information that 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 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.

A number of sectors and agencies within our jurisdiction have spoken of our beneficial role in facilitating the provision of information to police, FACS and other agencies, and have regularly sought advice and support from our office in liaising with these agencies on their behalf. At our forum on 26 February 2016 regarding the reportable conduct scheme, the Police Commissioner spoke very highly of the role we play in assisting police in identifying and obtaining evidence relating to the commission of criminal offences by those who work in child related employment. As a practical illustration of our strong relationship with the Police, our submission to the Senate Inquiry includes a copy of Standard Operating Procedures that we have developed with the Police, 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. It is our aim to develop a similar set of procedures with the Police in connection with matters arising under our reportable disability incidents function.

### **Client to client (or peer to peer) abuse**

One of the important and unique elements of the Disability Reportable Incidents scheme in NSW is the inclusion of incidents and allegations of client to client abuse. In seeking the inclusion of client to client matters, we were conscious of the violence that tends to occur in supported group accommodation environments, and the need for independent oversight of agencies’ responses to such incidents and their actions to prevent recurrence.

Reporting, and independent oversight of the handling of, client to client (or peer to peer) matters is important for a range of reasons, including enabling:

- accurate analysis of the prevalence and cause of such incidents
- action to be taken to provide appropriate support to both clients, and

- steps to be taken to prevent such incidents from occurring and recurring.

We agree with the evidence to the Committee by the NSW Nurses and Midwives Association on 22 February 2016 that: a) it is inappropriate to criminalise people who are not culpable for their actions due to cognitive impairment, and b) there must be reporting of such matters in order to ensure that effective action is taken to address the underlying issues. It is important to recognise that, in the Disability Reportable Incidents scheme, different approaches are generally taken with client to client matters as distinct from employee to client matters.

In the first instance, the threshold for notification of client to client incidents to the NSW Ombudsman is much higher than it is for employee to client – for physical assaults, they must result in *serious* injury, involve the use of a weapon, or be part of a pattern of abuse against the alleged victim. Secondly, while the response to allegations of employee to client abuse focuses on reporting to the Police and possible disciplinary action, we stress the need for the main focus in responding to client to client abuse to be on managing and reducing risks – including identifying the cause of the abuse, and the action that needs to be taken (and the support that needs to be provided) to prevent recurrence. Details of the work we are undertaking to improve the actions of disability services to reduce and effectively respond to client to client abuse is provided below.

### **Current work of the Ombudsman**

Various submissions and evidence to the Committee have appropriately noted that it is critical that any mandatory reporting of abuse and neglect leads to tangible improvements – including better outcomes for alleged victims; and greater prevention of, and improved response to, serious incidents. We strongly agree, and we are undertaking a range of activities which are aimed at improving outcomes and access to justice for people with disability. (This work is leveraging off our oversight of the Disability Reportable Incidents scheme, and the exercise of our broader legislative functions in relation to people with disability and the community service sector).

Details of many aspects of this work are provided in our submission to the Federal Senate Inquiry (see pp10-15) and the related briefing in which we presented details regarding our:

- establishment of a Best Practice Working Group
- delivery of training to disability services on handling and responding to serious incidents
- work with the NSW Police Force to improve the response to serious incidents involving people with disability, and
- enhanced data collection, analysis and reporting.

In addition to the information in our submission to the Senate Inquiry, below is brief information on key aspects of our current work which are relevant to the topics being considered by the Committee.

### ***Guidance on preventing, and effectively responding to, abuse and neglect of people with disability***

Following extensive consultation with representatives from disability and justice agencies in NSW and Victoria, we have developed a *Resource guide on the initial and early response to abuse or neglect in disability services*. The document provides clear guidance to disability services on the early action which they need to take in response to a serious incident; and the different approaches required to respond to allegations of employee to client abuse as distinct from allegations of client to client abuse.

To maximise the ability of direct care staff to access and quickly understand the information, we have developed companion documents of a plain-English 'Quick Guide', and a one-page flow chart. The draft document and related resources are attached for the Committee's reference, and will be finalised and released this financial year. The information will be accompanied by a Team Meeting training pack for managers to use to introduce and reinforce key messages with direct care staff; together with a range of more intensive training courses provided by our office.

### ***Protocol to reduce the contact of people with disability with the criminal justice system***

We have drafted a *Joint Protocol to reduce the contact of people with disability in supported accommodation with the criminal justice system*, supported by separate procedures for disability services and police. Among other things, the aims of the protocol are to reduce the frequency of police involvement in responding to behaviour that would be better managed solely within the disability service, and to improve the relationships and communication between local police and disability services.

We are in the process of consulting with key stakeholders on the draft protocol, which includes a commitment to form a Statewide Steering Committee to both oversee implementation of the protocol and respond to any systemic issues associated with its implementation. Our intention is to release the joint protocol at the same time as the Resource Guide, noting that they provide complementary advice on responding to client to client abuse. A copy of the draft protocol is attached for the Committee's reference.

### ***Work with NSW Police to improve training on interviewing vulnerable people***

We are currently working with NSW Police to include training in its Detective Education Program on interviewing vulnerable people – particularly people with cognitive impairment. The main role of 'Registered Intermediaries' is to assist two-way communication between children or vulnerable adults and professionals involved at the investigation and trial stages of a case (including police officers, lawyers, judges and magistrates).

On a related note, the South Australian Parliament introduced changes to its *Evidence Act 1929* in August 2015, which includes general entitlement for people with complex communication needs to a communication assistant; provision for the evidence of vulnerable witnesses to be taken in informal surroundings; and provision of alternative measures for their evidence to be presented to court.

### ***Rights project for people with disability***

Our office has been engaged by FACS to deliver a project that promotes the rights of people with disability in the lead-up to the full transition of the NDIS. A key focus of the project is on ensuring that appropriate support is provided to people with disability to assist them to be able to identify when things are not right and where they can turn for help – including making it easier for people with disability to identify and report abuse and neglect.

As part of the project, we have established a Joint Advisory Committee with three related FACS-funded projects that are also focused on promoting the rights of people with disability in NSW, including a supported decision making project run by the Public Guardian and NSW Trustee and Guardian; a capacity development project to support planning for the NDIS run by NSW Council for Intellectual Disability and My Choice Matters; and a Disability Justice project run by ACWA, the Intellectual Disability Rights Service, and Life Without Barriers.



### ***Arrangements for responding to concerns about abuse and neglect of people with disability in the community***

Our office is increasingly contacted by people raising concerns about abuse and/or neglect of individuals with disability living in community settings (such as their family home). In response to existing gaps in the coordination and response to these matters, we are undertaking the following action.

#### ***Work with the National Disability Abuse and Neglect Hotline***

Since earlier this year, we have had an agreement with the National Disability Abuse and Neglect Hotline that they will make 'warm referrals' to our office of matters involving allegations or concerns about abuse or neglect of people with disability in community settings (following provision of consent by the caller). In response to these matters, we typically undertake inquiries, check available intelligence, and identify further actions that may be required to resolve the concerns or to establish whether the person requires protection and/or supports.

#### ***Work with the Public Guardian***

In some cases, we identify that further investigations are required to establish whether the person with disability is in need of guardianship or other protection/support. In such cases, we have an agreement with the Public Guardian to refer relevant information for his consideration and submission of a guardianship application where appropriate. We note that guardianship legislation in NSW does not currently allow the Public Guardian to automatically investigate the care and circumstances of individuals with disability (or older people) who are reported to be at risk – rather, he has to lodge a guardianship application and seek to have NCAT make a short-term order to enable him to undertake such investigations, including consultation with the person reported to be at risk.

#### ***Forum on abuse and neglect of people with disability***

In the second half of 2016, our office will hold a forum on abuse and neglect of people with disability, with a focus on three areas:

- a) abuse and neglect in disability service settings
- b) abuse and neglect in other service settings (including universal services), and
- c) abuse and neglect in community settings.

We have had positive preliminary discussions with the Disability Council of NSW and the NSW Police Force about both agencies co-sponsoring the forum with us.

In our view, there are valuable opportunities to improve systems and practice in relation to abuse and neglect of people with cognitive impairment across a range of settings, including people with disability and older people in residential and other environments. In addition to the Committee's inquiry (and among other things), recent and current activity includes:

- Development of the National Disability Insurance Scheme Quality and Safeguarding framework
- Findings and recommendations from the Senate inquiry into violence, abuse and neglect against people with disability in institutional and residential settings
- Findings and recommendations from the Victorian Ombudsman investigation into disability abuse reporting
- Findings and recommendations from the Australian Law Reform Commission inquiry into equality, capacity and disability in Commonwealth laws
- NSW Law Reform Commission review of the *Guardianship Act 1987*

We are keen to work with key parties in NSW and nationally to improve safeguards for vulnerable communities, including people with disability and older people. It is important that the opportunities afforded by inquiries, reviews, and other relevant work are maximised to drive a coordinated approach to addressing the issues, with a view to national consistency wherever possible.