

**INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL
CARE OFFENCES**

Organisation: NSW Ombudsman

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Legislative Council Standing Committee on Law and Justice
Parliament of NSW
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Dear Committee

Inquiry into the adequacy and scope of special care offences

The NSW Ombudsman welcomes the opportunity to contribute to this inquiry into the adequacy and scope of special care relationships recognised in the special care offence provisions contained in section 73 of the *Crimes Act 1900*.

As you are aware, the NSW Ombudsman has overseen the handling of workplace child abuse allegations¹ in relation to the employees and certain volunteers of thousands of government and non-government agencies in NSW for the past 19 years. Up until recently, NSW was the only jurisdiction in the country with a reportable conduct scheme. The Royal Commission has recommended that all states and territories implement reportable conduct schemes modelled on the NSW scheme, with Victoria and the ACT establishing schemes in 2017.

As we discuss in sections 2 to 5 of this submission, the Ombudsman's office considers that there is merit in the Crimes Act being amended to reflect some of the relationships to which the Committee's terms of reference are directed. Our observations in this submission are confined to those areas where we believe we have useful insights to provide to the Committee that are directly informed by our oversight role.

1. The Ombudsman's Part 3A functions

Under our Part 3A jurisdiction, there are three types of agencies that must notify the Ombudsman of reportable allegations or convictions against employees: designated government agencies,² all other public authorities, and designated non-government agencies (such as schools, child care centres, out of school hours services and agencies providing substitute residential care (for example, residential out-of-home care (OOHC) services and youth refuges)).³

All agencies in the Ombudsman's reportable conduct jurisdiction must notify the Ombudsman of reportable allegations and reportable convictions against employees that arise in the course of an employee's work. Designated agencies, whether government or non-government, must also report allegations or convictions against employees that arise outside the workplace.

¹ In the context of the reportable conduct scheme, a child is defined as a person under 18 years, *Ombudsman Act 1974*, s 25A.

² *Ombudsman Act 1975*, s 25A(1).

³ *Ombudsman Act 1975*, s 25A(1).

Employees are defined broadly in the Act to include any employee of the agency, any individual engaged by the agency to provide services to children (such as contractors, students on placement, instructors of religion, foster carers and the adult household members of authorised carers) and volunteers.

We perform the following functions under our reportable conduct jurisdiction:

- receive notifications from government and certain non-government agencies of reportable allegations and convictions against employees in child-related employment
- scrutinise the systems these agencies have in place for preventing and responding to reportable allegations (including allegations which are exempt from notification) against employees
- monitor agency investigations of reportable allegations against employees or, in some cases, conduct those investigations, and
- investigate a complaint about an agency's handling of a reportable allegation or conviction against an employee.

Section 25A of the *Ombudsman Act 1974* defines a 'reportable allegation' as an allegation of reportable conduct against a person, or an allegation of misconduct that may involve reportable conduct. A reportable conviction means a conviction of an offence involving 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 an offence involving child abuse material), or
- b) any assault, ill-treatment or neglect of a child, or
- c) any behaviour that causes psychological harm to a child,³ whether or not, in any case, with the consent of the child.

The term 'sexual offence' encompasses all criminal offences involving a sexual element that are 'committed against, with or in the presence of a child'. Relevant to this inquiry, it includes deemed non-consensual sexual intercourse on the basis of special care relationships as defined in section 73 of the *Crimes Act 1900*.

2. The Ombudsman's experience in relation to special care relationships

During 2016-2017, we received 1,754 reportable conduct notifications. Of these, almost half (49.8%) came from the government and non-government OOHC sector. By way of comparison, the government and non-government education sector made up around one third of all notifications for the same period (32%). Consistent with trends over the previous three years, reportable allegations of a sexual nature were the most common type of notification received.⁴

A proportion of these notifications relate to sexual offences or sexual misconduct committed against, with or in the presence of a young person aged 16 to 18 years, including allegations relevant to the current coverage of section 73. For example, an allegation of sexual intercourse between a teacher and a student aged between 16 and 18 years.

We also receive notifications relating to sexual offences or sexual misconduct occurring in the context of certain other relationships which are not currently captured by section 73. For example, adults working with young people accessing homelessness services, and adults working

⁴ During 2016-17, 34% of all notifications received involved an allegation of a sexual offence or of sexual misconduct, compared to 32% for physical assault and 19% for neglect: *NSW Ombudsman Annual Report 2016-17*, p 113-114.

with young people in residential OOHC settings. We discuss these two types of relationship below.

3. Extending the special care offence to adults working with children and young people working in residential OOHC care settings and youth homelessness services

We think there is merit in the ‘special care’ offence being expanded to capture adults working with young people who are in residential care, as well as adults working with young people who are staying in youth homelessness services. In our view, there is strong evidence to support the proposition that these two cohorts of young people are more at risk of sexual exploitation than their peers.

- ***Young people in residential care***

Residential OOHC is often considered a placement of last resort for young people in the statutory OOHC system, and is generally utilised when home-based foster care placements have been unsuccessful and/or suitable placements are unavailable.

While all children and young people in OOHC are vulnerable by virtue of their circumstances, this vulnerability is heightened for the small number living in residential care placements – the majority of whom have generally experienced severe abuse and/or neglect. [They] often have very high support needs, display challenging behaviours that cannot be adequately accommodated in home-based care [which] can involve risk taking, poor impulse control, and resistance to boundaries, and in some situations, can escalate into violent and/or criminal behaviour. Typically, young people in residential care have experienced numerous prior placement breakdowns. All of these factors combined, make this cohort of children and young people highly vulnerable to sexual exploitation and predatory behaviour.⁵

Each quarter, on average, there are about 600 children and young people in residential care in NSW – representing about 3% of the overall OOHC population.⁶ Although the numbers of children and young people in residential care are relatively small, the residential care sector makes up 20% of sexual offence and sexual misconduct notifications from the OOHC sector overall, and 5% of all sexual offence and sexual misconduct notifications to this office.⁷

In light of the vulnerability of this cohort, and their over-representation in notification data, we believe there is a sound basis for prescribing the relationship between a young person aged between 16 and 18 years living in residential care with a worker employed by the same residential care service, as a ‘special care’ relationship.

- ***Young people accessing homelessness services***

Young people accessing homelessness services have, in many respects, similar characteristics to those placed in residential care. Many have histories of complex trauma and abuse, family breakdown and substance abuse issues. There is also evidence to suggest that particular groups –

⁵ See, for example, Royal Commission into Institutional Responses to Child Sexual Abuse, (2016) *Consultation Paper on out-of-home care*; Moore, T., McArthur, M., Roche, S., Death, J., and Tilbury, C. (2016), *Safe and sound: Exploring the safety of young people in residential out of home care, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse*; Bath, H. (2015) *Out of home care in Australia: Looking back and looking ahead*; Australian Institute of Family Studies (2011) *Therapeutic residential care in Australia: Taking stock and looking forward*; Bath, H. (2008). *Residential care in Australia, Part 1: Service trends, the young people in care, and needs-based responses*.

⁶ FACS quarterly data from 1 July 2015 – 31 December 2017. The most recent figures available to this office show that in the last quarter of 2017, there were 674 children and young people in residential care in NSW – representing about 3.55% of the overall OOHC population: [FACS Quarterly statistical report on services for children and young people: Placement of children and young people in need of care and protection](#).

⁷ Closed notifications of sexual offence or sexual misconduct for the period 1 July 2015 – 30 June 2017.

including those who have been in state care and protection – are both ‘over-represented in the homeless population and are at increased risk of homelessness.’⁸

It is clear that adults working in these services will – by virtue of the circumstances in which they meet and support young people accessing those services – be in a position to influence and potentially exploit them. On this basis, noting the compound effect of the power imbalance in these relationships with the vulnerability of young homeless people, we would similarly argue for the relationship between adults working in youth homelessness services, and young people aged between 16 and 18 years staying in these services, to be prescribed as a ‘special care’ relationship.

- ***Which adult workers in these settings should be captured?***

Consistent with the approach in section 73(3)(b)⁹ and (d)¹⁰, which capture a broader range of people beyond those in a ‘direct’ relationship with the victim, we submit that the heightened vulnerability of the young people in residential care and those staying in homelessness services, warrants extending the section 73 offence to adults who are engaged to provide services to those young people in those service settings. We believe that such an approach would be consistent with community expectations of adults engaged to support highly vulnerable young people.

- ***Whether the offence should apply if a special care relationship no longer exists***

In relation to this issue, we note that position of authority offences were considered by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in its Criminal Justice Report.¹¹ The Royal Commission recommended that all jurisdictions should have ‘position of authority’ offences where the existence of the relationship is sufficient to negate consent.¹² In considering when the offence might continue to apply, the Royal Commission, commented (in respect of teachers):

*If the schoolteacher and student really want to be together, they can cease the relationship of schoolteacher and student or wait until the student leaves school or turns 18.*¹³

This recognises that certain people in positions of authority must exercise restraint and consideration in their dealings with young people with whom they are in special care relationships, but also that the ‘special care’ relationship can cease and at that point the offence ought not to apply.

4. Whether any additional safeguards are required

We would support the Committee’s consideration of a requirement that the Director of Public Prosecutions (DPP) must approve any prosecution of a special care offence. Having a safeguard whereby a prosecutor requires the approval of the DPP before commencing a prosecution might alleviate some of the concerns that have been raised about the scope of relationships that an expanded provision could potentially capture.

However, in our view, there is an argument for treating the relationships outlined in s 73(3)(a) – where the offender is either a step-parent, guardian or foster parent or de-facto partner of a step-

⁸ National Youth Commission (2008) *Australia’s Homeless Youth: a report of the National Youth Inquiry into Youth Homelessness*, p 3.

⁹ Where the offender is a *member of the teaching staff* at the victim’s school.

¹⁰ Where the offender is a custodial officer of an institution at which the victim is an inmate.

¹¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report, Vol III-V*.

¹² Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report, Vol III-V*, (Recs 27 and 28).

¹³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report, Vol III-V*, p 118.

parent, guardian or foster parent of the victim – differently, and not requiring the approval of the DPP to prosecute given these relationships are of a familial nature.¹⁴

Thank you for the opportunity to contribute to this inquiry. If you require any further information about this submission, or if we can be of further assistance, please do not hesitate to contact me or Ms Vanessa Viaggio, Principal Project Officer, on _____ or _____.

Yours sincerely,

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Assistant Ombudsman

¹⁴ See, e.g. *R v PN* [2008] NSWDC 353; *KAB v R* [2015] NSWCCA 55.