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**Initial Responses to the Wood
Royal Commission Report
on Paedophilia**

by

Rachel Simpson

Briefing Paper No 8/98

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EXECUTIVE SUMMARY

As part of its response to recommendations made by the Royal Commission into the NSW Police Service, the Government introduced two bills into the Legislative Assembly in November 1997: the Child Protection (Prohibited Employment) Bill 1997 and the Ombudsman Amendment (Child Protection and Community Services) Bill 1997. Recommendations made by the Royal Commission that are relevant to these two bills are listed at pp. 11-13.

The *Children (Care and Protection) Act 1987* is the main piece of legislation which deals with the detection and prosecution of child abuse in NSW. This Act defines the statutory powers of the Department of Community Services as well as those of the police and the Children's Court. It also regulates child care, substitute care and child employment (pp. 2-3). Other relevant legislation includes the *Crimes Act 1900* which prescribes offences against children and the *Children (Protection and Parental Responsibility) Act 1997*, which empowers police to remove a child from a public place if the police officer believes the child to be at risk (pp. 3-4). The *Young Offenders Act 1997* introduces a new approach to dealing with juvenile offenders as an alternative to court proceedings: youth justice conferencing. Two recent pieces of legislation are also relevant: the *Crimes Amendment (Child Pornography) Act 1997*, which creates a new indictable offence of publishing child pornography, and the *Evidence (Children) Act 1997*, which requires interviews with children to be recorded and allows such recording to be used as all or part of the child's evidence in chief in any criminal proceeding (pp. 4-5).

The Royal Commission identified a number of key organisations concerned with child protection: the Department of Community Services; the NSW Health Department and the Department of School Education. A number of other agencies with a lesser interest were also identified, as were a number of overseeing bodies such as the Child Protection Council. A diagram illustrating the relationship between these agencies is included at p. 11.

The purpose of the Child Protection (Prohibited Employment) Bill 1997 is to prevent those people who present an unacceptable risk to the safety of children from employment whereby they will come into direct contact with children (pp. 13-19). The purpose of the Ombudsman Amendment (Child Protection and Community Services) Bill 1997 is to confer upon the Ombudsman a new power to oversee and monitor systems in place for handling and responding to allegations of child abuse in Government and designated non-Government agencies. The Bill also proposes to amend a number of public service regulations in order to make it compulsory to make and retain records of all allegations of child abuse made against an employee (pp. 19-21).

A number of other initiatives have been taken in response to the Royal Commission, including the formation of the Child Protection Enforcement Agency within the Police Service, Joint Investigation Teams comprising members from the Police Service and the Department of Community Services, and the release of the Green Paper on the establishment of a NSW Children's Commission. The Department of Health and the Department of School Education have also implemented a number of policy changes as in response to the findings of the Royal Commission (pp 22-23).

1.0 INTRODUCTION

The terms of reference of the Royal Commission into the New South Wales Police Service (“the Royal Commission”) were extended in December 1994 to include an investigation of activity and protection of paedophiles in New South Wales.¹ The *Final Report* of the Royal Commission was released in August 1997 and contained detailed recommendations as a result of the Commission’s inquiries into paedophilia in New South Wales. A number of measures have been taken to implement the recommendations of the Royal Commission, including two Bills introduced into the Legislative Assembly in November 1997: the Child Protection (Prohibited Employment) Bill 1997 and the Ombudsman Amendment (Child Protection and Community Services) Bill 1997.²

In relation to its paedophile inquiry, the Royal Commission found that

a very disturbing picture of neglect, indifference and concealment has emerged during the investigation extending to almost every aspect of the preventative, investigative and prosecution process. Serious deficiencies in the existing structures and procedures for the protection of children by those agencies and institutions responsible for their care have been highlighted, along with an appalling lack of co-ordination of effort or commitment.³

This paper will firstly examine the current framework for investigating and prosecuting those accused of child abuse. Recommendations of the Royal Commission relevant to the protection of children from child abuse will be outlined. A discussion of possible issues identified in relation to the Bills follows, in light of the recommendations of Commissioner Wood and the practicalities of implementing the proposed changes within the current system. Finally, other initiatives taken both as a result of the Royal Commission and independently will also be surveyed to provide a comprehensive picture of the response to child abuse in New South Wales to date.

¹ The effect of this extension was to authorise the Royal Commission to ‘inquire into the adequacy of the existing laws and of the investigatory and trial processes to deal with crimes involving paedophilia and pedantry, and into the sufficiency of the monitoring and screening processes of government departments and agencies to protect children in the care or to undertake purely criminal investigations.’ (Royal Commission into the New South Wales Police Service (“the Royal Commission”), *Final Report Volume IV: The Paedophile Inquiry*, August 1997, p. 570.)

² At the time of writing, the Ombudsman Amendment (Child Protection and Community Services) Bill 1997 had proceeded to the Legislative Council, and the Child Protection (Prohibited Employment) Bill 1997 was still being debated by the Legislative Assembly.

³ Royal Commission, n 1, *Final Report Volume 1: Corruption*, May 1997, p. 12.

2.0 FRAMEWORK FOR CHILD PROTECTION IN NEW SOUTH WALES

2.1 Legal framework

The primary legislation in New South Wales dealing with detection and prosecution of child abuse is the *Children (Care and Protection) Act 1987*. The purpose of this legislation, as contained in a report titled *Review of the Children (Care and Protection) Act 1987* by the Legislation Review Unit of the NSW Department of Community Services is “to provide the legal framework for an effective child protection and child welfare system in New South Wales.”⁴ The Act defines the statutory powers of the Department of Community Services (“DCS”) relevant to child protection, as well as those of the police and the Children’s Court. The Act also regulates the areas of substitute care, child care and child employment.⁵ Sections 12 and 55 of the Act identify the objectives of the Act. It is worth keeping these stated objectives in mind when discussing the legal and organisational framework of child protection in New South Wales:

...

- (a) to identify special needs of children, whether or not under parental care, with respect to services necessary to promote their optimum development; and
- (b) to ensure the provision of any necessary services for, and assistance to, families so that, the care available to children in the family environment can be enhanced to such a degree as to enable them to remain in or return to family care.⁶

and

The objects of this Part are to ensure that children in need of care are provided with assistance and supportive services, the provision of that assistance and those services being based on the premises that:

- (a) the welfare and interests of children are to be given paramount consideration,
- (b) children are entitled to special protection and to opportunities and

⁴ NSW Department of Community Services, Legislation Review Unit, *Review of the Children (Care and Protection) Act 1987*, Discussion Paper 1, law and Policy in Child Protection, October 1996, p. 12. This Report contains a number of criticisms and proposals for reform of the Act. When contacted by the author in February 1998, the Legislation Review Unit informed her that a number of recommendations for reforming the Act had been forwarded to the Cabinet Office.

⁵ Ibid, p. 7.

⁶ Section 12.

facilities to enable them to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity,

- (c) children, for the full and harmonious development of their personalities, need love and understanding and, towards that end, should, wherever possible, grow up in the care and under the responsibility of their parents, but if that is not possible, in an environment of affection and moral and material security and, in the case of children of tender years, should not, except in exceptional circumstances, be separated from their parents,
- (d) continuing contact between children and their parents should be encouraged in situations where, pursuant to legal proceedings, children have been separated from their parents,
- (e) children should be protected against all forms of neglect, cruelty and exploitation,
- (f) responsibility for the welfare of children belongs primarily to their parents, but if not fulfilled devolves upon the community, and
- (g) except in exceptional circumstances or pursuant to legal proceedings, there should be no interruption of relationships between children and their parents contrary to the wishes of children and their parents.⁷

A “child” is defined in section 3 of the Act to be a person under 18 years of age, and “abuse” in relation to a child means to:

- (a) assault (including sexual assault) the child; or
- (b) ill-treat the child; or
- (c) expose or subject the child to behaviour that psychologically harms the child, whether or not, in any case, with the consent of the child.⁸

The laws prescribing offences against children are contained principally within the *Crimes Act 1900*. A number of offences are also found within the *Children (Care and Protection) Act 1987*, specifically the offences of child abuse (section 25), neglect of children (section 26), unauthorised removal of children etc (section 27), tattooing of children (section 28) and leaving children unsupervised in motor vehicles (section 29). These offences carry the

⁷ Section 55.

⁸ Section 3.

penalty of a fine up to \$1,100 or 12 months imprisonment, or both. A person convicted of one of these offences is not a “prescribed person” for the purposes of the Child Protection (Prohibited Employment) Bill 1997 (see Part 4.3, below), however in the Ombudsman Amendment (Child Protection and Community Services) Bill 1997 the focus is on ‘child abuse’ more generally, so the principles contained within the *Children (Care and Protection) Act 1987* could be more applicable.

The *Children (Protection and Parental Responsibility) Act 1997*, which repealed and replaced the *Children (Parental Responsibility) Act 1994* is also relevant to a discussion of child welfare and child protection.⁹ This Act empowers police to remove a person who they reasonably believe to be under the age of 16 years from a public place if the police officer reasonably believes that the young person is not under the supervision or control of a responsible adult, and that being in the public place places the young person at risk.¹⁰ “Risk” for these purposes means that the person is in danger of being physically harmed or injured, that the person is in danger of abuse (including assault or sexual assault, ill treatment and exposure to treatment which may cause psychological harm to the person), or where the person is about to commit an offence.¹¹

Three recent pieces of legislation are also relevant insofar as the measures contained therein impact on the organisations which the Royal Commission determined to have a “direct interest” in child protection (see Part 2.2 below). The *Crimes Amendment (Child Pornography) Act 1997* was assented to on 17 December 1997. The Act amends the *Crimes Act 1900* by creating a new, indictable offence of publishing child pornography. This offence carries a penalty of a fine of \$110,000 and imprisonment for five years in the case of an individual, or \$220,000 and in the case of a corporation (section 578C). The Act also substantially increases the penalty for possessing child pornography (section 578B). The requirement of payment of money or some other valuable thing to the child used in producing the pornography has been removed (section 91G). Measures contained within this Act were introduced as a direct response to recommendations made by the Royal Commission.¹²

The *Evidence (Children) Act 1997* also received assent on 17 December 1997. The purpose of this Act is to alter the manner in which children’s evidence is given in criminal proceedings. The reforms are the result of the Children’s Evidence Taskforce, which was reconvened in August 1996. The task force was made up of representatives from the NSW Child Protection Council, the Office of the Director of Public Prosecutions, the Legal Aid

⁹ For a more detailed discussion of the operation of the *Children (Parental Responsibility) Act 1994*, see Parliamentary Library Research Service Briefing Paper No 6/97: *The Children (Parental Responsibility) Act 1994: An Update*, by M Swain.

¹⁰ Section 19(1).

¹¹ Section 19(3). Note that the definition of abuse is the same as that contained within the *Children (Care and Protection) Act 1987* and adopted by the Ombudsman Amendment (Child Protection and Community Services) Bill 1997.

¹² Hon F Lo Po’, MLC, Second Reading Speech, NSWPD, 19/11/97 pp. 2090-2091.

Commission, the Police Service, NSW Health, the Ministry for Police, the Department of Community Services and the Attorney-General's Department.¹³ Many of these organisations were identified by the Royal Commission as having a direct interest in child protection (see part 2.2 below). The Royal Commission in its *Final Report* supported the recommendations made by the task force in relation to the giving of children's evidence.¹⁴ The essence of the changes is that interviews with child witnesses concerning the commission or possible commission of an offence are mandatorily recorded, either visually or aurally. These electronically recorded interviews may then be admitted into evidence as part or all of the child's evidence in chief in any subsequent criminal proceedings.¹⁵ The procedures adopted are in keeping with those reforms in 1996 which enabled a child to give evidence by means of closed-circuit television.¹⁶ A child, therefore, who is giving evidence in a personal assault matter may rely upon closed circuit television or some other means of giving evidence.

The *Young Offenders Act 1997* was assented to on 2 July 1997. This Act introduces a new approach to dealing with juvenile offenders in NSW, impacting most directly on the Department of Juvenile Justice, the NSW Police Service and the Office of the Director of Public Prosecutions. One of the major developments included in this Act is the establishment of a youth justice conferencing scheme as an alternative to instituting court proceedings in respect of an offender who is under 18 years of age. Under this scheme the victim will have an opportunity to participate in the conference and will have a say in the result, which may include making an apology or reparation to the victim.¹⁷ The Act in fact provides for a four-level approach to juvenile justice, ranging from police warnings and cautions, through to cautions and attendance at court.¹⁸

2.2 Organisational framework

There are a multitude of agencies and organisations with an interest in child protection. The relationship between these bodies can be bewildering. As the Royal Commission pointed out, it is difficult sometimes to determine which organisation carries out which function, and who supervises whom. The measures contained within the Ombudsman Amendment (Child Protection and Community Services) Bill 1997 and the development of the Children's Commission, may alleviate some of the possible confusion. The Ombudsman Amendment (Child Protection and Community Services) Bill 1997 does, however, add a further layer to the already complicated structure as well as giving the Ombudsman's Office an overseeing

¹³ Hon B Langton, MP, Second Reading Speech, NSWPD, 25 November 1997, p. 2450.

¹⁴ Royal Commission, n 1, Chapter 15, in particular Part B - 'Videotaped interviews with child witnesses', pp. 1093-1097, and para 15.40, p. 1097.

¹⁵ Ibid.

¹⁶ *Crimes Amendment (Children's Evidence) Act 1996*.

¹⁷ For further discussion, see F Manning, *Juvenile Justice in NSW: overview and current issues*, briefing NSW Parliamentary Library Briefing Paper No 9/96, particularly pages 17-29.

¹⁸ Hon J Shaw, MLC, Second Reading Speech, NSWPD, 19 June 1997, pp. 8958-8959.

role. It is therefore of some value to begin this paper by examining the system as it operates currently, and looking at some of the recommendations made by the Royal Commission to modify this system. In its summary, the Royal Commission concluded that

the problem of child abuse is itself complex and very serious, the system for its management and for the protection of children is enormously complicated and fragmented, notwithstanding the Interagency Guidelines [produced by the NSW Child Protection Council in 1991 and updated in February 1997] which were designed to establish an integrated case plan for individual cases.

The Royal Commission proceeded to outline a number of “system deficiencies” and “complicating factors” which can be found at para 2.59 of Volume IV of the *Final Report*, and called these deficiencies “a matter for very deep concern”.¹⁹

The Royal Commission summarised the relationship between the agencies with a direct interest in child protection. The three agencies with a direct interest are:

- the NSW Department of Community Services (DCS);
- the NSW Health Department (NSW Health), and
- the NSW Department of School Education (DSE).

Additionally, the NSW Police Service and the Office of the Director of Public Prosecutions (ODPP) were identified as having a direct interest in the investigation and prosecution of child abuse cases. The NSW Police Service is the agency with primary responsibility for investigating and initiating prosecution for child abuse offences. The Child Protection Enforcement Agency (CPEA) commenced duties on 2 January 1996. Its present structure and functions began effectively on 1 July 1996, taking over the functions of Task Force Shad, a specialist task force commissioned to investigate specific suspected child sex offenders.²⁰ The purpose of the CPEA was to “investigate child serial sexual abuse, female genital mutilation, pornography and prostitution”. It was proposed that the Agency deal closely with the Departments of Community Services and Health, as well as other Australian and international services and agencies.²¹ Joint Investigation Teams (JITs), comprising specialist members from the NSW Police Service and DCS, were endorsed by the Government in October 1996 as the preferred model for investigation of serious child abuse throughout the state. The purpose of the JITs is to provide a more seamless approach to the investigation of child abuse allegations. The establishment of eight JITs throughout the metropolitan region was approved, as well as an additional two JITs if needed in rural areas. The first JITs were established in Ashfield, Parramatta, Liverpool and Penrith in July 1997, the other four being established in The Entrance, Kogarah, Wollongong and Newcastle later

¹⁹ Royal Commission, n 1, p. 607.

²⁰ *Ibid*, pp. 710-715.

²¹ NSW Police Service, *Annual Report 1996-97*, 5 November 1997, inside cover and p. 14.

that year.²²

The Royal Commission also identified those government agencies with a lesser interest in child protection issues:²³

- the Department of Sport and Recreation, which promotes children's participation in sport and recreation, and funds groups such as scouts, surf life-saving, pony clubs and youth centres;
- the Department of Juvenile Justice, with the responsibility for the supervision of children in detention;
- the Corrective Services Department, with the responsibility for the supervision and rehabilitation of sex offenders;
- the Community Services Commission, whose function is to monitor and review the delivery of community services and to respond to complaints about DCS case management, including management of sexual abuse cases;
- the Office of the Ombudsman, which prior to the enactment of the *Community Services (Complaints, Appeals and Monitoring) Act 1993* had direct jurisdiction to deal with complaints concerning the management by DCS of sexual abuse cases. It is arguable that the Ombudsman still has a residual jurisdiction, when the complaint does not involve the provision of a community service to a particular individual, but rather systemic misconduct or maladministration;²⁴
- the Health Care Complaints Commission, which investigates complaints made against health care workers, including complaints involving sexual abuse of children;
- the Police Integrity Commission, which has a general jurisdiction to investigate corruption and serious misconduct involving police, including that involved with policing child protection laws, and
- the Independent Commission Against Corruption, which has jurisdiction to investigate corruption within the whole of the NSW public sector.

In addition, the NSW Child Protection Council (CPC) consists of representatives from the DCS, NSW Health, the DSE, NSW Police, the Office of the Director of Public Prosecutions, the Attorney-General's Department, the Department of Juvenile Justice, the

²² Hon Ron Dyer, MLC, *Community Services and Police Adopt Joint Approach to Child Abuse Investigations*, Media Release 14 August 1997.

²³ Royal Commission, n 1, pp. 590-591.

²⁴ NSW Ombudsman, 'Legislation by Stealth Robs Ombudsman of Jurisdiction', *Annual Report 1992-93*, pp. 100-102, footnoted in Royal Commission, n 1, p. 590.

Ethnic Affairs Commission and the Department of Urban Affairs, Planning and Housing. A number of community representatives also sit on the CPC. The CPC is an advisory council whose role includes providing advice to the Minister for Community Services on child protection matters, conducting activities which prevent child abuse and neglect and activities which improve competence of staff working in child protection.

The CPC also has the important function of co-ordinating, implementing, monitoring and promoting strategies to improve interagency co-operation in child protection in New South Wales.²⁵ To this end, the CPC released Interagency Guidelines in 1991. The aim of these guidelines was to assist the five agencies principally involved in the management of child abuse cases (DCS, NSW Health, DSE, the NSW Police Service and the ODPP) to co-ordinate their response to child abuse. An updated version of the guidelines, produced in response to an identified lack of co-ordination between relevant agencies which became apparent during the course of the Royal Commission hearings, was officially launched on 17 February 1997, with full compliance expected from 1 July 1997. However, the Royal Commission stated in its final report that “notwithstanding previous guidelines, agencies did not co-operate in any committed way in managing child sexual abuse cases. The Royal Commission is acutely aware that professional co-ordination will take much more than guidelines but it is pleasing to see that they have at least been produced.”²⁶

There are numerous private, non-government organisations with a direct or lesser interest in child protection. These include private educational institutions and child care centres, sporting and cultural clubs, refuges, churches, and foster care agencies. Many of these organisations are staffed by volunteers and untrained workers. There are often no monitoring mechanisms in place, and no guidelines for dealing with suspected or alleged sexual abuse or with complaints involving members of the organisations. Unlike certain government entities and other professionals, members of these organisations (with the exception of non-government schools) were not, until early 1998, subject to the same notification requirements under section 22 of the *Children (Care and Protection) Act 1987*, which require the Director-General of DCS to be notified of suspected child abuse of a child who is under 16 years of age.²⁷ Conversely, the Director-General is empowered by section

²⁵ Royal Commission, n 1, p. 599.

²⁶ Ibid, p. 600.

²⁷ Section 22(2) prescribes that a medical practitioner inform the Director-General of suspected child abuse. It extends that requirement to members of other professions, callings or vocations prescribed by the regulations for that purpose. Consequently, regulation 16 of the *Children (Care and Protection) Regulation 1996* prescribes teachers, early childhood teachers, school counsellors and social workers at a school, the Principal and Deputy Principal of a school as persons who must report suspected child abuse. Regulation 16 was amended by the *Children (Care and Protection) Amendment (Notification of Child Abuse) Regulation 1997* to include non-government schools. Despite this mandatory notification requirement, the Royal Commission noted in its *Final Report* at p. 958, that “the evidence before the Commission indicates that mandatory reporting provisions have largely been ignored by teachers and school principles, in that:

- the incidence of reporting has been very low; and in that

22 to notify relevant bodies with information relating to the suspected child abuse of a particular child or class of child. The Regulation was amended in early 1998²⁸ so that, for the purposes of section 22 of the Act, non-government agencies are prescribed bodies where they receive funding or are licensed by the Minister for Community Services or the Minister for Disability Services or where they provide any of the following services on a formal or regular basis:

- health care services (for example, community health centres, medical centres);
- children's services (for example, child care centres, toy libraries, adoption agencies);
- educational services (for example, preschools, parent education associations);
- recreational services (for example, sporting clubs);
- counselling and therapy services (for example, drop in centres, mediation firms, welfare organisations);
- disability support services (for example, respite care centres, advocacy organisations, support organisations);
- accommodation services (for example, women's refuges, hostels, residential institutions);
- information services (for example, neighbourhood centres), or
- youth services (for example, youth drop-in centres, youth education organisations).

A further development saw the release in December 1997 of a *Green Paper* on a NSW Children's Commission. This follows from a recommendation by the Royal Commission that a Children's Commission be established in New South Wales.²⁹ The Royal Commission recommended that the Commission have three units:

- The Centre for Child Protection, with responsibility for research, education and training, community awareness, and co-ordination of the activities of the various departments and agencies involved in child protection. The Centre for Child Protection will also act as an child's advocate in relation to matters of police and

-
- few prosecutions or disciplinary proceedings have been instituted for non-compliance."

²⁸ By the Children (Care and Protection) Amendment (Prescribed Bodies) Regulation 1988, which inserted clause 16A into the Regulation.

²⁹ Recommendation 131: "Creation of a Children's Commission to take over the responsibilities in relation to children currently vested in the Child Protection Council and the Community Services Commission, with three divisions: the Centre for Child Protection, the Employment Information Centre, and the Investigation and Review Unit.....".

planning.³⁰

- The Employment Information Centre, with the responsibility for issuing “unacceptable risk certificates” in relation to persons seeking or currently occupying, employment or voluntary work in areas related to children.³¹
- The Investigation and Review Unit, with responsibility for monitoring systemic issues and complains concerning the care and protection of children, as well as reviewing the position of children in foster and substitute care.³²

Although it is not the purpose of this paper to go into it in detail, the recommendation is discussed in order to provide a comprehensive illustration of the agencies involved, or proposed to be involved, in child protection. The *Green Paper* looked in detail at the Royal Commission’s recommendations, and particularly the manner in which the recommendations could be put into practice given the existing child protection framework, and without resulting in the Children’s Commission “simply imposing another layer of bureaucracy on this already complex set of services and complaints handling mechanisms”.³³ The *Green Paper* generally supported the formation of the Centre for Child Protection and the Employment Information Centre, although aware of potential problems of definition, implementation and scope.³⁴ In relation to the Centre for Child Protection, the *Green Paper* did, however, state that there “is a case that the monitoring of service to children should be carried out by the departments which fund them and by complaints handling bodies. However the Children’s Commission should monitor the overall wellbeing of children in New South Wales” (p. 12). The main concerns in regard to the Employment Information Centre are who should be screened, how the screening system should be designed and how privacy issues and concerns should be addressed. An Employment Screening Taskforce has been established within the Premier’s Department to look at these issues, and to provide Cabinet with a detailed proposal for employment screening in NSW (pp. 14-17). Three options were put forward regarding the third function recommended by the Royal Commission - the Investigation and Review Unit. The first was to dissolve the Community Services Commission, transfer its functions to the Children’s Commission and establish a separate Disability Services Commission. Complaints about services to the aged, homeless and domestic violence victims would be directed towards the Ombudsman. The second option was to dissolve the Community Services Commission and transfer its whole jurisdiction to the Ombudsman, in a newly created community services division. The third option, which the Government favours in the *Green Paper* is to retain existing arrangements and streamline their relationship. Under this arrangement the Community Services Commission would keep its jurisdiction but would be overseen by the Ombudsman, allowing

³⁰ Recommendation 133, para 20.29.

³¹ Recommendation 134, para 20.33.

³² Recommendation 135, paras 20-34-20.39.

³³ ‘A NSW Children’s Commission’, *Green Paper*, December 1997, p. 7.

³⁴ *Ibid*, pp. 10-17.

the Ombudsman to handle cross-jurisdictional complaints.³⁵

The Royal Commission also proposed a Children's Division within DCS to deal with child protection issues, recognising the diversity of the responsibilities of DCS, and the specialist skills required to deal with child protection issues.³⁶ The Royal Commission *Final Report* contained a diagrammatic representation of the current supervisory structure for child protection.³⁷ This diagram is reproduced below. Under the Royal Commission's proposed structure, the Children's Commission would oversee the entire system. The responsibilities of the Community Services Commission (CSC) would be taken over by the Children's Commission, as would those of the Child Protection Council (CPC) (see below).

3.0 ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE FORCE - RECOMMENDATIONS RELEVANT TO CHILD PROTECTION

The two Bills that are the main subject of this paper were introduced into Parliament in response to recommendations by the Royal Commission. Relevant recommendations include:

³⁵ Ibid, pp. 18-20.

³⁶ This recommendation was the favoured of three options mooted by the Royal Commission for restructuring the DCS. See Royal Commission, n 1, pp. 901-910 for more detail.

³⁷ Ibid, p. 591.

- 33: Adoption of the system of pre-employment checking outlined in Volume IV, Chapter 8 of this Report,³⁸ to be developed in conjunction with the establishment of the Children's Commission (para 8.242)
- 35: Empowerment of the Office of the Ombudsman to conduct investigations in respect of allegations of sexual misconduct with or towards children made against any DCS employee as outlined in Chapter 8 of this Report (paras 8.262-8.265).³⁹
- 36: Amendment of clause 28 of the Public Sector Management (General) Regulation to permit the retention of information concerning allegations of sexual misconduct with or towards a child and any consequential investigation, whether or not a charge is brought and sustained, and to allow the DCS officer concerned to have a statement in response to the matter placed on the file (para 8.258).

Similar recommendations were also made in relation to employees of the Department of Juvenile Justice (No 72).

- 56: An urgent review of Department of School Education (DSE) practices concerning the keeping of teacher files with a view to ensuring that:
- standardised practices of file management and record keeping are adopted throughout the State; and that
 - information concerning suspicions or allegations of child sexual abuse in relation to DSE teachers is centralised and available for disciplinary investigation, and for notification to the Children's Commission (para 10.128).

³⁸ The Royal Commission made the same recommendation in relation to pre-employment screening of DCS and NSW Health employees. A similar scheme was proposed by the Minister for Education regarding the registration of teachers, which the Commission supported (para 10.154). The following minimum information from applicants for positions was recommended by the Royal Commission as being relevant:

- personal details including details of any allegations that have been made against the applicant involving improper or inappropriate sexual conduct towards or with children;
- full employment history;
- details of education qualifications and training;
- history when not employed;
- details of recreational interests;
- references including one from the applicant's current supervisor or manager, and
- a declaration of good character and confirmation of the truth of the contents of the application, together with a consent for a criminal history check, if the applicant is recommended for the position (paras 8.242, 9.65)

³⁹ Para 8.262 recommends, inter alia, that "allegations against a DCS employee of improper sexual conduct with or towards a child should be investigated by the Ombudsman followed by a report to the Director-General and the Children's Commissioner."

- 139: Consideration be given to the creation of a summary offence where a person convicted of child sexual abuse, or the subject of a current unacceptable risk certificate, seeks or obtains work, or offers or provides services, which in any such case involves that person having children in his care or under his supervision (paras 20.97-20.76).
- 140: Departmental investigation onto allegations of child sexual abuse in relation to DCS, Department of Juvenile Justice, and Department of Sport and Recreation, as well as DSE employees (unless a Teacher Registration Authority with disciplinary investigatory powers is created) be transferred to the Office of the Ombudsman (para 20.49).

4.0 CHILD PROTECTION (PROHIBITED EMPLOYMENT) BILL 1997

The Child Protection (Prohibited Employment) Bill 1997 was introduced into the Legislative Assembly by the Minister for Police, the Hon Mr Paul Whelan, MP, on 25 November 1997. In his second reading speech, Mr Whelan stated that “the Bill complies with recommendation 139 of the Royal Commission’s report” (see above). It does so by making it an offence for ‘prohibited persons’ to:

- apply for child-related employment;
- undertake child-related employment, or
- remain in child-related employment.⁴⁰

A ‘prohibited person’ is defined in the Bill to be a person convicted of a serious sex offence, whether before or after the legislation comes into effect. What constitutes a ‘serious sex offence’ is discussed in Part 4.3, below. It is also an offence to employ a person in child-related employment without requiring disclosure, or to employ a prohibited person in child-related employment (section 7). The main issues raised by the Bill are definitional in nature, although there are civil liberties and privacy issues which are also relevant to a discussion of this Bill and the Ombudsman (Child Protection and Community Service) Bill. Specific issues raised in this Bill are discussed below:

4.1 Definition of ‘child’

The Bill defines “child” as a person under the age of 16 years, or under the age of 18 years where the person has a disability, is mentally incapacitated, is a child in care or is subject to a control order.⁴¹ The reason given by the Minister in his second reading speech is that “most children over 16 are similar to adults in many respect and have passed the stage when

⁴⁰ Section 6(1).

⁴¹ Section 1, definition of ‘child’.

they are at significant risk from paedophile activity.”⁴² Note that this definition is inconsistent with that contained within the *Children (Care and Protection) Act 1993*, which defines a child as a person under the age of 18 years, without the additional qualifications contained in this Bill.⁴³ The application of this Bill, therefore, is limited. An example is a teacher, which comes under the definition of ‘child-related employment’ but who only teaches senior students, above 16 years of age. Such a person would not come within the ambit of the Bill because of the definition of ‘child’, yet could in fact be a person to whom the Bill should apply, posing a risk to the young people in his or her care. An alternative could be to define “child” in relation to child-related employment, as being any young person below the age of 18 years, for whom a person engaged in such employment is responsible.

4.2 Definition of child-related employment

Child-related employment is very broadly but comprehensively defined as any employment which primarily involves direct unsupervised contact with children. It includes employment in schools, preschools, overnight camps for children, on school buses, in detention centres, child refuges and children’s wards, and also includes employment in clubs, associations or movements having a significant child membership and employment in entertainment venues where the clientele are predominantly children. The definition includes employment as a babysitter or childminder, and as a private tutor. It also includes those who provide health services or counselling to children, and those involved in fostering or escorting children. It includes employment under a contract of employment, as a self-employed person or subcontractor, voluntary work and practical training as part of an education course. Clearly, there are potential difficulties in enforcement in relation to self-employed persons and volunteers, particularly in relation to such casual relationships as babysitting or private tuition.

An important exception is contained in clause 4 of the Bill. The definition of child-related employment does not apply if all the children with whom the person has contact are the children or relatives of the person or the person’s spouse, or the children or relatives of the person’s employer or employer’s spouse, where the person is a relative of the employer or employer’s spouse. This creates an exception in relation to the child or relatives of the person’s spouse (married or de facto), parent, child, grandparent, grandchild, uncle, aunt, brother or sister. It has the effect that, for example, family babysitting arrangements or tutoring arrangements between family members are not covered by the provisions of the Bill. Research has in fact shown that girls are most likely to be abused in their own home, over a prolonged period of time, by men they know. The Judicial Commission of New South Wales’s publication, *Child Sexual Assault*, which analysed outcomes of matters determined by the District Court of New South Wales during 1994 found that, in relation to female

⁴² NSWPD, 25 November 1997, p. 2458.

⁴³ The definition is, however, consistent with child sexual assault offences contained in the *Crimes Act 1900*, which differentiates between sexual assault of children under 10 years of age (sections 66A, 66B), and of children between 10 and 16 years of age (sections 66C, 66D). There is no separate offence for sexual assault of a child between 16 and 18 years of age.

victims, 26.6% of offenders were immediate family members of the victim, 14.9% were other family, 22.6% were an acquaintance, 3.4% were in a position of authority and 2.3% were a stranger.⁴⁴ The Report also showed that 31.2% of proven offences occurred in the family home, 23.5% in the accused's home, 8.0% in the victim's home, and 11.3% in some other place.⁴⁵

4.3 Definition of 'serious sex offence'

The Minister for Police, in his second reading speech, stated that the "Bill is part of the Government's strategy to protect children from paedophiles who either seek or have already gained employment in positions where they have unsupervised contact with children".⁴⁶ It is important to distinguish between child sex offenders and paedophiles. The distinction was made by the Legislative Assembly of Queensland Legal Constitutional and Administrative Review Committee in its *Report on the Criminal Law (Sex Offenders Reporting) Bill 1997*.⁴⁷ The Committee defined a child sex offender as "anyone who has committed an offence of a sexual nature where the complainant is a child ... Sexual offences include both those where absence of consent is necessary and those in which consent is simply irrelevant. They may involve a once only-incident of a series of incidents. There may be a closeness in age of a great disparity in age between the child and the offender. The child may be related to the offender or a complete stranger. The offence may involve only one offender or multiple offenders."⁴⁸ The term 'paedophile' has proven notoriously difficult to define. Commissioner Wood, after canvassing all the main definitions of paedophile concluded that "it is clear ... that there is no universally accepted meaning for the expressions 'paedophilia', 'paedophile' or 'paedophile activity' ...".⁴⁹ The definition that the Royal Commission adopted "takes paedophiles to mean those adults who act on their sexual preferences or urges for children, in a manner which is contrary to the criminal laws of the State of New South Wales".⁵⁰

Another definition of paedophile, found in the *Butterworths Australian Criminal Law*

⁴⁴ Gallagher, P and Hickey, J, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994*, Judicial Commission of New South Wales, Monograph Series No 15, 1997, pp. 26-7. In relation to male victims, the majority of offences were committed by an acquaintance (20.6%), with 4.6% being committed by an immediate family member and 0.6% by an other family member.

⁴⁵ Ibid, pp. 28-9. Again, this figure relates to female victims. Offences against male victims were most often committed in the accused's home (12.1%), the victim's home (4.1%) or the family home (3.6%).

⁴⁶ NSWPD, 25 November 1997, p. 2458.

⁴⁷ Legislative Assembly of Queensland Legal, Constitutional and Administrative Review Committee, *Report on the Criminal Law (Sex Offenders Reporting) Bill*, Report No. 8, February 1998, pp. 6-8.

⁴⁸ Ibid, pp. 6-7.

⁴⁹ Royal Commission, n 1, p. 577.

⁵⁰ Ibid, p. 578.

Dictionary is:

a person who displays sexual desire directed towards children, usually of pre-pubertal or early pubertal age. Some are attracted only to girls, others only to boys, and others are interested in both sexes. Strong feelings of fear and condemnation of both male and female adult sexuality are found. The core complex of the paedophile is characterised by intense longings with annihilation anxiety, narcissistic withdrawal with depression and low self-esteem and aggression more or less fully converted to sadomasochism.⁵¹

The definition of ‘serious sex offence’ in the Bill does not restrict itself to sex offences against children. The Minister for Police, in his second reading speech on the Bill stated that the inclusion of adult sex offences “acknowledges that persons who commit sex offences against adults may pose significant risks to the safety of children”. However, it could be argued that the inclusion of adult sex offences in the definition of ‘serious sex offence’ could have the effect of barring people who pose no greater risk to children than any other person with a criminal record. The Queensland Criminal Law (Sex Offenders Reporting) Bill 1997 recognises this concern by limiting its definition of ‘serious sex offence’ to only those serious sex offences *in relation to a child*, and carrying a penalty of a term of imprisonment of six months or more.⁵²

The definition of ‘serious sex offence’ in the Bill also includes “any other offence, whether under the law of New South Wales, or elsewhere, prescribed by the regulations”. The discretion that this provision vests allows for virtually any offence to be included in the definition. While the current provision refers to serious offences which are punishable by penal servitude of 12 years or more, what is considered a relatively minor offence today could be included in the definition at a later time. This could have the effect of a person being punished disproportionately for a crime for which he or she has already been sentenced. See also the section on retrospectivity below for further discussion of the problems of defining “serious sex offence”. An illustration of this point is what happened in the United States where many people arrested for minor homosexual offences in the 1940s and 1950s are having their files reopened and their names added to sexual offences registers.⁵³ A crime which was minor at the time it was committed has been redefined in a manner which makes its consequences far more severe almost half a century later.

4.4 Retrospectivity

The Act applies in relation to “serious sex offences” committed before or after the commencement of the Act. A question could be raised concerning the retrospectivity of this

⁵¹ R Howie, P Nygh & P Butt (eds), *Butterworths Australian Criminal Law Dictionary*, 1997, definition of ‘paedophile’, p. 145.

⁵² Clause 3(1).

⁵³ M Swain, *Registration of Paedophiles*, Briefing Paper No. 12/97, New South Wales Parliamentary Library Research Service, 1997, p. 16.

aspect of the Act. It is a belief held by many that retrospective Acts can be inexpedient and unjust, and unless there is a specific statement within the Act as to its retrospectivity, courts will generally presume the Act not to be retrospective in its operation. It is clear that Parliament has the unqualified power to make an Act which operates retrospectively,⁵⁴ although it is a generally accepted principle that, except in relation to procedural matters, changes to the law should not be retrospective. An Act is only truly retrospective if it provides that rights and obligations are changed with effect prior to the commencement of the legislation.⁵⁵ There are two ways in which this bill could be called retrospective. The first is the inclusion in its definition of 'serious sex offence' those acts which were held by a court to be illegal prior to the commencement of the Bill. The proposed Act is also retrospective insofar as it operates on those people deemed 'prohibited persons' who commenced child-related employment prior to the commencement of the Act. In this sense the Bill is truly retrospective, as it is making illegal an act - engaging in child-related employment, even though it was not illegal at the time the prohibited person commenced that employment.

Perhaps of even greater concern is the idea that an act, albeit a criminal one, which was committed many years ago, is still relevant in judging the person today. Given the nature of child sex offences, it is common to find multiple offences committed over a lifetime. It has been found that "most offenders have multiple victims, often both boys and girls. Most offenders are long term recidivists."⁵⁶ However, this is not always the case, and isolated incidents do occur. There is conflicting opinion regarding the recidivism of child sex offenders. A contrasting study to the one above found that carefully designed studies can claim a six per cent recidivism rate, compared to a thirty five per cent rate in uncontrolled groups.⁵⁷ Any policy must at least attempt to discern between those likely to reoffend and those whose offence was a one-off incident (a distinction, perhaps, between 'paedophiles' and 'sex offenders'). The implication of the provisions of the proposed Act is that those who have been found guilty of an offence in their past will never be given the chance to escape that past.⁵⁸ Relevant also is the notion that once a person has been punished for a crime, his

⁵⁴ *R v Kidman* (1915) 20 CLR 425 at 451, in DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (4th ed), Sydney, 1996, p. 246.

⁵⁵ *Ibid*, p. 244.

⁵⁶ A Tomison, 'New measures for combatting child sexual assault', *Family Matters*, No. 42, Spring/Summer 1995, p. 36.

⁵⁷ W Glaser, 'Paedophilia: The public health problem of the decade, Paper presented at the *Paedophilia: Policy and Prevention* Conference, April 1997, p. 10.

⁵⁸ The Queensland Criminal Law (Sex Offenders Reporting) Bill 1997, introduced into the Queensland Parliament on 18 November 1997 and the subject of a Legal, Constitutional and Administrative Review Committee Report released in February 1998, provides for a scheme whereby adult offenders convicted of a 'serious sex offence' are required to report to a police station within 7 days of release from custody and provide to the police their name, address, date of birth and details of their conviction. The reporting requirements also apply retrospectively, however, importantly for the current discussion, only to convictions that happened within 10 years before the commencement of the Act. Additionally, the reporting requirements last for a period generally 2.5 times the length of the person's sentence. The Committee recommended that the consideration be given to amending the Bill so that first

or her debt to society has been paid and he or she must be afforded the opportunity to re-integrate into the community. By continuing to take account of past offences, the offender is being doubly punished, and can be subject to a lifetime of persecution and victimisation.⁵⁹ However, it is argued by some that the need to protect children from sexual and other abuse is such a priority that it outweighs such contentions. The Minister for Police in his second reading speech was conscious of this problem, stating that “the purpose of the proposed legislation is to protect children from persons who use employment to get access to children. It is not to punish people who have been found guilty of offences against children. These people have already been punished by the judicial system. Any employment prohibition on the basis of a person having committed offences should be made with reference to the risk of that person re-offending if presented with the opportunity to do so, and that person’s deliberate decision to seek out opportunities to do so through their employment choices.”

It must be noted that there is provision for a prohibited person to make an application to the Supreme Court or the District Court to make an order declaring that the provisions do not apply to that person. The Court must be satisfied that the person does not pose a risk to the safety of children. This could overcome some of the problems highlighted in the above paragraphs.

4.4.1 *Spent Conviction Schemes*

The Commonwealth and States operate “spent conviction” schemes, whereby offenders are able to “live down” an old minor offence. These schemes acknowledge the fact that a person who commits a minor indiscretion ought not be dogged by that indiscretion for life. The New South Wales scheme operates with the effect that, upon completion of a crime-free period (ordinarily 10 consecutive years), the conviction is regarded as spent and does not form a part of the person’s criminal history. Convictions for sexual offences are not included in the scheme, nor are convictions for which a penalty of more than six months imprisonment was imposed, an offence against a body corporate or another offence as prescribed by the Regulations,⁶⁰ recognising also that sexual offences are in a separate category of offences. Once spent, the person is not required to disclose to any other person for any purpose information concerning the conviction.⁶¹ However, the *Criminal Records Act 1991* stipulates that this provision does not apply in relation to an application for employment as a judge, magistrate, prison officer, justice of the peace, teacher, teacher’s aide or provider of child care services, recognising the special position that these people hold in society.⁶² The last three of these groups of people similarly come under the definition

time offenders are not included, nor are those convicted but receiving a suspended sentence: see n 32, p. 91, Recommendations 4 & 5.

⁵⁹ M Swain, n 53, p. 20.

⁶⁰ *Criminal Records Act 1991* (NSW), section 7.

⁶¹ Section 12.

⁶² Section 15.

of those employed in ‘child-related employment’ in the Child Protection (Prohibited Employment) Bill.⁶³

5.0 OMBUDSMAN AMENDMENT (CHILD PROTECTION AND COMMUNITY SERVICES) BILL 1997

The Ombudsman Amendment (Child Protection and Community Services) Bill 1997 confers on the Ombudsman a new power to “oversee and monitor the systems which designated public authorities and designated non-government agencies have in place for handling and responding to allegations of child abuse made against their staff.”⁶⁴ This provision specifically responds to recommendations 140 and 35 of the Royal Commission Report, (see Part 3.0, above). Broadly, the Bill proposes to widen the Ombudsman’s jurisdiction by:

- requiring the Ombudsman to keep those systems for preventing child abuse or, handling and responding to child abuse allegations, or child abuse convictions of employees of ‘designated agencies’;⁶⁵
- requiring the head of a designated agency to notify the Ombudsman of any child abuse allegation or conviction against any employee of the agency, whether the agency proposes to take any action, and the reasons for that action, and any written submissions made to the head of the agency concerning any such allegation;
- enabling the Ombudsman to monitor the progress of the investigation by a designated agency if it considers it to be in the public interest to do so;
- requiring the head of a designated agency to send as soon as practicable after the conclusion of an investigation a copy of any report, including any action that has been taken with respect to the allegation, and
- empowering the Ombudsman to conduct an investigation concerning any child abuse allegation or conviction against any employee of a designated agency (in which case the agency must hand over their investigation to the Ombudsman), or any

⁶³ Interestingly, the *Criminal Records Act 1991* does not provide for the destruction of a record relating to a spent conviction, quashed conviction or pardon (section 23).

⁶⁴ The Hon P Whelan, MP, second reading speech, NSWPD, 25 November 1997, p. 2455.

⁶⁵ A ‘designated agency’ is defined in proposed section 25A of the *Ombudsman Act 1974* to be:

- the Department of School, Education, the Technical and Further Education Commission; the Department of Community Services; the department of Sport and Recreation; the Department of Juvenile Justice, the Department of Health or the Department of Corrective Services;
- the Community Services Commission or the Health Care Complaints Commission;
- a non-Government school within the meaning of the *Education Reform Act 1990*;
- a child care centre, or residential child care centre that is licensed or required to be licensed under the *Children (Care and Protection) Act 1987*, or
- any other body prescribed by the regulations for the purposes of this definition.

inappropriate handling of or response to a child abuse allegation or conviction.

The Bill also proposes to amend a number of regulations, to allow the recording of charges and any disciplinary action taken, in relation to child abuse allegations or convictions. Employees affected are those covered by the following regulations: the Ambulance Services (Staff) Regulation (1995); the Public Sector Management (General) Regulation 1996, and the Teaching Service (Education Teaching Service) Regulation 1994. This amendment proposes conviction or allegation records are to be kept separately from personal records of employees. The record must indicate whether or not the charge was found not to be proved or without foundation. It further proposes to ensure that a government agency will have access to such records for the purposes of screening applicants for a position which involves the care of or contact with children. The question arises whether or not all the provisions of the Child Protection (Prohibited Employment) Bill 1997 are in fact necessary if there is a screening procedure put in place using records such as those proposed by this Bill.

5.1 Definitional issues

5.1.1 Definition of 'child'

It is worth noting that in this Bill, the same definition of 'child' is adopted as is contained within the *Children (Care and Protection) Act 1987*. For the purposes of this Bill, a child is any person under the age of 18 years. This is not consistent with the definition of 'child' in the Child Protection (Prohibited Employment) Bill 1997. If the purpose of introducing these Bills is to provide a consistent approach to the prevention and detection of child abuse across all government and relevant non-government agencies, then it is worth considering making those to whom the Bill applies consistent.

5.1.2 Definition of 'child abuse'

This Bill is concerned with more than child sexual abuse. The definition of 'child abuse' to be inserted into the *Ombudsman Act 1974* includes assault, sexual assault, ill treatment or neglect of a child or exposing or subjecting a child to behaviour that psychologically harms the child. Once again, this definition is consistent with the definition of abuse in the *Children (Care and Protection) Act 1987*. Again, it is a much wider definition than that contained within the Child Protection (Prohibited Employment) Bill 1997. In relation to the first part of the Bill, that dealing with the extending the Ombudsman's powers to overseeing investigations of child abuse, a wide definition is appropriate, to ensure that all relevant investigations fall within the scope of the Act. However, in relation to the second part of the Bill, which relates to the retention of records of allegations of child abuse, there may be justification for more restricted application, bearing in mind the potential consequences of having a record of that nature made when the person applies for any job involving children. See Part 5.2 - Natural Justice, below, for further discussion.

5.1.3 Definition of 'employee'

For the purposes of the Bill, the definition of 'employee' includes any employee of the

agency, whether or not employed in connection with any work or activity of the agency that relates to children. Once again, this is an extremely expansive definition, and would include those people who, through the nature of their work, have no more contact with children than they would in a non-designated agency. An example could be an accounts clerk in the head office of the Department of School Education, who would have no more contact with children than he or she would have if employed by the Department of Transport, for example. The definition also includes ‘any individual engaged by the agency to provide services to children (whether or not under a contract for services)’. It does not seem clear from this definition whether an employee includes volunteers, as is the case in the Child Protection (Prohibited Employment) Bill 1997.

5.2 Natural justice/presumption of innocence

Schedule 3 of the Bill proposes to amend the *Ambulance Services (Staff) Regulation 1995*, the *Public Sector Management (General) Regulation 1996* and the *Teaching Service (Education Teaching Service) Regulation 1994* to require records of charges of child abuse allegations or convictions and any disciplinary action taken in relation to those allegations or convictions to be made and retained. A fundamental presumption upon which our legal system is based is that a person is innocent until proved otherwise. However, a conviction is not necessary before a record is made and retained. It is not even necessary that the allegation be proved internally, whether or not criminal proceedings are commenced. An internal investigation regardless of its outcome, without the formal structure of a criminal proceeding which is designed to uphold the principles of procedural fairness and natural justice, is sufficient for the purposes of this Bill. Natural justice may not in fact be done in an internal investigation where the accused may or may not have the right of reply or the right to question the allegations made against him or her, for example. The Ombudsman’s involvement in overseeing the investigative proceedings cannot ensure that natural justice concerns are answered. Where an allegation of child abuse has been found to be groundless, this does not give cause for removal of the person’s record. Even where, for example, victimisation of the employee has occurred, and a number of allegations have been made and proven to be groundless, the allegations will be recorded. Of course, the outcome of any investigation must also be recorded. In an environment where it is believed that allegations of child abuse may be unproven “for reasons other than untruth”,⁶⁶ it could be argued that a record of an unproven allegation, once recorded, may have an undeservedly detrimental effect on an employee’s career. The Bill contains no provision for the destruction of records after a certain period of time. The potential problems which may result are discussed in Part 4.4 – Retrospectivity, above (see in particular note 58). This argument must, however, be weighed against the risk to children of, for example, teachers remaining in a class room after allegations have been made and neither proved nor disproved. There is the risk that if the allegation was true despite not being able to be proved, the alleged behaviour may in fact continue.

6.0 OTHER CHILD PROTECTION INITIATIVES

⁶⁶ Hon P Whelan, MP, NSWPD, 25 November, 1997, p. 2457, reiterating the opinions of the Royal Commission.

The Australian Bureau of Criminal Intelligence (ACBI) established a national paedophile project in 1990, which includes a national database of child sex offenders, including child sex offender suspects. The database is available to Australian law enforcement agencies, but not to the wider community. However, the ACBI began in 1996 to revamp the database so that the information could become more widely available. The Child Protection Enforcement Agency (CPEA) commenced operations in its present form in July 1996, and eight Joint Investigation Teams (JITs) had been established by November 1997 with members from both the Department of Community Services and NSW Police to provide a more co-ordinated and streamlined approach to child abuse investigations (see page 6). The green paper on the proposed Children's Commission was also released in response to Royal Commission recommendations (see pages 10-11).

The NSW Health Department issued a circular in August 1997 entitled *Procedures for Recruitment and Employment of Staff and Other Persons – Vetting and Management of Allegations of Improper Conduct*. The Circular includes policy and procedures on screening of all people working in any capacity in the NSW health system, as well as for reporting and managing allegations of sexual, physical and emotional abuse of children and other patients by any person employed or engaged by NSW Health. Criminal record checks will also be conducted on an annual basis on all people employed or engaged in the NSW health system. People convicted of a sexual offence against children and of other vulnerable people will not be employed or engaged by NSW Health. Where an allegation of sexual abuse is made, the Health Service must notify the NSW Police Service, the Staff Records Management Unit of the Department of Health, the Health Care Complaints Commission, and where the alleged victim is under the age of 18 years, the Department of Community Services.⁶⁷

Department of School Education initiatives

The NSW Department of School Education has made a number of organisational changes to facilitate the prevention and investigation of child abuse. The Case Management Unit was established in May 1996 to “investigate and manage allegations of improper conduct of a sexual nature by a staff member against a student,”⁶⁸ and is staffed by an Assistant Director-General and a number of Case Managers and Investigators. The Teaching Service (Education Teaching Services) Amendment Regulation 1997 enables the Department to keep permanent records of staff charged with having engaged in disgraceful or improper conduct, being conduct of a sexual nature involving a student or students. These records may be kept whether or not the allegation has been found to be proved.⁶⁹ The DSE policy on child protection makes it mandatory for any staff member to notify cases where they have reasonable grounds to suspect child sexual abuse. The teacher must notify his or her

⁶⁷ NSW Health Department, *Procedures for recruitment and employment of staff and other persons - vetting and management of allegations and improper conduct*, Circular No 97/80, August 1997.

⁶⁸ ‘Action Taken by the NSW Department of Education and Training as Part of its Child Protection Strategy: 1.0 Case Management Unit’, [Http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_1.htm](http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_1.htm).

⁶⁹ Ibid.

Principal who must in turn notify DCS. Staff also have the option of notifying DCS directly.

The DSE has revised its protocol regarding criminal record checks to make it mandatory for all applicants for employment, both permanent and casual staff and teacher interns, to have a criminal record check. Where a staff member is dismissed or leaves teaching having been convicted of child sexual assault or disciplined for improper conduct, a statement of service or reference is not to be issued. The teacher's record states the reason why he or she has left teaching, and the teacher is placed on the Not To Be Employed List.⁷⁰ In fact, DSE policy is such that staff who are under investigation or are the subject of disciplinary action are not permitted to resign, retire, take long service leave, leave without pay, transfer or be promoted. A National Strategy in Schooling to Prevent Paedophilia and Other Forms of Child Abuse allows for interstate checking of employment history. Since May 1997, NSW had made 247 checks interstate and other States had made 57 checks with NSW. These checks resulted in three people being identified as having a background of child sexual abuse or improper conduct of a sexual nature.⁷¹

On Friday 8 August 1997 the Minister for Education released a Discussion Paper on the establishment of a Teacher Registration Authority in New South Wales. The purpose of the proposed independent, statutory Authority is to establish a code of ethics for the profession, establish standards of professional performance and conduct, determine minimum standards for registration, set clear policy for processing applicants for registration including criminal record checks, and through its Teacher Registration Authority Hearing Tribunal hear and determine matters of teacher discipline, both with regard to allegations of teacher incompetence and allegations of improper conduct. Responses to the Paper were due by 17 October 1997.⁷² At the time of writing, consultation was still underway with key players affected by the proposal.⁷³

7.0 CONCLUSION

The two Bills which are the main subject of this Paper are an important part of the Government's response to the recommendations made by the Royal Commission into the NSW Police Service. Other responses to the Royal Commission have also been mentioned in the Paper. Commissioner Wood made 140 recommendations into all aspects of the NSW Police Service, as well as organisations with responsibility for child protection and child

⁷⁰ Ibid, 2.0 *Policies* [Http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_2.htm](http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_2.htm). The List currently contains the names of 139 people who have been convicted in the past 25 years of child sexual assault or who have been the subject of disciplinary action for improper conduct of a sexual nature. None of these people are presently employed by the DSE.

⁷¹ Ibid, 11.0 *National Strategy in Schooling to Prevent Paedophilia and Other Forms of Child Abuse*, [Http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_11.htm](http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_11.htm).

⁷² Ibid, 14.0 *Teacher Registration Authority*, [Http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_14.htm](http://www.dse.nsw.edu.au/stand.cgi/dse/D1.0/action_14.htm).

⁷³ Information given to the author by the office of the Minister for Education, 23 April, 1998.

welfare. The Child Protection (Prohibited Employment) Bill 1997 aims to prevent those people who present an unacceptable risk to the safety of children from employment whereby they will come into direct contact with children. It does this by requiring all present employees in such situations to declare whether or not they are a “prohibited person”, a person defined in the Bill as someone who has been convicted of a serious sex offence. A prohibited person is placed under an obligation to resign from, or not seek, child-related employment. The Ombudsman Amendment (Child Protection and Community Services) Bill 1997 has two main facets. Firstly it bestows upon the Ombudsman’s Office the power to oversee all child abuse investigations undertaken by relevant government and non-government organisations. Secondly, it amends a number of public service regulations in order to make it compulsory to make and retain records of all allegations of child abuse made against an employee. The purpose of this amendment is similar to that of the Child Protection (Prohibited Employment) Bill 1997, namely to ensure that those who pose a serious risk to the safety and welfare of children do not gain or remain in child-related employment.