

13 July 2016

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**Our ref:** ADM/2016/394

The Hon Justice Peter McClellan  
Chair, Royal Commission into Institutional Responses to Child Sexual Abuse  
GPO Box 5283  
Sydney NSW 2001

Dear Commissioners,

**Royal Commission into Institutional responses to Child Sexual Abuse – April 2016 public roundtable into reporting offences and blind reporting**

I write for the purpose of providing further information in relation to matters canvassed at the Royal Commission's criminal justice roundtable into reporting offences and blind reporting.

Consideration of relevant offences

As the Commission recently highlighted in its *Consultation Paper: Best practice principles in responding to complaints of child sexual abuse in institutional contexts*, the work of the Commission has identified past failures by many institutions to report child sexual abuse.

In this regard, we welcome the Commission's consideration of whether legislative reform is required in NSW – whether by way of an amendment to section 316 of the *Crimes Act 1900* (NSW), and/or the creation of a specific offence relating to the reporting of child sexual offences.

As I indicated in my evidence at the roundtable, our view is that there would be a benefit in a specific provision which relates to the failure by individuals connected with particular institutions<sup>1</sup> to report to police child sexual offence allegations.<sup>2</sup> The offence provision could be tied to another provision that imposed a general duty on those with knowledge of these types of allegations to provide all relevant information to the police. This position is consistent with the views that I expressed at the roundtable discussions.

However, as I also indicated during the discussions, I believe that there will be circumstances when withholding relevant information from police should not warrant prosecution.

These exceptions to the general rule could be potentially dealt with in two ways. Firstly, like the Victorian legislation, a number of exceptions could be specified in the legislation. Secondly, as is currently the case with section 316, the prosecution of the offence could require the approval of the Attorney General for any prosecution under the section.

Our suggestion that the Attorney General would have to approve all prosecutions recognises that there will be circumstances when a decision to make a blind report might not conform with a specific statutory exception to the requirement to provide all relevant material relating to an alleged offence, but the decision to withhold information might nevertheless conform with accepted and appropriate industry practice.

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<sup>1</sup> These institutions could be specified in the Act and/or prescribed by regulations.

<sup>2</sup> The offence might also include the failure to report other forms of serious child abuse.

If a specific offence provision of the type we are proposing were enacted, consideration would still need to be given to whether any amendment would be required to section 316. It was noted during the roundtable discussions that section 316 is usually used in connection with prosecuting a range of conduct outside the context of a failure to report the criminal abuse of children. Therefore, the general utility of this provision would not appear to be in doubt. However, what needs to be carefully considered is the public benefit in using a general provision of this type for prosecuting members of the public who, without a 'reasonable excuse', fail to provide information relating to serious criminal assaults on children.

If the view is taken that a new provision is not needed, and that section 316 should continue as the avenue for prosecuting members of the public for not reporting information to Police that is relevant to serious criminal child abuse, our view is that section 316(4) should be amended to require all such prosecutions of this kind to be approved by the Attorney General (and not merely in the limited circumstances currently specified in section 316(4)). In addition, and from a policy perspective, the Attorney General should publish guidelines as to when the prosecution of these cases would be appropriate (a matter that could be required in the legislation).

In this regard, published guidelines along these lines would serve to both identify and promote good practice in this area, and also remedy difficulties associated with the fact that what constitutes a 'reasonable excuse' is not clarified in the legislation.

Irrespective of any findings and recommendations reached by the Commission on these issues (and any resulting outcome in terms of legislative amendment in NSW), the key message that we have taken away from the roundtable is the need for our office to work together with relevant stakeholders to improve practice in this area. In particular, we are currently progressing two specific issues which were raised at the roundtable.

#### Factsheets for victims in NSW

As discussed at the roundtable, there is a need to improve the information provided to alleged victims of child sexual abuse – and other forms of serious abuse – regarding what will occur if police are advised of their allegations.

With this in mind, since the roundtable we have had preliminary discussions with a number of parties about the viability of preparing a factsheet for adult victims of historical child abuse. From these discussions, it is apparent that the proposed factsheet should cover, inter alia:

- A reassurance to victims that, except in the most exceptional circumstances, their views regarding whether they wish to participate in any police investigation and criminal proceedings would prevail.
- The right of victims to have a nominated police officer act as a support person for the purpose of providing them with regular updates on the progress of their matter and to address any relevant questions or concerns the victim might wish to raise; and
- A specific commitment by police to work with the victim to address any concerns they might have for their own safety and/or the safety of others.

#### NSW Police Force processes for responding to reports of historical child abuse

Associated with the development of resources for victims, there is also the need for police and other agencies to have clear and comprehensive internal processes for responding to reports of sexual abuse. As the Commission is aware, in 2014 the NSW Police Force developed an incident report and associated protocol to be used by non-government organisations in their reporting of historical allegations of child abuse to Police. These documents were targeted at specific groups such as the major faith based organisations, and were intended to facilitate the systematic provision of reports of historical allegations of child abuse to police.

Prior to the development of these resources, non-government organisations (NGOs) had been forwarding reports of historical child sexual abuse directly to the Sex Crimes Squad. Upon distributing the protocol and associated resources, the NSW Police Force requested that, in future, organisations forward reports to the relevant local area command (LAC).

To support the implementation of the new protocol, we understand that in July 2014, the Sex Crimes Squad distributed a memorandum to the LACs titled 'Reporting Processes NGO's to NSWPF', together with a related letter and flow chart (attached). These documents detail the minimum response to reports where:

- 1) the identity of the alleged victim is not known to the organisation making the report;
- 2) the identity of the alleged victim is known to the organisation making the report and that person has indicated they are willing to speak with police; and
- 3) the identity of the alleged victim is known to the organisation making the report and that person has indicated they do not wish to speak with police.<sup>3</sup>

From our review of the above documents, while it does appear that the flow chart provides some avenue for police to investigate a report that falls into category 3 – particularly in circumstances when there is information to suggest that there are children or other persons at risk – the corresponding section of the memorandum fails to include the option of considering criminal investigative action within the range of potential actions which police might take.

In this regard, I note Detective Superintendent Howlett's evidence at the roundtable that, in practice, criminal investigative action is an option which police can take if they receive a report in category 3 (and that often *a range* of investigative steps will be pursued). We support the view put by Mr David Shoebridge, MLC at the roundtable that the memorandum should make it clear that police should always consider the potential for investigative action. This could be achieved by adding specific guidance in the relevant section of the memorandum along the following lines:

'In circumstances where the NGO knows the victim's name but also informs the NSWPF that the victim is not prepared to take part in a criminal investigation, police should take the following steps:

- Review existing police information holdings about the person of interest.
- Review any information from the NGO about current risks to children from the person of interest.
- Based on the above checks, consider whether there may be scope for a criminal investigation.'

We propose to put this suggested amendment to the NSWPF as part of our ongoing discussions with them. In addition, we propose suggesting to the NSWPF that it develops a consistent label for those 'blind reports' which are processed by local area commands for the purpose of monitoring the number of such reports, and the related responses to them by individual LACs.

I also note that I have discussed these matters with Professor McMillan, Acting Ombudsman, and he endorses the position I have taken in this letter.

I trust that the information provided is of assistance to the Royal Commission. Please do not hesitate to contact me on (02) 9286 0989 or Ms Julianna Demetrius, Assistant Ombudsman, on (02) 9286 0920 if you would like to discuss this matter.

Yours sincerely



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

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<sup>3</sup> In these circumstances the associated protocol and incident report do not require the organisation to provide the name of the alleged victim to police; however this section of the NSW Police Force guidance appears to apply in all circumstances where an alleged victim has indicated they do not wish to speak to police – ie whether or not police have been provided the person's name.