

Report of the Children's Commissioner regarding functions referred to in the Ombudsman's Report 'A Life Long Shadow'



**REPORT OF THE CHILDREN'S COMMISSIONER REGARDING
FUNCTIONS REFERRED TO IN THE OMBUDSMAN'S REPORT
'A LIFE LONG SHADOW'**

BACKGROUND

This report is given to the Minister for Child protection, the Hon. Konstantine Vatskalis, under s278(2) of the *Care and Protection of Children Act* ("the Act"), being a report about matters relating to the performance of functions of the Children's Commissioner.

I have read the report of the Ombudsman for the Northern Territory entitled "*A Life Long Shadow*" tabled in the Legislative Assembly on 8 August 2011. The report follows the Ombudsman embarking on an 'own motion' investigation under the *Ombudsman Act* on 2 November 2009, more than 20 months ago. The investigation was not completed hence the subtitle: "*Report of a Partial Investigation of the Child Protection Authority*".

The Ombudsman's investigation was conducted against the background of two investigations commenced by the Children's Commissioner ("the Commissioner") at the request of the then Minister for Child Protection in late October 2009 under section 260(1)(e) of the Act as it then stood. The Commissioner reported to the Minister on those matters, which concerned the functioning and efficacy of the Central Intake Team, and the death of a child who had been notified to Central Intake in September 2009. Those reports were tabled in the Legislative Assembly on 17 February 2010, the first sittings after the reports were provided to the Minister.

The Ombudsman's investigation was also conducted at the same time as the Board of Inquiry into Child Protection ("Board of Inquiry") announced by the Northern Territory Government under the *Inquiries Act* on 11 November 2009. The Board of Inquiry reported to the Government on 18 October 2010.

The Ombudsman's Notice of Investigation dated 2 November 2009 was formally served on the CEO of the then Department of Children and Families¹, but not on the Commissioner, despite my written requests that this should occur. I took this view due to the various provisions of the Act providing independence to the Children's Commissioner in the performance of the offices functions, including investigations², and due to the Administrative Arrangements Order provided for by section 35 of the *Interpretation Act*. The notice of 2 November 2009 made clear that the Ombudsman intended to investigate, amongst other things, various actions of the Commissioner which fell within his office's legislated functions³.

¹ As required by section 47 of the *Ombudsman Act*.

² See sections 262, and 259 and 289 of the Act.

³ Third paragraph of the Notice issued 2 November 2009 and paragraphs 3 and 9.

The Ombudsman in her report has seen fit to amplify one aspect which she intended to investigate by stating, in part, "*The issue to be investigated was how the worker's employer became aware of the report to the Children's Commissioner...*"⁴. The issue is identified and expressed in the report in the context of the preceding sentence, referring to information received by the Ombudsman "*from two sources*" that following an approach by a health worker to the Commissioner, the worker was subjected to harassment and unfavourable treatment in her workplace.

This adverse implication, which is addressed below, has also been included in the Ombudsman's report against the background of some ill-informed and incorrect statements in the media during 2010 concerning the Commissioner's functions, attributed to the Ombudsman. These media reports related to issues concerning the Commissioner's report on the Central Intake Team referred to above⁵ ("the Intake Report"), and to my role as a co-chair to the Board of Inquiry. It is confounding that the Intake Report which the Ombudsman used as justification for "*sparking*" the resumption of her investigation in January 2010⁶, along with the Board of Inquiry Report, are referred to and relied upon extensively in the Ombudsman's report.

The Intake Report, dated 6 January 2010, was compiled and provided to the Minister as part of my functions as Commissioner. Contrary to suggestions made at that time, the Minister had not received or read the Intake Report or any draft of it, and never requested the Commissioner to "*...make it a report that can be tabled in parliament, and not what it is*"⁷. The fact is that the Minister was unaware of the content of the Intake Report until it was delivered by the Commissioner on 6 January 2010. Suggestions that I was asked to change the content of the Intake Report to enable tabling in the Legislative Assembly, or that I complied with such a request, were fanciful and offensive. I was never asked to change the Intake Report, and did not change that report, and did not see fit to provide the Minister with any confidential edition of the Intake Report as I was entitled to do under the Act⁸. I cannot say whether the Ombudsman was correctly reported by the media on those occasions, but do note that in January 2010 the Ombudsman responded to concerns raised by me by stating that "*... in my experience it is unwise to take literally everything that the media publishes*".

The Ombudsman's report also makes other adverse comments in relation to the performance of the Commissioner's functions, including in relation to legal advice sought by me as Commissioner on leave of absence, and stating that I objected to producing any documents to the Ombudsman, and in relation to

⁴ Page 21 of the Ombudsman's report.

⁵ Which was provided to the then Minister for Child Protection on 6 January 2010, and was subsequently tabled in the Legislative Assembly.

⁶ On 22 January 2010 the Ombudsman was reported by the NT News as stating that her move to continue the investigation was "*sparked*" by the Minister not handing over a report of the Children's Commissioner; "*She said she believed Mr Vatskalis had instead sent the report back to the author - Children's Commissioner Howard Bath - and told him to change it, before it's released publicly*".

⁷ As the Australian on 8 February 2010 reported the Ombudsman to have said.

⁸ See section 278(5) of the Act.

my involvement on the Board of Inquiry. Despite section 61 of the *Ombudsman Act*, which the Ombudsman notes should be complied with⁹, neither I nor staff of my office were provided with any part of the report by the Ombudsman prior to publication, to enable compliance with that section. Regardless of section 61, I consider the Ombudsman was obliged to provide procedural fairness to the Commissioner and staff of that office prior to publishing the report¹⁰, but did not do so.

As the adverse comments in the Ombudsman's report to which I refer relate to the Commissioner's functions, and my office has not been provided procedural fairness prior to their publication, I am placed in the position where the only manner in which I can appropriately address the issues relating to my functions is by now reporting to the Minister under section 278(2) of the Act.

In this report I intend only to deal with some inaccuracies, misrepresentations and the failure to afford procedural fairness, together with problems around the naming of or possible identification of clients of the Department, including their family members. Other responses to the quality of the substantive discussion in the report regarding Central Intake and the various recommendations could be provided in due course, if requested.

THE OMBUDSMAN'S REPORT

The complaint

Through various means, including communications of the Ombudsman¹¹, I am aware of the matter to which the Ombudsman's report refers on pages 19 and 21. The Commissioner's office initially received a complaint in October 2009, and dealt with it in accordance with the Act. In addition, the Commissioner ensured that the complainant received advice from the office of the Commissioner for Public Interest Disclosures, and understood she may also have some avenue under the *Ombudsman Act* were she to suffer any adverse treatment as a result of having made a complaint.

The Ombudsman's report includes the statement that "*The issue to be investigated was how the worker's employer became aware of the report to the Children's Commissioner...*"¹². I consider the implication of this statement is that the Commissioner or his office improperly advised the employer about the complainant/complaint. This is an implication that I vigorously reject.

I am unable to make any comment on whether the person involved was indeed subject to any harassment or discrimination. Whether or not this occurred, it is unreasonable to imply that it was because the Commissioner or his office improperly passed on information. As Commissioner I am not generally in a position to divulge details of information obtained in dealing with

⁹ See page 222 of the Ombudsman's report.

¹⁰ Section 49 of the *Ombudsman Act* requires natural justice to be accorded in investigations.

¹¹ ABC News article of Jane Bardon on 21 January 2010, and more recently.

¹² Report page 21.

a complaint¹³, however, the relevant details of the matter and timing of events clearly indicate that the Ombudsman's implication is not consistent with the facts. The Ombudsman would have become aware of the pertinent information had appropriate questions been asked of the complainant and Departmental staff during her investigation, even to the CEO level were that required. Moreover, neither I nor any of my office's staff were requested or summoned to answer questions in her investigation. The Ombudsman's report provides no proper explanation of what appropriate investigation was in fact made, nor is the issue determined in her report. It was inappropriate for the Ombudsman to include such content in a report without proper investigation and determination or affording the parties procedural fairness. Having posited the issue, the Ombudsman was obliged to either properly investigate and determine the matter or, alternatively, refrain from including narrative inferences in her report.

Summons to the Children's Commissioner

The Ombudsman states that a summons was served on the Commissioner to produce relevant records and that, "*The Children's Commissioner objected, on various grounds, to producing any records and quoted in his objection the opinion of Queen's Counsel to the Department*"¹⁴. The statement is both misleading and false.

On 22 January 2010 the Ombudsman served me, as Commissioner, with a Notice to Produce Documents and Records ("summons") under section 52 of the *Ombudsman Act*. The summons sought 8 categories of documents to be produced to the Ombudsman on or before 12 February 2010. Of those 8 categories, 5 were able to be readily produced to the Ombudsman. At the time of service I was on leave of absence from office of Commissioner¹⁵, and on 9 February 2010 I wrote to the Ombudsman. That letter advised of the leave of absence and of the Acting Commissioner's appointment, and requested the Ombudsman to provide notice to the Acting Commissioner as required by section 47 of the *Ombudsman Act*. In addition, I requested the Ombudsman to authorise me to disclose service of the summons to the Acting Commissioner, my fellow Board of Inquiry members, and to the Chief Minister as Minister responsible for the *Inquiries Act*¹⁶.

The letter then advised that I intended taking all reasonable steps to provide the documentation sought, and in fact then provided the first 3 categories of documentation required by the summons.

In relation to 2 categories of documents required by paragraphs 4 and 5 of the summons, the letter of 9 February 2010 requested the Ombudsman to

¹³ Section 282 of the Act.

¹⁴ Page 24 of the Ombudsman's report.

¹⁵ Which leave was granted by the Minister under the Act in order to co-chair the Board of Inquiry.

¹⁶ As the summons had been served with a 'nondisclosure direction' under section 121 of the *Ombudsman Act*.

undertake that the content of that documentation would be treated as confidential until the two Commissioner's reports requested by the Minister in late October 2009 had been tabled in the Legislative Assembly. The documentation sought by the summons included the two reports, and all documentation relevant to those reports. The Commissioner's request of the Ombudsman was reasonable and appropriate, including because the Ombudsman is answerable to Parliament.

Had the Ombudsman given the undertaking requested on 9 February 2010, these 2 categories of documents would have been provided. As matters transpired, both reports were tabled in the Legislative Assembly on 17 February 2010, so were then publicly available. I note that the Ombudsman has had significant regard to the Intake Report in compiling her report, including because the issues and evidence considered by that report overlap significantly with those which have ultimately been considered by the Ombudsman's investigation.

In relation to one further category of document, being the Wright Institute report of November 2007, I requested the Ombudsman to seek the document from the most appropriate sources¹⁷.

Only the documentation sought by paragraphs 7 and 8 of the summons presented any significant difficulty, due to the range and number of the documents potentially falling within those categories. The Commissioner's letter of 9 February 2010 advised of the difficulty presented by paragraph 7 of the summons¹⁸, and requested any more specific details of the documents which the Ombudsman was able to provide. The letter also requested some particularity for the purpose of complying with paragraph 8 of the summons.

My letter also advised, "*... it is not the intention of this letter to take issue with jurisdictional or other legal difficulties which may attend the process you are proposing, although I reserve the right to do so. As previously advised, I consider it desirable to deal with the issues in a cooperative fashion as far as possible*".

Most importantly, the letter of 9 February 2010 requested an extension of time¹⁹ from the Ombudsman of 4 weeks within which to comply with the summons. Again, this was a reasonable request in the circumstances of the general and broad nature of the requirements of paragraph 7 of the summons.

On 11 February 2010²⁰ the Ombudsman declined my request for an extension of 4 weeks to enable the Commissioner to comply with paragraphs 7 and 8 of

¹⁷ That report had been requested by the Minister from a private body.

¹⁸ That paragraph essentially required production to the Ombudsman of every single document in the possession of the Commissioner relating to any complaint or report by any person employed by the Department of Health and Families about any child believed to be at risk of harm. The requirement was not limited in time, or by reference to any particular reports or complaints.

¹⁹ But only in relation to the remaining 2 categories of documents which the Commissioner was able to provide.

²⁰ In response to my letter of 9 February 2010 as Commissioner on leave of absence.

the summons. Instead, the Ombudsman advised, "*If the appointment of your replacement is confirmed I will serve a further notice on the Acting [Commissioner]. If the absence of the documents looks like delaying my investigations I can exercise the power of entry and access to information set out in section 54 of the [Ombudsman] Act*"²¹.

On 18 February 2010 I wrote again to the Ombudsman, in response to her letter of 11 February 2010, and provided further documents relating to the summons, being copies of the relevant instruments of appointment for the Commissioner and Acting Commissioner. From this point onwards, the Ombudsman could be satisfied that the appointment of the Acting Commissioner was regular.

I resumed the office of Commissioner in late 2010, following the Board of Inquiry reporting to the Northern Territory Government. Contrary to the Ombudsman's intention advised on 11 February 2010, no further summons was ever served by the Ombudsman on the Acting Commissioner for the documents required by paragraph 7 and 8 of the summons served on 22 January 2010, despite that she had over 12 months to do so. Had a further summons been served, the Acting Commissioner undoubtedly would have dealt with it in a cooperative fashion, and consistent with the obligations of the office of Commissioner. In fact, I indicated to the Ombudsman in my letter of 18 February 2010 that this would be the likely response of the Acting Commissioner.

With respect to certain documents pertaining to the Commissioner's complaints function, on 18 February 2010 I also informed the Ombudsman that I had received advice from senior counsel to the effect that the summons may not be valid to obtain this material, but that a cooperative approach should be possible through a "*common understanding*" with the Acting Commissioner.

Despite the responses detailed above, the Ombudsman has now seen fit to make the misleading statement that the Commissioner "*objected to producing any records*" in response to the summons²².

Legal Advice

The second aspect of the Ombudsman's statement concerning the summons is that the Commissioner "*quoted in his objection the opinion of Queen's Counsel to the Department*", being the so-called "*senior counsel at the Victorian Bar*"²³. This suggests that I was in common purpose with the

²¹ The Ombudsman had misunderstood that the appointment of an Acting Commissioner had to be gazetted. As the Ombudsman was unable to find any Gazette Notice she considered the appointment irregular.

²² I also note that the summons was far broader than as described at page 24 of the Ombudsman's report.

²³ References in pages 22 and 23 of the Ombudsman's report refer.

Department and is quite false. At no time did I refer to any opinion of a Queen's Counsel to the Department.

As noted above, on 18 February 2010 I wrote to the Ombudsman, including to provide further documentation required for the purpose of her investigation. At that time I sought to explain and correct various legal issues on which the Commissioner and the Ombudsman differed, including the 'complaints documentation' referred to above, and concerning the independence of the Commissioner from the Department. In that letter I referred to having taken senior counsel's advice on the issue.

On 19 February 2010 the Ombudsman wrote and requested me to provide a copy of that advice. In response I advised the Ombudsman in writing that the advice was provided orally by Ms Raelene Webb QC of William Forster Chambers. Ms Webb was head of those Darwin chambers and is the President of the NT Bar Association. I would expect the Ombudsman to be well aware that Ms Webb is not at the Victorian Bar and was not "*Queen's Counsel to the Department*".

The naming of Departmental Clients

I wish to express my concern at the direct naming of certain individuals in the report and the possible identification of clients or family members from various information contained in the report. Section 301 of the Act states that "*A person must not publish any material that may identify someone who is a child...in the CEO's care*", although disclosure may be permitted under law in certain instances and sometimes disclosure is in the public interest. The issue of confidentiality and privacy, however, is one involving both the law and professional ethics. Care must be taken to maintain confidentiality, particularly in relation to children, even if disclosure would not constitute a breach of the criminal law.

In my opinion, it is likely that the siblings and other family members of at least one child may be identified by the direct naming of that child in the Ombudsman's report, and that family members of many other clients may be identified through the level of detail that is provided in this report. Matters involving two extended families in particular are extensively canvassed throughout the report²⁴ and from the case details provided the families would be immediately recognisable not only to members of the professional service community but also to many in the public at large due the high level of publicity these cases received in the media. The report provides graphic details of (often) unproven allegations, for example, of the sexual activities and mental health struggles of adults, details that should not be in the public arena.

²⁴ Largely involving issues that have been previously investigated and reported on in other reports, including by the Commissioner.

The Ombudsman states²⁵ that the only families and children that are identifiable are “*those already in the public arena*”. I consider many of the individuals and families not already in the ‘public arena’ are identifiable (for example to various service professionals, neighbours, teachers, school peers) because of the level of detail provided and I cannot accept the proposition that because a vulnerable child or family member has been previously named, and their privacy compromised, that it is appropriate to keep doing so.

The privacy of clients connected with the child protection system, along with that of their family members, is a fundamental right that should be respected. At the very least, siblings and other family members of clients are entitled to privacy, particularly as many of the facts (including abuse they may have suffered) are of a very personal nature. Even where parents may be implicated in the maltreatment of children, criminal guilt has not usually been determined by a court. I note in this respect that many of the issues outlined in the report have been raised by public notifiers and have not necessarily been confirmed through investigation. The need for confidentiality in such matters is a widely-accepted ethical principle, even where it may not be a rule of law in a particular instance. I am in agreement with the submission from the Department noted on page 112 of the Ombudsman’s report, to the effect that “*making these stories public could impede current and ongoing activities with respect to the families and children named*”, but am just as concerned about the legitimate rights of children and other family members to privacy. It might be added that the families involved in the child protection system represent the most disadvantaged, vulnerable and powerless families in the community and in the Northern Territory over 75% of these families are Aboriginal.

Duly de-identified case vignettes to illustrate issues raised in a report may be legitimately and properly used throughout public reports such as this but the provision of family details, relationship histories, sexual activities, substance misuse issues, sibling ages, as well as abuse details and descriptions of therapeutic interventions, provides the public with information, the disclosure of which is not required to achieve the objects of the report.

Other Issues

There are a number of other incorrect assertions in the report. For example, it is of concern that the Ombudsman also states, in connection with her decision to recommence her investigation, that “*No information was given to me about the methodology to be used by the Board of Inquiry*” and that “*In the absence of that information being provided, three months after my notice, I commenced this investigation at the end of January 2010*”²⁶. These statements are incorrect. On 8 January 2010 the Ombudsman wrote to the Chief Minister with a copy to me stating, “*I have met with Dr Howard Bath and he has met with the Assistant Ombudsman on two occasions, the last time on 6 January 2010. The methodology the Board of Inquiry proposes to follow will*

²⁵ Page 122 of the Ombudsman’s report.

²⁶ Page 22 of the Ombudsman’s report.

not, in my opinion, result in an investigation being conducted of the issues about which I have received complaints”.

The issues addressed above are not exhaustive of my concerns about aspects of the Ombudsman's report relevant to the Commissioner's functions, including monitoring the administration of the Act.

SUMMARY

In summary, I consider I have no option but to report to the Minister in respect some statements made and implications suggested by the Ombudsman in her report concerning the exercise of the Commissioner's functions under the Act. This includes because, contrary to accepted principles of procedural fairness, the Commissioner's office was not provided an opportunity by the Ombudsman to explain or comment on the matters addressed above which I consider to be misleading, incorrect, or otherwise adverse.

It is also of significant concern to me as Commissioner, including having regard to my objects and monitoring function, that the Ombudsman's report contains information that may inappropriately identify vulnerable children and their families and provides details of their circumstances contrary to their interests and those of the public.

A handwritten signature in dark ink, appearing to read 'H Bath', with a long horizontal flourish extending to the right.

Dr Howard Bath
Children Commissioner
11 August 2011