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Statutory review of the Community Services (Complaints, Reviews and Monitoring) Act 1993

Thank you for the opportunity to provide a submission to the Committee on the Office of the Ombudsman and Police Integrity Commission (the Committee) on the statutory review of the Community Services (Complaints, Reviews and Monitoring) Act 1993 (CRAMA).

About the Council of Social Service of NSW (NCOSS)

NCOSS is an independent non-government organisation and is the peak body for the social and community services sector in NSW. Established in 1935, NCOSS has a proud history of working with its members on behalf of disadvantaged people and communities to achieve social justice in New South Wales. NCOSS represents more than 7,000 diverse community organisations and over 85,000 individuals, including unfunded self-help groups, children's services, youth services emergency relief agencies, chronic illness organisations, local Aboriginal community organisations, church groups and a range of population-specific consumer advocacy agencies. NCOSS is part of a national network of Councils of Social Service, which operate in each State and Territory and at the Commonwealth level.

Introduction - the Objects of the Act

NCOSS considers that the objects of the legislation remain valid and the task now is to safeguard the strengths of the Act, while also continuing to address any existing gaps and weaknesses. Mechanisms for individual complaints are critical to the protection of individual rights. Equally importantly, the Ombudsman plays a critical role in identifying and addressing systemic issues that impact on the lives of and outcomes for service users. The relationship between complaints handling, monitoring and systemic change should be spelt out clearly.

The legislation covers a wide range of agencies providing services for people with disability, children, young people, families and those who are homeless in New South Wales. NCOSS supports legislation which facilitates the airing and resolution of grievances about service provision in a manner that encourages people to seek redress when there are service shortcomings and abuses of power.

Also, by providing opportunities for systemic scrutiny, the Act contributes to the continued effort to ensure that children, young people and adults have access to competent and transparent services responsive to their needs. The Act, together with the NSW State Plan, which focuses on fairness and justice and departmental plans and programs such as *Stronger Together: A new direction for disability services in NSW 2006-2016* and the *Brighter Futures Program*, can be a valuable mechanism to ensure that the requirements of vulnerable and

disadvantaged people remain both a policy and budget priority, and that services are accountable for their performance. The role of the Ombudsman's office as an independent advocate, mediator, educator, and facilitator of change is a crucial one in maintaining a healthy scrutiny of the community services system in this State.

Our comments on each of the objectives of section 3 of the Act are set out below.

(a) to foster, in community services and programs, and in related services and programs, an atmosphere in which complaints and individual monitoring are viewed positively as ways of enhancing the delivery of those services and programs

NCOSS acknowledges that complaints systems evoke strong reactions and can result in a defensive mode of blame and counter-blame.

If a complaint is reframed as a statement of expectations that have not been met it can be viewed as an opportunity for the service or program to make helpful changes. Complaints therefore provide a feedback mechanism and a wake-up call when services are not achieving their fundamental purpose - meeting the needs of service users. In fact, we would be particularly concerned if there were services which claimed a total absence of complaints and which avoided complaints by closing down lines of communication. If that were to be the case, we would suggest that such services may warrant closer scrutiny.

Our priority is first and foremost that the process should allow people to feel safe when making complaints. Complaint management and the culture of complaint and monitoring will require continued effort if the Ombudsman is to be a change agent. It needs to occur on both the individual and community level, as well as at systems levels.

The Community Services Division of the Office of the Ombudsman has shown initiative in this respect when educating service providers, consumers and their advocates through its work with the Senior Officers Group (SOG) and the NSW Human Services Chief Executive Officers' Forum. There is a need, however, to ensure that high level policy determinations cascade down to the service delivery level, so that practices are in line with new policy directions.

Our members also report positively on other information and awareness raising initiatives of the Division such as the NGO roundtable meetings and community forums, which contribute to a much better understanding and acceptance of the complaint mechanisms and the role of the Ombudsman at the systems level. There has been an active seeking out of service providers that have not in the past engaged much with the Ombudsman – for example, the children's services sector – and a very deliberate strategy developed to include them in education about the Ombudsman's role.

In terms of individual and community acceptance of the complaint mechanisms, there is still much to do. Service users are often vulnerable and powerless and need to feel safe and confident that the issues they raise will be resolved. Therefore a communication strategy tailored to that level of the individual and the community is required. The message, through sharing peoples' stories, needs to go out and particularly of stories which represent a 'win-win' situation. This is necessary so that people can be educated about what best practice is, what they can expect and what can be improved. While the emphasis on systemic change is also important, the individuals' real stories, well dealt with and appropriately publicised, can

be effective in shifting entrenched attitudes and practices. This in turn helps to create a culture of acceptance of complaints and monitoring as a useful approach to service improvements.

(b) to provide for the resolution of complaints about community services and programs, especially complaints by persons who are eligible to receive, or receive, those services, by families and by persons advocating on behalf of such persons or families

There is compelling evidence in various studies that a number of barriers prevent people with disability and others, from initiating complaints and participating effectively in the proceedings. The barriers include:

- lack of clarity about the level of support that can be expected
- stress associated with launching the complaint
- perceived lack of credibility of people with disability
- cognitive impairment and communication problems
- practical constraints such as transport
- features of both the formal courtroom-type proceedings as well as the ADR process which, while less formal, still can be stressful

NCOSS believes that individual complaints, if properly supported through the removal of such barriers, can be the lifeblood of the change effort. Readily available and accessible information about eligibility guidelines is another factor which, if communicated appropriately, would improve the resolution of many issues.

Similarly, when a complaint is taken on by the Ombudsman and it results in an action plan, the responsibility for the action plan should be clearly attributed. The follow-up of the action plan needs to be mandated, time-tabled and supervised by the Ombudsman, so that there is a clear accountability of both process and outcome.

Effective monitoring effort is reinforced if there are clear standards which can be enforceable. NCOSS would welcome processes that moved indicative guidelines to a scheme of enforceable standards.

(c) to encourage, whenever reasonable and practicable, the resolution of complaints at a local level

NCOSS' view is that because most services are focused on the vulnerable and disadvantaged, it is critical that complaint mechanisms and processes are responsive and able to address the issues as quickly as possible.

We support local level resolution in the first instance. However, we believe that each situation will need its own individual approach. At times, issues cannot be resolved at a local level for example in cases of death or threat of violence.

There are also some issues in rural regions and remote areas where the complainant is much more vulnerable, may have no other service options available to him or her and therefore is even more vulnerable if there are negative repercussions of making a complaint. It is particularly important in this context to consider approaches to retaining anonymity of the complainant while also ensuring that there is a mechanism to improve complaint resolution while preventing community divisions. Equally this applies to Aboriginal and Torres Strait Islander people where there may be an issue of competing loyalties which would make the local process divisive.

Given that currently in many localities there is an inadequate infrastructure as well as lack of skills to give the complaint process the integrity and substance it requires, local resolution may not always be most effective.

Therefore, a concerted effort and resources would be required to improve a complaint management capacity at the local level, ensuring also that informed consent and support occurred at every step of the process.

(d) to encourage, whenever reasonable and practicable, the resolution of complaints through alternative dispute resolution

Alternative dispute resolution (ADR) approaches such as family conferencing, circle sentencing and mediation can be a helpful and economical way to resolve disputes and has been used in various forms across a wide spectrum of human services. While the intent of ADR providers is to assist parties to a dispute to find their own solution, thereby ensuring that the result is acceptable to the parties, potentially the issues can be made worse, unless there is a strong framework of robust methodology, personnel and standards.

In the case of people with disability the ADR approach may prove problematic; it has been suggested that the informal nature of mediation may, unless managed with integrity and skill, deliver poor outcomes given the unequal power relationship of the parties. Also, as mentioned above, if there is evidence of violence or similar level of complaint ADR is not an appropriate mechanism.

Another issue is whether there are skilled mediators able to undertake the work necessary for an effective ADR. Unless such mediators are readily available, even if there is an agreement to proceed to the ADR, there may be significant delays in resolving the complaint, compounding the stress and uncertainty for the complainant. Consideration could be given to statutory timeframes within which complaints should be mediated as this would provide a degree of accountability and predictability for the complainant.

In the context of the ADR, the mediators are required to remain impartial which may prevent them from influencing mediation outcomes even if these are discriminatory or against policy. While Codes of Conduct may resolve some of these problems, the issue of securing a level playing field remains for some 'people with disability who may not be able to mediate on their own behalf. Again, an informed consent at all points is imperative so that the complainant does not feel compelled to participate.

Additionally in mediation, standards of practice tend to be educative and voluntary rather than enforceable. While provision could be made to require participants to provide feedback on the process and outcome of the ADR and while this may be a desirable practice, it would not impose any legislative requirements.

The question then arises whether review by the Ombudsman of the mediation process and conduct of mediators would be excluded from ADR processes. It is our understanding that review by the Ombudsman of the conduct of mediators is excluded in legislation relating to community justice centres.

While NCOSS supports the development and use of the ADR it does not support the ADR displacing other avenues of dispute resolution nor potential lack of enforceable scrutiny of the process.

(e) to provide independent and accessible mechanisms for the resolution of complaints, for the review of administrative decisions and for monitoring of services, programs and complaint procedures

The provision of independent and accessible mechanisms for monitoring and reviewing of services, programs and complaints procedures is one of the critical objects of the Act. Maintaining the capacity of the Community Services Division to speak publicly about its findings is one of the surest ways of guaranteeing its independence.

The Official Community Visitors (OCVs) scheme is another way of meeting that objective. By making regular visits to services, checking on the standard of services provided and acting on issues raised the OCVs can become the voice for people with a disability who otherwise may not be heard and so therefore facilitate access to the complaint process. There is an acknowledgement of some improvement particularly in quality of care in residential care for children and young people largely attributed OCVs' scrutiny. Such efforts by the OCVs in turn support other initiatives by accrediting bodies and peak organisations within the sector as they strive to improve the standards of services provided.

There is general support for the concept of the OCV scheme, however within the sector several issues have been raised.

These centred on the definition and jurisdiction of visitable services and suggestions were made for such jurisdiction to be extended; an example would be the need to take into account various foster care arrangements found in Culturally and Linguistically Diverse communities.

The numbers of OCVs are rather low particularly in the disabilities area and the visits are not frequent enough. It appears that around three hours per service would be the norm and at times more than a year passes between visits. It has also been suggested that focus should be on growing the maximum possible diversity of OCVs with recruitment appropriately targeted to engage with diverse sections of the community including Aboriginal and Torres Strait Islanders and Culturally and Linguistically Diverse communities.

A related issue is that the OCV feedback is not strategic enough and data is provided by the OCVs at the broadest level only. On one hand it is important to preserve the OCVs' independence and the privacy of their engagement with people with disability in visitable services. At the same time complaints' detail can sometimes provide better information than periodic reporting by the services. Using information and annual reports from the Ombudsman's Office, NCOSS estimates that around 15% to 30% of issues raised with OCVs are not resolved. It would be useful to have clear information on both the successes as well as on those situations where resolution was not reached. Where resolution has not been reached, there should be a follow-up process to bring the issue to some form of conclusion, including clear follow up feedback to the complainant.

If collated information from OCVs was better able to identify patterns and emerging trends, this would add value to departmental monitoring processes. By offering OCVs' perspectives and combining those of the service providers and the Ombudsman, there is potential for a triangulated approach which can inform the continuous monitoring and improvement.

There is still much work to be done on increasing consumer focus and accessibility generally. There has been a good effort by the Community Services Division to provide information to organisations and to engage with wider communities through meetings and special projects such as that directed at the Aboriginal and Torres Strait Islander carers. A youth liaison position has also been established. Nevertheless, there remains a gap in the engagement with the consumers at the individual and community level.

It would be also useful to consider the use of current and emerging technologies to communicate with the consumers and to use those technologies to reduce barriers of access due to immobility or remoteness of location.

(f) to encourage compliance with, and facilitate awareness of, the objects, principles and provisions of the community welfare legislation

The objects and principles have been clearly spelt out at parliamentary level and need to be further communicated to the consumers. The fundamental principles which should inform the complaint and monitoring process are the independence of overseeing agencies, the transparency and independence of the review and reporting process, a stronger potential to share information and ensuring that protections in the process are not weakened.

The best interest principle and the person's right to be heard are fundamental to the operation of CRAMA. Nevertheless, there are still issues around whether the principles should impose on service providers a duty and confer on clients an enforceable right. As stated in earlier reviews and debates, the primary consideration in determining a person's best interests must be the views, attitudes, opinions, needs and wants of the particular person.

It is critically important to uphold the principles that a person who receives a service is entitled to clear information about the service, is able to express views about the service and may question decisions and actions affecting him or her when receiving the service.

Other principles are equally important in that they relate to ensuring that complaints about services are dealt with quickly and responsively.

The links to community welfare legislation should be protected from any reduction and include legislation such as the Disability Services Act 1993 (NSW) and the Children and Young Persons (Care and Protection) Act 1998 (NSW). There is also potential to expand such links. One opportunity would be to affirm the government's commitment to the principles of access and equity of the Ethnic Affairs Commission Amendment Bill 1996. Similarly, attention must be paid to identifying links for Aboriginal and Torres Strait Islander people.

(g) to provide for independent monitoring of community services and programs, both generally and in particular cases

NCOSS has generally received positive feedback about the efforts of the Community Services Division in its efforts to ensure high level of integrity in its investigations and reporting. This is necessary because relying on an in-house arrangement and reporting system of the funding department is not sufficient by itself. The Division should also be able to use reviews of other bodies such as the Auditor General or parliamentary reviews.

At another level there are concerns that bodies such as the Ombudsman are deemed to be independent but are nevertheless fettered by the requirement not to make decisions which are inconsistent with government policy and ministerial decision. The definition of independence is then problematic for, at its core, independence means protection against the executive attempts to either muzzle the watchdog or reduce its effectiveness through withdrawing resources. Impartiality must be underpinned by independence, the authority to publish information and reports as well as funds and other resources to do the job.

NCOSS would like to take this opportunity to congratulate the Community Services Division on some of its successful systemic work and its capacity to engage both government departments and community organisations in finding solutions to systemic problems. One such example is the SAAP Access and Exit project, which identified some serious concerns for service users. While the initial paper perhaps failed to contextualize the access problem and the difficulties SAAP service providers face when other parts of the service system fail, it did make recommendations for change that were critical of the SAAP sector. However, the collaborative work done post release of this report with service providers and peaks, whilst difficult, has translated into better service delivery. This aspect of the Ombudsman's role has also had an impact over the past five years on Departmental practices and systems in relation to out of home care and child protection.

Some disability advocates have raised issues around appeals to the Administrative Decisions Tribunal (ATD). They contend that in practice such appeals are not doable. The basis of such argument is that section 20 (a) of the Disability Services Act 1993 (NSW) calls for the Minister to give approval or make decisions about funding of disability services and therefore unless the Minister makes such decision no appeal is possible. The Minister has tended not to give specific approval for funding of disability services. Consequently any avenue of appeal is rendered inoperative. NCOSS contends that this issue should be investigated and resolved. Further, some agencies have raised concerns about the perceived low level of promotion and education undertaken by the Administrative Decisions Tribunal.

Overall, since the amalgamation of the Community Services Commission (CSC) and the Office of the Ombudsman, there has been positive progress made although there are concerns, expressed through our members who represent people with disability, that there is less openness in reporting of both the process and the findings of inquiries.

We have already made some comments in relation to the potential value of the OCVs. NCOSS is conscious of the need to balance personal/organisational confidentiality and privacy with the imperatives of the public interest. Given that the environment has changed dramatically since the Ombudsman Act 1974 there may be value in reviewing section 34 which dictates that no information shall be disclosed except in some circumstances, including community education function.

NCOSS believes that there is greater scope for the monitoring role of the Ombudsman, particularly in areas of government policy implementation that are contentious or that are identified as potentially impacting disproportionately on vulnerable groups. An example of this is the introduction of Parental Responsibility Contracts which NCOSS fears may adversely impact on Aboriginal families, and parents with an intellectual disability. When the Care and Protection Act was amended to include the contracts, NCOSS argued that the impacts should be monitored and that the Ombudsman was ideally placed to undertake this work if funded to do so. Monitoring of this kind must be seen to be undertaken independently of the government department implementing the program and of the Minister responsible for

its introduction. It is disappointing that this role has not been taken up in circumstances where it would be clearly beneficial.

Finally, NCOSS wishes to support moves by the Ombudsman to establish a cross-disciplinary team within the Office that can make connections across programs and across government departments. As the State Plan starts to drive policy and integrated service delivery becomes more of a reality, this will position the Ombudsman very strongly to monitor the impacts on disadvantaged and vulnerable people.

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NCOSS appreciates the opportunity to provide feedback to the Review of Community Services (Complaints, Reviews and Monitoring) Act 1993 (CRAMA).

Should you require any further information, please contact myself on ph 9211 2599 ext 111 or lindaf@ncoss.org.au or Christine Regan, Acting Deputy Director ph 9211 2599 ext 117 or chris@ncoss.org.au.

Yours sincerely,



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