Statement

Office of the Health Complaints Commissioner

(responding to questions from)

The Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings

A REQUEST FOR A STATEMENT

Prepare and produce a statement in which you answer the following questions.

Organisational structure

1. **Provide an organisation structure identifying key reporting lines within your office**
2. **Identify the number of people employed in your office, divided by public service band.**

General

3. **Describe the mechanisms that achieve independence for the Health Complaints Commissioner. Could these be strengthened?**

1. *Organisational Structure*

The Office of the Ombudsman and Health Complaints Commissioner (OHCC) includes six separate jurisdictions: the Parliamentary Ombudsman, the Health Complaints Commissioner, Energy Ombudsman, Right to Information, the Official Visitors Programs and the Custodial Inspectorate.

(See organisational chart, *Attachment One*, but please note this chart is indicative only as recruitment is underway in relation to a number of new positions.)

2. *People employed, divided by public service band*

The Office of the Health Complaints Commissioner consists of the following staff members:

- Health Complaints Commissioner 0.2 FTE
- Principal Officer 1.0FTE
- Senior Investigation Officers (Band 6) 0.8 FTE
- Senior Investigation Officers (Band 6) 1.0 FTE
- Senior Conciliation Officer (Band 7) 0.6FTE
- Intake and Assessment Officer (Band 4) 0.8 FTE

3. *Mechanisms that achieve independence for the Health Complaints Commissioner*

The Health Complaints Commissioner is a separate statutory appointment to that of Ombudsman, but pursuant to Schedule 3 of the *Health Complaints Act* 1995 (the Act) a person who holds the position of Ombudsman may also be appointed to the position of Health Complaints Commissioner.

The Office of the Ombudsman as a whole has a discreet budget allocation; it receives its own appropriation separate from all other government agencies. That budget allocation is managed independently and funds are distributed between the various jurisdictions, each of which puts in a separate Budget Bid each year. The Office has a service level agreement with the Department of Justice for the provision of Human Resources and Information Technology support.

Section 7 of the Act provides that *In performing his or her functions, the Commissioner must act independently, impartially and in the public interest* and the Commissioner is not subject to the direction of any person in the way he carries out his functions. As well as dealing with complaints, the Commissioner can also conduct investigations on his own motion, and when investigating has wide ranging powers to enable the gathering of information including the entry of premises, the power to search and the power to examine witnesses.

Could these be strengthened?

One of the major hallmarks of independence is having adequate funding and resourcing to perform relevant functions properly. The Health Complaints jurisdiction has been historically underfunded, but the allocation commencing last year of significant recurrent funding over three years to the Office as a whole will address this. Indeed additional funding to date has allowed for the appointment of a permanent 0.7FTE Principal Conciliation Officer this year, and further positions will be created as further funding becomes available over time.

Ideally it would be appropriate for there to be a separate Commissioner with separate funding, and this was one of the recommendations made following a review of the Act in 2003. All other states of Australia have a separate Commissioner.

Other things might include:

- the creation of Complaint Handling Standards as Victoria has; and a
- a further review of the Act.

The Office of the Health Complaints Commissioner was established in 1997 with a resolution focus, and was modelled on other health complaints entities (HCEs) in existence at the time such as those in Victoria and Queensland. Other HCE's have evolved since then and undergone wholesale reviews of their legislation and functions and moved into more of a watchdog function. There has only been one legislative review in 2003, whereas the Act as originally proclaimed intended that it be reviewed every five years. That review provision has since been removed

4. In relation to the role of the Health Complaints Commissioner, describe the following information:

***(a)* its functions, powers, duties, policies and procedures, including in relation to child sexual abuse in Institutional Contexts or responses to allegations of child sexual abuse in Institutional Contexts of the Health Complaints Commissioner.**

The focus of the *Act* has traditionally been on the resolution and conciliation of complaints as opposed to investigation. The functions of the Health Complains Commissioner are set out in s 6. In the context of child sexual abuse in Institutional contexts, these include:

(d) to receive, assess and resolve complaints;

(g) to inquire into and report on any matter relating to health services at his or her own discretion or on the direction of the Health Minister

Part 5 of the HC Act sets out the matters into which the Commissioner may undertake an investigation

S 40(1) provides as follows:

> *The Commissioner may investigate, by exercising the powers conferred by this Part –*
>
> *(a) any matter specified in a written direction given by the Health Minister; and*
>
> *(b) a complaint that the Commissioner has determined to investigate under section 25(1A)(b)(ii) ; and*
>
> *(c) an issue or question arising from a complaint if it appears to the Commissioner –*
>
> *(i) to be a significant issue of public safety or public interest; or*
>
> *(ii) to be a significant question as to the practice of a health service provider; and*
>
> *(d) on his or her own motion, any other matter relating to the provision of health services in Tasmania.*

Under s150 of the *Australian Health Practitioner Regulation Law* (National Law) The Commissioner has an obligation to notify the Australian Health Practitioner Regulation Agency (AHPRA) of any complaint pertaining to individual registered health practitioner. As is referred to in more detail below, there is a Memorandum of Understanding between the Commissioner and AHPRA that guides the process.

A complaint alleging any form of sexual abuse, whether of a child or an adult, by a registered practitioner would be referred to AHPRA.
As a matter of course when we receive a complaint that alleges possible criminal behaviour we refer the complainant to Tasmania Police or, with the complainant's permission notify Tasmania Police of the complaint.

The Commissioner does not yet have any powers in relation to unregistered health care providers; we can currently investigate the provision of health services by unregistered practitioners, and make recommendations, but until legislation is proclaimed in relation to the National Code of Conduct for Unregistered Health Care Workers, the Commissioner cannot impose any sanctions. Currently, in cases involving State Public Service officers, these would progress through an ED 5 process.

Notwithstanding this, I am not aware of any complaints to the Commissioner during the relevant period raising concerns about child sexual abuse, either in institutional settings

or otherwise. We have during the relevant period received complaints alleging sexual abuse of vulnerable adults in institutional contexts. These complaints either had already been, or were in the process of being, reported to the police; individual practitioners were reported to the relevant registration boards; and an investigation undertaken in relation to systemic issues. I anticipate that a complaint raising concerns about child sexual abuse would be managed in the same way.

(b) Its current funding and resourcing for the performance of its functions including in relation to child sexual abuse in Institutional Contexts, taking into account:

I. the relevant workload
II. staffing levels, and
III. **the ability to perform its functions, in accordance with best practice, including the details of any policies, procedures, guidelines or training used to ensure best practice.**

As I noted in my most recent Annual Report (2020/21) I have been reporting for the last seven years on the low resourcing of the Commissioner's office, which historical underfunding is noted earlier in this statement.

In the past, low staff numbers in the Health Complaints jurisdiction had not only an adverse impact on the time taken to resolve complaints but also, with a necessary focus on complaint resolution, resulted in an inability to perform other functions prescribed under the Act. These include things such as: education on health rights; building complaint resolution capacity in providers; auditing improvements to health services; and conducting own motion investigations.

Additional funding provided to the Office over a three year period will result in the addition of extra staffing to the Health Complaints jurisdiction, and this has already started. This extra staffing will allow the office to better perform its functions, including those which at present are not being performed.
The Office as a whole is in the process of developing a three year strategic plan, which includes in relation to the Health Complaints jurisdiction, a review of its policies and procedures and its team management structure, and the enhancement of its resourcing in relation to conciliation, with a view to streamlining health workflows. We are also undertaking a review of whole of office standard operating procedures.

(c) Any reviews, investigations or reports in relation to child sexual abuse in Institutional Contexts written, commissioned or received by the Health Complaints Commissioner during the Relevant Period.

There have been none

(d) Any information regarding the implementation and outcomes of those reports, recommendations or initiative referred to in paragraph 4c during the relevant period.

Not relevant.

5. Describe any complaints received during the Relevant Period regarding allegations or incidents of child sexual abuse in Institutional Contexts (including the management of such complaints), including:

(a) The avenue through which the complaint was made, and
(b) any action taken or outcome reached

We did not receive any complaints during the relevant period, but we did receive one enquiry which related to allegations of child sexual abuse at the Launceston General Hospital (LGH) involving Mr James Griffin.

The mother of a child contacted the Office by telephone on [redacted] October 2020 to complain about the *lack of action on a complaint* [she] *had submitted to the LGH* in approximately 2018. The mother was concerned about the lack of follow up from the LGH of her complaints about a nurse's behaviour with her daughter at the hospital in 2018. The mother claimed she had submitted 'blue forms' to the LGH but had heard nothing back. She advised that it had been confirmed that the person she complained about 'is a paedophile'.

On that same day the Health Complaints Officer who took the call contacted the LGH to ascertain the status of the complaint from the mother and / or whether it had received a complaint. She was advised that the mother could contact the consumer liaison office at the LGH directly and that they would respond to her concerns and the relevant phone number was provided to the mother. She was also provided with an email address.

The timing of this call is significant as some [redacted] days prior, the Minister for Health had requested that the Secretary of the Department of Health undertake a review of the situation at the LGH. On 22 October 2020 the Government announced an Independent Investigation into the LGH relating to Mr Griffin. It would have been open to the Minister to request the Commissioner to undertake this investigation pursuant to s 40(1)(a) of the Act, but in the event, on 3 November 2020, the Premier announced the terms of reference for the investigation and the appointment of Ms Maree Norton as the investigator. Then on 23 November, the Premier announced the establishment of the Commission of Inquiry.

6. Describe any observations arising from your role as Health Complaints Commissioner in relation to systematic issues or failures by the

(a) Department of Education

(b) Department of Health including Launceston General Hospital and Royal Hobart Hospital

(c) Department of Communities (including Ashley Youth Detention Centre and Out of Home Care)

where those issues of failures are in relation to allegations or incidents of child sexual abuse in Institutional Contexts.

(a) My Office does not receive complaints regarding the Department of Education.

(b) My Office has not received any complaints raising allegations of systemic failures in regard to child sexual abuse prior to October 2021.

(c) My Office has not received complaints raising allegations of systemic failures in regard to the Department of Communities.

We have conducted investigations, however, which identified failings in terms of the management of complaints and reporting in relation to claims of adult sexual abuse and boundary violation.

In one of those matters, the Tasmania Health Service advised that it had reported the nurses involved to AHPRA following an ED 5 process but it was found in fact that it hadn't. It had also failed to involve the Sexual Assault Support Service. We conducted an investigation identifying these shortcomings.

Police were involved at the outset, and as the hospital hadn't reported it to AHPRA we made the notifications. As well as the internal ED 5 process, we looked into some of the broader systemic issues in relation to the broader management of complaints at facility in question.

7. How does the Health Complaints Commissioner monitor systemic risks in relation to child sexual abuse (including harmful sexual behaviours) for children and young people in health contexts?

We do not specifically monitor risks in relation to child sexual abuse.

Our work is driven by the complaints we receive which cover a very broad range of issues with different degrees of seriousness and we are always concerned to ensure that we monitor systems generally as much as we can.

We are particularly vigilant with complaints and enquiries that come to our attention that relate to vulnerable groups or individuals.

8. How should a Tasmanian Health Service respond to and manage complaints in relation to an allegation or incident of child sexual abuse within the Tasmanian Health Service? What policies, processes and actions would you expect the Tasmanian Health Service to have in place to support this process? In your view, does the Tasmanian Health Service have these mechanisms in place?

I would expect that the Tasmanian Health Service would have policies and processes in place which:

- mandate the involvement of the Police if allegations of this nature are raised;
- ensure that any allegation of sexual assault of a patient be brought to the attention of senior management and that the patient is supported and protected from the alleged perpetrator;

- ensure that proper records are maintained, and that any internal response to the allegations is documented;
- if the allegations relate to a registered practitioner, ensure appropriate notifications are made in a timely manner.

Based on a complaint I received from a patient who alleged she had been sexually assaulted in the Emergency Department of a public hospital in 2018, however, it appears that there may be some reluctance on the part of THS to report these allegations to the police. I believe its normal process is to undertake an ED 5 'Code of Conduct' Investigation first.

9. How would factors in relation to a Tasmanian Health Service's response to and management of a complaint in relation to an allegation or incident of child sexual abuse be considered by the Health Complaints Commissioner if a complaint were made?

If I understand this question to be what would we do if someone complained about THS failure to manage a complaint appropriately, then firstly, it would depend who the complaint came from, whether an individual health service user, a Minister or secretary.

Under s 23 of the Act a person can make a complaint that:

(j) a health service provider acted unreasonably by not taking proper action in relation to a complaint made to him or her by the user about a provider's action of a kind referred to in this section;

There is, however, a two year time limit for the brining of a complaint, though this can be extended in certain circumstances.

We would also consider whether the complaint should be referred as a complaint to the Ombudsman, as THS's response if inadequate, might be indicative of defective administration.

We would in any event assess the complaint as required by the Act as potentially suitable for investigation.

10. **How does the Health Complaints Commissioner work with the Australian Health Practitioner Regulation Agency and the National Boards in relation to a complaint concerning a registered health practitioner engaging in child sexual abuse and the Tasmanian Health Service's response to the complaint? Would the Health Complaints Commissioner provide assistance to a Tasmanian Health Service to implement better complaint handling and management processes?**

There are two parts to this question.

The first pertains to the relationship between the Australian Health Practitioner Regulation Agency (AHPRA) and the Commissioner. This relationship is guided by *National Law* and a Memorandum of Understanding (MoU) (see Attachment 2) entered into by the parties, which clearly sets out their relationship.

That MoU requires that complaints be managed in a collaborative manner. This obligation has been in place since 2010 when the Health Practitioner Regulation National Law (the National Law) was enacted in each state and territory of Australia. The goal of the National Law was to create a national registration and accreditation scheme for registered health practitioners (the National Scheme). It is important to note, that AHPRA deals with notifications, and not complaints.

Most significantly, in the case of complaints about AHPRA registrants, how those complaints are managed depends on where the complaint or notification starts and whether it concerns an organisation or an individual.

If it came to the Commissioner first as a complaint about an organisation but also identified individual registered practitioners, then we would separate out the individual registered practitioners and refer them, either urgently or following the consultation process outlined in the MoU, to AHPRA. We would retain the *mother* file about the organisation and assess it though the Health Complaints processes in relation to any systemic issue.

If it went to AHPRA first as a notification about an individual registered practitioner we would hope they would tell us about it: under the National Law they are only obliged to tell us about a notification that might also form the basis of a complaint to a health complaints entity. We would potentially be provided with the opportunity to ask them to refer systemic issues to us. We could potentially address those systemic issues on our own motion.

Under s 6(g) of the Act, one of the functions of the Commissioner is to *inquire into and report on any matter relating to health services at his or her own discretion or on the direction of the Health Minister*; and under Part 5, the Commissioner can undertake an investigation into any health service provider or health service.

As to the second part of this question, would the Commissioner provide assistance to the THS to implement better complaint handling procedures, potentially yes. Often, and across jurisdictions, recommendations made at the end of an investigation address the manner with which a complaint has been dealt with internally, and are designed to promote good complaint handling and management processes. We have also routinely encouraged the THS to be more open with complainants, though of recent years we have sometimes encountered a somewhat protective and adversarial attitude.

A barrier to the office providing this sort of assistance has been a lack of resources to do this sort of work. Again, the additional funding we have now received may allow us to engage more proactively in this regard.

11. **What information sharing arrangements exist between the Health Complaints Commissioner, the Australian Health Practitioner Regulation Agency and other oversight bodies?**

Our arrangements include the following:

- as mentioned above, we have an MoU with AHPRA which provides for ongoing consultation and communication;

- we have arrangements for information sharing with the National Disability Insurance Agency and with the *Aged Care Quality* and Safety *Commission;*
- we have an informal arrangement with the Coroner; and
- an informal arrangement with Equal Opportunity Tasmania.

We are also working on the development of a MoU with the Commissioner for Children and Young People. The Commissioner has recently engaged an advocate who is largely based at the Ashley Youth Detention Centre, and we have established regular lines of communication.

12. When a registered health practitioner is the subject of a complaint concerning child sexual abuse within a Tasmanian Health Service, does the Health Complaints Commissioner also consider or review a Tasmanian Health Service's response as a matter of course?

We would – as we do with any complaint about the Tasmanian Health Service about any issue

13. What investigatory or disciplinary role does the Health Complaints Commissioner play in respect of unregistered health practitioner who work with a Tasmanian Health Service and are not within AHPRA's jurisdiction?

The Commissioner can investigate the activity of an unregistered health practitioner, if that activity comes within the definition of a health service under the Act, but at present has no disciplinary function.

At a meeting of the Commonwealth Parliamentary Standing Committee on Health in June 2013, Australia's Health Ministers agreed in principle to the establishment of a National Code of Conduct for Unregistered Health Care Workers (the Code), such as naturopaths, social workers and counsellors. It was agreed at the Council of Australian Governments Health Council meeting in April 2015 that this would proceed. Each State and Territory is responsible for enacting new, or amending existing legislation to give effect to the Code.

Amendments to the Act to implement the Code have been passed but a proclamation date has not yet been set. Responsibly for administration of the Code falls to the Commissioner, who will have the power to issue prohibition orders and make public statements about unregistered health care workers who breach the code and pose a risk to the public.

The work involved will be different to what we presently do. Given the potential impacts on public health and practitioners' livelihoods it will carry a high degree of responsibility. The Commissioner will become, in effect, the equivalent of AHPRA for unregistered practitioners. The nature of the investigation required to justify the making of prohibition orders and public statements will be more in the nature of a prosecution than an investigation.

14. **Does the Health Complaints Commissioner provide education to the Tasmanian Health Service in relation to how to respond to, manage and resolve complaints within the Tasmanian Health Service?**

The provision of education and training is one of the many functions ascribed to the Commissioner by s 6 of the Act.

As noted in earlier responses in this statement, historically low staffing levels have resulted in an inability to perform this function. Notwithstanding this, when dealing with day to day complaints, we do provide feedback to providers (including THS) as to how particular complaints might have been better handled, and it is anticipated that the additional funding also referred to will allow us to do more in this area.

15. **Identify any challenges in relation to institutional or organisation culture that could impact the ability of the Tasmanian Health Service or Department of Health to respond to child sexual abuse in Institutional Contexts.**

Perhaps the fear of retribution and a lack of understanding of the obligation to make mandatory notifications to AHPRA inhibits the reporting of child sexual abuse.

There may also be a lack of appreciation of the ability to make a complaint to the Commissioner. Anonymity would be a problem, however, when it came to assessing and investigating such a complaint and this may also be an inhibiting factor.

In correspondence to the Commission's General Counsel dated 26 May 2022 I raised my concerns about the lack of widespread understanding in the State Service of the provisions of the *Public Interest Disclosures Act 2002,* in terms of who may make disclosures, the type of conduct about which disclosures can be made, and the protections that are afforded by the Act to disclosers.

As I noted in that correspondence:

> *It is not for the person making the disclosure who determines whether that disclosure is a public interest disclosure, but rather the person who receives it. The lack of awareness on the part of State Service Managers of the Public Interest Disclosures process, I suggest, means that potential disclosures are not being addressed as such. I would also suggest that many potential disclosers are not aware of the protections afforded by the Act and may be reluctant to make complaints for fear of reprisals.*

16. Do you have any comments or observations in relation to the governance and institutional or organisational culture of the Department of Health and Tasmanian Health Service

As mentioned above, it is my experience that in responding to complaints, the THS can be somewhat defensive, despite Open Disclosure policy requirements. Responses to

complaints can take an extremely long time to arrive, and often seem to be waylaid in the 'legal department' for long periods of time.

This situation may be attributable to an under-resourced complaints management team which is overwhelmed and forced to rely on what the people involved - those who might get into trouble - are saying and does not have time to investigate properly.

A suggestion would be that there is a need to do more to promote open disclosure and the value of complaints across the organisation, that is, to admit mistakes and see complaints as opportunities to identify and implement improvements. This attitude prevailed prior to the creation of the Tasmanian Health Service and the centralisation of complaint management in one Office. Complaints management has since been decentralised, but along with this came the loss of experienced staff who appeared to have a good grasp of the value of complaints and open disclosure.

Education in relation to this obviously falls within the remit of the Commissioner but has not been possible to date due to inadequate resourcing.

17. **Did the Health Complaints Commissioner consider undertaking an own motion investigation in relation to any Tasmanian Health Service such as the Launceston General Hospital (pursuant to section 40(d) of the Health Complaints Act 1995 (Tas)) when the allegations in relation to James Geoffrey Griffin came to light? If not, why not?**

No, the Health Complaints Commissioner did not consider undertaking an own motion investigation in relation to any Tasmanian Health Service such as the Launceston General Hospital when allegations in relation to Mr Griffin first came to light.

As Ombudsman, on 17 November 2020 I received a disclosure pursuant to the *Public Interest Disclosure Act 2002* about the way that the THS and the Launceston General Hospital had dealt with notifications about the behaviour of Mr Griffin (which behaviour had already been referred to police). Under that Act, I am obliged to investigate any disclosure I determine to be a public interest disclosure.

The discloser was always forthright about their desire for an investigation similar to that which could be undertaken by a Royal Commission, and coincidentally, the establishment of the Commission of Inquiry, which would consider the same matters as those raised in the disclosure, was announced on 23 November 2020. I did not wish to encroach upon the activities of the Commission with a parallel investigation, but at that time, was obliged to do so. I was then unable to refer a matter to the Commission because there was no mechanism to do so in the Act.

I determined that the disclosure was a public interest disclosure, and on 22 December 2021 wrote to the Attorney seeking an amendment to the legislation to allow me to refer the disclosure to the Commission; s 41 of the Public Interest Disclosures Act provides that a disclosed matter can be referred to a prescribed public body to investigate. Ultimately, an amendment to the Act to include a Commission of Inquiry

in s 41 as a prescribed body was passed and came in to force on 22 April 2021. By letter of 20 May 2021 I formally referred the disclosure to the Commission.

[redacted]

Richard Connock
HEALTH COMPLAINTS COMMISSIONER

24 June 2022