

ROYAL COMMISSION INTO VIOLENCE, ABUSE, NEGLECT AND EXPLOITATION OF PEOPLE WITH DISABILITY

SUBMISSIONS IN REPLY BY THE NSW OMBUDSMAN PUBLIC HEARING 13

1. The Ombudsman provides these submissions in reply to Counsel Assisting's submissions dated 6 August 2021. It is noted from the transcript that Counsel for Sunnyfield also proposes to make submissions that adverse findings should be made against the 'Ombudsman'.¹ The Ombudsman submits he should be given a reasonable opportunity to respond to those submissions and that any submissions made in response to Sunnyfield's submissions also be taken into account by the Royal Commission.

Background

Terminology

2. Counsel Assisting's submissions use the term "NSW Ombudsman" to refer at different times to the office of the NSW Ombudsman or to Mr Paul Miller (the current holder of that office). In these submissions:
 - (a) "Ombudsman" refers to the individual holding office as Ombudsman under section 6 of the *Ombudsman Act 1974* (NSW). The current Ombudsman is Mr Paul Miller, appointed May 2021.
 - (b) "Ombudsman's Office" refers to the separate public sector agency of that title which has been established under the *Government Sector Employment Office 2008* (NSW)², and which comprises the group of staff (including any Deputy Ombudsman³) employed to undertake the functions conferred on the Ombudsman by the *Ombudsman Act 1974* and other legislation.⁴ The Ombudsman is the head of agency for the NSW Ombudsman's Office.⁵

¹ Transcript, 26 May 2021, page 279, lines 24-29.

² Part 3 of Schedule 1.

³ See s 8(4B) of the *Ombudsman Act 1974* (NSW).

⁴ Section 32 *Ombudsman Act 1974* (NSW).

⁵ Part 3 of Schedule 1, *Government Sector Employment Act 1988* (NSW).

- (c) "Acting Ombudsman" refers to the individual holding office as Acting Ombudsman under section 7 of the *Ombudsman Act 1974* (NSW) during a vacancy in the office of Ombudsman. The current Ombudsman, Mr Miller, was first appointed Acting Ombudsman in August 2020.
- (d) "Deputy Ombudsman" refers to a person appointed as Deputy Ombudsman under section 8 of the *Ombudsman Act 1974* (NSW).

Assistance provided by the Ombudsman to the Royal Commission before public hearing 13

3. In March 2021, the Ombudsman provided about 600 documents voluntarily to the Royal Commission in relation to complaints received by the Ombudsman's Office regarding **the House**.
4. By letter dated 14 April 2021, the Solicitor Assisting the Royal Commission wrote to the Ombudsman's solicitors, the NSW Crown Solicitor's Office, raising a number of questions about the documents provided by the Ombudsman and requesting "that an appropriate person from the office of the NSW Ombudsman prepare a written statement" addressing those questions. The letter stated "[a]lthough no final decision has been made, it is also possible that the person who provided the statement will be asked to appear before the Royal Commission".
5. By letter dated 11 May 2021, the NSW Crown Solicitor's Office wrote to the Solicitor Assisting the Royal Commission enclosing a signed statement of the Ombudsman dated 10 May 2021 that addressed in detail each of the questions raised in the 14 April letter. The 11 May letter noted that the Ombudsman was voluntarily providing the information to the Royal Commission pursuant to an exception in s. 34(2) of the *Ombudsman Act 1974* (NSW).
6. By letter dated 19 May 2021, the NSW Crown Solicitor's Office wrote to the Solicitor Assisting the Royal Commission confirming "the view of the NSW Ombudsman that he is not competent or compellable to give evidence pursuant to s.35 [of the] *Ombudsman Act 1974*". The letter

went on to state “the Ombudsman wishes to assist the Royal Commission by providing answers to any questions relevant to the functions of the Ombudsman and other matters raised by this Public Hearing”.

7. Pursuant to that expressed intention, the letter enclosed a further statement of the Ombudsman dated 19 May 2021 which, again, was provided voluntarily to the Royal Commission. The letter also stated “[i]n the event that there are other matters about which the NSW Ombudsman can assist, please provide in writing any questions you wish answered or topics addressed”.
8. By letter dated 20 May 2021, the Solicitor Assisting the Royal Commission wrote to the NSW Crown Solicitor’s Office stating, “Counsel Assisting the Royal Commission would like to examine [the NSW Ombudsman] in relation to the matters covered in his two statements” and requested the NSW Ombudsman to attend Public Hearing 13 in person, to give evidence. The letter stated, “in the event that [the Ombudsman declined to attend for this purpose voluntarily], we may consider issuing him with a Summons to Appear”.
9. By letter dated 21 May 2021, the NSW Crown Solicitor’s Office wrote to the Solicitor Assisting the Royal Commission, stating:

As indicated in my letter dated 19 May 2021, the Ombudsman wishes to assist the Royal Commission and to that end voluntarily provided two detailed statements and many documents in response to the Commission’s information requests.

I note, however, that the matters the subject of those requests occurred prior to Mr Miller’s employment by the NSW Ombudsman’s Office and prior to his appointment as Ombudsman. Mr Miller’s knowledge of those matters is generally limited to the documents which are currently before the Royal Commission. In so far as the matters relate to functions of previous Ombudsmans concerning reportable employment-related child protection conduct or reportable disability incidents, Mr Miller did not personally exercise those functions, and they are no longer functions of the Ombudsman.

I am instructed that the Ombudsman respectfully declines your request that he appear voluntarily. However, if there is any further assistance the Ombudsman can provide by way of the provision of other historical

documents or if any clarification is needed of any matters set out in the statements, please advise and these can be dealt with in a further statement. I confirm the view of the NSW Ombudsman that he is not competent or compellable to give evidence pursuant to s.35 of the Ombudsman Act 1974 and accordingly, has a reasonable excuse to not attend should a summons be issued (s 3(1B) Royal Commissions Act 1902).

The public hearing

10. On 24 May 2021, Senior Counsel Assisting stated during her opening:⁶

Commissioners, Paul Miller, the New South Wales Ombudsman, has provided two statements to the Royal Commission. Mr Miller has declined the Royal Commission's request to give oral evidence at this Public hearing and he asserts he cannot be compelled to give evidence. We keep our invitation open to him. But you have the benefit of his statements.

11. Upon Senior Counsel representing the Ombudsman announcing her appearance, the following exchange took place:⁷

CHAIR: According to the opening, the Ombudsman takes the view that he is not compellable as a witness before this Royal Commission. Is that right?

MS FURNESS: Yes, that is the view of the Ombudsman.

CHAIR: Could you help me by explaining how that works for the purposes of this Royal Commission, in light of the provisions in the Royal Commissions Act, that is the Commonwealth Royal Commissions Act?

MS FURNESS: The New South Wales Ombudsman takes the view that section 35(1), which is:

The Ombudsman shall not, nor shall an officer of the Ombudsman who is not a member of the Police Force, be competent or compellable to give evidence or produce any document in any legal proceedings in respect of any information obtained by the Ombudsman or officer in the course of [his functions].

He takes the view that "legal proceedings" incorporate proceedings before this Royal Commission.

⁶ Transcript, 24 May 2021, page 16, lines 18-22.

⁷ Transcript, 24 May 2021, page 19, line 38 – page 20, line 39.

CHAIR: What is the foundation for that view?

MS FURNESS: His foundation is the section I have just read.

CHAIR: That a Royal Commission is a legal proceeding for the purposes of that section?

MS FURNESS: Yes, Chair.

CHAIR: Is there any authority that establishes that proposition?

MS FURNESS: It is his view, based on his construction of the legislation.

CHAIR: I don't doubt it's his view but I am not sure that's the question I asked.

MS FURNESS: Chair, if you wish to have a discussion with me as to the legal basis, I would want to take that on notice. And if you wish submissions by the Ombudsman as to his view, then if that is the case, I will need to take that on notice.

CHAIR: If you would be good enough to do that. I'm not sure what the position might be but I rather judge from Counsel Assisting's opening that we might be invited to make a finding in relation to the Ombudsman and I'm just wondering about what role the Ombudsman is going to take in these proceedings.

Perhaps taking that on notice, you might also consider what the interaction is between a provision in state legislation, section 35 of the Ombudsman Act, and the relevant provisions of the Royal Commissions Act, which is a Commonwealth Act and, one might think, prevailed over any inconsistent state Act. But I will leave that with you, should the issue arise later on. Thank you.

12. On 26 May 2021, the Crown Solicitor's Office served written submissions by the Ombudsman on his competence and compellability to give evidence.

13. Following receipt of those submissions, the Chair stated:⁸

I have received submissions from you, Ms Furness, on the question of the competence and compellability or otherwise of the Ombudsman. The position

⁸ Transcript, 26 May 2021, page 275, line 1-13.

that I would adopt is I would not propose of my own motion or the Commission's own motion to issue a summons to the Ombudsman to appear. Whether that is something that is in issue for the purposes of the proceedings would depend upon whether a party represented here today seeks the issue of a summons for that purpose, and at present I do not know whether that is the case. For obvious reasons, I do not want to be, or for the Commission to be, in the position of a contradictor.

Therefore, I need to know whether there is any party that seeks the appearance of the Ombudsman in the light of Ms Furness's indication that the Ombudsman wishes to argue that he is neither competent nor compellable as a witness in the Royal Commission.

14. Senior Counsel Assisting then stated that she would not ask Commissioners to issue a notice compelling the Ombudsman to attend.⁹
15. On 27 May 2021, Counsel for Sunnyfield indicated that his instructions were not to seek the issue of that summons.¹⁰
16. On 28 May 2021, at the completion of day five of public hearing 13, the following exchange took place:¹¹

GLOVER: ...One matter that is not addressed in the directions is something I should put on the record, and that it is the NSW Ombudsman remains willing to assist the Commission if there is any further information that can be provided by way of historical documents or information arising from his previous statement.

CHAIR: Yes, thank you for that indication. Thank you very much.

Effect of the exchanges concerning the Ombudsman's competence and compellability during the public hearing

17. It appears to us two possible interpretations arise from the exchange between the Chair and Counsel for the Ombudsman on 26 May 2021.
18. *First*, that the Chair and Counsel Assisting accepted the submissions made by the Ombudsman that he is neither 'competent' nor 'compellable' to appear before the Royal Commission and give evidence because of (i) the

⁹ Transcript, 26 May 2021, page 275, lines 15-16.

¹⁰ Transcript, 27 May 2021, page 279, lines 32-33.

¹¹ Transcript, 28 May 2021, page 504, line 42 – page 505, line 1.

operation of s. 35(1) of the *Ombudsman Act 1974* (NSW), and (ii) the 'reasonable excuse' exceptions contained in relevant provisions of the *Royal Commissions Act 1902* (Cth) (*Commonwealth Royal Commissions Act*) and *Royal Commissions Act 1923* (NSW) (*NSW Royal Commissions Act*).

19. *Secondly*, and alternatively, that the Ombudsman's oral evidence was no longer required. Given the comments made by Senior Counsel Assisting later in the hearing and her submissions, it seems this second interpretation is not available.
20. Accordingly, these submissions are made on the basis that the Chair and Senior Counsel Assisting accept our submissions that the Ombudsman is neither competent nor compellable to give evidence before the Royal Commission.

Accuracy of submissions as to the Ombudsman's functions and powers

21. Part 5 of Counsel Assisting's submissions is titled "Regulator" and refers to the Ombudsman as a "relevant regulator" in [416]. However, the Ombudsman does not (and relevantly has never had) functions associated with the role of "regulator". The Ombudsman does not authorise, license or otherwise accredit any entity or individual. Nor can the Ombudsman fine, restrict, impose conditions on, suspend or prosecute any entity or individual. The Ombudsman's functions are limited to the making of reports in connection with the exercise of his or her complaint handling, monitoring, review and investigative functions; he or she has no powers to adjudicate or otherwise affect individual legal rights: *Ombudsman v Moroney* [1983] 1 NSWLR 317.

Counsel Assisting's submissions

22. The Ombudsman wishes to respond to two aspects of Counsel Assisting's submissions:
 - a. his competence to appear before the Royal Commission; and
 - b. the provision of information to Sunnyfield by the Ombudsman.

Competence

23. As noted in Counsel Assisting's submissions, the Ombudsman is subject to his governing legislation and regulation. [414]
24. The Ombudsman is a statutory office holder who has no inherent powers and is obliged to comply with the provisions of his enabling legislation.
25. That legislation declares that the Ombudsman is not "competent" to give evidence in proceedings including those of a Royal Commission: *Ombudsman Act*, s. 35.¹² The word "competence" addresses both legal competence and competence in the sense of the capacity of a person to be a witness.¹³
26. The effect of s. 35, properly construed,¹⁴ is simply that the Ombudsman is not legally competent (and also cannot be compelled) to give evidence to the Royal Commission (or in any other legal proceeding).
27. Viewed in this light, s. 35 is no different in its operation to other statutory provisions that address legal competence, such as s. 16 of the *Evidence Act 1995* (Cth and NSW), which provides that a person who is a judge or juror is "not competent" to give evidence in that proceeding.
28. To the extent Counsel Assisting's submissions (or those of any other interested party) suggest the Ombudsman should have given oral evidence to the Royal Commission, and criticise the Ombudsman for not doing so, that suggestion is without foundation, by reason of s. 35 of the *Ombudsman Act*. The Ombudsman is prohibited, by Parliament, from appearing to give evidence to the Royal Commission.

¹² The NSW Ombudsman is the only ombudsman in Australia who is both not competent nor compellable. Equivalent legislation in other Australian jurisdictions provides only for non-compellability. See *Ombudsman Act 1976* (Cth), s 35(8), *Ombudsman Act 1989* (ACT), s 33(6), *Ombudsman Act 2009* (NT), s 119, *Ombudsman Act 2009* (Qld), s 92A, *Ombudsman Act 1972* (SA), s 30(2), *Ombudsman Act 1978* (Tas), s 26(5), *Ombudsman Act 1973* (Vic), s 29(4), *Parliamentary Commissioner Act 1971* (WA), s 30(4).

¹³ Australian Law Reform Commission Report No 102, *Uniform Evidence Law*, [4.3].

¹⁴ As to which see the warning of Basten JA in *Kaldas v Barbour* [2017] NSWCA 275; (2017) 350 ALR 292 at [261], that unless the *Ombudsman Act* is read with an understanding of the novel legal and administrative issues such an office is designed to address, there is a risk its terms may be misconstrued (citing *North Ganalanja Aboriginal Corporation v Queensland* [1996] HCA 2; (1996) 185 CLR 595 at 614-615).

29. In the event that the Royal Commission does not accept this submission, the Ombudsman respectfully requests an opportunity to consider further his position before the Royal Commission publishes its report.

Co-operation

30. Counsel Assisting submit at [430] that:

Given the relatively recent role and functions of the NSW Ombudsman with respect to oversight of the provisions of disability services, as well as the office's direct involvement in matters being examined at the public hearing, his lack of co-operation with the Royal Commission in these proceedings is notable. The Royal Commission may wish to comment on that lack of co-operation in its reports.

31. The Ombudsman takes issue with any submission that he has not cooperated with the Royal Commission. Such a submission ignores the evidence to the contrary and the legal position. The Ombudsman provided all documents sought by the Royal Commission, and did so at all times in a completely open, timely, comprehensive and cooperative manner. It is not accurate to suggest otherwise, for the following reasons.
32. *First*, the Ombudsman's Office's direct involvement in matters being examined at the Public Hearing were reflected at length in the hundreds of documents provided voluntarily to the Royal Commission. Those documents were provided in response to any request made of him by the Royal Commission.
33. *Secondly*, the Ombudsman provided, again voluntarily, two comprehensive witness statement addressing any and all questions asked of him by those assisting the Royal Commission.
34. *Thirdly*, in writing, and at the conclusion of public hearing 13, the offer was made to the Royal Commission to assist with further information if there was any further information or questions that Counsel Assisting could identify that the Ombudsman could feasibly assist with. No further request for information or questions were put to the Ombudsman.
35. *Fourthly*, Counsel Assisting's submissions now make a specific criticism that, if the Ombudsman was not able to address the matters about which the Royal Commission was inquiring, it was open to him to suggest others within his office who could do so. [429] Further, Counsel Assisting's

submissions note that the Ombudsman did not explain who made the decision to not send the letter or whether he discussed the issue with anyone in the office who had direct involvement in the decision. [445] However:

- a. No request for this information was sought by those assisting the Royal Commission.
 - b. It is nevertheless obvious from the documents that the decision maker in respect of the release of information was the then Deputy Ombudsman, Steve Kinmond. On 7 November 2018, Mr Kinmond's decision was recorded as being to release the information contained in the draft letter to, among others, Sunnyfield was noted as being made under s.34(1)(b2) of the Ombudsman Act: ex 13-319. On 12 December 2018, in relation to a later draft of a letter, Mr Kinmond ('SK') was then recorded as making the decision that the information in the letter was to be released to the Office of the Children's Guardian under s.16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).
 - c. Mr Kinmond's appointment and employment with the Ombudsman's Office ended in December 2018. The Ombudsman (Mr Miller) commenced his role in the Ombudsman's Office after Mr Kinmond had left and has never worked with Mr Kinmond.
36. *Finally*, the submission has no regard for the special position occupied by the Ombudsman, as reflected in the legislative framework applying to him and the submissions made by the Ombudsman on 26 May 2021. The legislation carefully and proscriptively limits the Ombudsman's competence and compellability to give oral evidence to the Royal Commission. It is disappointing that Counsel Assisting's submissions did not have regard to the – at least – “interesting issues” thrown up by s. 35 of the *Ombudsman Act* that resulted in neither (i) Counsel Assisting submitting the Royal Commission issuing a summons to require the Ombudsman's attendance, or (ii) the Royal Commission issuing a summons on its own motion.
37. As is clear from the correspondence set out above, at all times the Ombudsman has indicated his willingness to volunteer relevant

documents and make statements answering any relevant question that the Royal Commission asked.

38. That willingness is not recorded anywhere in Counsel Assisting's submissions. It should have been.
39. In all those circumstances, to make adverse comments suggesting that the Ombudsman exhibited a lack of cooperation pays no regard to the effect of Ombudsman Act s. 35 and the Ombudsman's voluntary production of large volumes of documents and two statements, and is inaccurate and unfair.

Disclosure to Sunnyfield

40. Counsel Assisting submit that an available finding is that the Ombudsman's Office "could and should" have disclosed to Sunnyfield the information gathered by its staff concerning the previous allegations against SP1. [450]
41. That disclosure, so Counsel Assisting submit in a single paragraph [451], would have been permitted by the operation of s.34(1)(b2) on the basis that:
 - a. There had been repeated allegations against SP1 over a number of years, several of them serious
 - b. While only one of his previous employers found an allegation against him to be sustained, several took action against him
 - c. The concerns raised by Eliza in 2017 about SP1's conduct
 - d. The notification received from Sunnyfield in 2018 relating to injuries to Melissa and
 - e. Sunnyfield would have taken action against SP1 much sooner had the information been disclosed to it

which, presumably as such, provided reasonable grounds to believe that disclosure to Sunnyfield was "necessary to prevent or lessen the likelihood of harm being done to the residents of the house".

42. However, each of the matters and findings above need to be considered in context, and against the relevant legislation.

43. First, the evidence provides important context which is missing from Counsel Assisting's simplistic recitation of supposedly relevant matters. The evidence for the matters set out below can be found in ex 13:320.
44. The allegation dealt with by Provider 1 in 2003 was found to be "not substantiated insufficient evidence", meaning it was dismissed. He was stood down because of concerns about his honesty but was still considered suitable for work as a support in disabilities. A further complaint in 2003 resulted in SP1 being placed on restricted duties.
45. Four allegations were dealt with by Provider 2 in 2004 and 2005. All were dismissed. The first was found to be "not substantiated insufficient evidence" and the Provider took no action. The second and third were found to be "misconceived". The fourth was found to be "not substantiated insufficient evidence". SP1 then resigned.
46. The next allegations were made in 2016 by a previous employer. Two matters were dismissed, having been found to be "not substantiated insufficient evidence". One which concerned alleged fraud was sustained and SP1 was dismissed as a result of that finding.
47. Notifications were made to the Office of the Ombudsman in 2017 by Provider 4 against SP1 and other employees/contractors. SP1 was a contractor with Provider 4. The primary allegations were investigated by FACS and were not substantiated. The allegations against SP1 relied upon the primary allegations being substantiated. The Ombudsman's Office took no further action.
48. In 2018, notifications from Sunnyfield in relation to Melissa were received by the Ombudsman's Office.
49. Secondly, the applicable legislative basis identified by Counsel Assisting as providing the Ombudsman the power to disclose to Sunnyfield is s.34(1)(b2), which provides:

34 Disclosures by Ombudsman or officer

(1) The Ombudsman shall not, nor shall an officer of the Ombudsman, disclose any information obtained by the Ombudsman or officer in the course of the Ombudsman's or officer's office, unless the disclosure is made:

...
 (b2) *to any person if the Ombudsman believes on reasonable grounds that disclosure to that person is necessary to prevent or lessen the likelihood of harm being done to any person (but only if the Ombudsman also believes on reasonable grounds that there is a risk of harm (including self-harm) being done to any person),*

50. This provision is not properly characterised as a “power” but is in fact an exception that permits what would otherwise be prohibited. When regard is had to that provision, it does not support the submissions by Counsel Assisting for the following reasons.
51. *First*, a cluster of allegations were made in 2003 and 2004; 15 years before the notification by Sunnyfield, and none of those allegations were substantiated. Section 34(1)(b2) requires a current belief on reasonable grounds. Allegations that were investigated and dismissed 15 years ago cannot be properly considered as justifying that belief. It is also relevant that the serious allegation for which he was dismissed concerned fraud and not a matter involving risk of harm to residents.
52. *Secondly*, Sunnyfield’s view that, in hindsight, the information would have been relevant to it, is irrelevant to the statutory test.
53. It is not surprising that the decision was ultimately made not to send the information to Sunnyfield. The test, which requires the Ombudsman to believe on *reasonable grounds* that there is a risk of harm, was clearly not met. Dated, unsubstantiated, dismissed misconduct allegations could not in the circumstances have had a ‘rational bearing’ upon the formation of a reasonable belief that there was a risk of harm, and could not be considered ‘sufficient to induce in the mind of a reasonable person’ the necessary reasonable belief: *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 228 CLR 423, [12]-[13].
54. Counsel Assisting also submit, in response to the Ombudsman’s second statement that the decision maker may have doubted whether the power was available to make the disclosure to Sunnyfield, “it would be surprising” if that was not put in writing. This comment is speculative and not supported by the evidence before the Royal Commission.

55. *First*, Counsel Assisting appears to have misconceived the Ombudsman's comment. The Ombudsman is seeking to apply his knowledge of the legislation to correspondence (that he had no involvement with) some years earlier. He is not suggesting his comments are based on anything other than the records before the Royal Commission.
56. *Secondly*, there is no standard stated by Counsel Assisting that would make it "surprising" if there was no written record of a draft letter not having been sent. The retention of the draft letter itself (as a draft) on file, together with (i) absence on the file of a signed copy of that letter, or any email addressed to the proposed recipient attaching a copy of the draft letter, and (ii) final copies on the file of all correspondence that was signed and sent (i.e. to the Office of the Children's Guardian), provide written records of what decisions were made.

Conclusion

57. In conclusion, we note that there is no criticism of the handling of the various complaints by way of the Ombudsman Office's communications with the complainants and the Ombudsman Office's protracted attempts to assist a conciliation between Eliza and Sunnyfield: ex 13-37. That should be reflected in the final report.

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20 August 2021.