

Exposure Draft Explainer

Children's Guardian Amendment (Child Safe Scheme) Bill 2020

The Office of the Children's Guardian (OCG) is an independent statutory authority that regulates and oversees organisations to uphold children and young people's rights to be child safe. The OCG influences and leads change by supporting organisations to build their capability to be child safe.

The OCG is leading the implementation of a new Child Safe Scheme developed in response to recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). The Royal Commission recommended that child-related organisations be required to implement Child Safe Standards and be held accountable for their implementation through independent oversight.

You are invited to provide feedback on the Exposure Draft of the Children's Guardian Amendment (Child Safe Scheme) Bill 2020 (the Bill) which, if passed by Parliament, would amend the *Children's Guardian Act 2019* (the CG Act) to implement the Royal Commission's vision to make organisations safer for children.

Previous consultations

The Bill builds on the extensive stakeholder consultation undertaken by the OCG with government and non-government stakeholders throughout 2019 and 2020. The key components on a regulatory scheme for Child Safe Standards based on these consultations is summarised in our [Consultation Report](#). We thank stakeholders for providing detailed submissions during that consultation process.

The Bill largely reflects what stakeholders told us they would like to see in a Child Safe Scheme. However, following further consultation in 2019/20, it is proposed the scope of the Child Safe Scheme be limited to organisations that are relevant entities. The co-regulation component of the Royal Commission's recommended approach has also been replaced by Child Safe Action Plans to promote sector wide reform.

How to comment on the Exposure Draft

You can contribute to this conversation by completing the survey on the *Have your say* website or providing comments by email to policyteam@kidsguardian.nsw.gov.au, or by mail to the Office of the Children's Guardian, Locked Bag 5100, Strawberry Hills NSW 2012.

All comments received through the consultation process will be treated as public, unless you request that your comments be kept confidential. This means we may publish extracts or whole comments unless you ask us not to do so. Consultation will close **January 29, 2021**.

Overview of the Child Safe Scheme

The Child Safe Scheme will build on recent changes made to the CG Act, which transferred the Reportable Conduct function to the OCG. The Reportable Conduct Scheme, which commenced at the OCG on 1 March 2020, requires relevant entities that become aware of reportable conduct

(defined in the CG Act to include child physical, sexual and emotional abuse, and ill-treatment and neglect) in an organisation to notify the OCG, and to have adequate systems and process in place to prevent and respond to reportable conduct.

There are two limitations that exist in the current approach. First, the OCG can only do something in response to an incident having been notified. Second, the ability to publish an organisation's name on the website is a limited enforcement tool, as it is only linked to existence of systems, not implementation.

Additionally, the Working With Children Check (WWCC), while an effective regulatory tool to help prevent unsuitable people from working with children, is not sufficiently preventative to address overall risks of child abuse in organisations. The Royal Commission found that WWCCs are more effective when used as part of a suite of other child safe strategies.

The Bill seeks to implement a stronger, preventative Child Safe Scheme by enabling the OCG to proactively address identified gaps in an organisation's systems and processes before an incident occurs, guided by the Child Safe Standards, and respond to concerns in a proportionate way through the availability of strengthened powers to monitor, investigate and enforce Child Safe Standards.

The new framework will be reflected across two new parts in the CG Act – proposed Parts 3A (the Child Safe Scheme) and 9A (Enforcement measures). The Child Safe Scheme will have the following core components:

- The Child Safe Standards recommended by the Royal Commission will be embedded in the CG Act as the primary framework that guides child safe practice in organisations in NSW.
- Child safe organisations will be required to implement the Child Safe Standards. Child Safe organisations are entities listed in Schedule 1, public authorities (section 14 of the CG Act) or religious bodies (section 15A of the CG Act) (see **Attachment A**). Individuals who are Schedule 1 entities will be excluded from the Scheme because the Standards are designed to be implemented by organisations. The head of a child safe organisation will be required to ensure the organisation implements the Child Safe Standards through its systems, policies and processes. This incorporates the current requirement in section 54 of the CG Act where the head of a relevant entity must ensure the entity has systems in place to prevent and respond to reportable conduct.
- Capability building and support will continue to be the foundation of the OCG's work to create child safe organisations. This role will be embedded in the CG Act.
- Mandatory Codes of Practice for agencies providing out-of-home care to children and adoption service providers will set out in greater detail how the OCG will assess compliance with the Child Safe Standards.
- The OCG's monitoring, investigation and enforcement capability will be strengthened to ensure organisations can be held to account for their implementation of the Child Safe Standards and the adequacy of their systems, policies and processes. Enforcement will be responsive, and risk based as recommended by the Royal Commission.
- Certain prescribed government agencies will be required to develop Child Safe Action Plans (CSAPs) to promote and support the safety of children in child-related organisations in their sector. The purpose of a CSAP is to leverage the reach and influence of each of the prescribed government agencies.

- Information may be shared between NSW government agencies and other agencies in states and territories with child safe responsibilities about risks to child safety in organisations.

Implementing the Child Safe Standards (Division 2)

It is proposed that child safe organisations will be required to implement the 10 Child Safe Standards recommended by the Royal Commission. The head of a child safe organisation will be required to ensure the organisation implements the Child Safe Standards through systems, policies and processes (section 8BA), including by having in place a:

- Statement of the organisation's commitment to child safety
- Child Safe Policy
- Code of Conduct applying to staff, management, volunteers and contractors
- Complaint Management Policy and Procedure
- Human Resources Policy
- Risk Management Plan.

The Children's Guardian may also require the head of a child safe organisation to give the Children's Guardian information about these systems, policies and processes within a reasonable time (section 8BB).

During consultations, you told us that you wanted clear guidance on the expectations around what the Child Safe Standards mean in practice. The above policies and procedures represent these baseline expectations and provide organisations with a starting point for documenting child safe practices.

The Child Safe Standards have been designed so that they are principle-based and outcome-focused. This principle-based approach also aligns with the feedback provided in consultation that stakeholders strongly supported flexibility in implementing the Child Safe Standards (as how they will be implemented by different organisations will differ depending on their size, capability and resources).

Capability building and support (Division 5)

Feedback received during the 2019 consultations highlighted the OCG should provide guidance and support in the form of capability building so organisations were clear about how the Child Safe Standards could be applied in their contexts.

The OCG will take a strengths-based and capability building approach in regulating the requirement to implement the Child Safe Standards to promote cultural change. To assist organisations to implement the Child Safe Standards, the OCG has developed a range of resources and tools, including the [Guide to the Child Safe Standards](#).

Other resources and supports will be developed over the coming year and will be consistent with the legislative obligations outlined in section 8BA (see above). They will include a Statement of Commitment to Child Safety, Code of Conduct, Child Safe Policy, Human Resources Policy, Compliant Policy and Procedure and a Risk Management Plan. Online training on child safe organisations is currently available free of charge.

The OCG's existing capability building activities are reflected through the work of Child Safe Coordinators, who provide tailored support and training to a number of targeted sectors including: the faith-based sector, the sport and recreation sector, the early childhood sector, schools (Independent and Catholic Schools), Aboriginal agencies, the out-of-home care sector and local government.

Monitoring, investigation and enforcement

The Bill creates a clear distinction between the monitoring, investigation and enforcement functions of the Children's Guardian to enable the OCG to hold organisations to account for their implementation of the Child Safe Standards. The Child Safe framework is structured in a way that is progressive, where escalation is staged. The Bill sets out the activities that the OCG will be able to perform under each of the relevant functions, providing a level of clarity and certainty to the sector.

There was strong stakeholder feedback from the 2019 consultation for the OCG's monitoring and enforcement powers to be exercised in a responsive, proportionate and collaborative way. The OCG would adopt a responsive approach to regulation.

Capability building, including education and advice, will be the platform for the OCG's work to create child safe organisations. Enforcement measures will only be utilised where supportive strategies have not worked. The enforcement approach will also be proportionate to the willingness of the organisation to comply with the OCG's advice to the organisation regarding compliance.

Monitoring (Division 6)

Monitoring of an organisation's implementation of the Child Safe Standards may involve the following (section 8FA):

- Reviewing the organisation's systems, processes and policies
- Requesting the head of the organisation to answer questions and provide specified information
- Reviewing information held by the Children's Guardian about the organisation and its employees (for example, Reportable Conduct notifications and WWCCs)
- With the consent of the head of the organisation, conducting an inspection of the organisation's premises,
- Requesting the head of the organisation to complete a self-assessment of its compliance with the Child Safe Standards.

An Assessment Report may be issued to provide guidance and recommendations to an organisation, which the organisation will need to respond to. If recommendations are made, the organisation must respond within the period specified by the Children's Guardian. Recommendations would be based on guidance material (such as the OCG's *Guide to the Child Safe Standards*) and other resources developed by the OCG, or best practice research about what makes organisations safer for children. The Monitoring Assessment Report is a culmination of the educative process and draws a clear line under the monitoring function of the OCG. A minimum of 28 days will be provided for a response (section 8FB).

Investigation (Division 7)

It is proposed that the OCG will have powers to investigate an organisation's implementation of the Child Safe Standards. The investigation phase is more serious, generally activated where earlier recommendations and guidance have not been taken on board by the organisation.

Reasons why the Children's Guardian may decide to conduct an investigation into an organisation's implementation of the Child Safe Standards include: the receipt of a complaint about the organisation; the organisation fails to respond to a recommendation by the Children's Guardian provided in an Assessment Report; and any other reason if the Children's Guardian is concerned the organisation is not implementing the Child Safe Standards (section 8G). Schedule 2 and 3 of the CG Act provides the powers that may be utilised when investigating (section 8GA).

Investigation provisions will also apply where the Children's Guardian makes a decision or takes action regarding an organisation's compliance with the Child Safe Standards, for example determining whether to accredit an agency to provide statutory out-of-home care or adoption.

At the end of an investigation the Children's Guardian must prepare an Investigation Report with its findings and recommendations, together with any proposed enforcement action (section 8GB). Investigation Reports will provide the evidence-base for enforcement, as recommendations in an Investigation Report may feed into a Compliance Notice or inform an Enforceable Undertaking (see below). Organisations will be given the right of reply to Investigation Reports written by the OCG.

Enforcement measures (Part 9A, Divisions 1 to 3)

The enforcement actions proposed include the following: Compliance Notices (see Division 1) and Enforceable Undertakings (see Division 2). Regulatory action would generally not escalate to enforcement until after an investigation has been completed, and the organisation would be advised of proposed enforcement action in an Investigation Report (section 8GB(1)(c)).

A Compliance Notice may be issued if the Children's Guardian reasonably believes that children are or may be at risk of harm because an organisation's systems, policies or processes do not reflect or implement the Child Safe Standards, or the organisation fails to comply with a Code of Practice (see below) (section 152A). A Compliance Notice represents formal enforcement action where the organisation is not willing to identify solutions to improve their child safe practice. An organisation will have 28 days to ask the Children's Guardian to review the decision to issue the notice (152C).

As an alternative to a Compliance Notice, the Children's Guardian may accept an Enforceable Undertaking from an organisation to take specific action (section 152G). Enforceable Undertakings would be utilised when organisations are willing to rectify identified issues, and work with the OCG to devise solutions on how they can implement the Child Safe Standards.

The Children's Guardian would be required to keep a list of Compliance Notices and Enforceable Undertakings and publish that list on its website (sections 152E and 152I). An organisation would also be required to include in its annual report the details of a Compliance Notice or Enforceable Undertaking it was subject to during the annual report period (sections 152E and 152I(2)).

It would be an executive liability offence if an organisation does not comply with a Compliance Notice or Enforceable Undertaking (sections 152F and 152J). The following penalties would apply:

- Compliance Notice – 250 penalty units in the case of a corporation and 50 penalty units in any other case.

- Enforceable Undertakings – 500 penalty units in the case of a corporation and 100 penalty units in any other case.

If a Compliance Notice or Enforceable Undertaking is not complied with, the organisation may be subject to penalties (sections 152F and 152J). The Children’s Guardian must also inform the Minister before taking enforcement action against a public authority (section 152K).

Child Safe Action Plans (Division 3)

The Bill provides the foundation for the development of Child Safe Action Plans (CSAPs) by the following NSW Government agencies, each called a ‘prescribed agency’ (section 8CA): Department of Communities and Justice; Ministry of Health; Department of Education; the Office of Sport; and the Office of Local Government.

CSAPs would need to detail the strategies that agencies will take to: build awareness in the community about the importance of child safety in organisations; build the capability of organisations to implement the Child Safe Standards; and improve the safety of children by implementing the Child Safe Standards (section 8C). For example, CSAPs may set out the strategy for ensuring cultural safety of the children and young people who access the services offered by organisations.

The primary purpose of CSAPs is to enable these NSW Government agencies to become change agents within their sectors by championing the Child Safe Standards, leveraging their scope and influence. The OCG’s expectation is that these agencies will use their influence to embed the Child Safe Standards across government and services for children. The OCG will develop guidelines and templates to assist agencies develop their CSAPs.

The CSAPs provide an alternative path to co-regulation for leveraging existing sector knowledge. Co-regulation was a regulatory option that was considered by the OCG and recommended by the Royal Commission. It would have involved the OCG delegating regulatory functions to existing regulators. However, following feedback from stakeholders during consultation, co-regulation will not be part of the Child Safe Scheme as similar outcomes can be achieved through CSAPs.

Codes of Practice (Division 4)

Codes of Practice will prescribe mandatory approaches to the implementation of the Child Safe Standards. They will only apply to certain sectors where there are heightened risks to children and young people, and greater vulnerability.

A Code of Practice will only be developed, at this stage, for agencies providing statutory out-of-home care to children and adoption service providers. The Children’s Guardian proposes to replace the existing accreditation criteria (that is, the [NSW Child Safe Standards for Permanent Care](#)) with a Code of Practice for statutory out-of-home care and adoption service providers. The content of the Code of Practice would be similar to the indicators of compliance within the NSW Child Safe Standards for Permanent Care.

The OCG would assess, and may accredit, an agency’s compliance with the Child Safe Standards by reviewing an agency’s application against the Code of Practice. Consultations with agencies on the design of the Code of Practice will be undertaken in early 2021.

Compliance with a Code of Practice will be mandatory. A Code of Practice might include (section 8DC):

- technical child protection requirements (prescriptive requirements) relevant to the sector
- practices or activities that an organisation must undertake in order to meet the needs of children and young people in the organisation
- specific practices and activities the organisation must undertake in order to comply with the Child Safe Standards
- measures of compliance for each Child Safe Standard
- outcomes to be achieved in implementing the Standards.

The Children's Guardian will be required to consult with child safe organisations in the development of a Code of Practice (section 8DB).

Information sharing (section 180A)

Under section 180A, the OCG may give information obtained under Parts 3A (Child Safe Scheme) and 9A (Enforcement Measures) to other Commonwealth, State or Territory child safe regulators. This would enable the OCG to share information relating to organisations that work across borders and their child safe systems and enforcement action, which would support a national approach to child safety.

Implementation approach

It is intended that implementation by the OCG will be staged overtime, with the focus for the first two years being on building capability. Enforcement action (in sectors other than those that are already regulated by the OCG) would not commence until 2022. Staged implementation will reduce regulatory burden associated with implementing the Child Safe Standards, particularly noting the impact of COVID-19 on organisations. Our intention is not to overburden organisations with unnecessary regulatory requirements but take a strengths-based approach to promote cultural change.

For more information about the Child Safe Standards contact

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Attachment A – Child safe organisations

Schedule 1 entities include:

- the Department of Education, including a government school within the meaning of the *Education Act 1990*
- the Ministry of Health
- a local health district within the meaning of the *Health Services Act 1997*
- a non-government school within the meaning of the *Education Act 1990*
- a designated agency
- an approved education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011*
- that part of Youth Justice within the Department of Communities and Justice comprising the group of staff who are principally involved in the administration of an Act administered by the Attorney General, and Minister for the Prevention of Domestic Violence and the Minister for Families, Communities and Disability Services
- that part of the Department of Communities and Justice comprising the group of staff who are principally involved in the administration of an Act administered by the Minister for Families, Communities and Disability Services
- a statutory health corporation within the meaning of the *Health Services Act 1997*
- an affiliated health organisation within the meaning of the *Health Services Act 1997*
- the Ambulance Service of NSW within the meaning of the *Health Services Act 1997*
- the TAFE Commission within the meaning of the *Technical and Further Education Commission Act 1990*
- an agency providing substitute residential care for children.

Section 14 of the *Children’s Guardian Act 2019* defines a public authority as:

- a government sector agency within the meaning of the Government Sector Employment Act 2013, or
- a person specified in section 5(1)(a), (b) and (d)–(f) of the Government Sector Employment Act 2013, or
- a local government authority, or
- a statutory body representing the Crown, or
- a statutory officer, or
- a body, whether incorporated or unincorporated, established for a public purpose under the provisions of a legislative instrument, or
- a State-owned corporation, or
- a university established under an Act, or

- an Aboriginal Land Council within the meaning of the Aboriginal Land Rights Act 1983, or
- an entity, or part of an entity, declared by the regulations to be a public authority for this definition.

Section 15 of the *Children's Guardian Act 2019* includes a definition of a religious body as:

- a body established for a religious purpose, and
- an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.