
Statutory review of the Children's Guardian Act 2019

Office of the Children's Guardian

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Office of the
Children's Guardian

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1. Overview

1.1 Introduction

The commencement of the *Children's Guardian Act 2019* (the **CG Act**) on 1 March 2020¹ represented a major step in building an integrated child safety protection framework in NSW. The CG Act consolidates the powers, functions and responsibilities of the Children's Guardian, the lead agency for regulating organisations and individuals that provide services to children. The Office of the Children's Guardian is an independent statutory office² that oversees organisations to uphold children's right to be safe.

The main object of the CG Act is to protect children by providing for the role and functions of the office of the Children's Guardian, including:

- promoting the quality of organisations and persons providing services to children,
- regulating those organisations and persons in providing those services, and
- embedding the Child Safe Standards as the primary framework that guides child safe practice in organisations in New South Wales.³

The safety, welfare and wellbeing of children, including protecting children from child abuse, is the paramount consideration in decision-making under, and the operation of, the CG Act.⁴

The guiding principles of the CG Act include:⁵

- giving children the opportunity to express their views on matters concerning their safety, welfare and wellbeing, and for commensurate weight to be given to their views,
- taking account of the culture, disability, language, religion, gender identity and sexuality of children and persons with parental responsibility for the child, as relevant, when taking action and making decisions that significantly affect the child,
- intervening in the lives of children and their families in the least intrusive way consistent with the paramount consideration referred to above,
- adhering to the principles of natural justice and procedural fairness in decision-making, investigations and monitoring by the Children's Guardian,
- taking account of specific considerations in making decisions about an Aboriginal child or a Torres Strait Islander child,
- respecting cultural and social differences when providing child-related services, and
- ensuring safe, nurturing, stable and secure environments for out-of-home care.

The statutory review of the CG Act represents an opportunity to examine the functions of the Children's Guardian by reference to the CG Act's policy objectives, with a view to ensuring the legislation provides a contemporary and fit-for-purpose framework for the protection of children in NSW.

¹ Most, but not all, of the provisions of the *Children's Guardian Act 2019* commenced operation on 1 March 2020. Uncommenced provisions include sections 131, Removal of responsibility for daily care and control from an authorised carer, and 132, Application for review of order of the Children's Court and provisions that expand the list of entities in Schedule 1 to include the following – providers of overnight camps, accommodation and respite services for children that provide overnight beds for children, including housing and homelessness services, and providers of family group homes: see *Children's Guardian Act 2019*, Schedule 5.10 [5]-[7]. Other uncommenced provisions are Part 9A, containing enforcement measures, a requirement that a prescribed agency that provides services to Aboriginal children consult with one or more Aboriginal controlled entities of a prescribed class in developing its child safe action plan (section 8J(c)) and a requirement that a prescribed agency's child safe action plan be made publicly available in a way prescribed by the regulations (section 8L(1)(b)): see *Children's Guardian Amendment (Child Safe Scheme) Act 2021*, Schedule 1 [3] to the extent it would insert sections 8J(c) and 8L(1)(b), and [12]-[15].

² *Children's Guardian Act 2019*, section 12.

³ *Children's Guardian Act 2019*, section 6.

⁴ *Children's Guardian Act 2019*, section 7.

⁵ *Children's Guardian Act 2019*, section 8.

The functions of the Children’s Guardian include administering the child safe scheme, the reportable conduct scheme, the working with children check clearance scheme and the National Disability Insurance Scheme (NDIS) worker check clearance, accrediting and monitoring designated agencies providing statutory and supported out-of-home care (OOHC), accrediting and monitoring adoption service providers, registering organisations providing or arranging voluntary out-of-home care (VOOHC), keeping the carers register, the residential care workers register and the specialised substitute residential care workers register,⁶ and regulating children’s employment.

The review will focus particularly on:

- the effectiveness of the reportable conduct scheme since its transfer from the Ombudsman to the Office of the Children’s Guardian (OCG),
- the role of Official Community Visitors since the transfer of their functions in relation to children from the Ombudsman to the OCG,
- the role of the Deputy Children’s Guardian in light of the recommendations of the Family is Culture review,⁷ and
- issues arising from the Children’s Guardian’s role in regulating children’s employment.

The Children’s Guardian’s functions in relation to designated agencies, adoption service providers and VOOHC providers have been the subject of recent consultations that have led to proposals for reform in the Children’s Guardian Amendment Bill 2022, which has now passed both Houses of Parliament and is awaiting assent. Those functions will therefore have minimal focus in this review. The Children’s Guardian’s function in relation to administering the working with children check clearance scheme is contained in the *Child Protection (Working with Children) Act 2012* and does not come within this review. The Children’s Guardian’s function in relation to administering the NDIS worker check clearance operates under the *National Disability Insurance Scheme (Worker Checks) Act 2018* and similarly does not come within this review.

The Children’s Guardian’s functions in relation to the child safe scheme (Part 3A of the CG Act) are not subject to this review as the scheme only commenced in February this year. However, embedding the Child Safe Standards as the CG Act’s primary framework guiding child safe practice in organisations in NSW, impacts the way in which the various parts of the CG Act must now operate and shapes the strategic direction of the OCG. The Child Safe Standards provide an overarching lens through which the functions of the Children’s Guardian and the operations of the OCG should be examined. The child safe scheme has informed the Children’s Guardian’s recent reviews of the OOHC, adoption and VOOHC regulatory frameworks referred to above. A summary of the child safe scheme is in Chapter 3.

1.2 Terms of reference

The terms of reference of this review, set out in section 183 of the CG Act, are as follows:

- The Minister must review the CG Act to determine whether its policy objectives remain valid and its terms remain appropriate for achieving the objectives.
- The review must be undertaken as soon as possible after the period of two years from the commencement of the CG Act.
- A report on the outcome of the review must be tabled in each House of Parliament within 12 months after the end of the period of two years.

⁶ The residential care workers register and the specialised substitute residential care workers register commence operation on 18 July 2022: Children’s Guardian Amendment Bill 2022. The specialised substitute residential care workers register will replace the register for organisations that provide or arrange voluntary out-of-home care.

⁷ Megan Davis et al, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-Home Care* (Report, 25 October 2019) <https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf>.

1.3 Conduct of the review

The review is being conducted in three stages:

- Stage 1. This discussion paper referred to below constitutes the first stage to generate public discussion. We welcome written submissions from stakeholders in response to the issues raised in the discussion paper and about any other general matters relevant to improving the current regulatory framework.
- Stage 2. Targeted consultations with stakeholders will follow the release of the discussion paper.
- Stage 3. The final report will make recommendations for change based on the consultations and submissions. The OCG will table the report in Parliament by 1 March 2023, as required by the terms of reference. Any proposed legislative changes arising from the recommendations will then be submitted to Government.

The review of Part 4 of the CG Act, Reportable conduct, is being conducted by Mr Mark Tedeschi AM QC as part of this overall review conducted by the OCG.

1.4 How to make a submission

We seek your views on the CG Act to inform this review and the subsequent report to NSW Parliament.

This discussion paper explores broader policy-based issues relating to the CG Act and functions, and legal and technical issues on how the CG Act operates. There are questions throughout the discussion paper to guide your thinking and feedback, however, you may provide feedback on any issues important to you.

Feedback or formal submissions can be sent via email to policyteam@ocg.nsw.gov.au.

Please provide any feedback by **19 August 2022**.

Please note that the contents of the submissions may be made public, unless otherwise advised. If you wish for your submission to remain confidential, please clearly identify this when you make your submission.

2. Context and background

2.1 Historical development of the role of the Children's Guardian

The objectives of the CG Act are reflective of the history of the role of the Children's Guardian. The establishment and framing of the role was actuated by several reviews that recommended the creation of an independent body with appropriate powers to oversee and co-ordinate the delivery of services to protect children from abuse, including sexual, physical and emotional abuse and neglect.⁸

Since 2001, the roles and functions of the Children's Guardian have expanded to focus on improving the quality of service provision in out-of-home care, voluntary out-of-home care (VOOHC), children's employment and screening adults who work with children through the working with children check clearance scheme.

The Children's Guardian's role in relation to out-of-home care has been further strengthened with the establishment of the carers register.⁹ Additionally, the transfer of the reportable conduct scheme from the *Ombudsman Act 1974* to the CG Act strengthened the Children's Guardian's role in improving organisational responses to child abuse.

The commencement of the child safe scheme and the embedding of the Child Safe Standards in the CG Act has cemented the Children's Guardian's role in creating and maintaining child safe environments.

A detailed timeline of the development of the Children's Guardian is set out in Table 1.

2.2 Legacy provisions

The CG Act brought together functions of the Children's Guardian that were previously administered under various other Acts and gave to the Children's Guardian new functions previously exercised by the Ombudsman.

Provisions were transferred into the CG Act from:

- the *Children and Young Persons (Care and Protection) Act 1998*: provisions relating to accrediting designated agencies and registering VOOHC providers,
- the *Adoption Act 2000*: provisions relating to accrediting adoption service providers,
- the *Community Services (Complaints, Review and Monitoring) Act 1993*: provisions relating to the Official Community Visitors scheme as it applies to children in out-of-home care, and
- the *Ombudsman Act 1974*: provisions relating to the reportable conduct scheme.

These Acts are administered by departments or bodies that differ from the OCG in their purpose and ways of operating. As well, many of the transferred provisions were developed in different, less evolved social, legal and legislative environments, when organisational focus on child safety, and children's voices, were not given as much weight as they are today. There may also have been limited other mechanisms to support the safety of children and young people in organisations. The legacy provisions had not been comprehensively reviewed, either recently or at all, before their transfer into the CG Act. Since their transfer into the CG Act, only the Children's Guardian's functions in relation to accrediting designated agencies and adoption service providers and

⁸ *Royal Commission into the New South Wales Police Service (Final Report, 15 May 1997) vol 5, 1234.*

⁹ See *Children's Guardian Act 2019*, Part 5.

registering VOOHC agencies have been comprehensively reviewed with legislative reforms that have now passed both Houses of Parliament and are awaiting assent.

2.3 The transfer of the reportable conduct scheme

The Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) suggested that the same agency administering the working with children check clearance scheme and responsible for monitoring and enforcing Child Safe Standards should also administer the reportable conduct scheme.¹⁰ Consistent with this view, provisions relating to the responsibility for administering the reportable conduct scheme were transferred from the *Ombudsman Act 1974* to the CG Act in 2020.

The main changes made to the scheme with the transfer were:

- defining categories of reportable conduct in legislation,
- setting new timeframes for notification of allegations, and
- extending the scope of the scheme to religious bodies and contractors engaged in child-related work (and other sectors which are yet to be commenced) and the outside work conduct of employees of public authorities that are not Schedule 1 entities when the employee holds or is required to hold a working with children check clearance for employment with the public authority.

When commenting on the reportable conduct scheme, the Royal Commission noted that, at the time of the inquiry, no research had been undertaken to fully evaluate the scheme. The Royal Commission also observed that, over time, the reportable conduct scheme had become more complicated and legalistic, without necessarily resulting in the prioritisation of the protection of children.

Additionally, the reportable conduct scheme is now administered by the OCG, a regulatory body, as opposed to being administered by the Ombudsman, a complaint handling body. The principal role of the Ombudsman is to receive complaints about the conduct of public authorities, investigate conduct following a complaint or on its own initiative and conciliate complaints. The Ombudsman's powers are extensive and include powers to hold inquiries and exercise powers of a commissioner of a Royal Commission, all of which had been available to the Ombudsman in the administration of the reportable conduct scheme.

By contrast, the principal role of the Children's Guardian is to promote the quality of organisations and persons providing services to children and regulate provision of those services. The Children's Guardian can therefore be characterised as an oversight body and a regulator, whose focus is on guiding and regulating child safe practice in NSW. In addition, embedding the Child Safe Standards as the primary framework that guides child safe practice is now one of the main objects of the CG Act and is implemented through the child safe scheme. These contextual factors may be relevant to the review of the reportable conduct scheme.

¹⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 7, 301.

Table 1 – Children’s Guardian – historical development

Timeframe	Event
January 2001	The role of the Children’s Guardian was first established. The 1992 Usher Committee review, ¹¹ the 1997 Parkinson Review ¹² and the 1997 Wood Royal Commission ¹³ all recommended the establishment of an independent body with “appropriate powers and capacity to oversee and co-ordinate the delivery of service for the protection of children from abuse (including sexual, physical and emotional abuse and neglect)”. ¹⁴
2003	The Children’s Guardian was given powers to accredit certain agencies as “designated agencies” able to provide or arrange out-of-home care and authorise certain types of children’s employment, including employment in the entertainment industry. Out-of-home care standards were introduced in NSW. Accreditation program commenced in July 2003.
July 2005	Power to accredit non-government adoption providers was delegated to the Children’s Guardian.
April 2006	The OCG was integrated into the newly established Office for Children.
2008	The Special Commission of Inquiry into Child Protection Services in NSW recommended expanding the functions of the Children’s Guardian to include regulation of voluntary out-of-home care. ¹⁵ The Special Commission also recommended responsibility for arranging the provision of statutory out-of-home care be progressively transferred from the Department of Community Services to designated non-government agencies.
July 2009	The Office for Children was dissolved. The Children’s Guardian was integrated into Communities NSW.
July 2011	Voluntary out-of-home care legislation commenced. Revised standards for statutory out-of-home care were released.
15 June 2013	The Children’s Guardian’s functions were expanded to include responsibility for the working with children check clearance scheme, child safe organisations and the Child Sex Offender Counsellor Accreditation Scheme. ¹⁶
June 2015	The Children’s Guardian established the carers register in which information about certain authorised carers is entered. ¹⁷
1 March 2020	The transfer of the reportable conduct scheme from the <i>Ombudsman Act 1974</i> to the CG Act expanded the functions of the Children’s Guardian. The scope of the reportable conduct scheme was expanded to include the religious and faith-based sector.
1 February 2022	Commencement of the child safe scheme.

¹¹ *Royal Commission into the New South Wales Police Service* (Final Report, 15 May 1997) vol 6, 65 rec 17, citing Department of Community Services, Ministerial Review Committee, *A report to the Minister for Health & Community Services, the Hon. John Hannaford, MLC from the Committee established to review substitute care services in NSW* (Final Report, January 1992).

¹² Department of Community Services (NSW), Legislation Review Unit, *Review of the Children (Care and Protection) Act 1987: recommendations for law reform* (Final Report, December 1997).

¹³ *Royal Commission into the New South Wales Police Service* (Final Report, 15 May 1997).

¹⁴ *Royal Commission into the New South Wales Police Service* (Final Report, 26 August 1997) vol 5, 1234.

¹⁵ James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Report, 24 November 2008) vol 2, 691 rec 16.16

<<https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/special-commission-of-inquiry-into-child-protection-services-in-new-south-wales/>>.

¹⁶ Giving the Children’s Guardian responsibility for administering the working with children check clearance scheme was part of the NSW Government’s response to recommendations of the Royal Commission into Institutional Responses to Child Abuse: NSW Government, *NSW Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Response, June 2018) <https://www.nsw.gov.au/sites/default/files/2020-10/NSW-Government-response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse-June-2018_0.pdf>.

¹⁷ The Children’s Guardian was required to establish and maintain the carers register under clause 86B of the *Children and Young Persons (Care and Protection) Regulation 2012*, inserted by the *Children and Young Persons (Care and Protection) Amendment (Authorised Carers) Regulation 2015*.

3. Child safe scheme

3.1 Introduction

The insertion of Part 3A Child safe scheme into the CG Act in late 2021, commencing on 1 February 2022, as the overarching framework of the CG Act is one of the most significant reforms in child protection in NSW.¹⁸ The child safe scheme implements the key future-focused, preventative recommendations made by Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**).¹⁹

The object of Part 3A is for the Children's Guardian to protect children from harm by:

- adopting the Child Safe Standards as the primary framework that guides child safe practice, and
- implementing certain regulatory approaches.²⁰

The child safe scheme is designed to support organisations to create and maintain child safe environments through the implementation of the Child Safe Standards, and to prevent child abuse in organisations by changing cultures and improving practices before an incident occurs. The insertion of the child safe scheme has had the effect of steering the focus of the CG Act to an emphasis on prevention through capability building.

3.2 The Child Safe Standards

The Child Safe Standards, set out in section 8C of the CG Act, are as follows:

1. Child safety is embedded in organisational leadership, governance and culture.
2. Children participate in decisions affecting them and are taken seriously.
3. Families and communities are informed and involved.
4. Equity is upheld, and diverse needs are taken into account.
5. People working with children are suitable and supported.
6. Processes to respond to complaints of child abuse are child focused.
7. Staff are equipped with the knowledge, skills and awareness to keep children safe through continual education and training.
8. Physical and online environments minimise the opportunity for abuse to occur.
9. Implementation of the Child Safe Standards is continuously reviewed and improved.
10. Policies and procedures document how the organisation is child safe.

Embedding the Child Safe Standards as the primary framework that guides child safe practice in organisations in NSW is also one of the ways of achieving the main object of the CG Act, as set out in Chapter 2.

Certain child-related organisations in NSW are required to implement the Child Safe Standards through their systems, policies and procedures. Implementation of the Child Safe Standards must be consistent with the recommendations of the Royal Commission.²¹

The child safe scheme also strengthens the Office of the Children's Guardian's monitoring, investigation and enforcement powers. The OCG can monitor the implementation of the Child Safe

¹⁸ *Children's Guardian Amendment (Child Safe Scheme) Act 2021*.

¹⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 7, 22-26.

²⁰ *Children's Guardian Act 2019*, section 8A.

²¹ *Children's Guardian Act 2019*, section 8AA.

Standards and investigate an organisation if there are concerns about child safety. If the Children's Guardian reasonably believes a child safe organisation's systems, policies or processes do not reflect or implement the Child Safe Standards, the Children's Guardian can take enforcement action, including by issuing a compliance notice or accepting an enforceable undertaking. A child safe organisation that does not comply with a compliance notice or breaches an undertaking commits an offence.²²

3.3 Integration of the Children's Guardian's functions under the child safe scheme

The vision of the OCG is to influence and lead change by building an organisation's capability to be child safe. The strategic priorities of the OCG include: "regulate, monitor and foster capability in quality child safe practices" and "an integrated child-safe authority supported by contemporary systems".²³ In implementing these priorities, the OCG is committed to providing "integrated oversight for promoting child safe practices, identifying gaps in protection, monitoring performance and trends, and detecting and acting on non-compliance".²⁴

The impact of embedding the Child Safe Standards as the primary framework that guides child safe practice in organisations in NSW is that the child safe scheme now influences the strategic direction of all aspects of the OCG's operations with a view to enhancing the OCG's role as a child safe regulator. The varied and intersecting functions of the Children's Guardian largely offer tools to keep children safe after an allegation or incident takes place, and to learn from those incidents to inform change in future practice and responses. The primary object of the child safe scheme is to prevent child abuse from occurring by changing the culture in organisations and improving responses when abuse does occur through the capability building, monitoring, investigating and enforcement powers that characterise the scheme. Adopting an integrated approach to the Children's Guardian's functions by ensuring organisations that deliver services to children are within the scope of the child safe scheme, and avoiding duplication and overlap in oversight, is integral to achieving efficiency and better regulatory outcomes in keeping children safe. The amendments in the Children's Guardian Amendment Bill 2022, which has now been passed by both Houses of Parliament and is awaiting assent, align with this approach.

3.4 The child safe scheme and accreditation and registration functions

The Royal Commission recommended that the scope of the child safe scheme should include "child protection services, including out-of-home care".²⁵ However, designated agencies providing statutory and supported out-of-home care, and adoption service providers, were not included in the original scope of the child safe scheme to allow for further consultation with the sectors. Stakeholders overwhelmingly agreed that statutory and supported out-of-home care and the adoption sectors should come within the scope of the child safe scheme. As a result, the Children's Guardian Amendment Bill 2022 included an amendment to the meaning of "child safe organisation"²⁶. From 1 September 2022, designated agencies and adoption service providers will be within the scope of the child safe scheme. Significantly, implementation of the Child Safe Standards will be mandatory for these sectors, as it is for other organisations within the child safe scheme.²⁷

Agencies that arrange and provide voluntary out-of-home care (VOOHC) already fall within the scope of the child safe scheme because they are classified as agencies providing substitute

²² *Children's Guardian Act 2019*, Part 9A. However, Part 9A has not yet commenced.

²³ Office of the Children's Guardian, 'Our strategic priorities', *Who we are* (Web Page) <<https://ocg.nsw.gov.au/about-us/who-we-are#section-target-3>>.

²⁴ Office of the Children's Guardian, 'Our Strategic Approach', *Our Strategic Approach* (Fact Sheet) <https://ocg.nsw.gov.au/sites/default/files/2022-01/P_OCG_StrategicPlan2020.pdf>.

²⁵ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 6, 28 rec 6.9(d).

²⁶ Children's Guardian Amendment Bill 2022, Schedule 1 [41].

²⁷ This is discussed in more detail in Chapter 5.

residential care. However, they are also subject to the OCG's registration and monitoring program, VOOHC being a form of out-of-home care. Following consultation and strong support for streamlining the approach to VOOHC, the Children's Guardian Amendment Bill 2022 has removed provisions relating to VOOHC and registered agencies from coverage within out-of-home care and reframed it within the existing umbrella of substitute residential care, classified as specialised substitute residential care. This means that providers of specialised substitute residential care (formerly VOOHC providers) will now be solely regulated under the child safe scheme affording enhanced oversight and greater protection for children.²⁸

3.5 The child safe scheme and reportable conduct functions

While the child safe scheme and reportable conduct scheme create distinct responsibilities for organisations, they complement each other by strengthening the capability of organisations to prevent and respond to child abuse. The regulatory approach that underpins the child safe scheme is responsive and risk-based, resulting in the regulatory effort being focused where it is needed most: on organisations where there are higher risks to child safety. The reportable conduct scheme, whilst monitoring investigations into allegations, utilises insights from that process to assist agencies to adapt child safe practices.

The commencement of the child safe scheme has also resulted in some crossover with the operation of the reportable conduct scheme. For example, Child Safe Standard 6 is about ensuring organisations have processes to respond to complaints of child abuse that are child focused. Similarly, one of the objects of the reportable conduct scheme is to monitor a relevant entity's systems for preventing, detecting and dealing with reportable conduct and reportable convictions. Since the commencement of the child safe scheme, the reportable conduct scheme is only required to monitor the systems, policies and processes of relevant entities that are not child safe organisations.²⁹ At present, these are designated agencies and adoption service providers (although they are set to be included within the child safe scheme from 1 September 2022) and public authorities that are not local government authorities. Although the organisational reach of the reportable conduct scheme in monitoring systems and policies is less than the child safe scheme, both schemes currently have a dual role in monitoring child-related organisations and their systems, policies and procedures, and improving access to capability building supports in relation to complaints of child abuse or reportable conduct and reportable convictions.

3.5.1 The Victorian approach

The Victorian Commission for Children and Young People was the first jurisdiction in Australia to have oversight and regulatory responsibility for the Child Safe Standards and the reportable conduct scheme.³⁰ In Victoria, as in NSW, the Child Safe Standards focus on organisations and what they do to identify, prevent, respond to and report child abuse. Conversely, the reportable conduct scheme is focused on worker and volunteer conduct and how organisations investigate and respond to suspected child abuse.

The Victorian reportable conduct scheme aims to improve organisational responses to suspected child abuse and facilitate the identification of individuals who pose a risk of harm to children but do not have a criminal record. It applies to some organisations required to meet the Child Safe Standards.

The focus of the Victorian child safe scheme is on organisational preventative systems and policies to promote child safe practices while the focus of their reportable conduct scheme is on individual

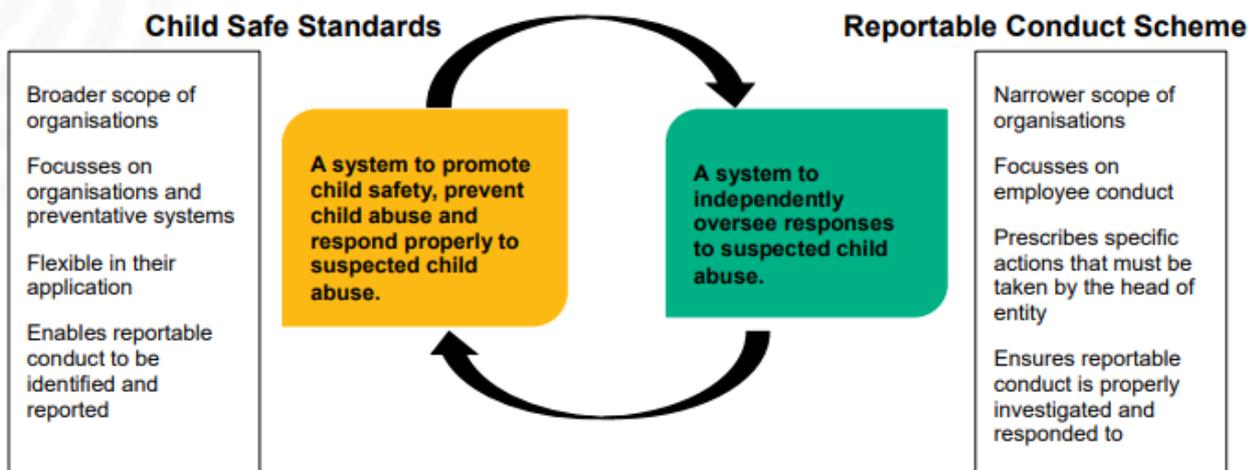
²⁸ This is discussed in more detail in Chapter 5.

²⁹ *Children's Guardian Act 2019*, section 54(1).

³⁰ Victorian Commission for Children and Young People, 'Information sheet 6: Child Safe Standards and Reportable Conduct Scheme', *Child Safe Standards and Reportable Conduct Scheme* (Fact Sheet, 21 March 2018) <[Child-Safe-Standards-and-Reportable-Conduct-Scheme.pdf](#) (ccyp.vic.gov.au)>.

employee conduct and ensuring that reportable conduct is properly investigated and responded to. The Victorian approach to the two schemes is depicted in the diagram below.

Figure 1 – Child safe and reportable conduct in Victoria (source: Victorian Commission for Children and Young People)



4. Reportable conduct

4.1 Introduction

This chapter reviews Part 4, Reportable conduct, to determine whether the Part’s policy objectives remain valid in the context of the overall objectives of the CG Act. It also examines whether the terms of the Part remain appropriate for achieving both the Part’s and the CG Act’s objectives. The review provides an opportunity to ensure the reportable conduct scheme is contributing optimally to the child safeguarding role of the OCG as a regulator and an oversight agency.

4.2 Intent of the reportable conduct scheme

Until its transfer to the CG Act, the reportable conduct scheme sat within the *Ombudsman Act 1974 (the Ombudsman Act)* as Part 3A. Part 3A was inserted into the Ombudsman Act by the *Ombudsman Amendment (Child Protection and Community Services) Act 1998*, commencing on 7 May 1999.

In his Second Reading Speech to the amending Bill, the then Attorney General noted the amendments were aimed at overcoming shortcomings, and possible conflicts of interest, identified by the 1997 Wood Royal Commission³¹ when agencies investigate child abuse allegations made against their staff. To avoid potential conflicts of interest, and in recognition of the Ombudsman’s “watchdog role”, the Ombudsman was given significant functions in the oversight, and development, of systems and procedures to overcome past inadequacies in complaint handling processes.³²

More recently, the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) reiterated that the original intent of the reportable conduct scheme was:

to overcome malfeasance and conflicts of interest where agencies investigate child sexual abuse allegations against their own staff, and instead seek to create a culture of integrity, transparency, and accountability to external independent oversight.³³

4.3 Current objects of the reportable conduct scheme

Objects of the reportable conduct scheme were inserted into the CG Act on the transfer of the scheme from the Ombudsman Act. The currently stated objects of Part 4, as set out in section 9, are founded on the same rationale as initially intended, but with more detail. They are for the Children’s Guardian to protect children from harm by:

- administering a scheme to report and notify a reportable allegation or a conviction considered to be a reportable conviction to the head of a relevant entity and the Children’s Guardian,
- providing oversight and guidance on an investigation undertaken by the head of a relevant entity,
- conducting investigations and inquiries into reports about reportable allegations and convictions considered to be reportable convictions and the response to, and handling of, reports by relevant entities,

³¹ *Royal Commission into the New South Wales Police Service* (Final Report, 15 May 1997).

³² New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 1998, 9768-9770 (Jeffrey Shaw, Attorney General) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1820781676-16915/HANSARD-1820781676-16873>>. The Attorney General noted the amendments would also enable the Ombudsman to oversee non-government schools, childcare and residential substitute care services.

³³ The Royal Commission into Institutional Responses to Child Sexual Abuse quoted from research conducted by Professor Ben Matthews, commissioned by the Royal Commission: Ben Matthews, ‘Optimising implementation of reforms to better prevent and respond to child sexual abuse in institutions: Insights from public health, regulatory theory, and Australia’s Royal Commission’ (2017) 74 *Child Abuse & Neglect* 86.

- ensuring appropriate action is taken by a relevant entity,
- monitoring a relevant entity's systems for preventing, detecting and dealing with reportable conduct and reportable convictions, and
- providing advice and education to relevant entities to assist them in detecting and dealing with reportable conduct and reportable convictions.

Questions

1. What, in your view, are the key strengths and weaknesses of the reportable conduct scheme, as it currently operates under the CG Act?
2. What in your view should be the key purpose of a reportable conduct scheme?
3. How do you consider the child safe scheme and the reportable conduct scheme can operate most efficiently together within the context of the objects of the CG Act as set out in section 6 of the CG Act?

4.4 Scope of the reportable conduct scheme

4.4.1 Relevant entities

The reportable conduct scheme imposes requirements on organisations and individuals, known as “relevant entities”. These are: “Schedule 1 entities”, public authorities and religious bodies.³⁴

Relevant entities may or may not provide services, or be in roles relating, to children.

“Schedule 1 entities” include:

- the 13 public sector agencies that provide services to children mentioned in Schedule 1 to the CG Act, including the Department of Education and Ministry of Health, government and non-government schools, early education care providers, designated agencies and agencies providing substitute residential care for children,
- authorised carers not employed by, or in, an entity mentioned in Schedule 1, and
- adults who, under the *Child Protection (Working with Children) Act 2012*, section 10, hold, or are required to hold, a working with children check clearance.³⁵

There are several other organisations intended to come within the scope of the reportable conduct scheme but the provisions that bring them under the CG Act have not been commenced.³⁶ These organisations are providers of:

- overnight camps,
- accommodation and respite services for children that provide overnight beds for children, including housing and homelessness services, and
- family group homes.

When these organisations are brought within the scope of the reportable conduct scheme, there may be some overlap with agencies providing substitute residential care. “Substitute residential care” is defined in the CG Act to mean the type of care ordinarily provided to children in a home environment, involving the provision of accommodation, food, care and other support, for more than two nights.³⁷

³⁴ *Children's Guardian Act 2019*, section 12.

³⁵ *Children's Guardian Act 2019*, section 13.

³⁶ Amendments to the *Children's Guardian Act 2019* ('CG Act') expand the list of entities in Schedule 1 to include these organisations: see CG Act Schedule 5.10 [5]-[7]. These amendments have not been commenced.

³⁷ The Children's Guardian Amendment Bill 2022, which has now passed both Houses of Parliament and is awaiting assent, amends the definition of substitute residential care to refer to two nights in any period of seven days.

4.4.1.1 Reviewing the scope of the reportable conduct scheme – entities covered

The Royal Commission observed that if a reportable conduct scheme has an overly broad scope, it may be difficult to administer and the regulatory and cost burdens may be disproportionate to the risk being addressed by the scheme.³⁸ In particular, the Royal Commission noted concerns with placing disproportionate regulatory burdens on smaller organisations that may be captured under the definition of an agency providing substitute residential care, for example, smaller sports and recreation organisations. Smaller organisations may lack the resources to comply with a reportable conduct scheme, or at least need more support and guidance when investigating reportable conduct.

Under the NSW reportable conduct scheme, there is no requirement that a relevant entity have a child-related focus. In contrast, Western Australia has recently introduced a Bill for a reportable conduct scheme that will not apply to organisations that do not exercise care, supervision or authority over children.³⁹

The Royal Commission also said that reportable conduct schemes should be periodically reviewed and include a review of whether the scope of a scheme should be expanded to bring in additional organisations that exercise a high degree of responsibility for children and involve a heightened risk of child sexual abuse, or if there are vulnerable children present.⁴⁰

Currently, the scope of the reportable conduct scheme and the scope of the child safe scheme differ. There is incomplete alignment between the organisations the reportable conduct scheme applies to on the one hand and the organisations the child safe scheme applies to on the other. This is outlined in Table 2 below.

Table 2 – Application of the reportable conduct scheme and the child safe scheme

Application of reportable conduct scheme	Application of child safe scheme
Schedule 1 entities, including designated agencies and accredited adoption service providers	Schedule 1 entities other than designated agencies and accredited adoption service providers Note, however, a Bill to bring designated agencies and accredited adoption service providers within the child safe scheme has now passed both Houses of Parliament and is awaiting assent
Public authorities, including local government authorities	Local government authorities
Religious bodies ⁴¹	Religious bodies that provide services to children or in which adults have contact with children
-	Clubs and other bodies providing recreational or sporting programs and services for children in which workers are required to hold a working with children check clearance

³⁸ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 7, 285.

³⁹ Parliamentary Commissioner Amendment (Reportable Conduct) Bill 2021 (WA).

⁴⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 7, 283 rec 7.11.

⁴¹ The reportable conduct scheme applies to religious bodies in relation to employees who hold a working with children check clearance.

Questions

4. Should the application of the reportable conduct scheme be limited to entities that provide services to children only?
5. Are there relevant entities that are currently within the reportable conduct scheme that should be excluded from it?
6. Are there any other child-related sectors that should be covered by the reportable conduct scheme?
7. Do smaller, less resourced organisations have difficulty complying with the reportable conduct scheme? How could these challenges be overcome?
8. Should the uncommenced provisions of the CG Act that bring within the scope of the reportable conduct scheme providers of overnight camps, accommodation and respite services for children that provide overnight beds for children, including housing and homelessness services, and providers of family group homes be commenced? If so, how should any potential overlap with agencies that provide substitute residential care be addressed?

4.4.1.2 Private schools and public hospitals

The reportable conduct scheme applies to private schools and public hospitals, but does not apply to private hospitals. Schedule 1 entities include affiliated health organisations, within the meaning of the *Health Services Act 1997*, but these do not include private hospitals unless the hospital is also an affiliated health organisation, bringing it within scope.⁴² The reportable conduct scheme may also cover private hospitals contracted by the government to provide services to public patients in a Public Private Partnership (PPP).

The inconsistent application to some private hospitals and not others, and the difficulty of characterising PPPs for the purposes of the reportable conduct scheme, including the difficulty of identifying which staff employed in a PPP come within the scope of the scheme, may create uncertainty and confusion. However, if private hospitals are brought within the scope of the reportable conduct scheme, it needs to be borne in mind that this may have implications for the scope of the child safe scheme.

Question

9. Should the reportable conduct scheme apply to all private hospitals?

4.4.1.3 NSW Police Force

The inclusion of the NSW Police Force, a statutory body representing the Crown,⁴³ in the definition of “public authority”, raises the question whether this creates unnecessary duplication of functions dealing with reportable conduct. The NSW Police Force is subject to oversight and investigations under the *Law Enforcement Conduct Commission Act 2016*. The Law Enforcement Conduct Commission has wide powers to investigate and deal with misconduct by police officers, administrative employees, and Crime Commission officers. Misconduct includes criminal offences, corrupt conduct, unlawful conduct and conduct that constitutes a disciplinary infringement. Conduct outside the course of the officer’s or employee’s duties or employment can also be investigated.⁴⁴ Conduct may also be dealt with under the *Law Enforcement Conduct Commission Act 2016* even though the person being investigated no longer holds the role of police officer,

⁴² Some of the organisations listed in the *Children’s Guardian Act 2019*, Schedule 1 may separately run a private hospital.

⁴³ The NSW Police Force was established under the *Police Act 1990*, section 4.

⁴⁴ The *Law Enforcement Conduct Commission Act 2016* defines police misconduct, administrative employee misconduct and Crime Commission officer misconduct as, in part, any misconduct “whether or not” the police officer/administrative employee/Crime Commission officer “is officially on duty”: at section 9(1)(b), (2)(b) and (3)(b).

administrative employee or Crime Commission officer, but only if the conduct occurred while the person was in the role.⁴⁵

Questions

10. Should the NSW Police Force be excluded from the scope of the reportable conduct scheme?
11. Has the inclusion of the NSW Police Force in the reportable conduct scheme resulted in duplication of effort, or in unnecessary oversight or monitoring?
12. What has been the value in oversight by the OCG (and previously by the Ombudsman) of reportable conduct matters relating to the NSW Police Force to date?

4.4.2 Employees

The reportable conduct scheme requires the reporting and investigation of certain conduct of employees of relevant entities. An “employee” of a relevant entity has different meanings depending on the kind of entity involved.

For a Schedule 1 entity or a public authority, an employee of the entity or public authority, respectively, is an individual who is:

- employed by or in the entity or the public authority,
- if the entity or the public authority is an individual, for example, a sole trader—the individual themselves,
- a volunteer who is engaged to provide services to children, whether engaged directly by the entity or the public authority, or by a third-party employer,
- a contractor who is required to hold a working with children check clearance for the purpose of the contractor’s engagement, whether engaged directly by the entity or public authority or by a third-party employer, or
- the head of a third-party employer contracted to provide services to children on behalf of the Schedule 1 entity or the public authority if that person holds, or is required to hold, a working with children check clearance.⁴⁶

For a religious body, an employee is an individual who holds, or is required by the religious body to hold, a working with children check clearance for the purpose of engagement with the religious body.

4.4.2.1 Third-party employers and contractors

One of the changes to the reportable conduct scheme from how it was under the Ombudsman Act when it was transferred to the CG Act was to include within the scheme contractors and subcontractors who hold, or are required to hold, a working with children check clearance for the purpose of their engagement.

The need for this amendment was highlighted in media reports that expressed a view that the reportable conduct framework was deficient in not covering contractors operating pools owned by local councils. It was reported that a parent had earlier complained to a swim school, which was the operator of a council pool, about the conduct of a swimming instructor alleged to be using “inappropriate holds” while teaching swimming. The swim school had no obligation to report this complaint to the local council.

As mentioned above, when the CG Act commenced, the definition of “employee” included an individual engaged by a third party as a contractor, provided the contractor held, or was required to

⁴⁵ *Law Enforcement Conduct Commission Act 2016*, section 9(5).

⁴⁶ *Children’s Guardian Act 2019*, section 16(1)(a)-(b).

hold, a working with children check clearance for the purpose of the engagement. “Contractor” was defined to only include a subcontractor and an employee of, or volunteer for, the contractor.

Only an employee of a relevant entity had an obligation to report a reportable allegation.⁴⁷ A third-party employer was not an employee of the relevant entity and therefore did not have reporting obligations under the CG Act. As a result, the policy intention to impose reporting requirements on all third parties providing the services of their employees to relevant entities was not fulfilled in the CG Act as first enacted.

In 2020, the contractor provisions were amended to address this gap by imposing reporting obligations on third-party employers who provide services to children on behalf of entities that are already subject to the reporting requirements.⁴⁸ The insertion of a definition of “third party employer”⁴⁹ established the link between the third-party employer and the relevant entity.⁵⁰

The definition of “contractor” was amended to add “an employee of, or volunteer for, a third party employer”. The effect of the amendments was to require third-party employers, for example, the swim school in the above case, to report reportable allegations about their employees, contractors or subcontractors, for example, the swimming instructor, to the relevant entity, for example, the local council, with an obligation on the relevant entity, that is, the local council, to investigate the matter. However, the obligations only apply to contractors who hold, or are required to hold, a working with children check clearance. That is, reporting obligations applying to contractors are limited to contractors who have direct contact with children.⁵¹

While the amendments to the contractor provisions resolve the previous gap, there are concerns about the requirement for a head of entity to investigate an allegation in relation to an employee or contractor of a third-party employer. One possible option to resolve this issue may be to expand the scope of the reportable conduct scheme to include organisations that provide services to children thereby capturing third-party employers as relevant entities. This may, however, result in an expansion of the scheme to cover agencies that are not currently within the scheme. For example, many councils engage sporting and recreational organisations under contract to deliver services on the council’s behalf, for example, operate council aquatic centres. These organisations are captured under the child safe scheme in their own right and compliance with the Child Safe Standards by the organisations is directly monitored and enforced by the OCG.

However, these same organisations are not within the scope of the reportable conduct scheme as they are neither a Schedule 1 entity nor a public authority. They are indirectly brought within the scheme through the third-party employer obligations to report reportable allegations to the council.

Although it may present challenges for some of these organisations, particularly smaller ones, to be brought directly within the scope of the reportable conduct scheme, as relevant entities, there are also benefits to doing so. No doubt, if there is a contract of engagement between a council and a contractor, the terms of the contract would address joint responsibilities for responding to allegations of reportable conduct. Councils would also undoubtedly require contracted service providers to implement training and procedures that meet with the council’s understanding of the reportable conduct scheme and requirements under the contract with council. This results in some organisations being regulated by the OCG under the child safe scheme and then subject to different sets of contractual obligations to councils. The challenges of this are brought home by the example of a particular organisation that operates aquatic centres on behalf of 27 councils across NSW.

⁴⁷ Under section 27 of the *Children’s Guardian Act 2019*.

⁴⁸ *Children’s Guardian Act 2019*, section 27(2)-(3). The amendments changed references to “third party” to “third party employer”, inserted a definition of “third party employer” and expanded the definition of “contractor” to include an employee of, or volunteer for, a third-party employer: *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020*, Schedule 1.1 [1]-[3]; see also Schedule 1.1 [7].

⁴⁹ “Third party employer” means a person, other than a relevant entity, who engages another person to provide services to children on behalf of a relevant entity, including as a contractor.

⁵⁰ *Children’s Guardian Act 2019*, section 27(2) was amended to require a person who is an employee of a relevant entity “or a third party employer” to report a reportable allegation or a possible reportable conviction to the relevant entity or the Children’s Guardian.

⁵¹ *Children’s Guardian Act 2019*, section 16(1)(a)(v) and (b)(v) inserted by the *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020*, Schedule 1.1 [4] and [5].

Questions

13. Does the definition of “employee” need to be clarified further? If so, in what respect?
14. Do the contractor provisions need further clarification? If so, in what respect?
15. Are there challenges with implementing the third-party employer and contractor provisions? If so, how would they best be addressed?
16. Is expanding the reportable conduct scheme to cover third-party employers providing services to children as relevant entities that have reporting and investigating obligations a feasible approach? What would be the difficulties with this approach?

4.4.3 Reportable conduct

4.4.3.1 What is reportable conduct?

“Reportable conduct” is defined in the CG Act⁵² to mean: a sexual offence; sexual misconduct; ill-treatment of a child; neglect of a child; an assault against a child; offences under the *Crimes Act 1900* of failing to reduce or remove the risk of a child becoming the victim of child abuse or concealing a child abuse offence;⁵³ and behaviour that causes significant emotional or psychological harm to a child. Section 20 gives examples of indicators of significant emotional or psychological harm as: displaying behaviour patterns that are out of character; regressive behaviour; and anxiety or self-harm.

Sexual offences, sexual misconduct, ill-treatment, neglect and assault are further defined in the CG Act.⁵⁴ Prior to the transfer of the reportable conduct scheme to the CG Act, when the reportable conduct scheme was under the Ombudsman, categories of reportable conduct were listed but not defined in legislation. Instead they were separately described in fact sheets. Reliance on fact sheets to elucidate the details of what conduct might be reportable sacrificed the transparency and certainty of legislation. The definitions were included in the CG Act to provide greater clarity in determining what form of conduct is reportable. By sufficiently defining concepts in the CG Act, the risk of misunderstanding or misconstruing the intention of the CG Act is averted.

An alleged sexual offence does not have to be the subject of criminal investigation or charges for it to be categorised as a reportable allegation of a sexual offence.

“Sexual misconduct” is defined as conduct with, towards or in the presence of a child that is sexual in nature, but not a sexual offence. Examples of sexual misconduct are descriptions of sexual acts without a legitimate reason to provide the descriptions, sexual comments, conversations or communications, and comments to a child that express a desire to act in a sexual manner towards the child or another child.

4.4.3.2 What is not reportable conduct?

Behaviour that involves an inappropriate and overly personal or intimate relationship with, conduct towards, or focus on, a child is characterised as “crossing professional boundaries”. It only comes within the scope of the reportable conduct scheme if the conduct meets the definition of “sexual misconduct”. That is, it must be conduct with, towards or in the presence of a child that is sexual in nature, but is not a sexual offence. Conduct characterised as “crossing professional boundaries” that is not sexual in nature is not sexual misconduct and not reportable conduct.

Many entities address what constitutes “crossing professional boundaries” in their codes of conduct and other policy documents and manage the conduct internally as a disciplinary matter. The fact that “crossing professional boundaries” is described in various ways in policy documents and, more

⁵² *Children’s Guardian Act 2019*, section 20.

⁵³ *Crimes Act 1900*, sections 43B and 316A, respectively.

⁵⁴ *Children’s Guardian Act 2019*, sections 21–25.

often than not, described through the use of examples rather than precise language, demonstrates the difficulty in defining the concept with precision. The challenge to defining the conduct with the level of precision required in legislation, for inclusion in a scheme where there are significant consequences for engaging in the conduct, is considerable. To illustrate, attempts at defining the behaviour include “when teachers blur their role as an educator with one of ‘friend’ with a student” and giving examples that include spending time outside of work with the child and/or the child’s family, favouring one child over another or sharing personal information with the child.

The OCG’s resource material about codes of conduct suggests organisations include clear descriptions of expected behaviours within their codes, relevant to their organisational context. Simply requiring a person “not to cross professional boundaries with children” is not considered to be clear guidance. More useful guidance might be: “do not spend time alone with a child in a secluded environment and ensure you are in the direct sight of another worker”.⁵⁵

Section 41 of the CG Act also makes reference to conduct that is not reportable conduct. It refers to conduct that is reasonable for the purposes of discipline, management or care of a child, having regard to the age, maturity, health or other characteristic of the child and any relevant code of conduct or professional standard. The use of physical force that is trivial or negligible and has been investigated is also not reportable conduct.

In effect, conduct that is not reportable conduct, described above, is conduct that is below a certain threshold and that is more appropriately dealt with through disciplinary procedures. In assessing conduct for the purposes of making a finding, it is incumbent on the head of entity to consider whether the reportable allegation relates to conduct that is in breach of established standards having regard to professional standards, codes of conduct and accepted community standards. While all reportable conduct would be a breach of these established standards, not all breaches of a code of conduct will be reportable conduct. It is questionable whether a matter that is a breach of a code of conduct but below the threshold of conduct that is reportable should be brought within the scope of the reportable conduct scheme or if it should be dealt with by means of disciplinary processes. If conduct that is a breach of a code of conduct, but no more serious than that, were included in the reportable conduct scheme, the obligations on organisations to notify the Children's Guardian and investigate could be an untenable drain on the organisation’s resources, particularly for smaller organisations. Equally, the OCG would be inundated with matters to monitor, and possibly investigate, diverting attention and resources from more serious matters presenting serious risks to the safety and welfare of children.

Lower-level conduct may be better addressed by a preventative response, which includes educating organisations about child safe practice. Specifically, the OCG may be more effective in preventing this behaviour by educating organisations how they can develop codes of conduct⁵⁶ and how to respond to certain behaviours that may fall below expected standards of behaviour, for example, through disciplinary actions, additional training, and education.

If an organisation continually fails to have appropriate policies, or if the OCG becomes aware an organisation is consistently ignoring lower-level conduct, the Children's Guardian has powers under the child safe scheme to investigate, and make recommendations about, the organisation’s implementation of the Child Safe Standards.⁵⁷

⁵⁵ Office of the Children’s Guardian, ‘Codes of Conduct: a guide to developing child safe Codes of Conduct’ *Child Safe Code of Conduct* (Code of Conduct, 2020) <https://ocg.nsw.gov.au/sites/default/files/2021-12/ChildSafeCodeofConduct_1_3.pdf?Embed=Y>.

⁵⁶ Organisations are required to implement the Child Safe Standards, which may include having a code of conduct: *Children’s Guardian Act 2019*, section 8D(1)(c).

⁵⁷ *Children’s Guardian Act 2019*, sections 8X and 8Z.

4.4.3.3 Thresholds for reportable conduct

To assess whether certain conduct falls within the scope of reportable conduct, the determining factor would be the threshold for notification. Given that the reportable conduct scheme has been operating for over 20 years and the child safe scheme has now commenced, it may be an opportune time to consider if the thresholds for notification and reporting should be raised. For example, raising the notification threshold for assault to a threshold of serious physical assault would mean that the reportable conduct scheme would provide oversight of more serious allegations. However, if serious physical assault is to be the threshold for reportable conduct, it should be clearly defined and this could present difficulties in view of varying circumstances that may need to be considered.

Questions

17. Within the existing categories of reportable conduct, is there a need for greater clarity in how the conduct is defined?
18. Should the thresholds for conduct that amounts to reportable conduct be reconsidered?
19. Should the threshold for assault be raised to serious physical assault? If so, how should it be defined?
20. Should the examples of reportable conduct provided in the CG Act be clarified or expanded?
21. Should breaches of established standards such as codes, professional standards and accepted community standards be considered reportable conduct or should this type of conduct be dealt with by employers internally, for example through disciplinary procedures?
22. Section 41 of the CG Act sets out the conduct that is not reportable conduct. Are these exclusions appropriate? Are there other matters that should be excluded from being reportable conduct?
23. Do you address behaviours classified as crossing professional boundaries as a breach of your code of conduct and according to your disciplinary procedures? If so, do you find this is an effective and efficient way of dealing with these behaviours?

4.4.3.4 Conduct in or outside the course of employment

There are two aspects to the definition of “reportable allegation”. First, it is an allegation that an employee has engaged in conduct that may be reportable conduct. The first part of the statement is then qualified by whether the conduct is alleged to have occurred in, or outside, the course of the employee’s employment, depending on the type of entity who is the employer.

For a Schedule 1 entity, conduct may be reportable conduct whether or not the conduct is alleged to have occurred in the course of the employee’s employment with the Schedule 1 entity.

For a public authority, if the employee holds, or is required to hold, a working with children check clearance for the purpose of employment with the public authority, conduct may be reportable conduct whether or not the conduct is alleged to have occurred in the course of the employee’s employment. However, if the employee is not required to hold a working with children check clearance, conduct that is alleged to have occurred outside the course of the employee’s employment with the public authority is excluded from the scope of the reportable conduct scheme.

When the reportable conduct scheme was administered by the Ombudsman, conduct that was outside the course of an employee’s employment with a public authority that was not a “designated agency” could not be the subject of a reportable allegation. The scope was broadened under the CG Act to cover conduct outside the course of an employee’s employment if a person working in a public authority is working with children and therefore holds or is required to hold a working with children check clearance. The reportable conduct scheme also applies to conduct outside the course of an employee’s employment if a person is employed in a Schedule 1 entity, that is, if services are provided to children.

Previously, outside of work conduct of public authorities that were not “designated agencies” was not captured at all. Under the CG Act, it is captured if the employee holds a working with children check clearance for the purpose of employment with the public authority.

The obligation to report under section 25C, and the authority to disclose information under section 25D, with respect to designated government agencies, extend to public authorities that are not designated government agencies if the reportable conduct concerned arises in the course of employment with the public authority.

While conduct outside the course of the employee’s employment may in certain circumstances be of concern, this is less likely to be a risk in the case of an employee who does not work with children. Relevantly, investigating this conduct would present a number of challenges for the employer.

Questions

24. Have you or your organisation had difficulty investigating reportable conduct allegations that concerned conduct that has occurred outside the course of employment?
25. Should all conduct that is outside the course of an employee’s employment with an entity be excluded from the application of the reportable conduct scheme?
26. Alternatively, should conduct that is outside the course of an employee’s employment only be excluded if the employee does not hold, or is not required to hold, a working with children check clearance?
27. Should conduct that is outside the course of an employee’s employment only be excluded if the employment is with a certain kind of entity or specifically named entities?

4.5 Reportable conduct process

4.5.1 Overview

The process under the reportable conduct scheme for responding to reportable allegations, in simple terms, is set out below.⁵⁸

1. A person who becomes aware of a reportable allegation about an employee reports the matter to:
 - the head of the relevant entity, or
 - if the report is about the head of the entity, the Children’s Guardian.⁵⁹
2. Within seven business days after the head of the entity is made aware of the report, the head must give the Children’s Guardian a written notice (a “notification”) about the reportable allegation.⁶⁰
3. As soon as practicable after receiving the report, the head of the relevant entity must (unless exempted), investigate, or arrange for an investigator to investigate, the reportable allegation.⁶¹
4. The Children’s Guardian may, if it is in the public interest, monitor the progress of an investigation by the head of a relevant entity.⁶²

⁵⁸ As the process is, with the necessary changes in wording, essentially the same for possible reportable convictions as it is for reportable allegations, for ease of reading the steps only refer to reportable allegations.

⁵⁹ *Children’s Guardian Act 2019*, section 27. The person *must* make a report to the head of the relevant entity or the Children’s Guardian if the person is also an employee of the relevant entity or a third-party employer.

⁶⁰ *Children’s Guardian Act 2019*, section 29. The notification must state the matters set out in sub-section (2) and include the matters set out in sub-section (3) if known to the head of the relevant entity. The seven-day time limit does not apply if an exemption applies under section 30 or the head of the relevant entity has a reasonable excuse.

⁶¹ *Children’s Guardian Act 2019*, section 34, or determine whether the conviction considered to be a reportable conviction is a reportable conviction.

⁶² *Children’s Guardian Act 2019*, section 43.

5. After an investigation is completed, the head of the relevant entity must prepare an entity report and provide it to the Children's Guardian within 30 days of receiving the report of the reportable allegation or if the investigation has not yet been completed, an interim report with an estimated timeframe for completion.⁶³
6. The Children's Guardian may, if it is in the public interest, investigate a reportable allegation or investigate the way in which a relevant entity has dealt with, or is dealing with, a report, complaint or notification and, after completing an investigation, prepare a report.⁶⁴
7. The Children's Guardian's report must include recommendations for action to be taken by the relevant entity in relation to the reportable allegation.⁶⁵

4.5.2 Timeframes for notification and reporting

The notification to be given within seven business days only requires basic information to be provided to the Children's Guardian. It is primarily to ensure that reports to police and the Child Protection Helpline have been made (where warranted), the entity has undertaken an initial risk assessment and that, as a matter of urgency, action has been taken to mitigate risks to the child or children who may be affected. By way of contrast, in Victoria, the period within which the head of an entity must give notification to the Commission for Children and Young people is three business days after becoming aware of a reportable allegation.⁶⁶

Reportable conduct scheme data indicates that in the year 2020-21, 1896 matters were notified, and 44 complaints were made, to the Children's Guardian and 1833 enquiries were made of the OCG.⁶⁷

The 30-day timeframe for the head of the entity to give the Children's Guardian an entity report, commencing to run from the time the head receives the report of the reportable allegation or conviction considered to be a reportable conviction, is similarly to provide a level of accountability: it ensures the Children's Guardian is kept informed of the progress of the matter. If it is not possible to conclude an investigation within 30 days of receiving the report of the reportable allegation or conviction considered to be a reportable conviction, an interim report can be given to the Children's Guardian, provided this is given within the 30-day period, and the entity also gives a reason for not providing the entity report within 30 days, and an estimated timeframe for completion of the entity report.

Questions

28. Given the rationale for the seven-business-day notification requirement, and the limited information that is required to be provided at that stage, is the timeframe appropriate?
29. Should further information be provided in the notification to be given within the seven-business-day notification period?
30. Is the 30-day period, in which to give an entity report, commencing from the time the head of the entity receives the report of a reportable allegation or conviction, an appropriate period?
31. Should there be a timeframe for the provision of a final report in terms of a length of time after the allegation is made?
32. Should a relevant entity be required to provide updated interim reports on the progress of an investigation? If so, how often should updated interim reports be given after the initial interim report?

⁶³ *Children's Guardian Act 2019*, section 36. The investigation must be completed within a reasonable time unless an exemption applies under section 31, the head of the relevant entity has a reasonable excuse or the Children's Guardian grants an extension.

⁶⁴ *Children's Guardian Act 2019*, sections 46 and 49.

⁶⁵ *Children's Guardian Act 2019*, section 49.

⁶⁶ *Child Wellbeing and Safety Act 2005* (Vic), section 16M.

⁶⁷ Office of the Children's Guardian, *Annual Report 2021* (Report, 2020-2021) 33 <https://ocg.nsw.gov.au/sites/default/files/2022-01/R_OCG_2020-21AnnualReport.pdf>.

4.5.3 Monitoring and investigation

4.5.3.1 Monitoring

The Children's Guardian can monitor the progress of an investigation conducted by the head of a relevant entity into a report to ensure the reportable allegation is being investigated appropriately.⁶⁸ However, the power can only be exercised if the Children's Guardian considers the monitoring is in the public interest.⁶⁹ It can be exercised on the Children's Guardian's own initiative or because of a complaint and triggers various functions to facilitate the monitoring. These include powers to:

- observe interviews,
- discuss the investigation with the head of the relevant entity,
- provide guidance and advice to the relevant entity about the investigation,
- require the provision of documents and other information relating to the investigation, and
- review the relevant entity's systems, policies and processes and their effectiveness in preventing, and responding to, reportable allegations and reportable convictions.

After receiving a notification, the Children's Guardian may also require the relevant entity to provide further information in relation to the reportable allegation, or conviction considered to be a reportable conviction, or the entity's response to the notification.

In the period between its transition to the OCG and 22 March 2022, less than 1% of reportable conduct notifications received were subject to monitoring under section 43 due to resource constraints.⁷⁰ It is noted, however, that the NSW Budget handed down on 21 June 2022 increased funding for the OCG, including allocating additional funds for the reportable conduct scheme.

There is no specific power in section 42 or 43 to monitor an entity's risk mitigation response to a reportable allegation or conviction considered to be a reportable conviction to keep a child, or children, safe while an investigation is being carried out. Risk mitigation measures that might be advisable in the circumstances of a matter include the temporary transfer or suspension of an employee. It is arguable that the powers in sections 42 and 43, including the power to require information about the entity's response to the notification, or discuss the investigation with the entity, gives the Children's Guardian the ability to monitor interim measures taken for the protection and wellbeing of children. This gives rise to the question whether this should be specifically addressed in the legislation.

4.5.3.2 Investigation

The Children's Guardian can also investigate a reportable allegation or investigate the way in which a relevant entity has dealt with, or is dealing with, a report, complaint or notification.⁷¹ Like the power to monitor an entity's investigation, the power to investigate can only be exercised if the Children's Guardian considers this is in the public interest.

An investigation can be carried out:

- on the Children's Guardian's own initiative,
- because of a complaint or notification, or
- because the Children's Guardian is satisfied the head of a relevant entity is unable or unwilling to investigate or determine a report or engage an investigator to carry out an investigation.

At the conclusion of an investigation by the Children's Guardian, or on a recommendation by the Children's Guardian to refer a reportable allegation, reportable conduct or a reportable conviction back to the relevant entity, the Children's Guardian must, under section 52, give the relevant entity

⁶⁸ *Children's Guardian Act 2019*, section 43. Section 43 also applies to determinations in relation to possible reportable convictions.

⁶⁹ *Children's Guardian Act 2019*, section 43(1).

⁷⁰ Office of the Children's Guardian, *Annual Report 2021* (Report, 2020-2021) <https://ocg.nsw.gov.au/sites/default/files/2022-01/R_OCG_2020-21AnnualReport.pdf>.

⁷¹ *Children's Guardian Act 2019*, section 46 also provides that the Children's Guardian can make a determination about a conviction considered to be a reportable conviction.

and the employee involved recommendations for action to be taken as well as necessary information relating to the recommendations. Unlike under the child safe scheme,⁷² there are no enforcement powers if the recommendations are not complied with.

4.5.3.3 The distinction between monitoring and investigation

The Children's Guardian's monitoring and investigative roles are set out in the legislation and clearly delineated, as explained above. This aligns with the characterisation of the OCG as a regulator with both monitoring and investigative powers. The Children's Guardian has similarly clearly delineated monitoring and investigative roles set out elsewhere in the CG Act, including to support implementation of the child safe scheme.

Under the child safe scheme, the monitoring function involves scrutiny, oversight and supervision of agencies and organisations. It may also involve education, capability building and guidance by the Children's Guardian. The purpose of the monitoring function is to ensure organisations are implementing the Child Safe Standards. Under the reportable conduct scheme, monitoring by the Children's Guardian of the head of a relevant entity's investigation of a reportable allegation similarly involves scrutiny, oversight, and supervision of the entity's investigation. At the same time, the Children's Guardian provides guidance to ensure the investigation is conducted properly.

By contrast with the investigative functions of the Children's Guardian under the child safe scheme, the investigative functions of the Children's Guardian under the reportable conduct scheme are limited. The investigative function under the child safe scheme provides for a more intensive response than monitoring and will generally be exercised in more serious matters, for example, if earlier recommendations and guidance have not been heeded, or if risks to children and compliance concerns are identified. The limited nature of the investigative functions under the reportable conduct scheme, specifically, the non-binding nature of recommendations and the lack of enforcement mechanisms, is set out in paragraph 4.5.3.2.

The Children's Guardian did not initiate any investigations in the period 2020-21.⁷³ Even when the reportable conduct scheme was administered by the Ombudsman, very few matters were investigated in the last three to four years before the scheme was transferred to the Children's Guardian.⁷⁴ This is consistent with the intention of the scheme that direct investigations be a last resort, as it is incumbent on the Children's Guardian to resolve concerns through the least intrusive use of available powers and only escalate matters to investigation when these have been exhausted.

It would be desirable if monitoring and investigative functions, and the language used for each, were as consistent as possible across the CG Act. The recent insertion of the child safe scheme into the CG Act provides clarity about these functions in the child safe context.

4.5.3.4 "Public interest" test

The Children's Guardian must meet a threshold before being able to exercise monitoring or investigation powers under the reportable conduct scheme. This is the "public interest" test, mentioned above. It is noted there is no similar public interest threshold to meet before monitoring or investigative functions can be exercised under the child safe scheme.

Before a monitoring or investigative function can be exercised under the reportable conduct scheme, the Children's Guardian must give priority to the broader interests of the community over private interest.⁷⁵ In general terms, the public interest is "the welfare or well-being of the general public" and society. Section 7 of the CG Act sets out that the paramount consideration in decision-making under, and in the operation of, the CG Act is the safety, welfare and wellbeing of children, including protecting children from child abuse. This is the public interest that the

⁷² Enforcement powers are contained in Part 9A of the *Children's Guardian Act 2019*, but the Part has not yet commenced.

⁷³ Office of the Children's Guardian, *Annual Report 2021* (Report, 2020-2021) 33 <https://ocg.nsw.gov.au/sites/default/files/2022-01/R_OCG_2020-21AnnualReport.pdf>.

⁷⁴ NSW Ombudsman, *Annual Report 2017-18* (Report, 22 October 2018) <https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0003/133095/NSW-Ombudsman-Annual-Report-2017-18.pdf>; NSW Ombudsman, *Annual Report 2018-19* (Report, 31 October 2019)

<https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0007/133909/NSW-Ombudsman-Annual-Report_2018-19.pdf>; NSW Ombudsman, *Annual Report 2019-20* (Report, 27 October 2020) <https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0018/134442/NSW-Ombudsman_Annual_Report_2019-20.pdf>.

⁷⁵ See *AYU v The Children's Guardian* [2021] NSWCATAD 48.

Children's Guardian must consider. But the Children's Guardian must also balance factors for and against the exercise of the power and consider the effects on individual entities, employees and children of exercising, or not exercising, the power.⁷⁶

The following points may be relevant in considering the rationale for, and justification of, the public interest test to be met before the Children's Guardian intervenes in a matter:

- The broader context and aim of the reportable conduct scheme is to ensure the integrity of investigations conducted by relevant entities.
- Standard 6 of the Child Safe Standards requires that processes to respond to complaints of child abuse must be child focused.

Relatively low numbers of matters have been monitored and investigated by the OCG under the reportable conduct scheme, largely due to resource constraints. However, as noted above, the NSW Budget handed down on 21 June 2022 allocated additional funds for the reportable conduct scheme.

Questions

33. Is the Children's Guardian's monitoring function effective in facilitating the investigation of reportable conduct by organisations? Is it perceived to be useful? Is it perceived to be too intrusive?
34. The monitoring function includes discussing the investigation with the head of the relevant entity, and providing guidance and advice. Have these functions been found to be useful to an entity in conducting its investigation?
35. Is the current public interest test for the Children's Guardian's involvement in monitoring reportable conduct matters too high?
36. Should there be a "public interest" test at all? If so, should there be guidelines for applying the test?
37. Is there a more appropriate threshold to meet before the Children's Guardian can exercise oversight of the reportable conduct process?
38. Should the Children's Guardian have the power to initiate an investigation if the report is about the head of a relevant entity, without satisfying the "public interest" test?
39. Should it be mandatory for the Children's Guardian to investigate a reportable allegation about the head of a relevant entity?
40. Is the type and amount of information provided under section 52 to the head of the entity and the employee at the conclusion of an investigation useful and sufficient? If not, what other information should be provided?

4.6 Review of reportable conduct findings

The Children's Guardian can provide advice and guidance and make non-binding recommendations during and at the end of a monitoring process.

Apart from self-initiating an investigation, there is no recourse for the Children's Guardian to act on a failure of procedural fairness or an untenable finding by a relevant entity. The Children's Guardian has no power to direct the entity to modify the way it is conducting its investigation or direct the entity to re-investigate a report, and neither can the Children's Guardian come to a contrary finding based on the entity's investigation. There is, in short, no review capacity; only the capacity for the Children's Guardian to conduct its own investigation.

⁷⁶ In *AYU v The Children's Guardian* [2021] NSWCATAD 48, the Tribunal stated that, at the same time as giving priority to the broader interests of the community over private interest, "regard should be had to the rehabilitation of offenders ... and take into consideration the right of a person to engage in child-related work when they have the appropriate skills and experience": at [38].

There is also very little recourse for a person who has been investigated to appeal a finding. The employee can notify the Children's Guardian but can do little else. It is only if the finding results in the employee losing a working with children check clearance that the employee can appeal to the NSW Civil and Administrative Tribunal. If the employee's employment is terminated, it can be onerous and costly to bring a case for unfair dismissal in the Fair Work Commission.⁷⁷ If the employee is not dismissed or demoted, there is no remedy at all and the adverse finding will be on the employee's employment record.

However, if a reportable conduct matter raises broader, or systemic, issues that go beyond the specific incident that is the subject of notification, the Children's Guardian has powers and enforcement options available under Parts 3A and 9A⁷⁸ of the CG Act to address this.

It was noted in paragraph 4.5.3.1 that the Children's Guardian does not have a specific oversight power in relation to interim measures taken by an entity to protect children while an investigation into a reportable allegation is in progress. Concomitant with the issue of a monitoring power is the issue whether the Children's Guardian should have a power to review the adequacy and effectiveness of interim measures taken, or a failure to mitigate risks.

4.6.1 Powers to make orders on the conclusion of an entity's investigation

The Royal Commission observed there was scope to improve an oversight agency's involvement in reportable allegations made under a reportable conduct scheme in relation to its ability to make binding orders, rather than only non-binding recommendations.⁷⁹ It noted that the oversight body can recommend an agency take certain action in response to reportable conduct, but if these recommendations are not binding, as is the case for the Children's Guardian, the oversight agency is reliant on building strong relationships with agencies to ensure its recommendations are implemented.

The Children's Guardian has built strong relationships with many agencies. However, as the Royal Commission noted, the potential exists for the non-binding nature of recommendations to be an "impediment to the effective functioning of a reportable conduct scheme":

Non-binding recommendations may limit the capacity of an oversight body to ensure change within institutions that are reluctant or unwilling to change and where child sexual abuse is being actively covered up. Further, the oversight body's amicable relationship with an institution does not guarantee that its recommendations are always implemented by the institution, or, if implemented, that it is done in the intended way.⁸⁰

The Royal Commission concluded there may be merit in considering whether an oversight body's recommendations should be binding for agencies in exceptional circumstances, for example, where it is in the public interest. This would enable the oversight body to require a relevant entity to focus on improving their investigation process, ensuring defensible outcomes in reportable conduct matters.

The capacity to make orders that the entity must comply with may bring about a better outcome in a specific matter but may also serve a wider purpose in motivating compliance by agencies generally, as well as deterring bad practice. This would be in keeping with the Children's Guardian's focus on prevention.

Orders could include an order that the entity re-investigate a report or come to a different finding. It may also be useful for the Children's Guardian to have the power to review an entity's investigation and come to a different finding.

This gives rise to the question whether the employee investigated should, in the interests of justice and balance, have a right to ask the Children's Guardian to review a finding, in effect, a right of

⁷⁷ While there are also avenues of appeal to the Supreme Court, proceedings in that jurisdiction would be even costlier and more onerous, with possible delays in resolution.

⁷⁸ Part 9A of the *Children's Guardian Act 2019* has not yet commenced.

⁷⁹ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 7, 273.

⁸⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017) vol 7, 271.

appeal. This would not involve a re-investigation of the matter but rather a review by the Children's Guardian on the papers of the relevant entity. Rights of review are likely to result in greater confidence in the whole reportable conduct scheme by those who are affected by it. It is also noted that the *Administrative Decisions Review Act 1997* already provides for rights for internal review of certain decisions of the Children's Guardian made under the CG Act. This is discussed in more detail under paragraph 10.2.3.

It is noted that giving the Children's Guardian these additional powers and providing for rights to ask the Children's Guardian to review outcomes may have resource implications. This would depend on the criteria on which the powers, or rights of appeal, could be exercised and the numbers of matters that would come before the Children's Guardian. A demand on the OCG's resources may also be ameliorated by the additional funding allocated to the reportable conduct scheme in the recent NSW Budget.

Questions

41. Should the Children's Guardian have other powers, for example, the power to direct an entity to re-investigate a matter after a report has been given by a relevant entity or make different findings from those made by the entity orders, if the investigation is flawed or the finding is perverse? If so, do you have any views on what these powers should be and what the threshold to trigger the exercise of the powers should be?
42. Should an employee who has been investigated have a right to apply to the Children's Guardian for a review of the entity's findings or actions taken by the entity?
43. Should the Children's Guardian have specific power to monitor an entity's interim risk mitigation measures by reviewing the adequacy and effectiveness of those interim measures to protect children while an investigation into a reportable allegation is being conducted, or review an entity's failure to mitigate risks?

4.7 Mandatory matters for consideration in reportable allegations

A relevant entity or the Children's Guardian must make a finding of reportable conduct if it is satisfied that the case against the employee the subject of the reportable allegation has been proved against the employee on the balance of probabilities.⁸¹ The balance of probabilities is generally the applicable standard of proof in civil proceedings, known as the "Briginshaw standard",⁸² now codified in section 140 of the *Evidence Act 1995*. In reaching a decision, the relevant entity or the Children's Guardian may take into account the nature and gravity of the matters alleged and any defence raised, but is not restricted from taking into account any other matter not specifically listed.⁸³

The nature of the reportable allegation and the gravity of the matters alleged, and whether a defence has been presented, are arguably integral to deciding whether the case against the employee has been proved on the balance of probabilities. However, the legislation is framed to make a consideration of these matters discretionary. This raises the question whether the relevant entity or the Children's Guardian should be obliged to take these matters into account.

The head of a relevant entity must also consider whether the reportable allegation relates to conduct that is in breach of established standards applying to the employee of the relevant entity, having regard to professional standards, codes of conduct and accepted community standards.⁸⁴

⁸¹ *Children's Guardian Act 2019*, section 40.

⁸² See *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁸³ *Children's Guardian Act 2019*, section 40(2).

⁸⁴ *Children's Guardian Act 2019*, section 40(3).

Questions

44. Should the matters set out in section 40(2) be mandatory, rather than discretionary, considerations for determining if a finding of reportable conduct can be made?
45. How should the mandatory considerations in section 40(3) inform findings of reportable conduct? Should they be used to broaden or narrow the scope of reportable conduct?

4.8 Concurrent investigations

The last 20 years have seen significant reform in criminal law and procedure to respond to issues in identifying, investigating, prosecuting, and sentencing of criminal offences involving the abuse of children and young people. The role of the NSW Police in relation to child sexual abuse has also expanded significantly. Relevant entities must respond to reportable allegations and reportable convictions, meaning employees in the relevant entity must report criminal offences to NSW Police.

If a reportable allegation involves conduct that may be a criminal offence and it is being investigated by NSW Police or prosecuted by the Director of Public Prosecutions (**DPP**), and the Police or the DPP advises the Children's Guardian or the head of a relevant entity that an investigation or determination under the CG Act is likely to prejudice the police investigation or court proceedings, the Children's Guardian or head of the relevant entity may suspend their own investigation of the conduct.⁸⁵

If the Children's Guardian or head of the relevant entity suspends a reportable conduct investigation, the Children's Guardian or head may take steps to manage any risks while the investigation or determination is suspended.

The response to the advice of NSW Police or the DPP of suspending an investigation and mitigating any risks are discretionary.

Questions

46. Should it be mandatory for the Children's Guardian or the head of the relevant entity to suspend a reportable conduct investigation if there is a concurrent Police investigation into, or court proceedings in relation to, the same conduct?
47. Should it be mandatory for the Children's Guardian or the head of the relevant entity to take steps to manage risks while a reportable conduct investigation is suspended?
48. Are you or your organisation aware of a matter where an investigation by a relevant entity has, or may have, prejudiced a NSW Police investigation or a DPP prosecution?

4.9 Class or kind exemptions

The Children's Guardian has the power to exempt a class or kind of conduct⁸⁶ of employees of a relevant entity from notification under section 29 of the CG Act.⁸⁷ This means a head of a relevant entity would not have to provide notice about certain kinds of conduct, subject to the class or kind exemption, or to provide an entity report.⁸⁸ The conduct is still reportable conduct⁸⁹ and the relevant

⁸⁵ *Children's Guardian Act 2019*, section 33.

⁸⁶ There are no parameters in *Children's Guardian Act 2019*, section 30 on the types of conduct that might qualify for exemption; the section is worded widely to give the Children's Guardian the power to exempt "a class or kind of conduct". However, in practice, the Children's Guardian (and the Ombudsman previously) has tended to grant exemptions for a class or kind of conduct that is of a low level of seriousness.

⁸⁷ *Children's Guardian Act 2019*, section 30(1).

⁸⁸ To give an exemption, the Children's Guardian must follow the procedures for exempting a class or kind of conduct, and be satisfied the relevant entity meets criteria, prescribed by the regulations: *Children's Guardian Act 2019*, section 30(2).

⁸⁹ The reference in the *Children's Guardian Act 2019*, section 41(c) to class or kind exemptions not being reportable conduct is incorrect and will be amended.

entity would still need to investigate the reportable allegation, but without oversight by the OCG.⁹⁰

The rationale for exempting a class or kind of conduct is to ensure the OCG's resources are focused on serious matters and on entities that have not demonstrated a satisfactory level of competence in complaint handling. Equally, it follows that entities that are granted exemptions must be able to demonstrate a level of integrity and competence in their complaint handling capacity.

When the reportable conduct scheme was transferred to the OCG, a number of existing class or kind exemptions were also transferred by means of transitional provisions. These transitional provisions lapse on 1 September 2022 after which fresh applications for class or kind exemptions will need to be made.⁹¹ It was decided that the existing class or kind exemptions be allowed to lapse on this date for the reason that the thresholds of reporting have changed over time, making many of the class or kind exemptions previously granted irrelevant. This review of the CG Act presents an opportunity to re-evaluate the purpose of class or kind exemptions.

Questions

49. Is there a continuing need or purpose for class or kind exemptions, particularly if thresholds of reportable conduct are raised? If so, what are the benefits of class or kind exemptions?
50. Have class or kind exemptions previously granted, whether by the Children's Guardian or the Ombudsman under the Ombudsman Act, been effective or efficient? What will result from their lapsing on 1 September 2022?
51. If the capacity to exempt certain classes or kinds of conduct from notification is to be maintained, how should the criteria and processes for the grant of exemptions be determined?

4.10 Cross-jurisdictional issues

The reportable conduct scheme applies in relation to children who:

- ordinarily live in NSW,
- are present in NSW but do not ordinarily live in this State, or
- are subject to an event or circumstance, whether occurring in NSW or elsewhere, committed by an employee of a relevant entity, that gives rise to a report.⁹²

The operation of the reportable conduct scheme in relation to conduct occurring in areas spanning borders between NSW and another State or territory can be illustrated by the following scenarios:

- If an alleged assault takes place in Albury or Wodonga and the alleged offender is the "employee" of a NSW "relevant entity",⁹³ under section 3 the matter may be investigated by the relevant entity in NSW. This is so even if there is a concurrent Police investigation.⁹⁴
- If an alleged assault takes place in Albury and the alleged offender is the "employee" of a Victorian organisation based in Wodonga, the matter may also be able to be investigated by the Victorian employer under Victorian law but cannot be investigated under the CG Act as there is no "relevant entity" to whom the NSW reportable conduct scheme applies.

⁹⁰ There are several class or kind exemptions that were granted when the scheme was administered by the Ombudsman and continue in force until 1 September 2022. Any new class or kind exemptions may be entered into by the Children's Guardian if certain procedures are followed and criteria are met. These procedures and criteria are yet to be prescribed by regulations under the *Children's Guardian Act 2019*.

⁹¹ See *Children's Guardian Act 2019*, section 30 ('CG Act'). New exemptions may only be granted by the Children's Guardian if certain procedures are followed and criteria are met. Although, these procedures and criteria are yet to be prescribed by regulations under the CG Act.

⁹² *Children's Guardian Act 2019*, section 3 ('CG Act'). It is not just the reportable conduct scheme that applies to children across jurisdictions; section 3 provides that all the functions of the CG Act and the regulations may be exercised in relation to children across jurisdictions. Although, only Part 4 reports can be about conduct occurring outside NSW. For other reports, the events or circumstances must have occurred in NSW.

⁹³ This will be all public authorities and Schedule 1 entities: see *Interpretation Act 1987*, section 12. It may not include all religious bodies.

⁹⁴ *Children's Guardian Act 2019*, section 33.

- If an alleged assault takes place in Wodonga and the alleged offender is the “employee” of a NSW “relevant entity” that operates in NSW and Victoria, the matter may be investigated in accordance with the requirements of Part 4 of the CG Act. The matter may also be investigated in accordance with the requirements of Part 5A of the *Child Wellbeing and Safety Act 2005* (Vic) (**the Victorian Act**).

Unlike the CG Act, the Victorian Act requires the Commissioner for Children and Young People to “liaise with regulators”⁹⁵ to “avoid unnecessary duplication in the oversight of the investigation of reportable allegations” and “share information and provide advice and guidance about the protection of children”.⁹⁶ “Liaise” is not defined but clearly means something other than sharing information, as this is separately referred to, and should be interpreted as having its ordinary meaning. “Liaise” would ordinarily be understood to mean establishing a working relationship with another person or body to cooperate on a matter of mutual concern. If the Commissioner identifies that investigation by the Commission would result in unnecessary duplication, the Commission may request a regulator to investigate the allegation. If the regulator accepts responsibility for conducting the investigation, the Commission has certain powers to monitor and undertake other actions in relation to the investigation.⁹⁷

Question

52. Should there be a requirement, similar to the Victorian provision, to liaise with State or territory regulators to avoid duplication of effort?

4.11 Other matters

The OCG appreciates there are a range of technical issues relating to the reportable conduct scheme that stakeholders may wish to comment on. This may include the following:

- information sharing and non-disclosure provisions,
- non-compellability provisions,
- protection against retribution,
- the definition of “complaint” in section 10 of the CG Act.

The OCG welcomes feedback on these subjects or any other matters considered relevant to the reportable conduct scheme by stakeholders.

⁹⁵ *Child Wellbeing and Safety Act 2005* (Vic), section 3. The definition of “regulator” could capture a regulator in another jurisdiction, such as the Office of the Children’s Guardian.

⁹⁶ *Child Wellbeing and Safety Act 2005* (Vic), section 16E.

⁹⁷ *Child Wellbeing and Safety Act 2005* (Vic), section 16E.

5. Out-of-home care matters regulated by the Children’s Guardian

5.1 Children’s Guardian’s functions under Part 5

Part 5 of the CG Act contains the Children’s Guardian’s powers, functions, and responsibilities in relation to out-of-home care (OOHC) that were extracted from the *Children and Young Persons (Care and Protection) Act 1998 (the Care Act)*. In the CG Act, OOHC has the same meaning as in the Care Act. OOHC is defined in section 135 of the Care Act as residential care and control of a child or young person that is provided:

- a. by a person other than a parent of the child or young person, and
- b. at a place other than the usual home of the child or young person,

whether or not for fee, gain or reward. Currently, the Care Act lists three types of OOHC: statutory OOHC, supported OOHC, and voluntary OOHC (VOOHC).

The objects of Part 5 of the CG Act replicate, with modification, the objects that were in Part 8 of the Care Act relating to OOHC,⁹⁸ and the specific functions of the Children’s Guardian relating to OOHC.⁹⁹

5.1.1 Key provisions about designated agencies

Part 5 currently includes the key definitions of “designated agency”¹⁰⁰ and “principal officer”.¹⁰¹ A designated agency is defined in section 72 as any of the following that are accredited under the regulations¹⁰² as a designated agency to provide or arrange out-of-home care and the accreditation is in force:

- a. a government sector agency or part of a government sector agency,
- b. an organisation, or part of an organisation, that arranges the provision of out-of-home care.

Designated agencies can be either for-profit or not-for-profit organisations.

A designated agency that places a child in the out-of-home care of an authorised carer has a responsibility to supervise the placement.¹⁰³ The Care Act provides for the oversight of children in statutory OOHC and supported OOHC.

Section 84 makes it clear that the powers in Schedule 2 may be exercised by an authorised person¹⁰⁴ for the purpose of monitoring and accreditation under Part 5 or under the regulations in relation to OOHC. These include the power to enter places and require information or attendance.

⁹⁸ *Children and Young Persons (Care and Protection) Act 1998*, section 134.

⁹⁹ *Children and Young Persons (Care and Protection) Act 1998*, section 181, as repealed by the *Children’s Guardian Act 2019*, Schedule 5.8 [17].

¹⁰⁰ *Children’s Guardian Act 2019*, section 72.

¹⁰¹ *Children’s Guardian Act 2019*, section 74; see also sections 75 and 81 relating to the actions of a principal officer.

¹⁰² *The Children’s Guardian (Transitional) Regulation 2020*, clause 7 saves the accreditation of existing designated agencies.

¹⁰³ *Children’s Guardian Act 2019*, section 82.

¹⁰⁴ *Children’s Guardian Act 2019*, Schedule 2 [3] provides that the Children’s Guardian is an authorised person; Schedule 2 [4] provides that the Children’s Guardian may appoint an officer of the Children’s Guardian as an authorised person.

5.1.2 Key provisions about registered agencies and VOOHC

Part 5 also sets out the framework for VOOHC.¹⁰⁵ As noted above, provisions relating to VOOHC were transferred out of the Care Act and into the CG Act. Section 76 defines VOOHC as OOHC for a child that is arranged by a parent of the child, but does not include OOHC that is provided by an individual in a private capacity, or outside NSW.

Section 77 provides that a child may remain in VOOHC for more than 90 days if the care is provided by a designated agency, or supervised by a designated agency or the Children's Guardian. A child may remain in VOOHC for more than 180 days only if the designated agency providing or supervising the care, or the Children's Guardian, has ensured there is a case plan in place.¹⁰⁶

The OCG registers and monitors organisations that provide or arrange VOOHC under the CG Act and the *Children and Young Persons (Care and Protection) Regulation 2012 (the Care Regulation)*.

A "registered agency" is currently defined as any of the following that are registered by the Children's Guardian under a regulation¹⁰⁷ to provide or arrange VOOHC:

- a. a government sector agency or part of a government sector agency,
- b. an organisation, or part of an organisation, that provides or arranges VOOHC.¹⁰⁸

5.1.3 Key provisions about registers

Part 5 sets out the various registers to be kept by the Children's Guardian.¹⁰⁹ These include the carers register, register for organisations that provide or arrange VOOHC, and residential care workers register. The residential care workers register, commencing on 18 July 2022,¹¹⁰ provides a mechanism for out-of-home residential care providers to exchange information about the safety and suitability of residential care workers prior to deciding whether to engage a person. This was a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse.

5.2 Consultation processes preceding statutory review

5.2.1 Accreditation and monitoring consultation

The OCG released two discussion papers in late 2021.¹¹¹ The accreditation and monitoring consultation paper for statutory OOHC and adoption service providers outlined some proposed amendments to the CG Act in relation to the Children's Guardian's accreditation and monitoring functions. The OCG also sought feedback on a range of policy and operational issues impacting the sector. Key proposals discussed in the paper included:

- legislative amendments to strengthen the assessment process for new applicants,
- legislative amendments to provide greater flexibility in the administration of the accreditation system,
- policy options to support the accreditation of short-term emergency care providers,

¹⁰⁵ *Children's Guardian Act 2019*, sections 76-80.

¹⁰⁶ *Children's Guardian Act 2019*, section 77(2).

¹⁰⁷ *Children and Young Persons (Care and Protection) Regulation 2012*, Part 6 Division 5.

¹⁰⁸ *Children's Guardian Act 2019*, section 73.

¹⁰⁹ *Children's Guardian Act 2019*, section 85. The *Stronger Communities Legislation Amendment (Courts and Civil) Act 2020* clarified that the Children's Guardian may keep a register for authorised carers, applicants for authorisation as authorised carers, persons who, under section 10 of the *Child Protection (Working with Children) Act 2012*, are required to hold a working with children check clearance because the person resides on the same property as an authorised carer for three weeks or more, residential care workers, applicants for employment as residential care workers; organisations that provide or arrange voluntary out-of-home care, and children in voluntary out-of-home care.

¹¹⁰ *Children's Guardian Regulation 2022*.

¹¹¹ Office of the Children's Guardian, *Review of accreditation & monitoring functions* (Consultation Paper, 8 November 2021)

<<https://ocg.nsw.gov.au/sites/default/files/2021-11/ConsultationPaper-outofhomecare.pdf>>; Office of the Children's Guardian, *Child Safe and Voluntary Out-of-Home Care* (Consultation Paper, 9 December 2021) <https://ocg.nsw.gov.au/sites/default/files/2022-01/VOOHC_ConsultPaper2021.pdf>.

- operational changes to support a new approach to monitoring and accreditation,
- greater clarity about the Children's Guardian's functions, and
- the prospect of prescribing designated agencies and adoption service providers as child safe organisations.

5.2.2 VOOHC consultation

The VOOHC consultation paper explored the following broad issues with stakeholders:

- the future operation of VOOHC in the context of the child safe scheme,
- options to streamline regulation,
- the need for the current VOOHC register and registration process, and
- high risk areas that may require more prescriptive requirements under the child safe scheme in the VOOHC context.

Currently, agencies providing VOOHC operate under multiple regulatory frameworks. These include the OCG's registration and monitoring framework,¹¹² the child safe scheme (as agencies providing "substitute residential care")¹¹³ and the National Disability Insurance Scheme Quality and Safeguard Commission regulatory scheme.

5.2.3 Residential care workers register consultation

The *Children's Guardian Regulation (the CG Regulation)*¹¹⁴ creates the legislative mechanism to ensure information about a residential care worker's suitability to work in residential care can be obtained, retained and exchanged using the residential care workers register.

The proposed CG Regulation was released, alongside a regulatory impact statement, for public consultation in March 2021, and stakeholder feedback was incorporated in the final CG Regulation. The CG Regulation was made on 1 April 2022, and the residential care workers register will commence on 18 July 2022.

5.3 Legislative and policy reform post consultation

The Children's Guardian Amendment Bill 2022 has been passed by both Houses of Parliament and is awaiting assent.¹¹⁵ The Bill implements key child protection reforms following the OCG's comprehensive review of the regulatory landscape for statutory OOHC, VOOHC and adoption service providers.¹¹⁶ The amendments contained in the Children's Guardian Amendment Bill 2022:

- strengthen the independent oversight and accreditation of designated agencies and adoption service providers by ensuring the accreditation scheme reflects the contemporary service system and is in line with modern legislative drafting.
- bring designated agencies and adoption service providers within the scope of the child safe scheme, implementing the outcomes of two consultation processes with the sector in 2020¹¹⁷ and

¹¹² *Children's Guardian Act 2019*, section 128(1)(f).

¹¹³ *Children's Guardian Act 2019*, Schedules 1 and 6.

¹¹⁴ The power to keep a register of residential care workers is established by section 85 of the *Children's Guardian Act 2019*.

¹¹⁵ Children's Guardian Amendment Bill 2022 <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3973>>.

¹¹⁶ Office of the Children's Guardian, *Review of accreditation & monitoring functions* (Consultation Paper, 8 November 2021)

<<https://ocg.nsw.gov.au/sites/default/files/2021-11/ConsultationPaper-outofhomecare.pdf>>; Office of the Children's Guardian, *Child Safe and Voluntary Out-of-Home Care* (Consultation Paper, 9 December 2021) <https://ocg.nsw.gov.au/sites/default/files/2022-01/VOOHC_ConsultPaper2021.pdf>.

¹¹⁷ Children's Guardian Amendment (Child Safe Scheme) Bill 2021, Public Consultation Draft.

2021¹¹⁸ where inclusion of designated agencies and adoption service providers in the child safe scheme was strongly supported.¹¹⁹

- support the effective functioning of the residential care workers register when it commences on 18 July 2022.
- strengthen the regulation-making powers ahead of the commencement of the Consolidated CG Regulation on 1 September 2022.
- refocus the regulation of VOOHC through its revised form as “specialised substitute residential care” within the child safe scheme. The concepts of “voluntary out-of-home care” and “registered agency” will be removed from the CG Act and VOOHC will be reframed as “specialised substitute residential care”. Specialised substitute residential care will be substitute residential care for a child funded by the National Disability Insurance Scheme under the *National Disability Insurance Scheme Act 2013* of the Commonwealth, or provided for the purposes of respite services or behaviour support.
- make other amendments to clarify or consolidate existing provisions.

In relation to the accreditation framework for designated agencies and adoption service providers, the majority of the proposed amendments in the new Schedule 3A in the Children's Guardian Amendment Bill 2022, reposition existing and long-established accreditation functions from the Care Regulation and *Adoption Regulation 2015* in a remodelled, or contemporary, way. The policy position underpinning the exercise of these functions remains largely unchanged. The amendments either consolidate functions, clarify functions or introduce new provisions that were considered by the sector in the consultation process.

The OCG is committed to ensuring that the regulatory framework for statutory OOHC, VOOHC (newly framed as “specialised substitute residential care”) and adoption service providers is cohesive, consistent and clearly expressed across the CG Act and the CG Regulation. Given that Part 5 has been comprehensively reviewed by the OCG, and the Children's Guardian Amendment Bill 2022 has passed both Houses of Parliament and is awaiting assent, Part 5 of the CG Act will not form part of the statutory review.

¹¹⁸ Office of the Children's Guardian, *Review of accreditation & monitoring functions* (Consultation Paper, 8 November 2021) <<https://ocg.nsw.gov.au/sites/default/files/2021-11/ConsultationPaper-outofhomecare.pdf>>.

¹¹⁹ The expansion of scope further implements Recommendation 6.9 of the *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017), which the NSW Government accepted in principle.

6. Child employment

6.1 Introduction

This chapter reviews Part 6 of the CG Act, Child employment, to determine whether the policy objectives of the Part remain valid, and the terms remain appropriate for achieving the objectives of the Part and the overall objectives of the CG Act.

In NSW, responsibility for regulating children’s employment is shared between the Minister for Employee Relations and the Children’s Guardian.¹²⁰ The Minister for Employee Relations has responsibility for setting minimum conditions and hours of work for children employed in all industries covered by the *Industrial Relations Act 1996* and the *Industrial Relations (Child Employment) Act 2006*.

The Children’s Guardian has responsibility for protecting the safety, welfare and wellbeing of children who are employed in specific industries, including entertainment and modelling.

6.2 Background to Part 6

Discrete legislative provision for the care and protection of children in certain types of employment in NSW can be traced back to the late 19th century.¹²¹ Since 1892, the regulation of children’s employment in specific industries has evolved from the need to protect children from physical harm, through deterring endangerment of a child’s “life or limb”, to today’s focus on safeguarding children physically, emotionally, educationally and socially.

The way the focus evolved can be explained by developments at the international level, culminating in the codification of children’s fundamental rights under the United Nations Convention on the Rights of the Child (**UNCRC**) and International Labour Organisation Conventions on child labour.¹²²

6.3 Objects of Part 6

The objects of Part 6 articulate the philosophy of articles 28 and 32 of the UNCRC within the scope of the Children’s Guardian’s regulatory remit. The objects of the regulatory scheme under Part 6 are:

- to promote the safety, welfare and wellbeing of children under the age of 16 years in relation to employment by assessing and granting employers’ authorities and exemptions,
- to prevent the exploitation and abuse of children in employment, and
- to provide for the circumstances in which a child may be employed that ensure the employment does not compromise the child’s personal or social development and ability to benefit from education, including the granting and revocation of exemptions from the requirement to hold an employer’s authority.¹²³

¹²⁰ *Children’s Guardian Act 2019; Industrial Relations Act 1996; Industrial Relations (Child Employment) Act 2006*.

¹²¹ *Children’s Protection Act 1892; Children’s Protection Act 1902; Neglected Children and Juvenile Offenders Act 1905; Child Welfare Act 1923; Child Welfare Act 1939*.

¹²² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 28, 32; *Minimum Age Convention (No. 138)*, opened for signature 26 June 1973, C138 (entered into force 19 June 1976).

¹²³ *Children’s Guardian Act 2019*, section 89.

6.4 Children protected under Part 6

Historically, Government regulation of children’s employment has developed in tandem with education reform to ensure that employment does not interfere with a child’s education.¹²⁴

Despite this history, a disconnect currently exists between the school leaving age and the protections afforded to all children employed in activities regulated under Part 6. Prior to 2009, a consistent definition of “child” was used for the purposes of the application of child employment laws and conformed with the school leaving age of 15.¹²⁵

Reforms progressed in 2009 and 2010 disrupted this conformity. First, the definition of “child”, for the purposes of child employment, was amended in 2009 to provide additional safeguards to models under the age of 16.¹²⁶ Second, the school leaving age was raised from 15 to 17 in 2010 without corresponding amendment to the child employment provisions.¹²⁷

Question

53. Having regard to the history of conformity between child employment regulation and the school leaving age, should the scheme apply to children aged under 17 for all regulated activities?

6.5 Activities regulated by the Children’s Guardian

Section 92 of the CG Act provides for the types of employment that are subject to regulation by the Children’s Guardian. A person must hold an authority to employ a child if the person proposes to employ the child in any one of the following activities:

- film, television, or theatre productions,
- modelling, promotional work and other exhibitions,
- still photography,
- door-to-door sales,
- performances recorded for use in subsequent entertainment or exhibition.¹²⁸

The *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015 (the Child Employment Regulation)* expands on the activities for which an employer’s authority is required to capture performance, and preparatory, activities.¹²⁹

Exemptions from the requirement to hold an employer’s authority apply if the child is employed under any of the following circumstances:

- a fundraising appeal within the meaning of the *Charitable Fundraising Act 1991*,
- an occasional entertainment or exhibition, the net proceeds of which are to be applied wholly for a charitable purpose,
- an activity for which the employer has been granted an exemption under section 102.¹³⁰

The Child Employment Regulation expands on the circumstances in which an exemption applies.¹³¹

¹²⁴ *Public Instruction Act 1880*, section 20; *Children’s Protection Act 1892*.

¹²⁵ *Youth Welfare Act 1940*, section 2A(1)(c).

¹²⁶ *Children and Young Persons (Care and Protection) Amendment (Children’s Employment) Act 2009*, section 221; New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 March 2009, 12907-8 (Linda Burney, Minister for Community Services)

<<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1323879322-71221/HANSARD-1323879322-71178>>.

¹²⁷ *Education Amendment Act 2009*, Schedule 1 [2].

¹²⁸ *Children’s Guardian Act 2019*, section 92.

¹²⁹ *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015*, clause 5 (‘Care Regulation’). The Care Regulation will be consolidated into the *Children’s Guardian Regulation 2022* on 1 September 2022.

¹³⁰ *Children’s Guardian Act 2019*, section 93.

¹³¹ *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015*, clause 6.

The child protection risks associated with employing children to undertake work in the entertainment and modelling industries are well established. Commercial demands and the nature and circumstances of work in these industries amplify the vulnerability of children to physical, psychological, sexual and educational harm. Accordingly, the nuanced constellation of risk factors present in these industries calls for responsive child-focused regulation that extends beyond the traditional remit of industrial relations regulation.

Children employed to undertake door-to-door sales may also be vulnerable to certain risk factors, yet the continued utility of child welfare-based regulation of this type of work requires further examination.

As child welfare-based regulation of employment derives from a historical context in which many children who were found wandering the streets engaging in trade were considered at risk of harm, charged with neglect, and sentenced to reformatory institutions, “street trading” was the first officially regulated form of child employment.¹³²

In 1992, the *Children (Care and Protection) Act 1987* was amended to capture children employed in door-to-door sales in response to public concern about “children as young as nine- and 10-years selling sweets in this fashion, often with very minimal and inappropriate supervision”.¹³³

The child welfare and employment landscapes have changed significantly since “street trading” and door-to-door sales became subject to regulation, and it is not clear how many children continue to be employed in door-to-door sales now that the provisions of the *Fair Work Act 2009* restrict employment in this area. Additionally, Part 6 currently excludes children employed to collect money in connection with a fundraising appeal under the *Charitable Fundraising Act 1991*.

Questions

54. Should the child employment scheme continue to regulate children employed in door-to-door sales?
55. Should the child employment scheme regulate children’s employment in any other industries?

6.6 Powers of authorised persons

The CG Act provides that the Children’s Guardian, and persons authorised by the Children’s Guardian, may exercise a range of powers, including the power to compel the production of information for the purposes of investigating a complaint or offence under Part 6.¹³⁴

Unlike other provisions of the CG Act, the Children’s Guardian does not have a power to treat information received, or identified, in the exercise of its functions as a complaint.¹³⁵ This may result in a diminution of the Children’s Guardian’s ability to fulfil the safeguarding objects of Part 6.

Additionally, while there are various offences attached to failure to comply with the Children’s Guardian’s information gathering powers under Schedule 2 to the CG Act, the Children’s Guardian has no power to enforce compliance where a person fails to produce information compelled under section 105 of the CG Act.

¹³² *Child Welfare Act 1939*.

¹³³ *Children (Care and Protection) (Child Employment) Amendment Act 1992*, Schedule 1; New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 April 1992, 3067-9 (Ronald Phillips, Minister for Health Services Management)
<<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-95715>>.

¹³⁴ *Children’s Guardian Act 2019*, sections 103 and 105.

¹³⁵ See, e.g., *Children’s Guardian Act 2019*, section 147(6) which allows the Children’s Guardian, on its own initiative, to deal with certain matters as reports for the purposes of determining how to deal with issues relating to the safety, welfare or wellbeing of children in visitable services.

Questions

56. Having regard to the objects of Part 6, should the Children's Guardian have a power to treat information identified, or received, as a complaint?
57. Should a failure to produce information compelled under section 105 of the CG Act be an offence?

6.7 Endangering children in employment

Under section 106 of the CG Act, it is an offence to cause or allow a child to take part in employment where the child's "physical or emotional well-being is put at risk". A person who is found guilty of endangering a child in employment is liable to a maximum penalty of \$22,000 (200 penalty units).¹³⁶

This offence has existed in child welfare-based employment legislation since 1987.¹³⁷ Prior to 1987, the scope of endangerment offences in child employment legislation was limited to:

- endangerment in regulated activities, and
- endangerment causing risk, or occurrence, of physical harm.¹³⁸

In 1992, the *Children (Care and Protection) Act 1987* was amended to extend the offence of endangerment in child employment beyond regulated activities to any child employment and beyond risk of physical harm to risk to "physical or emotional well-being".¹³⁹

While a subsequent review questioned the adequacy and appropriateness of the revised offence provision, it has not been recast since 1992.¹⁴⁰

Questions

58. Should the offence of causing or allowing a child to take part in employment where the child's "physical or emotional well-being" is put at risk be clarified to ensure it can be appropriately enforced?
59. Given the Children's Guardian's specific regulatory remit under Part 6, and considering the existence of uniform workplace health and safety laws, should this offence be confined to endangerment of a child in activities regulated by the Children's Guardian under Part 6?
60. Children's employment has historically existed as a separate form of regulation. While the contemporary children's employment scheme applies many of the Child Safe Standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, children's employment continues to be separately regulated. Given the CG Act's focus on child safe as the overarching regulatory framework, should children's employment be brought within the child safe scheme?

¹³⁶ *Children's Guardian Act 2019*, section 106.

¹³⁷ *Children and Young Persons (Care and Protection) Act 1987*, section 51.

¹³⁸ *Children's Protection Act 1892; Children's Protection Act 1902; Neglected Children and Juvenile Offenders Act 1905; Child Welfare Act 1923; Child Welfare Act 1939.*

¹³⁹ *Children (Care and Protection) (Child Employment) Amendment Act 1992*, Schedule 1.

¹⁴⁰ Department of Community Services (NSW), Legislation Review Unit, *Review of the Children (Care and Protection) Act 1987 – Protecting Children in Employment: A Legal Framework* (Discussion Paper No 3, January 1997) 10; Department of Community Services (NSW), Legislation Review Unit, *Review of the Children (Care and Protection) Act 1987: recommendations for law reform* (Final Report, December 1997) pt. C, 246-7.

7. Adoption service providers

7.1 Children’s Guardian’s functions under Part 7

As described in Chapter 5, on the enactment of the CG Act, Part 7 extracted the Children’s Guardian’s existing powers, functions and responsibilities relating to adoption service providers from the *Adoption Act 2000* and placed them in the CG Act.

To the greatest extent possible, the provisions relating to the accreditation of designated agencies and adoption service providers align.

Currently, Division 1 sets out the objects of Part 7 and defines certain terms used throughout the Part. Section 110 sets out the meaning of “principal officer” of an adoption service provider and the actions of the principal officer. Section 110 mirrors sections 74 and 75 (principal officer provisions for designated agencies). Section 81, as it applies to designated agencies, is not applicable to accredited adoption service providers, so no equivalent provision is found in Part 7. Appointment requirements for principal officers of accredited adoption service providers are set out in the *Adoption Regulation 2015*. These include probity and suitability checks for principal officers, power to appoint acting principal officers and notification arrangements.¹⁴¹ The *Children and Young Persons (Care and Protection) Regulation 2012* does not include equivalent appointment requirements for designated agencies.

Division 2 of Part 7 provides for the accreditation of charitable and non-profit organisations as adoption service providers. Section 113 allows the Minister to approve standards and other criteria for accreditation on the recommendation of the Children’s Guardian.

Division 3 restricts access to records made in connection with the administration or execution of Part 7.

7.2 Consultation on accreditation and monitoring framework

As noted in Chapter 5, in 2021, the OCG reviewed the accreditation and monitoring framework for designated agencies and adoption service providers. The accreditation and monitoring consultation paper for statutory out-of-home care and adoption service providers outlined some proposed amendments to the CG Act in relation to the Children’s Guardian’s accreditation and monitoring functions.

In relation to Part 7, the paper noted that, under current arrangements, charitable or not-for-profit organisations may apply to the Children’s Guardian for accreditation to provide domestic adoption services and/or intercountry adoption services or apply for the renewal of accreditation. The Department of Communities and Justice does not require accreditation to provide adoption services, however the Children’s Guardian monitors the provision of adoption services by the Secretary of the Department of Communities and Justice.

As noted at 5.3, the Children’s Guardian Amendment Bill 2022 has been passed by both Houses of Parliament and is awaiting assent.¹⁴² From 1 September 2022, significant amendments will be made to the infrastructure in the CG Act to support the accreditation scheme for designated agencies and adoption service providers. Given that Part 7 has been comprehensively reviewed by the OCG and

¹⁴¹ *Adoption Regulation 2015*, clauses 32, 34 and 35.

¹⁴² Children’s Guardian Amendment Bill 2022 <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3973>>.

the Children's Guardian Amendment Bill 2022 has now passed both Houses of Parliament and is awaiting assent, Part 7 of the CG Act will not form part of the statutory review.

8. Children’s Guardian and Deputy Children’s Guardian

8.1 Children’s Guardian’s functions under the CG Act

Since 2001, the roles and functions of the Children’s Guardian have expanded to focus on improving quality in service provision in out-of-home care (OOHC), voluntary out-of-home care (VOOHC), and children’s employment and screening adults who work with children via the working with children check clearance scheme.

The Children’s Guardian Amendment Bill 2022 includes reforms to VOOHC that refine the Children’s Guardian’s functions in relation to OOHC. From 1 September 2022, the concepts of “voluntary out-of-home care” and “registered agency” will be removed from the CG Act and VOOHC will be reframed as “specialised substitute residential care”. This is discussed in more detail in Chapter 5.

With the introduction of the working with children check clearance scheme, the Children’s Guardian’s role also expanded to focus on capability building and support to help organisations prevent and respond to child abuse. The role of the Office of the Children’s Guardian (OCG) in preventing and improving responses to child abuse has been cemented with the introduction of the child safe scheme in 2022 and the transfer of the reportable conduct scheme to the OCG from the NSW Ombudsman in 2020.

Pending commencement of the amendments to the Children’s Guardian’s functions in the Children’s Guardian Amendment Bill 2022, the principal functions of the Children’s Guardian include:¹⁴³

- build the capability of child safe organisations to implement the Child Safe Standards and undertake functions in relation to Child Safe Action Plans,
- monitor, investigate and enforce the implementation of the Child Safe Standards in certain child-related organisations,
- exercise functions relating to persons engaged in child-related work, including working with children check clearances, under the *Child Protection (Working with Children) Act 2012*,
- promote the best interests of all children in OOHC and ensure their rights are safeguarded and promoted,
- establish and maintain the carers register, VOOHC and a residential care worker register,
- accredit and monitor designated agencies and adoption service providers,
- register and monitor organisations that provide or arrange VOOHC,
- exercise functions relating to the employment of children,
- administer voluntary accreditation scheme for persons working with people who have committed sexual offences against children,
- administer a reportable conduct scheme and work with relevant entities to prevent, identify and respond to reportable conduct, and promote compliance with the scheme,

¹⁴³ *Children’s Guardian Act 2019*, section 128 (‘CG Act’). The Children’s Guardian Amendment Bill 2022, Schedule 1 [28] removes the Children’s Guardian’s registration and monitoring functions in relation to voluntary out-of-home care, currently found in section 128(1)(f) of the CG Act. Item [28] steps out the Children’s Guardian’s accreditation, monitoring and investigation functions for designated agencies and adoption service providers.

- educate and provide advice to relevant entities, monitor investigations by relevant entities, make recommendations to relevant entities and investigate reportable allegations or make determinations about convictions considered to be reportable convictions,
- co-ordinate the Official Community Visitors scheme.

8.1.1 Background – “special guardianship”

It was originally envisioned the Children's Guardian would exercise a special guardianship role for individual children and young people who were in the care of the Minister for Family and Community Services. This arose from the recommendations of various inquiries,¹⁴⁴ which recognised a need for an independent body:

- able to review OOHC arrangements for individual children and young people and, in certain circumstances, make decisions relating to that care,
- separate from what was then the Department of Community Services (now the Department of Communities and Justice), given a perceived tension between the Department's funding and provider roles and its ability to make decisions in the best interests of individual child or young person, and
- separate from the Children's Court so the independent body could make decisions in a less formal and legalistic manner, with those decisions made by experienced child welfare practitioners.

Accordingly, several provisions relevant to the special guardianship role were included in the *Children and Young Persons (Care and Protection) Act 1998* to enable the Children's Guardian to intervene in individual OOHC cases. The provisions were transferred into the CG Act but have never been commenced.¹⁴⁵

Over time, there have been significant changes in the OOHC sector, including, for example: the transfer of OOHC services to the non-government sector, outcomes-based contracting and increased regulation and oversight. Many of the originally intended provisions no longer align with the strategic direction of the OCG. However, considering successive inquiries finding First Nations children continue to enter care at high rates – and the opportunities to improve care outcomes for First Nations children – a special guardianship-type role for the Deputy Children's Guardian is worth reconsidering.

8.1.2 Examples of special guardianship in other jurisdictions

Across Australia, Children's Guardians, Commissioners and Advocates undertake special guardianship functions for children and young people in OOHC. These functions include individual and systemic investigations and advocacy.

In the Northern Territory, the Children's Commissioner's objective is to ensure the safety and wellbeing of “vulnerable children”, and promote continuous improvement in policies, practices and services relating to the safety and wellbeing of those children.¹⁴⁶ Key mechanisms for achieving this are dealing with complaints and undertaking investigations relating to “vulnerable children” and monitoring service provider's responses. Legislative grounds for receiving complaints and conducting investigations are limited to where services fail to provide required services to the child or do not meet the service standard reasonably expected.¹⁴⁷ The Commissioner also engages in

¹⁴⁴ Department of Community Services (NSW), Ministerial Review Committee, *A report to the Minister for Health & Community Services, the Hon. John Hannaford, MLC from the Committee established to review substitute care services in NSW* (Final Report, January 1992); Royal Commission into the New South Wales Police Service (Final Report, 15 May 1997) vol 4; Department of Community Services (NSW), Legislation Review Unit, *Review of the Children (Care and Protection) Act 1987: recommendations for law reform* (Final Report, December 1997).

¹⁴⁵ *Children's Guardian Act 2019*, section 131, Removal of responsibility for daily care and control from an authorised carer, section 132, Application for review of order of the Children's Court.

¹⁴⁶ *Children's Commissioner Act 2013* (NT), section 4.

¹⁴⁷ *Children's Commissioner Act 2013* (NT), sections 21 and 28.

systemic advocacy by analysing information from investigations into complaints and community engagement to identify emerging systemic issues and influence legislative reform and policy related to “vulnerable children”.

Similarly, in Victoria, the Commissioner for Children and Young People can conduct individual inquiries about the safety and wellbeing of an individual or group of “vulnerable children and young people”.¹⁴⁸ An individual inquiry must relate to the services provided, or omitted to be provided, to those children, or the death of a “vulnerable child or young person”. The Commissioner can also conduct systemic inquiries into the provision of services for those children when a persistent or recurring systemic issue is identified. The legislative objective of inquiries is to promote continuous improvement and innovation in policies and practices relating to child protection and the safety and wellbeing of vulnerable children and young people.¹⁴⁹

In 2020-21, on the recommendation of the Victorian Minister for Child Protection, the Commissioner completed an individual inquiry into services provided to an Aboriginal child, “Jane”.¹⁵⁰ The individual inquiry found a series of extremely concerning failures in the ways Jane’s case was managed and evidence of systemic racism. This had significant consequences for Jane’s physical and cultural safety.

8.1.3 Uncommenced “special guardianship” provisions

Currently, two functions concerning children and young people in OOHC in the CG Act have not commenced. These are:

- Section 131 – the Children’s Guardian may remove the responsibility for the daily care and control of a child or young person from an authorised carer, and
- Section 132 – the Children’s Guardian may apply to the Children’s Court at any time for the rescission or variation of any order made under the *Children and Young Persons (Care and Protection) Act 1998* by the Children’s Court as if the Children’s Guardian were a party to the proceedings in respect of which the order was made.

As an independent regulator separate from the Department of Communities and Justice and the Children’s Court, commencing section 132 may be of value to complement investigations of individual children’s experience in care. It would enable the Children’s Guardian to intervene if there is evidence of a breakdown of a placement or significant concerns about the care of an individual child.

Questions

61. Do you support section 131 of the CG Act being repealed? If not, why not?
62. Do you support section 132 of the CG Act being commenced? If not, why not? What would be the advantages or challenges of commencing this section?

8.2 Family is Culture Report

The Family is Culture Report (**FIC Report**) aimed to address issues unique to Aboriginal and Torres Strait Islander children and young people in OOHC and their families.¹⁵¹ This included reducing entries into care, increasing exits from care and proper implementation of the Aboriginal Child Placement Principle.

¹⁴⁸ See Victorian Commission for Children and Young People, ‘Individual inquiries’, *Inquiries* (Web Page) <<https://ccyp.vic.gov.au/inquiries/individual-inquiries/>>.

¹⁴⁹ *Commission for Children and Young People Act 2012* (Vic), section 31.

¹⁵⁰ Victorian Commission for Children and Young People, *Annual Report 2020-21* (Report, 21 October 2021) 31 <<https://ccyp.vic.gov.au/assets/corporate-documents/Annual-report-2020-21.pdf>>.

¹⁵¹ Megan Davis et al, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-Home Care* (Report, 25 October 2019) <https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf>.

Concerns about the current regulatory system affecting First Nations children led to a recommendation to establish a new, independent NSW Child Protection Commission. It was proposed this new agency would undertake a broad range of regulatory activities in relation to the child protection system, including:¹⁵²

- handling complaints about those involved in the operation of the child protection system,
- oversight and coordination of the Official Community Visitors scheme,
- management of the “reviewable deaths” scheme where the death is of a child in OOHC, or a child whose death is, or may be, due to abuse or neglect,
- accreditation and monitoring of OOHC providers,
- reviewing the circumstances of an individual child or group of children in OOHC,
- conducting inquiries into systemic issues in the child protection system, either on its own motion or at the request of the NSW Government,
- monitoring the implementation of the Aboriginal Case Management Policy (and related rules and guidance), the Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system and mandatory alternative dispute resolution,
- conducting case file reviews, and
- providing information, education and training to stakeholders and the community about the operation of the child protection system.

The intention of the Commission was to enhance the transparency of the child protection system and ensure that OOHC services are provided to children only if the provider satisfies the minimum requirements to ensure child safety and wellbeing. The FIC Report also suggested that the Commission have at least one Aboriginal Commissioner and an Aboriginal Advisory Body appointed in consultation with First Nations communities.¹⁵³

The NSW Government's response to the FIC Report did not support this proposal for a new independent statutory body. However, the OCG currently administers many of the functions of the proposed Child Protection Commission, either in part or in full, including administering an Official Community Visitors scheme, accreditation and monitoring of OOHC and capability building and support.

This review provides the opportunity to further consider how the intention of the recommendations in the FIC Report can be advanced in the context of the Children's Guardian's functions and the role of Deputy Children's Guardian.

8.3 Deputy Children's Guardian role

The CG Act enables the Children's Guardian to appoint a Deputy Children's Guardian.¹⁵⁴ While the CG Act does not require the Deputy Children's Guardian role to be filled by a First Nations person, a First Nations person was appointed in the context of the NSW Government's response to the FIC Report.¹⁵⁵ It has been promoted as a First Nations role to elevate the rights and wellbeing of First Nations children and young people in care.¹⁵⁶

This review provides the opportunity to consider whether it should be legislatively required that the role of the Deputy Children's Guardian be filled by a First Nations person, and the functions that

¹⁵² Megan Davis et al, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-Home Care* (Report, 25 October 2019), XL-XLI rec 9 <https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf>.

¹⁵³ Megan Davis et al, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-Home Care* (Report, 25 October 2019), 127 <https://www.familyisculture.nsw.gov.au/_data/assets/pdf_file/0011/726329/Family-Is-Culture-Review-Report.pdf>.

¹⁵⁴ *Children's Guardian Act 2019*, section 124.

¹⁵⁵ NSW Government, *NSW Government Response to the Family is Culture Review Report* (Response, 7 July 2020) <<https://www.facs.nsw.gov.au/download?file=784517>>.

¹⁵⁶ NSW Government, *NSW Government Response to the Family is Culture Review Report* (Response, 7 July 2020) 3 <<https://www.facs.nsw.gov.au/download?file=784517>>.

should attach to that role. The guiding principles in the CG Act¹⁵⁷ acknowledge that cultural safety is a significant protective factor for the wellbeing of First Nations children and young people. Decision making under the CG Act mandates that respect for cultural and social differences for First Nations people must be considered in the provision of child-related services. As a leader in the OCG, the Deputy Children's Guardian can champion this mandate internally and externally, furthering the cultural and social rights of First Nations children and young people and their families.

8.3.1 Examples of other roles

There are a few jurisdictions in Australia, including Victoria, Queensland and South Australia that have a dedicated Aboriginal Children's Commissioner or Assistant Commissioner. They work to further advance the rights and interests of First Nations children and young people by developing culturally safe strategies that promote a First Nations voice for improved safety and wellbeing.

In New Zealand, the Assistant Māori Commissioner for Children is dedicated to ensuring all Māori children are connected to their communities and ancestry and that there is both a Māori and non-Māori view within the Commission and in its decision-making.¹⁵⁸

Additionally, the NSW Ombudsman has a Deputy Ombudsman for Aboriginal Programs. The Deputy Ombudsman (Aboriginal Programs) monitors and assesses prescribed Aboriginal programs under Part 3B of the *Ombudsman Act 1974* and engages with stakeholders to promote improvements in the delivery of services and programs to Aboriginal people and communities.¹⁵⁹

8.3.2 Benefits of an identified or targeted role

A legislative requirement to have the position of the Deputy Children's Guardian filled by a First Nations person is an important component to achieving substantive equality by exercising functions in a culturally sensitive way. This is important given the work of the OCG has a direct impact on First Nations people and communities.

Targeted roles in the public service aim to address the disadvantage experienced by specific diversity groups in employment opportunities.¹⁶⁰ The NSW Public Service Commission can nominate a position as a targeted role for eligible persons from a specific diversity group and can also modify recruitment processes to facilitate this employment process. Conversely, an identified role is one where the employment of a person from a specific diversity group is required. In these instances, an identified role often works directly with First Nations people or is involved in dealing with First Nations communities and issues.

Targeted or identified roles for First Nations people in organisations influence the attitudes and behaviours of staff to support diversity, culturally safe environments and openness to change. It is proposed the Deputy Children's Guardian would be an "identified" role. The expertise and personal experience of a First Nations person in the role of the Deputy Children's Guardian provides genuine benefit to the position's objectives.

The Deputy Children's Guardian provides leadership within the OCG and works with First Nations people and communities to drive better, more culturally appropriate standards of care. The presence of cultural leadership can create a stronger sense of cultural identity within the OCG.

By having an identified Deputy role, the OCG would have greater opportunities to lead improvements for cultural competency across the sector and support the right of First Nations people to self-determination.

¹⁵⁷ *Children's Guardian Act 2019*, section 8.

¹⁵⁸ New Zealand Office of the Children's Commissioner, 'Glenis Philip-Barbara, Assistant Māori Commissioner for Children', *About us* (Web Page) <<https://www.childrenandyoungpeople.org.nz/about/people/glenis-philip-barbara/>>.

¹⁵⁹ *Ombudsman Act 1974*, section 8; see also NSW Ombudsman, 'NSW Ombudsman and executive team', *Who we are* (Web Page)

<<https://www.ombo.nsw.gov.au/about-us/who-we-are/nsw-ombudsman-and-executive-team>>.

¹⁶⁰ Public Service Commission (NSW), 'Targeted role', *Glossary* (Web Page) <<https://www.psc.nsw.gov.au/workforce-management/recruitment/recruitment-and-selection-guide/glossary#:~:text=the%20work%20context,Targeted%20role,from%20a%20designated%20diversity%20group>>.

Questions

63. Do you support a legislative requirement that the role of the Deputy Children's Guardian be an identified role to be filled by a First Nations person? If not, why not?
64. What benefits do you see in the position being an identified role for a First Nations person?
65. What role should the Deputy Children's Guardian play to:
- strengthen the independent oversight of the OOHC system for First Nations children, and
 - help break the cycle of over-representation of First Nations children in care?

8.4 Deputy Children's Guardian—functions

Currently, there are no legislative functions attached to the Deputy Children's Guardian role in the CG Act. To strengthen the legislative role of the Deputy Children's Guardian there are several proposed functions that could be embedded in the CG Act. These are intended to be high-level statements to capture the broad scope of work undertaken by the Deputy Children's Guardian, as opposed to being prescriptive or technical.

The proposed functions that could be embedded include the following:

- to facilitate the exercise of culturally competent functions and decision-making at the OCG,
- to improve how the OOHC system supports First Nations children, their families, and communities to have a more culturally appropriate standard of care,
- to further advance the rights and interests of First Nations children and young people, at either a systemic level or an individual level, or both, and
- to build the capability of First Nations-controlled entities relevant to children and young people and the functions of the Children's Guardian.

Question

66. Do you support the proposed high-level functions for the Deputy Children's Guardian, if it is to be an identified role? Are there other functions that should be considered?

8.4.1 Discussion

Currently, the Children's Guardian's primary involvement with the OOHC sector is at an organisational level, specifically, the accreditation and monitoring of OOHC service providers.

Should sections 131 and 132 be proclaimed, the Children's Guardian will have a level of involvement at an individual level in relation to all children in OOHC.

In this case, there may also be value in expanding the Deputy Children's Guardian role to include intervention in individual OOHC cases concerning First Nations children and young people. It is envisioned that intervention at the individual level would provide First Nations children and young people in care with an independent body to hear their concerns and intervene, and direct and facilitate favourable outcomes.

Questions

67. Do you support the Deputy Children's Guardian having a role in relation to individual Aboriginal children in the OOHC system? If not, why not?

9. Official Community Visitors

9.1 Introduction

As Chapter 2 outlined, responsibility for coordinating the Official Community Visitors scheme (**OCV scheme**) is shared between the Ageing and Disability Commissioner and the Children’s Guardian. The Ageing and Disability Commissioner has responsibility for applying the OCV scheme to certain services providing accommodation to adults with disability and older adults.¹⁶¹ The OCV scheme, as it applies to adults, is currently under review as part of the statutory review of the *Ageing and Disability Commissioner Act 2019 (the ADC Act)*.¹⁶²

The Children’s Guardian has responsibility for coordinating the OCV scheme in relation to Official Community Visitors (**OCVs**) who visit accommodation services for children in residential out-of-home care, including children living with disability.¹⁶³

The legislative bifurcation of OCV coordination recognises that children in residential out-of-home care have discrete needs and safeguards children by integrating the work of OCVs into the Children’s Guardian’s child safe focus, specifically with respect to the regulation of out-of-home care providers.

9.2 Background to Part 9

The need for independent visitors to safeguard children and young people in residential out-of-home care through voice, visibility, agency and accountability can be traced back to a series of inquiries commencing in 1923.¹⁶⁴ At the time of these inquiries, institutions were required to be visited and inspected every three months by a person appointed by the Minister.¹⁶⁵

Accordingly, the foundations of today’s OCV scheme derive from a historical context in which children and young people were charged with neglect and sentenced to reformatory institutions that offered total care. In many cases, once sentenced to these institutions, children and young people had little or no access to the outside world. Table 4 summarises the history of the OCV scheme in NSW.

Table 4 – Official Community Visitors – historical development

Timeframe	Event
1939	Provisions introduced for the appointment of “persons not being officers or employees of the Child Welfare Department, to be visitors to any of the institutions, homes, depots, hostels and shelters constituted or established under this Act”. ¹⁶⁶
1987	Provisions introduced clarifying the appointment, powers and functions of visitors. ¹⁶⁷

¹⁶¹ *Ageing and Disability Commissioner Act 2019*, Part 4.

¹⁶² *Ageing and Disability Commissioner Act 2019*, section 36.

¹⁶³ *Children’s Guardian Act 2019*, section 128.

¹⁶⁴ New South Wales Legislative Assembly, *Gosford Home for Boys: Papers concerning Inquiry held by W.M. Fincham Esq., Special Magistrate, Children’s Court, Sydney, regarding punishment of Joseph Bayliss, Gosford Farm Home for Boys* (Report, 1923); New South Wales Legislative Assembly, *Child Welfare Department: report on the general organisation, control and administration of, with special reference to state welfare institutions*, Michael, J.E. (Report, 1934) rec 50.

¹⁶⁵ *Neglected Children and Juvenile Offenders Act 1905*, section 8.

¹⁶⁶ *Child Welfare Act 1939*, section 6.

¹⁶⁷ *Community Welfare Act 1987*, section 3B.

Timeframe	Event
1993	Independent Commissioner for Community Services established with responsibility for monitoring the standard and quality of community service provision in accordance with the best interests of the client. ¹⁶⁸
1995	Broad, customer-focused, OCV scheme commences, modernising and reforming the previous scheme to provide children, young people and adults accessing community services with the opportunity to raise concerns about the care they received, and to have those concerns investigated and resolved. ¹⁶⁹
1999	<i>Community Services (Complaints, Appeals and Monitoring) Act 1993 (CAMA)</i> reviewed by the New South Wales Law Reform Commission (NSWLRC). ¹⁷⁰
2008	<i>Community Services (Complaints, Reviews and Monitoring) Act 1993</i> ¹⁷¹ reviewed by the Joint Parliamentary Committee on the Office of the Ombudsman and Police Integrity Commission ¹⁷² and the Wood Special Commission of Inquiry into Child Protection Services in NSW. ¹⁷³

The 2008 inquiry into child protection services found that the OCV scheme remained valuable and was not duplicative of other regulatory schemes, such as the accreditation and monitoring of out-of-home care providers.¹⁷⁴

The endorsement of the OCV scheme's continued utility has seen an expansion in the scope of accommodation services visited by OCVs, with the total number of accommodation services visited by OCVs increasing from 663 in 1995 to 1281 in 2020-2021.¹⁷⁵

Despite this expanded scope and the recent legislative separation of the OCV scheme as it relates to children, broad arrangements governing OCVs and their role and functions remain relatively unchanged since the scheme established under CAMA commenced in 1995.

9.3 Objects of Part 9

OCVs are empowered to resolve problems and complaints relating to the provision of residential out-of-home care, including children with disability. To achieve this, OCVs “provide a sympathetic ear for any needs, concerns or difficulties that clients may wish to share with someone who is not directly involved in the delivery of those services.”¹⁷⁶

To ensure quality services are provided to children in residential out-of-home care, the OCV scheme is to be administered in accordance with the objects, principles and considerations of the CG Act with two tailored objects for Part 9:

- to protect and promote the rights of children in visitable services, and

¹⁶⁸ *Community Services (Complaints, Appeals and Monitoring) Act 1993*; New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 March 1993, 766-769 (James Longley, Minister for Community Services) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-4488>>.

¹⁶⁹ *Community Services (Complaints, Appeals and Monitoring) Act 1993*, Part 2.

¹⁷⁰ New South Wales Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* (Report No 90, July 1999) <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-90.pdf>>.

¹⁷¹ *Administrative Decisions Legislation Amendment Act 1997*, Schedule 1.6 [1].

¹⁷² New South Wales Parliament, Committee on the Office of the Ombudsman and the Police Integrity Commission, *Statutory Review of the Community Services (Complaints, Reviews and Monitoring) Act 1993* (Report No 4/54, June 2008) <<https://www.parliament.nsw.gov.au/ladocs/inquiries/1705/Statutory%20Review%20of%20CS-CRAMA.pdf>>.

¹⁷³ James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Report, 24 November 2008) vol 3 <<https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/special-commission-of-inquiry-into-child-protection-services-in-new-south-wales/>>.

¹⁷⁴ James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Report, 24 November 2008) vol 3, 929 [23.141]

<<https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/special-commission-of-inquiry-into-child-protection-services-in-new-south-wales/>>.

¹⁷⁵ NSW Ageing and Disability Commission, *Official Community Visitors Annual Report 2020-2021* (Report, 2020-2021) 7

<<https://www.ageingdisabilitycommission.nsw.gov.au/download?file=820752>>; NSW Ageing and Disability Commissioner, *Official Community Visitors – A voice for people in supported accommodation* (Booklet, 2021) 1 <https://www.ageingdisabilitycommission.nsw.gov.au/_data/assets/pdf_file/0007/726199/OCV-Voice-for-People-in-Supported-Accommodation-Booklet.pdf>. This data includes visitable services for both adults and children.

¹⁷⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 March 1993, 767 (James Longley, Minister for Community Services) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-4488>>.

- to protect children from abuse, neglect and exploitation.

9.4 Functions of OCVs

OCVs are often described as the “eyes and ears of the Minister”, providing a critical contribution to robust and effective service provision through their independent, proactive oversight. Part 9 empowers OCVs with various functions, including to:

- provide the Minister and the Children’s Guardian with advice or reports on any matters relating to the conduct of a visitable service,
- inform the Minister and the Children’s Guardian on matters affecting the welfare, interests and conditions of children using visitable services,
- assist children to obtain independent advocacy services, where appropriate, and
- facilitate, if reasonable and practicable, the early and speedy resolution of grievances or matters of concern affecting children using visitable services by referring grievances or matters of concern to the providers of the relevant services or other appropriate bodies.¹⁷⁷

Clear legislative authority to share information efficiently and effectively with agencies who have responsibilities for children’s safety and wellbeing is critical to the effective performance of an OCV’s functions.

Currently, Part 9 permits information sharing with the Minister and the Children’s Guardian but does not permit the same information sharing with the Department of Communities and Justice.

Permitting exchange of advice, reports and information between the Department of Communities and Justice and OCVs could strengthen the child protection safeguarding process and ensure that improvements and reforms arising from the work of OCVs can be implemented efficiently and effectively.

Questions

68. Should the functions of OCVs be further tailored to meet the specific needs of children and young people? For example, should the CG Act set out the participation principles provided at section 10 of the *Children and Young Persons (Care and Protection) Act 1998*?
69. Should OCVs be permitted to provide advice, reports and information to the Department of Communities and Justice?
70. Given the Children’s Guardian’s child safe regulatory focus on preventing and responding to child abuse in organisations, should information sharing between OCVs and the Children’s Guardian be further strengthened or clarified?

9.5 Jurisdiction of OCVs—visitable services

OCVs are responsible for protecting and promoting the rights of children in visitable services. The CG Act defines “visitable service” to mean:

- a. an accommodation service where a child in care using the service is in the full-time care of the service provider, or
- b. a service prescribed by the regulations as a visitable service.¹⁷⁸

¹⁷⁷ *Children’s Guardian Act 2019*, section 145(1).

¹⁷⁸ *Children’s Guardian Act 2019*, section 143.

Part 9 defines “child in care” to cover a broad range of care arrangements for children under the age of 18 years.¹⁷⁹ The definition of “service provider” includes government and non-government agencies funded to provide residential accommodation to children and young people.¹⁸⁰

The need for independent visitors to function as the “eyes and ears” of the Minister was based on the premise that children and young people living in reformatory institutions had no other opportunity to have their complaints received, reviewed and addressed by an independent person.

The legacy of the OCV scheme has resulted in a scheme that has selective application. Specifically, OCVs are empowered to visit children and young people living in residential out-of-home care settings but are not empowered to visit children and young people living in private homes with foster carers or relative/kinship carers. Unlike the reformatory institutions in existence at the inception of the OCV scheme, both residential care and foster, and relative/kinship, care are intended to provide children and young people with a home-like environment.

The question of whether OCVs should be empowered to visit the private homes of foster carers and relative/kinship carers has been considered in previous reviews, without definitive resolution. While the 1999 NSWLRC review report concluded that the jurisdiction of the OCV scheme should not be expanded, the 2008 statutory review of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (previously CAMA) concluded that while “there are grounds to justify the exploration of appropriate ways in which the definition of visitable service may be expanded”, the issue should be deferred for resolution by the Wood Special Commission of Inquiry into Child Protection Services in NSW (**Wood Special Commission of Inquiry**).¹⁸¹

Notably, the Wood Special Commission of Inquiry was silent on this issue, and the question of expanding the visitable jurisdiction of OCVs in this way has not been formally pursued since 2008.

As outlined in Chapter 5, the Children’s Guardian has independent oversight of agencies that arrange the provision of statutory, and supported, out-of-home care. Children and young people in residential care are provided with voice and visibility through the Children’s Guardian’s coordination of the OCV scheme. Children and young people in foster, and relative/kinship, care are not provided with that voice and visibility.

There is no doubt that permitting OCVs to visit the private homes of foster, and relative kinship, carers would significantly expand the OCV scheme, with resource implications. Yet, the State’s public duty to provide appropriate oversight to all children in care is not contingent, or displaced, by the specific arrangements for the child’s placement.

It is also worth examining whether the OCV scheme should be recast to allocate OCVs to specific cohorts of children in out-of-home care, rather than allocation of OCVs based on the accommodation service provided to the child. Currently, the jurisdiction of OCVs is limited to accommodation services where a child in care using the service is in the “full-time care” of the service provider.

The effect of this requirement is that, for an accommodation service to be visitable, the service provider who provides the accommodation service must have exclusive or primary control over the accommodation service provided to the child or young person. If a person receiving a service can exclude the service provider from their home, then this could mean that the person is not in the “full-time care” of the service provider.

This “full-time care” requirement may present challenges in identifying whether an OCV has, or should have, jurisdiction to visit young people in flexible accommodation and support programs

¹⁷⁹ *Children’s Guardian Act 2019*, section 143. Note also that amendments recasting voluntary out-of-home care to specialised substitute residential care by way of the *Children’s Guardian (Amendment) Act 2022*, will not have impact on Official Community Visitors’ visitable jurisdiction. Official Community Visitors will have jurisdiction to visit children in specialised substitute residential care.

¹⁸⁰ *Children’s Guardian Act 2019*, section 143.

¹⁸¹ James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Report, 24 November 2008)

<<https://www.dpc.nsw.gov.au/publications/special-commissions-of-inquiry/special-commission-of-inquiry-into-child-protection-services-in-new-south-wales/>>.

funded by the Department of Communities and Justice and provided by non-government out-of-home care agencies.¹⁸²

In the contemporary out-of-home care context, the Department of Communities and Justice funds a range of placement types under its Permanency Support Program. These arrangements include flexible placement arrangements designed to transition young people in care, who are over the age of 16, to independent living with “levels of support decreasing as they move towards independence”.¹⁸³ While service providers must provide caseworkers and provide stable, furnished accommodation, some young people in these placement arrangements may have their own tenancy agreement and the service providers involvement may be limited to drop-in casework support once a fortnight.

Questions

71. Should the jurisdiction of OCVs be set by the accommodation the children are living in, or by the children in care who should be visited?
72. Should OCVs have jurisdiction to visit private accommodation where a child or young person is in the full-time care of a foster carer or relative/kinship carer?
73. Should OCV jurisdiction be re-examined considering contemporary models of care? If so, what accommodation services should OCVs be empowered to visit and why?

9.6 Children's Guardian's powers under Part 9

The Children's Guardian has broad powers to safeguard the rights of children and young people in visitable services. In response to a report, the Children's Guardian may:

- make preliminary inquiries to determine how to deal with the matter,
- refer the matter to the most appropriate entity to deal with the matter,¹⁸⁴
- conduct an investigation,
- decline to take action.¹⁸⁵

If the Children's Guardian decides that a matter requires investigation, the CG Act provides the Children's Guardian with broad information gathering powers to facilitate the conduct of that investigation, including the power to make or hold inquiries.¹⁸⁶

Additionally, the CG Act integrates the work of OCVs into the Children's Guardian's regulation of out-of-home care providers by allowing the Children's Guardian to require, collect, use and disclose information the Children's Guardian determines to be relevant to its out-of-home care regulation functions.¹⁸⁷

Question

74. Does the Children's Guardian have sufficient power to deal with reports, or other matters, raised by OCVs?

¹⁸² Department of Communities and Justice (NSW), 'Supported Independent Living & Therapeutic Supported Independent Living', *SIL and TSIL Fact Sheet* (Fact Sheet, March 2020) <https://www.facs.nsw.gov.au/_data/assets/pdf_file/0004/788251/SIL-and-TSIL-factsheet.PDF>.

¹⁸³ Department of Communities and Justice (NSW), 'Supported Independent Living & Therapeutic Supported Independent Living', *SIL and TSIL Fact Sheet* (Fact Sheet, March 2020) 3 <https://www.facs.nsw.gov.au/_data/assets/pdf_file/0004/788251/SIL-and-TSIL-factsheet.PDF>.

¹⁸⁴ *Children's Guardian Act 2019*, sections 147 and 150.

¹⁸⁵ *Children's Guardian Act 2019*, section 147.

¹⁸⁶ *Children's Guardian Act 2019*, Schedule 2, section 148 and Schedule 3, section 149.

¹⁸⁷ *Children's Guardian Act 2019*, section 151.

9.7 Appointment and removal of OCVs

The independence of OCVs is critical to the effective performance of their functions.¹⁸⁸ Part 9 provides for this independence through provisions setting out the appointment and termination of OCVs.

OCVs may be appointed for a term of up to three years, if the Minister is satisfied that the OCV has appropriate knowledge, skill and expertise in matters relating to children in care, has a commitment to the objects of child welfare and disability legislation and is not employed within the Department of Communities and Justice or the Office of the Children’s Guardian.¹⁸⁹

Under the current appointment criteria, it is open to the Minister to appoint a diverse range of OCVs with a diverse range of competencies, and targeted appointments can be undertaken by way of recruitment policies. On the other hand, a legislative statement of requisite competencies could strengthen the OCV scheme by ensuring all OCVs meet diverse competencies.

In addition to giving the Minister appointment powers, Part 9 allows the Minister to remove an OCV from office for “incompetence, incapacity or misbehaviour”, on the recommendation of the Children’s Guardian.¹⁹⁰ This termination provision was inserted into CAMA following the NSWLRC review in 1999 to ensure consistency with the grounds on which the Commissioner for Community Services could be removed from office.¹⁹¹ Under the ADC Act, the grounds on which the Governor may remove the Ageing and Disability Commissioner from office and the grounds on which the Minister may remove an OCV from office, are the same.¹⁹²

Although the Children’s Guardian may recommend removal of an OCV and may “take other action, as may be necessary for the exercise of the Children’s Guardian’s functions”, the CG Act is silent on the actions, or authority, the Children’s Guardian has with respect to supervision and management of OCVs, including management of OCVs who may be underperforming.¹⁹³

Once conduct escalates to “incompetence, incapacity or misbehaviour”, the Children’s Guardian may make a recommendation to the Minister to remove the OCV.¹⁹⁴ While “incompetence” and “incapacity” are generally understood, it is not clear what scope of conduct is contemplated to fall within the ground of “misbehaviour”.

Additionally, OCV schemes for juvenile detention centres and health, and mental health, facilities provide for a range of circumstances in which the Minister may remove an OCV. For example, the Minister may remove an OCV appointed for a private mental health facility under the *Mental Health Act 2007* if the OCV has a direct, or indirect, pecuniary interest in a private mental health facility.¹⁹⁵

Questions

75. Should the CG Act specify particular criteria for appointing OCVs, for example, criteria specifying cultural and linguistic competencies, including demonstrated Aboriginal and Torres Strait Islander cultural competency and demonstrated ability to communicate with children and young people?
76. Should the CG Act clarify the scope of the Children’s Guardian’s authority to manage the performance of OCVs?
77. Should the grounds for removal of an OCV be clarified?

¹⁸⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 March 1993, 766-769 (James Longley, Minister for Community Services) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#docid/HANSARD-1323879322-4488>>.

¹⁸⁹ *Children’s Guardian Act 2019*, section 144.

¹⁹⁰ *Children’s Guardian Act 2019*, section 144.

¹⁹¹ New South Wales Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* (Report No 90, July 1999) 144-5 <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-90.pdf>>; *Community Services Legislation Amendment Act 2002*, Schedule 1 [14].

¹⁹² *Ageing and Disability Commissioner Act 2019*, sections 8 and 21.

¹⁹³ *Children’s Guardian Act 2019*, sections 144 and 146.

¹⁹⁴ *Children’s Guardian Act 2019*, section 144.

¹⁹⁵ *Mental Health Act 2007*, Schedule 4.

9.8 Offences

As outlined earlier in this chapter, independence is critical to the successful performance of an OCV's role as "the eyes and ears of the Minister". To secure this independence, and to encourage reporting to the Children's Guardian, the CG Act protects OCVs who make a report in good faith from any civil, criminal or disciplinary action associated with making that report.¹⁹⁶

Additionally, the CG Act contains penalty provisions directed at protecting the rights of children and young people in visitable services by encouraging OCVs, or any other person, to make a complaint without fear of retribution. Any person who takes detrimental action in contravention of this provision is liable to a maximum fine of 50 penalty units, 12 months' imprisonment, or both.¹⁹⁷

Questions

78. Are OCVs adequately and appropriately protected when exercising their functions?

79. Are the protections in the CG Act sufficient to encourage a person, including a child or young person in a visitable service, to raise complaints with OCVs?

¹⁹⁶ *Children's Guardian Act 2019*, section 147(5).

¹⁹⁷ *Children's Guardian Act 2019*, section 152.

10. Other issues

10.1 Introduction

This chapter discusses the remaining Parts of the CG Act, Parts 10, 11 and 12. Although the Parts cover disparate subject areas, they do not warrant a separate chapter for each for three reasons: the provisions support the framework of the CG Act but are not central to it, with many being of a machinery nature; there are no difficult or controversial policy and legislative issues arising from their operation; and amendments to consolidate administrative review of decisions made under the CG Act have been made by the Children's Guardian Amendment Bill 2022, which has now passed both Houses of Parliament and is awaiting assent.

10.2 Part 10 Administrative review

10.2.1 Current decisions that can be administratively reviewed

Part 10 enables an application to be made to the Civil and Administrative Tribunal (**NCAT**) under the *Administrative Decisions Review Act 1997* for administrative review of certain decisions made under the CG Act. Section 154 sets out the decisions that can be reviewed under the Children's Guardian Act, including decisions about accreditation of designated agencies and adoption service providers, child employment and decisions made by the Children's Guardian in relation to reportable conduct matters.

However, the *Children and Young Persons (Care and Protection) Regulation 2012* (**the Care Regulation**) also contains other administrative review rights, but only in relation to accreditation of designated agencies. This means that the right to review of decisions about the accreditation of designated agencies is currently divided between the CG Act and the Care Regulation, as explained below.

Section 154(1)(a) of the CG Act allows review of decisions made by certain persons¹⁹⁸ to accredit, or not accredit, designated agencies. However, the right to administrative review of other accreditation decisions is contained in clause 7 of the Care Regulation. These are decisions about conditions imposed on accreditation, shortening the accreditation period, or suspending or cancelling accreditation. By contrast, all the administrative review rights for decisions in relation to the accreditation of adoption service providers are contained in the CG Act.¹⁹⁹

10.2.2 Proposal for reform

The Children's Guardian Amendment Bill 2022 was introduced in the Legislative Council on 19 May 2022 and includes amendments to section 154 to consolidate the administrative review rights for all decisions about the accreditation of designated agencies and adoption service providers in the one Act, the CG Act. The proposed amendments will also align the administrative review rights for decisions about accreditation of designated agencies and decisions about accreditation of adoption service providers.

¹⁹⁸ The decisions of persons authorised under the *Children's Guardian Act 2019* ('CG Act') or the *Children's Guardian Regulation 2022* to make the decision are reviewable under section 154(1)(a) of the CG Act.

¹⁹⁹ *Children's Guardian Act 2019*, section 154(e)-(i).

The new section 154 will allow applications to be made for administrative review of decisions in relation to accreditation as a designated agency or an accredited adoption service provider to do, or refuse to do, any of the following:

- grant accreditation,
- impose or vary a condition on an accreditation,
- transfer an accreditation,
- cancel or shorten the period of an accreditation.

10.2.3 Internal review of Children's Guardian's decisions

Under the *Administrative Decisions Review Act 1997*, if the Children's Guardian²⁰⁰ makes a decision over which NCAT has administrative review jurisdiction under section 154,²⁰¹ an interested person can apply to the Children's Guardian for an internal review, that is, a review conducted by the OCG of the decision.²⁰² An "interested person" is a person who is entitled under the CG Act to apply to NCAT for an administrative review of a decision of the Children's Guardian.²⁰³ Generally, an interested person cannot seek administrative review by NCAT until they have exercised any entitlement to seek internal review.²⁰⁴ The internal reviewer may affirm or vary the decision or set the decision aside and substitute another decision.

Decisions that can be internally reviewed by the OCG include decisions by the Children's Guardian about accreditation of designated agencies and adoption service providers, employer's authorities, and in relation to reportable conduct investigations carried out by the Children's Guardian.²⁰⁵

Questions

80. The Children's Guardian Amendment Bill 2022, which makes amendments to section 154, has passed both Houses of Parliament. In view of that, are there any other issues that arise in relation to the right to apply to NCAT for administrative review of decisions made under the CG Act?
81. Should the types of decisions made by the Children's Guardian that can be internally reviewed by the OCG be expanded?

10.3 Part 11 Offences

Part 11 creates offences for certain things done, or failed to be done, in contravention of provisions of the CG Act. The maximum penalties for the offences range from 10 penalty units (\$1,100), or 10 penalty units and 12 months' imprisonment, to 100 penalty units. The regulations can prescribe offences that can be dealt with by way of penalty notice. None are currently prescribed, meaning that no offences can as yet be dealt with by way of penalty notice.

Division 1 creates offences about use and disclosure of information. Offences include unlawful disclosure of information, providing false and misleading information and unlawful use of stored information. It also exempts certain disclosures that would otherwise be an offence. For example, it is not an offence for the Children's Guardian to disclose certain information, in certain circumstances, to Official Community Visitors or for research purposes.

²⁰⁰ As an administrator, within the meaning of "administrator" in section 8 of the *Administrative Decisions Review Act 1997*: "An **administrator**, in relation to an administratively reviewable decision, is the person or body that makes (or is taken to have made) the decision under enabling legislation".

²⁰¹ This is an **administratively reviewable decision** within the meaning of section 7 of the *Administrative Decisions Review Act 1997*.

²⁰² *Administrative Decisions Review Act 1997*, section 53. Decisions made under the working with children check clearance scheme are not internally reviewable.

²⁰³ *Administrative Decisions Review Act 1997*, section 4.

²⁰⁴ *Administrative Decisions Review Act 1997*, section 55(3).

²⁰⁵ Decisions made under the working with children check clearance scheme are not internally reviewable.

Division 2 creates offences relating to directors and corporate liability. Offences under certain sections of the CG Act are “executive liability offences” if they are committed by corporations. A director of a corporation is made personally liable for an executive liability offence in certain circumstances.

Division 3 creates an offence of wilfully hindering or obstructing a person exercising functions under the CG Act.

There are other offence provisions in other Parts of the CG Act, including offences relating to the implementation of the Child Safe Standards,²⁰⁶ the reportable conduct scheme,²⁰⁷ provision of voluntary out-of-home care,²⁰⁸ oversight of designated agencies,²⁰⁹ access to registers,²¹⁰ child employment,²¹¹ accreditation of adoption service providers²¹² and protection against retribution by an employer against an employee who assists the Children's Guardian, for persons making a report, complaint or notification under the reportable conduct scheme or the Official Community Visitors scheme or against Official Community Visitors.²¹³ Penalties under these other offence provisions range from 5 penalty units (\$550), through 200 penalty units (\$2,200), to 200 penalty units or five years' imprisonment, or both, for an employer who takes retribution against an employee.

Question

82. Are there any issues that arise in relation to the types of offences that can be committed under the CG Act or the penalties for the offences? Should any other actions, or failures to act, be an offence?

10.4 Part 12 Miscellaneous

Part 12 contains various provisions about the general operation of the CG Act, including in relation to the following:

- the powers, set out in Schedule 2 to the CG Act, that may be exercised by the Children's Guardian or authorised persons under the CG Act,
- the power for the Children's Guardian and the Secretary of the Department of Communities and Justice to make guidelines,
- the service of notices and other instruments,
- the provision and exchange of information, and information sharing, and
- the protection of officers of the Children's Guardian from personal liability if acting in good faith.

10.4.1 Information sharing

The Children's Guardian may give to a relevant body, and direct a relevant body to give to the Children's Guardian, information about the safety, welfare and wellbeing of a particular child or class of children for the purpose of exercising the Children's Guardian's functions under the CG Act.²¹⁴ A “relevant body” means:²¹⁵

- a. the NSW Police Force, a Public Service agency or a public authority,

²⁰⁶ *Children's Guardian Act 2019*, section 8V.

²⁰⁷ *Children's Guardian Act 2019*, sections 29, 36, 57, 58, 63, 64 and 69.

²⁰⁸ *Children's Guardian Act 2019*, section 79.

²⁰⁹ *Children's Guardian Act 2019*, section 81.

²¹⁰ *Children's Guardian Act 2019*, section 87.

²¹¹ *Children's Guardian Act 2019*, sections 92, 97 and 106.

²¹² *Children's Guardian Act 2019*, section 112.

²¹³ *Children's Guardian Act 2019*, sections 63, 64 and 152.

²¹⁴ *Children's Guardian Act 2019*, section 80.

²¹⁵ *Children's Guardian Act 2019*, section 180(8) includes in the definition of “relevant body” a “prescribed body” under the *Children and Young Persons (Care and Protection) Act 1998*, section 248 ('Care Act'). These are the bodies listed in section 248(6)(a)–(e) of the Care Act.

- b. a government school or registered non-government school,
- c. a TAFE establishment,
- d. a public health organisation,
- e. a private health facility, and
- f. a prescribed agency.

The CG Act also allows for the provision of certain information to jurisdictions outside NSW.²¹⁶ The Children's Guardian may give information obtained under Part 3A Child safe scheme or Part 9A Enforcement measures²¹⁷ to a person exercising functions under the law of another Australian jurisdiction that are substantially the same as the functions of the Children's Guardian under the CG Act. The information that can be given is in relation to a matter relevant to the exercise of a law of another Australian jurisdiction or an undertaking that is or was being carried out jointly by the OCG and another Australian jurisdiction.

Questions

- 83. Are there any issues that arise in relation to the miscellaneous matters dealt with in Part 12?
- 84. Should the list of bodies that the Children's Guardian can share information with under section 180 be expanded? Are there any other issues arising in relation to information sharing?

²¹⁶ *Children's Guardian Act 2019*, section 180A.

²¹⁷ *Children's Guardian Act 2019*, Part 9A as inserted by the *Children's Guardian Amendment (Child Safe Scheme) Act 2021*, has not yet commenced.

Consolidated question list

Reportable conduct

1. What, in your view, are the key strengths and weaknesses of the reportable conduct scheme, as it currently operates under the CG Act? 12
2. What in your view should be the key purpose of a reportable conduct scheme? 12
3. How do you consider the child safe scheme and the reportable conduct scheme can operate most efficiently together within the context of the objects of the CG Act as set out in section 6 of the CG Act? 12
4. Should the application of the reportable conduct scheme be limited to entities that provide services to children only? 14
5. Are there relevant entities that are currently within the reportable conduct scheme that should be excluded from it? 14
6. Are there any other child-related sectors that should be covered by the reportable conduct scheme? 14
7. Do smaller, less resourced organisations have difficulty complying with the reportable conduct scheme? How could these challenges be overcome? 14
8. Should the uncommenced provisions of the CG Act that bring within the scope of the reportable conduct scheme providers of overnight camps, accommodation and respite services for children that provide overnight beds for children, including housing and homelessness services, and providers of family group homes be commenced? If so, how should any potential overlap with agencies that provide substitute residential care be addressed? 14
9. Should the reportable conduct scheme apply to all private hospitals? 14
10. Should the NSW Police Force be excluded from the scope of the reportable conduct scheme? 15
11. Has the inclusion of the NSW Police Force in the reportable conduct scheme resulted in duplication of effort, or in unnecessary oversight or monitoring? 15
12. What has been the value in oversight by the OCG (and previously by the Ombudsman) of reportable conduct matters relating to the NSW Police Force to date? 15
13. Does the definition of “employee” need to be clarified further? If so, in what respect? 17
14. Do the contractor provisions need further clarification? If so, in what respect? 17
15. Are there challenges with implementing the third-party employer and contractor provisions? If so, how would they best be addressed? 17
16. Is expanding the reportable conduct scheme to cover third-party employers providing services to children as relevant entities that have reporting and investigating obligations a feasible approach? What would be the difficulties with this approach? 17
17. Within the existing categories of reportable conduct, is there a need for greater clarity in how the conduct is defined? 19

18.	Should the thresholds for conduct that amounts to reportable conduct be reconsidered?	19
19.	Should the threshold for assault be raised to serious physical assault? If so, how should it be defined?	19
20.	Should the examples of reportable conduct provided in the CG Act be clarified or expanded?	19
21.	Should breaches of established standards such as codes, professional standards and accepted community standards be considered reportable conduct or should this type of conduct be dealt with by employers internally, for example through disciplinary procedures?	19
22.	Section 41 of the CG Act sets out the conduct that is not reportable conduct. Are these exclusions appropriate? Are there other matters that should be excluded from being reportable conduct?	19
23.	Do you address behaviours classified as crossing professional boundaries as a breach of your code of conduct and according to your disciplinary procedures? If so, do you find this is an effective and efficient way of dealing with these behaviours?	19
24.	Have you or your organisation had difficulty investigating reportable conduct allegations that concerned conduct that has occurred outside the course of employment?	20
25.	Should all conduct that is outside the course of an employee's employment with an entity be excluded from the application of the reportable conduct scheme?	20
26.	Alternatively, should conduct that is outside the course of an employee's employment only be excluded if the employee does not hold, or is not required to hold, a working with children check clearance?	20
27.	Should conduct that is outside the course of an employee's employment only be excluded if the employment is with a certain kind of entity or specifically named entities?	20
28.	Given the rationale for the seven-business-day notification requirement, and the limited information that is required to be provided at that stage, is the timeframe appropriate?	21
29.	Should further information be provided in the notification to be given within the seven-business-day notification period?	21
30.	Is the 30-day period, in which to give an entity report, commencing from the time the head of the entity receives the report of a reportable allegation or conviction, an appropriate period?	21
31.	Should there be a timeframe for the provision of a final report in terms of a length of time after the allegation is made?	21
32.	Should a relevant entity be required to provide updated interim reports on the progress of an investigation? If so, how often should updated interim reports be given after the initial interim report?	21
33.	Is the Children's Guardian's monitoring function effective in facilitating the investigation of reportable conduct by organisations? Is it perceived to be useful? Is it perceived to be too intrusive?	24
34.	The monitoring function includes discussing the investigation with the head of the relevant entity, and providing guidance and advice. Have these functions been found to be useful to an entity in conducting its investigation?	24
35.	Is the current public interest test for the Children's Guardian's involvement in monitoring reportable conduct matters too high?	24

36.	Should there be a “public interest” test at all? If so, should there be guidelines for applying the test?	24
37.	Is there a more appropriate threshold to meet before the Children’s Guardian can exercise oversight of the reportable conduct process?	24
38.	Should the Children’s Guardian have the power to initiate an investigation if the report is about the head of a relevant entity, without satisfying the “public interest” test?	24
39.	Should it be mandatory for the Children’s Guardian to investigate a reportable allegation about the head of a relevant entity?	24
40.	Is the type and amount of information provided under section 52 to the head of the entity and the employee at the conclusion of an investigation useful and sufficient? If not, what other information should be provided?	24
41.	Should the Children’s Guardian have other powers, for example, the power to direct an entity to re-investigate a matter after a report has been given by a relevant entity or make different findings from those made by the entity orders, if the investigation is flawed or the finding is perverse? If so, do you have any views on what these powers should be and what the threshold to trigger the exercise of the powers should be?	26
42.	Should an employee who has been investigated have a right to apply to the Children’s Guardian for a review of the entity’s findings or actions taken by the entity?	26
43.	Should the Children’s Guardian have specific power to monitor an entity’s interim risk mitigation measures by reviewing the adequacy and effectiveness of those interim measures to protect children while an investigation into a reportable allegation is being conducted, or review an entity’s failure to mitigate risks?	26
44.	Should the matters set out in section 40(2) be mandatory, rather than discretionary, considerations for determining if a finding of reportable conduct can be made?	27
45.	How should the mandatory considerations in section 40(3) inform findings of reportable conduct? Should they be used to broaden or narrow the scope of reportable conduct?	27
46.	Should it be mandatory for the Children’s Guardian or the head of the relevant entity to suspend a reportable conduct investigation if there is a concurrent Police investigation into, or court proceedings in relation to, the same conduct?	27
47.	Should it be mandatory for the Children’s Guardian or the head of the relevant entity to take steps to manage risks while a reportable conduct investigation is suspended?	27
48.	Are you or your organisation aware of a matter where an investigation by a relevant entity has, or may have, prejudiced a NSW Police investigation or a DPP prosecution?	27
49.	Is there a continuing need or purpose for class or kind exemptions, particularly if thresholds of reportable conduct are raised? If so, what are the benefits of class or kind exemptions?	28
50.	Have class or kind exemptions previously granted, whether by the Children’s Guardian or the Ombudsman under the Ombudsman Act, been effective or efficient? What will result from their lapsing on 1 September 2022?	28
51.	If the capacity to exempt certain classes or kinds of conduct from notification is to be maintained, how should the criteria and processes for the grant of exemptions be determined?	28
52.	Should there be a requirement, similar to the Victorian provision, to liaise with State or territory regulators to avoid duplication of effort?	29

Child employment

53. Having regard to the history of conformity between child employment regulation and the school leaving age, should the scheme apply to children aged under 17 for all regulated activities? 35
54. Should the child employment scheme continue to regulate children employed in door-to-door sales? 36
55. Should the child employment scheme regulate children's employment in any other industries? 36
56. Having regard to the objects of Part 6, should the Children's Guardian have a power to treat information identified, or received, as a complaint? 37
57. Should a failure to produce information compelled under section 105 of the CG Act be an offence? 37
58. Should the offence of causing or allowing a child to take part in employment where the child's "physical or emotional well-being" is put at risk be clarified to ensure it can be appropriately enforced? 37
59. Given the Children's Guardian's specific regulatory remit under Part 6, and considering the existence of uniform workplace health and safety laws, should the offence referred to in question 59 be confined to endangerment of a child in activities regulated by the Children's Guardian under Part 6? 37
60. Children's employment has historically existed as a separate form of regulation. While the contemporary children's employment scheme applies many of the Child Safe Standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, children's employment continues to be separately regulated. Given the CG Act's focus on child safe as the overarching regulatory framework, should children's employment be brought within the child safe scheme? 37

Children's Guardian and Deputy Children's Guardian

61. Do you support section 131 of the CG Act being repealed? If not, why not? 42
62. Do you support section 132 of the CG Act being commenced? If not, why not? What would be the advantages or challenges of commencing this section? 42
63. Do you support a legislative requirement that the role of the Deputy Children's Guardian be an identified role to be filled by a First Nations person? If not, why not? 45
64. What benefits do you see in the position being an identified role for a First Nations person? 45
65. What role should the Deputy Children's Guardian play to:
 - strengthen the independent oversight of the OOHC system for First Nations children, and
 - help break the cycle of over-representation of First Nations children in care?
 45
66. Do you support the proposed high-level functions for the Deputy Children's Guardian, if it is to be an identified role? Are there other functions that should be considered? 45
67. Do you support the Deputy Children's Guardian having a role in relation to individual Aboriginal children in the OOHC system? If not, why not? 45

Official Community Visitors

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| 68. | Should the functions of OCVs be further tailored to meet the specific needs of children and young people? For example, should the CG Act set out the participation principles provided at section 10 of the <i>Children and Young Persons (Care and Protection) Act 1998</i> ? | 48 |
| 69. | Should OCVs be permitted to provide advice, reports and information to the Department of Communities and Justice? | 48 |
| 70. | Given the Children's Guardian's child safe regulatory focus on preventing and responding to child abuse in organisations, should information sharing between OCVs and the Children's Guardian be further strengthened or clarified? | 48 |
| 71. | Should the jurisdiction of OCVs be set by the accommodation the children are living in, or by the children in care who should be visited? | 50 |
| 72. | Should OCVs have jurisdiction to visit private accommodation where a child or young person is in the full-time care of a foster carer or relative/kinship carer? | 50 |
| 73. | Should OCV jurisdiction be re-examined considering contemporary models of care? If so, what accommodation services should OCVs be empowered to visit and why? | 50 |
| 74. | Does the Children's Guardian have sufficient power to deal with reports, or other matters, raised by OCVs? | 50 |
| 75. | Should the CG Act specify particular criteria for appointing OCVs, for example, criteria specifying cultural and linguistic competencies, including demonstrated Aboriginal and Torres Strait Islander cultural competency and demonstrated ability to communicate with children and young people? | 51 |
| 76. | Should the CG Act clarify the scope of the Children's Guardian's authority to manage the performance of OCVs? | 51 |
| 77. | Should the grounds for removal of an OCV be clarified? | 51 |
| 78. | Are OCVs adequately and appropriately protected when exercising their functions? | 52 |
| 79. | Are the protections in the CG Act sufficient to encourage a person, including a child or young person in a visitable service, to raise complaints with OCVs? | 52 |

Other issues

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| 80. | The Children's Guardian Amendment Bill 2022, which makes amendments to section 154, has passed both Houses of Parliament. In view of that, are there any other issues that arise in relation to the right to apply to NCAT for administrative review of decisions made under the CG Act? | 54 |
| 81. | Should the types of decisions made by the Children's Guardian that can be internally reviewed by the OCG be expanded? | 54 |
| 82. | Are there any issues that arise in relation to the types of offences that can be committed under the CG Act or the penalties for the offences? Should any other actions, or failures to act, be an offence? | 55 |
| 83. | Are there any issues that arise in relation to the miscellaneous matters dealt with in Part 12? | 56 |
| 84. | Should the list of bodies that the Children's Guardian can share information with under section 180 be expanded? Are there any other issues arising in relation to information sharing? | 56 |

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