



Ms Janet Schorer
NSW Children's Guardian
Office of the Children's Guardian

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Dear Ms Schorer

Children's Guardian Act statutory review

Thank you for the opportunity to provide a submission to the statutory review of the *Children's Guardian Act 2019* (the 'CG Act').

The Collective notes that the focus of the review is:

- 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
- issues arising from the Children's Guardian's role in regulating children's employment.

This submission focuses in particular on the questions asked about the effectiveness of the reportable conduct scheme and the role of the Deputy Children's Guardian. We have taken the approach of addressing principles and systemic issues rather than operational details and our submission is set out under sub-headings which gather up the individual questions set out in the discussion paper.

Reportable conduct scheme in New South Wales – overall

The key purpose of a reportable conduct scheme remains unchanged since its inception in New South Wales more than 20 years ago. That is, ensuring the protection of children from abuse within institutions by embedding independent oversight as a key element of the child protection regulatory framework. As stated in the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (the 'Royal Commission'):

Independent oversight can help institutions better identify and manage risks to children. It can improve institutions' competency, transparency and accountability in complaint handling, and help create a consistent standard of practice across sectors. Further, independent oversight can assure the public that the institutions entrusted to care for children cannot minimise or ignore complaints, and that the leaders and employees of these institutions cannot operate with impunity. (Volume 7, Section 4.1, p242)

The strength of the reportable conduct scheme includes its capacity to identify and respond to current risks to children, high-risk situations and employees. It assists prevention through information gathering

and sharing with relevant agencies, including NSW Police Force and the Department of Communities and Justice (DCJ). In addition, that the Office of the Children’s Guardian (OCG) also administers the WWCC and NDIS worker schemes as well as the NSW Carers and Residential Care Workers register offers a unique opportunity to ensure the easy exchange and response to information within the OCG about risks to children and consistent advice and guidance to agencies providing services to children. We note that this was the view of the Royal Commission into Institutional Responses to Child Sexual Abuse (Volume 7, Section 4.7.6)

The publication of data and analysis arising from the reportable conduct scheme is an important component of its value. It would be useful for the Children’s Guardian’s annual report to include data about the operation of the scheme, including action taken as well as additional analysis of formal notifications, trends and patterns, perhaps similar to the annual reporting by the NSW Ombudsman when it was responsible for the scheme. This reporting would not only provide useful intelligence for agencies but would increase transparency about the OCG’s work in administering the reportable conduct scheme.

Data sourced from the reportable conduct scheme is clearly useful information for the OCG’s monitoring, investigation and oversight of agencies as they implement the Child Safe Scheme. The former Minister for Families, Communities and Disability Services made this quite clear in his Second Reading Speech on the Children’s Guardian Bill 2019:

Bringing these functions under one roof will deliver a cohesive approach to auditing, researching, reviewing and capacity building with the many thousands of agencies operating in the child protection sphere, and provide stronger safeguards for children in this State.
(Legislative Assembly Hansard – 20 August 2019)

Scope of the reportable conduct scheme

The Collective believes the scope of the reportable conduct scheme should reflect the recommendations of the Royal Commission about institutions that should be included, focusing as it did on institutions that exercise a high degree of responsibility for children in potentially risky situations and contexts.

This should include 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, as well as all private hospitals that provide health services to children and the NSW Police Force unless there is clear and forceful evidence to the contrary.

It is essential that formal agreements between relevant regulatory and oversight bodies, for example the Law Enforcement Conduct Commission and the NDIS Quality and Safeguards Commission, are established to ensure there is no duplication of reporting or investigative effort.

Definition of reportable conduct

Greater clarity on the definition of the existing categories of reportable conduct would be very welcome, including Plain English explanations and examples that work in the different systems covered by the reportable conduct scheme and for children of different ages.

As an example of the need for greater clarity, it is noted that sometimes considerations that sit outside the allegation, a child’s medical diagnosis for example, have led to a decision that the allegation reaches the reportable conduct threshold when it would not otherwise. As part of clarifying the categories of reportable conduct, it would be useful for the OCG to provide advice, and examples, of the extent to which factors outside the allegation determine if and when a matter reaches the threshold.

The Collective agencies within the scope of the reportable conduct scheme advise that they are appreciative of the opportunity to consult with the OCG about whether or not a matter reaches the reportable conduct threshold and would like this to continue.

The Collective does not consider that existing thresholds for reportable conduct should be raised. If the purpose of the scheme is to ensure the safety of children, in specific instances and by providing information to agencies about risky settings and employees, it is important that it casts a wide net. The existing exemption of acts that are trivial or negligible is a sufficient lower threshold. The ability of agencies to seek advice from the OCG about whether an allegation reaches the existing threshold is an important element of the scheme.

Breaches of established standards should be dealt with by employers, except where the breach constitutes reportable conduct as currently defined (including where crossing professional boundaries meets the definition of sexual misconduct).

Reporting protocols

The Collective considers the existing time frames for reporting, that is 7-days for notification and 30-days for a report to be appropriate.

Establishing and publishing time frames within which the OCG is required to respond to notifications and reports would seem an appropriate reciprocal arrangement designed to strengthen the overall functioning of the scheme.

Class or kind agreements

The Collective strongly supports class or kind agreements rather than raising the thresholds of reportable conduct. Such agreements should be made where agencies have demonstrated competence in responding to allegations of reportable conduct and should not depend on the number of allegations dealt with by the agency. As the Royal Commission noted, the benefit of class or kind agreements is that the OCG is able to focus its efforts on serious matters and on agencies that have not demonstrated sufficient competence or capacity.

Class or kind agreements are also consistent with the OCG's focus on capacity-building within agencies.

Role of the Office of the Children's Guardian

The OCG's first annual report on its administration of the reportable conduct scheme does not include information about its exercise of the monitoring function and it would be useful to include this in future reports.

It would also be useful for the OCG to have ongoing liaison meetings and discussion with all sectors within the scheme about its operation and the role of the OCG. This would provide opportunities to promote a shared responsibility for the protection of children, to resolve any issues and increase transparency about the operation of the scheme, including the thresholds for monitoring and/or investigation by the OCG.

It should not be mandatory for the OCG to investigate a reportable allegation about the head of a relevant agency. This should in the first instance be the responsibility of the agency's board, noting the OCG's existing capacity to monitor the agency's response.

In relation to re-investigations and review of findings, the Collective understands that there are existing provisions for these matters.

The OCG's response to investigation findings and reports can be a valuable tool for agencies in ensuring their processes are of a high standard and detailed feedback is valuable.

Liaison with state or territory regulators

The Collective considers that liaison with other State and Territory regulators to avoid duplication is essential. Increased liaison would also provide opportunities for collaboration and cooperation beyond information sharing, in line with the significant benefits identified by the Royal Commission from the development of nationally consistent reportable conduct schemes.

Children's Guardian and Deputy Children's Guardian

The Collective supports a legislative requirement that the role of Deputy Children's Guardian be an identified role to be filled by a First Nations person. Perhaps the legislative amendment could be worded to require that at least one of the Guardian and Deputy Guardian positions be held by a First Nations person.

As a First Nations person, NSW Guardian and/or Deputy Children's Guardian would bring cultural leadership and competency to working with First Nations people and communities to address the over-representation of First Nations children in the child protection and out-of-home care systems. The work being undertaken by Mr Richard Weston, including the depth of his community engagement, is indicative of the value of a First Nations person in this role.

The Collective agrees with the proposed high-level functions set out in the discussion paper:

- 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.

The Collective also supports the Deputy Children's Guardian having a role in relation to individual Aboriginal children in out-of-home care. Perhaps the Victorian model as established by the *Commission for Children and Young People Act 2012* would be a good model, focusing as it does on the provision, or not, of services to ensure the safety and wellbeing of a vulnerable child or young person. This approach would provide a direct focus on the individual circumstances of a child or young person and enable the identification of systemic issues affecting First Nations children and young people.

Official Community Visitors

The Collective submits that the OCVs should continue to provide advice, reports and information to the Children's Guardian only rather than directly to the Department of Communities and Justice, except of course when an OCV decides a report to the Child Protection Helpline is necessary. The Children's Guardian is already empowered to refer matters to other agencies as necessary. The work of responding to OCV requests is sometimes already considerable so maintaining clear governance and reporting lines is important.

It would be valuable to clarify information sharing arrangements between OCVs and the Children's Guardian, particularly with regard to the confidential information OCVs receive from agencies, how

reports by OCVs are used to ensure the safety of children and how they inform the OCG's monitoring, investigation and oversight of agencies in their implementation of the Child Safe Scheme.

The Collective does not support OCVs being empowered to visit the private homes of foster carers and relative/kinship carers. We submit that it is important OCVs visit accommodation services, providing as it does additional oversight of the agency involved in the child/young person's life. For home-based services, there is usually sufficient oversight by an agency case manager. We note that children and young people already mention how having even a case manager regularly visit is an intrusion on their ability to have a 'normal' life.

The Collective notes that s144 of the *Children's Guardian Act 2019* already states that OCVs are required to have 'appropriate knowledge and expertise in the matters relating to children in care' and we believe this is essential. While cultural competencies could be viewed as a component of this 'appropriate knowledge and expertise', we have no objection to criteria requiring these competencies. We certainly believe that OCVs should be able to demonstrate an ability to communicate with children and young people.

Conclusion

The Children in Care Collective would be pleased to continue to assist the Office of the Children's Guardian with its review of the Children's Guardian Act. Should you have any queries arising from this submission, please direct them to me at Rob.Ryan@lwb.org.au.

Yours sincerely



Rob Ryan
Chair
Children in Care Collective
17 August 2022

On behalf of the Children in Care Collective:

Allambi Care; Anglicare NSW South | NSW West | ACT; Anglicare Sydney; CareSouth; Key Assets; Life Without Barriers; Mackillop Family Services; Marist180; Pathfinders; Settlement Services International; Uniting NSW/ACT; Institute of Child Protection Studies (ICPS) - Australian Catholic University; Australian Centre for Child Protection (ACCP) - University of South Australia; Research Centre for Children and Families (RCCF) – University of Sydney.