

Office of the Children's Guardian submission

NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

Ensuring justice is an essential component of healing for victims of child sexual abuse. The Children's Guardian welcomes the invitation to provide a submission and comment on proposals to improve the current civil litigation system.

This submission will comment on key issues raised in the consultation paper that relate to the functions of the Children's Guardian.

There are a number of regulatory mechanisms to protect children and young people from harm in organisations currently operating in NSW. These include the Working With Children Check (WWCC), the Reportable Conduct Scheme, the Child Safe Organisations program, the NSW Child Safe Standards for Permanent Care, the Carers Register, the registration of agencies providing voluntary out-of-home care (VOOHC), authorisation of children's employers in the prescribed industries and the information sharing scheme under *Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998*. Further information on these regulatory mechanisms is included at Appendix A.

COMMENTS

The Office of the Children's Guardian (OCG) is engaged with a wide range of organisations and institutions across NSW to assist them to provide services that are safe for children. The consultation paper raises a number of issues for institutions/ organisations that deliver services to children and young people in NSW and has implications for the exercise of the functions of the Children's Guardian.

It is important to consider how the proposals will improve access to civil litigation for children and young people who are currently in OOHHC. The premise of the Royal Commission recommendations appears to be that victims of child sexual abuse will not seek to commence proceedings until they are adults. This may or may not be the case however consideration should be given to the impact of the Royal Commission's recommendations access to civil litigation for children and young people.

In particular there is a need to consider access to justice and civil litigation for vulnerable children and young people currently in out-of-home care (OOHC) and complexities that may arise should the Royal commission recommendations be implemented. For example, how would a 15 year old in a residential placement (statutory OOHHC) commence civil proceedings against FACS or a funded agency? As proceedings generally have to be brought by an adult on behalf of a child, and if the child is in the care of the Minister, then the person bringing proceedings would likely be the Minister or their delegate.

It is also acknowledged that implementation of recommendations may focus organisations on reducing risk of liability rather than delivery of quality services to children. Any reforms should highlight that reducing liability is not the same as reducing risk of child sexual abuse.

Reform should focus on the aim of protecting children rather than on reducing organisational risk. This is important for guarding against the creation of a culture of risk adversity in organisations delivering services to children as some of the recommendations, for example those concerned with liability, may have perverse impacts such as organisations not encouraging children to report allegations of abuse for fear that such reports will result in damage to the organisation. Any changes to legislation should be accompanied by strong messages to organisations that reinforce the moral obligation of organisations to protect children.

Preliminary issue: A consistent definition of child abuse

It is noted that the consultation paper raises the issue of whether grooming should be included in the definition of child abuse. Given that grooming is employed by perpetrators to facilitate sexual abuse of children, and may be viewed as a form of child abuse, consideration could be given to including this in the definition of abuse adopted. It would seem reasonable that grooming would be included in 'connected abuse' however grooming is considered to be a form of sexual misconduct in the *Child Protection (Working with Children) Act 2012*, and must be reported to the OCG, and should be included in the definition of child abuse. We note that NSW, Victoria and the Commonwealth recognise the offence of grooming however the scope of the definitions vary.

ISSUE A: The liability of organisations

The OCG appreciates the concerns outlined in the consultation paper regarding the impact of changes to liability on services and, in particular, that organisations may respond to changes by reducing service provision to children. Additionally it is possible that organisations may seek to limit risk by reducing the services provided to particular children, for example vulnerable children, children more at risk of being sexually abused or children with challenging behaviours.

The consultation paper acknowledges that whilst liability may encourage organisations to improve child safety this is contested. It should be noted that a potential unintended consequence of the proposed reforms to liability is that organisations will conflate child safe organisation approaches with limiting potential risk of liability. The OCG CSO program was developed from a child centric approach, not merely a risk management approach, and focusses on providing organisations with support to encourage them to be safe for children, as opposed to instructions on how to operate so as to limit liability. Ensuring that any proposed reforms are implemented in such a way that maintains the focus on child safe rather than limiting risk of liability should be a priority and any changes should be monitored to identify the impact on organisations and children and young people.

Non-delegable duty of care

The OCG supports the proposal for a strict non-delegable duty of care on the institutions identified in the consultation paper. It is noted however that the exclusion of foster and kinship care arrangements may limit the ability of children and young people to make a claim.

It should be noted that while the Royal Commission has argued that foster care providers do not "control the foster home environment" in NSW there is oversight of the foster and kinship care 'home environment' by accredited agencies in the form of home visits.

- NSW has an accreditation system for OOHC and adoption where agencies are required to demonstrate that they meet the NSW Child Safe Standards for Permanent care. The Standards require organisations to ensure that children and young people are cared for in safe nurturing environments that are suited for their specific needs. It is expected that agencies arranging foster and statutory kinship care will undertake comprehensive assessments of prospective carers and adult household members (including registration on the carer's register) and that agencies will regularly monitor the safety and suitability of the care environment. The OCG monitors compliance with the Standards which requires agencies to regularly visit and provide ongoing support to carers.
- In NSW authorised carers and adult household members engaged to provide foster care are treated as employees for the purpose of the WWCC and reportable conduct schemes, in the same way as employees of residential care services and therefore must hold a WWCC clearance.
- It should also be noted that approximately one third of accredited agencies in NSW are accredited to provide both foster and residential care. The implementation of the Royal Commission's recommendations will result in an agencies having non-delegable duty of care for some children they are providing services to and not others.
- Large numbers of Aboriginal children and young people in OOHC are in kinship placements, supervised by designated agencies. Consideration should be given to the potential impact of excluding foster and kinship care on Aboriginal children and young people's access to civil litigation and approaches to address inequity.

It is noted however that while the exclusion of foster and kinship care placements may limit claims from children and young people who have been abused, the inclusion of these placement types may discourage agencies from providing these services. It is also acknowledged that an agency has a limited capacity, despite monitoring responsibilities, to supervise adults in a home setting. Therefore it is our view that if such a duty was to come into force consultation with agencies captured would be required to ascertain their response to a non-delegable duty.

With regard to whether the recommendations should apply to organisations which work with children as well as adults, consideration could be given to extending the non-delegable duty to those universal services that employ people in child-related employment (for the purposes of the WWCC Act). This may be particularly important for health and disability services as they are likely to involve intimate contact with children.

Reverse onus of proof

The recommendation reversing the onus of proof for child abuse claims is supported. There are a number of existing mechanisms in place for organisations in NSW to prevent child abuse. These include compliance with WWCC requirements, registration for VOOHC providers, carers register and accreditation requirements for agencies arranging OOHC and adoption services, authorisation of children's employment and adoption of the NSW principles for child safe organisations. It is noted that guidance could be provided as to what constitutes reasonable steps (para 6.27). Compliance with legislative requirements and adoption of principles and strategies to keep children safe in institutions could constitute reasonable steps for the purposes of a defence. An advantage of this approach is that it is likely to be somewhat familiar to organisations, as it is consistent with current frameworks for organisational liability in, for example, discrimination and work health and safety.

The OCG has consulted extensively with organisations providing services to children in the development of the Principles for Child-Safe Organisations. The issue of whether there should be legally binding requirements was included in these consultations. Feedback from stakeholders across a range of sectors expressed a preference for guidance and resources to improve practices rather than for legally binding standards. In considering this feedback the OCG considered the diversity in the approx. 27,000 organisations registered as employers for the purposes for the WWCC and existing regulatory arrangements for many of these organisations. The OCG has adopted a principle based approach to Child Safe Organisations supported by training and education and awareness raising activities to encourage organisations to be child safe. The OCG will be monitoring the uptake of the CSO principles, using a co-design approach to developing a monitoring and evaluation framework. Should this principle based approach provide unsuccessful the OCG will consider developing a proposal for mandatory CSO standards.

Persons associated with an institution

(b) Association between the perpetrator and the institution

The OCG supports institutional liability being extended to all persons associated with an institution where the organisation provides services to vulnerable children and young people. For example the OCG has included as a condition of accreditation the extension of probity checks, including criminal records checks, for residential care workers to all employees, contractors and volunteers in child-related work in residential care services and that all these workers are required to also have a national police check.

Consideration could also be given to whether the organisation/institution has deemed the position held by an individual as child-related employment. An organisation requiring an individual to hold a WWCC (application or clearance) would imply that the position, and the individual, has an association with an institution and also with a child or class of children. Relevantly, the *Child Protection (Working with Children) Act 2012* currently allows employers to require a worker who would not otherwise be required to hold a WWCC to nevertheless apply for one in specific circumstances. Imposing such a requirement is only allowed if the worker has access to confidential records or information about children and the Children's Guardian has approved the requirement. If an employer has required a worker to apply for a WWCC in such circumstances, then an association between the employer and the worker can be seen to have been established.

Regarding the issue of child abuse perpetrated by other children, leaving aside the complexity for children with problem sexual behaviours it is reasonable to assume that an organisation has a duty of care to protect all children and that the creation of safe environments may include the management of children with problem sexual behaviours – thus liability should extend to child abuse perpetrated by other children in particular settings, for example residential and/or foster care where the organisation has responsibility for placement management. This issue raises the question of whether foster and residential care should be excluded from the strict non-delegable duty of care.

(c) Association between the abuse and an institution

An institution's liability should not be restricted to abuse on the institution's premises or during hours of work. Again, this is not a completely novel concept at law – for example, employers can be held vicariously liable for out-of-hours conduct of their employees, if the employer created the conditions allowing the conduct to occur.¹ The Royal Commission Case Study Two illustrated the way in which a relationship formed through an employment arrangement allowed the perpetrator access to children outside employment activities (babysitting in children's homes) that resulted in sexual abuse. This case study highlighted the importance of the relationship formed by an employee with children, and their families, by virtue of his role as an employee of an organisation. This relationship allowed him to sexually abuse children in settings not restricted to the institution's premises or hours of operation, including in the homes of children. Institutional liability should be extended to circumstances in which the relationship between the perpetrator and a child or class of children is known of or supported by the organisation and was established as a result of the institutions/ organisations role with the child. In recognition that this association may be difficult to define in legislation this may be best determined on a case by case basis.

It should be noted that a child may not distinguish between a contractor and an employee of an organisation and that children may believe that everyone on the school ground has an association with the school. The focus in establishing an association between the abuse and the institution should be on the victim's reasonable perception, rather than technical categories which would not be readily apparent to a victim.

ISSUE B: Ensuring there is someone to sue

In order for the recommendations regarding institutional liability to be meaningful there needs to be someone to sue. The OCG supports identification of a proper defendant in organisations providing services to children. However, the recommendation for all organisations providing services to children to incorporate may be unwieldy in practice.

Noting that there are over 27,000 organisations registered as employers in the WWCC system, requiring every organisation to incorporate or have an incorporated 'proper defendant' would impose a significant burden for some organisations, in particular small organisations.

While it might not be possible to require every organisation to be an incorporated body consideration could be given to requiring agencies providing services to vulnerable children – such as VOOHC and OOHHC to incorporate or to nominate a proper defendant in order to receive government funding. Currently nine of the 86 organisations accredited to provide OOHHC and adoption services in

¹ *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130

NSW and eight of the registered VOOHC organisations are unincorporated. The OCG could consider imposing a requirement either through legislation or via a condition of accreditation/registration that agencies must be incorporated bodies.

It should be noted that VOOHC does not include care provided by an individual in a private capacity - i.e. the individual is not acting on behalf of, or pursuant to an arrangement with, a body or organisation or care provided outside NSW.

It should be noted that the Children and Young Persons (Care and Protection) Regulation 2012 allows for a designated agency to transfer their accreditation to another agency (see cl 55- 60). In such circumstances, liability arising out of historical events would not necessarily transfer to the new organisation, depending on the specific arrangements reached between the transferring and receiving agencies. This leaves open the risk that there would be no appropriate defendant. This issue requires further consideration to appropriately balance organisations' preferences to be able to operate freely and make arrangements which best suit their circumstances against the desirability of ensuring that there is a relevant organisation for a victim to pursue. From this perspective, further exploration of the concept of a "nominal defendant" may be warranted – this approach again has the advantage of being established and familiar to organisations through the current compulsory third party insurance regime.

ISSUE C: Requiring institutions to hold insurance cover for child abuse

While recognising the benefits of this type of insurance cover for ensuring that there are funds available to provide to victims of abuse it is noted that requiring organisations to hold insurance cover will have potential impacts of costs for organisations and there are currently a limited number of insurance providers currently offering this insurance. It is reasonable to assume, for government funded agencies, that increased costs associated with service provisions will increase the costs of commissioning services.

The fact that all institutions covered for sexual abuse claims through insurance policies would be required to continually monitor child safety and investigate suspected abuse or risky behaviours should be seen as a positive, even though such monitoring and investigation would inevitably be resource intensive. There is also an opportunity for insurance providers to make child abuse cover contingent on adherence to existing legislative requirements and the adoption of child safe principles which would encourage organisations to adopt child safe practices.

Upholding child safety requires continuous interrogation and vigilance, rather than a "set and forget" approach. Although requiring insurance cover may not, in and of itself, be the *best* way to drive change in organisational behaviour, such a requirement may result in organisations focussing more intensely on child safety and should be given serious consideration.

APPENDIX A: REGULATORY FUNCTIONS OF THE NSW OFFICE OF THE CHILDREN'S GUARDIAN

Working With Children Check

The OCG is responsible for the administration of the WWCC. In NSW all workers in child-related employment are required to obtain a Working With Children Check. As of 30 June 2016 there had been 1 388 092 working with children check clearances issued and 27 870 employers registered for the purposes of the WWCC system. A five year phase in accompanied the implementation of the new system which will be completed in in March 2018.

An employer cannot commence to employ, or continue to employ, a worker if they have reasonable cause to believe the worker does not have a WWCC clearance. Employers are required to register and to verify employees (including volunteers) WWCCs online. Where a person applies for child related work, they cannot start working in that role unless the employer has verified online their WWCC clearance or application number.

The OCG monitors employers' compliance with their WWCC obligations through regular audits and compliance activities.

The NSW WWCC is supported by a continuous monitoring system with certain police records relating to individuals with a WWCC reported to the OCG. Where a serious offence has been committed an individual's WWCC clearance can be cancelled and the OCG will advise employers who have verified the individual of the cancelation. The OCG undertakes regular audits and awareness raising activities with employers so that they fulfil their obligations regarding verification and are thus able to access the benefits of the continuous checking function of the new system for the protection of children.

Reportable conduct scheme

The NSW Ombudsman oversees the handling of allegations of a child protection nature against employees by designated government and non-government agencies or other public authorities.

Reportable conduct includes sexual offences and sexual misconduct involving a child; physical assault of a child; neglect and ill-treatment of a child and behaviour causing psychological harm to a child.

Part 3A of the Ombudsman Act 1974 requires relevant government and non-government agencies, including non-government schools, approved children's services and agencies providing substitute residential care, to notify the NSW Ombudsman of any reportable allegations or convictions involving their employees within 30 days of becoming aware of them.

The *Child Protection (Working With Children) Act 2012* requires prescribed reporting bodies to notify the Children's Guardian of findings of misconduct in relation to sexual misconduct committed against, with or in the presence of a child, including grooming of a child or any serious physical assault of a child. The Ombudsman may also make a 'notification of concern' to the Children's Guardian if he receives information in the course of exercising his functions that he believes on a risk

assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to the safety of children.²

Information sharing

Information sharing provisions under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* promote increased information sharing between prescribed bodies³ where that information relates to the safety, welfare or well-being of a child or young person or class of children and young people.

Child Safe Organisations program

Encouraging organisations to develop their capacity to be safe for children is a principal function of the Children's Guardian (section 181(j) of the *Children's Guardian in the Child and Young Persons (Care and Protection) Act 1998* and part of the Children's Guardian's public awareness and advice functions under section 38 of the *Child Protection (Working with Children) Act 2012*.

The Child Safe Organisations (CSO) program has now been operating in NSW for over ten years and is one of the most established programs of its kind in Australia. Responsibility for the CSO program was transferred to the Children's Guardian in June 2013.

The CSO program provides free training and resources to organisations that provide services to children across NSW and to the general public. The focus of the program is on ensuring that organisation have policies, systems, practices, policies and cultures that safeguard children.

The broad range of organisations accessing training and resources include government, non-government and private organisations. These include those providing services that, while not specifically targeted at children, encourage the participation and involvement of children and young people in activities.

Accreditation and monitoring of organisations providing statutory OOHC and adoption services

The Children's Guardian is responsible for the accreditation and monitoring of organisations that deliver statutory out-of-home care (OOHC) and adoption services in NSW. In order to be eligible to deliver services in NSW organisations must demonstrate compliance with *The NSW Child Safe Standards for Permanent Care*. Accredited agencies, known as designated agencies, are subject to ongoing monitoring, including regular site visits, by the OCG to ensure that compliance with the Standards is maintained.

As of 30 June 2017 there were 86 accredited services in NSW. This includes both government and non-government organisations, including 15 FACS districts.

² *Child Protection (Working With Children Act) 2012, Schedule 1, Clause 2A*

³ As defined by s 245B of the Care Act and which includes the OCG, NSW Ombudsman, NSW Police, Department of Family and Community Services (FACS) and other organisations providing OOHC, health, education and children's services)

The Carers Register

The OCG administers a centralised database of persons who are authorised, or who apply for authorisation, as carers for children and young people in OOHC in NSW – this is known as the Carers Register.

The Carers Register allows designated agencies to exchange information about carers and prospective carers and their household members for the purpose of assessing and reviewing carer suitability. Designated agencies share information about carer applicants, carers and household member suitability, which stops unsuitable carers moving from agency to agency. The register is administered by the OCG and information on the register is available to designated agencies, FACS and the Ombudsman. In certain circumstances information held on the register may be provided to law enforcement, investigative bodies, and other child protection or OOHC bodies.

Voluntary Out-of-Home Care (VOOHC) system

The OCG administers the Voluntary Out-of-Home Care (VOOHC) system under the *Children and Young Persons (Care and Protection) Act 1998* and the *Children and Young Persons (Care and Protection) Regulation 2012*. VOOHC refers to those situations where a parent of a child or young person (under the age of 18 years) makes a voluntary arrangement with an organisation for the placement of their child or young person in out-of-home care for one or more nights. Many children and young people in voluntary out-of-home care have a disability.

The OCG is responsible for registering agencies that provide VOOHC, and monitoring whether children and young people in longer term VOOHC receive care that is appropriately supervised and planned. The VOOHC Register records information about each child or young person using VOOHC. The aim of the system is to reduce the risk of children and young people drifting in the voluntary out-of-home care system without appropriate planning and care and to promote improved quality, consistency, efficiency and coordination in the delivery of voluntary out-of-home care services.

As of 30 June 2017 there were 167 agencies authorised to provide or arrange voluntary out-of-home care.

Employment of children in the entertainment industry

The Children's Guardian regulates children's employment in NSW under Chapter 13 and Schedule 2 of the *Children and Young Persons (Care and Protection) Act 1998* and *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2010*. The principal aim of this legislation is to support participation while protecting children and young people from undue risk.

A Code of Practice sets out the minimum requirements for the employment of children and young people in entertainment and exhibition, still photography and door-to-door sales. The Code of Practice requires employers to notify any risks associated with the employment; meet education requirements; ensure appropriate work times and work breaks; protect children and young people from unreasonable working conditions; ensure no child or young person is subject to behaviour likely to punish, humiliate or frighten a child; ensure that roles are appropriate for children and that work directions are not likely to cause distress and ensure there is appropriate supervision for children and young people while they are employed.

There are a range of penalties for non-compliance with legislative requirements and the Children's Guardian may place additional conditions on an employer's Authority, suspend an employer's Authority, revoke an employer's Authority or prosecute an employer. This includes financial penalties for non-compliance.