



NSW OFFICE FOR CHILDREN

**the Children's
Guardian.**

**Submission to the
Special Commission of
Inquiry into
Child Protection Services
in New South Wales**

25 February 2008

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Part A

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1 THE CHILDREN'S GUARDIAN – OVERVIEW

The Children's Guardian is a statutory office, established by s178 of the *Children and Young Persons (Care and Protection) Act 1998* ("the Act").

The Children's Guardian's principal functions relate to children and young people in out-of-home care (OOHC) and the designated agencies that make arrangements for the provision of OOHC. These functions, which make up approximately 70% of the Children's Guardian's workload, are addressed in this submission.

The Children's Guardian also has the functions of:

- accrediting and monitoring non-government adoption service providers; and
- authorising the paid employment of children under the age of 15 in entertainment, exhibition, still photography and door-to-door sales work, and monitoring employer compliance with the child employment provisions of Chapter 13 of the Act and the *Children and Young Persons (Care and Protection – Child Employment) Regulation 2005*.

This submission does not address the Children's Guardian's adoption and children's employment functions, as they are not directly relevant to the Inquiry's Terms of Reference. Further information on these functions, is contained in the Children's Guardian's 2006/07 Annual Report (part of the Office for Children Annual Report), a copy of which has been provided to the Inquiry.

The Children's Guardian was the chief executive of the Office of the Children's Guardian until 3 April 2006, when the Office was merged with the Commission for Children and Young People (CCYP) to form the Office for Children (OFC).

The OFC was established to provide more efficient shared administrative and financial support to the Children's Guardian and CCYP. The statutory functions of the Children's Guardian, CCYP, and CCYP Commissioner were not changed as a result of the merger.

The Children's Guardian is responsible for the management of the division of OFC known as the Office for Children – the Children's Guardian (OCCG), which supports the Children's Guardian in the exercise of her functions.

Whilst the OFC is within the Youth Portfolio for budgetary purposes, the Children's Guardian reports to the Minister for Community Services ("the Minister"), as all of the Children's Guardian's functions relate to the community services portfolio.

The Children's Guardian is required to report annually to Parliament¹ and may also make special reports to Parliament on any matter relevant to her functions².

¹ Section 187 of the Act.

² Section 188 of the Act.

2 THE REGULATORY FRAMEWORK FOR OOHC

The Children's Guardian's OOHC functions are regulated by the:

- Children and Young Persons (Care and Protection) Act 1998 ("the Act");
- Children and Young Persons (Care and Protection) Regulation 2000 ("the Regulation"); and
- Children and Young Persons (Savings and Transitional) Regulation 2000 ("the Transitional Regulation").

The Children's Guardian's functions must be understood within the context of the following key elements of the OOHC legislative framework.

2.1 SCOPE OF OOHC

Section 135 of the Act provides that OOHC is residential care and control of a child or young person provided by a person other than their parent, at a place other than their usual home. Section 135 and clause 17 of the Regulation exclude certain arrangements from the definition of OOHC, including care provided by a relative of the child or young person (unless the child or young person is under the parental responsibility of the Minister or in the care of the Director-General of the Department of Community Services (DoCS)).

The proclaimed provisions of s135 restrict OOHC to various types of court-ordered care of more than 14 days (commonly known as "statutory care"). Where this submission refers to the OOHC functions of the Children's Guardian, those functions are confined to statutory care.

Approximately 8,000 children and young people (about 63% of children and young people in care) are in statutory care in NSW³.

The provisions of s135 that extend the definition of OOHC to other care arrangements of more than 28 days in any period of 12 months, known as "voluntary care", remain unproclaimed.

The lack of a clear regulatory framework for voluntary care, including arrangements for external oversight of voluntary care arrangements, is of concern to the Children's Guardian and the OOHC sector generally (see section 3.11 of Part B of this submission).

2.2 PARENTAL RESPONSIBILITY FOR CHILDREN AND YOUNG PEOPLE IN OOHC

Parental responsibility involves "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children."⁴

³ Advice from Department of Community Services as to the number of children and young people in statutory and voluntary care as at 30 June 2007.

⁴ Section 3 of the Act.

Under s79(1)(b) of the Act, if the Children's Court finds that a child or young person is in need of care and protection it may make an order placing the child or young person under the parental responsibility of the Minister. Where such an order is made, the Court must determine which aspects of parental responsibility can be the responsibility of others pursuant to s81 of the Act.

The Court may also make an order under s79(1)(a) allocating parental responsibility, or specific aspects of parental responsibility, to:

- a parent (in which case the child or young person is not in OOHC);
- a parent/s and the Minister or others jointly; or
- another suitable person (eg: the Court has placed some children under the parental responsibility of designated agency principal officers)⁵.

A parent may retain specific aspects of parental responsibility (eg: contact and religious upbringing), whilst parental responsibility in relation to residence may be allocated to another person. In cases where the parent does not have parental responsibility for residence, the child or young person will be in OOHC, unless one of the specific exemptions in s135 of the Act or cl 17 of the Regulation applies.

Section 164 of the Act provides that the Minister is responsible for the provision of accommodation for any child or young person for whom the Minister has sole parental responsibility or parental responsibility in relation to residence.

The parental responsibility of the Minister is delegated to the Director-General of DoCS ("the Director-General"). Aspects of parental responsibility, other than residual powers of guardianship⁶, may be delegated to the principal officer of a designated agency and then sub-delegated to other authorised carers (see s157 of the Act). The delegate may also, in some situations, arrange for others to perform care tasks while still retaining care responsibility.

The primary reason for the establishment of the Children's Guardian was to exercise guardianship functions (ie: parental responsibility) in respect of children and young people under the parental responsibility of the Minister. The "special guardian" role was proposed by:

- the 1992 Ministerial Review Committee established to review substitute care in NSW ("the Usher Committee");
- the 1997 *Royal Commission into the New South Wales Police Service – The Paedophile Inquiry* (which recommended the special guardian function be exercised by the proposed Children's Commission); and
- the 1997 DoCS *Review of the Children (Care and Protection) Act 1987*, chaired by Associate Professor Patrick Parkinson ("the Parkinson Review").

Section 4 of Part B to this submission addresses the Children's Guardian's intended special guardian functions and other unproclaimed functions.

⁵ The Children's Guardian's concerns about the Court making orders allocating parental responsibility to the principal officers of designated agencies are outlined at section 2.1 of Part B to this submission.

⁶ Residual powers of guardianship are addressed at the note to s140 of the Act and at s186(1)(b)-(f) of the Act.

2.3 SUPERVISORY RESPONSIBILITY AND ARRANGEMENTS FOR THE PROVISION OF OOHC – DESIGNATED AGENCIES

Section 134(b) of the Act provides that supervisory responsibility involves “the supervision of those who have care responsibility”.

Section 138 of the Act provides that arrangements for the provision of OOHC may only be made by a designated agency or the Children’s Guardian⁷.

Sections 134 and 140 of the Act provide that a designated agency is responsible for supervising:

- the placement of a child or young person that the agency has placed in the OOHC of an authorised carer; and
- those who have care responsibility (ie: authorised carers).

Section 141 of the Act requires DoCS to supervise the placement of a child or young person in OOHC if another designated agency ceases to be able to fulfil its responsibilities in relation to the child or young person.

Designated agencies must be accredited

Section 139 of the Act provides that a designated agency is a department of the Public Service, or an organisation that arranges the provision of OOHC, if the department or organisation is accredited for the time being in accordance with the regulations.

Clause 36 of the Regulation provides for the Children’s Guardian accrediting a department or organisation as a designated agency if the agency satisfies accreditation criteria.

Clause 22A of the Transitional Regulation confers interim accreditation on organisations that were providing OOHC immediately before the accreditation regime commenced in July 2003. It required such agencies, before 1 July 2005, to apply to the Children’s Guardian for accreditation under the Regulation or under clause 22C of the Transitional Regulation.

Agencies that applied for accreditation under clause 22C entered the Children’s Guardian’s Quality Improvement Program (QIP) and must progressively achieve the standard that would entitle them to be accredited as a designated agency by 14 July 2013 at the latest.

The Children’s Guardian’s Accreditation and Quality Improvement Programs are detailed further at sections 3.5-6 below.

2.4 CARE RESPONSIBILITY – AUTHORISED CARERS

Section 134(c) of the Act provides that care responsibility involves “the daily care and control of a child or young person” (functions under s157 of the Act).

Section 136 of the Act provides that OOHC for a child or young person may only be provided by an authorised carer.

⁷ The Children’s Guardian has not exercised functions under s138, as they are ancillary to the special guardian role contemplated by s181(1)(a) of the Act.

Carers are authorised by designated agencies (cl20 of the Regulation), with the principal officers of designated agencies also being authorised carers by virtue of their position (see s137 of the Act).

All foster carers and relative/kinship carers (where the Minister has parental responsibility or the child or young person is in the care of the Director-General) must be authorised. There is no requirement that all residential care workers are authorised, as long as the officer(s) who exercise residential care and control are authorised.

Sub-sections 157(1)(a)-(d) of the Act provide that an authorised carer of a child or young person has authority to do certain specific things, whilst s157(1)(e) gives the authorised carer general authority "to make other decisions that are required in the day-to-day care and control of the child or young person". Section 157(2) provides that an authorised carer has authority to exercise any aspects of parental responsibility that are delegated to them.

Section 157(3) provides the authority of authorised carers under section 157 is subject to any written direction given by the designated agency that placed the child or young person in the daily care and control of the authorised carer, or the Children's Guardian (as outlined at section 3.9 below, the Children's Guardian has delegated functions under s157 to the Director-General of DoCS).

The designated agency with supervisory responsibility can determine the extent to which authorised carers have daily care and control of children and young people in their care. This enables the designated agency to have daily care and control in respect to specified matters, with daily care and control in respect to other matters left to the authorised carer.

3 THE CHILDREN'S GUARDIAN'S OOHC FUNCTIONS

3.1 PRINCIPAL OOHC FUNCTIONS OF THE CHILDREN'S GUARDIAN

Currently, the main OOHC functions of the Children's Guardian include:

- promoting the best interests of all children and young people in OOHC - s181(1)(b) of the Act;
- ensuring that the rights of all children and young people in OOHC are safeguarded and promoted - s181(1)(c) of the Act;
- developing criteria for the accreditation of designated agencies, for the approval of the Minister – cl 36(2) of the Regulation;
- accrediting designated agencies - s181(1)(e) of the Act and Division 4 of Part 6 of the Regulation;
- administering a Quality Improvement Program to progress designated agencies that were making arrangements for the provision of OOHC before the accreditation scheme commenced (“interim accredited agencies”) to accreditation – s181(1)(e) of the Act and Part 3A of the Transitional Regulation;
- monitoring the responsibilities of designated agencies under the Act and regulations - s181(1)(e) of the Act;
- policy development and making recommendations – see sections 150(4), 149D and 187(2)(c) of the Act.

The Children's Guardian is sometimes referred to as a “watchdog”. The Children's Guardian is not a “watchdog” body within the common meaning of the term.

Section 180(2) of the Act provides that the Children's Guardian has no jurisdiction to investigate or resolve disputes that are the subject of a community services complaint within the meaning of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS-CRAMA) or to investigate the death of a child that is subject to investigation by the coroner, or review or investigation by the Ombudsman.

The Ombudsman fulfils the “watchdog” role for the OOHC sector and, whilst the Children's Guardian and Ombudsman need to cooperate in the exercise of their respective functions, their functions are distinct.

The relationship between the Ombudsman and Children's Guardian was considered in the Children's Guardian's submission to the review of CS-CRAMA being undertaken by the Parliamentary Joint Committee on the Office of the Ombudsman and Police Integrity Commission, a copy of which has been provided to the Inquiry. It will be further discussed in the Children's Guardian's separate submission to the Inquiry on the manner in which the functions of the Children's Guardian and other “oversight agencies”, including DOCS, inter-relate.

The Children's Guardian may provide advice and make recommendations relevant to children and young people in OOHC generally, classes of children and young people in OOHC, or individual children and young people in OOHC. The Children's Guardian may attach reasonable conditions to an agency's accreditation that require effect to be given to such recommendations (such conditions are subject to Administrative Decisions Tribunal review).

However, the Children's Guardian does not have a specific advocacy function in respect to children and young people in OOHC. CREATE is a non-government advocacy group for children and young people in OOHC and the Commission for Children and Young People (CCYP) has a general advocacy function in respect of all children and young people. CCYP does not advocate on behalf of individual children.

All of the Children's Guardian's functions have a quality assurance/improvement focus and are consistent with the recommendations of the Usher Committee and Parkinson Review that there should be a separation between the funder of care services (ie: DoCS) and the body responsible for ensuring the quality of those services.

Each of the Children's Guardian's principal functions is detailed in sections 3.2-9 below.

3.2 PROMOTING THE BEST INTERESTS OF ALL CHILDREN AND YOUNG PEOPLE IN OOHC

This function, provided for at s181(1)(b) of the Act, informs all of the Children's Guardian's OOHC work.

There are situations where action the Children's Guardian is required to take in exercising his/her other functions may conflict with promoting the best interests of all children and young people in OOHC.

For example, the lack of flexibility in the provisions of the Regulation dealing with OOHC accreditation may require the Children's Guardian to cancel or not renew a designated agency's accreditation when there are no alternative services available. This is a particular issue in remote areas of NSW, or for children and young people who have highly specialised care needs.

As outlined at section 4.5 of Part B of this submission, regulatory change is needed to allow the timing of accreditation decisions, and the date at which they take effect, to be more flexible so that they are aligned with the best interests of children and young people in OOHC who are affected by those decisions.

The Children's Guardian relies on s181(1)(b) for:

- taking action to improve outcomes for individual children and young people in OOHC;
- disclosing relevant information to organisations that are not designated agencies; and
- supporting research or other work of benefit to children and young people in OOHC.

Taking action to improve outcomes for individuals in OOHC

There is a common misperception that the non-proclamation of the "special guardian" functions of the Children's Guardian means that the Children's Guardian may only operate at a systems level, and cannot play a role in respect to individual care arrangements.

Whilst the non-proclaimed provisions of the Act that would require the Children's Guardian to consider the case plans and reports on case reviews for every child and young person are not practical and would not support the best interests of children and young people in OOHC, the Children's Guardian relies on s181(1)(b) to monitor the placements and planning for individual children and young people in OOHC who are placed in certain "non-standard" arrangements.

It is current policy that residential care is not a suitable model of care for children under the age of 12, unless the child is part of a sibling group in the placement, or has special needs that cannot be adequately met in a family based placement.

The Children's Guardian therefore imposes the following standard condition on the accreditation of designated agencies:

"Residential care may only be provided to children and young persons aged 12 years and over."

In those circumstances where such a child's needs are best met within a residential care environment, an agency may apply to have this condition varied to permit a specific residential placement. The agency must demonstrate to the Children's Guardian that alternative placement arrangements are not in the child's best interests. The variation lasts for 6 months, which means agencies must provide the Children's Guardian with assessments of the care needs of the child if the variation is to be extended for further 6 month periods.

The Children's Guardian, through its Case File Audit Program, monitors the case files of every child aged under 12 who is in residential care. If those files raise particular concerns, those concerns are taken up with the agency, DoCS or other appropriate authorities such as the Ombudsman.

There are currently 22 children under the age of 12 in residential care, whose placement arrangements are being regularly monitored by the Children's Guardian.

The Children's Guardian also monitors the appropriateness of care arrangements for children and young people that DoCS places in an accommodation service that is not operated by a designated agency.

There are some children and young people with special care needs who will not be able to access all the services they require from a designated agency. For example, a child in OOHC:

- may require intensive disability services, with the only provider of such services close to the child's home being a non-designated organisation;
- with particular medical problems may need to be accommodated in close proximity to a relevant medical service;
- with extreme self-harm behaviour may need to be placed with an agency with specialist high need behaviour management experience and support services.

All such placements are approved by the DoCS Deputy Director-General, Operations, following an assessment that they are in the best interests of the child or young person. The Children's Guardian is consulted as part of this process. DoCS takes on supervisory and care responsibility for such placements, with the respective responsibilities of DoCS staff and those of the agency providing the accommodation service set out in the child or young person's case plan. Quarterly reports on these placements are provided to the Children's Guardian.

The Children's Guardian has recommended that the Regulation be amended to allow officers of the accommodation service to exercise care responsibility, in accordance with the directions of DoCS, with the requirements for a best interests assessment and consultation

with the Children's Guardian also recognised. In the absence of regulatory change allowing care responsibility to lie within the accommodation service, the Children's Guardian is concerned that some such necessary arrangements may not be permitted under the current legislative framework.

This recommendation was made in the Children's Guardian's October 2007 report to the Minister, *Proposed regulatory amendments for the assessment and authorisation of carers and principal officers of designated agencies*, which was prepared in consultation with key OOHC sector stakeholders and has been provided to the Inquiry.

The Children's Guardian is currently monitoring 12 placements with non-designated agencies.

The Children's Guardian's 2006/07 Case File Audit of 2,335 case files for children and young people in OOHC recorded compliance with Audit items for individual case files, with this information provided to each designated agency on CD-ROM. In earlier years, agencies were provided only with aggregated results, rather than aggregated and individual file results. Designated agencies can now use the feedback provided to identify action that needs to be taken in case management or planning for individual children and young people. Designated agencies have responded positively to this approach and indications are they are using this new source of information to take remediation action in respect of individual cases.

The Children's Guardian may also become aware of concerns about care arrangements for individual children and young people in OOHC through evidence submitted in applications for accreditation, Annual Progress Reports submitted by QIP agencies, or through concerns expressed directly to the Children's Guardian by individuals.

In such cases, the Children's Guardian may:

- ask the designated agency to provide advice on the matter, or to take action to address the concern;
- report the matter to DoCS for attention; and/or
- refer the matter to the Ombudsman as a community service complaint.

Disclosing relevant information

Section 185 of the Act enables the Children's Guardian to disclose certain information to the Director-General of DoCS, designated agencies and authorised carers.

Section 254 of the Act imposes broad restrictions on the disclosure of any information obtained in connection with the administration or execution of the Act. OCCG obtains all of its OOHC information in connection with the administration or execution of the Act.

Section 254(1)(b) enables the Children's Guardian to disclose such information in connection with the administration or execution of the Act or regulations. Having regard to Crown Solicitor's advice, the Children's Guardian relies heavily on its function of promoting the best interests of all children and young people in OOHC in disclosing relevant information to organisations that are not designated agencies.

If the Children's Guardian is satisfied that the disclosure of information is in the best interests of an individual or class of individuals in OOHC, then s181(1)(b) authorises such disclosures under s254.

In the absence of the broad function under s181(1)(b), the Children's Guardian would be restricted in sharing necessary information with the Ombudsman and other agencies.

Supporting research or other work of benefit to those in OOHC

The Children's Guardian, within its budget constraints, initiates or supports the work of other agencies or individuals that has the potential to benefit the OOHC population.

For example, the Children's Guardian recently approached the Royal Australian and New Zealand College of Psychiatry to develop practice guidelines for psychiatrists and mental health professionals working with children and young people in OOHC.

The Children's Guardian took this action in response to recent Australian research that found that a high proportion of children and young people in OOHC have exceptionally poor mental health, resembling "clinic-referred" children and young people in terms of the scope and severity of their problems⁸.

The Project Team responsible for developing the guidelines is chaired by Dr Phil Brock of the College's Faculty of Child and Adolescent Psychiatry. The practice guidelines will be released in 2008.

The Children's Guardian also provides support to ACWA conferences and previously sponsored Professor Richard Barth of the Jordan Institute for Families at the University of North Carolina to visit NSW to give presentations to, and discuss research on residential care with, representatives of the OOHC sector.

The Children's Guardian also sponsors the annual Foster Care Week Gala Picnic for children and young people in OOHC, and provides an information stall at the picnic.

3.3 ENSURING THAT THE RIGHTS OF ALL CHILDREN AND YOUNG PEOPLE IN OOHC ARE SAFEGUARDED AND PROMOTED

Section 162 of the Act requires the Minister to prepare a Charter of Rights for children and young people in OOHC and promote designated agency and authorised carer compliance with the Charter. Designated agencies and authorised carers have an obligation to uphold the Charter.

The Charter of Rights was published in August 2006 and can be accessed through a link on the OCCG website.

The Children's Guardian safeguards and promotes the rights recognised in the Charter by ensuring that they are reflected in the NSW OOHC Standards and mandatory requirements for accreditation and the checklists used in assessing compliance with those Standards and requirements⁹.

The Children's Guardian then requires designated agencies to provide evidence of how they uphold those rights when applying for accreditation or, in the case of agencies in the QIP, when submitting their Annual Progress Reports.

⁸ In particular, see:

- Sawyer, Carbone, Searle, Robinson. *The mental health and well-being of children and adolescents in home-based foster care* Medical Journal of Australia, Vol 186(4), Feb 2007.
- Tarren-Sweeny and Hazell. *The mental health of children in foster and kinship care in New South Wales, Australia*. Journal of Paediatrics and Child Health, 42 (2006): 91-99.

⁹ The checklists detail the "aspects" of each NSW OOHC Standard the Children's Guardian will consider in assessing compliance with each Standard. The aspects for each Standard are listed in the Self-Study Record Book for designated agencies which can be accessed from kidsguardian.nsw.gov.au/accreditation/acc_application.php.

The Children's Guardian's Case File Audit Program also examines case files for evidence of the manner in which designated agencies address certain rights of children and young people in OOHC.

3.4 DEVELOPING CRITERIA FOR THE ACCREDITATION OF DESIGNATED AGENCIES

The Parkinson Review recommended that government and non-government organisations be required to meet minimum standards in order to be accredited as designated agencies¹⁰.

Section 139(2) of the Act provides that the regulations may prescribe the standards with which an applicant for accreditation must comply in order to be accredited as a designated agency.

Clause 36(2) of the Regulation provides that the Children's Guardian is responsible for developing the criteria for accreditation, with the Minister responsible for approving those criteria from time to time on the Children's Guardian's recommendations.

DoCS and the non-government OOHC sector commenced developing the *NSW Standards for Substitute Care Services* before the Parkinson Review commenced, with the final Standards published in 1998.

These Standards were developed as "best practice" standards¹¹ to serve as practice ideals for a voluntary accreditation scheme. The introduction to the *NSW Standards for Substitute Care Services* states:

"It is unlikely that any organisation will currently be achieving all of the standards.... Most agencies will be achieving some of the standards and, over time, will move to achieving them all."¹²

The Children's Guardian commenced work on developing an accreditation system before the legislative provisions addressing accreditation were proclaimed in July 2003. During this development work, it became clear that the OOHC sector favoured the *NSW Standards for Substitute Care Services* underpinning the accreditation regime, given the considerable work that had been put into developing them and their use by a number of agencies in their internal performance monitoring and improvement programs.

However, the Parkinson Review had recommended that accreditation should set the threshold for entry into the OOHC sector and standards used for determining participation in a particular industry are traditionally "minimum standards"¹³.

The Children's Guardian therefore trialled an accreditation program, which assessed the performance of volunteering OOHC agencies against:

- the NSW OOHC Standards, which comprised the 1998 *NSW Standards for Substitute Care Services* and additions addressing residential care; and

¹⁰ Department of Community Services. *Review of the Children (Care and Protection) Act 1987. Recommendations for Law Reform* 1997: 98-99.

¹¹ Department of Community Services. *NSW Standards for Substitute Care Services*. 1998: 4.

¹² Department of Community Services. *NSW Standards for Substitute Care Services*. 1998: 6.

¹³ Le Brasseur, R., R. Whistle and A. Johan. 2002. *Organisational Learning Transformational Leadership and Implementing Continuous Quality Improvement in Canadian Hospitals*. Australian Journal of Management 27(2): 141-162.

- additional mandatory requirements developed by the Children's Guardian, having regard to matters provided for in the Regulation.

The trial confirmed that it would take time for many existing agencies to meet these accreditation criteria.

The accreditation framework needed to meet the OOHC sector's desire to keep the optimum standards, but allow existing OOHC agencies time to demonstrate compliance with all of the standards.

The Minister, on the recommendation of the Children's Guardian, therefore approved the NSW OOHC Standards and mandatory requirements as the criteria for accreditation, but introduced the Transitional Regulation to allow existing OOHC service providers to progressively demonstrate compliance with those criteria over time (discussed at section 3.6 below).

Whilst it took until July 2003 to establish a framework for accreditation and quality improvement that could accommodate the NSW OOHC Standards, setting the standards high has served the OOHC system well and offers greater reassurance about the quality of OOHC services than would be possible under a scheme based on minimum standards.

The accreditation criteria introduced in July 2003 remain in place, although the Children's Guardian has amended the "aspects" of the NSW OOHC Standards over time. The aspects outline the types of evidence the Children's Guardian will be looking for in assessing compliance with each standard or mandatory requirement.

Further information on accreditation criteria and their application is included at sections 3.5-6 below.

3.5 ACCREDITING DESIGNATED AGENCIES

Section 181(1)(e) of the Act provides that the Children's Guardian is responsible for accrediting designated agencies¹⁴, with s245 providing that accreditation decisions are reviewable by the Administrative Decisions Tribunal (ADT).

Accreditation is a structured means of providing recognition of an organisation's performance against relevant standards. Whilst accreditation was originally developed for quality assurance purposes, it is increasingly being used as a driver to promote continuous improvement in the delivery of human services.

Whilst accreditation is commonly used in Australia in respect of health, aged care and child care services, NSW is the only jurisdiction that has established an OOHC accreditation system. The approaches other jurisdictions take to OOHC quality assurance are summarised at section 4.3 of Part B to this submission.

¹⁴ Many other human services accreditation schemes accredit services, rather than organisations. It would not be practical to adopt such an approach for OOHC services as foster, relative and kinship care services are provided by individual authorised carers and a centralised accreditation body cannot accredit each carer. It would be possible to accredit residential care services provided by a single organisation or discrete service hubs of foster care organisations (this would require legislative change and a simplified accreditation system), although there would obviously be resource impacts in adopting such an approach. It is noted that Official Community Visitors under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* focus on "visitable services", which include residential OOHC services, rather than the organisations responsible for providing those services.

The government fully funds the Children's Guardian to administer the accreditation regime, whilst most accreditation systems operate on a user-pays basis. Whilst agencies still incur costs in bringing their policies, procedures and practices into line with OOHC accreditation criteria, the government meeting the costs of assessing agency performance against those criteria is an important hallmark of the NSW OOHC accreditation system.

The Children's Guardian's Accreditation and Quality Improvement Program is the Children's Guardian's principal means of promoting and safeguarding the best interests and rights of children and young people in OOHC.

The NSW OOHC accreditation system commenced operating in July 2003. It is a young "foundation system" and significant improvements can be made to it to benefit both children and young people in OOHC and designated agencies. Recommended legislative and administrative improvements to the Program are outlined at section 4.5 of Part B to this submission.

The Children's Guardian has developed 11 objectives for the Program, having regard to the regulatory framework and consideration of the objectives of other accreditation regimes. The objectives of the Program are to:

- promote the best interests of children and young people in OOHC;
- assist designated agencies to meet standards of care and services for children and young people in OOHC;
- provide a reliable measure of designated agency compliance with accreditation criteria;
- be fair;
- be transparent;
- be uniformly applied across all designated agencies;
- deliver assessment decisions that reflect actual service quality;
- identify gaps between actual practice and best practice;
- provide designated agencies with feedback for improvement;
- provide ongoing monitoring of designated agency performance against accreditation criteria; and
- be viewed by designated agencies and the OOHC sector as a valuable process.

Designated agencies were asked to rate the importance of each objective from 1 to 10, with all but two objectives rated on average between 9 and 10 (those two objectives were still rated as important, with ratings of 8.98 and 7.14).

The Children's Guardian intends to rationalise the current objectives, so that they are expressed as policy outcomes, with objectives separated from principles informing how the Program should be administered.

The NSW OOHc accreditation scheme is unusual in that accreditation (including interim accreditation for participants in the QIP) operates as a licence¹⁵ to provide OOHc services¹⁶. The Children's Guardian, as well as determining entry into the OOHc sector, has a number of other powers common to licensing bodies, including powers to impose and vary conditions of operation, and to remove or suspend an organisation from the OOHc sector¹⁷.

Most accreditation schemes, while employing some of the same mechanisms as licensing (eg: external assessment and audit), operate voluntarily and accreditation is not usually a pre-requisite to provide services¹⁸.

OOHC accreditation operates as a form of licence in a number of Canadian provinces and the Canadian experience has informed the development of many of the proposed reforms to the Accreditation and Quality Improvement Program that are outlined at section 4.5 of Part B to this submission.

The detail of the regulatory framework for OOHc accreditation is set out in the Regulation, which:

- requires organisations to apply to the Children's Guardian for accreditation and provide required information in support of their applications;
- provides that the Children's Guardian may accredit applicants if they satisfy accreditation criteria;
- provides accreditation may be granted for 1, 3 or 5 years;
- allows the Children's Guardian to impose, vary or revoke conditions on an accreditation or the process for accreditation;
- allows the Children's Guardian to suspend or cancel accreditation if an agency ceases to meet accreditation criteria, or fails to comply with an accreditation condition or obligations under the Act or Regulation; and
- provides for ADT review of Children's Guardian decisions concerning conditions on, and suspension or cancellation of, accreditation.

Organisations that wish to provide OOHc may apply to be accredited to provide residential care, foster care (including relative and kinship care), or both¹⁹.

Applicants for accreditation that are not already making arrangements for the provision of OOHc at the time of their application must satisfy the Children's Guardian that they have policies and procedures to support the delivery of appropriate care. Their policies and procedures are assessed against accreditation criteria, being:

- applicable core NSW OOHc Standards that focus on children and young people, their direct experience of care and the carers that support them (there are 31 core standards);

¹⁵ A licence is often described as a "permit to do business which could not be done without the licence" – *Judicial and Statutory Definitions of Words and Phrases*, Vol 5, St Paul, West Publishing, 1904: 4138.

¹⁶ Sections 138 and 139 of the Act provide that only organisations accredited as designated agencies in accordance with the regulations may arrange the provision of OOHc.

¹⁷ Le Brasseur, R., R. Whistle and A. Johan. 2002: 141-162.

¹⁸ Harvey, L. 2004. *The Power of Accreditation: Views of Academics*. *Journal of Higher Education* 26(2): 207-223.

¹⁹ The type of care the agency wishes to provide, and whether it is a government or non-government organisation, determine which NSW OOHc Standards must be met.

- applicable critical NSW OOHC Standards²⁰ that address interagency cooperation and partnerships, and the importance of effective casework (there are 8 critical standards); and
- “mandatory requirements” that have been developed, having regard to designated agency obligations under the Act and Regulation²¹.

Former designated agencies that apply for reaccreditation must also provide evidence of how they have addressed any specified concerns the Children’s Guardian has concerning their former practices²².

The accreditation system allows for applications to progress incrementally, with the Children’s Guardian providing applicants with feedback on where further evidence is required or where changes need to be made to policies, procedures or practices. Applicants may then make necessary changes and submit additional information in support of their applications.

Applications are independently assessed by two OCCG officers, with their assessments independently reviewed by a senior officer who attempts to reconcile any differences between the assessments. A draft report is then provided to OCCG’s Director, Accreditation, who then provides a report and recommendations to the Children’s Guardian. The Children’s Guardian may refer particular issues back to the Accreditation Team or proceed to make a decision that the accreditation criteria are met or not met.

Agencies accredited on the basis of their policies and procedures are subject to conditions of accreditation requiring them to notify the Children’s Guardian immediately after first making arrangements for the provision of OOHC, and to provide the Children’s Guardian with evidence of their practice against the above accreditation criteria within 12 months of first making arrangements for the provision of OOHC. Accreditation for these agencies runs for 3 years.

Agencies that are making arrangements for the provision of OOHC at the time of their application, whether they are interim accredited agencies or accredited agencies that are reapplying for accreditation, are required to provide evidence of policies, procedures and practice relevant to applicable accreditation criteria to be accredited for 3 years.

These existing providers may be accredited for 5 years if they provide additional evidence of compliance with 5 of the 11 significant NSW OOHC Standards, being standards that address organisational management and planning.

The Children’s Guardian generally no longer grants accreditation for one year, but may grant such accreditation to agencies that made arrangements for the provision of OOHC before the commencement of the accreditation scheme and that elected to apply for accreditation, rather than enter the QIP, where their policies and procedures satisfy accreditation criteria. The Children’s Guardian has granted accreditation of this kind to one agency that is the only provider in a remote area of NSW, after having regard to the best interests of children and young people placed with the agency.

²⁰ The Children’s Guardian previously granted accreditation for one year to agencies that were able to meet core standards and mandatory requirements. The Children’s Guardian has ceased this practice and now requires all applicants for accreditation to address critical standards. There is now no real distinction between core standards, critical standards and mandatory requirements and the Children’s Guardian’s review of the OOHC Accreditation and Quality Improvement Program will recommend a rationalisation of the current system for classifying accreditation criteria.

²¹ The mandatory requirements are detailed in the Self Study Report, a copy of which has been provided to the Inquiry and is available at www.kidsguardian.nsw.gov.au/accreditation/acc_application.php

²² The Minister approved this criterion for former designated agency applicants for accreditation in December 2007.

The Children's Guardian recognises compliance with elements of 7 other accreditation systems as evidence of compliance with particular NSW OOHC Standards.

The current accreditation system is entirely document based. The Children's Guardian generally relies on documentation provided by the applicant, but also sometimes considers documentation obtained from other organisations (eg: DoCS or Ombudsman investigation reports), subject to the applicant being afforded procedural fairness in being able to respond to relevant material in such documentation.

Thirty-three non-government agencies, including 9 agencies that have entered the OOHC sector since the accreditation system was established, have now been accredited by the Children's Guardian²³. Accreditation has not been a barrier to new organisations entering the OOHC sector.

3.6 ADMINISTERING A QUALITY IMPROVEMENT PROGRAM (QIP) FOR DESIGNATED AGENCIES

The Transitional Regulation provided interim accreditation to OOHC service providers operating immediately before the accreditation scheme commenced in July 2003. This interim accreditation is limited to the type of care they were providing at the time the accreditation scheme commenced (ie: residential care, foster care, or both).

The Transitional Regulation required interim accredited agencies, by 1 July 2005, to either apply for accreditation under the Regulation or under clause 22C of the Transitional Regulation.

All interim accredited agencies that elected to apply for accreditation under the Regulation have now been accredited or have withdrawn their applications.

Interim accredited agencies that applied for accreditation under clause 22C entered the QIP and must progressively achieve the standard that would entitle them to be accredited as a designated agency by 14 July 2013. An agency's application for accreditation remains pending whilst it is in the QIP.

Clause 22C requires a QIP agency to meet minimum standards determined by the Minister on the recommendation of the Children's Guardian, by dates consented to by both the agency and the Children's Guardian.

The then Minister did not determine any standards needed to be met before the QIP closure date of 14 July 2013, instead requiring QIP agencies to demonstrate annual continuing improvement against accreditation criteria. The Children's Guardian may terminate an interim accredited agency's application for accreditation if it does not demonstrate such improvement.

QIP agencies demonstrate the annual improvement they are making against accreditation criteria by submitting Annual Progress Reports to the Children's Guardian for assessment and feedback.

QIP agencies that are unable to provide annual evidence of practice improvement because they have not had placements must either withdraw from the QIP or apply for accreditation on the basis of policies and procedures alone.

The only other requirement that QIP agencies must meet is compliance with conditions of DoCS/DADHC OOHC funding. The Children's Guardian believes it is questionable that the

²³ 23 agencies are accredited for 5 years, 9 agencies are accredited for 3 years, and 1 agency is accredited for 1 year.

Children's Guardian can take action in respect of funding breaches, given Service Agreements outline processes for addressing such breaches and the Children's Guardian is not a party to such Agreements.

There are currently 24 designated agencies in the QIP²⁴, including both government agencies that arrange the provision of OOHC (DoCS and DADHC).

Three non-government agencies have made recent significant progress towards accreditation and are expected to achieve accreditation in the next 6 to 9 months.

The remaining agencies have demonstrated varying levels of progress and the Children's Guardian has identified priority areas for each agency and is encouraging each agency to develop strategies to address performance in those areas.

The Children's Guardian is liaising with the Centre for Community Welfare Training concerning the provision of training courses that target performance issues identified in the QIP. Children's Guardian feedback reports to agencies have been revised to identify and recommend training courses relevant to particular performance issues.

Section 4.5 of Part B to this submission addresses regulatory changes that the Children's Guardian believes are necessary to address performance concerns about QIP agencies and to preserve the integrity of the QIP.

3.7 MONITORING THE RESPONSIBILITIES OF DESIGNATED AGENCIES UNDER THE ACT AND REGULATIONS

Section 181(1)(e) of the Act provides that the Children's Guardian is responsible for monitoring the responsibilities of designated agencies under the Act and Regulations.

Section 181(1)(d) provides for a more specific monitoring function, requiring the Children's Guardian to examine a copy of the case plan for each child or young person in OOHC and a copy of each report made following the review of the case plan. Section 150(5) of the Act provides for copies of each review report to be provided to the Children's Guardian.

Sections 181(1)(d) and 150(5) have not been proclaimed. The Children's Guardian is of the view that these provisions are unworkable. The originally contemplated individual case monitoring role of the Children's Guardian, and its link to the unproclaimed "special guardian" provisions of the Act, is further considered at section 4.7 of Part B of this submission.

Instead of monitoring every case plan and review, the Children's Guardian has established a Case File Audit Program to review designated agency case files for children and young people in OOHC. This is seen as a more efficient and effective way of monitoring designated agency case management and planning, particularly as case files contain material that informs, but may not be evident on the face of, case plans or reviews.

The Case File Audit examines whether documentation on case files provides evidence of compliance with the Act, Regulations and NSW OOHC Standards. Trained OCCG staff and contractors with OOHC sector experience assess compliance against 54 audit items in the following four key areas:

- file content and structure;

²⁴ One of the Children's Guardian's responsibilities under State Plan Priority F7 is to increase the proportion of accredited designated agencies and reduce the proportion of QIP agencies.

- case plan and plan review content;
- participation of children and young people and other relevant people in plan reviews; and
- application of the Aboriginal and Torres Strait Islander placement and participation principles.

A copy of the 2006/2007 Case File Audit tool has previously been provided to the Inquiry.

It is important to note that the Audit focuses on documentation held on case files, and that there may be undocumented practice that is not captured by the Audit.

This audit of “record keeping” is however the best available indicator of case management and casework practice. There should be a strong correlation between actual practice and documented practice, given the OOHC system’s emphasis on documenting material relevant to case management and planning.

The lack of effective record keeping will also compromise ongoing case management and planning, as caseworkers move on or children and young people in OOHC transition to other placements. If relevant material is not held on file, it cannot be considered in future case management or planning and will not be available to children and young people who are in, or who have been, in care – these people have a right to this information²⁵ and this right will be undermined where poor care records are kept.

The Case File Audit Program has been refined and expanded since the first Audit was conducted in 2004/05. The methodology for each Audit has been developed in accordance with independent advice from PriceWaterhouseCoopers.

The 2004/05 Audit applied to 450 files for children and young people on long term orders under the parental responsibility of the Minister.

The 2005/06 Audit of 748 files applied to files for all children and young people on final orders, and included files where parental responsibility was assigned to the principal officers of specialist Indigenous OOHC agencies.

The 2006/07 Audit of 2,335 files extended to children and young people on interim orders, and provides the first statistically valid audit sample of the whole statutory OOHC population. The 2006/07 Case File Audit establishes a baseline from which future practice across the OOHC sector can be assessed against.

The data in the 2006/07 Audit is considered to be more reliable than in previous audits, as post-Audit interviews were introduced to give agencies the opportunity to identify and correct any omissions of the auditors.

The 2006/07 Audit also responded to non-government agency concerns that previous audits did not have sufficient regard to an agency’s ability to comply with all audit items where DoCS exercised case management responsibility in respect of children and young people placed with a designated agency.

The 2006/07 Audit therefore audited files having regard to whether case management was exercised by DoCS. Where case management responsibility for non-government designated agency placements was exercised by DoCS, the Children’s Guardian audited the files of both DoCS and the designated agency.

²⁵ See Charter of Rights published under s162 of the Act and record maintenance provisions of s160.

This aspect of the audit allows some general conclusions to be drawn about case management and planning under different case management allocation arrangements. Part B of this submission discusses this, along with some key findings of the 2006/07 Case File Audit, designated agency feedback on the value of the Audit process, and the need to maintain an independent audit function in respect of designated agency performance.

The Children's Guardian provides each designated agency with an individual Case File Audit Report following each audit. The Report addresses compliance with each applicable audit item. In keeping with the principles of quality improvement, the compliance threshold is set at 80%²⁶.

This means that where 80% of the files in an agency were assessed as meeting the requirements against a particular audit item, the agency is considered to have met the compliance threshold for that particular item. Where fewer than 80% of files met the compliance threshold, the result is highlighted, and the agency is asked to develop and advise the Children's Guardian of strategies to improve compliance.

As noted above, in 2006/07 the Children's Guardian moved from just providing designated agencies with aggregated Case File Audit data to providing aggregated data and data for each individual case file on a CD-ROM. Designated agencies are now able to use Case File Audit feedback to better identify action that needs to be taken in case management or planning for individual children and young people.

The Children's Guardian's Annual Reports provide high level information about Case File Audit results. The Children's Guardian intends to publish a detailed report on the performance of the OOHC sector in the 2006/07 Audit in the near future.

Section 4.5 of Part B to this submission addresses future changes to be made to the Case File Audit Program.

The Children's Guardian also monitors designated agency responsibilities when they apply for accreditation or reaccreditation. The Annual Progress Reports submitted by QIP agencies also allow the Children's Guardian to monitor agency performance and provide feedback for performance improvement.

The Children's Guardian also imposes conditions on the accreditation of designated agencies. These conditions may require agencies to report on particular issues the Children's Guardian wishes to monitor.

3.8 POLICY DEVELOPMENT AND RECOMMENDATIONS

Statutory guidelines

The Children's Guardian is responsible for developing statutory guidelines that designated agencies must comply with in making certain arrangements for the provision of OOHC.

Compliance with statutory guidelines is monitored through the Children's Guardian's Accreditation and Quality Improvement Program and Case File Audit Program.

²⁶ This threshold was based on *Gore's National Performance Review: Best Practice in Performance Measurement* (1997) which states that the setting of a quality standard with zero tolerance for human error undermines morale and makes goals appear unattainable, particularly where benchmark standards have not been determined and it is not known if 100% compliance is realistically attainable.

Guidelines concerning the disclosure of OOHC placement information

Section 149D of the Act requires designated agencies to have regard to guidelines prepared by the Children's Guardian, in considering the amount and type of placement information to be disclosed to parents and other people significant to children and young people in OOHC²⁷.

The provisions of the Act, which deal with the disclosure of placement information, commenced in March 2007. The Foster Carers' Association (FCA) and Foster Parents' Support Network (FPSN) were strongly opposed to these provisions when they were introduced.

The Children's Guardian developed the Guidelines in consultation with organisations including the FCA, FPSN, Association of Childrens Welfare Agencies (ACWA), Aboriginal Child, Family and Community Care State Secretariat (AbSec), DoCS, DADHC, Privacy NSW and Attorney-General's Department.

The resulting Guidelines balance the legitimate privacy and safety concerns of carers with the interests of parents in having information about the OOHC placements of their children, with the best interests and participation of children and young people in OOHC being central to the Guidelines. The Guidelines were supported by all key OOHC stakeholder groups.

The process of developing the s149D Guidelines is a good example of how the Children's Guardian can act as an "honest broker" in developing policy for the OOHC sector.

Guidelines on the review of placements effected by order of the Children's Court

Section 150(4) of the Act requires designated agencies to conduct reviews of placements effected by order of the Children's Court in accordance with guidelines prepared by the Children's Guardian²⁸.

These Guidelines are central to effective case management and planning.

The Children's Guardian is currently reviewing these guidelines, given changes to the OOHC sector since they were introduced. Consultation with key stakeholders will commence shortly.

Non-statutory guidelines and benchmark policies

The Children's Guardian has also released a number of guidelines that are not required by legislation, but that give guidance as to good practice in particular areas²⁹.

The Children's Guardian has also released benchmark policies³⁰ for each of the NSW OOHC Standards and mandatory requirements, which comprise the criteria for accreditation as a designated agency. These policies provide information on the rationale for each accreditation criterion and inform agencies of the policy areas and content that OCCG expects organisations to address when applying for accreditation.

Recommendations for changes to NSW laws, or for administrative action

Section 187(2)(c) of the Act requires the Children's Guardian's annual reports to Parliament to include recommendations for changes to NSW laws, or for administrative action, that should be made as a result of the exercise of the Children's Guardian's functions.

²⁷ These Guidelines are available at www.kidsguardian.nsw.gov.au/accreditation/acc_guidelines.php.

²⁸ These Guidelines are available at www.kidsguardian.nsw.gov.au/accreditation/acc_guidelines.php.

²⁹ These are also available at www.kidsguardian.nsw.gov.au/accreditation/acc_guidelines.php.

³⁰ These are available at www.kidsguardian.nsw.gov.au/accreditation/acc_policies.php.

The Children's Guardian also makes recommendations relevant to the delivery of OOHC services to the Minister, DoCS, designated agencies and other OOHC sector stakeholders.

The Children's Guardian's recent contribution to policy development relevant to OOHC is outlined in Chapters 4 and 7 of the Children's Guardian's 2006/07 Annual Report, a copy of which has been provided to the Inquiry.

3.9 "SPECIAL GUARDIAN" FUNCTIONS

The Children's Guardian has a range of other functions that are ancillary to the unproclaimed "special guardian" function at s181(1)(a) of the Act. Some of these have been proclaimed because they are included in sub-sections of the Act that address other matters, but remain inoperative in a practical sense.

The Children's Guardian has delegated the following two functions to the Director-General of DoCS, as they relate to the exercise of the Minister's parental responsibility:

- consent to the publication or broadcasting of the name of a child or young person who is involved, or reasonably likely to be involved, in relevant proceedings – function under s105(3)(B)(iii); and
- giving written directions to authorised carers on the exercise of care responsibility and on the religious instruction of children and young people in care – functions under s157(3)-(4).

The functions relevant to the Children's Guardian's originally contemplated "special guardian" role are considered further at 4.7 of Part B to this submission.



NSW OFFICE FOR CHILDREN
**the Children's
Guardian.**

Part B

Submission to the Special Commission of Inquiry into Child Protection Services in New South Wales

1 MANDATORY REPORTING

There has been in excess of 80% growth in reports of children at risk of harm since the reporting provisions of Chapter 3 of the *Children and Young Persons (Care and Protection) Act 1998* ("the Act") took effect in late 2000.

This growth is often attributed to the introduction of new mandatory reporting provisions, with 3 out of 4 child protection reports received from mandatory reporters, with police the largest mandatory reporters.

However, between 2001/02 and 2004/05 the reports from non-mandatory reporters increased at a greater rate than the reports from mandatory reporters³¹, which suggests caution should be exercised in attributing the increase in reports to mandatory reporting arrangements. Reporting levels have increased in other Australian and international jurisdictions, which suggests an increased awareness of child protection issues and a willingness to report concerns.

In considering whether current reporting arrangements are appropriate, the focus should be the relevance of the information provided to child protection intervention, not the rate at which reporting is increasing.

Whilst part of the answer to the growth demands of the child protection system is to increase resources, as has occurred through the introduction of an additional \$617M for OOHC services, consideration also needs to be given to making more efficient use of resources by:

- improving the quality of reporting to minimise the follow up work needed to be done in assessing reports;
- minimising the number of reports that do not require child protection intervention; and
- ensuring that assessment processes operate to minimise unnecessary escalation of child protection interventions and maximise appropriate transitions out of the child protection system.

One way of achieving the first two outcomes above is to transfer greater responsibility for considering risk to the reporter. The current threshold for mandatory reporting is "reasonable grounds to suspect that a child is at risk of harm", whilst other jurisdictions such as Victoria, Queensland, Tasmania and the ACT all require reporters to believe there is a real likelihood of harm.

Raising the reporting threshold in this way would encourage reporters to submit clearer evidence of risk of harm and could reduce reports where there is no clear evidence of harm. This approach would enable DoCS to focus on those cases where the need for intervention is most likely and to transfer some resources to case assessment and response.

The Children's Guardian supports moving towards a "real likelihood of risk of harm" test, subject to the Inquiry being satisfied that mandatory reporters have the capacity to make such assessments.

³¹ Department of Community Services. *Discussion Paper for Review: Statutory Child Protection in NSW – Issues and options for reform*. October 2006: 10

The Children's Guardian also supports the inclusion of neglect as an explicit basis for reporting, the reporting of serious and persistent parental drug use as a behaviour that carries a real likelihood of risk of harm, and reporting matters where there is a cumulative risk of harm.

It is understood that the Inquiry will consider whether reporting should be the responsibility of an organisation, or a particular level of management within an organisation, rather than the responsibility of an individual.

The approaches currently in place within some health settings and under the MOUs with education providers appear to be working well. However, these agencies have a good understanding of children's issues and operate within a professional paradigm that may not be easily replicated in all areas in which mandatory reporters operate.

Further efficiencies may be able to be gained by unit level 'centralisation' of reporting, provided that agency nominees have real capacity to adequately assess reports submitted by individual officers. It is also imperative that any such approach does not lead to delays in critical information being provided to DoCS.

If this cannot be guaranteed, then the individual officers who have direct knowledge of the case should continue to be responsible for mandatory reporting.

The Children's Guardian also suggests the removal of the 200 penalty unit penalty for mandatory reporters who fail to report matters to DoCS. There is a degree of subjectivity in determining whether some matters should be reported, and this will increase if a "real likelihood of risk of harm" test is adopted.

The penalty regime does not sit comfortably with subjective assessment and may encourage some over-reporting, as the penalty was well publicised amongst mandatory reporters when the current provisions were introduced. Attaching criminal penalties for failure to report has certainly led to a culture of police taking a broad approach to reporting, as criminal sanctions carry greater consequences for police than for other categories of mandatory reporter³², as compliance with the law is an inherent requirement of the office of constable.

The system should operate to encourage a culture of mandatory reporters wanting to make appropriate reports for protective reasons, not because they are motivated by caution or fear.

Any failure to comply with section 27(2) of the Act should be able to be adequately addressed within a disciplinary/employee management framework.

³² The Office for Children – the Children's Guardian staff member responsible for preparing this submission was formerly a Policy Manager within the Ministry for Police, with portfolio responsibility for child protection policy.

2 ROLE OF COURTS

2.1 POWER OF THE CHILDREN'S COURT TO ASSIGN PARENTAL RESPONSIBILITY IN CARE PROCEEDINGS

Parental responsibility involves “all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.”³³

The manner in which parental responsibility may be allocated during and after care proceedings is outlined at section 2.2 of Part A to this submission.

Where the Court finds that a child or young person is in need of care and protection, it may make an order allocating full parental responsibility, or aspects of parental responsibility, to:

- a parent (in which case the child or young person is not in OOHC);
- a parent/s and the Minister or others jointly (if the parent has parental responsibility for residence, the child or young person is not in OOHC); or
- another suitable person³⁴.

The Children's Guardian recognises the need for the Court to have broad discretion in allocating parental responsibility to natural persons. The Court frequently assigns parental responsibility to a grandparent, other relative or kinship group member. Children and young people who are the subject of such orders are not part of the OOHC system³⁵.

However, the Children's Guardian is concerned that the Court has made orders under s79(1)(iii) of the Act that allocate parental responsibility to the principal officers of designated agencies. It has done so in the case of at least three specialist Indigenous agencies.

The Minister and DoCS are not responsible for the care provided to children where parental responsibility is allocated to the principal officer of a designated agency, and cannot make decisions concerning that care. Poor care is difficult to detect and address.

The Children's Guardian also has limited power to intervene in such cases, particularly given the agencies allocated parental responsibility are in the Children's Guardian's Quality Improvement Program and the Children's Guardian cannot attach conditions to the interim accreditation of such agencies.

Court orders allocating parental responsibility to the principal officers of designated agencies short-circuit a number of the safeguards that the Act provides for children and young people in OOHC. It is of great concern to the Children's Guardian that one of the agencies where the principal officer was allocated parental responsibility was unable to locate a number of children and young people placed with the agency.

The Children's Guardian's 2006/07 Case File Audit specifically looked at designated agency case planning and case management, evidenced by material recorded on case files, where the Court allocated parental responsibility to the principal officer of a designated agency.

³³ Section 3 of the Act.

³⁴ Section 79(1) of the Act.

³⁵ See s135(2)(a1) of the Act.

Results for Indigenous children and young people under the parental responsibility of a principal officer were compared with those for Indigenous children and young people under other care arrangements.

Indigenous children and young people under the parental responsibility of the principal officer were the least likely to have a case conference convened to support case planning and review, and to have the following information recorded on their case files:

- birth family contact details;
- developmental history;
- current medication and doctor's contact details;
- immunisation status; and
- current and past school reports.

Where Indigenous children and young people were under shared parental responsibility or sole parental responsibility of the Minister, it was more likely that:

- responsibilities of each person or agency would be stipulated in case plans and reviews;
- timeframes for the completion of tasks/actions would be identified; and
- a date for the review of the case plan would be nominated.

The Children's Guardian believes that the Court's allocation of parental responsibility to the principal officers of designated agencies is not in the best interests of children and young people in OOHC.

The Children's Guardian is also aware of suggestions that orders might be sought for parental responsibility to be allocated to an officer of a non-designated agency. The Children's Guardian does not have power to monitor such placements. Such orders would frustrate the intention of the Act, which is that OOHC placements should be supervised by designated agencies that are subject to accreditation and monitoring by the Children's Guardian.

The Children's Guardian acknowledges that some children and young people in OOHC may need to access residential services provided by non-designated agencies (see 3.2.13-18 of Part A to this submission). However, such arrangements can be made in a way that preserves DoCS supervisory responsibility for, and the Children's Guardian monitoring of, such placements.

The Minister has established procedures for the delegation of his parental responsibility (other than the residual powers of guardianship³⁶) to designated agencies. The Minister will only consider delegating such responsibility where the agency has been granted accreditation for 5 years – agencies accredited for 5 years have demonstrated their policies, procedures and practice meet the requirements of the highest level of accreditation granted by the Children's Guardian.

³⁶ Residual powers of guardianship are discussed at section 4.7 of this Part of the submission.

Where the Minister delegates parental responsibility to a designated agency, certain residual powers of guardianship are retained within DoCS and a Deed of Agreement between the Minister and agency details the roles and responsibilities and communication processes between DoCS and the agency³⁷.

The importance of a consistent approach to the exercise of residual powers of guardianship is discussed at section 4.7 below. If the Court allocates parental responsibility to the principal officer of a designated agency, then residual powers of guardianship will also lie with the agency.

The Children's Guardian recommends that s79 of the Act be amended to preclude the Children's Court from making an order allocating parental responsibility to a person, in their capacity as an officer of a body that provides services to children and young people in OOHC.

If an organisation is to be responsible for supervising children and young people in OOHC, then it should be a designated agency that is subject to the accountability requirements of the Act.

2.2 POWER OF CHILDREN'S COURT TO MAKE CONTACT ORDERS

Section 86 of the Act provides for the Court making orders concerning the contact children and young people in care have with their parents, relatives and other significant persons.

Prior to s86 commencing, the Court's power to make such orders was limited to the period during which a case was before the Court. Contact was determined through undertakings between the parties, which were enforceable by the Court, with contact arrangements able to be varied during ongoing case planning and review.

Whilst the ACT and Northern Territory have court ordered contact regimes similar to NSW, in Victoria and Tasmania the court only makes interim or short term orders. In Western Australia, the court is not involved in determining contact.

In recent reviews of contact arrangements in Victoria, South Australia and Western Australia, those states have rejected the NSW model because of concerns that the court process lacks sufficient flexibility to respond to evolving individual circumstances and needs, and the requirement to return to court to vary contact arrangements is cumbersome, costly and can be stressful for children and carers.

The Children's Guardian believes that the Court should be able to make interim orders concerning contact, but that ongoing contact arrangements should be determined through case planning and review, subject to parties having a right for contact arrangements to be reviewed by the Court or other appropriate body.

The review jurisdiction of the Children's Court could be minimised through use of alternative dispute resolution and, possibly, through the Children's Guardian taking on a parental responsibility role in respect to particular contact disputes (see section 4.7 below).

If contact is supported through the case management process, the Act might be amended to require the Children's Guardian to develop statutory guidelines on contact arrangements. The Children's Guardian is already responsible for developing statutory guidelines on the disclosure of placement information to parents of children and young people in OOHC and other significant people.

Such Guidelines would support:

³⁷ To date, only Barnardos Australia has entered into such a Deed with the Minister.

- contact arrangements that support case plan goals and foster permanent and stable placements for children;
- early and effective engagement with birth families and/or carers in relation to contact arrangements; and
- flexibility in contact arrangements, as the needs and circumstances of parties change.

The Children's Guardian could monitor contact arrangements through the accreditation process and Case File Audits and report to the Department and Minister on the integration of contact into case management.

2.3 ROLE OF THE COURT UNDER SECTION 141 OF THE ACT

Section 141(1) of the Act requires DoCS to supervise the placement of a child or young person in OOHC if another designated agency ceases to be able to fulfil its responsibilities in relation to the child or young person.

Section 141(2) provides that immediately after a designated agency becomes aware that it will cease to be able to fulfil its responsibilities to a child or young person, it must make an application to the Children's Court for an order to vary the OOHC arrangements applying to the child or young person.

It is generally DoCS, rather than the Court, that allocates responsibility for a placement to a designated agency.

Under new OOHC Service Provision Guidelines, currently under development, designated agencies will be able to transfer cases to other designated agencies that provide less intensive OOHC services (eg: from intensive foster care to general foster care). DoCS Regions must be informed of such transfers and may make alternative arrangements, if necessary.

It is difficult to see why the Court should have a role under s141(2). Professor Patrick Parkinson, who chaired the 1997 review of NSW care and protection legislation, has previously stated:

"Non-government agencies do not have the infrastructure of legal representation in the Children's Court which the Department has. There is also the issue of what would happen if the Court refuses permission for the change of designated agency yet the non-government agency is not in a position to provide suitable placement options."³⁸

Professor Parkinson further notes, in recommending s141(2) be reconsidered:

"As the needs of a child or young person change, so a non-government agency may find that it cannot meet the needs of that child or young person and must invite the Department, or another non-government agency, to provide a different type of care arrangement. There is a legal obstacle to this, yet the Court has little to offer by way of supervision of these placements and no significant legal rights need to be protected by means of judicial examination of the decision...."

Once a parental responsibility order has been made, the detail of out-of-home care arrangements is properly left to the Government...³⁹

³⁸ Parkinson, P. *The Children's Guardian and Parental Responsibility*, 2003: 10.

³⁹ Parkinson. 2003: 19.

The requirement to apply to the Children's Court may interfere with DoCS promptly fulfilling its responsibilities under s141(1) of the Act, resulting in children and young people being left in placements where they cannot be properly supported.

It is recommended that s141(2) of the Act be amended to remove the requirement for applications to be made to the Children's Court. Instead, the designated agency should be required to notify DoCS, so it can take necessary action under s141(1).

DoCS should be required to notify the Children's Guardian of notifications made under s141(2), so the Children's Guardian can be satisfied that a child or young person has been removed from an unsustainable placement and can consider whether the agency's inability to fulfil its responsibilities to the child or young person has broader implications for the services it is able to offer and its accreditation.

2.4 DIVERSION OF MATTERS FROM CHILDREN'S COURT - CHILDREN'S GUARDIAN'S UNPROCLAIMED "SPECIAL GUARDIAN" POWERS

A number of submissions made to the DoCS Review of the Act identified that proclaiming the provisions of the Act that provide for the Children's Guardian's "special guardian" functions could divert some matters from the more formal and legalistic Children's Court.

NCOSS stated, in its submission:

"If the Children's Guardian had been set up in the way in which it was originally intended, with powers to intervene in individual cases where conflict occurs, or casework needs monitoring and/or review, then this would have provided a valid, independent and expert alternative option to the Court."

Centacare Sydney stated:

"Many of these issues pertaining to contact, supervision and monitoring and review of PR arrangements should sit with the Children's Guardian as an independent review body. This would take the probable inappropriate responsibility of the Children's Courts in essentially reviewing DoCS casework decisions and have it sit with a body of skilled workers in the areas of child protection and OOHC."

The Association of Children's Welfare Agencies (ACWA), in considering the appropriateness of removing powers of the Court in relation to contact orders, stated:

"If the decision were to be one that removed the power of the court to order contact, there would need to be a suitable system of third party scrutiny and review options. This would be an appropriate role for the Children's Guardian had the functions as set out in the 1998 Act been proclaimed."

Both the Legal Aid Commission and Law Society of New South Wales submission identified that proclamation of the Children's Guardian's non-proclaimed functions might provide an alternative avenue for independent external review of some matters.

Whilst the provisions of the Act addressing the Children's Guardian "special guardian" function are currently too broad to be workable, section 4.7 below considers the merits of providing the Children's Guardian with more targeted "special guardian" powers.

3 OUT-OF-HOME CARE

3.1 MANAGING INCREASING DEMAND FOR OOHC SERVICES

The OOHC population has steadily increased over recent years, with there being a significant increase of 20% in 2006/07 (from 10,623 on 30 June 2006 to 12,712 on 30 June 2007). During 2006/07 the statutory OOHC population increased from 6,671 to 8,040⁴⁰.

The increase in the OOHC population cannot be simply attributed to increased child protection reports flowing through the child protection system. The overall OOHC profile has changed and children and young people are generally spending longer in care. For example, between 2001 and 2005, while care periods of up to 2 years significantly decreased there was a dramatic rise in care periods of more than 4 years⁴¹.

Whilst the recent \$617M enhancement for OOHC services is welcome, it was calculated with reference to an OOHC system that is significantly smaller than the current one. The following comment of the 2002 Joint Working Party on NSW DoCS is still relevant today:

"Demand and supply need to be re-defined and measured with greater validity and reliability. The gap between demand and supply can be addressed by increasing resources, or by making structural or process changes, or by some combination of the two. The increase in resources in the absence of structural change is likely to yield little in the way of long term benefit."⁴²

The demands placed on the OOHC sector might be better managed by focusing greater attention on entry into, and exit from, OOHC. Statutory care should only be an option where it is absolutely necessary to promote the best interests of a child or young person.

Demand might be better managed by further developing:

- early intervention systems to provide greater support to families and reduce the need for OOHC services⁴³;
- alternative dispute mechanisms for resolving care arrangements, as provided for in the Act, to avoid care applications, develop consent orders and reduce breakdown in parent/child relationships⁴⁴. Caseworkers should be trained in ADR to support children remaining in the care of their families, where appropriate, and there should be greater use of preliminary conferences in care proceedings;

⁴⁰ DoCS Corporate Information Warehouse Annual Data, provided by DoCS Information and Reporting.

⁴¹ Department of Community Services. 2006: 14 – See also the DoCS June 2005 Report on *Trends of the number of children and young people in out-of-home care in NSW*, which showed a reduction in entries into care each year between 1998 and 2003, but the total care population increasing in each of those years.

⁴² Joint Working Party on NSW Department of Community Services - *Demand for DoCS Services and Management of the Intake and Casework Process*. 2002: page x. of Executive Summary.

⁴³ It is pleasing that additional non-government agencies have been funded to provide Family Preservation Services through the recent EOI process

⁴⁴ NSW Ombudsman. *Discussion Paper: Care Proceedings in the Children's Court*. January 2006: 10-11 suggests alternative dispute resolution is rarely used, particularly in country areas.

- the focus on restoration and permanency planning, with greater use of adoption for children in long term care where restoration has been assessed as not being viable⁴⁵
 - adoption has considerable advantages over long-term foster care, with adopted children assessed as having higher levels of emotional security, sense of belonging and general well-being⁴⁶.

Further pursuit of these approaches may reduce the number of children and young people in OOHC. A number of other approaches for managing OOHC demand are discussed below.

3.2 THE IMPACT OF INCREASING DEMAND

The Children's Guardian has noted the impact of increased demand on some non-government designated agencies. The expansion of some non-government OOHC services has occurred at such a rapid rate that necessary infrastructure and organisational systems have not been in place to support the quality of care the organisations wish to provide.

The impact of increasing demand is probably felt most acutely within DoCS. Non-government agencies are better able to limit demand for their services – they cannot be forced to take more children and young people than they are funded to provide care for. Ultimately, funding arrangements with DoCS place a cap on demand for a non-government agency's services.

However, DoCS is the "provider of last resort". It must make arrangements for all children and young people who enter the OOHC system, itself providing care for roughly two thirds of the OOHC population. It must also assume responsibility for children and young people supported by non-government agencies if those agencies are unable to fulfil their responsibilities to those children or young people⁴⁷.

The inability of DoCS to effectively control demand reduces its ability to plan workload and workforce needs. This directly affects the scope and quality of services that it is able to provide to children and young people in its care.

3.3 DOCS OOHC SERVICE AND FUNDING REFORM

It is important to acknowledge recent positive reforms to the OOHC system, including:

- recent enhanced funding of \$617M;
- increased use of non-government agencies in providing OOHC;
- the development of new evidence-based models of care that draw on Australian and international best practice and clearly articulate the program objectives and expected outcomes of each model;
- the development of clearer service specifications for OOHC and Service Level Agreements which will underpin funding agreements;

⁴⁵ In the United Kingdom, there is parallel planning of OOHC and adoption services. In NSW, the systems remain largely separate, although the Barnardos Australia Find-a-Family Program integrates long term OOHC and adoption services. DoCS' Adoption and Permanent Care Services arranges adoptions where this has been assessed as appropriate through the case planning process, and there now appears to be an increasing focus on adoption as an option for NSW children in long term care.

⁴⁶ Triseliotis, J. *Long-term foster care or adoption? The evidence examined*. Child and Family Social Work. 2002, 7: 23-33.

⁴⁷ See s141(1) of the Act.

- the development of comprehensive OOHC Service Provision Guidelines, which will provide OOHC agencies with the core policy and operational framework for delivering OOHC services;
- the introduction of Performance Based Contracting to support a casemix performance based approach to funding, and the development of costing tools to enable service costs to be better identified;
- the further transfer of case management responsibility to non-government agencies;
- encouraging agencies to form consortia to provide a suite of integrated OOHC services that support transitions through care; and
- a stronger emphasis on the need for OOHC support services.

These reforms should assist in developing and organising the OOHC service system, leading to an improved range of integrated OOHC services that are able to better match services to the needs of children and young people. They will also allow DoCS to strengthen its focus on managing demand.

3.4 EXPANDING THE NON-GOVERNMENT OOHC SECTOR

The Children's Guardian supports an increased role for non-government agencies in the provision of OOHC services. A reduced service provision role for DoCS should enable it to better manage demand and develop service and funding systems that promote the best interests of children and young people in OOHC.

The non-government sector has a strong ingrained child and family focus, given the influence religious and other charitable institutions have played in developing philosophies of care. They are smaller and often more closely connected to local communities than DoCS can be and they generally have simpler leadership and governance structures that support locally based decision making. As noted above, non-government agencies are also better able to control and plan workload and workforce needs.

The Children's Guardian's 2006/07 Case File Audit also provides clear evidence of the relative strengths of non-government service provision and the level of support non-government agencies are able to provide to children and young people in OOHC. Results of the Case File Audit Program, which is summarised at section 3.7 of Part A of this submission, are discussed throughout this section.

It is important to note that Case File Audits focus on documentation held on case files, and that there may be undocumented practice that is not captured. However, the Audit is the best available indicator of case management and casework practice and there should be a strong correlation between actual practice and documented practice.

Supervision of children and young people in OOHC

DoCS' OOHC policies and procedures satisfy the criteria for accreditation and form a sound basis for quality OOHC practice.

However, the size of the DoCS supervised OOHC population and the demands this places on DoCS means that practice is variable and some children and young people do not receive the same level of support they would receive from a non-government agency.

In 2002, the Legislative Council Standing Committee on Social Issues noted some children and young people under DoCS case management did not have allocated caseworkers⁴⁸. A 2002 Ombudsman's Report was critical of DoCS record keeping practices and found DoCS casework files were hard to follow and contained inadequate records⁴⁹.

Since 2002, DoCS has increased the number of DoCS caseworkers, upgraded its entry level casework qualification and provides 40 days of entry level training to new caseworkers. These reforms should, over time, see improvements to the extent and quality of DoCS casework.

Despite these improvements, cases still remain unallocated within DoCS, which means that the immediate and longer term needs of these children and young people cannot be known or actively addressed⁵⁰.

DoCS caseloads, which are significantly higher than those of non-government agencies, mean that even where cases are allocated, contact between caseworker and child may be infrequent⁵¹. Non-government agencies are better able to control their caseloads, because demand is set with reference to funding, not the size of the OOHHC population.

The 2002 Report of the Legislative Council Standing Committee on Social Issues stated:

"Feedback to the Committee is that casework is better and more participatory in non-government out-of-home care providers, and that this is directly related to the respective caseloads of DoCS and non-government organisation staff."⁵²

Case File Audit Findings

The 2006/07 Case File Audit allows some conclusions to be drawn about case management and planning in the OOHHC sector.

There have been improvements to DoCS case files since the Ombudsman's 2002 Report. In the 2006/07 Audit, DoCS met or exceeded the 80% compliance threshold for recording of information regarding child and family details and placement and developmental history, DoCS decision makers attending case conferences, carers and significant others being invited to attend case conferences, and current reviews for interim orders being on case files.

DoCS has responded positively to the 2006/07 Case File Audit by requiring CSCs to remediate individual files in areas where non-compliance with audit items was identified.

Notwithstanding this positive progress, the 2006/07 Case File Audit supports earlier findings that children and young people in non-government agency care are likely to benefit from more informed and comprehensive case support than children and young people in DoCS care.

Non-government agency case files generally demonstrated higher levels of compliance than DoCS case files across the four key Audit areas. It should be noted that this is a general finding and in some areas DoCS performed better than some non-government designated agencies – there was also considerable variability across DoCS Regions.

The Case File Audit findings about the comparative quality of DoCS and non-government agency case files should not be seen as a criticism of the many hard-working, competent and

⁴⁸ Legislative Council Standing Committee on Social Issues. *Care and Support – Final Report on Child Protection Services*. December 2002: 103.

⁴⁹ Ombudsman. *DoCS – Critical Issues: Concerns arising from the investigations into the Department of Community Services*. April 2002: 14.

⁵⁰ Legislative Council Standing Committee on Social Issues. 2002: 103

⁵¹ This finding of the Community Services Commission in its July 2000 Report, *Voices of Children and Young People in Foster Care* (p5), is still relevant today.

⁵² Legislative Council Standing Committee on Social Issues. 2002: 109.

committed DoCS caseworkers – it is a comment about the demands the OOHC system places on those caseworkers.

DoCS acknowledges that there is likely to be a significant number of unallocated files in the sample of DoCS case files reviewed in Case File Audits and that the lack of allocated caseworkers limits the casework and support services it is able to provide. To the extent that some DoCS cases remain unallocated, this will colour the overall performance of DoCS in meeting Case File Audit compliance thresholds.

The Children's Guardian will seek additional information as to caseworker allocation for each case file in future Audits. This will allow the Children's Guardian to monitor the extent to which children and young people in OOHC have allocated caseworkers and allow comparisons to be drawn between the case file content of allocated and unallocated cases.

Expanding the non-government OOHC sector

The transfer of additional responsibility to the non-government sector, consistent with the direction set by the 2007 Expression of Interest (EOI) process, will need to be carefully managed over a number of years so that responsibility does not outstrip capacity.

If this direction is pursued, the proportion of children and young people in OOHC who receive a consistent level of service will increase, as funding can be tied to a particular casemix population. Building the capacity of the non-government sector to support additional OOHC placements will promote the best interests of children and young people in OOHC.

3.5 TRANSFERRING ADDITIONAL CASE MANAGEMENT AND PARENTAL RESPONSIBILITY TO THE NON-GOVERNMENT SECTOR

Parental responsibility involves “all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.”⁵³

Case management is the process of assessment, planning, implementation, monitoring and review.⁵⁴ Where an agency has case management responsibility for a child or young person under the parental responsibility of the Minister, the agency has aspects of the Minister's parental responsibility delegated to it so it can make decisions relevant to the care of the child or young person.

Case management is distinguished from casework, which involves the practical day to day involvement with children, young people, their carers and families. Casework activities can be shared between service providers⁵⁵. Agencies involved in casework also have certain decision making powers delegated to them.

As the provisions of the Act conferring the Minister's parental responsibility on the Children's Guardian have not been proclaimed, DoCS has retained responsibility for delegating responsibility for decision making to the non-government sector. The Children's Guardian does not believe it would be appropriate for the Children's Guardian to assume responsibility for delegating decision making powers, for the reasons outlined at section 4.7 below.

There are a number of different arrangements for the allocation of decision making responsibility in respect of children and young people in OOHC:

⁵³ See s3 of the Act.

⁵⁴ Department of Community Services. *Case Management Policy*. 2007: 3.

⁵⁵ Department of Community Services. *Case Management Policy*. 2007: 4.

- The child or young person is placed with DoCS, with DoCS responsible for casework, case management and exercising all aspects of the Minister's parental responsibility;
- The child or young person is placed with a non-government agency, and that agency is responsible for casework, case management and exercising the Minister's parental responsibility, except for residual powers of guardianship which lie with DoCS⁵⁶;
- The child or young person is placed with a non-government agency, and that agency is responsible for casework and case management, with DoCS exercising the Minister's parental responsibility;
- The child or young person is placed with a non-government agency, and that agency is responsible for casework, with DoCS responsible for case management and exercising the Minister's parental responsibility;
- The child or young person is placed with a non-government agency, and that agency is responsible for the placement, with DoCS responsible for casework, case management and exercising the Minister's parental responsibility.

The Children's Guardian's experience has been that where DoCS has case management responsibility for a non-government placement, there is the potential for role confusion, decisions not being made, delays in decision making, and gaps in OOHC service delivery. It also contributes to some DoCS/non-government agency double-handling, which is not an efficient use of limited OOHC resources, and has prevented some non-government agencies from delivering services in accordance with their own program objectives.

The 2007 DoCS *Case Management Policy* outlines the responsibilities of DoCS and non-government agencies under particular parental responsibility, case management, casework and placement arrangements. This is an excellent resource and it is hoped it will resolve some of the uncertainties that have traditionally accompanied arrangements where DoCS and a non-government agency share responsibilities for a child or young person in OOHC.

Case File Audit Findings

The 2006/07 Case File Audit suggests children and young people are likely to benefit from non-government agency case management.

Non-government agencies with case management responsibility were more likely to have case conferences convened to support case planning and review, consider contact arrangements, invite the child or young person and their mother to attend case reviews, have mental health reports and review behaviour management and the use of psychotropic medication, and commenced preparation for leaving care⁵⁷. They were also more likely to identify timeframes for reviews and the completion of tasks, and stipulate the responsibilities of each person or agency.

The current DoCS direction of transferring case management responsibility to non-government agencies, supported by funding through the 2007 EOI process, is endorsed. Further devolution of case management responsibility should free up DoCS resources, which can be allocated to those cases where DoCS is responsible for the placement.

⁵⁶ To date, only Barnardos Australia has been allocated parental responsibility beyond case management. Residual powers of guardianship are further discussed at section 4.7 below.

⁵⁷ It should be noted that DoCS has increased the focus on leaving care and after care support since the 2006/07 Case File Audit, including releasing a service model on Supported Independent Living and funding non-government agencies to provide after care support through the recent EOI process.

Consultation between DoCS and the Children's Guardian on case management transfer

While agencies accredited by the Children's Guardian should have the capacity to take on case management responsibility, the Children's Guardian is concerned that some agencies in the Quality Improvement Program currently lack this capacity.

The Children's Guardian has encouraged DoCS to consider Children's Guardian reports addressing agency performance when making decisions concerning funding and roll-out of case management responsibility, but it is not clear to the Children's Guardian the extent to which DoCS uses this information in making its decisions.

Whilst there are frequent discussions between the Children's Guardian and DoCS senior management as to designated agency performance and capacity, there is no formal structured consultation process associated with decisions to delegate case management or broader parental responsibility to other designated agencies.

The 2003 Paper to the Ministerial Advisory Council, which recommended DoCS retain responsibility for exercising and delegating the Minister's parental responsibility, noted that *"Delegation would be done in consultation with the Office of the Children's Guardian."*⁵⁸

The Children's Guardian believes that the consultative process committed to in 2003 will be best given effect by amending the Act to require the Director-General of DoCS to consult with the Children's Guardian before aspects of the Minister's parental responsibility, including aspects associated with case management, are delegated to a designated agency.

3.6 EXPANSION OF OOHC SUPPORT SERVICES

When DoCS published details of new models of OOHC in 2007, it emphasised the importance of providing support services to children and young people in OOHC and their carers. Support services improve placement stability and quality, and the developmental, emotional, and physical well being of children and young people in OOHC⁵⁹.

Some support services are provided by government agencies, such as DADHC, NSW Health, the Department of Education and Training, and the Department of Juvenile Justice. DoCS has MOUs with such agencies that outline how services will be provided to children and young people in OOHC.

With the increased transfer of case management responsibility to the non-government sector these other government agencies will need to establish links with a broader range of non-government providers, instead of dealing largely with one government agency.

DoCS has considered this issue, with its preferred approach being a non-government agency with case management responsibility acting as an agent of DoCS under DoCS' MOUs with other government agencies. DoCS will liaise with other government agencies if a non-government agency is unable to secure appropriate support services in this way.

This approach is supported, but the devolution of case management to the non-government sector will inevitably increase complexity within the OOHC system, as some PANOC workers have already advised the Children's Guardian. The manner in which government agencies adapt to a less DoCS focused OOHC system needs to be carefully monitored.

⁵⁸ *Parental Responsibility Functions in OOHC – A Paper prepared for the Ministerial Advisory Committee* 2003: 8.

⁵⁹ Department of Community Services. *Out-of-home care wraparound support services for children and young people*. 2007: 2.

Non-government agencies may also provide support services and it is pleasing that the recent EOI process has resulted in increased use of agencies in providing health care assessments, supervised contact and after-care support.

Support through respite care

The Children’s Guardian believes that respite care is an important support service, for both children and young people in care and their carers. Without access to respite, retention of carers may be adversely affected, placement stability may be jeopardised, and the continuity of care threatened.

Further respite supports need to be provided for children and young people in OOHC.

The Children’s Guardian is concerned that the current carer authorisation requirements of clause 20 of the *Children and Young Persons (Care and Protection) Regulation 2000* (“the Regulation”), which preclude designated agencies from authorising carers who are officers of third party organisations, may restrict designated agencies in accessing respite services.

There is a sizable respite sector that currently provides voluntary OOHC services. While there are only 57 designated agencies, DADHC funds 176 respite providers.

The Children’s Guardian, following consultation with peak OOHC and carer organisations, has recommended to the Minister that the Regulation be amended to enable designated agencies to authorise carers attached to non-designated organisations to provide respite care for children and young people in OOHC. Parliamentary Counsel’s Office is currently preparing draft regulations and a copy will be provided to the Inquiry, when available.

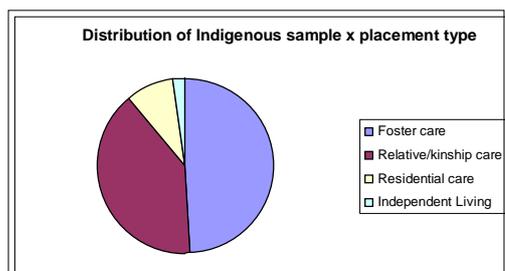
3.7 INDIGENOUS CHILDREN AND YOUNG PEOPLE IN OOHC

Indigenous children and young people are significantly over-represented in the OOHC system. As at 30 June 2006, 28.5% of the OOHC population identified as Indigenous⁶⁰.

Case File Audit findings

The Children’s Guardian’s Case File Audit focuses on children and young people in statutory OOHC. Indigenous children and young people comprised 24.79% of the total 2006/07 Audit sample. 73% of designated agencies participating in the Audit were responsible for supervising Indigenous children and young people.

Substantially more Indigenous children and young people in the Audit sample (39.90%) were in relative or kinship placements, compared to their non-Indigenous counterparts (25.40%). The following graph illustrates the placement arrangements of Indigenous children and young people in the 2006/07 Audit sample.

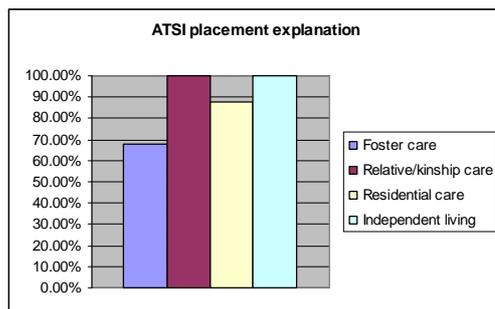


⁶⁰ NSW Department of Community Services. *Child Protection Quarterly Data July 2005 - September 2006*. 2007: 12

The 2006/07 Case File Audit considered whether case files provided evidence of:

- Indigenous children and young people being placed in accordance with the ATSI Placement Principles;
- arrangements being made for Indigenous children and young people to maintain continuing contact with their community and culture.

Recording of placement decisions was also considered and the following table summarises documentation of explanations for Indigenous placements by care type.



Agencies were less compliant in terms of documenting:

- arrangements for continuing contact with Indigenous community in foster care and independent living; and
- efforts to enable reunion with family/community in non-Indigenous placements in foster and relative/kinship care.

The non-government sector generally demonstrated greater compliance with the ATSI Placement Principles than DoCS. However it is noted that non-government agencies with case management generally had more compliant files in the areas of file content/structure, participation and plan/review content, for non-Indigenous children and young people.

In placements with DoCS, or non-government agencies where DoCS had case management, case files for Indigenous children and young people were more likely than those for non-Indigenous children and young people to have higher levels of compliance for file contents/structure and participation, and cultural/religious issues were given greater consideration in case planning and review. This suggests that DoCS is giving additional priority to Indigenous placements.

Consistent with the findings of the *Overcoming Indigenous Disadvantage Key Indicators 2007 Report*⁶¹, the Children's Guardian considers that for Indigenous children and young people, it is particularly important for agencies to:

- maintain current and comprehensive health and education records;
- prioritise participation in age appropriate education;
- prioritise regular health checks and immunisation catch up programs;
- include discussion of education and health needs at every case review;

⁶¹ www.pc.gov.au/gsp/reports/Indigenous/keyindicators2007/index.html

- develop collaborative relationships with family, community representatives and other professionals to support their participation in the case planning process.

The outcomes for Indigenous children and young people under the parental responsibility of the principal officer of a designated agency were discussed at section 2.1 above.

Support for specialist Indigenous OOHC agencies

It is important that government support and resource specialist Indigenous OOHC agencies. One of the priorities under State Plan Priority F7 is **Building the capacity of, and improving the quality of services provided by, specialist Aboriginal OOHC agencies.**

There are currently nine specialist Indigenous designated agencies, seven of which are currently providing OOHC services. One of the nine agencies has been accredited by the Children's Guardian – it is a new provider and is yet to receive any placements.

The remaining agencies are participating in the Children's Guardian's Quality Improvement Program (QIP). Six of the agencies with current placements are being supported by DoCS, through its Capacity Building Project, with the other agency being a very small OOHC provider. The Capacity Building Project funds a consultant to work with the agencies to develop their services and improve their capacity.

The Children's Guardian, in consultation with the Aboriginal Child, Family and Community Care State Secretariat (AbSec) and specialist Indigenous agencies, has developed a preferred approach to accelerate specialist Indigenous agencies towards accreditation.

The Children's Guardian has developed individualised programs to assist four of these agencies address specific performance issues relevant to accreditation criteria within identified quarterly timeframes. Support strategies include regular on-site visits and workshops to provide individual feedback. The Children's Guardian aims to negotiate similar programs with the remaining two agencies involved in the Capacity Building Project.

It is recommended that DoCS increase its capacity building activity with Indigenous agencies and consideration should be given to funding AbSec to employ an officer responsible for working with the specialist Indigenous agencies in achieving accreditation.

The Children's Guardian has also supported specialist Indigenous agencies by developing a *Caring for Aboriginal and Torres Strait Islander Kids Resource*⁶².

The Children's Guardian intends to make other changes to the Accreditation and Quality Improvement Program ("AQI Program") that should improve the process for specialist Indigenous agencies, including allowing evidence of practice to be provided in non-documentary form and involving Indigenous people in panel assessments of Indigenous agency applications for accreditation.

3.8 PARTICIPATION OF CHILDREN, YOUNG PEOPLE AND SIGNIFICANT OTHERS IN OOHC PLANNING

One of the key principles that underpins the Act is that children and young people should be given an opportunity to express their views and those views should be taken into account when making significant decisions that affect them⁶³.

⁶² See OCCG website at www.kidsguardian.nsw.gov.au/accreditation/acc_application.php

⁶³ See sections 10 and 9(b) of the Act.

The Charter of Rights for children and young people in OOHC⁶⁴ provides that children and young people in OOHC have the right to take part in making important decisions that affect their lives⁶⁵. The NSW OOHC Standards emphasise the importance of involving children, young people, their families, carers and significant others in decision making and case planning.

The Children's Guardian's statutory guidelines for reviewing placements of children and young people in court ordered OOHC (s150 guidelines) provide that agencies should ideally convene a case conference to develop case plans or conduct case reviews.

Designated agencies are expected to make reasonable efforts to include all appropriate relevant people in the decision making process. The participants should have a choice in how they participate – either by attending the case conference, or by having their views obtained and recorded as part of the process.

Findings of the Children's Guardian's Review Questionnaire

In 2007 the Children's Guardian issued a Questionnaire to current and former participants in the AQI Program. Agencies were asked how participation in the Program has affected the quality of the OOHC their agency provides for children and young people.

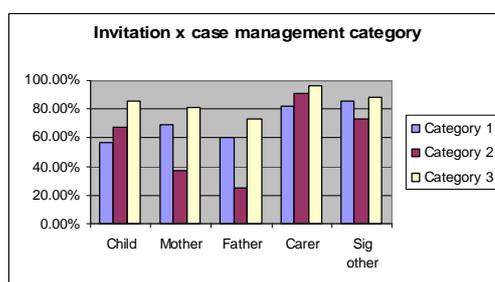
One of the major themes in the responses to the Questionnaire was that involvement with the Program had improved the participation of children, young people and others in decision making relevant to care. Agency responses are detailed at Attachment B to this submission.

Case File Audit findings

Notwithstanding improvements in participation, the 2006/07 Audit suggests many agencies still have a way to go in supporting appropriate participation in case planning and review.

Only three quarters of files (72.85%) had a current plan or review under s150 of the Act. Of these, only two thirds (68.68%) showed that a case conference was convened for the development or review of the plan.

In the table below, category 1 relates to DoCS files for DoCS placements, category 2 relates to DoCS files for agency placements where DoCS retains case management, and category 3 relates to agency placements where the agency has case management.



It is very disappointing that rates of inviting children and young people to participate in case reviews are so low. Designated agencies need their practices to reflect the rights of children and young people to participate in the making of significant decisions that affect them.

⁶⁴ The Charter of Rights is provided for under s162 of the Act. Designated agencies and carers have an obligation to uphold the rights conferred by the Charter.

⁶⁵ Department of Community Services. *Charter of Rights* June 2006: 1.

If participants did not attend the case conference, non-government agencies were more likely to record reasons and alternative methods of obtaining the person's views. However, performance in these areas did not meet compliance thresholds.

While a case conference was convened for eight out of ten placements in non-government agencies where DoCS had case management responsibility, it was most likely to only consist of a meeting between representatives of DoCS and the agency. Where levels of participation were low, the results for content of case plan/review were correspondingly low.

3.9 THE IMPORTANCE OF CONNECTIONS FOR CHILDREN AND YOUNG PEOPLE IN OOHC

Mason and Gibson, through joint research conducted by the Social Justice and Social Change Research Centre and UnitingCare Burnside⁶⁶, point to the importance of connections for children and young people in OOHC. They report that children and young people need connections with people who they know and/or have something in common. They emphasise the need for continuity of these connections and note that an important person in a child or young people's life can be a birth parent, sibling, friend, carer or worker.

The Children's Guardian recognises the significance of connections for children and young people in OOHC and that fostering and maintaining connections can contribute to placement stability. This, along with the health and education needs of children and young people in OOHC, is one of the priorities for the Children's Guardian. Future Case File Audits will focus more strongly on practice relating to acknowledgment and maintenance of connections.

3.10 HEALTH OF CHILDREN AND YOUNG PEOPLE IN OOHC

Children and young people in OOHC are more likely than members of the general population to have high levels of acute and chronic health problems and/or developmental issues.

Designated agencies are required to maintain comprehensive health records to meet the ongoing health needs of children and young people in OOHC.

Case File Audit findings

The 2006/07 Case File Audit shows that:

- non-government agency files are significantly more likely than DoCS files to hold information on doctor's contact details, known medical problems, medication details and immunisation status;
- non-government agency files where DoCS has case management were the only category of agency to meet the 80% compliance threshold for recording details of current medication;
- health records are less likely to be available for children and young people in relative/kinship care⁶⁷ - given Indigenous children and young people are more likely to suffer from a range of chronic health problems, the quality of health records for children in relative/kinship care is a concern that needs to be proactively addressed;

⁶⁶ Social Justice and Social Change Research Centre, University of Western Sydney and UnitingCare Burnside: *Developing a model of out-of-home care to meet the needs of individual children*.

⁶⁷ This is consistent with comments made by the Royal Australian College of Physicians in its *Health of Children in Out of Home Care Paediatric Policy*.

- children and young people in non-government placements are more likely to have immunisation records, or evidence of attempts to find immunisation records, on their case files;
- all categories of agency failed to meet immunisation record compliance thresholds, apart from non-government agency case files for children aged eight or less, where the agency had case management responsibility.

It is of concern that children and young people, particularly those who are nine years or older, appear to be missing out on scheduled vaccines. In view of the Audit findings and in line with expert advice⁶⁸, the Children's Guardian considers that designated agencies should:

- check vaccination status as soon as possible after entering care;
- obtain vaccination records, wherever possible;
- if vaccination is incomplete or records are not available, consult with a medical practitioner to arrange for an age-appropriate catch up course of vaccination;
- include discussion of immunisation status when reviewing health needs at every case review.

Mental health and behaviour management issues

Recent Australian research has found that a high proportion of children and young people in OOHc have exceptionally poor mental health, resembling "clinic-referred" children and young people in terms of the scope and severity of their problems.

The Children's Guardian has approached the Royal Australian and New Zealand College of Psychiatry to develop practice guidelines for psychiatrists and mental health professionals working with children in care. The practice guidelines will be released later this year.

The 2006/07 Case File Audit found that non-government agencies were more likely to have a current psychological/psychiatric report on file to inform case planning and review.

The Children's Guardian is concerned that, across the board, consent arrangements for the use of psychotropic medication in behaviour management were not adequately reviewed.

In September 2006, DoCS revised its procedures for the development of behaviour management plans and the use of psychotropic medication for children and young people in OOHc. The procedures state that when developing a behaviour management plan, a psychologist or relevant skilled professional with expertise in behaviour management must be consulted. Where psychotropic medication is used, the consent of the Director Child and Family of the relevant DoCS Region must be obtained.

It is anticipated that the impact of this direction on the use of psychotropic medication will become apparent in future Case File Audits.

There is a need for a more integrated approach to mental health assessment, management and support in the OOHc system.

Recent positive reforms

There have been a number of positive reforms since the 2006/07 Case File Audit was conducted, including:

⁶⁸ The National Health & Medical Research Council *Australian Immunisation Handbook 8th Edition*.

- Catholic Health Care has been selected through the EOI process to provide health assessment services for children and young people in DoCS care;
- DoCS has issued guidelines that emphasise the importance of the NSW Health *Personal Health Record for Children* ("the Blue Book") being obtained and moving with children and young people through the care system;
- the draft OOHC Service Provision Guidelines require comprehensive health, developmental, and mental health/behavioural assessment within 60 days of children and young people entering OOHC;
- the MOU between DoCS and NSW Health is being reviewed and NSW Health is developing a mental health service plan for children and young people that targets service provision in OOHC.

Children's Guardian focus on OOHC health issues in 2008/09

In light of the Children's Guardian's concerns about satisfactory health planning and management for children and young people in OOHC, the 2008/09 Case File Audit will focus specifically on practice related to meeting the health needs of children and young people in OOHC. This will include the health related information recorded on case files, the monitoring of immunisation catch-up programs, the use of psychotropic medication and accompanying behaviour management plans, and the extent to which planning around health needs is incorporated into case planning and review.

The Children's Guardian will also update s150 guidelines to include further information about the consideration of health and immunisation issues in placement reviews.

3.11 CHILDREN AND YOUNG PEOPLE IN OOHC WITH DISABILITIES

The Children's Guardian is concerned that the provisions of the Act regulating voluntary OOHC, other than temporary care arrangements arranged by DoCS, remain unproclaimed.

This means there is limited monitoring of, and accountability for, the quality of care provided to children and young people in voluntary care. This is a particular issue for children and young people with disabilities who require care outside the family home.

The unproclaimed s155 of the Act provides for the Children's Guardian monitoring such care arrangements and formulating procedures addressing intake, assessment and inter-agency coordination in voluntary care.

DoCS has consulted the Children's Guardian and DADHC on a more targeted regulatory framework for voluntary care, which is considered necessary because of the breadth of arrangements captured by the current provisions.

Some disability service providers also provide OOHC to children and young people in statutory care. These providers need to meet both OOHC and disability standards. This can be challenging, particularly for small agencies. However, Caringa Enterprises, the Sunnyfield Association and Lifestyle Solutions show that disability service providers can accommodate the NSW OOHC Standards in a disability services framework and achieve accreditation.

3.12 EDUCATION OF CHILDREN AND YOUNG PEOPLE IN OOHC

Children and young people in OOHC are more likely to perform at levels below that of the general school population and are less likely to complete high school⁶⁹.

The NSW OOHC Standards address education of children and young people in OOHC⁷⁰.

Case File Audit findings

Agencies are required to maintain current information about progress at school, and to regularly monitor and review the educational needs of children and young people in their care.

The 2006/07 Audit measured compliance with recording details of school reports on case files and evidence of education issues being considered in reviews.

Non-government agency files were significantly more compliant than DoCS files. Whilst over two thirds of DoCS placement plans/reviews addressed educational issues, only 30% of those files contained past school reports and only 20% had recent school reports.

Education records were less likely to be available for Indigenous children and young people and children and young people in relative/kinship care (there is a correlation between these two groups). This needs to be remedied.

Children and young people in OOHC require targeted assistance to help them access and remain in age appropriate education. The Children's Guardian considers that designated agencies should:

- Prioritise participation in age appropriate education;
- Develop collaborative relationships with other agencies and professionals to promote participation in education;
- Maintain current education records for each children and young person;
- Include discussion of educational needs at every case review.

The Children's Guardian will update the s150 guidelines to include further information about consideration of educational requirements at case review.

3.13 INFORMATION EXCHANGE AND INTER-AGENCY COOPERATION IN OOHC

A number of non-government agencies have raised concerns with the Children's Guardian that DoCS does not provide them with sufficient information to provide optimum care. Some agencies made similar comments to DoCS as part of the current review of the Act⁷¹.

⁶⁹ See Townsend. M. Centre for Children and Young People, Southern Cross University: 2006 for research on barriers to educational success for children and young people in OOHC.

⁷⁰ In particular, see Standard 3.5.

⁷¹ For example, Centacare submitted DoCS officers were often reticent to give necessary information to the agency, which delays appropriate placement arrangements. Wesley Dalmar advised it had experienced occasional difficulty in obtaining information about the background of children who have come into its care, arguing it was essential that OOHC agencies have this information if they are to be able to take the child's history into account when matching them with future carers.

The Ombudsman has raised concerns that s248 of the Act restricts effective inter-agency cooperation as it allows DoCS to share relevant information with certain prescribed bodies, but does not support those bodies sharing information with each other.

The Children's Guardian regards the current restrictions in s248 as unsustainable, particularly as case management responsibility is being increasingly transferred to non-government agencies. Non-government agencies will also be able to transition children and young people to other care arrangements without DoCS involvement in some cases. Information will need to be transferred with the child or young person.

The Ombudsman has recommended a more open approach to sharing information, with any "prescribed agency" able to supply information to other specified agencies where the supply of information relates to the safety, welfare and well-being of children or young people.

The Children's Guardian believes that some highly sensitive categories of information may need to be restricted, with their dissemination regulated by DoCS, but that as a general rule agencies involved in supporting children in the care and protection system should be able to exchange information with each other.

Legislation might be amended to provide for such arrangements, with sensitive categories of information protected. The Privacy Commissioner might also consider a Privacy Code of Practice in this area.

4 ROLE OF THE CHILDREN'S GUARDIAN IN THE NSW OOHC SYSTEM

4.1 INTRODUCTION

This section of the submission:

- outlines a brief history of OOHC quality regulation in NSW;
- OOHC quality regulation in other Australian jurisdictions;
- considers whether the Children's Guardian's existing functions are appropriate and have had a positive impact on children and young people in OOHC;
- outlines legislative or administrative changes that could be made to improve the operation of those functions;
- examines whether any of the Children's Guardian's unproclaimed functions are required in current or modified form; and
- considers accountability arrangements for the exercise of the Children's Guardian's functions.

4.2 A BRIEF HISTORY OF OOHC QUALITY REGULATION IN NSW

The current Children's Guardian's Accreditation and Quality Improvement Program (AQI Program) should be understood in the context of the historical regulation of the NSW OOHC sector.

In NSW, there has always been a focus on fostering, with a relatively small proportion of children and young people in residential care. The government has also always been a major provider of OOHC services. These two factors resulted in there being limited regulation of the OOHC system for most of the 20th century.

The *Child Welfare Act 1939* only regulated the small non-government residential OOHC sector, where homes provided care to children under 7 years of age⁷². At the time, child welfare operated within a strong health paradigm and quality was considered in the context of the physical care environment and health and hygiene.

The 1939 framework for regulating non-government OOHC agencies remained largely unchanged for almost fifty years.

NSW commenced regulating foster carers in 1966⁷³, but it was not until 1982, when the government expanded funding for non-government OOHC services⁷⁴, that legislation was

⁷² Penglase, J. 1999. *Orphans of the Living The Home Children NSW 1939-1965*. PhD Thesis. Macquarie University.

⁷³ Valentine, B. *Licensing Accreditation and Quality Improvement*. The Australian Journal of Public Administration, vol. 66. 2007: 238.

⁷⁴ Association of Childrens Welfare Agencies. 2003. *Background Information on child welfare in NSW*.

introduced to regulate non-government agencies that arranged and supported foster care (the *Community Welfare Act 1982*).

However, the *Community Welfare Act 1982* was never proclaimed and non-government agencies arranging foster care were not regulated until the commencement of the *Children (Care and Protection) Act 1987*.

The 1987 Act provided the first comprehensive framework for the regulation of OOHC in NSW, with private fostering agencies required to be authorised and residential care services required to be licensed by DoCS. Whilst the authorisation and licensing regime gave consideration to the quality of OOHC, the quality framework was rudimentary.

During the 1990s, the government withdrew from the licensing and authorisation of services funded under the DoCS Substitute Care Program, on the basis that funding agreements were sufficient to regulate these services. The problem with this approach was that DoCS funding agreements did not have a significant quality focus, with service delivery issues generally involving decisions about resources⁷⁵.

The problems associated with DoCS regulating OOHC quality were canvassed in both the 1992 Report of the Ministerial Review Committee established to review substitute care services in NSW ("the Usher Committee") and again in the 1997 Review of the *Children (Care and Protection) Act 1987*, chaired by Professor Patrick Parkinson ("the Parkinson Review"). Both reviews concluded that there is an inevitable tension between DoCS' role in managing resources and always acting in the best interests of children and young people.

Both reviews recommended the establishment of an independent Special/Children's Guardian for reasons including the separation of the government funder from the body responsible for ensuring the quality of those services.

The 1997 Royal Commission into the New South Wales Police Service – The Paedophile Inquiry also found there was a need for a "special guardian" function.

The Parkinson Review also recommended the establishment of a standards based accreditation scheme⁷⁶. Importantly, the Review recognised that DoCS should be subject to this regulatory regime, particular as it was the major provider of OOHC in NSW:

"If the Department is to continue to be a major provider of substitute care services, then there needs to be a means of ensuring that it, along with all the other agencies, meets the same standards and is accountable outside of its own organisation for the quality of those services."⁷⁷

The *Children and Young Persons (Care and Protection) Act 1998* ("the Act") provided for the Children's Guardian being responsible for accrediting government and non-government designated agencies (see sections 3.5-6 of Part A of this submission for information on how the standards based OOHC accreditation scheme operates). It also provided for the Children's Guardian exercising the special guardian function proposed by the Usher Committee, 1997 Royal Commission and Parkinson Review, although the provisions dealing with this function remain unproclaimed.

In 2000, PriceWaterhouseCoopers prepared a Regulatory Impact Statement to the draft *Children and Young Persons (Care and Protection) Regulation 2000* ("the 2000 RIS")⁷⁸.

⁷⁵ Ministerial Review Committee (NSW). 1992. *A report to the Minister for Health and Community Services, the Hon. John P Hannaford, MLC, from the committee established to review substitute care services in NSW*: 52-55.

⁷⁶ Department of Community Services. 1997: 98-99.

⁷⁷ Department of Community Services. 1997: 99.

⁷⁸ PriceWaterhouseCoopers. 2000. "*Children and Young Persons (Care and Protection) Regulation 2000 Regulatory Impact Statement*".

The 2000 RIS found the proposed regulatory regime for accreditation had the following benefits, when compared to alternative options:

- ensuring a minimum and consistent level of quality care is provided to children and young people;
- the provision of a benchmark from which service providers may refer;
- a process which is transparent;
- enforceability via legislation.

The 2000 RIS considered each of the following alternative regulatory options to the proposed mandatory accreditation regime to be lacking in transparency, accountability and enforcement provisions⁷⁹:

- no regulation of designated agencies;
- designated agency self regulation;
- voluntary accreditation for designated agencies;
- negative licensing of designated agencies; and
- conditional funding of designated agencies.

The 2000 RIS stated:

“A regulatory strategy that lacks any capacity to impose penalties or sanctions (other than the withdrawal of funding) may have serious limitations and do little to enhance the care and protection of children and young people”⁸⁰,

and concluded:

“... the current conditional funding regime is unable to provide the enforcement mechanisms that a statutory regime can provide to attempt to ensure the care and protection of children and young people.”⁸¹

The first Children’s Guardian was appointed in January 2001 and the AQI Program was trialled with volunteers before the legislation requiring mandatory participation in the Program commenced in July 2003. The legislation is broadly consistent with the provisions considered in the 2000 RIS.

The increased regulation of OOHC in NSW over the last two decades is reflected in other Australian and international jurisdictions. This trend has grown out of a desire to:

- Manage risks inherent in OOHC
- Raise the quality of OOHC services; and
- Make the OOHC system more accountable⁸².

⁷⁹ PriceWaterhouseCoopers. 2000: 16-24.

⁸⁰ PriceWaterhouseCoopers. 2000: 24.

⁸¹ PriceWaterhouseCoopers. 2000: 42.

⁸² Tilbury, C. *The Regulation of Out-of-Home Care* British Journal of Social Work. 2006: 1.

The NSW OOHC accreditation and quality improvement system is consistent with these broad regulatory objectives.

While DoCS conditional funding is an important element of any OOHC regulatory system, it is not sufficient, for the reasons already outlined. A conditional funding regime for statutory OOHC was in place before the establishment of the AQI Program and did not satisfactorily address quality issues in the OOHC sector or demonstrate a real capacity to drive improvements in systems of care for children and young people. In the current context of an overburdened OOHC system, such a regime would be insufficient to guarantee continued and future quality improvement within the OOHC sector.

The Children's Guardian believes that an independently administered AQI Program for both government and non-government OOHC providers should be maintained. If quality assurance and improvement activity against standards becomes second nature for all OOHC providers, future consideration could be given to a different regulatory model.

4.3 QUALITY REGULATION IN OTHER AUSTRALIAN JURISDICTIONS

The following summarises responsibility for OOHC funding, service provision and regulation in Australia:

- In NSW the Children's Guardian is the independent regulator that determines entry into the OOHC sector. DoCS both funds and provides OOHC, with the non-government sector responsible for approximately one-third of children and young people in OOHC.
- In Queensland, South Australia and Victoria the Department is a regulator, funder and provider. Government care provision is on a very small scale in Victoria and less than 50% in the remaining jurisdictions.
- The ACT is the only jurisdiction where the government is not a care provider. The ACT Department funds OOHC services and monitors these through funding agreements.
- In Tasmania, the Northern Territory and Western Australia, the Department provides OOHC and funds non-government services, monitored through funding or service agreements that have a limited quality focus. In Tasmania and the Northern Territory, contracting of non-government services is limited.

OOHC Standards now have practical application in NSW, Queensland and Victoria. South Australia has recently developed Alternate Care Standards that will cover government and non-government OOHC and form the basis for a new licensing framework.

In Queensland, the Department of Child Safety licenses OOHC services. It approves and monitors providers against 11 OOHC standards. Licensing is a 5 stage process that can result in a license being refused or granted with standard conditions or with additional conditions. The licensing assessment function is outsourced to an independent, external agent in Queensland, while responsibility for final approval of the license remains with the Department of Child Safety.

In Victoria, the *Children, Youth and Families Act 2005* requires community services funded to provide OOHC services to be registered. In Victoria, most providers are non-government services and government services do not come under the regulatory scheme. New Standards for Community Service Organisations (CSOs) have been gazetted and services must meet these standards to obtain registration. The registration process is a three year cycle. For two of the three years, each CSO must undertake an internal review of performance against the

standards, as part of a continuous improvement process. During the third year, an external re-registration review will be undertaken (this has not yet occurred).

In Tasmania, Departmental funding agreements with individual agencies specify conditions and reporting requirements. These agreements are reviewed annually. Two concurrent projects examining child protection services are underway. One will be considering regulation and quality improvement in OOHC.

In the Northern Territory, OOHC is mainly arranged through the Department of Health and Community Services. Where non-government services are engaged, performance is addressed in funding agreements. There are no standards for OOHC service provision at present, but it is possible that they will be developed now that new legislation is in place. A quality assurance scheme is currently under consideration.

In line with the *National Plan for Foster Children, Young People and their Carers (2004-2006)*, Australian Ministers with community and disability services responsibilities approved OOHC National Standards between 2005 and 2007 in the following areas:

- Recruitment of foster carers;
- Training of foster carers;
- Assessment of foster carers;
- Transition planning for children and young people in foster care; and
- Core information that should be provided to children and young people and foster carers about children/young people at the point of placement.

It was considered that National Standards would encourage those jurisdictions that do not have a well established standards regime to introduce standards.

The Children's Guardian has benchmarked the NSW OOHC Standards against the National Standards. The NSW Standards are generally consistent with, and in some cases more comprehensive than, the National Standards.

In summary, Australian jurisdictions are moving towards a standards based regulatory framework for OOHC, with some jurisdictions applying standards to government service provision and/or introducing independent assessment of compliance with standards.

4.4 IMPACT OF THE AQI AND CASE FILE AUDIT PROGRAMS ON OOHC SERVICES

The establishment of the AQI and Case File Audit Programs have improved standards within OOHC agencies, providing for improved and more consistent levels of service for children and young people in OOHC.

The AQI Program has been of particular importance in improving outcomes for children and young people in the care of agencies that had no quality assurance or improvement framework before the AQI Program commenced.

The positive impact of the Programs is demonstrated by:

- Improved compliance with the NSW OOHC Standards and other accreditation criteria;
- Designated agency responses to the Children's Guardian's 2007 Questionnaire on the AQI Program;

- Auditor views on changing focus of case files and designated agency responses to the Case File Audit Survey.

Improved compliance with NSW OOHC Standards and other accreditation criteria

Agencies accredited by the Children's Guardian have demonstrated that they meet relevant NSW OOHC Standards, which were originally developed as optimum standards, rather than minimum standards commonly used in licensing regimes.

The rate at which OOHC agencies are achieving accreditation has steadily increased since the AQI Program was introduced in June 2003, with:

- 1 agency accredited as at June 2004;
- 9 agencies accredited as at June 2005;
- 18 agencies accredited as at June 2006;
- 30 agencies accredited as at June 2007;
- 33 agencies accredited as at February 2008.

24 of the 33 accredited agencies were OOHC providers before the AQI Program commenced. All of those agencies have made improvements to their policies, procedures and practices to achieve accreditation.

The 24 agencies remaining in the Quality Improvement Program (QIP) have each demonstrated annual improvement against the NSW OOHC Standards and mandatory requirements.

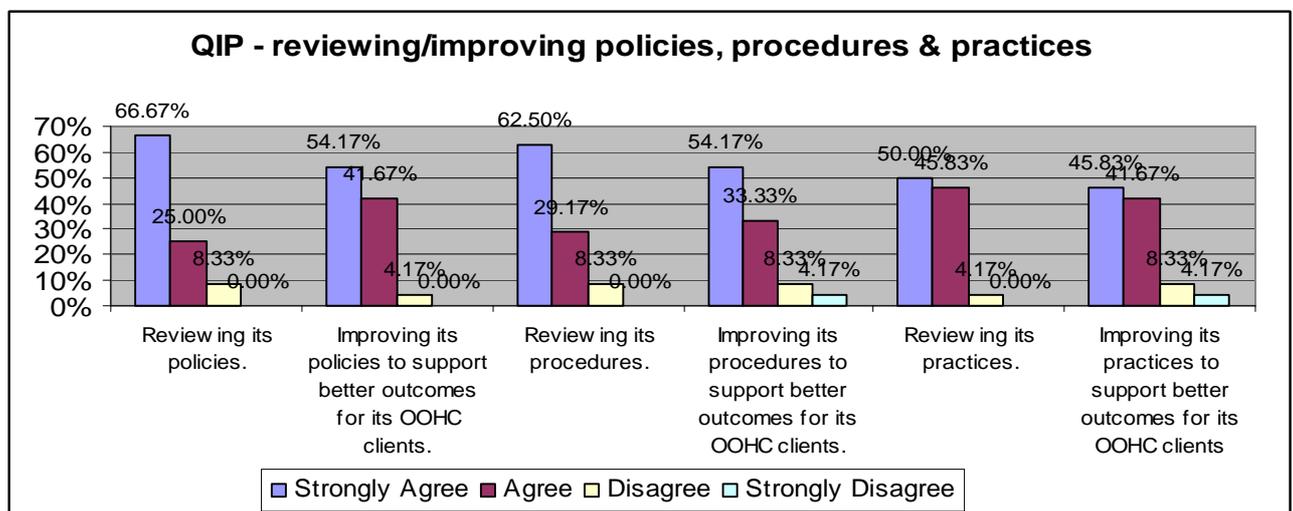
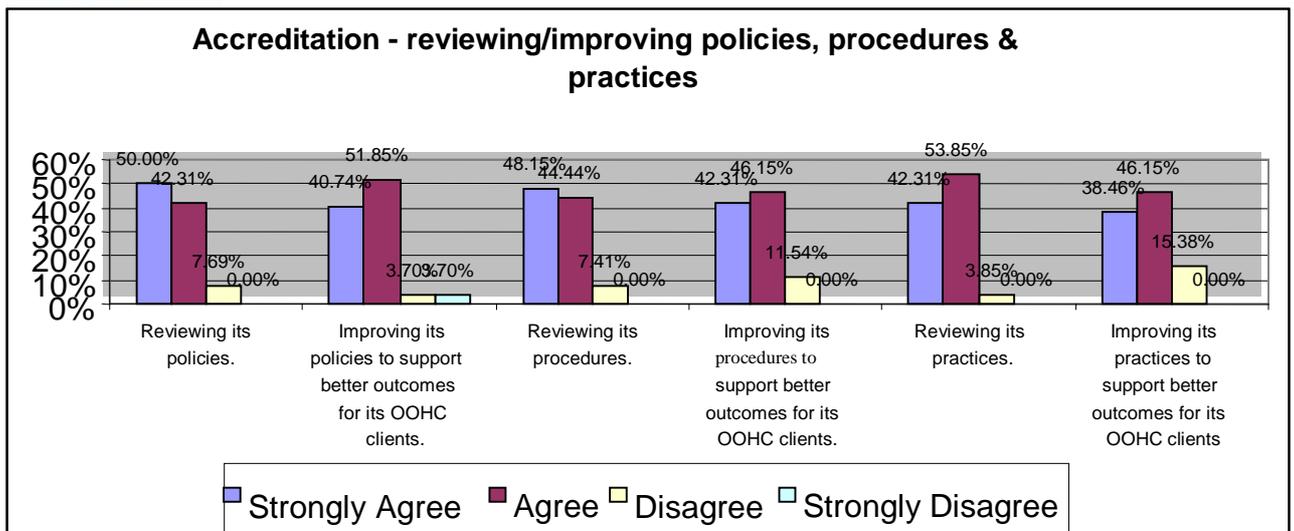
Designated agency responses to 2007 Questionnaire on the AQI Program

The Children's Guardian recently initiated and conducted a Review of the AQI Program. As part of the Review, the Children's Guardian issued a Questionnaire to all agencies that have ever participated in the Program or applied for accreditation. The Children's Guardian received 52 responses to the Questionnaire, with 88% of then accredited agencies and 72% of agencies then participating in the QIP responding.

The responses of OOHC agencies and the Association of Childrens Welfare Agencies (ACWA) to the Review Questionnaire demonstrate strong OOHC sector support for the AQI Program, although they also identify a number of areas where the Program might be improved.

The responses show approximately 40% of pre-existing OOHC providers had no internal programs for reviewing and improving their policies, procedures and practices before the Program was established.

The Questionnaire asked agencies whether the Program had resulted in them reviewing their policies, procedures and practices and improving their policies, procedures and practice to support better outcomes for OOHC clients. Agencies could strongly agree, agree, disagree, or strongly disagree about the impact of the Program in the above areas. The responses to the Questionnaire, broken down by accreditation and QIP streams, is summarised below:



Disagreement does not necessarily equate to lack of support for the Program, but sometimes reflected an agency's assessment that it had good systems in place before the Program commenced.

Whilst there was a strong general consensus as to improvements in policy, procedure and practice, the greatest improvement is seen at the policy level. This is not surprising, as it takes time for policy change to translate to the procedure and practice level, and agencies in the QIP still need to demonstrate improvement against the NSW OOHC Standards, particularly at the practice level.

Agencies were also invited to comment on how participation in the Program has affected the quality of OOHC they provide. The responses, which are included in full at Attachment B, suggest the Program has resulted in:

- more child-focussed policies, procedures and practices;
- agencies developing their own internal quality assurance/improvement programs, supported by self-monitoring;
- greater consistency of practice across agency programs;
- improved agency documentation and systems;

- improved and more highly structured agency case management and casework;
- improved agency understanding of the reasons why certain documentation is needed to support quality practice;
- increased participation of children, young people and their families in OOHC decision making;
- increased attention being given to support services for children and young people (eg: in areas of health and education);
- improvements to behaviour management and leaving care arrangements; and
- improved staff/carer training and development.

Overall, the OOHC sector views the Program positively and believes it has led to improvements in practice and in the quality of OOHC services provided to children and young people.

Auditor views on changing focus of case files and responses to the Case File Audit Survey

The Children's Guardian's 2006/07 Case File Audit Program, summarised at section 3.7 of Part A to this submission, suggests that accredited agencies, and those QIP agencies applying for accreditation, have greater levels of compliance with case management and planning standards than agencies in the QIP. This result, whilst not surprising, demonstrates the value of accreditation in improving standards.

Since the Case File Audit was introduced, OCCG auditors have noticed a marked shift in the focus of material held on case files. At the time of the first Audit, many case files focused largely on funding arrangements. Over time, this focus has shifted and case files now generally focus on the needs of the child or young person.

As part of the 2006/07 Audit Program, the Children's Guardian issued a Survey seeking feedback from the 50 agencies that participated in the Audit. 31 agencies completed the Survey. Agency feedback in response to the Case File Audit Survey is detailed at Attachment C to this submission. In summary:

- all respondents found preparing for the Audit very helpful or fairly helpful;
- 93% of respondents rated the Audit tool content as very good or fairly good;
- 94%⁸³ of respondents used the Audit results to improve casework practice;
- 97% of respondents used the Audit results to change other aspects of their operations;
- 80% of respondents used the Audit results to report to their Board;
- 94% of respondents used the Audit results to tell staff how the agency is performing;
- 58% of respondents used the Audit results to undertake research.

⁸³ Minor variations in percentages in this summary are attributed to some respondents not answering all questions.

Some respondents commented on the 80% compliance threshold, particularly where they had a small number of children and young people placed with them and an omission on one case file could bring them under the threshold.

The Children's Guardian's view is that the 80% compliance threshold serves as a guide to agencies on where they might improve performance and that both the Children's Guardian and agency would be expected to take small sample sizes into account in drawing conclusions about performance against the compliance threshold. The Children's Guardian does not publish individual agency results or impose sanctions as a result of a compliance threshold not being met. On this basis, the 80% threshold serves as a useful guide, particularly where data is aggregated to assess sector performance.

In summary, feedback from the OOHC sector suggests that the Case File Audit is a valuable process for monitoring and improving designated agency performance.

It is strongly recommended that the Children's Guardian's current monitoring function continues to be independently exercised.

4.5 LEGISLATIVE AND ADMINISTRATIVE CHANGES TO IMPROVE THE AQI AND CASE FILE AUDIT PROGRAMS

The NSW OOHC accreditation and quality improvement system commenced operating in July 2003. It is a young "foundation system" and significant improvements can be made to it to benefit both children and young people in OOHC and designated agencies. The Children's Guardian initiated a Review of the accreditation and quality improvement system because:

- OOHC agencies, whilst generally supportive of the system, had made a number of suggestions as to how it might be improved;
- it was a foundation system and the intention always was to review it in light of operational experience;
- OOHC agencies are required to review their policies and procedures every three years and it is appropriate that the Children's Guardian does likewise; and
- the United States Council on Accreditation system, which informed the development of the NSW system, had been improved since 2003.

Legislative improvements to the Accreditation and Quality Improvement Program

The review process has identified a number of legislative changes that are required to make the Program more effective, efficient, easy to use, and accountable.

In October 2007, the Children's Guardian provided the Minister with the first volume of the Report on the Review⁸⁴, which made recommendations for legislative reform to the Program that have been supported by ACWA, AbSec, DoCS, DADHC, and Barnardos Australia, which was consulted as it is the first agency scheduled to reapply for accreditation. The Foster Care Association and Foster Parents' Support Network were consulted on, and support, the proposed reforms that directly impact on carers. The Attorney-General and Administrative Decisions Tribunal (ADT) support the proposed expansion of the Children's Guardian's decisions that are subject to ADT review.

The Minister approved the drafting of regulations to address the Report recommendations and a copy of the Report was subsequently provided to the Inquiry. Parliamentary Counsel's

⁸⁴ Children's Guardian. *Review of Out-of-Home Care Accreditation and Quality Improvement Systems and Processes – Review Report Volume 1 – Recommendations for Regulatory Reform*. October 2007.

Office is currently preparing draft regulations and a copy will be provided to the Inquiry, when available.

The drafting process has identified that some of the recommendations in the Report can be simplified, and others addressed by alternative means⁸⁵. However, the draft regulations will generally give effect to the recommendations in the Report⁸⁶.

In summary, the major proposed legislative reforms are designed to:

- Move the Program away from the current pass/fail model to a Program that will allow agencies to be conditionally accredited where they substantially satisfy the criteria for accreditation. Agencies will have 12 months from accreditation to address any minor performance issues, consistent with accreditation operating within a quality improvement framework. This will also promote the Children's Guardian focussing on areas of risk, consistent with best practice principles in regulation;
- Strengthen the regulatory framework for the QIP, including more closely integrating regulatory arrangements for QIP agencies with those that apply to accredited agencies and agencies applying for accreditation. It is also proposed that the Children's Guardian can impose reasonable conditions on the continued participation of agencies in the QIP, where the Children's Guardian believes on reasonable grounds that an act or omission of the QIP agency may adversely affect the safety, welfare and well-being of a child or young person;
- Provide additional flexibility as to when accreditation decisions must be made and take effect, and allow the Children's Guardian to restore accreditation;
- Distinguish between new providers accredited on the basis of policies and procedures and established providers who have also demonstrated that their practices satisfy accreditation criteria – new providers will be granted "provisional accreditation" until such time as they demonstrate their practices satisfy accreditation criteria;
- Allow the Children's Guardian to reduce a period of accreditation, as an additional option to cancelling or suspending accreditation, with reductions to be reviewable by the ADT;
- Allow the Children's Guardian to cancel, suspend or reduce a period of accreditation where a designated agency fails to comply with a lawful direction to provide the Children's Guardian with information, or provides information knowing it to be false or misleading in a material particular;
- Allow the Children's Guardian to enter designated agency premises and do specified things to support a move towards accreditation assessments that rely less on designated agencies providing documentary evidence to the Children's Guardian – and to ensure the privacy of children and young people and carers; and
- Integrate a Children's Guardian administered probity regime for the principal officers of designated agencies into the accreditation system.

⁸⁵ For example, the Act need not be amended to establish a new offence of knowingly providing false and misleading information to the Children's Guardian. Instead, the Children's Guardian can take administrative action to ensure that the false and misleading information provisions of Division 3 of Part 5 of the *Crimes Act 1900* apply.

⁸⁶ The Children's Guardian intends to make minor amendments to the Report, to reflect the issues identified through the drafting process, before publishing the Report on the OCCG website.

Administrative improvements to the Accreditation and Quality Improvement Program

The Children's Guardian is currently considering a number of administrative improvements to the Children's Guardian's OOHC accreditation and quality improvement systems and processes. A number of administrative reforms identified during the review process have already been implemented.

The following summarises some of the administrative reforms that the Children's Guardian has identified as being appropriate:

- OCCG priority setting to be informed by risk management approach – OCCG has, until recently, offered the same level of support to all applicants for accreditation. It is now offering more individually tailored programs to specialist Indigenous agencies (see section 3.7 above) and other agencies where particular risks have been identified.
- Strengthening the OCCG focus on performance, with less focus on conformance and compliance – stronger recognition of agency innovation and greater flexibility in the application of aspects of the NSW OOHC Standards.
- Greater OCCG use of conditions of accreditation in promoting compliance with the NSW OOHC Standards and other accreditation criteria.
- Updating and streamlining the NSW OOHC Standards and associated aspects, in collaboration with the OOHC sector – there is the potential to reduce duplication in the current Standards, provide for higher level standards that can better accommodate different models of care, reflect recent evidence based research, provide a stronger outcomes focus, and ensure that relevant matters that are addressed in the DoCS Performance Monitoring Framework and Good Practice Guidelines are reflected in the Standards⁸⁷.
- Building quality improvement principles into the NSW OOHC Standards to improve integration of quality assurance and improvement activity into designated agency governance (this approach has been taken by the Australian Aged Care Standards and Accreditation Agency Ltd).
- Adopting a better weighting approach, to reflect the relative importance of standards and associated aspects to the experience of children and young people in care (precise weighting model to be determined after standards updated).
- Better alignment of the Program to different case management arrangements, to better reflect the different responsibilities of agencies under those arrangements.
- Allowing evidence of compliance to be presented/gathered in different ways – eg) obtaining direct evidence through site visits and discussion with agency staff and others, rather than just requiring documentation.
- Introducing Accreditation Plans, to be settled by OCCG and agencies at the start of the accreditation process, so that there is a common understanding as to the timeframe for submitting different types of evidence and guidance as to the most appropriate way of providing evidence (OCCG has already progressed down this path in developing tailored programs for some agencies).

⁸⁷ The Children's Guardian is satisfied that the current NSW OOHC Standards are generally compatible with the DoCS Performance Monitoring Framework and Good Practice Guidelines, although some minor changes will be needed to promote full alignment.

- Recognising that the officer responsible for advising an agency on accreditation requirements should ideally also be involved in assessment – the previous policy of separating advisory and assessment functions sometimes resulted in inconsistent advice being provided and meant that assessors were not so familiar with some agency policies, procedures and practices.
- Integrating Official Community Visitor reports for residential services into accreditation assessment processes, reducing the evidence residential services are required to provide – this is dependent on the *Community Services (Complaints, Reviews and Monitoring) Act 1993* being amended and agreement on suitable arrangements being settled with the Ombudsman (this issue will be discussed further in the Children's Guardian's separate submission on the way the Children's Guardian's functions inter-relate with those of other "oversight" agencies).
- Streamlining the number of OCCG levels of assessment, with OCCG assessors to prepare a joint submission (rather than separate submissions) to an Assessment Panel comprising the Director, Accreditation and Children's Guardian and, in some cases, an independent expert⁸⁸ (for example, in assessments dealing with specialist Indigenous agencies or disability service providers).
- Aligning Children's Guardian quality reporting tools (eg: Annual Performance Reports) with reporting under the DoCS Performance Monitoring Framework, where possible – ideally agencies should be able to provide one report that meets both DoCS/Children's Guardian requirements, or integrate reports to DoCS into Annual Performance Reports or applications for accreditation.
- Allowing agencies that have demonstrated they have built standards based continuous quality improvement activity into their normal processes to reapply for accreditation based on self-assessment, supported by an OCCG compliance audit for a sample of standards (agencies would still need to report on changes made during the accreditation period, and provide evidence of compliance with any accreditation criteria that have changed during that period).
- Strengthening of OCCG's education and communication activity on accreditation and quality improvement, supported by stronger partnerships with ACWA, AbSec, the Centre for Community Welfare Training, DoCS and DADHC.

There is no doubt that meeting the requirements of the Program is more challenging for relatively small agencies or agencies that predominantly provide specialist services (eg: specialist disability services). This message comes through very clearly in designated agency responses to the Review Questionnaire and is supported by OCCG experience.

Whilst a number of small and specialist agencies have demonstrated they can meet the criteria for OOHC accreditation, the Inquiry may wish to consider the establishment of a moderately resourced Quality Care Fund, that could provide funding to assist appropriate smaller and specialist agencies achieve the standard required for accreditation. DoCS has recently ventured down this path in providing funding to assist specialist Indigenous agencies build their capacity. Continued access to funding should be dependent on quality focused performance benchmarks being met.

⁸⁸ The Review has considered a peer review assessment model. However, the number of OOHC providers is relatively small and has decreased over recent years. As a consequence of the recent EOI process, the OOHC sector may be further concentrated, with a smaller number of agencies supporting larger numbers of children and young people in OOHC. Competition between agencies for funding, and the grouping of agencies in cooperative consortia arrangements, may also limit the number of industry assessors who would be regarded as impartial. Whilst peer review has many advantages, it should not be reconsidered until after the non-government OOHC sector has had an opportunity to settle further.

It would not be appropriate for the Children's Guardian to administer such a fund. Any such fund should be administered by DoCS/DADHC.

The AQI Program should continue to be supported through government funding. Transferring the full costs of accreditation and quality improvement to the non-government sector, with fees levied on a user-pays basis, as occurs in most other accreditation systems would compromise the ability of many agencies to maintain or improve the quality of their OOHC services.

Future improvements to the Case File Audit Program

The Case File Audit Program has been refined over time and adjustments will continue to be made as issues arise. The feedback provided by agencies has already led to a number of significant improvements being made (see section 3.7 of Part A of this submission).

The Children's Guardian's Case File Audit for the next two years will target particular risks identified in the 2006/07 Audit.

In 2007/08, the Children's Guardian will conduct a targeted audit of a sample of agencies that have been selected on the basis of particular risks.

In 2008/09, the Children's Guardian will adjust the Case File Audit tool to seek additional information as to caseworker allocation for each government and non-government designated agency case file that is reviewed – see section 3.4 above.

In 2008/09, the Children's Guardian will conduct a targeted audit to examine practice related to meeting the health needs of children and young people in OOHC.

In 2009/10, the Children's Guardian will again conduct a full audit across the whole OOHC sector. This will be comparable with the baseline 2006/07 Audit and measure any changes in practice over the intervening period.

4.6 APPROPRIATENESS OF OTHER CURRENT FUNCTIONS OF THE CHILDREN'S GUARDIAN

The Children's Guardian is responsible for developing criteria for accreditation for the Minister's approval⁸⁹. This role is appropriate, given the Children's Guardian's independence and understanding of OOHC service delivery, obtained through the exercise of her accreditation and monitoring functions.

The functions of promoting the best interests of all children and young people in OOHC and ensuring that their rights are safeguarded and promoted⁹⁰ are integral to the work of the Children's Guardian. The Children's Guardian would not be able to effectively fulfil her other functions if she did not also have these broad functions.

The Children's Guardian's responsibility for issuing statutory guidelines⁹¹ is also appropriate. It allows for independent policy setting in sensitive areas where there are competing views.

The Children's Guardian's mandate to make recommendations for legislative and administrative change⁹² allows the Children's Guardian to have input into broader policy development and promotes the Children's Guardian being consulted on policy reforms that impact on the OOHC sector.

⁸⁹ Clause 36(2) of the Regulation.

⁹⁰ Section 181(1)(b)-(c) of the Act.

⁹¹ Sections 149D and 150(4) of the Act.

⁹² Section 187(2)(c) of the Act.

However, it is recognised that the Children's Guardian role in influencing OOHC policy and research would be enhanced if OCCG had better data storage and analysis tools.

The Children's Guardian is developing a Management Information Application (MIA) to provide an up-to-date, flexible application for the delivery of OCCG information. The MIA involves the establishment of:

- a relational database;
- an Information Infrastructure which defines, classifies and models OCCG data in a way that allows it to be harmonised with industry standards and DoCS data collections; and
- counting rules for the information to provide a stable basis for baseline and trend information and statistics.

Analysis and aggregated reporting of MIA data will occur at scheduled times, which may be monthly, quarterly and/or annually, depending on data type. These reports may inform operational policy development and strategic planning activity and will over time enable the Children's Guardian, in consultation with the sector, to develop appropriate performance measures.

Data entry onto MIA should begin in the first half of 2008.

4.7 THE CHILDREN'S GUARDIAN'S UNPROCLAIMED FUNCTIONS

The Children's Guardian has a range of unproclaimed functions under the Act, including monitoring and developing procedures for voluntary OOHC, which was addressed at section 3.11 above.

However, most of the Children's Guardian's unproclaimed functions relate to the Children's Guardian's powers of guardianship in relation to individual children and young people in OOHC.

The Usher Committee, the 1997 Royal Commission and the Parkinson Review all identified the need for a body, independent of DoCS and the courts, to exercise powers of guardianship in respect of children and young people under the parental responsibility of the Minister.

Whilst the models developed by those bodies varied, they all recognised a need for an independent body to be able to review OOHC arrangements for individual children and young people and, in certain circumstances, make decisions relating to that care, having regard to the best interests of the child or young person.

This body was to be separate from DoCS, given a perceived tension between its funder/provider role and its ability to make decisions in the best interests of each individual child or young person. The body was also to be separate from the Children's Court, so that it could make decisions in a less formal and legalistic manner, with those decisions made by experienced child welfare practitioners.

The identified need for an independent special guardian was the primary reason for the establishment of the Children's Guardian.

The Act contains a range of provisions, most of which remain unproclaimed, to support the Children's Guardian making care decisions in respect of individual children and young people in OOHC.

Out-of-home care, child welfare, carer and legal organisations have continued to call for the Children's Guardian to be given the special guardian functions that were the rationale for it being established.

The Act provides for the Children's Guardian having the following principal powers and responsibilities to support its originally contemplated special guardianship role:

- The power to exercise, subject to the direction of the Minister, the parental responsibilities of the Minister for a child or young person, for the benefit of the child or young person (s181(1)(a));
- The power to delegate aspects of the Minister's parental responsibility, other than residual powers of guardianship, to designated agencies and certain other persons (s186);
- Responsibility for residual powers of guardianship (s186);
- Responsibility for examining each case plan for each child or young person in OOHC, and a copy of each report made following the regular review of the case plan (s181(1)(d));
- The power to resolve disputes between various parties, connected to the administration of the Act and regulation (s183);
- The power to remove a child from an authorised carer (s182);
- The power to apply to the Children's Court for the rescission or variation of a care order (s184).

The Children's Guardian believes the current unproclaimed provisions would be unworkable in their current form and are not in the best interests of children and young people in OOHC.

Some of those provisions duplicate functions more appropriately performed by others in the OOHC system and have the potential to undermine local responsibility for ensuring the quality of care.

One of the problems with the current statutory child protection system is that broad, rather than targeted, reporting and monitoring arrangements are often favoured. This approach has the potential to overload decision making/review bodies with cases where no intervention is required, making it difficult to focus on those areas where attention is necessary.

The difficulties associated with broad notification requirements are apparent in the mandatory reporting system. These difficulties would be replicated if the current provisions of the Act supporting the Children's Guardian's special guardianship function were proclaimed.

However, in the Children's Guardian's experience, there are individual children and young people in OOHC who are not receiving appropriate care and the existing regulatory framework does not offer those children and young people sufficient protection.

One option for addressing this might be to give the Children's Guardian more targeted special guardianship powers, so they are focused on vulnerable children and young people in OOHC who have not had their care concerns addressed by existing mechanisms, or whose life or safety is in such danger that urgent independent decision making is required.

This would see the Children's Guardian taking on a "safety net" role – the Children's Guardian would be the guardian of last resort. This option, and the need for the various provisions

supporting the Children's Guardian's uncommenced current broad powers of special guardianship, are discussed below.

Dispute resolution function

The unproclaimed s183 of the Act provides that the Children's Guardian may use his/her best endeavours to informally resolve disputes between various parties that may arise in the administration of the Act and regulations.

The Children's Guardian would not have the expertise to resolve disputes concerning the broad administration of the Act and regulations, given the Children's Guardian's OOHC focus.

Disputes should be resolved at a local level, wherever possible, with this philosophy reflected in Standard 4.3 of the NSW OOHC Standards and s3(1)(c) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS-CRAMA).

If a person continues to have a concern about OOHC services, they may make a complaint to the Ombudsman under CS-CRAMA. Section 180(2)(b) of the Act makes it clear that the Children's Guardian has no role in the investigation or **resolution** of a dispute that is the subject of a community services complaint under CS-CRAMA.

When the Ombudsman receives a complaint, the Ombudsman may refer the matter back to the designated agency for resolution. The Ombudsman may also choose to conciliate the matter, with or without an independent mediator attending⁹³, or arrange for other alternative dispute resolution (ADR) to take place. One of the objects of CS-CRAMA is to encourage the resolution of complaints through ADR⁹⁴.

The Children's Guardian's unproclaimed dispute resolution function does not sit comfortably with s180(2)(b) of the Act or CS-CRAMA. Proclaiming s183 would lead to confusion as to whether matters should be dealt with under s183 or CS-CRAMA and may lead to forum shopping. It would also limit the Ombudsman's ability to monitor trends in community service complaints concerning designated agencies.

Section 183 may be safely repealed.

Case plan/review review function

The unproclaimed s181(1)(d) of the Act requires the Children's Guardian to examine a copy of the case plan for **each** child or young person in OOHC and a copy of each report made following the regular review of the case plan.

The unproclaimed s150(5) of the Act requires copies of **each** review report to be provided to the Children's Guardian, with reviews to be conducted at least annually. More frequent reviews are required in some circumstances.

As there are approximately 8000 children and young people in statutory care⁹⁵, proclamation of s181(1)(d) and s150(5) would require the Children's Guardian to review well in excess of 10,000 case plans/reviews each year.

If the Children's Guardian were to review every case plan and case review, then the Children's Guardian would require significant additional resources. It would also make the Children's Guardian a kind of "super case manager" that would be constantly second guessing workers in the field.

⁹³ See s13A of the *Ombudsman Act 1974*, which also applies to complaints made under CS-CRAMA.

⁹⁴ See s3(1)(d) of CS-CRAMA.

⁹⁵ Advice from DoCS on statutory OOHC population as at 30 June 2007.

This would not be an efficient use of limited OOHC resources and would undermine local accountability for case management. This broad, rather than targeted, monitoring function would simply overload the Children's Guardian, making it difficult to focus on those areas where attention is necessary.

The broad monitoring provided for under the Children's Guardian's Case File Audit Program and Accreditation and Quality Improvement Program is a better approach. This may inform the Children's Guardian as to where more focused monitoring activity is required.

There is a common misperception that the non-proclamation of s181(1)(d) means that the Children's Guardian may only operate at a system level, and may not monitor individual care arrangements.

The broad functions of the Children's Guardian at s181(1)(b)-(c) of the Act, combined with broad powers to require designated agencies to provide information to the Children's Guardian under s185⁹⁶, may be used to require designated agencies to provide information relating to the safety, welfare and well-being of a particular child or young person in OOHC or a particular class of such children or young persons.

The Children's Guardian can request case plan and review information under these provisions. As outlined in section 3.2 of Part A of this submission, the Children's Guardian seeks regular case plan and review information in respect of children and young people accommodated by non-designated agencies or children under the age of 12 placed in residential care.

The Children's Guardian believes that, subject to available resourcing, the Children's Guardian might play a similar individual monitoring role for other classes of children and young people in OOHC where there are serious physical or psychological harm risks that need to be managed. The Children's Guardian's monitoring of cases of this kind is contemplated in the unproclaimed compulsory assistance provisions of Part 3 of Chapter 7 of the Act.

It is recommended that sections 150(5) and 181(1)(d) of the Act are repealed as they are unnecessarily broad and are not necessary to support more targeted monitoring of case plans/reviews.

Exercising and delegating the Minister's parental responsibility

The notion that guardianship (effectively full parental responsibility) should always be separated from service provision, which underpins the Usher Report, Parkinson Review, and the unproclaimed s181(1)(a) of the Act, should be challenged.

Responsibility for decision making and service provision cannot and should not be fully separated. It is difficult to reconcile the split model with the One Agency Principle, which also informed the development of the Act and was widely supported within the OOHC sector. Ideally, decisions should be made as close as possible to the point of service delivery, as authorised carers and designated agencies are most familiar with the particular needs of children and young people in care.

The challenge for government should be to properly build capacity for locally based decision making, rather than reverting to a more centralist model, with centralised decision making confined to those limited situations where it is needed.

Professor Parkinson, in a 2003 paper on the Children's Guardian and parental responsibility that has been provided to the Inquiry, acknowledged that current provisions for the Children's Guardian exercising all of the Minister's parental responsibility, and then delegating that

⁹⁶ Section 185 would benefit from clarifying amendments, as discussed in Review Report Volume 1.

responsibility, are problematic. He suggested that the current system be replaced with a scheme under which the Children's Guardian would be able to give written directions to designated agencies as to the exercise of any aspect of parental responsibility⁹⁷. This approach is discussed further below.

As s181(1)(a) of the Act has not been proclaimed, DoCS has retained responsibility for delegating responsibility for decision making to non-government agencies.

The Children's Guardian does not believe it would be appropriate for the Children's Guardian to be responsible for delegating the Minister's parental responsibility at this time, as it would interfere with recently established systems for allocating parental responsibility, case management responsibility, and casework responsibility. These systems, set out in the 2007 DoCS *Case Management Policy*, are linked with current funding systems and should be given an opportunity to be embedded.

However, the Children's Guardian believes that the Children's Guardian holds information relevant to agency capacity to take on additional decision making functions and that DoCS should consult with the Children's Guardian before delegating responsibility (including case management responsibility) to non-government agencies, as outlined at section 3.5 above.

The Children's Guardian suggests that consideration be given to amending the Act so that the Children's Guardian is not generally responsible for exercising and delegating the Minister's parental responsibility, but that there be a requirement for the Children's Guardian to be consulted before the Director-General of DoCS delegates aspects of that responsibility (including case management responsibility) to designated agencies.

Residual powers of guardianship

The Children's Guardian believes that it would not be in the best interests of children and young people in OOHC for the Children's Guardian to exercise non-delegable "residual powers of guardianship", but that non-delegable functions should be set out in the regulations and the Children's Guardian should have a defined monitoring role in this area.

Section 186 of the Act contemplated the Children's Guardian's exercising the Minister's non-delegable "residual powers of guardianship"⁹⁸, being:

- granting consent to the marriage of a child or young person;
- granting permission to remove a child or young person from NSW;
- applying for a passport on behalf of a child or young person;
- granting consent to medical and dental treatment of a kind prescribed by the regulations; and
- such other kind as may be prescribed by the regulations.

No regulations have been made under s186, as s181(1)(a) has not been proclaimed and the Children's Guardian does not exercise residual powers of guardianship on behalf of the Minister.

The Minister has delegated responsibility for making decisions involving residual powers of guardianship to the Director-General of DoCS, who has sub-delegated these powers to DoCS Regions. These powers cannot be further sub-delegated.

⁹⁷ Parkinson, P. 2003: 17.

⁹⁸ The note to s140 of the Act explains how certain matters are delegable and non-delegable to designated agencies.

The list of non-delegable functions has been added to administratively and the following parental responsibility decisions of the Minister are also retained within DoCS⁹⁹:

- seeking medical advice on, and consenting to, special medical treatment (see also s175 of the Act and clauses 15-16 of the Regulation)¹⁰⁰;
- registering a child's birth, obtaining a birth certificate, or naming or changing the name of a child or young person;
- consenting to termination of pregnancy; and
- consenting to end of life medical intervention.

Professor Parkinson has argued that vesting residual powers of guardianship in the Children's Guardian would support the One Agency Principle by eliminating the double-handling of the current arrangements so that only one agency is involved with the child or young person¹⁰¹. In the Children's Guardian's view, this would not eliminate double-handling – it will simply transfer the “double-handling” from DoCS to the Children's Guardian.

Professor Parkinson has also advised:

*“[The arrangement] was seen as a way of encouraging more consistent and considered decision-making when difficult issues arise which fall within the category of residual responsibilities of guardianship to be exercised by the Children's Guardian”.*¹⁰²

The Children's Guardian agrees that some parental responsibility decisions should be centralised close to Ministerial direction and control, given the fundamental importance of those decisions to the life or identity of a child or young person in OOHC or, in the case of decisions involving travel outside NSW, the ability of a child or young person in OOHC to maintain appropriate relationships.

However, the Children's Guardian is unaware of any evidence that the current manner in which DoCS makes these high-level decisions is problematic. In the absence of such evidence, the Children's Guardian believes it is appropriate that DoCS continues to make such decisions.

DoCS has sufficient capacity to handle the making of all such decisions, whilst the Children's Guardian would need additional resources to exercise non-delegable parental responsibility functions. DoCS Regional officers are also closer to the point of service delivery than the Children's Guardian.

It is therefore recommended the Act is amended to remove references to the Children's Guardian exercising residual powers of guardianship.

However, it is appropriate that the systems in place for making non-delegable decisions are subject to external oversight, given the significance of those decisions to children and young people in OOHC. The 2003 Paper to the Ministerial Advisory Council, which contemplated DoCS exercising the Minister's residual powers of guardianship and other parental responsibilities, noted:

⁹⁹ Department of Community Services, Case Management Policy, Table 3.

¹⁰⁰ The Director, Child and Family Services is responsible for consenting to the use of psychotropic medication for behaviour management purposes, which is special medical treatment for the purposes of s175 of the Act.

¹⁰¹ Parkinson. 2003: 9.

¹⁰² Parkinson. 2003: 5.

“The exercise of the parental responsibility function would be subject to the full suite of systemic review and audit processes of the Children’s Guardian.”¹⁰³

However, it is doubtful that the Children’s Guardian’s monitoring functions under s181(1)(e) of the Act extend to monitoring the manner in which DoCS exercises non-delegable parental responsibility functions.

It is recommended that all “non-delegable” parental responsibility decisions are provided for in the regulations and that the Children’s Guardian have a statutory:

- function of monitoring the systems in place for making such decisions;
- power to require the Director-General of DoCS to provide such information to the Children’s Guardian on the exercise of “non-delegable” parental responsibility functions, as the Children’s Guardian may require; and
- power to report and make recommendations to the Minister on systems for making “non-delegable” parental responsibility decisions, and on particular parental responsibility decisions that should or should not be capable of being delegated.

The special guardianship function revisited – a targeted decision making role in respect of individual children and young people in OOHC

The Children’s Guardian believes that the provisions of the Act that provide for the Children’s Guardian exercising the Minister’s parental responsibility are too broad and are unworkable in their current form.

The Children’s Guardian cannot effectively monitor all case plans/reviews to identify matters where it might be appropriate to intervene by exercising the Minister’s parental responsibility.

In the absence of an effective triaging system, the Children’s Guardian would be inundated with matters that may be resolved through existing processes and this would limit the ability of the Children’s Guardian to focus on the small number of matters where there may be a need for a special guardian.

However, the Children’s Guardian believes that the existing complaints and dispute resolution processes of CS-CRAMA do not provide sufficient protection to all children and young people in OOHC. The Ombudsman has the power to make recommendations, but no power to make decisions if its recommendations are not followed.

The Children’s Guardian might impose conditions on an agency’s accreditation, or suspend or cancel accreditation, where a designated agency refuses to address a serious care concern. However, the ultimate sanction of stripping away a designated agency’s status is a very blunt instrument for dealing with individual cases of concern. Such action may also adversely affect other children and young people who are receiving appropriate care from the agency.

There may be merit in providing the Children’s Guardian with targeted powers that would enable him/her to effectively intervene in individual cases, rather than taking action resulting in loss of designated agency status.

Professor Parkinson’s 2003 Paper offers guidance on how the Act might provide for such powers. The 2003 Paper suggests it is not necessary for the Children’s Guardian to act as a “watchdog” for all cases of children and young people in OOHC, but it might act as a “safety

¹⁰³ *Parental Responsibility Functions in OOHC – A Paper prepared for the Ministerial Advisory Committee* 2003: 8.

net” where there are serious problems¹⁰⁴. The Children’s Guardian would not be involved in day to day service provision decisions, but would be a “guardian of last resort”¹⁰⁵.

Under this model, the Children’s Guardian would have the power to “overrule the decision of a designated agency concerning any aspect of parental responsibility”, with s140 of the Act being amended to provide that a designated agency must comply with any written direction of the Children’s Guardian to exercise parental responsibility in a particular way¹⁰⁶.

The 2003 Parkinson model is worthy of serious consideration, as long as safeguards are introduced to prevent minor and non-urgent matters being brought to the Children’s Guardian for resolution.

Any model that is ultimately developed should emphasise the importance of DoCS and other designated agencies being accountable for care decisions and the Children’s Guardian should only consider using the proposed powers after giving designated agencies an opportunity to firstly address issues of concern at a local level.

Any such model also needs to be integrated with the complaints and dispute resolution arrangements under CS-CRAMA. Options for addressing matters through CS-CRAMA should be exhausted, and the Children’s Guardian might only consider making particular parental responsibility decisions if the Ombudsman concludes or halts handling the matter under CS-CRAMA and makes a specific recommendation that the Children’s Guardian consider the matter.

In addition to accepting Ombudsman’s referrals, the Children’s Guardian might be able to use the proposed decision making powers where a matter is referred to the Children’s Guardian by the Minister or Director-General of DoCS.

It may also be appropriate for the Children’s Court to be able to refer responsibility for making particular decisions to the Children’s Guardian or, if contact arrangements are in the future determined as part of the case management process, for the Children’s Guardian to review contact arrangements that are in dispute.

It is possible that the Children’s Guardian could make decisions through a less formal and adversarial process than is possible in the Children’s Court, as noted by a number of organisations in their submissions to the current Review of the Act (see section 3.4 above). However, decisions of the Children’s Guardian would need to be subject to judicial/administrative review in the same manner as other decisions involving the exercise of the Minister’s parental responsibility.

Other parties might be able to refer a matter for the Children’s Guardian’s consideration where there is an imminent risk to the life or safety of a child or young person in care. The Ombudsman should be able to appropriately deal with other matters through CS-CRAMA.

The Children’s Guardian might also exercise decision making powers upon his or her own motion, where the exercise of the Children’s Guardian’s monitoring functions suggests this is the most appropriate course of action (in most cases it would be appropriate to refer the matter for local resolution or to the Ombudsman under CS-CRAMA) and a designated agency has failed to take appropriate action, after having been given an opportunity to do so.

These limitations should confine the exercise of the Children’s Guardian’s decision making powers to a limited range of high-level cases where alternative options have been exhausted.

¹⁰⁴ Parkinson. 2003: 6.

¹⁰⁵ Parkinson. 2003: 7.

¹⁰⁶ Parkinson. 2003: 17.

Any model that is ultimately developed should also recognise that the Minister is ultimately the guardian of, and accountable for, children and young people placed under the parental responsibility of the Minister.

Consistent with s181(1)(a), the Children's Guardian should not be able to issue directions to a designated agency where this conflicts with a direction of the Minister. Any model should provide for prompt reporting to the Minister where the Children's Guardian believes it is appropriate to direct a designated agency in the exercise of an aspect of parental responsibility.

Adoption of such a model would have resource implications, as the Children's Guardian would need to employ a small group of senior expert practitioners who are familiar with case management, case planning and decision making frameworks. The Children's Guardian would also need to employ a legal officer.

There may also be resource implications for DoCS and its funding of other designated agencies, as particular decisions of the Children's Guardian may have resource implications for the care of individual children and young people. However, the limitations placed on when the Children's Guardian might exercise decision making powers should limit these resource impacts.

The Children's Guardian should make decisions that are in the best interests of a child or young person in OOHC. That does not mean that resource impacts of particular decisions can be ignored. If the Children's Guardian has targeted decision making powers, the Children's Guardian should be required to give designated agencies an opportunity to comment on the most resource effective means of addressing the Children's Guardian's concerns in respect of an individual child or young person. It is noted that the Children's Court is required to give persons who may be significantly impacted by an order an opportunity to be heard on the matter of significant impact¹⁰⁷.

If the Children's Guardian were to make parental responsibility decisions on behalf of the Minister, the Children's Guardian would most probably need to be insured through the Treasury Managed Fund (TMF). However, this is not a new area of liability, with some liability effectively being transferred from DoCS to the Children's Guardian. The proposal would appear to be liability neutral and may even limit the Crown's liability in some cases, as there is potential for the proposed model to divert some matters away from the Court.

It would be necessary to proclaim s182 of the Act to allow the Children's Guardian to remove a child or young person from a particular care arrangement if the designated agency did not comply with a proposed written direction under s140.

The Children's Guardian would, in exercising such decision making powers, need to be able to apply to the Court for the rescission or variation of a care order under s90(3) of the Act. Section 184 of the Act would appropriately be proclaimed to ensure the Children's Guardian may make such an application, notwithstanding the Children's Guardian not having been a party to the original proceedings.

Consideration would also need to be given to provisions compelling affected parties to appear personally before the Children's Guardian and provide true information, although an adversarial framework and formal rules of evidence should be avoided.

¹⁰⁷ See s87 of the Act.

4.8 OTHER PROCLAIMED FUNCTIONS OF THE CHILDREN'S GUARDIAN THAT ARE NO LONGER APPROPRIATE

Section 105(3)(b)(iii) of the Act provides that the Children's Guardian may consent to the publication or broadcasting of identifying information about children and young people under the parental responsibility of the Minister. Consent may only be given if the Children's Guardian is in the opinion that publication or broadcasting may be seen to be of benefit to the child or young person.

The Children's Guardian is not a party to care or other Court proceedings and has not been involved in case management or case planning for children and young people under the parental responsibility of the Minister – it is not sufficiently informed to make assessments under s105(3)(b)(iii).

Accordingly, the Children's Guardian has delegated this function to the Director-General of DoCS, given DoCS appears in Children's Court proceedings and has a relationship with the Court.

Notwithstanding this, the Children's Guardian is still occasionally approached to approve the publication or broadcasting of identifying information concerning children and young people under the parental responsibility of the Minister. There may be some delay as parties seeking consent need to be referred to DoCS.

The Children's Guardian would support s105(3)(b)(iii) being amended to authorise the Director-General to consent to such publication or broadcasting.

The Children's Guardian would also support s90(3A) of the Act being amended, to remove the requirement that the Children's Guardian be notified of certain rescission and variation proceedings concerning the assignment of parental responsibility.

As noted by Professor Parkinson, s90(3A) also requires the Director-General to be notified of such proceedings and it does not make sense to involve both DoCS and the Children's Guardian in such proceedings, with DoCS being the appropriate party to appear¹⁰⁸.

4.9 ACCOUNTABILITY OF THE CHILDREN'S GUARDIAN

Whilst the Office for Children, which provides administrative support to both the Children's Guardian and Commission for Young People (CCYP), is within the Youth Portfolio, the Children's Guardian continues to report to the Minister for Community Services ("the Minister") on the exercise of her functions.

This reflects the Minister's responsibility for the administration of the Act and *Adoption Act 2000*, under which the Children's Guardian exercises her statutory and delegated functions.

Whilst the Children's Guardian reports to the Minister, the Act establishes the Children's Guardian as an independent statutory office, with this independence recognised in sections 178, 187 and 188 of the Act.

A number of other independent statutory offices, including those that have roles in respect of children and young people and the community services sector, have more formalised structures supporting their Parliamentary accountability.

¹⁰⁸ Parkinson. 2003: 20-21.

For example, the Ombudsman's accountability is supported by the Parliamentary Joint Committee (PJC) on the Office of the Ombudsman and the Police Integrity Commission, established under Part 4A of the *Ombudsman Act 1974*.

Similarly, CCYP's accountability is supported by the establishment of the PJC on Children and Young People, established under Part 6 of the *Commission for Children and Young People Act 1998* ("CCYP Act"). The PJC has the following functions under the CCYP Act:

- (a) to monitor and review the exercise by the CCYP of its functions,
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the CCYP or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- (c) to examine each annual or other report of the CCYP and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
- (d) to examine trends and changes in services and issues affecting children, and report to both Houses of Parliament any changes that the Joint Committee thinks desirable to the functions and procedures of the CCYP,
- (e) to inquire into any question in connection with the Committee's functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

The first Children's Guardian, in her submission to the Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998, stated that:

"A Parliamentary Committee is the mechanism through which independent statutory agencies retain accountability to Parliament and the NSW community."¹⁰⁹

The Children's Guardian does not have a sufficient range of functions to warrant the establishment of a stand-alone Parliamentary Joint Committee. However, consideration might be given to extending the coverage of the PJC on Children and Young People so that it applies to the Children's Guardian in the same manner that it applies to CCYP.

This would:

- provide for consistent accountability arrangements for both arms of the Office for Children;
- ensure that the Children's Guardian is subject to the same level of independent scrutiny as similarly independent statutory offices; and
- increase awareness of issues relevant to the provision of OOHC and the best interests of children and young people in OOHC.

¹⁰⁹ L'Orange, Helen. *Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998*, Report to The Hon. Carmel Tebbutt, MLC, Minister for Youth. November 2004: 25.

5 THE CHILDREN'S GUARDIAN'S RELATIONSHIP WITH OTHER OVERSIGHT AGENCIES

5.1 SCOPE OF THIS SECTION OF THE SUBMISSION

This section considers the manner in which the functions of the Children's Guardian and other "oversight agencies" inter-relate.

The Children's Guardian's comments are confined to functions of "oversight agencies" that have some connection to the functions currently exercised by the Children's Guardian. It is expected that other bodies will make submissions on the broader functions of other "oversight agencies".

For the purposes of this section, DoCS is regarded as an "oversight agency" as well as a service provider, as it plays a regulatory role in the OOHC system through its funding and performance monitoring functions.

The Children's Guardian does not intend to make recommendations as to the integration of child protection "oversight" or regulatory functions currently exercised by different agencies. Ultimately that is a matter for government, having regard to any recommendations the Inquiry may make in this area.

However, the submission raises practical issues that would need to be overcome if functions currently exercised by the Children's Guardian were to be integrated with functions currently exercised by other agencies.

5.2 THE CHILDREN'S GUARDIAN AND DOCS

Before the establishment of the Children's Guardian, quality issues were given some, albeit insufficient, consideration in DoCS licensing and authorisation regimes for OOHC agencies, and then in DoCS conditional funding agreements.

The problems of supporting quality of care solely through DoCS conditional funding agreements have been recognised in reviews of OOHC service delivery since the 1992 Usher Committee Report. The Usher Committee argued there was an inevitable tension between DoCS' role in managing resources and always acting in the best interests of children and young people, with service delivery issues generally involving decisions about resources¹¹⁰.

It is important that NSW maintains a system where assessment against the NSW OOHC standards is conducted independently. DoCS cannot be expected to independently assess its own performance against the NSW OOHC Standards and other accreditation criteria. Given the relative performance of DoCS and the non-government sector against Case File Audit criteria, the Children's Guardian would be concerned if DoCS performance becomes the bar against which satisfactory performance of non-government agencies is assessed.

¹¹⁰ Ministerial Review Committee (NSW). 1992. *A report to the Minister for Health and Community Services, The Hon. John P Hannaford, MLC, from the committee established to review substitute care services in NSW* ("the Usher Report"): 52-55.

The Children's Guardian also believes there is a need for an independent agency to promote the best interests and safeguard the rights of children and young people in OOHC, and to provide independent advice to the Minister and Parliament on issues relevant to children and young people in OOHC.

That is not to say DoCS plays no quality assurance role.

The Good Practice Guidelines for DoCS Funded Services ("the Good Practice Guidelines") have been developed to apply across DoCS funded services and funded agencies are responsible for integrating the Guidelines into agency management and practice.

The Good Practice Guidelines have been developed to apply to community services generally, whilst the more detailed OOHC Standards and Mandatory Requirements were designed specifically for OOHC. The Good Practice Guidelines make it clear:

"For ... OOHC the quality assurance approaches already in place will remain. This is through the Office of the Children's Guardian accreditation process...."

Therefore, OOHC agencies are not required to demonstrate integration of the Good Practice Guidelines into agency management and practice as part of the DoCS funding process, as this is demonstrated through accreditation.

However, it is important that the DoCS generic and OOHC specific quality assurance systems are aligned.

Whilst the NSW OOHC Standards/Mandatory Requirements and Good Practice Guidelines are structured differently, the Children's Guardian has benchmarked the Standards and Requirements against the Guidelines and is satisfied that relevant issues¹¹¹ addressed in the Guidelines are reflected in accreditation criteria (although the accreditation criteria are both broader and more OOHC specific).

However, the NSW OOHC Standards for "Working with other agencies and liaison with the community" focus on partnership building for the benefit of individual agency clients, whilst the Community Development Good Practice Guideline has an additional system advocacy focus. This focus should be incorporated into the NSW OOHC Standards when they are updated in the near future.

It is also appropriate that DoCS has regard to quality issues as part of the OOHC funding process. The Children's Guardian welcomes recent DoCS funding reforms, which are underpinned by a commitment to Performance Based Contracting (PBC). PBC has a greater focus on results for clients, performance monitoring and performance improvement than traditional DoCS funding models. Under the new model, DoCS will monitor performance against outputs and outcomes specified in agency Service Specifications linked to Service Agreements¹¹².

Agencies will collect data on these outputs and outcomes and report to DoCS under the DoCS Performance Monitoring Framework (PMF). As part of these reforms, DoCS is moving away from separate reporting and monitoring arrangements for each funded OOHC project. Instead an agency will comply with one set of reporting and monitoring requirements for all its

¹¹¹ The NSW OOHC Standards have no equivalent to the Funding Partnerships and Contracts Good Practice Guideline. The Children's Guardian only has an interest in partnerships and arrangements between designated agencies and third parties such as support services, and the NSW OOHC Standards address this. It is not appropriate for the Children's Guardian to otherwise consider funding and contractual arrangements as part of the accreditation process, as this could lead to a blurring of accountabilities between the funder and the independent regulator.

¹¹² Department of Community Services (NSW). 2007. *Performance Based Approach to OOHC Funding 4*.

OOHC services. The information provided will be used to determine appropriate casemix and funding arrangements.

The PBC and PMF have not been designed to replace the accreditation system or Children's Guardian monitoring of compliance with care and protection legislation, including the NSW OOHC Standards and other accreditation criteria.

DoCS has advised, "Funding agreements will largely rely on accreditation by the Children's Guardian to ensure overall quality of services"¹¹³ and the PMF does not attempt to assess performance against the NSW OOHC Standards.

PBC has the potential to provide an overlay of more specific service requirements, targeted towards the service specifications of particular services. However, assurance of quality against accreditation criteria will be crucial for the effectiveness of PBC.

Similarly, the PMF is designed to monitor performance against a narrow range of specific outputs and outcomes, which will be of assistance in targeting resources to service need.

It is critical that the Children's Guardian accreditation and monitoring systems and DoCS PBC/PMF do not evolve in different directions. If agencies are exposed to competing demands, then this may interfere either with eligibility for funding or eligibility for accreditation.

It is also important that PBC/PMF does not, over time, attempt to duplicate the standards assessment and monitoring role that is the statutory responsibility of the Children's Guardian. This would not only be an inappropriate use of resources, but could lead to differing assessments and cause considerable confusion in the OOHC sector.

Whilst funding and accreditation schemes need to remain independent, it is important that DoCS and the Children's Guardian share information obtained through funding and accreditation/monitoring processes to ensure OOHC organisations do not provide conflicting information for different purposes and to support properly informed decision making. Effective information sharing may also reduce the information agencies need to report separately to DoCS and the Children's Guardian.

The current DoCS OOHC Service Agreement contemplates DoCS and the Children's Guardian sharing this kind of information. However, whilst there are frequent discussions between the Children's Guardian and DoCS senior management as to designated agency performance and capacity, there are no formalised information sharing arrangements between the Children's Guardian and DoCS.

Whilst the Children's Guardian attempted to initiate a Memorandum of Understanding (MOU) with DoCS soon after the Children's Guardian was established, there was originally little support for an MOU within DoCS.

However, there have been positive changes in this area and a more cooperative approach is now supported. On 2 May 2007, the Children's Guardian met with the DoCS Director-General and Deputy Director-General, Service System Development. At that meeting, it was agreed that DoCS and the Children's Guardian should develop an MOU to address information exchange and alignment of DoCS/OCCG quality focussed systems.

This MOU will be developed after the Children's Guardian reports on administrative improvements to be made to the OOHC Accreditation and Quality Improvement Program.

¹¹³ Whilst some potential new providers may be identified through Expression of Interest processes, DoCS does not fund such organisation to provide services until after they are accredited.

5.3 THE CHILDREN'S GUARDIAN AND THE OMBUDSMAN

The relationship between the Children's Guardian and the Ombudsman/Official Community Visitors was discussed in the Children's Guardian's submission to the Parliamentary Joint Committee on the Office of the Ombudsman and Police Integrity Commission (PJC), for its statutory review of the *Community Services (Complaints, Reviews and Monitoring) Act 1993 (CS-CRAMA)*. A copy of that submission has been provided to the Inquiry.

Whilst the Children's Guardian and Ombudsman have distinct functions, they also have areas of common interest.

The Ombudsman and Children's Guardian have entered into an MOU, which principally relates to the exchange of information to support the exercise of the respective functions of the Ombudsman and Children's Guardian¹¹⁴. The MOU is currently being reviewed.

Senior staff of OCCG and the Community Services and Child Protection Divisions of the Ombudsman's Office meet several times a year to discuss their respective work programs and issues of common interest.

In the Children's Guardian's view, these arrangements are generally effective in supporting the Ombudsman and Children's Guardian exercising their respective functions and minimising the potential for any duplication in work.

The Children's Guardian's submission to the PJC noted discussions between the Ombudsman and Children's Guardian as to the appropriateness of recognising the Children's Guardian as a relevant agency under Schedule 1A of the *Ombudsman Act 1974* to enable the Ombudsman and Children's Guardian to enter into complaint referral and information sharing arrangements under Part 6 of that Act.

Since the submission to the PJC, this issue has been further discussed with the Department of Premier and Cabinet. The Children's Guardian is now satisfied that its broad function of promoting the best interests of children and young people in OOHCA allows relevant information to be disclosed to the Ombudsman under s254 of the Act, and the Ombudsman is satisfied that relevant information can be disclosed to the Children's Guardian under s34 of the *Ombudsman Act*.

The following comments address the relationship between particular Ombudsman and Children's Guardian functions. They are:

- i) Community service complaints
- ii) Reviews under s13 of CS-CRAMA and s150(6) of the Act
- iii) Standards for the delivery of community services
- iv) Reportable allegations under Part 3A of the Ombudsman Act
- v) Official Community Visitors (OCVs)
- vi) Review of deaths of children in care

i) Community service complaints

There is no potential for the Ombudsman and Children's Guardian to have overlapping functions in this area, as s180(2) of the Act provides that the Children's Guardian may not investigate or resolve a dispute that is the subject of a community services complaint under CS-CRAMA.

¹¹⁴ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Report No 14/53 Stakeholder Review of the Merger of the Community Services Commission into the Office of the Ombudsman*, October 2006, p17.

The Children's Guardian/Ombudsman MOU provides that the Children's Guardian may refer complaints about OOHC service providers to the Ombudsman. The Children's Guardian has done so on a number of occasions.

The Children's Guardian will also consider Ombudsman report recommendations in making accreditation decisions or attaching conditions to a designated agency's accreditation.

Whilst the Children's Guardian does not have a complaints handling role, the OOHC accreditation criteria require designated agencies to demonstrate they have appropriate complaints systems in place¹¹⁵. As it is intended to update and streamline the NSW OOHC Standards, officers of the Ombudsman's Office and OCCG have recently met to discuss whether improvements can be made to NSW OOHC Standards addressing complaints.

If the Children's Guardian has concerns about the complaints systems of a designated agency or applicant for accreditation, it would draw those concerns to the Ombudsman's attention, given the Ombudsman's responsibility for reviewing community service provider complaints handling systems under s14 of CS-CRAMA. If the Ombudsman has concerns about the complaints handling systems of a designated agency, the Ombudsman may provide the Children's Guardian with any report containing recommendations regarding those systems under section 14(4)(b) of CS-CRAMA.

ii) Reviews under s13 of CS-CRAMA and s150(6) of the Act

The 1999 Law Reform Commission (LRC) Review of CS-CRAMA found there was a potential overlap between the review functions under s13 of CS-CRAMA and the Children's Guardian's function of reviewing placements under s150(6) of the Act¹¹⁶.

In 2001, the NSW Parliamentary Library Service stated:

"Under the new regime both the Children's Guardian and the Community Services Commission have a statutory role relating to the review of the situation of children in care."¹¹⁷

Both the LRC and NSW Parliamentary Library Service noted the Children's Guardian's review functions had not been proclaimed and that the Ombudsman and Children's Guardian would need to develop protocols to delineate the respective roles of the Children's Guardian and the Ombudsman in the review of the situation of children in OOHC.

The review functions of the Ombudsman under s13 of CS-CRAMA are broader than the Children's Guardian's review functions under s150 of the Act. They extend to all persons in care, whilst the Children's Guardian's review functions under s150 of the Act are confined to children and young people in statutory OOHC.

If the Children's Guardian were to have a limited role in making parental responsibility decisions, as put forward for consideration at page 63 above (see also Appendix D), it would be appropriate to proclaim s150(6) of the Act. This would support the Children's Guardian reviewing individual OOHC placements for the purpose of considering whether to exercise an aspect of parental responsibility. However, the model put forward for consideration makes it clear that these powers would only be used after CS-CRAMA options have been exhausted or in situations where there is an imminent threat to the life or safety of a child or young person in OOHC.

¹¹⁵ See aspects under NSW OOHC Standards 4.3, 4.1, 2.1 and 2.4.

¹¹⁶ Law Reform Commission. *Report 90 - Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 NSW*. 1999: paras 3.112-117.

¹¹⁷ Griffith, G, 2001, *Child Protection in NSW: A Review of Oversight and Supervisory Agencies*, NSW Parliamentary Library Research Service. Briefing paper No 16/2001, p47.

The Children's Guardian sees no conflict between CS-CRAMA and s150(6) of the Act under such arrangements.

The Children's Guardian is generally satisfied as to information exchange arrangements relevant to the Ombudsman's review jurisdiction, but has asked the PJC whether it is necessary to amend CS-CRAMA to enable the Ombudsman to provide the Children's Guardian with information arising from a review before a review report is finalised. The preferred view of the Ombudsman's Office and Children's Guardian is that such information can be disclosed to the Children's Guardian under s34 of the *Ombudsman Act*, if appropriate.

It should be noted that there would be tensions in collocating parental responsibility decision making powers with the Ombudsman's traditional review and complaints handling functions. The Ombudsman has the power to make recommendations – not decisions. If the Ombudsman were to exercise decision making powers, the Ombudsman would in effect become part of the service system it is responsible for overseeing. If these functions were to be colocated, then careful attention would need to be given to appropriate "Chinese wall" arrangements.

iii) Standards for the delivery of community services

Sections 11(1)(a)-(b) of CS-CRAMA provide that the Ombudsman has functions to:

- promote and assist the development of standards for the delivery of community services; and
- educate service providers, clients, carers and the community generally about those standards.

The Ombudsman promotes and assists in the development of standards by:

"... inquiring into significant systemic issues about community services, researching current issues in the delivery of services, and reviewing the causes and patterns of complaints. [The Ombudsman] also provides advice to government policy makers, service providers and other stakeholders on ways in which services might be improved."¹¹⁸

The Ombudsman's role is advisory and educational. The Ombudsman is not responsible for developing service standards, nor does it have responsibility for monitoring compliance with such standards (although investigations and reviews may identify that particular service standards are not being met).

The LRC Review of CS-CRAMA made it clear sections 11(a)-(b) did not provide for the Community Services Commission (and now the Ombudsman) monitoring compliance with service standards, and strongly recommended against sections 11(a)-(b) being extended to encompass such monitoring. The LRC said:

"In the Commission's view, it is inappropriate for the CSC to be given functions relating to this form of monitoring. This is qualitatively very different to the form of monitoring which the CSC currently conducts, which is extremely selective monitoring of services with a focus on identifying broad systemic problems. To undertake comprehensive monitoring of the compliance of all services with particular service standards is a very different task. Nor do other comparable complaints bodies have such roles."¹¹⁹

¹¹⁸ Information on the website of the NSW Ombudsman.

¹¹⁹ Law Reform Commission. 1999: para 3.104.

The Children's Guardian monitors designated agency compliance with service standards through its Accreditation and Quality Improvement Program and Case File Audit Program.

There would be tensions in locating accreditation and complaints/review functions within a single agency. There may be a perceived conflict of interest in an organisation accrediting an agency against a particular service standard on the one hand, whilst on the other conducting an investigation that may give rise to questions as to the merits of the accreditation decision. If the functions were to be collocated, then careful attention would need to be given to appropriate "Chinese wall" arrangements.

iv) Reportable allegations under Part 3A of the Ombudsman Act

Designated agencies are subject to Part 3A of the *Ombudsman Act*. Whilst the Ombudsman is responsible for keeping under scrutiny systems for responding to reportable allegations under Part 3A, OOHC accreditation criteria also address:

- whether systems are in place for designated agencies notifying the Ombudsman of any reportable allegations if inappropriate behaviour management techniques are used which harm a child or young person in OOHC (Mandatory Requirement - Behaviour Management Policy Statement); and
- whether organisations have clear guidelines for investigating allegations of misconduct against staff and carers which comply with the requirements of the *Ombudsman Act* (Standard 4.3.4).

The Children's Guardian has identified concerns about some designated agencies' compliance with Part 3A of the *Ombudsman Act* and has alerted relevant agencies, DoCS and the Ombudsman. Similarly, the Children's Guardian has become aware of some concerns about agency compliance with the above accreditation criteria as a result of having been provided with Ombudsman reports. The Children's Guardian has used conditions of accreditation to monitor how designated agencies address these concerns.

v) Official Community Visitors (OCVs)

The Children's Guardian believes there would be great benefit in OCV reports being considered in making accreditation decisions. However, CS-CRAMA does not support effective sharing of OCV information.

OCVs have jurisdiction in respect of visitable services, which include residential OOHC services, residential services for people with disabilities and licensed boarding houses.

While a small proportion of children and young people in OOHC are in residential care, 41 of the 57 designated agencies are accredited or interim accredited to provide residential care. The proportion of children and young people subject to the jurisdictions of both the Children's Guardian and OCVs may be low, but the proportion of designated agencies subject to both jurisdictions is high.

Where the Children's Guardian and OCVs have jurisdiction over the same population of children and young people, their functions are distinct but complementary. OCVs spend a relatively short time with each designated agency that is a visitable service. Whilst they can identify and look at particular issues in depth, the Children's Guardian conducts a broader assessment of designated agency services, having regard to policies, procedures and practice.

The Ombudsman and OCVs are working together to develop more structured OOHC visits. The Ombudsman has consulted the Children's Guardian in developing a pilot Data

Classification and Reporting System for OCVs in their OOHC work. The Children's Guardian strongly supports the development of such a system and appreciates having been given the opportunity to have input into its development.

It is important that the OCV system that emerges from the pilot does not result in OCVs making recommendations that are inconsistent with the NSW OOHC Standards. The Children's Guardian is encouraged that the Ombudsman's Office has considered the NSW OOHC Standards in developing the pilot system and discussions with the Ombudsman's Office suggest the Standards will inform further refinements to the reporting tool. The Ombudsman continues to consult with the Children's Guardian in developing the reporting system.

There is no doubt that the insight of OCVs would be extremely useful in making accreditation decisions and developing appropriate conditions of accreditation. OCV Reports are expected to be even more useful in this regard after the new Data Classification and Reporting System is operational.

During the review of the Accreditation and Quality Improvement Program, some designated agencies also recommended integrating OCV assessments into the accreditation system. This will not only ensure the Children's Guardian has access to a broader range of relevant information, but may also minimise the amount of evidence that designated agencies need to submit to the Children's Guardian to achieve accreditation.

However, the Children's Guardian is concerned that there is no mechanism under CS-CRAMA for OCV information about a specific service, which may be relevant to the Children's Guardian's accreditation and monitoring functions, to be provided to the Children's Guardian.

Section 8 of CS-CRAMA and clause 4 of the *Community Services (Complaints, Reviews and Monitoring) Regulation 2004* require OCV advice and reports to be provided to the Ombudsman and relevant Minister, but there is no provision for information included in such advice or reports to be passed on to the Children's Guardian.

The Ombudsman can only pass on OCV information to the Children's Guardian where that information forms the basis of a complaint or review under CS-CRAMA.

The Children's Guardian believes current arrangements do not reflect one of the principles that informed the development of CS-CRAMA, being "*the potential to share information should be strengthened wherever possible*"¹²⁰.

The Children's Guardian has submitted to the PJC that consideration should be given to amending CS-CRAMA to allow OCV information to be provided to the Children's Guardian.

In many ways, it would be sensible to collocate the OOHC work of the Children's Guardian and OCVs. However, OOHC work makes up a relatively small proportion of the OCV Program and there are also clear advantages in all OCVs reporting through one administration.

The Children's Guardian and the Ombudsman's Office have recently agreed to hold regular meetings with OCVs to enable better identification of common issues of interest to the Children's Guardian and OCVs.

vi) Review of deaths of children in care

Part 6 of CS-CRAMA provides for Ombudsman reviews of deaths of children in care, as well as the deaths of other specified vulnerable people.

¹²⁰ *Community Services Legislation Amendment Bill 2002*, Second Reading, the Hon. Carmel Tebbutt, NSW Legislative Council Hansard, 18 June 2002, p3199.

Section 180(2)(a) of the Act provides the Children's Guardian is not entitled to carry out an investigation into the death of a child that is subject to investigation by the coroner or review or investigation by the Ombudsman.

There is no potential for any overlap of the Children's Guardian's and Ombudsman's functions in this area.

CS-CRAMA provides for effective information exchange between the Children's Guardian and Ombudsman where the death of children in OOHC is concerned.

5.4 THE CHILDREN'S GUARDIAN AND COMMISSION FOR CHILDREN AND YOUNG PEOPLE (CCYP)

The Office of the Children's Guardian was merged with the Commission for Children and Young People (CCYP) on 3 April 2006 to form the Office for Children (OFC).

The OFC was established to provide more efficient shared administrative and financial support to the Children's Guardian and CCYP. The statutory functions of the Children's Guardian, CCYP, and CCYP Commissioner were not changed as a result of the merger.

CCYP has broad advocacy, education and research functions in respect of children and young people generally. It also encourages workplaces to be child-safe and child-friendly, oversees employment screening systems for child-related employment, and supports the Child Death Review Team.

Section 12 of the *Commission for Children and Young People Act 1998* ("the CCYP Act") provides that CCYP, in exercising its functions, is to give priority to the interests and needs of vulnerable children (children in OOHC are certainly vulnerable).

The 2004 Review of the *CCYP Act* and *Child Protection (Prohibited Employment) Act 1998* outlined the manner in which CCYP administers s12:

"The approach the Commission takes is to focus on those issues of importance to most children which, if acted upon, will result in greatest benefit to the most vulnerable children. A list of vulnerable children in the legislation could at best be indicative. The Review considers that the needs of vulnerable children are already given priority and that further expression of this could compromise the breadth and inclusiveness of the Commission's current mandate. This broad mandate is strongly supported by children and young people."¹²¹

The fact that CCYP has a broad focus on children and young people generally, whilst the Children's Guardian has a much narrower focus, means there is little intersection between the work programs of the Children's Guardian and CCYP.

However, the broad work of CCYP does have some application to children and young people in OOHC. For example, CCYP's work on child-safe and child-friendly organisations is relevant to designated agencies. While the current OOHC Standards include "child-safe" and "child-friendly" practice and management attributes (eg: in recruitment, complaints management and participation), the proposed updating of the Standards provides an opportunity to check that they reflect current best practice in risk management. CCYP will be invited to participate in updating the Standards, given the work it has done in building "child-safe and child-friendly" organisations.

OOHC accreditation criteria also assess whether there are systems in place for conducting Working With Children Checks for all carers (ie: designated agencies are complying with the

¹²¹ L'Orange. 2004: 21.

background checking requirements of the CCYP Act) and for informing CCYP of relevant completed employment proceedings.

The Children's Guardian has identified non-compliant practice in these areas and informed CCYP. CCYP has provided advice on compliant practice, which the Children's Guardian passes on to designated agencies. The Children's Guardian then requires agencies to correct their practice before they are assessed as meeting relevant accreditation criteria. CCYP may also inform the Children's Guardian of any concerns it identifies in this area. CCYP and the Children's Guardian have agreed that it is not necessary to enter into a formal MOU to address information exchange in this area.

If consideration were to be given to collocating the Children's Guardian's functions with a CCYP that has a strong focus on children and young people generally, then great care would be needed in ensuring the OOHC focus of work currently performed by the Children's Guardian's work is not diluted in any way. Funding and staffing for that work would need to be quarantined.

There may also be some tension between the CCYP's very broad advocacy functions and the Children's Guardian's regulatory role in assessing compliance with NSW OOHC Standards. It may be difficult to regulate the OOHC sector in accordance with those ministerially approved Standards, whilst at the same time publicly advocating that changes be made to them.

In Queensland, there is a Commission for Children and Young People and Child Guardian ("the Queensland Commission"). Whilst the Commission does have a remit in respect of children and young people generally, it focuses predominantly on vulnerable children, particularly children in the child safety system – a child starts being in child safety when the chief executive of the Department of Child Safety becomes aware of alleged harm or alleged risk of harm to the child.

The Queensland Commission's strategic objectives are:

- effective child safety and juvenile justice systems in which the best interests of each child or young person are appropriately assessed and an effective services strategy is implemented;
- prevention and targeted early intervention strategies for vulnerable children and young people; and
- a safe environment for children and young people where risks are identified and managed, including appropriate employment screening.¹²²

The functions of the Queensland Commission include some functions similar to those of the Community Services Division of the NSW Ombudsman, including:

- complaints handling and oversight;
- monitoring, auditing and reviewing systemic issues and the handling of individual cases in the child safety system;
- administering a community visitor program;
- recording, analysing, researching and reporting on information about child deaths¹²³.

¹²² Queensland Commission for Children and Young People and Child Guardian. *2006/07 Annual Report*. 4.

¹²³ See sections 15 and 15AA of the *Commission for Children and Young People and Child Guardian Act 2000* for a full list of the Commission's functions.

The Queensland Commission does not have functions of the NSW Children's Guardian such as developing service standards or accrediting providers against those standards - the Department of Child Safety administers a standards based quality assurance system for non-government providers, which incorporates independent assessment. Neither does the Queensland Commission have parental responsibility decision making powers of the kind considered at page 63 above.

5.5 THE DOCS/OVERSIGHT AGENCY FORUM

In 2002, the Legislative Council Standing Committee on Social Issues published its Final Report on Child Protection Services.

Recommendation 16 of that Report provided:

"To ensure that an effective system of external oversight is established, the Department of Community Services should:

- *Work in partnership with oversight bodies in the identification of problems and in finding appropriate solutions*
- *Ensure a timely and comprehensive formal response is provided to all recommendations made by oversight agencies...*¹²⁴

Following the Report of the Legislative Council Standing Committee on Social Issues, DoCS convened a DoCS/Oversighting Agencies Policy and Legal Issues Working Party, which met monthly. Both the Ombudsman's Office and Children's Guardian were represented on that Working Party.

This forum for dialogue between DoCS and the oversight agencies was not maintained.

Consideration might be given to re-establishing such a forum, although monthly meetings would not be necessary, where DoCS and oversight agencies could discuss issues of common interest. CCYP might be invited to attend on a needs basis – for example, where background checking issues need to be discussed.

¹²⁴ Legislative Council Standing Committee on Social Issues. *Care and Support – Final Report on Child Protection Services*. December 2002: 48.

ATTACHMENT A

RECOMMENDATIONS

Mandatory reporting

1. That the mandatory reporting threshold be changed to require reporting where a mandatory reporter has reasonable grounds to suspect that there is a real likelihood of harm to a child, subject to the Inquiry being satisfied that mandatory reporters have the capacity to make such assessments.
2. That neglect is included as an explicit basis for mandatory reporting.
3. That serious and persistent parental drug use is recognised as a behaviour that carries a real likelihood of risk of harm to a child.
4. That the mandatory reporting regime supports the reporting of matters where there is a cumulative risk of harm.
5. That “unit level” mandatory reporting is introduced in those organisations where appropriately skilled officers have the capacity to assess child protection information and rapidly transmit that information to DoCS.
6. That the penalty for failure to report a matter under section 27(2) of the Act is removed.

Role of the courts

7. That section 79 of the Act is amended to preclude the Children’s Court from making orders allocating parental responsibility to a person in their capacity as an officer of an organisation that provides services to children and young people in OOHC.
8. That section 86 of the Act be amended to allow the Children’s Court to make interim contact orders, with ongoing contact arrangements to be determined through case planning and review, subject to parties having a right to apply to the Court or other appropriate body to review contact arrangements.
9. That if recommendation 8 is supported:
 - a) the Act should be amended to require the Children’s Guardian to issue statutory guidelines on contact arrangements; and
 - b) the Children’s Guardian should monitor the integration of contact into case management through the accreditation process and Case File Audits.

10. That section 141(2) of the Act is amended to remove the requirement for designated agencies to apply to the Children's Court for an order to vary OOHC arrangements where they become aware that they will be unable to fulfil their responsibilities in relation to a child or young person. Instead, they should be required to notify DoCS, and DoCS should be required to notify the Children's Guardian.

Out-of-home care

11. That demands placed on the statutory OOHC system are reduced by further developing:
 - a) early intervention systems to provide greater support to families;
 - b) alternative dispute mechanisms for resolving care arrangements, as provided for in the Act (including preliminary conferences), to avoid care applications, develop consent orders and reduce breakdown in parent/child relationships; and
 - c) restoration and permanency planning, with greater use of adoption for children in long term care where restoration has been assessed as not being viable.
12. That the proportion of children and young people in OOHC supervised by non-government designated agencies is progressively increased over time, with this process carefully managed so that responsibility does not outstrip capacity.
13. That the Children's Guardian examine caseworker allocation for children and young people in OOHC as part of future Case File Audits, with the Children's Guardian to report on differences in case file content for allocated and unallocated cases.
14. That case management responsibility continues to be progressively delegated to non-government designated agencies according to their capacity, with DoCS to consult the Children's Guardian before delegating case management or broader parental responsibility.
15. That clause 20 of the *Children and Young Persons (Care and Protection) Regulation 2000* is amended to enable designated agencies to authorise carers attached to non-designated organisations to provide respite care for children and young people in OOHC.
16. That designated agencies should increase their focus on:
 - a) maintaining current and comprehensive health and education records for Indigenous children and young people in OOHC;
 - b) prioritising participation of Indigenous children and young people in OOHC in age appropriate education;

- c) prioritising regular health checks and immunisation catch up programs for Indigenous children and young people in OOHC;
 - d) including discussion of education and health needs at every case review for Indigenous children and young people in OOHC; and
 - e) developing collaborative relationships with family, community representatives and other professionals to support their participation in the case planning process for Indigenous children and young people in OOHC.
17. That the Children's Guardian continue to provide individualised programs for specialist Indigenous designated agencies to accelerate their progress towards accreditation.
18. That DoCS increase its capacity building activity with specialist Indigenous designated agencies.
19. That consideration be given to funding the Aboriginal Family and Community Care State Secretariat to employ an officer responsible for working with specialist Indigenous agencies to assist them achieve accreditation.
20. That designated agencies should increase their focus on:
- a) reviewing court-ordered OOHC placements in accordance with s150 of the Act;
 - b) convening formal case conferences to conduct reviews;
 - c) involving children and young people in case planning and reviews;
 - d) checking the vaccination status of children and young people as soon as possible after they enter care;
 - e) obtaining vaccination records for children and young people in OOHC, wherever possible;
 - f) arranging for an age-appropriate catch up course of vaccination if vaccination is incomplete or records are not available;
 - g) including discussion of immunisation status when reviewing health needs at every case review;
 - h) including current psychological/psychiatric reports on file to inform case planning and review;
 - i) reviewing consent arrangements for the use of psychotropic medication in behaviour management;

- j) developing collaborative relationships with other agencies and professionals to promote participation of children and young people in OOHC in age appropriate education;
- k) maintaining education records for each child and young person in OOHC;
- l) including discussion of educational needs at every case review.

21. That the Children's Guardian:

- a) continue to support the Royal Australian and New Zealand College of Psychiatry develop practice guidelines for psychiatrists and mental health professionals working with children in care;
- b) focus on health planning and management for children and young people in OOHC in the 2008/09 Case File Audit; and
- c) amend the guidelines issued under section 150 of the Act to include further information about health, immunisation and education records in placement reviews.

22. That a statutory scheme to support quality and accountability in voluntary out-of-home care service provision is introduced.

23. That consideration is given to amending section 248 of the Act to promote relevant agencies sharing information that relates to the safety, welfare and well-being of children and young people in the child protection system, with identified sensitive categories of information only to be released with DoCS approval.

24. That the Privacy Commissioner be consulted in developing a modified information exchange framework, with consideration given to the development of a Privacy Code of Practice to inform practice in this area.

Role of the Children's Guardian in the OOHC system

25. That an independently administered Accreditation and Quality Improvement Program is maintained for government and non-government designated agencies.

26. That an independently administered OOHC Case File Audit Program is maintained for government and non-government designated agencies.

27. That the Inquiry endorse the direction of proposed legislative reforms to improve the Accreditation and Quality Improvement Program, addressed in the Children's Guardian's October 2007 Report "*Review of Out-of-Home Accreditation and Quality Improvement Systems and Processes*" and summarised at section 4.5 of Part B of this submission.

28. That the Inquiry endorse the direction of proposed administrative reforms to improve the Accreditation and Quality Improvement Program, summarised at section 4.5 of Part B of this submission.
29. That the following functions of the Children's Guardian continue to be independently exercised:
 - a) promoting the best interests of all children and young people in OOHC;
 - b) ensuring that the rights of all children and young people in OOHC are safeguarded and promoted;
 - c) developing designated agency accreditation criteria for the approval of the Minister;
 - d) developing statutory guidelines in sensitive OOHC areas;
 - e) making recommendations to the Minister and Parliament.
30. That consideration be given to repealing the unproclaimed:
 - a) s183 of the Act, which confers broad dispute resolution powers on the Children's Guardian;
 - b) s181(1)(d) of the Act, which requires the Children's Guardian to examine a copy of the case plan and review reports for each child or young person in OOHC;
 - c) s150(5) of the Act, which requires copies of each review report for court ordered placements to be provided to the Children's Guardian.
31. That the Children's Guardian use its existing broad powers to obtain and monitor case plans and reviews for children and young people in OOHC where there are serious physical or psychological harm risks.
32. That the unproclaimed s181(1)(a) and s186 of the Act are amended so that DoCS, rather than the Children's Guardian, is responsible for:
 - a) exercising and delegating the Minister's parental responsibilities; and
 - b) making parental responsibility decisions that may not be delegated to other designated agencies (ie: exercising residual powers of guardianship).

33. That consideration is given to amending the Act to:

- a) require DoCS to consult the Children's Guardian before delegating aspects of the Minister's parental responsibility (including aspects related to case management) to a designated agency (to be done on a class basis, rather than for each individual child);
- b) require all non-delegable parental responsibility decisions to be prescribed by regulation;
- c) require the Children's Guardian to monitor the systems in place for making non-delegable parental responsibility decisions;
- d) enable the Children's Guardian to require DoCS to provide such information to the Children's Guardian on the exercise of non-delegable parental responsibility functions, as the Children's Guardian may require; and
- e) require the Children's Guardian to report and make recommendations to the Minister on systems for making non-delegable parental responsibility decisions, and on particular decisions that should or should not be capable of being delegated.

34. That the Inquiry give consideration to establishing a safety-net "special guardianship" jurisdiction for the Children's Guardian, which might have the following elements:

- a) designated agencies would be required to comply with any written direction of the Children's Guardian to exercise the Minister's parental responsibility in a particular way (such directions could not conflict with any direction of the Minister);
- b) the Children's Guardian being required to give designated agencies an opportunity to address a particular care issue before issuing such a written direction, except where the Children's Guardian reasonably believes a direction needs to be urgently issued because there is an imminent risk to the life or safety of a child or young person in OOHC;
- c) the Children's Guardian being unable to issue such a direction unless:
 - I. options for resolving the matter through the *Community Services (Complaints, Reviews and Monitoring) Act 1993* have been exhausted or the Ombudsman refers the matter to the Children's Guardian for consideration; or
 - II. the Minister or Director-General of DoCS refers a matter to the Children's Guardian for consideration; or
 - III. the Children's Court refers a matter to the Children's Guardian for consideration; or

- IV. another person refers a matter to the Children's Guardian for consideration, where that person believes there is an imminent risk to the life or safety of a child or young person in OOHC (if the Children's Guardian does not share this view then the matter must be referred to a designated agency for local attention or to the Ombudsman as a community service complaint); or
 - V. the Children's Guardian decides to do so on his/her own motion, after having complied with 34(b) above.
- d) the Children's Guardian giving the designated agency an opportunity to be heard on the impact on the designated agency of issuing a particular direction;
 - e) s182 of the Act being proclaimed to enable the Children's Guardian to remove a child or young person from a care arrangement where the designated agency does not comply with a direction; and
 - f) s184 of the Act being proclaimed to allow the Children's Guardian to apply to the Children's Court for the rescission or variation of a Children's Court order made under the Act, notwithstanding the Children's Guardian not having been a party to earlier proceedings.
35. That consideration be given to the Director-General of DoCS, rather than the Children's Guardian, being responsible for consenting to the publication or broadcasting of identifying information concerning children and young people under the parental responsibility of the Minister (s105(3)(b)(iii) of the Act).
36. That consideration is given to amending s90(3A) of the Act to remove the requirement that the Children's Guardian is notified of rescission and variation proceedings.
37. That consideration be given to extending the coverage of the Parliamentary Joint Committee on Children and Young People so that the Children's Guardian is accountable to that Committee in the same manner as the Commission for Children and Young People.

ATTACHMENT B

AGENCY RESPONSES TO REVIEW QUESTIONNAIRE

Agencies were invited to provide written comments about the policy, procedure and practice benefits of the Accreditation and Quality Improvement Program (“the Program”).

Agencies in the accreditation stream made the following comments:

- *After accreditation the regional programs now operate in a more consistent framework including documentation, carer support and training, casework practice, case planning and review. There is also a quality assurance framework in place to ensure continued improvement and monitoring of existing practices.*
- *Accreditation has sharpened our monitoring and compliance recognition in agency eg we now have a Practice Development Service. The biggest shift between Audits 2005/6 and 2006/7 was increased documentation of participation and families. We are thus more documented as accountable to families and carers. It has stimulated the agency's interest in other ways to look at participation eg industry PhD on using ICT for participation. Documents are now being given to carers/clients/families more actively. There was only one policy area in which (the agency) had to develop policy to address accreditation - this was the psychotropic drugs issue. This did not change actual practice.*
- *After applying for accreditation policy and procedure had a major overhaul. Continuous improvement register introduced. Better documentation and systems developed. Resulted in better service delivery/development.*
- *Prior to accreditation, whilst we believed that our practice was of a good standard we did not have the tools to measure this. Having to go through the process of demonstrating good practice with direct evidence was a useful process in looking at the way we do things and document our decisions & our casework. Now case file audits are a regular practice in our out of home care program as we can now recognise that this is another way to review practice & reflect on the way we do things. The accreditation process also guided us in putting together a complete range of policies & procedures to guide our practice. We had been providing sound casework but we had not always been rigorous about setting out & documenting the steps involved and the expectations around this work.*
- *Just prior to meeting with representatives from the OCG with respect to the accreditation process, an OOHC Working Group was convened to begin working on documentation for OOHC services within the agency. Subsequent to the initial meetings with members from the OCG, a number of people (2 actually) spent time with the working group to develop policies and procedures in line with the standards. Further into the process, contractual arrangements have been in place with a team of consultants who work with the OOHC management group to continue revising and improving the policies, practices and procedures within OOHC services.*
- *There is now a process for reviewing policies at the monthly staff meeting, and a process for amending policies whenever there is a change of policy or procedure.*
- *With the accreditation process (the agency) developed further written PPP's and was more consistent in ensuring review.*

- *We have continued all of these system since accredited. The thing that has changed is we now do more intensive and detailed file audits. Administration since accreditation has increased.*
- *Since being accredited (the agency) has introduced a Quality Improvement System (QIS) to monitor the quality of service provision and outcomes for children on an annual basis.*
- *(The agency) was moving to an environment of continuous quality improvement at the same time as the OoHC accreditation process was introduced. Changes include: development of an agency specific "Out of Home Care Policy & Procedures Manual; setting of "Policy & Procedures Review" as a standing item at all OoHC Team Meetings; carrying out of internal file audits; training of staff in continuous improvement & problem solving techniques; increased level of staff support & supervision.... these outcomes would have occurred to some extent regardless of the accreditation program but it certainly hastened the process and led to a much sharper focus on quality improvements.*
- *At the same time as (the agency) was progressing through the accreditation process the agency as a whole was looking at quality improvement in general. Just after we achieved accreditation (the agency) created a Quality Improvement position.*
- *The accreditation process meant that some policies and procedures were updated and improved and others were created according to the standards. (The agency) had also been a part of the original pilot program on developing OoHC standards so we had an idea of what would be required. We felt our practice was pretty good so we had a lot of the evidence, accreditation meant more structure about processes and written policies and procedures. (The agency) welcomed the accreditation process although the amount of work in collation and collection was huge and required much staff time. We did not have the resources to employ a specific co-ordinator so used existing resources.*
- *We provide a number of residential placements for adults with moderate to severe intellectual disabilities. The process of accreditation made us review all our policies, procedures and practice. Whilst many were fine, it certainly enhanced what we were doing well and made us focus on improving areas where we were not performing as well.*
- *No difference after application for accreditation at this stage.*

The following comments were made by those in the QIP stream:

- *What the QIP program has enabled is a more in depth review and expansion of Policies and Procedures. We believe that it has improved our practices in a huge way with a more child and young person focus, which we believe we did in an informal way before, but are now able to demonstrate through process.*
- *Since undertaking QIP these practices continue to a higher level.*
- *The QIP provides us with these clear practice indicators.*
- *The QIP gave us a real opportunity to learn together and incorporated best practice into our day to day operations.*
- *All (the agency) programs have improved in the areas of demonstrating accountability. The ongoing and continuous improvement of policies, procedures and practice had already been a focus of the organisation, but the detail had been less*

than adequate and due to the high level of demand of service provision to children and young people with high and complex needs, the organisation appreciated the external timeframes to complete the required documentation.

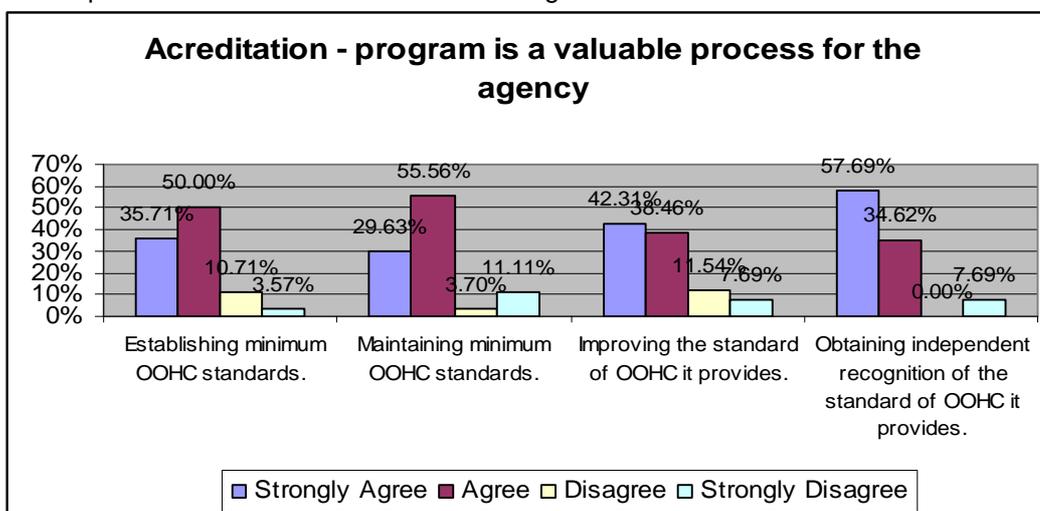
- *As the result of the QIP, (the agency) is introducing centralised policy, procedures and monitoring practices.*
- *After becoming part of the QIP process there was a much greater emphasis on reviewing and documenting policies, procedures and practices, which I believe is a good thing. This occurred at a Board and general staff level. I believe there has been greater general awareness at all levels of best practice procedures and greater accountability shown by staff.*
- *On entering the QI program the process has assisted us in forming a strong foundation of policies, procedures and protocol and streamlining our record systems.*
- *The QIP process has resulted in a more structured approach to working inclusively across the agency to a timetable, with individual managers at a program level becoming more involved in the process.*
- *..when preparing to enter the QIP we followed the guidelines from OCG assisting us to revise these policies and procedures we find that these assist staff understand more clearly what to do, and how to do in their care for children/young people.*

One respondent said that the agency had not changed the way it reviewed or improved its policies, procedures or practices since entering the QIP.

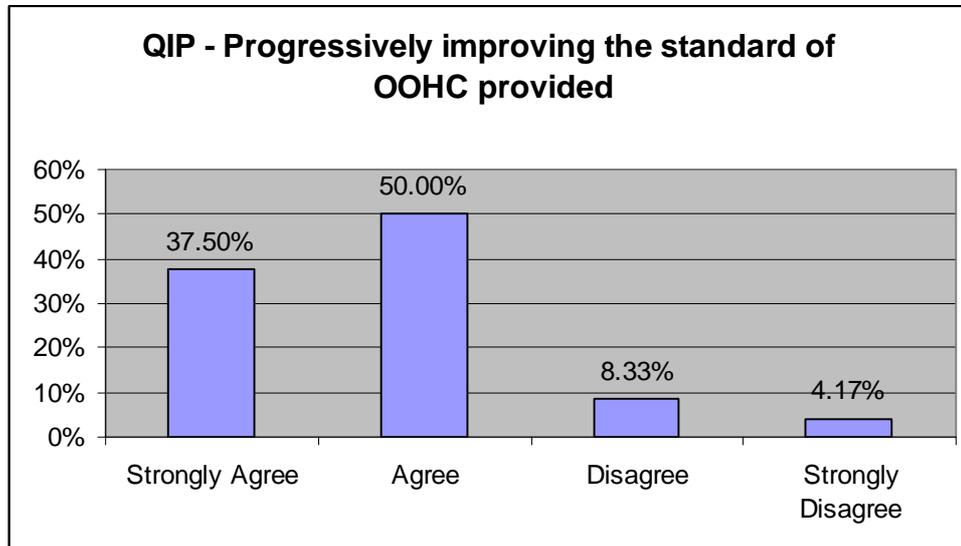
Agencies in the accreditation stream were asked if they saw the Program as a valuable process for:

- Establishing minimum OOHC standards
- Maintaining minimum OOHC standards
- Improving the standard of OOHC provided
- Obtaining independent recognition of the standard of OOHC provided by the agency.

The responses are summarised in the following table.



Agencies in the QIP were asked if they thought the Program was a valuable process for progressively improving the standard of OOHC the agency provides. The responses are summarised in the following table.



Respondents were asked to provide example of how participation in the Program has affected the quality of the OOHC their agency provides for children and young people.

Most of the responses from agencies in the QIP were positive. A significant number of the examples of practice improvement provided by the respondents were about changes in record keeping, case monitoring/review practices and increased participation of children, young people and their families in decision making processes. The responses are provided below:

- *Although (the agency) was previously meeting the standards required by the OCCG, the process has helped the agency streamline our processes and improve paperwork. The process has also made this agency consciously aware of “why” we need the policies and procedures in place and current. This “why” is not because it is a requirement of the OCCG but they are there to better improve services provided to clients.*
- *It has impacted on the workers who are now more aware about the type of information that must be recorded to demonstrate we are following through on certain actions. The educational/medical needs are more closely monitored. Case planning is monitored more closely.*
- *(The agency) believes that it has always provided a high level of OOHC. What QIP has done has enabled a more accurate record of children, young people and foster carers whilst in the service. Meeting requirements in regard to case files has enabled a more holistic and accurate reflection of the child or young person’s needs and history. It has invited caseworkers to be more thoughtful in terms of providing a sound basis for children & young people to be inclusive and better able to state their own needs and make decisions; and to caseworkers and foster carers enabling them to provide an informed environment that is based on best outcomes for the child or young person.*
- *Our record keeping is more targeted and exhaustive to ensure we record critical issues relevant to the QIP.*

- *The agency has developed clear casework practice procedures; improved reporting systems so that all staff are clear about their responsibilities in providing support to children and young people to meet their goals.*
- *We have revised Policy and the associated practice, including forms which have improved our service. We have been involved in the QIP since its creation and we are keen to gain accreditation. We have submitted material twice.*
- *By providing us with clearer definition of the reporting requirements and the type of evidence required. This fits with our basic philosophy on data collection: "Unless you are going to do something useful with the data why bother collecting it".*
- *By providing more participation for the child in care to have a say in their care. By providing all stakeholders involved in the care of the child to present dissenting views.*
- *We have better policy and procedures in place for carer assessment, case planning, participation in decision making of children and their parents, established a working agreement with DoCS, we also improved our carer training manual and updated all our forms and linked them to our P&P Manual.*
- *It has assisted the organisation in gaining a better understanding of its role in case management when working in collaboration with DoCS. This had led to being more assertive in our dealings with DoCS caseworkers and managers when following up responsibilities agreed on at case management meeting and reviews.*
- *(From a specialist disability service) The development of child/young people specific accommodation policies, and the consideration of needs of children/young people in the context of developing/reviewing population wide policies.*
- *Better resources.*
- *Our involvement in QIP has led to: Total review of the case review process – more inclination to push for family/other involvement etc; More involvement of the young people in decision making at all stages of their OOHC; Better planning for the future for young people & a greater emphasis on a continuum of care & transition; More reviews of policy & procedures; More documentation of procedures along the way.*
- *When a child/young person was referred to our service, we, as a gatekeeper, need to get the details of this child/young person and the information of their present situation and that of their family as much as possible so that we can rightly assess the situation to avoid taking this child/young people in care unnecessary; Shortly after a child/young person entered the care, one staff sit with them to support for a while and make them feel at home. This way of support helps the child/young person settle in quite well.*
- *The QI program has made us more aware of ensuring that our documentation, procedures and protocols are accurate and actively pursued.*
- *The QIP provides a rigid framework for the service to analyse and model our policies, procedures and practices on those considered "best practice".*

Some respondents from agencies in the QIP queried whether the agency's participation in the Program had positively affected the quality of OOHC:

- *I think it has strongly improved our paper based systems and improved training and development. I think our practice standards were always high and I worry that the QIP*

focuses too much on paper. This is not a true measure of the care provided by the agency.

- *Participation has provided some method for measuring results by some objective standard, however the agency is concerned that the concrete OOHC provided is somewhat compromised by the reporting process due to lack of time and staff resources and that there is a somewhat artificial division between the process of the reporting, and the actual OOHC provided.*
- *Participation has had a positive impact in that we have improved our protocols and procedures and tightened up our policies. The care for young people has not greatly changed, though perhaps more careful attention is given to their participation and to monitoring health, culture, and family connection issues. Participation in the QIP has had a negative impact in that it has resulted in a significant amount of time and resources being diverted from more proactive improvement (around eight weeks part time for two senior staff and around 2% of our OoHC annual expenditure).*
- *From a former participant - (The agency's) participation included attempts to meet all applicable standards as recommended by our Project Officer (though this may not have been the Guardian's intention). Consequently considerable resources were diverted away from service provision to meet standards that were peripheral to the service. While few changes were made as a result of QIP, there were a few which were mainly to do with record keeping rather than service provision. For example (the agency) now documents adjustments for CALD children. The change has not led to a change in practice because we have always made adjustments where needed or requested. However we now have a form that documents adjustments.*

Most of the respondents in the accreditation stream believed participation in the Program positively affected the quality of care provided and gave similar examples to the QIP respondents, with slightly more emphasis on how changes to their policies and procedures have improved service delivery:

- *Well documented policy and procedures regarding all aspects of casework practice and the development and implementation of tools (templates) enable all OOHC staff to be fully informed and operate under standards and legislative requirements to best meet the needs of children and young people in care. The tools ensure consistent work practice and ensure all relevant aspects of casework practice are met.*
- *Our assessment process is more thorough now accreditation has affected the quality of Data collected; Needs assessment early in placement; Client participation is higher.*
- *It has assisted us in developing compliance with core practices, such as recording via LAC, because it puts strong pressure on workers to be externally accountable.*
- *Support workers from the OCG met with management to review the study guide/policies/procedures manual. This assistance clarified the need for further research to be undertaken before we applied for accreditation.*
- *DOCS have to accept that the accreditation of (agency name) proves that we are able meet to the demands of providing out of home care – this would never have been acknowledged prior to accreditation.*
- *Agency now uses LAC system - better history documentation of children's history. Keeps us mindful of always involving children and their families in decision making and keeping records of this. Children live in home that organisation owns - stable environment. Continual review and improvements.*

- *Development & implementation of more formal and comprehensive Preparation for Leaving Care Plans for young people. Development of more detailed Behaviour Management Plans for children/young people. Greater level of participation by children/young people in planning & decision making.*
- *One example for us was in relation to “participation” of all stakeholders in our program. We had been working to involve carers, birth parents & children/young people to a certain degree. However, this process made us realise that we had not been pro-active enough in involving stakeholders, particularly birth parents & young people/children in decision making and recording their views. Since accreditation we have been much more mindful of this which has been reflected in our practice.*
- *Development of specific tools to assist processes has resulted from involvement in accreditation. Eg: In terms of Case Conferences: Agency development of Conference Checklist as part of the Procedure has ensured that all aspects necessary for planning and executing a Conference (including participation of all significant players) have been undertaken or reasons given as to why not. Conferences happen annually now without exception and reviews are timely as required. As per the procedure, Staff are much more proactive in seeking views of children and young people about plans involving them and encouraging children and young persons to present their views. Staff are also more proactive in encouraging birth family and significant persons to attend conferences or at least have their views noted; Development of Food Diary for carers to implement on behalf of child in their care to be used in discussion with caseworker; Development of Leaving Care Checklist for caseworker to use with young people leaving care.*
- *As a provider, we make it our business to obtain much more background information on the young people within our services, there is an increased level of staff awareness of overall responsibilities to young people (and children) in our care, responsibilities are clearly defined, there is more clarity around planning for the futures of the children and young people in our care, staff feel more “professional”.*
- *We have only just received accreditation and are in the process of tendering for our first programs for children. However, the training of staff in policy, procedures and practice has been refined and improved. Being professional, ethical, respectful and client centered is promoted as the minimum standard for (agency) staff.*
- *The application of OOHC Standards and the accreditation programme was both the catalyst and framework for transitioning (the agency’s) OOHC programme. Historically (the agency’s) Header Agreement required that the agency provide ‘placements’ and support carers, with DoCS having casework and case management responsibility. For the majority of placements this arrangement did not actually occur, given the Department’s caseload pressures. The advent of the Standards has led to a model where (the agency) has developed the requisite infrastructure, assumed the casework and an increasing level of case management responsibility.*
- *The process of seeking Accreditation enabled (the agency) to establish specific Policies and Procedures around providing services to young people.*
- *Monitor our files better and all staff are aware of what is contained in the client files. Case plans are reviewed more carefully.*
- *(The agency) has now aligned its Policy Manuals with the NSW Standards for Out of Home Care. The Accreditation process also encouraged us to create Position Manuals for each staffing position. These are now valuable tools when training new staff and ensure that there is some consistency in procedures.*

- *Broader policy documentation.*
- *Ensuring that all clients are directly consulted about their care plans and that these interactions are clearly documented and used to inform case planning.*
- *The program has enabled (the Agency) to provide better evidence of: participation by children and young people in case conferences; education and health support that is provided; involvement of birth family and significant others in the lives of children and young people; specific cultural (particularly ATSI) and other supports that are provided*

Some respondents from accredited agencies felt that their agencies were providing a high standard of OOHC prior to the implementation, or regardless, of the Program:

- *... we were always going to operate to a high standard despite the accreditation process. Am not sure that the process will maintain standards across all agencies especially if token process of accreditation is applied. Process is not transparent and most are not aware of the difference between designated agency, quality improvement program and fully accredited. (The agency) is very happy about the accreditation process and believes it is very significant in sector reform. However we were already operating at a very high level of care. In some instances this high level was not documented in policies and procedures of the organisation and it is now.*
- *We do believe the process is positive in that it provides a way of measuring compliance with minimum standards - however some of the expectations of evidence is way "over the top" and we do not believe the process helped increase or improve quality. All the process does is increase the amount of time spent on documenting the case work and other tasks. This is essence is positive in some ways but in many areas it is extreme and much of the documentation is really unnecessary and does nothing to improve actual quality. Case planning / case conferencing may have improved but only in that it is more fully documented. Form templates have been designed.*
- *I believe that (the Agency) has always focused on positive outcomes for children/young persons placed in our program as evidenced by the minimal placement breakdowns.*
- *We found that participation in the programme enabled us to produce policies and procedures in line with what was required, but it did not affect the quality of OOHC that we provide. We believe that we were able to deliver high quality OOHC prior to the programme, and now have the written policies and procedures to underpin good practice.*

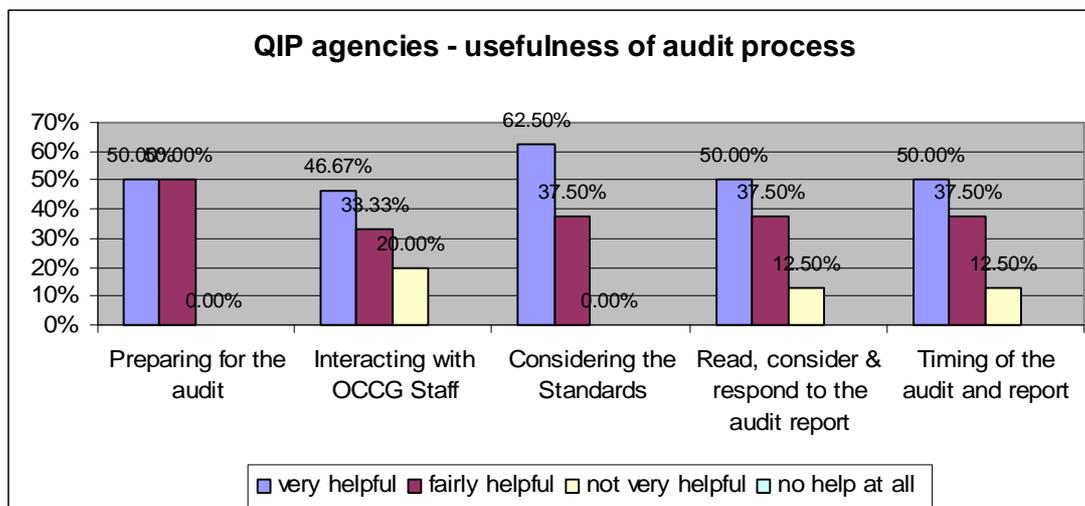
ATTACHMENT C

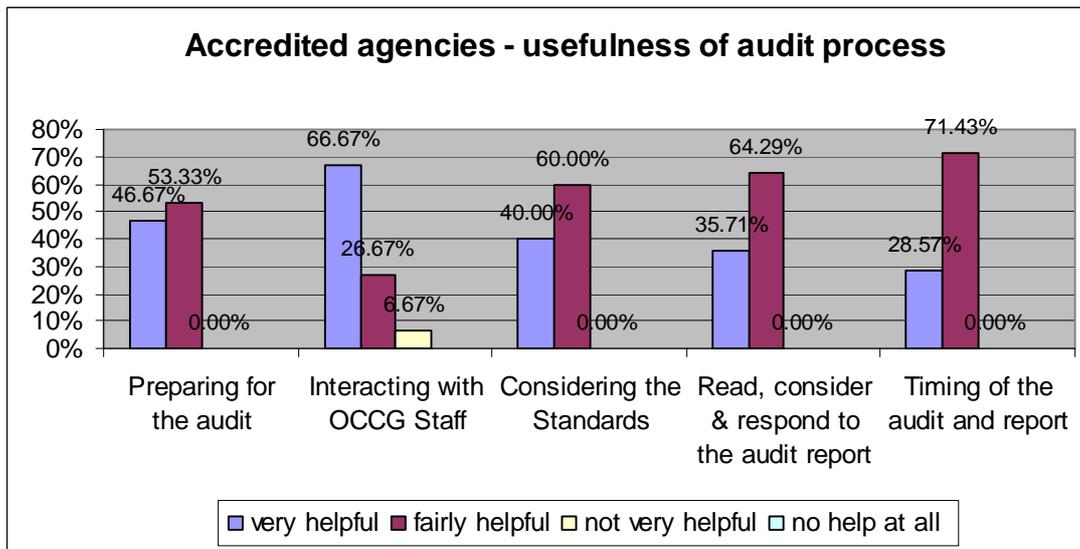
RESPONSES TO THE CASE FILE AUDIT SURVEY

Designated agencies were asked how helpful they found various aspects of the Case File Audit process. The responses are summarised in the following table.

	very helpful	fairly helpful	not very helpful	no help at all
I found preparing for the audit				
Total = 31	15	16	0	0
%	48%	52%	0%	0%
I found interacting with OCCG Staff				
Total =30	17	9	4	0
%	57%	30%	13%	0%
I found considering the Standards				
Total = 31	16	15	0	0
%	52%	48%	0%	0%
I found reading, considering & responding to the audit report				
Total = 29	13	15	2	0
%	43%	50%	7%	0%
I found the timing of the audit and report				
Total = 29	10	17	3	0
%	33%	57%	10%	0%

The following graphs break down the above responses by QIP/accredited agency status.





All of the respondents found preparing for the Audit and considering the NSW OOHC Standards useful processes. All of the accredited respondents found reading, considering and responding to the Audit report useful, as did 87.5% of respondents from the QIP.

Two respondents, from specialist Indigenous agencies in the QIP, said reading, considering and responding to the Audit report was 'not very helpful', which suggests OCCG needs to explore ways of making Audit information available in a more culturally appropriate way.

Four respondents (13%) said they did not find their interaction with the OCCG staff helpful. Four respondents (13%) said that they did not find the timing of the audit and the report useful.

29 respondents provided written comments in this section of the Survey. 20 (66%) of them were generally positive about the usefulness of the Audit process. For example:

- *The audit can help focus on some key aspects of case management, for example - need for planning & review in relation to behaviour management.*
- *The report can help identify areas where staff require further training and/or support.*
- *Having access to the audit tool prior to the audit taking place made the process a more positive experience.*
- *The file audit process is partly beneficial in terms of meeting standards. It also highlights the importance of collecting and maintaining important information to assist in meeting the needs of the young people in the OOHC system.*

Nine respondents raised concerns about OCCG expectations and DoCS' responsibilities in regard to case management. It is thought these concerns most probably related to previous audits, as for the first time the 2006/07 Audit did not consider compliance with certain audit items where DoCS retained case management responsibility.

Concerns were expressed about the need to keep all information subject to the Audit on case files, with one agency stating:

"However, the process does significantly increase the level of work that direct care staff have to do which detracts from their work with the young people. The Services are not funded or resourced adequately to have the administration time to do these

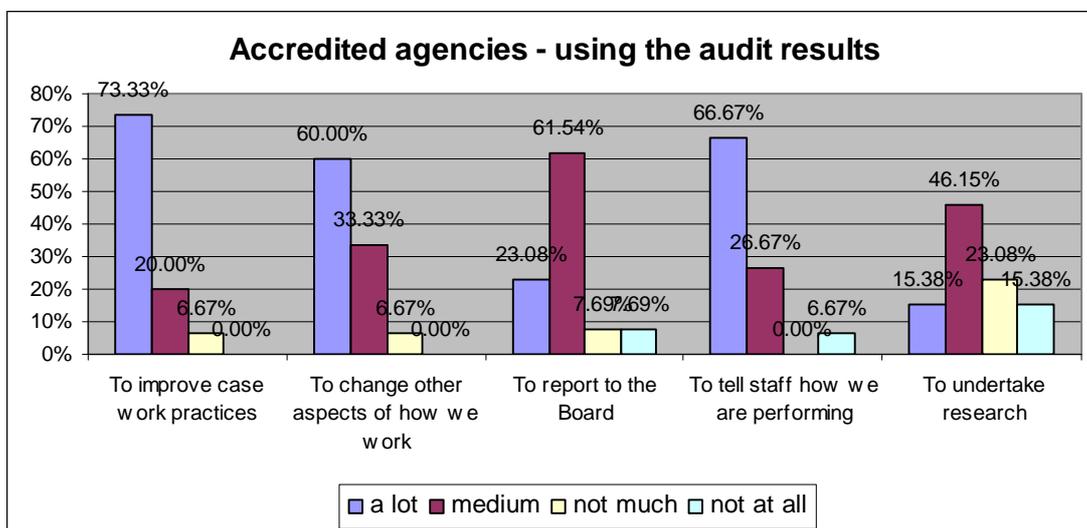
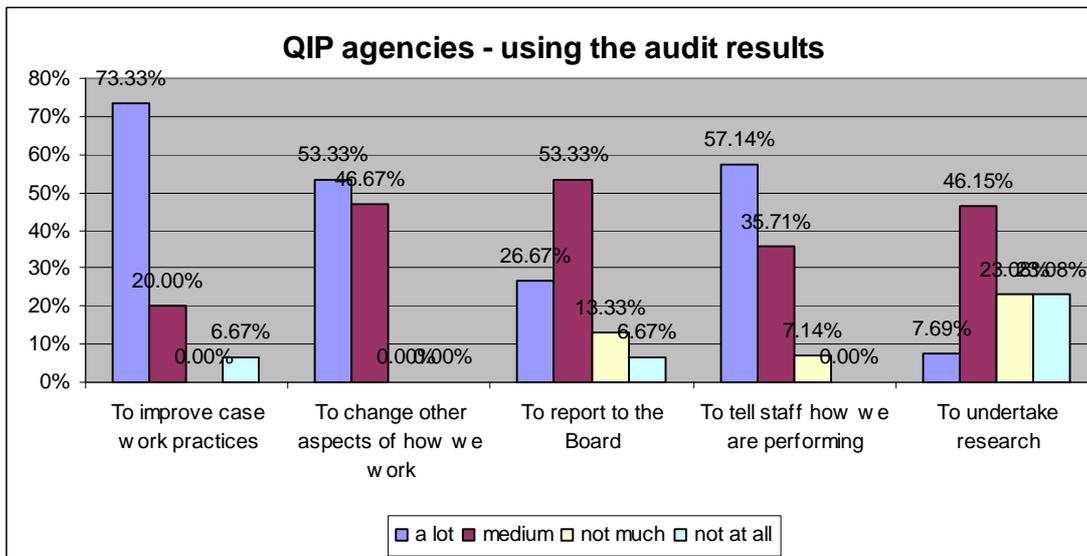
files in the way the audit demands. There is way too much detail expected and some of this does in no way improve the service. It in fact it causes negativity about the emphasis on the paper work”.

The Children’s Guardian only audits material that is required to be held in accordance with legislative requirements and the NSW OOHC Standards. The Children’s Guardian believes that the information audited is necessary to inform proper decision making and participation of relevant parties in case planning and review.

Agencies were also asked the extent to which they used Audit results in various agency activities. The responses are summarised in the following table.

I use the results to improve case work practices:	A lot	Medium	Not much	Not at all
Total = 30	23	5	1	1
	77%	17%	3%	3%
I use the results to change other aspects of how we work				
Total = 30	18	11	1	0
	60%	37%	3%	0%
I use the results to report to the Board				
Total = 29	7	16	3	3
	25%	55%	10%	10%
I use the results to tell staff how we are performing				
Total = 29	19	8	1	1
	66%	28%	3%	3%
I use the results to undertake research				
Total = 26	4	11	6	5
	15%	43%	23%	19%

The following graphs break down the above responses by QIP/accredited agency status.



Two accredited respondents said they had not, or rarely, used their results to improve case work practice. One of these respondents was from an agency that had scored 80% compliance or more in their 2006/2007 Audit. The other respondent commented that:

“We do not believe that the file audit process improves the quality of service delivery. We believe quality of service is not driven by administration requirements of file audits”.

24 respondents provided written comments in this section of the Survey. Some told how practice improvements have been made as a result of the audit process:

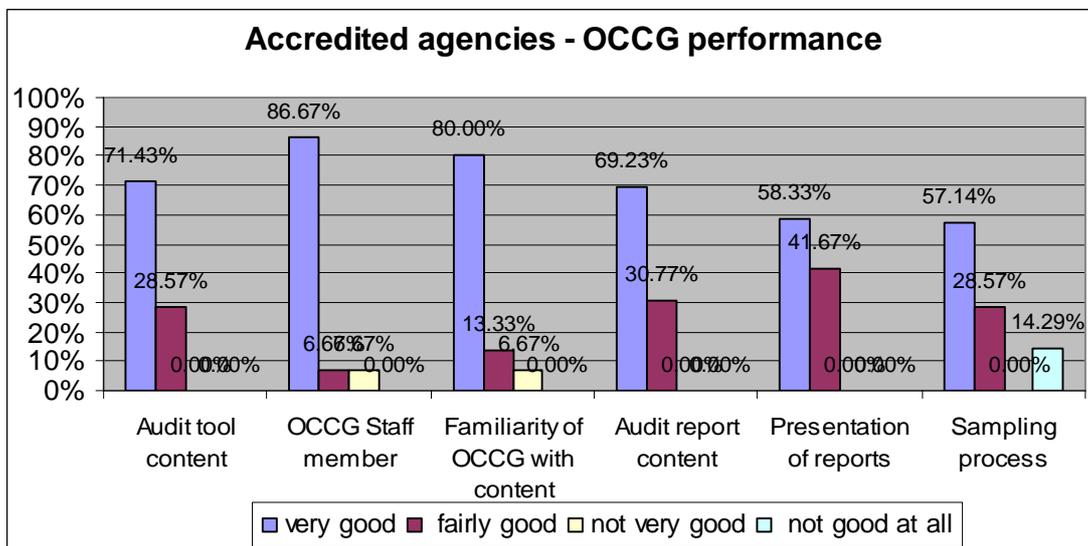
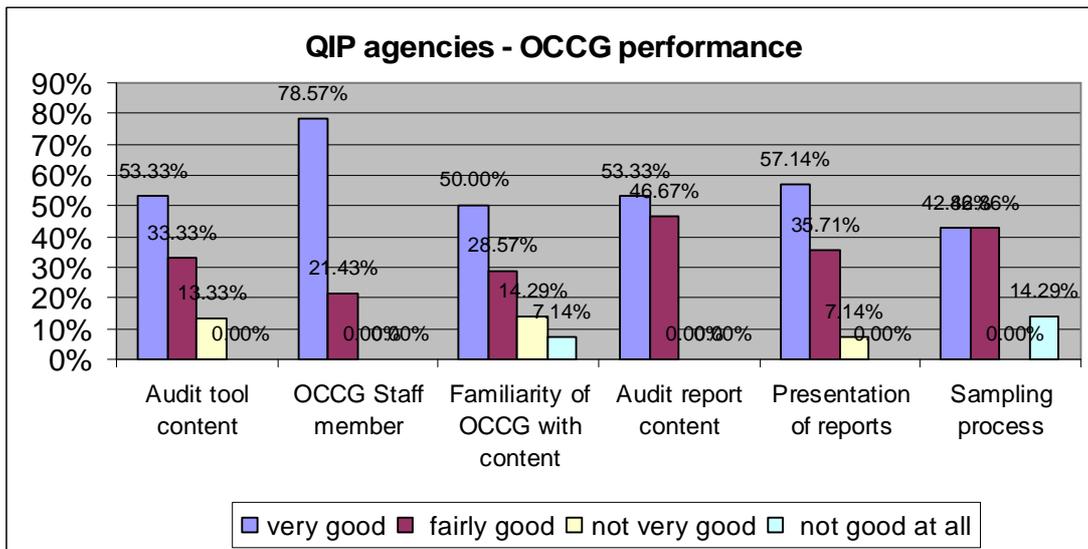
- *The results tend to drive any changes we make in practice in our agency. I think it creates a bit of a snow balling effect as well, which is good.*
- *To measure our performances and to improve all round systems.*
- *I will be encouraging our OOHC staff to view the results as constructive criticism and therefore improve our casework practice.*
- *We also use results to improve systems, forms etc.*

- *It makes us more mindful of what we are doing and how we are doing it. Any changes we have made have improved the quality outcomes for clients.*
- *The results will show us how to improve our casework practices. Sometimes you do not realise you are not recording as per standard. For example, not placing in specific timeframes for particular tasks and who is responsible for it.*
- *The feedback on individual files this year makes it much easier to identify where improvements need to be made or training needs to be organised.*

Finally, agencies were asked a series of questions about the performance of OCCG in carrying out the Audit, with responses summarised in the following table.

	very good	fairly good	not very good	not good at all
I rate the Audit tool content as				
Total = 29	18	9	2	0
%	62%	31%	7%	0%
I rate the performance of the OCCG Staff member	very good	fairly good	not very good	not good at all
Total = 29	24	4	1	0
%	83%	14%	3%	0%
I rate the familiarity of OCCG staff with (file) content as	very good	fairly good	not very good	not good at all
Total = 29	19	6	3	1
%	66%	21%	10%	3%
I rate the audit report content as	very good	fairly good	not very good	not good at all
Total = 28	17	11	0	0
%	61%	39%	0%	0%
I rate the presentation of the audit report as	very good	fairly good	not very good	not good at all
Total = 27	16	10	1	0
%	59%	37%	4%	0%
(If files were randomly selected) I rate the Sampling process as	very good	fairly good	not very good	not good at all
Total = 14	7	5	0	2
%	50%	36%	0%	14%

The following graphs break down the above responses by QIP/accredited agency status.



26 respondents (93%) rated the Audit tool content as 'very good' or 'good'. One of the two respondents who rated the tool content as 'not very good' said:

"The audit process tries to be very objective, but misses out on the relational quality of a service – there is a risk of being process-focused rather than personal".

With one exception, the respondents rated the OCCG staff member's performance as either 'very good' or 'fairly good'. The respondent who rated the OCCG staff member's performance as 'not very good' said: *"OCCG staff seemed frustrated with our systems"*.

Some very positive comments were made about OCCG staff performance. For example:

- *We have found all OCCG staff that we have been in contact with to be extremely helpful and pleasant. They have made the process less stressful because of their manner and they are happy to answer any questions.*
- *The people involved in the actual audit were very pleasant, helpful and most positive in their approach and their interactions with staff. It was a pleasure to have them around.*

- *The OCCG auditor was very helpful with good suggestions that we will put into practice.*
- *I found discussing with the OCCG auditors very beneficial in terms of her offering practical suggestions for improvements.*
- *Auditors were very helpful and much more approachable and flexible than other years. Found interaction after every few cases very useful. Approach was not so rigid or test like. Audit of files really reflected audit of casework practice.*
- *Much improved communication by OCCG staff in 2006-07, than in previous years, meant any documents they had overlooked could be quickly located in the files.*

25 respondents (81%) rated the familiarity of OCCG staff with file content as 'very good' or 'fairly good'. Some respondents felt the assessors had missed information on the agency files and commented that:

- *Greater familiarity with LAC documents by the auditors would be helpful*
- *We believe the expectations of documentation are too high and the auditor does not always see everything and does miss things because they may be in another section of the file or something like that.*
- *The more familiar the staff are to specific issues of OOHC the more rational the results can be. For example, there are significant differences in practice issues for short term care episodes and permanent/long term care.*

The Children's Guardian acknowledges that assessors may overlook some matters in auditing something as complex as a case file. In light of this, the Children's Guardian introduced post-Audit interviews following the 2006/07 Audit, giving agencies the opportunity to identify any information not located during the initial Audit. Where additional information was located, Audit results were adjusted accordingly.

All of the respondents (100%) rated the Audit report content as 'very good' or 'fairly good', although some respondents commented on the 80% compliance rule, particularly where they had a small number of children and young people placed with them and an omission on one case file could bring them under the 80% threshold.

The Children's Guardian's view is that the 80% compliance threshold serves as a guide to agencies on where they might improve performance and that both the Children's Guardian and agency would be expected to take small sample sizes into account in drawing conclusions about performance against the compliance threshold. The Children's Guardian does not publish individual agency results or impose sanctions as a result of a compliance threshold not being met. On this basis, the 80% threshold serves as a useful guide, particularly where data is aggregated to assess sector performance.

Feedback from the OOHC sector suggests that the Case File Audit is a valuable process for monitoring and improving designated agency performance.

ATTACHMENT D

THE CHILDREN'S GUARDIAN'S UNPROCLAIMED FUNCTIONS

The Children's Guardian has a range of unproclaimed functions under the Act, including monitoring and developing procedures for voluntary OOHC, which was addressed at section 3.11 above.

However, most of the Children's Guardian's unproclaimed functions relate to the Children's Guardian's powers of guardianship in relation to individual children and young people in OOHC.

The Usher Committee, the 1997 Royal Commission and the Parkinson Review all identified the need for a body, independent of DoCS and the courts, to exercise powers of guardianship in respect of children and young people under the parental responsibility of the Minister.

Whilst the models developed by those bodies varied, they all recognised a need for an independent body to be able to review OOHC arrangements for individual children and young people and, in certain circumstances, make decisions relating to that care, having regard to the best interests of the child or young person.

This body was to be separate from DoCS, given a perceived tension between its funder/provider role and its ability to make decisions in the best interests of each individual child or young person. The body was also to be separate from the Children's Court, so that it could make decisions in a less formal and legalistic manner, with those decisions made by experienced child welfare practitioners.

The identified need for an independent special guardian was the primary reason for the establishment of the Children's Guardian.

The Act contains a range of provisions, most of which remain unproclaimed, to support the Children's Guardian making care decisions in respect of individual children and young people in OOHC.

OOHC, child welfare, carer and legal organisations have continued to call for the Children's Guardian to be given the special guardian functions that were the rationale for it being established.

The Act provides for the Children's Guardian having the following principal powers and responsibilities to support its originally contemplated special guardianship role:

- The power to exercise, subject to the direction of the Minister, the parental responsibilities of the Minister for a child or young person, for the benefit of the child or young person (s181(1)(a));
- The power to delegate aspects of the Minister's parental responsibility, other than residual powers of guardianship, to designated agencies and certain other persons (s186);
- Responsibility for residual powers of guardianship (s186);
- Responsibility for examining each case plan for each child or young person in OOHC, and a copy of each report made following the regular review of the case plan (s181(1)(d));

- The power to resolve disputes between various parties, connected to the administration of the Act and regulation (s183);
- The power to remove a child from an authorised carer (s182);
- The power to apply to the Children's Court for the rescission or variation of a care order (s184).

The Children's Guardian believes the current unproclaimed provisions would be unworkable in their current form and are not in the best interests of children and young people in OOHC.

Some of those provisions duplicate functions more appropriately performed by others in the OOHC system and have the potential to undermine local responsibility for ensuring the quality of care.

One of the problems with the current statutory child protection system is that broad, rather than targeted, reporting and monitoring arrangements are often favoured. This approach has the potential to overload decision making/review bodies with cases where no intervention is required, making it difficult to focus on those areas where attention is necessary.

The difficulties associated with broad notification requirements are apparent in the mandatory reporting system. These difficulties would be replicated if the current provisions of the Act supporting the Children's Guardian's special guardianship function were proclaimed.

However, in the Children's Guardian's experience, there are individual children and young people in OOHC who are not receiving appropriate care and the existing regulatory framework does not offer those children and young people sufficient protection.

One option for addressing this might be to give the Children's Guardian more targeted special guardianship powers, so they are focused on vulnerable children and young people in OOHC who have not had their care concerns addressed by existing mechanisms, or whose life or safety is in such danger that urgent independent decision making is required.

This would see the Children's Guardian taking on a "safety net" role – the Children's Guardian would be the guardian of last resort. This option, and the need for the various provisions supporting the Children's Guardian's uncommenced current broad powers of special guardianship, are discussed below.

Dispute resolution function

The unproclaimed s183 of the Act provides that the Children's Guardian may use his/her best endeavours to informally resolve disputes between various parties that may arise in the administration of the Act and regulations.

The Children's Guardian would not have the expertise to resolve disputes concerning the broad administration of the Act and regulations, given the Children's Guardian's OOHC focus.

Disputes should be resolved at a local level, wherever possible, with this philosophy reflected in Standard 4.3 of the NSW OOHC Standards and s3(1)(c) of the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS-CRAMA).

If a person continues to have a concern about OOHC services, they may make a complaint to the Ombudsman under CS-CRAMA. Section 180(2)(b) of the Act makes it clear that the Children's Guardian has no role in the investigation or **resolution** of a dispute that is the subject of a community services complaint under CS-CRAMA.

When the Ombudsman receives a complaint, the Ombudsman may refer the matter back to the designated agency for resolution. The Ombudsman may also choose to conciliate the

matter, with or without an independent mediator attending¹²⁵, or arrange for other alternative dispute resolution (ADR) to take place. One of the objects of CS-CRAMA is to encourage the resolution of complaints through ADR¹²⁶.

The Children's Guardian's unproclaimed dispute resolution function does not sit comfortably with s180(2)(b) of the Act or CS-CRAMA. Proclaiming s183 would lead to confusion as to whether matters should be dealt with under s183 or CS-CRAMA and may lead to forum shopping. It would also limit the Ombudsman's ability to monitor trends in community service complaints concerning designated agencies.

Section 183 may be safely repealed.

Case plan/review review function

The unproclaimed s181(1)(d) of the Act requires the Children's Guardian to examine a copy of the case plan for **each** child or young person in OOHC and a copy of each report made following the regular review of the case plan.

The unproclaimed s150(5) of the Act requires copies of **each** review report to be provided to the Children's Guardian, with reviews to be conducted at least annually. More frequent reviews are required in some circumstances.

As there are approximately 8000 children and young people in statutory care¹²⁷, proclamation of s181(1)(d) and s150(5) would require the Children's Guardian to review well in excess of 10,000 case plans/reviews each year.

If the Children's Guardian were to review every case plan and case review, then the Children's Guardian would require significant additional resources. It would also make the Children's Guardian a kind of "super case manager" that would be constantly second guessing workers in the field.

This would not be an efficient use of limited OOHC resources and would undermine local accountability for case management. This broad, rather than targeted, monitoring function would simply overload the Children's Guardian, making it difficult to focus on those areas where attention is necessary.

The broad monitoring provided for under the Children's Guardian's Case File Audit Program and Accreditation and Quality Improvement Program is a better approach. This may inform the Children's Guardian as to where more focused monitoring activity is required.

There is a common misperception that the non-proclamation of s181(1)(d) means that the Children's Guardian may only operate at a system level, and may not monitor individual care arrangements.

The broad functions of the Children's Guardian at s181(1)(b)-(c) of the Act, combined with broad powers to require designated agencies to provide information to the Children's Guardian under s185¹²⁸, may be used to require designated agencies to provide information relating to the safety, welfare and well-being of a particular child or young person in OOHC or a particular class of such children or young persons.

The Children's Guardian can request case plan and review information under these provisions. As outlined in section 3.2 of Part A of this submission, the Children's Guardian seeks regular case plan and review information in respect of children and young people

¹²⁵ See s13A of the *Ombudsman Act 1974*, which also applies to complaints made under CS-CRAMA.

¹²⁶ See s3(1)(d) of CS-CRAMA.

¹²⁷ Advice from DoCS on statutory OOHC population as at 30 June 2007.

¹²⁸ Section 185 would benefit from clarifying amendments, as discussed in Review Report Volume 1.

accommodated by non-designated agencies or children under the age of 12 placed in residential care.

The Children's Guardian believes that, subject to available resourcing, the Children's Guardian might play a similar individual monitoring role for other classes of children and young people in OOHC where there are serious physical or psychological harm risks that need to be managed. The Children's Guardian's monitoring of cases of this kind is contemplated in the unproclaimed compulsory assistance provisions of Part 3 of Chapter 7 of the Act.

It is recommended that sections 150(5) and 181(1)(d) of the Act are repealed as they are unnecessarily broad and are not necessary to support more targeted monitoring of case plans/reviews.

Exercising and delegating the Minister's parental responsibility

The notion that guardianship (effectively full parental responsibility) should always be separated from service provision, which underpins the Usher Report, Parkinson Review, and the unproclaimed s181(1)(a) of the Act, should be challenged.

Responsibility for decision making and service provision cannot and should not be fully separated. It is difficult to reconcile the split model with the One Agency Principle, which also informed the development of the Act and was widely supported within the OOHC sector. Ideally, decisions should be made as close as possible to the point of service delivery, as authorised carers and designated agencies are most familiar with the particular needs of children and young people in care.

The challenge for government should be to properly build capacity for locally based decision making, rather than reverting to a more centralist model, with centralised decision making confined to those limited situations where it is needed.

Professor Parkinson, in a 2003 paper on the Children's Guardian and parental responsibility that has been provided to the Inquiry, acknowledged that current provisions for the Children's Guardian exercising all of the Minister's parental responsibility, and then delegating that responsibility, are problematic. He suggested that the current system be replaced with a scheme under which the Children's Guardian would be able to give written directions to designated agencies as to the exercise of any aspect of parental responsibility¹²⁹. This approach is discussed further below.

As s181(1)(a) of the Act has not been proclaimed, DoCS has retained responsibility for delegating responsibility for decision making to non-government agencies.

The Children's Guardian does not believe it would be appropriate for the Children's Guardian to be responsible for delegating the Minister's parental responsibility at this time, as it would interfere with recently established systems for allocating parental responsibility, case management responsibility, and casework responsibility. These systems, set out in the 2007 DoCS *Case Management Policy*, are linked with current funding systems and should be given an opportunity to be embedded.

However, the Children's Guardian believes that the Children's Guardian holds information relevant to agency capacity to take on additional decision making functions and that DoCS should consult with the Children's Guardian before delegating responsibility (including case management responsibility) to non-government agencies, as outlined at section 3.5 above.

The Children's Guardian suggests that consideration be given to amending the Act so that the Children's Guardian is not generally responsible for exercising and delegating the Minister's

¹²⁹ Parkinson, P. 2003: 17.

parental responsibility, but that there be a requirement for the Children's Guardian to be consulted before the Director-General of DoCS delegates aspects of that responsibility (including case management responsibility) to designated agencies.

Residual powers of guardianship

The Children's Guardian believes that it would not be in the best interests of children and young people in OOHC for the Children's Guardian to exercise non-delegable "residual powers of guardianship", but that non-delegable functions should be set out in the regulations and the Children's Guardian should have a defined monitoring role in this area.

Section 186 of the Act contemplated the Children's Guardian's exercising the Minister's non-delegable "residual powers of guardianship"¹³⁰, being:

- granting consent to the marriage of a child or young person;
- granting permission to remove a child or young person from NSW;
- applying for a passport on behalf of a child or young person;
- granting consent to medical and dental treatment of a kind prescribed by the regulations; and
- such other kind as may be prescribed by the regulations.

No regulations have been made under s186, as s181(1)(a) has not been proclaimed and the Children's Guardian does not exercise residual powers of guardianship on behalf of the Minister.

The Minister has delegated responsibility for making decisions involving residual powers of guardianship to the Director-General of DoCS, who has sub-delegated these powers to DoCS Regions. These powers cannot be further sub-delegated.

The list of non-delegable functions has been added to administratively and the following parental responsibility decisions of the Minister are also retained within DoCS¹³¹:

- seeking medical advice on, and consenting to, special medical treatment (see also s175 of the Act and clauses 15-16 of the Regulation)¹³²;
- registering a child's birth, obtaining a birth certificate, or naming or changing the name of a child or young person;
- consenting to termination of pregnancy; and
- consenting to end of life medical intervention.

Professor Parkinson has argued that vesting residual powers of guardianship in the Children's Guardian would support the One Agency Principle by eliminating the double-handling of the current arrangements so that only one agency is involved with the child or young person¹³³. In

¹³⁰ The note to s140 of the Act explains how certain matters are delegable and non-delegable to designated agencies.

¹³¹ Department of Community Services, Case Management Policy, Table 3.

¹³² The Director, Child and Family Services is responsible for consenting to the use of psychotropic medication for behaviour management purposes, which is special medical treatment for the purposes of s175 of the Act.

¹³³ Parkinson. 2003: 9.

the Children's Guardian's view, this would not eliminate double-handling – it will simply transfer the “double-handling” from DoCS to the Children's Guardian.

Professor Parkinson has also advised:

*“[The arrangement] was seen as a way of encouraging more consistent and considered decision-making when difficult issues arise which fall within the category of residual responsibilities of guardianship to be exercised by the Children's Guardian”.*¹³⁴

The Children's Guardian agrees that some parental responsibility decisions should be centralised close to Ministerial direction and control, given the fundamental importance of those decisions to the life or identity of a child or young person in OOHC or, in the case of decisions involving travel outside NSW, the ability of a child or young person in OOHC to maintain appropriate relationships.

However, the Children's Guardian is unaware of any evidence that the current manner in which DoCS makes these high-level decisions is problematic. In the absence of such evidence, the Children's Guardian believes it is appropriate that DoCS continues to make such decisions.

DoCS has sufficient capacity to handle the making of all such decisions, whilst the Children's Guardian would need additional resources to exercise non-delegable parental responsibility functions. DoCS Region officers are also closer to the point of service delivery than the Children's Guardian.

It is therefore recommended the Act is amended to remove references to the Children's Guardian exercising residual powers of guardianship.

However, it is appropriate that the systems in place for making non-delegable decisions are subject to external oversight, given the significance of those decisions to children and young people in OOHC. The 2003 Paper to the Ministerial Advisory Council, which contemplated DoCS exercising the Minister's residual powers of guardianship and other parental responsibilities, noted:

*“The exercise of the parental responsibility function would be subject to the full suite of systemic review and audit processes of the Children's Guardian.”*¹³⁵

However, it is doubtful that the Children's Guardian's monitoring functions under s181(1)(e) of the Act extend to monitoring the manner in which DoCS exercises non-delegable parental responsibility functions.

It is recommended that all “non-delegable” parental responsibility decisions are provided for in the regulations and that the Children's Guardian have a statutory:

- function of monitoring the systems in place for making such decisions;
- power to require the Director-General of DoCS to provide such information to the Children's Guardian on the exercise of “non-delegable” parental responsibility functions, as the Children's Guardian may require; and
- power to report and make recommendations to the Minister on systems for making “non-delegable” parental responsibility decisions, and on particular parental responsibility decisions that should or should not be capable of being delegated.

¹³⁴ Parkinson. 2003: 5.

¹³⁵ *Parental Responsibility Functions in OOHC – A Paper prepared for the Ministerial Advisory Committee* 2003: 8.

The special guardianship function revisited – a targeted decision making role in respect of individual children and young people in OOHC

The Children's Guardian believes that the provisions of the Act that provide for the Children's Guardian exercising the Minister's parental responsibility are too broad and are unworkable in their current form.

The Children's Guardian cannot effectively monitor all case plans/reviews to identify matters where it might be appropriate to intervene by exercising the Minister's parental responsibility.

In the absence of an effective triaging system, the Children's Guardian would be inundated with matters that may be resolved through existing processes and this would limit the ability of the Children's Guardian to focus on the small number of matters where there may be a need for a special guardian.

However, the Children's Guardian believes that the existing complaints and dispute resolution processes of CS-CRAMA do not provide sufficient protection to all children and young people in OOHC. The Ombudsman has the power to make recommendations, but no power to make decisions if its recommendations are not followed.

The Children's Guardian might impose conditions on an agency's accreditation, or suspend or cancel accreditation, where a designated agency refuses to address a serious care concern. However, the ultimate sanction of stripping away a designated agency's status is a very blunt instrument for dealing with individual cases of concern. Such action may also adversely affect other children and young people who are receiving appropriate care from the agency.

There may be merit in providing the Children's Guardian with targeted powers that would enable him/her to effectively intervene in individual cases, rather than taking action resulting in loss of designated agency status.

Professor Parkinson's 2003 Paper offers guidance on how the Act might provide for such powers. The 2003 Paper suggests it is not necessary for the Children's Guardian to act as a "watchdog" for all cases of children and young people in OOHC, but it might act as a "safety net" where there are serious problems¹³⁶. The Children's Guardian would not be involved in day to day service provision decisions, but would be a "guardian of last resort"¹³⁷.

Under this model, the Children's Guardian would have the power to "overrule the decision of a designated agency concerning any aspect of parental responsibility", with s140 of the Act being amended to provide that a designated agency must comply with any written direction of the Children's Guardian to exercise parental responsibility in a particular way¹³⁸.

The 2003 Parkinson model is worthy of serious consideration, as long as safeguards are introduced to prevent minor and non-urgent matters being brought to the Children's Guardian for resolution.

Any model that is ultimately developed should emphasise the importance of DoCS and other designated agencies being accountable for care decisions and the Children's Guardian should only consider using the proposed powers after giving designated agencies an opportunity to firstly address issues of concern at a local level.

Any such model also needs to be integrated with the complaints and dispute resolution arrangements under CS-CRAMA. Options for addressing matters through CS-CRAMA should be exhausted, and the Children's Guardian might only consider making particular parental responsibility decisions if the Ombudsman concludes or halts handling the matter under CS-

¹³⁶ Parkinson. 2003: 6.

¹³⁷ Parkinson. 2003: 7.

¹³⁸ Parkinson. 2003: 17.

CRAMA and makes a specific recommendation that the Children's Guardian consider the matter.

In addition to accepting Ombudsman's referrals, the Children's Guardian might be able to use the proposed decision making powers where a matter is referred to the Children's Guardian by the Minister or Director-General of DoCS.

It may also be appropriate for the Children's Court to be able to refer responsibility for making particular decisions to the Children's Guardian or, if contact arrangements are in the future determined as part of the case management process, for the Children's Guardian to review contact arrangements that are in dispute.

It is possible that the Children's Guardian could make decisions through a less formal and adversarial process than is possible in the Children's Court, as noted by a number of organisations in their submissions to the current Review of the Act (see section 3.4 above). However, decisions of the Children's Guardian would need to be subject to judicial/administrative review in the same manner as other decisions involving the exercise of the Minister's parental responsibility.

Other parties might be able to refer a matter for the Children's Guardian's consideration where there is an imminent risk to the life or safety of a child or young person in care. The Ombudsman should be able to appropriately deal with other matters through CS-CRAMA.

The Children's Guardian might also exercise decision making powers upon his or her own motion, where the exercise of the Children's Guardian's monitoring functions suggests this is the most appropriate course of action (in most cases it would be appropriate to refer the matter for local resolution or to the Ombudsman under CS-CRAMA) and a designated agency has failed to take appropriate action, after having been given an opportunity to do so.

These limitations should confine the exercise of the Children's Guardian's decision making powers to a limited range of high-level cases where alternative options have been exhausted.

Any model that is ultimately developed should also recognise that the Minister is ultimately the guardian of, and accountable for, children and young people placed under the parental responsibility of the Minister.

Consistent with s181(1)(a), the Children's Guardian should not be able to issue directions to a designated agency where this conflicts with a direction of the Minister. Any model should provide for prompt reporting to the Minister where the Children's Guardian believes it is appropriate to direct a designated agency in the exercise of an aspect of parental responsibility.

Adoption of such a model would have resource implications, as the Children's Guardian would need to employ a small group of senior expert practitioners who are familiar with case management, case planning and decision making frameworks. The Children's Guardian would also need to employ a legal officer.

There may also be resource implications for DoCS and its funding of other designated agencies, as particular decisions of the Children's Guardian may have resource implications for the care of individual children and young people. However, the limitations placed on when the Children's Guardian might exercise decision making powers should limit these resource impacts.

The Children's Guardian should make decisions that are in the best interests of a child or young person in OOHC. That does not mean that resource impacts of particular decisions can be ignored. If the Children's Guardian has targeted decision making powers, the Children's Guardian should be required to give designated agencies an opportunity to comment on the most resource effective means of addressing the Children's Guardian's concerns in respect of

an individual child or young person. It is noted that the Children's Court is required to give persons who may be significantly impacted by an order an opportunity to be heard on the matter of significant impact¹³⁹.

If the Children's Guardian were to make parental responsibility decisions on behalf of the Minister, the Children's Guardian would most probably need to be insured through the Treasury Managed Fund (TMF). However, this is not a new area of liability, with some liability effectively being transferred from DoCS to the Children's Guardian. The proposal would appear to be liability neutral and may even limit the Crown's liability in some cases, as there is potential for the proposed model to divert some matters away from the Court.

It would be necessary to proclaim s182 of the Act to allow the Children's Guardian to remove a child or young person from a particular care arrangement if the designated agency did not comply with a proposed written direction under s140.

The Children's Guardian would, in exercising such decision making powers, need to be able to apply to the Court for the rescission or variation of a care order under s90(3) of the Act. Section 184 of the Act would appropriately be proclaimed to ensure the Children's Guardian may make such an application, notwithstanding the Children's Guardian not having been a party to the original proceedings.

Consideration would also need to be given to provisions compelling affected parties to appear personally before the Children's Guardian and provide true information, although an adversarial framework and formal rules of evidence should be avoided.

¹³⁹ See s87 of the Act.