



STATUTORY REVIEW OF THE *CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) REGULATION 2000*

EXECUTIVE SUMMARY

I welcome this opportunity to comment on the statutory review of the *Children and Young Persons (Care and Protection) Regulation 2000* (the Regulation).

I share the view of Community Services that the Regulation should be remade with amendments to update its content to reflect and improve current practice.

It should be noted at the outset that, in addition to this statutory review process, there are a number of other concurrent and ongoing consultation and review processes which will result in proposals for amendments to the care and protection legislation. To facilitate consistency in outcomes and efficiency in legislative reform, consideration of issues through the statutory review process should be informed by the consideration of similar and related issues through these other consultation and review processes (and vice versa). I understand however, that opportunities for collaborative and coordinated review will be limited by the time frame for the statutory review process.

Community Services' discussion paper on the statutory review of the Regulation¹ (the Discussion Paper) contains a plethora of suggestions and proposals, which raise numerous questions and concerns. Comments are set out below in response to a number of issues, however it is not possible to give all the issues raised adequate consideration here. The absence of comment on any suggestions or proposals should not be taken as an indication of support or otherwise.

In brief, the comments include, but are not limited to the following:

- Ø Expansion of the definition of 'prescribed bodies' for the purpose of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (the Act) to include general medical practitioners is supported.

¹ Department of Family & Community Services, *Children and Young Persons (Care and Protection) Regulation 2000 Statutory Review Discussion Paper*, January 2012,

- Ø Removal of the prohibition on principal officers witnessing consent to sole parental responsibility orders is recommended.
- Ø Prescription of persons who may conduct attachment assessments for the purposes of sole parental responsibility orders to “independent registered psychologists” requires further consideration.
- Ø Some amendments with respect to confidentiality and inadmissibility of information from ADR are supported and additional amendments are proposed. The need to protect the safety of individuals (especially children and young people) through exceptions to confidentiality and inadmissibility is counterbalanced with the need to protect the integrity of ADR processes in order to maximise the potential for ADR to secure positive care and protection outcomes.
- Ø The need for review of Community Services policies and procedures relating to consent and three – monthly review of consent for administration of psychotropic medication is discussed, and the upcoming review of the Children’s Guardian’s *Guidelines for Designated Agencies for Developing a Behaviour Management Policy* is noted.
- Ø The proposal for two-stage authorisation for relative/kinship carers is not supported. It is recommended that two stage authorisation apply only with respect to emergency relative/kinship placements.
- Ø The proposed expansion of grounds for cancellation / suspension of authorisation under clause 31 of the Regulation is supported.
- Ø Qualified support is given to the proposed grounds for automatic cancellation of authorisation.

Comments in response to proposed amendments to the *Code of Conduct for Authorised Carers* and *Code of Conduct for Residential Units* include, but are not limited to the following:

- The Codes should be principle-based. Excessive detail in the Codes will render them overly prescriptive and reduce the possibilities for creative and flexible responses and solutions where these may be appropriate.
- Proposals which would transfer designated agency responsibilities to carers will, in effect, create regulatory overlap. Such proposals are not supported; in some cases suggestions are made to re-cast obligations to reflect proper responsibilities of designated agencies and carers.
- Proposals which simply replicate carers’ obligations under care and protection legislation and various other laws which apply to the general population will increase duplication in regulation, not aid compliance.
- Every effort should be made to reduce regulatory overlap, duplication and prescription – inappropriate regulatory overlap, unnecessary duplication and

excessive prescription will add to confusion about responsibilities and increase regulatory burden with respect to monitoring and demonstrating compliance.

- Detailing of carers' behaviour management obligations in the Code is not supported.
- The Code of Conduct for Residential Units is not the appropriate place to list all possible crises and to provide for the many and varied permutations of appropriate responses to such crises – detailed guidance should be delivered through designated agency policies, guidelines and training.

The comments also note ongoing consideration, by my office, of the need for legislative amendments in relation to:

- the out-of-home care (OOHC) accreditation system,
- carer screening, and
- the Carers Register.

I look forward to further discussions with Community Services about particular proposals for amendment of the Regulation. Any inquiries with respect to these comments should be directed to Ms Maha Melhem, Director, Policy & Projects, on 8219 3605 or at maha.melhem@kidsguardian.nsw.gov.au.



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CHILDREN'S GUARDIAN'S COMMENTS

Definitions

'Principal Officer'

The discussion paper notes that consideration is being given to including a definition of "principal officer" in the list of definitions in clause 3 of the Regulation, to assist in identifying who is the principal officer of a designated agency.

It should be noted here that clause 35(2)(c) of the Regulation relevantly provides that any non-government agency seeking accreditation as a designated agency must specify the name of the individual proposed to be the applicant's principal officer on accreditation. Clause 40E(2)(b) similarly provides that the application of any organisation for registration to provide/arrange voluntary out-of-home care must identify the organisation's principal officer. Any definition of "principal officer" should, therefore, include a reference to the person identified, in accordance with clauses 35(2)(c) and 40(2)(c), as the principal officer.

Any definition should also be consistent with requirement that the person be a 'fit and proper person', and with the person's role as an authorised carer.

'Prescribed bodies' for the purposes of Chapter 16A

The Children's Guardian supports the proposal to expand the definition of 'prescribed bodies' for the purposes of Chapter 16A to include 'general medical practitioners', and so capture sole practitioners.

It is also suggested that consideration be given to defining 'public authority' for the purposes of s248 and Chapter 16A of the Act.

'Special care'

The Children's Guardian supports the proposed definition of 'special care' in clause 20A of the Regulation as "care that is provided to a child or young person with high or complex needs", or words to that effect.

Such a definition would assist in identifying when placement in a non-designated agency, as permitted by clause 20A, may be appropriate.

'Kinship care'

The Children's Guardian supports the inclusion, in the legislation, of a definition of 'kinship care' which is consistent with Community Services' working definition, and which

is flexible enough to accommodate different social and personal relationships in different cultural communities.

Form of consent to order for sole parental responsibility

Clause 7A of the Regulation prevents individuals under the age of 18, and principal officers and employees of designated agencies who have been directly involved in the supervision of the child or young person's placement from witnessing the child or young person's consent to a sole parental responsibility order. Other than these persons, however, clause 7A allows *any* person to be a witness (see cl 7A(2)).

In contrast, adoption legislation specifically prescribes those who may witness a child or young person's consent to an adoption order, and prohibits a counsellor (as defined by the *Adoption Regulation*), and anyone who is not independent of a counsellor, from being a witness (*Adoption Act 2000*, s62, and *Adoption Regulation 2003*, cl 35).

Clause 7A of the *Children and Young Persons (Care and Protection) Regulation* should be amended to provide better guidance as to appropriate witnesses to consent to a sole parental responsibility order. The effect of such guidance should be to ensure that witnesses are persons who are:

- over the age of 18,
- do not have any conflict of interest, and
- have the ability to communicate the required information to the child or young person "in a language and manner that the child or young person [can] understand" (see clause 7A(1)(c)), and to ascertain that the child or young person has understood that information before he or she consents.

To avoid the possibility of undue pressure and conflict of interest, authorised carers seeking sole parental responsibility, and members of their family should be expressly prohibited from acting as witnesses.

The Children's Guardian supports amendment of clause 7A to provide that the child or young person must obtain legal advice prior to giving or withholding consent. If this amendment is made, the legal advisor would be well-placed to witness consent (assuming that the legal advisor also satisfies requirements such as those listed above).

The Children's Guardian questions, however, the appropriateness of the existing blanket prohibition on the principal officer of the relevant designated agency acting as a witness. It is worth noting here that adoption legislation expressly prescribes principal officers of accredited adoption service providers as a class of persons who may witness a child or young person's consent to adoption (see *Adoption Act*, s62 and *Adoption Regulation*, cl 35).

It should not be assumed that the principal officer would have undue influence or a conflict of interest; if concerns about conflict of interest do arise, these should be dealt

with by the court. The principal officer may, in fact, be more likely than others to have the ability to communicate information to the child or young person as required by clause 7A(1)(c). Removal of the prohibition on principal officers witnessing a child or young person's consent to a sole parental responsibility order should be considered.

Principal officer's placement report for sole parental responsibility order

The proposal to prescribe that the attachment assessment required for a sole parental responsibility placement report (cl 7C(2)(a)) must be conducted by an independent registered psychologist requires further consideration.

Clarification is required as to what "independent" means in this context. If "independent" refers to a psychologist who has had no prior contact with the child or young person, it should not be assumed that such a practitioner will always be best placed to make the necessary assessment. Nor should it be assumed that an appropriately qualified and registered psychologist who is working with or who has recently worked with the child or young person will have a conflict of interest in making an assessment about attachment (where concerns about conflict of interest arise, these may be dealt with by the court). It is likely that, in many cases, a psychologist who is familiar with the child or young person and his or her history will be better placed to make this assessment.

Consideration also needs to be given to the efficacy of engaging an independent psychologist to conduct the assessment where an appropriately qualified and registered psychologist is already working with, or has recently worked with the child or young person. As acknowledged in the Discussion Paper, this recommendation will have resource implications (particularly in regional areas). These resources may be better devoted to therapeutic support for the child or young person – particularly if the attachment assessment could be undertaken by a psychologist who is working with or has previously worked with the child or young person. Introducing an additional level of clinical review in this context may be considered over servicing.

Given that psychiatrists may also have expertise in attachment and may be more accessible through the public health system, consideration should be given to allowing attachment assessment to be undertaken by an appropriately qualified psychologist or psychiatrist. This may assist in addressing resourcing concerns. The comments made above with respect to independence also apply in the case of psychiatrists making attachment assessments.

In addition, consideration should be given to the child or young person's views - a child or young person may have difficulties participating in, or may refuse to participate in an assessment conducted by an independent psychologist or psychiatrist with whom she or he is unfamiliar. The court's capacity to exercise discretion in accepting evidence on this issue from a psychologist or psychiatrist who is known to the child or young person where this is appropriate or necessary should not be unduly fettered. The Regulation should not be amended to preclude this option for assessment..

Record, reporting and information – Access to records relating to Aboriginal and Torres Strait Islanders

The Children’s Guardian supports the proposal to amend clause 9(2) to allow Community Services to determine whether access to original or copied records is provided, rather than leaving this as a matter to be specified by the person seeking access.

This proposal is supported on the basis that it may be inappropriate to provide access to original records where they contain information about third parties’ personal or business affairs, information which would allow a person who had reported child protection concerns to be identified, and records protected by legal professional privilege.

The Children’s Guardian also supports an amendment to clarify that persons seeking access to records pursuant to clause must establish their identity in order to access the records.

The Children’s Guardian does not support the proposal to replace the 21 day time frame for providing access to records relating to *Aboriginal and Torres Strait Islanders* under clause 9(3) with a requirement that the Director-General give access to the records “in a timely manner”.

The proposed alternative amendment to reflect section 14 of the *Privacy and Personal Information Act 1998* and require access to be provided “without excessive delay or expense” is also not supported.

A measurable time frame for providing access to these records will give staff processing the request clearer direction, and individuals seeking access greater certainty.

If clause 9(3) is to be amended, it should be made consistent with section 57 of the *Government Information (Public Access) Act 2009* which provides that agencies must decide access applications within 20 working days with a maximum extension period of 15 working days in circumstances where consultation with other persons is needed or where records are in archives. ‘

Alternative Dispute Resolution

Prescribing ADR convenors as mandatory reporters

The Children’s Guardian is of the view that ADR convenors in the care and protection jurisdiction should be prescribed as mandatory reporters. This view is supported by the fact that, under the *Family Law Act 1975* (Cth) and *Western Australia Family Court Act*

1997 (WA), family dispute resolution practitioners (ADR practitioners in family law matters) are prescribed as mandatory reporters.²

Confidentiality and inadmissibility of information from ADR processes

Proposals to extend exceptions to the confidentiality and inadmissibility of information from ADR processes in care and protection matters require a careful balancing of competing considerations. The need to provide information and make evidence available to relevant agencies and courts so that they can better protect children and young people is critical. At the same time, ADR processes offer significant potential to secure positive outcomes for the care and protection of children and young people, so due weight must be given to the need for confidentiality and inadmissibility to protect the integrity of ADR processes.³

The Children's Guardian has responded to the Discussion Paper's proposed amendments with respect to ADR confidentiality and inadmissibility on an indicative and in-principle basis only. Given the complexity of issues to be addressed, the Children's Guardian is of the view that Community Services should consider undertaking additional and more comprehensive consultations with ADR practitioners and other stakeholders with direct experience and involvement in ADR processes for child protection matters before amending the ADR provisions of the Regulation. The Children's Guardian understands, however, that such consultations may not be possible within the time frame for this statutory review.

Exceptions to Confidentiality

The Children's Guardian supports the proposal to extend the definition of ADR to include external ADR ordered by the Court under section 65A of the Act, Care Circles, private sessions and pre-ADR arrangements. The protections afforded to ADR would strengthen these processes.

The Children's Guardian also supports the proposal to allow exceptions to confidentiality to make de-identified information from ADR processes available for research purposes. This is supported on the basis of the paucity of available material for research purposes

² Section 67ZA(2) of the *Family Law Act* requires disclosure of reasonable suspicion of child abuse or the risk of child abuse (assault, including sexual assault, and involving a child in sexual activity) to a 'prescribed welfare authority'. Section 160 of the *Western Australia Family Court Act 1997 (WA)* requires reporting where there is reasonable suspicion of physical, sexual, and emotional/psychological abuse, and neglect, or reasonable suspicion of risk of such abuse or neglect. As noted by the Discussion Paper, the *Family Law Act* imposes mandatory reporting obligations on a range of court personnel from the Family Court of Australia and the Federal Magistrates Court. Personnel of the Family Court of Western Australia also have mandatory reporting obligations.

³ The difficulties inherent in balancing these considerations in the context of family law matters have been considered by the Australian Law Reform Commission and New South Wales Law Reform Commission in their joint report *Family Violence – A National Legal Response* (ALRC Report 114) – see "Confidentiality and Admissibility", Chapter 22 of that Report. See also National Alternative Dispute Resolution Advisory Council, *Maintaining and Enhancing the Integrity of ADR Processes: From Principles to Practice Through People*, February 2011.

in this area, and that sufficiently de-identified information is unlikely to pose a risk to the safety of parties, practitioners or children and young people.

The Children's Guardian proposes that amendments be considered to allow ADR convenors to disclose information from ADR where they reasonably believe that disclosure is necessary to:

- prevent or lessen a serious threat to the life or health of any person;⁴
- report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person.

Such amendments relating to threats to life or health and offences involving violence or the threat of violence would be largely consistent with exceptions to confidentiality applying to FDR (family dispute resolution) practitioners conducting FDR under of the *Family Law Act*.⁵

The Children's Guardian proposes that consideration should also be given to expanding the clause 11(5) exceptions to confidentiality to enable an ADR convenor to make a disclosure which would assist an independent children's lawyer to represent a child or young person's interests. Such an amendment would be consistent with the similar existing exception for FDR under the *Family Law Act*.⁶

Clause 11(5) of the Regulation sets out exceptions to confidentiality applying to ADR convenors only. These exceptions should not be extended to ADR parties. There is a risk that such extension would be open to abuse by adversarial parties. Furthermore, if ADR convenors are made mandatory reporters they could be relied on to disclose information where the safety of children and young people is at risk.

The Children's Guardian supports the addition of an exception to confidentiality to report serious misconduct or fraud by the ADR convenor or a legal practitioner involved in ADR processes. Such an amendment would do more to bolster, than to compromise the integrity of ADR processes.

Exceptions to Inadmissibility

Inadmissibility of evidence from ADR limits the information available to the Children's Court. However, adding inappropriate exceptions to inadmissibility simply to make more information available to the Court may ultimately lead to adverse outcomes for children and young people in care and protection matters. If parties know that what they say in ADR may be used in subsequent litigation, they may be discouraged from speaking honestly and frankly and the effectiveness of ADR will be undermined. The potential for

⁴ This is not dissimilar to the proposal in the Discussion Paper for an exception to "lessen or prevent a serious threat to public health or public safety".

⁵ See s10H of the *Family Law Act*. It should be noted here that s10H(4)(b) of the Family Law Act requires a threat to life or health to be imminent as well as serious – in some cases, however, it may be difficult to characterise a threat as imminent even though it may be extremely serious.

⁶ *Family Law Act*, s10H(4)(b).

appropriate and safe outcomes to be secured through ADR would be compromised and, consequently, children and young people could be exposed to greater risk.⁷

Clause 11(4)(b) of the Regulation currently allows for admissibility of evidence or documents in cases where an ADR convenor has made a risk of (significant) harm disclosure under clause 11(5)(c). If ADR convenors are to be made mandatory reporters then clause 11(5)(c) will have to be amended – ADR convenors will be required, not permitted (as they currently are under clause 11(5)(c)) to make such reports. Clause 11(4)(b) would then also need to be amended to provide for admissibility of evidence from ADR in cases where the ADR convenor has made a mandatory report.

Amendments to make ADR convenors mandatory reporters, and subsequently to provide for admissibility where a mandatory report has been made may add significantly to the availability of evidence before the Court. Such cases raise serious concerns about a child or young person's safety, and it is appropriate that evidence relating directly to those concerns is brought before the Court.

The addition of an exception to inadmissibility to allow evidence from ADR to be adduced in proceedings for serious misconduct or fraud is also supported. This exception should be clearly limited to serious matters. In this regard, it is noted that the *Alternative Dispute Resolution Act 2001* (Tas) creates an exception to inadmissibility of ADR information which is very similar to the exception to legal professional privilege in the *Evidence Act 1995* (NSW) – ADR information may be adduced where proceedings have been instituted in respect of a fraud, or an offence or an act that renders a person liable to a civil penalty.⁸

Special medical treatment – administration of psychotropic medication

The Discussion Paper notes that preliminary consultation has indicated the provisions for special medical treatment, particularly the application of clause 15A of the Regulation, are confusing and should be simplified.

The Discussion Paper then goes on to describe clause 15(1)(c) as providing that “the administration of psychotropic drugs to children in OOHC where those drugs are administered for the purpose of controlling behaviour without the support of a behaviour management plan” is special medical treatment.⁹

It should be noted that clause 15(1)(c) does not refer to behaviour management plans. Rather, clause 15(1)(c) provides that “the administration of psychotropic drugs to a child in out-of-home care for the purpose of controlling his or her behaviour” is special medical treatment. In other words, the existence of a behaviour management plan does not, as

⁷ See the joint ALRC / NSWLRC report *Family Violence – A National Legal Response* (ALRC Report 114), Chapter 22 for a discussion of these issues in relation to FDR in family law matters where family violence is a risk.

⁸ *Alternative Dispute Resolution Act 2001* (Tas), s10(6)(c); *Evidence Act 1995* (NSW), s125.

⁹ Discussion Paper, p 34.

the Discussion Paper implies, take administration of psychotropic medication to control behaviour outside the legislative provisions for special medical treatment.

The role of behaviour management plans in relation to administration of psychotropic medication to control behaviour is set out in clause 15A. Clause 15A expressly prohibits the use of psychotropic medication to control behaviour unless this is part of a behaviour management plan.

The purpose of clauses 15(1)(c) and 15(A) is to prevent children and young persons being medicated for control of behaviour without adequate medical supervision, monitoring, evaluation and review.

The *NSW Standards for Statutory Out-of-Home Care* (the NSW Standards) support this purpose. In particular, Standard 14 requires that behaviour support and management plans which include the use of restricted practices (such as administration of psychotropic medication to control behaviour) are authorised and monitored in accordance with “the relevant guidelines”. The relevant guidelines – the Children’s Guardian’s *Guidelines for Designated Agencies for Developing a Behaviour Management Policy* – require that behaviour management plans which include use of psychotropic medication for controlling behaviour must have the consent of the person with parental responsibility for the child or young person.

Guidance provided by designated agencies is also relevant here. Clause 30(2) of the Regulation provides that an authorised carer may only use behaviour management practices approved by the designated agency. Behaviour management plans are developed in accordance with the designated agency’s behaviour management and psychotropic drugs policies. The Children’s Guardian assesses agencies’ behaviour management and psychotropic drugs policies against the *Guidelines for Designated Agencies for Developing a Behaviour Management Policy* as part of the accreditation process (see cl 35 (2)(d) – (f) of the Regulation).

Designated agencies’ policies (and practices) should reflect the Children’s Guardian’s Guidelines and make it clear that consent of the person with parental responsibility must be obtained for behaviour management plans which include use of psychotropic medication to control behaviour.

Issues relating to the requirement for consent of the person with parental responsibility

The findings of the Children’s Guardian’s 2008 – 2010 Case File Audit, the Children’s Guardian’s discussions with Community Services and ongoing work with designated agencies indicate that the requirement for consent is a significant and vexed issue.

The Children’s Guardian’s 2008-10 Case File Audit identified that non-government agencies generally understood the requirement for consent and were much more likely than Community Services to document consent. However these agencies reported

difficulties in following Community Services' procedures and requirements for obtaining consent from the Director, Child and Family who exercises delegated parental responsibility for this purpose.

There is a concern that the Director, Child and Family may be too far removed from the child or young person to be the appropriate person to provide consent and approve reviews for use of psychotropic medication. More particularly the requirement, established by Community Services' policy (and subsequently reflected in the Children's Guardian's Guidelines) for three-monthly reviews of consent for administration of psychotropic medication is onerous and impractical.

The Audit findings in this area underline the need to review procedures and policies relating to consent for use of psychotropic medication, particularly with respect to the requirement for three-monthly review of consent.

The Children's Guardian is participating in Community Services' behaviour management working group, which is considering these issues. The Children's Guardian will also be reviewing the *Guidelines for Designated Agencies for Developing a Behaviour Management Policy* in 2012. Outcomes from the behaviour management working group and from the review of the Children's Guardian's Guidelines may result in proposals for legislative amendments to provide greater clarity and direction on behaviour management.

Placement of psychotropic medication and behaviour management provisions in the Regulation

The Children's Guardian agrees with the suggestion that provisions relating to behaviour management and the conditions under which psychotropic medications may be used (cll 15, 15A, and 30) should be dealt with in one place in the Regulation.

The requirement for policies and plans to comply with the Children's Guardian's Guidelines

The basis on which designated agencies' behaviour management and psychotropic drugs policies and behaviour management plans are required to comply with the Children's Guardian's *Guidelines for Designated Agencies for Developing a Behaviour Management Policy* is discussed above.

As indicated, the requirement for compliance with the Guidelines is supported by the legislation and by the NSW Standards. However, given that the Guidelines are not made as statutory guidelines, there may be some confusion about their legislative force.

It may be worth stating the requirement for consistency with the *Guidelines for Designated Agencies for Developing a Behaviour Management Policy* clearly in the legislation. The Children's Guardian will give further consideration to this issue in its upcoming review of the Guidelines.

Authorisation of relative and kinship carers

The Discussion Paper proposes that the Regulation be amended to provide for a two-stage authorisation process for relative and kinship carers.¹⁰

This would allow provisional authorisation for three months on the basis of first stage assessment (criminal records checks for carer and all household members aged 14 and over; lodgement of working with children checks; KiDS check; household safety assessment; brief assessment report regarding capacity). Full authorisation would follow the second stage assessment (working with children checks completed; relevant carer training completed; comprehensive assessment).

The Discussion Paper notes that “[t]he approach of a provisional and then full authorisation of relative/kinship carers which is proposed has already been implemented successfully in Queensland, Victoria and Western Australia”.¹¹ It should be noted here, however, that the Queensland model for provisional authorisation is *not* the same as that proposed in the Discussion Paper.

The Queensland model for provisional authorisation of carers is a “limited approval” which may be given to a person to care for a particular child in circumstances where;

- a) the person has been provisionally assessed as suitable to care for the child; and
- b) it is not possible, or not in the child’s best interests, for the child to be placed in the care of an approved kinship carer for the child, approved foster carer, entity conducting a departmental care service or licensee.¹²

Although provisional approval is tied to a particular child, it may be granted on either a foster care or a kinship care basis to allow time for a foster carer or kinship carer authorisation to be finalised. More significantly, provisional approval “is usually given to family members or other people already well known to a child or young person to enable an *immediate* [emphasis added] placement to be made”.¹³ Unlike the model proposed by the Discussion Paper, the Queensland model does not establish a category of provisional authorisation for all relative/kinship carers.

As noted above, the Discussion Paper also refers to Victoria’s successful implementation of the same provisional authorisation model for relative/kinship placements as that proposed in the Discussion Paper. However, the Discussion Paper also notes that “[t]he Victorian Ombudsman has identified the inadequate screening of kinship carers and supervision of such placements as an area of high risk in Victoria”. In addition, the Discussion Paper notes research which “cautions that the quality of

¹⁰ Discussion Paper, pp 39 – 42.

¹¹ Discussion Paper, p 42.

¹² *Child Protection Act 1999* (Qld), s136A; see also s136C.

¹³ Queensland Department of Communities, <http://www.communities.qld.gov.au/childsafety/foster-care/about-foster-and-kinship-care/provisionally-approved-carers>.

relative/kinship care can be variable and requires careful assessment".¹⁴ These observations do not lend support to the Discussion Paper's proposed model of provisional authorisation for all relative/kinship carers.

While authorisation of relative and kinship carers may require a different approach than that for foster carers, it is important to ensure that any approach taken does not compromise the integrity of the assessment process, or the safety and well-being of children and young people in relative/kinship placements. Given the significant risk of compromising safety and well-being, the Children's Guardian does not support the proposal for a two-stage authorisation for relative/kinship carers generally. The Children's Guardian acknowledges, however, the need to facilitate *emergency* relative and kinship placements.¹⁵ The Children's Guardian would, therefore, support a two-stage authorisation process for relative/kinship carers where emergency placements are required.

If provisional authorisation for emergency relative/kinship placements is to be introduced, further consideration should be given to the validity period for such authorisation.

The two-stage authorisation model proposed by the Discussion Paper for all relative/kinship carers allows a period of three months after placement for provisional authorisation to remain valid while the second stage assessment (for full authorisation) is completed. As noted above, working with children checks (WWCCs) and comprehensive assessment of capacity are to be completed in this second stage of assessment,

The Children's Guardian appreciates that the validity period for provisional authorisation needs to take into account that completion of WWCCs in particular may, for a variety of reasons, take longer in some cases than in others. For example, in some cases, several WWCCs will be required (for all adult members of the carer's household); additionally, there may be some delay in obtaining old criminal history information.

Nevertheless, a three month time frame for completion of WWCCs raises significant concerns, given the potential exposure of the child or young person to risk of harm during that period. Beyond considerations relating to immediate safety, a person's capacity to provide care which supports well-being is also critical. A three month time frame for completion of comprehensive assessment of capacity raises additional concerns, given the risk of compromising a child or young person's well-being.

It is worth noting here that under the Queensland model, provisional authorisation is valid for a maximum of 60 days. It may be extended (once only) for a further 30 days. Such an extension may be granted only if the provisional authorisation is still in force

¹⁴ Discussion Paper, p 40.

¹⁵ At its last meeting in September 2011, the Carer Screening (Probity) Roundtable also acknowledged, that there is a need to differentiate between emergency placements with relative/kinship placements and other longer term relative/kinship placements.

and the extension is “appropriate and desirable to meet the needs of the child”.¹⁶ Consideration should be given to providing for a similar general rule (for emergency relative/kinship placements in New South Wales) of 60 days for provisional authorisation with an option for a one-off 30 day extension on a case-by-case basis. Such extension should not be granted unless a determination is made that the extension is necessary to complete the assessment and it is in the best interest of the child or young person to remain in the care of the provisionally authorised carer for a further 30 days, rather than being moved to another placement. The Children’s Guardian considers that this would better balance the need for time to complete the second stage of assessment with the need to safeguard the safety and well-being of the child or young person.

To minimise potential disruption to the child or young person, any decision to cancel provisional authorisation for emergency relative/kinship placements or to refuse to extend the provisional authorisation period should not be reviewable by the Administrative Decisions Tribunal.

Cancellation or suspension of authorisations by designated agencies

The Children’s Guardian supports expanding the grounds for cancellation or suspension of a carer’s authorisation in clause 31 of the Regulation to allow cancellation or suspension where the designated agency has formed the opinion that the person is no longer suitable to be involved in the care of children and young people.

The Children’s Guardian also supports the proposal to provide for automatic cancellation of authorisation where:

- carers no longer have children in their care, and they advise the designated agency of their intention to cease caring;
- carers no longer have children in their care who were identified in their authorisation, and they do not need to be reassessed to care for other children (provided that carers have been given the option of re-assessment to care for other children and that, in cases of removal, they have been given proper notice of appeal rights and appeal periods have lapsed).

The Children’s Guardian does not, however, support the proposal to provide for automatic cancellation where a carer, who has not had a child or young person in their care for three years, fails to participate in offered training for three years.

Failures to comply with conditions of authorisation or to comply with any obligation or restriction imposed by the Act or Regulation do not form grounds for automatic cancellation – such failures are addressed in clause 31 of the Regulation, which allows (but does not require) the designated agency to exercise a discretion as to whether to cancel or suspend authorisation. Failure to attend training in the circumstances described in the Discussion Paper should similarly form a ground for cancellation or suspension in accordance with clause 31. In some cases, it may be appropriate for

¹⁶ *Child Protection Act 1999* (Qld), ss 136D, 138B.

designated agencies to exercise their discretion to provide further opportunity for training before cancelling or suspending authorisation.

Codes of conduct for authorised carers and residential units*

**References below to “the Code” or “the Code of Conduct” are generally references to the Code of Conduct for Authorised Carers (although in some cases proposed amendments may relate to both the Code of Conduct for Authorised Carers and the Code of Conduct for Residential Units). Proposed amendments that relate to the Code of Conduct for Residential Units only are dealt with separately.*

General comments

The Children’s Guardian agrees that the *Code of Conduct for Authorised Carers* and the *Code of Conduct of Conduct for Residential Units* should be revised to reflect current obligations and practices. The purpose of the Codes should be to concisely set out broad expectations relating to conduct, and to provide general (rather than specific) and practical guidance on complying with obligations where this is required and appropriate. The Codes should be principle-based and outcomes-focussed rather than prescriptive and compliance-focussed.

The Children’s Guardian agrees with the comment in the Discussion Paper that “any redrafted code [should] achieve a balance between providing appropriate guidance as to standards of conduct and providing a document which is simple enough for carers to know well and use”¹⁷. However, the Discussion Paper raises numerous suggestions for amendments to the Codes, including detailed direction on certain matters. The Codes cannot, and should not attempt to address all the possible challenges that may arise in caring for children and young people in OOH. Excessive detail in the Codes may render them overly prescriptive and unnecessarily restrict possibilities for creative and flexible responses and solutions to situations which arise in the care of children and young people where these may be appropriate.

Such amendments would defeat the stated intention of creating a document which is simple enough for carers to know well and to use. They would also limit designated agencies’ ability to provide carers with more detailed guidance which is appropriately responsive to particular circumstances. Designated agencies are well placed to provide such guidance through guideline documents and training, as well as in the ordinary course of supervision.

Comments are made below regarding proposed Code amendments which transfer designated agency responsibilities to carers. In effect, such amendments would result in overlap in regulation, with carers being required to address the same matters that designated agencies are required to address through the *NSW Standards for Statutory Out-of-Home Care*. Comments are also made below with respect to proposed Code amendments which simply replicate existing carer obligations under care and protection

¹⁷ Department of Family & Community Services, *Children and Young Persons (Care and Protection) Regulation 2000 Statutory Review Discussion Paper*, January 2012, p45.

legislation and other laws. Such amendments will result in unnecessary duplication in regulation.

Regulatory overlap, unnecessary duplication and excessive prescription will not assist carers' understanding of their obligations or aid in their compliance. Instead, this will add to confusion about responsibilities and unnecessarily increase regulatory burden with respect to monitoring and demonstrating compliance. Every effort should be made to reduce excessive prescription, unnecessary overlap and duplication in regulation.

Retention of separate Codes

The Children's Guardian considers that the *Code of Conduct for Authorised Carers* and the *Code of Conduct of Conduct for Residential Units* should remain separate. While the two Codes deal with some common matters, the significant difference between the environments they address warrant their retention as separate Codes.

Transferring designated agencies' responsibilities to carers

Some suggestions for amendments to the Codes attempt to address matters dealt with in the NSW Standards. The NSW Standards address the obligations of designated agencies.

As the Discussion Paper acknowledges, "it is important that the code of conduct not be a mechanism for transferring responsibility from the authorised agency that accredits the carer to the individual carer. The responsibility for meeting standards should rest with the agency which needs to properly assess and support carers".¹⁸ However, amendments which seek to import obligations from the NSW Standards will have the effect of transferring designated agencies' responsibilities to individual carers. This is particularly concerning given that non-compliance with Code obligations may result in suspension or cancellation of authorisation in accordance with clause 31 of the Regulation.

Some carers may be more proactive than others – the Code should support the exercise of initiative by carers where this is appropriate and in the best interests of the child or young person in their care. In particular, the Code should encourage partnership between carers and designated agencies to provide quality care which improves outcomes for children and young people. However, supporting carers to exercise appropriate initiative and to work in partnership with their supervising designated agency should not result in inappropriate transfer of responsibility. It is important that Code provisions are based on an acknowledgement of the responsibilities of designated agencies in actively supervising carers and managing the care of children and young people.

Participation of children and young persons

The Discussion Paper proposes a new Code provision requiring authorised carers to facilitate the child or young person's participation in decisions about their care having regard to the age and developmental capacity of the child or young person.

Standard 6 of the *NSW Standards* identifies the inclusion of children and young people in decision making processes as a designated agency responsibility. Designated agencies are required to proactively facilitate participation of children and young people in case planning and review and other decision-making processes. Designated agencies also have an important role in providing guidance to carers on appropriate participation by children and young people in decision making in the domestic sphere. It is particularly important that designated agencies assess the capacity of a child or young person to participate in decision making and that they also advise carers with respect to this.

The Discussion Paper's proposal imposes disproportionate responsibility for children and young people's participation in decision making about care on carers. If participation of children and young people in decision making about their care is to be addressed in

¹⁸ Page 46.

the Code, it should not be framed in the terms proposed by the Discussion Paper. Carers should be encouraged to work together with the designated agency to *support* (not facilitate) participation of children and young people in decision making about their care.

Identity and culture

The Discussion Paper notes the obligation in clause 4(c) of the *Code of Conduct for Authorised Carers* to ensure that the child or young person observes his or her religion (if any) and that preservation of the child or young person's cultural identity are encouraged. The Discussion Paper proposes that clause 4(c) be expanded to refer to all the matters referred to in s9(2)(b) of the Act, as well as NSW Standards and the *Charter of Rights* for children and young people in OOHC.

The Children's Guardian considers that a general statement in the Code reflecting the role of the carer in encouraging the development and preservation of the child or young person's identity and culture is sufficient. It is not necessary for the Code to elaborate as suggested on all matters pertaining to identity and culture. Such detailing risks becoming excessively prescriptive. Again, this is a matter which the NSW Standards identify as a responsibility of designated agencies (Standard 4). Designated agencies should provide carers with appropriate support in this area, including specific guidance relevant to the particular child or young person.

School attendance as required by the Education Act 1990

The Discussion Paper asks whether the Code should impose an obligation on carers to ensure that the child or young person attends school as required by the *Education Act 1990*.¹⁹

This proposal imposes disproportionate responsibility for school attendance on carers. Ensuring school attendance is matter which carers may find particularly challenging, particularly with older children. This is a matter which requires the active involvement of the supervising agency – Standard 10 of the NSW Standards recognises this by making school attendance a responsibility of designated agencies. If this matter is to be dealt with in the Code, it would be more appropriately framed as an obligation on the carer to work together with the supervising agency to support school attendance.

Leaving care

The Discussion Paper notes a suggestion that the Code should “require the authorised carer to assist and facilitate preparation for the development of the young person's leaving care plan and preparing the person in their care generally for leaving care”.²⁰

¹⁹ Discussion Paper, p56.

²⁰ Discussion Paper, p63.

The Act clearly imposes the responsibility for preparation of leaving care plans on designated agencies with supervisory responsibility (s166). The NSW Standards also make it clear that planning and support for leaving care is the responsibility of designated agencies.

The Children's Guardian agrees that carers have an important role to play in supporting a young person in preparing to leave care. However, the imposition of an express obligation on the carer to *facilitate* the preparation of a leaving care plan is excessive, and appears to inappropriately transfer responsibility from the agency to the carer. If this matter is to be dealt with in the Code, it would be more appropriately framed as an obligation on the carer to cooperate with and support the designated agency's work in preparing a child or young person for leaving care.

Health and medical treatment of the child and young person – notification

As explained in the Discussion Paper, where a child or young person is admitted into hospital, the Code currently requires authorised carers to inform each person who has parental responsibility and the principal officer of the designated agency with supervisory responsibility immediately or as soon as practicable (within 24 hours) after the admission.

The Discussion Paper proposes that the Code be amended to require a carer to “notify the relevant people immediately, or if not immediately, as soon as practicable (but within 24 hours)” of the admission of a child or young person to hospital as well as “the reasons for the admission, the circumstances that led to the admission, the current health status of the child, and the recommendation or prognosis from Health professionals”.²¹ The Children's Guardian does not support this proposal.

Such an obligation would be onerous, inappropriate and unnecessary. It is not specified who the “relevant people” would be in this situation – although presumably from the other comments made in the Discussion Paper, this term would include (but not be limited to) the birth parents.

While the Discussion Paper acknowledges concerns in relation to authorised carers contacting parents, it does not suggest how these should be addressed. Contacting parents and other “relevant people” in the circumstances contemplated should be undertaken by the supervising designated agency. It is inappropriate to transfer responsibility this to authorised carers.

The notification obligation that the Code currently imposes on carers is sufficient. The proposed amendment to that notification obligation is not supported. .

Contact with family and significant others

²¹ Discussion Paper, p63.

The Children's Guardian agrees that carers should support relationships that a child or young person in OOHC has with family and significant others, unless it is contrary to the child or young person's best interests.

However, any amendment to the Code with respect to this issue should not be framed as an obligation to *facilitate* such relationships. It is the responsibility of designated agencies to ensure that children and young people are in placements which facilitate the involvement of their families, communities, and significant attachments (Standard 5). While carers should support designated agencies work in this regard, designated agencies should organise, manage, and supervise contact.

Any obligations to be included in the Code on this subject should acknowledge designated agency responsibilities as discussed above, and should be framed in terms of the carer's role in working with the designated agency to support these important relationships.

Record keeping

As the NSW Standards recognise, record keeping is a designated agency responsibility (Standard 16). The accreditation criteria under Standard 16 set out specific requirements relating to collection, maintenance and access to all available information, documents and records about the child or young person.

Certain information, documents and records relating to the child or young person would initially be obtained by the carer rather than the designated agency (for example, school reports and awards, photographs). Designated agencies should provide guidance and assistance to carers to ensure that such information, documents or records are properly collected and maintained by the carer. Designated agencies should also have arrangements in place for collection by the agency of such information, records and documents from the carer, where and when this is appropriate. For example, while carers would initially receive school reports and awards, and would probably need to keep these documents (or copies) for future reference when discussing the child or young person's educational needs with the school, the designated agency should be responsible for keeping a file of these documents.

Other information, records and documents would be provided to carers by designated agencies (for example, details of contact arrangements, details of previous health professionals). Carers should maintain these as needed to provide daily care for the child or young person, however ongoing responsibility for maintenance of these records should remain with the designated agency.

The Code should not transfer designated agency responsibilities with regard to collection and maintenance of information, records and documents to authorised carers. If the Code is to deal with record keeping by the carer, it should refer to the carer's obligation to work together with the designated agency to support collection and maintenance of information, records and documents relating to the child or young

person. Designated agencies should provide appropriate guidance and assistance to carers for the proper collection and maintenance of information, records and documents.

Training, knowledge and skills

The Children's Guardian supports measures that will promote carers participation in training and contribute to their knowledge and skills. The Children's Guardian appreciates that ongoing training will contribute to the quality of care provided by carers, as well providing them with ongoing support for their role.

However, carers' ability to participate in training and to develop knowledge and skills will, to a significant extent, depend on designated agencies providing them with adequate, appropriate and accessible opportunities to do so. This is why the NSW Standards impose responsibilities on designated agencies to provide appropriate initial and ongoing training and professional development opportunities for carers (and staff) (Standard 18).

Any provisions in the Code addressing carer participation in training and development of knowledge and skills must acknowledge the responsibility of designated agencies with respect to carer training, knowledge and skill development.

Court proceedings

The Children's Guardian agrees that it is important that authorised carers appropriately support a child or young person who is the subject of a court matter, but not become inappropriately involved or exert any undue influence on the child or young person during court proceedings. As the Discussion Paper suggests, this is a matter that can be addressed in the Code of Conduct.²²

However, the Children's Guardian does not support the proposal that the Code include a clause requiring authorised carers, with designated agency support, to facilitate the child or young person's contact with the legal representative appointed by the Court for that child or young person. Such a requirement could lead to a conflict with the proposed requirement, referred to above, that the carer not become too involved in such matters and would increase risks arising out of a conflict of interest.

Facilitating contact with legal representatives should remain very clearly a case worker/manager responsibility. If this matter is to be dealt with in the Code, the onus of responsibility proposed in the Discussion Paper should be reversed – that is, the carer should be obliged to support designated agency efforts to facilitate the child or young person's contact with his or her legal representative.

Duplication of statutory obligations in the Codes

Suggestions have been made for amendments to the Codes which replicate carers' obligations under care and protection legislation, and under various other laws which are relevant to the care of children and which apply to the general population.

²² Discussion Paper, p.58.

For example, it is proposed to include a requirement that “authorised carers provide any personal information directly relating to a child or young person in OOHC in any records that they keep to that child or young person on request and free of charge”.²³ This is an obligation which is already clearly imposed on carers by section 168(1) of the Act.

It has also been suggested that the Codes should include various statutory obligations imposed on persons responsible for children in motor vehicles.²⁴

The Children’s Guardian agrees that it is important that carers understand their obligations under all laws relevant to the care of children. However, the Codes should not simply replicate existing statutory obligations. Simply duplicating these matters in the Codes will be of little benefit in aiding compliance. Such duplication will only make the Codes more susceptible to becoming outdated, with the need for legislative amendments to the Codes to reflect all changes – whether minor or significant – to the statutory obligations which have been referred to.

Specific reference in the Code to statutory obligations may be appropriate where a particular need is identified to highlight certain obligations and to provide some general guidance with respect to these. Otherwise, it would be more efficient to include a general reference in the Codes to the obligation to comply with care and protection legislation and all relevant laws regarding the care, safety and well-being of children and young people. Designated agencies should then provide more detailed guidelines and training on all relevant laws with which carers must comply.

Behaviour management

The Children’s Guardian does not support suggestions in the Discussion Paper that behaviour management obligations should be detailed in the Code of Conduct.

The use of appropriate behaviour management practices is a responsibility that is shared between carers and designated agencies. As noted above in comments relating to behaviour management and administration of psychotropic medication, the Regulation already requires that authorised carers use only behaviour management practices approved by the designated agency (cl 30(2)). The Regulation also requires agencies to submit behaviour management policies for consideration by the Children’s Guardian as part of the process for accreditation (see cl 35 (2)(d)-(e)). The Children’s Guardian assesses agencies behaviour management policies against the *Guidelines for Designated Agencies for Developing a Behaviour Management Policy*. These Guidelines provide detailed guidance to designated agencies on the development of appropriate behaviour support or management policies, and on requirements for behaviour management plans.

²³ Discussion Paper, p.63

²⁴ Discussion Paper, p.61.

The Children's Guardian does not consider it appropriate or necessary, therefore, that the Code of Conduct detail all disciplinary conduct that could be injurious to a child, having regard to the behaviour management policy provided for in clause 35(1)(d), as suggested in the Discussion Paper. Nor does the Children's Guardian agree with the suggestion that the Code of Conduct should detail unacceptable behaviour management and restrictive practices as outlined in the Children's Guardian's *Guidelines for Designated Agencies for Developing a Behaviour Management Policy*.

A breach by a carer of the designated agency's approved behaviour management practices would contravene clause 30(2) of the Regulation, and consequently may lead to cancellation or suspension of the carer's authorisation in accordance with clause 31(b). It is, therefore, unnecessary for the suggested amendments to be made to the Code of Conduct in order to make inappropriate behaviour management a ground for cancellation or suspension of authorisation.

Further, as part of legislation, the Code of Conduct has a degree of inflexibility – it cannot be amended without a legislative process. However, as administrative documents, designated agencies' behaviour management policies and the Children's Guardian's Guidelines are more adaptable, and can respond more readily to developments in behaviour management practice and theory.

The Children's Guardian considers that it would be more appropriate and effective for unacceptable behaviour management and restrictive practices to be detailed in the Children's Guardian's Guidelines and designated agencies' behaviour management policies.

Sufficient reference to carers' obligation to use only appropriate and approved behaviour management could be made with a statement in the Code of Conduct that carers must comply with restrictions and prohibitions on behaviour management as set out in the relevant designated agency's behaviour management policy. The designated agency could then provide carers with further guidance (information, education and training) with respect to appropriate behaviour management.

It should again be noted here that Community Services' behaviour management working group and the Children's Guardian's upcoming review of the *Guidelines for Designated Agencies for Developing a Behaviour Management Policy* will be considering the need for greater clarity and direction on behaviour management. Outcomes from Community Services' behaviour management working group and from the review of the Children's Guardian's Guidelines may result in proposals for legislative amendments to provide greater clarity and direction on behaviour management.

Notification obligations

The Discussion Paper proposes that the Code of Conduct be amended to require the authorised carer to notify the designated agency and/or Community Services

immediately of certain significant events.²⁵ The Regulation and Act require carers to notify designated agencies of some, but not all of the events listed in the Discussion Paper.

The Children's Guardian agrees that it would be helpful to provide guidance to carers as to notification of significant events. Such guidance should, however, remain concise. Care should also be taken with references to other legislation – as noted above, such legislation is subject to change. Furthermore, if carers are not familiar with the legislation, such references may simply cause confusion. To address such concerns, designated agencies should provide additional explanation through carer training and guideline documents to amplify the guidance in the Code. Explanation provided by designated agencies could be appropriately detailed and more easily updated than guidance provided in the Code.

Where the Code requires immediate notification of an event, the carer's failure to do so could lead to suspension or cancellation of authorisation. Careful consideration should, therefore, be given as to whether some events may not require *immediate* notification (for example pregnancy of the carer).

Notification obligations – new household members

One of the proposed notification obligations proposed for inclusion in the Code would require the carer to notify the designated agency immediately of a change in the composition of his or her household.²⁶

In making this proposal, the Discussion Paper refers to the carer's obligation, under section 137(3) of the Act, to notify the designated agency if any other adult is residing at the carer's home on a regular basis and has been doing so for a period of at least three months. It should be noted, however, that the notification obligation in section 137(3) is significantly different to the notification obligation proposed for the Code. Firstly, with respect to the time frame for notification – section 137(3) does not require notification until *at least three months* after the new adult commenced regular residence. The discussion paper, however, proposes that carers be obliged to notify *immediately* of changes in household composition. Secondly, with respect to the matter to be notified – the Discussion Paper refers to changes in "household composition". This is much broader in scope than section 137(3), which refers only to a change involving regular residence by an adult.

It is not clear whether the notification obligation proposed for the Code of Conduct is intended to reflect section 137(3). If this is the case, then the wording of the notification obligation proposed for the Code needs to be amended to align with section 137(3). If, however, the notification obligation proposed for the Code is intended to be broader in scope than section 137(3), then the circumstances which would constitute a change in household composition need to be identified.

²⁵ Discussion Paper, pp 64 – 65.

²⁶ Discussion Paper, p. 65.

The notification obligation in section 137(3) of the Act is directly linked to the requirement, in section 45 of the *Commission for Children and Young People Act 1998*, for background checks on all adults who have been residing in the carer's household on a regular basis for a period of at least three months (see in particular s45(3) of that Act).

The Carer Screening (Probity) Roundtable is currently considering the requirement for background checks on adult household members under section 45 of the *Commission for Children and Young People Act* (and by association, the notification obligation under section 137(3) of the *Children and Young Persons (Care and Protection) Act*). At the last Roundtable meeting, participants agreed that the three month delay permitted before notification and background checking is required is too long, and may expose children and young people in OOHC to unacceptable risk of harm.

Roundtable participants also agreed that considerations other than length of residency should be considered to determine whether a person was to be assessed as a household member – for example, the nature of the relationship between the carer and that person, whether that relationship is ongoing and the involvement of the person in the care of the child or young person.

Roundtable discussions with respect to this issue are ongoing. The agreed outcome may result in amendment to section 45(3) of the *Commission for Children and Young People Act* and to section 137(3) of the *Children and Young Persons (Care and Protection) Act*. Any proposed amendment to the Code of Conduct to include a notification obligation relating to changes in carers' domestic arrangements needs to take into account the Roundtable's deliberations and any resulting amendments to the *Commission for Children and Young People Act* and the *Children and Young Persons (Care and Protection) Act*.

Other proposed Code amendments

The Juvenile Justice System

The Children's Guardian supports initiatives for the diversion of children and young people exhibiting low risk behaviour away from the criminal justice system. However, this not a matter which can be appropriately addressed by the Code of Conduct. As the UK system for dealing with young offenders demonstrates (referred to in the Discussion Paper), this requires interagency commitment and action.

It would be more appropriate and useful to address the role that carers can play to support children and young people in this respect through training and guidance provided by designated agencies. Consideration could also be given to the role that designated agencies can play in working with child protection, welfare, law enforcement and justice agencies to develop and implement systemic measures to address the over-representation of children and young persons in OOHC in the juvenile justice system.

Access to the Internet

It is not appropriate to impose a requirement on authorised carers to provide the child or young person in their care with access to a computer and the internet without identifying who is responsible for providing the computer and the internet connection.

This could be a significant impost on carers (particularly those in regional and remote areas) who otherwise might not have a computer and internet connection, or who have only limited internet connection in their homes.

Confidentiality

The Codes should require authorised carers and staff of residential units to uphold children and young people's right to confidentiality and privacy. In particular, information about the child or young person and his or her family should be kept confidential unless disclosure is appropriate or necessary.

Code of Conduct for Residential Units

Admission of child or young persons into out-of-home care

Clause 1 of the *Code of Conduct for Residential Units* sets out matters which a designated agency must consider before admitting a child or young person into an OOHC residential unit. The Discussion Paper proposes that clause 1 be amended to include the age of the child or young person as a factor to be considered.

The Children's Guardian agrees that age should be a key factor in determining OOHC placement options, particularly options for care in residential units. However, as the Children's Guardian has previously indicated, age is one of a number of important matters which need to be considered before placing a child or young person in residential care.

As the Discussion Paper notes, consideration of the child or young person's compatibility with other residents in the placement is also a relevant consideration. However, as with age, compatibility with other residents is one of a range of matters that should be considered. Even in cases where a child is aged over 12 years and is assessed as being compatible with other residents, there may be very important reasons why the placement would be unsuitable.

It should be noted that the *Code of Conduct for Residential Units* already provides general guidance on the matters to be considered prior to admission of a child or young person into residential care. These include available options for care, the views of the child or young person, and the welfare and interests of the child or young person (cl 1(a)–(c)). The Children's Guardian agrees that the reference to "welfare and interests of

the child or young person” in clause 1(c) should be amended to “safety, welfare and well-being of the child or young person” to reflect the wording in section 9(1) of the Act,

Such general guidance allows for consideration of a range of important matters. However, prescribing specific individual criteria in the Code as proposed may inappropriately de-prioritise criteria not specifically prescribed and obfuscate the need for more holistic assessment.

It should also be noted that the NSW Standards (Standard 11) clearly require designated agencies to undertake *comprehensive initial assessment* (prior to placement or immediately after for emergency or crisis cases) to facilitate appropriate placement. This includes consideration of the reasons for the placement, family details, social and medical history, cultural identity, and the capacity of the proposed placement to meet the needs, interests and well-being of the child or young person. Agencies are also expected to consider the views of the child or young person.

The minimum age for entry into residential care has been set, by current Community Services’ policy, at 12 years. The Children’s Guardian implements this policy through the regulatory tool of accreditation.

The Children’s Guardian imposes a standard condition on accreditation for designated agencies providing residential care which allows residential care to be provided only to children aged 12 and over. In cases where such a placement may be the best or only option for a child under 12, a variation to this condition, allowing placement of a child younger than 12 may be granted for a period of up to 6 months and may be extended upon application. The variation provides a mechanism for monitoring such placements. As part of the process for granting a variation, designated agencies are required to provide a copy of the child’s current case plan and, where applicable, a copy of the behaviour management plan. Applications for variation need to be endorsed by Community Services and include a rationale for the placement.

In addition to the points made above with respect to the range of important factors for consideration, inclusion of age for admission in the Code would be an unnecessary duplication of the function of residential care accreditation conditions.

Supervision

The Discussion Paper proposes that the Code impose an obligation on designated agencies to ensure that any person who is to supervise children and young people undergo appropriate background checking in accordance with the *Commission for Children and Young People Act 1998*.

The Children’s Guardian agrees that persons who supervise children in residential units should be subject to the same background checks as authorised carers. It should be noted, however, that such persons *would* generally be subject to background checks

under the *Commission for Children and Young People Act*. If there are any gaps in requirements for background checks for residential unit staff, these should be addressed through amendments to the relevant legislation – that is, the *Commission for Children and Young People Act 1998*, as well as the *Children and Young Persons (Care and Protection) Act* and the Regulation. Such obligations should not be addressed simply by amending the Code of Conduct.

Furthermore, given that designated agencies' compliance with background checking obligations go to accreditation, this matter is more appropriately addressed in the NSW Standards rather than in codes of conduct. Standard 17 of the NSW Standards requires that recruitment, assessment and selection processes comply with relevant legislation.

It is also recommended that any concerns raised in submissions with respect to screening of persons supervising children and young people in residential units be brought to the attention of the Carer Screening (Probity) Roundtable. The Roundtable may wish to consider, for example, whether some of the standardised probity checking requirements being considered for authorised carers should be extended to persons (who are not authorised carers) supervising children in residential units.

Additional rights for children and young people in residential units

The Discussion Paper proposes to clarify that children and young people placed in residential units are entitled to expect a personalised environment that meets their individual needs; to be treated fairly and equally; and to have opportunities for shared and mutually beneficial experiences and outcomes.²⁷

The Children's Guardian supports recognition of such rights for children and young people in residential units. The Children's Guardian also supports initiatives to raise awareness and understanding of these and other rights by those involved in the care of the children and young people. However it is questionable whether such rights should be detailed in the Code of Conduct. It would seem more appropriate to create a new version of the Charter of Rights for children and young persons in OOHC (developed in accordance with s162 of the Act) which specifies additional rights for children and young people in residential units

The *Code of Conduct for Residential Units* could refer to the rights set out in the Charter, and note the obligation of those involved in the care of children and young people in residential units to observe and uphold these rights. The *Code of Conduct for Authorised Carers* could similarly refer to the rights set out in the Charter and note the obligation of authorised carers in this respect. It should be noted here, however, that designated agencies' obligation to ensure that staff and carers uphold the rights of children and young people is a matter that goes to accreditation. The NSW Standards very clearly articulate this as an accreditation criterion under Standard 1.

Management of crisis situations

²⁷ Discussion Paper, p68.

The Discussion paper seeks comment as to whether the Code of Conduct for Residential Units should include clarification of actions that should be taken by authorised carers and designated agencies in response to situations of crisis.²⁸

The Code of Conduct is not an appropriate place to attempt to list all possible crises that may arise, or to provide for the many and varied permutations of appropriate responses that may be required in different circumstances.

To attempt to particularise in the Code all situations of crisis and all appropriate responses – for example to particularise “[s]ituations in which it would be appropriate to separate a child or young person from the group program, and how such separation should be managed”²⁹ – would defeat the intention of creating a document which is simple enough for staff and carers to know well and to use. Any attempt to create an exhaustive listing of crises risks omission of potentially significant situations. Listing all appropriate responses would render the Code overly prescriptive, and restrict possibilities for appropriately flexible responses.

Furthermore, in some cases, appropriate responses to crisis situations will be linked to behaviour management requirements set out in the care and protection legislation, and designated agency policies (which reflect the Children’s Guardian’s *Guidelines for Designated Agencies for Developing a Behaviour Management Policy*) as well as to obligations legislatively defined elsewhere. Listing crises situations and appropriate responses in the Code would result in the need for legislative amendments to the Codes to reflect changes to behaviour management and other legislative obligations relevant to crisis management.

A better approach would be to note, in the Code, an obligation to respond to crisis situations appropriately, in accordance with the designated agency’s behaviour management policies and any other relevant policies and guidelines, and consistently with the NSW Standards (see for example, Standard 3) and legislative obligations. More detailed guidance could then be delivered through policy and guideline documents. Training of staff and carers should also be undertaken to develop their understanding of their obligations and of the needs of the children and young people in their care, and to develop their capacity to use appropriate judgment in response to particular circumstances.

FURTHER REGULATORY AMENDMENTS BEING CONSIDERED BY THE CHILDREN’S GUARDIAN

The Children’s Guardian is currently considering the need for legislative amendments relating to accreditation of designated agencies, assessment and authorisation of carers, and the establishment and operation of the Carers Register.

²⁸ Discussion Paper, p70.

²⁹ Ibid.

These matters are discussed below. As indicated, some of these matters are subject to further consideration, including ongoing consultation. Given the time frame for the current statutory review of the Regulation, it will not be possible to progress all of these matters through the statutory review process.

The OOHC accreditation system

Over the last four years, the Children's Guardian has recommended and implemented substantial legislative and administrative reforms to the NSW OOHC accreditation system. As a result, there is now significant flexibility in the existing accreditation system to support the transfer of OOHC services to the NGO sector. Additional regulatory reforms may further enhance the capacity of the accreditation system to accommodate rapid expansion of the OOHC sector as the transfer progresses.

In particular, amendments could be made to the Regulation to facilitate the accreditation of amalgamating OOHC agencies by allowing accreditation of an organisation that is formed from two or more accredited organisations or parts of accredited organisations, upon the application of the pre-merged organisations. This may encourage rapid capacity building by proven providers.

Amendments could also be made to the Regulation to facilitate the accreditation of two or more agencies formed out of a single accredited agency by allowing accreditation of an organisation that splits from an accredited organisation, while maintaining the accreditation of the "parent" organisation. This may support the development of new provider capacity by a proven provider.

The Children's Guardian is currently considering proposals for such amendments, and will provide further advice to Community Services.

Carer screening

As mentioned above, the Children's Guardian is working with relevant agencies as part of the interagency Carer Screening (Probity) Roundtable to develop consistent probity checking requirements for authorisation of carers.

Other Roundtable participants include the Ombudsman's Office, Community Services, ACWA, AbSec, and the Commission for Children and Young People. Designated agencies will also be consulted in this process. Roundtable discussions are ongoing and it is likely that agreed outcomes will result in the need for amendments to the Regulation.

The Children's Guardian recognises that, given the time frame for the current statutory review of the Regulation, it may not be possible to progress all Roundtable proposals for amendments through the statutory review process. Nevertheless the statutory review of the Regulation should, in so far as is possible, take into account matters being considered by the Roundtable.

The Children's Guardian has made a number of recommendations to the Roundtable. These include that all prospective carers should be subject to two personal referee checks, and to National Criminal History Records Checks (in addition to Working With Children Checks). The Children's Guardian has also recommended that designated agencies should be required to seek information from prospective carers as to any previous applications to another agency for authorisation, any interstate registration as a carer, and any involvement with interstate child protection authorities. Designated agencies should also be required to seek any relevant information from Community Services (including any relevant KiDS information).

There is scope to impose standardised probity checking requirements on designated agencies through the Children's Guardian's accreditation system. The Children's Guardian can recommend accreditation criteria (included in the NSW Standards) for the approval of the Minister which would require designated agencies to seek certain information from prospective carers or to conduct specified probity checks (cl 36(3)(a)). The Children's Guardian could also attach conditions on accreditation requiring designated agencies to do this (cII 39(2)).

However, rather than setting out in the accreditation criteria all details relating to requirements for information to be sought and checks to be conducted, it may be preferable to include provisions in the Regulation to:

- Enable the Children's Guardian to issue procedures as to information that designated agencies must seek and consider in assessing carer suitability and relevant members of carers' households; and
- Require designated agencies to comply with those procedures.

The accreditation criteria in the NSW Standards could then be amended to reflect this by requiring information to be sought and checks to be conducted in accordance with those procedures.

It should be noted, however, the Children's Guardian could not impose accreditation criteria (or accreditation conditions) or issue procedures as suggested above which conflict with legislative provisions relating to the assessment and authorisation of carers. For example, clause 20(4)(a) of the Regulation permits, but does not require designated agencies to undertake national criminal history records checks for prospective carers and their household members aged 14 years or above. If the Children's Guardian's were to mandate national criminal history records checks through accreditation criteria, conditions or procedures, clause 20(4)(a) would need to be amended to eliminate inconsistency on this point.

Carers Register

The Children's Guardian has commenced work to develop a central online register of foster carers and statutory relative and kinship carers (the Carers Register) to record information relevant to a person's suitability to be a carer. Information on the Carers

Register will be updated by and shared between designated agencies for the purpose of assessing and authorising carers.

Development of the Carers Register is proceeding on the basis that minimum carer authorisation requirements (including standardised probity checking requirements) will be set. A carer will not appear as authorised on the Register unless the relevant designated agency certifies, on the Register, that all mandatory checks have been undertaken.

The Carer Screening (Probity) Roundtable is currently considering standardised probity checking requirements – outcomes from the Roundtable will inform development of the Carers Register. Outcomes from the interagency Carers Register Working Group (established by the Children’s Guardian to guide development of the Register) and from other consultations with stakeholders will also be critical in development of the Register.

Legislative amendments will be required to support the establishment and operation of the Register. The development of amendments will be informed by outcomes from the Children’s Guardian’s consultations with stakeholders and the interagency Carers Screening (Probity) Roundtable. Amendments made to the Regulation as a result of this statutory review, and amendments to the working with children check provisions of the *Commission for Children and Young People* (currently being developed) will also need to be considered for this purpose.

Taking into account all of the above, it is expected that legislative amendments will be sought in the latter part of 2012.
