

Key changes in the *Children's Guardian Act 2019*

Overall changes			
Change in CG Act	Current position	Rationale for change	Impact of change after 1 March 2020
<p>Consolidating existing and new functions of the Children's Guardian</p>	<p>The Children's Guardian's adoptions functions under the <i>Adoption Act 2000</i>, her children's employment functions and responsibilities regarding accreditation, monitoring and registration of out of home care are scattered through the <i>Children and Young Persons (Care and Protection) Act 1998</i> are set out in s 181 of the Care Act. The Children's Guardian also has functions under the <i>Child Protection (Working with Children) Act 2012</i>.</p>	<p>The consolidation of the Adoption Act and Care Act functions and responsibilities in one Act together with the expanded functions (i.e. in gaining responsibility over the Reportable Conduct Scheme and Official Community Visitors, both previously administered by the NSW Ombudsman and the new function to establish and maintain a register of residential care workers in out of home care) means that the Children's Guardian's functions would be easily locatable in a single place.</p>	<ul style="list-style-type: none"> • The functions in the Children's Guardian will be located on a single piece of legislation. • The Children's Guardian will be responsible for administering the reportable conduct scheme and the community visitors scheme (transferred from the NSW Ombudsman) • The legislative lever to establish and maintain a register for residential care workers in out of home care - this is anticipated to be operational in mid 2020 after further consultation. When operational, it will provide a mechanism for out of home care residential care providers to exchange information about the safety and suitability of residential care workers, prior to making a decision whether to engage a person. • The Children's Guardian will continue to exercise functions under the <i>Child Protection (Working with Children) Act 2012</i>.

<p>A new objects clause, paramountcy principle and guiding principles</p>	<p>With no specific Act governing the Children’s Guardian’s functions, the objects and principles pertaining specifically to the Children’s Guardian’s role is currently non-existent.</p>	<p>The objects and principles inform and reinforce the purpose of the legislation which is to protect children by promoting and regulating the quality of organisations and people providing services to children. An understanding of this overall object assists in clarifying how the various functions of the Children’s Guardian complement and work together as it is at the core of the Children’s Guardian’s work and the entire legislation. The guiding principles are necessary in undertaking decision making under the Act.</p>	<ul style="list-style-type: none"> • There will be greater clarity about the object of the Act and how the various functions give effect to the overall object. • The Act makes clear that the paramount consideration in administering, operating and making decisions under the Act is the safety, welfare and wellbeing of children, including protecting children from child abuse – mirroring the <i>Child Protection (Working with Children) Act 2012</i>. • The guiding principles clarify what matters should be taken into account in administering the Act.
<p>Independence and Governance matters</p>	<p>The process for appointment, vacancy and removal from the office of the Children’s Guardian is currently in the Care Act.</p>	<p>The removal of office of the Children’s Guardian will draw on elements from the Ombudsman Act 1974 with the Children’s Guardian now being removed from office by the Governor upon the address of both Houses of Parliament. With the expanded functions, the Children’s Guardian also needs to be able to appoint one or more statutory offices. Further, while the Children’s Guardian is an independent statutory office, given the transfer of the reportable conduct scheme, the legislation reiterates the independence of this role.</p>	<ul style="list-style-type: none"> • The Children’s Guardian can appoint statutory offices and her independence is enshrined in the legislation.
<p>Information exchange to complement expanded regulatory role</p>	<p>The Secretary of the Department of Communities can exchange information with a relevant body under s 248 of the Care Act</p>	<p>Noting the expanded regulatory role that the Children’s Guardian will now have, the information exchange provision that currently applies to the Secretary has been replicated so that the Children’s Guardian can share information with a relevant body (which includes prescribed bodies under the Care Act framework).</p>	<ul style="list-style-type: none"> • This replication will enable information of concern to be provided to entities on the same basis as the Secretary. • The capacity to share information with Commonwealth recognises the new regulatory environment with the commencement of the

		<p>A discrete expansion of the Children’s Guardian’s existing information exchange powers at section 186A of the Care Act enables the Children’s Guardian to share information with police and other investigative agencies including interstate and Commonwealth police and investigative agencies.</p>	<p>Commonwealth NDIS Quality and Safeguarding Commission.</p>
<p>Increased reporting requirements</p>	<p>The Children’s Guardian reports to the Joint Parliamentary Committee in relation to the administration of the Working with Children Check and the Ombudsman similarly reports in relation to the reportable conduct scheme.</p>	<p>To ensure accountability and transparency in processes and decision making, the Children’s Guardian will report to the Joint Parliamentary Committee in relation to the administration of the reportable conduct scheme. In addition, the Children’s Guardian is required to report to the Committee about policies and processes being adopted in relation to the exercise of her functions in relation to reportable conduct. As well, there are a number of additional matters to be reported in the Annual Report in relation to the new functions.</p>	<ul style="list-style-type: none"> • The additional reporting requirements will ensure greater scrutiny, transparency and accountability in processes and decision making.

Transfer of the reportable conduct scheme from the Ombudsman’s office to the Children’s Guardian
1. Structural changes

Change in CG Act	Current position under <i>Ombudsman Act</i>	Rationale for change	Impact of change for entities after 1 March 2020
<p>Co-location of Reportable Conduct Scheme with Child Safe Standards and the Working With Children Check</p>	<p>The Reportable Conduct Scheme was administered by Ombudsman's Office.</p> <p>The Office of the Children's Guardian is responsible for administration of the Working With Children Check and the Child Safe Standards.</p>	<ul style="list-style-type: none"> • The Royal Commission recognised the benefits of locating the reportable conduct scheme with the agency responsible for the Working With Children Check; and the agency monitoring and enforcing the Child Safe Standards. • The Standards apply to a broader group of organisations and focus is on organisations and preventative systems. • The Reportable Conduct Scheme only applied to a targeted group of entities and focus was on employee conduct. 	<ul style="list-style-type: none"> • A stronger, more integrated 'child safe organisations' framework for NSW. • Improved integration of systems, information sharing and oversight mechanisms. • Assists OCG to work with organisations to identify high-risk situations and employees and creating preventative conditions where it is more difficult for child abuse to occur. • Helps drive a broader culture of child safety, enables more people to identify reportable conduct, ensures entities properly respond to allegations of inappropriate or abusive conduct towards children. • Reduces organisations' dependence on the WWCC and Reportable Conduct Scheme to be their main child safe strategies. • More efficient oversight arrangements; reduces reporting duplication for organisations; delivers a cohesive approach to auditing, researching, reviewing and capacity building of child related organisations.

2. Operational Changes

Change in CG Act	Current position under <i>Ombudsman Act</i>	Rationale for change	Impact of change for entities after 1 March 2020
<p>Prescribing a notification timeframe of 7 business days (cl.29(4)) and an interim report or final report at 30 (calendar) days (cl.36 and cl.38).</p>	<p>Entities must notify the Ombudsman 'as soon as practicable' of a reportable allegation/conviction and in any event, within 30 days of the head of the agency becoming aware of the allegation or conviction.</p>	<ul style="list-style-type: none"> • The Royal Commission considered that the existing NSW notification timeframe 'dilutes the primary purpose of the scheme', and that It should consider adopting a mandatory three-day initial notification period. • Entities could "sit" on allegations of child abuse for up to a month. • An employee who poses a risk could continue to have contact with children for up to a month. 	<ul style="list-style-type: none"> • The 7-business day notification timeframe achieves a workable balance for NSW entities. • The Head of a Relevant Entity must provide 7 details within 7 business days after becoming aware of the allegation or conviction. • Greater certainty in what must be reported: <ul style="list-style-type: none"> - date report received - type of reportable conduct - name of employee, - name and contact details of entity and head of entity - whether Police notified - whether a ROSH report was made - nature of initial risk assessment and management eg whether the employee has been moved) - other additional information (if known) • Entities provide an update on the status of the investigation within 30 calendar days and can seek further guidance for a final report. • Early access to the Children's Guardian enables assistance/intervention with an investigation for inexperienced entities. • Mitigates risk to children through early management and action. • Introduces penalties for failure to comply with 7 business day notification requirements and to provide the 30 calendar day interim/final report.

			Exemptions and a 'reasonable excuse' discretion apply. (<u>Penalties not operative until 3 months after commencement i.e. until 1 June 2020</u>).
<p>Reporting bodies under the WWCC framework will not have duplicative reporting requirements</p>	<p>A reporting body under the <i>Child Protection (Working with Children) Act 2012</i> must notify the Children's Guardian of a finding that a worker has engaged in conduct specified in the WWC Act. Out of Home Care agencies are also required to notify the Children's Guardian as a condition of their accreditation</p>	<ul style="list-style-type: none"> • Duplication of reporting obligations - the <i>Child Protection (Working with Children) Act 2012</i> and the Reportable Conduct Scheme currently creates separate reporting requirements for the same conduct. It is also a condition of accreditation that designated agencies report to the Children's Guardian as soon as possible. 	<ul style="list-style-type: none"> • Brings all reporting requirements into the Reportable Conduct Scheme by 1 March 2020 (the condition of accreditation will be removed when the RCS is transferred to the OCG) • Entities will not have to notify the same conduct three times as internal OCG information sharing of reportable conduct findings will be provided to the WWCC and allegations to the OOHC teams.

<p>Agencies must investigate and make findings with reasons</p>	<p>Entities are not currently specifically required to investigate each allegation (only required to notify and make findings, so the requirement to investigate is implied, but not expressly specified in legislation).</p>	<ul style="list-style-type: none"> • While the current Scheme envisages that entities will investigate, the legislation is silent on this requirement. • It is unclear if procedural fairness is to be observed in investigations eg an entity report 'may' include submissions from the employee, and for Ombudsman-led investigations, informing a person who is the subject of an investigation is tied to where there are grounds for adverse comment in respect of the person. 	<ul style="list-style-type: none"> • The Act clearly requires relevant entities to investigate and make findings in the first instance. • The Children's Guardian will be able to monitor that investigation, or conduct her own-motion investigation, if it is in the public interest. • There will be certain exemptions to the requirement on entities to investigate, in line with the current framework (for example, class/kind exemptions). • The scope of procedural fairness in these investigations will be made clearer: <ul style="list-style-type: none"> - Entities will be required to have systems, policies, and processes about how they handle reportable conduct allegations that have regard to principles of procedural fairness. - The Act clarifies that an entity may give an employee who is the subject of a report written notice that a reportable allegation or conviction has been made and is to include any submission made by the employee in the report. • The procedural fairness provisions are noted in discretionary, not mandatory, language, to recognise circumstances where affording procedural fairness would put a person's health or safety at serious risk.
<p>Immunity from liability ('whistleblower' provisions)</p>	<p>The existing <i>Ombudsman Act</i> does not protect entities/persons from liability</p>	<p>System issues in an entity may preclude an employee from reporting an allegation of abuse for fear of disciplinary action in response to raising concerns.</p>	<ul style="list-style-type: none"> • Clauses 68 and 69 create an immunity from liability for any person who gives a report, makes a complaint, gives the Children's Guardian a notification of a reportable allegation, or complies with Part 4. • This is an added protection for persons and entities notifying allegations of child abuse.

Review of decisions

Reportable conduct decisions of the Ombudsman are not currently reviewable by the NSW Civil and Administrative Tribunal.

- The Office of the Children’s Guardian has an established framework of NCAT administrative review of decisions that relate to the Working With Children Check; and certain decisions regarding the accreditation and registration of agencies providing out-of-home care.

- A relevant entity’s investigation may be monitored by the OCG’s Reportable Conduct Directorate and the OCG can conduct an own-motion investigation if it is in the public interest.
- Complaints about an entity’s investigative process or decision would come to the Office of the Children’s Guardian; complaints about the handling of an investigation by the OCG (may be made by any person) to the Ombudsman.
- A new avenue of appeal to the NSW Civil and Administrative Tribunal about the finding/decision/ outcome of an OCG-initiated investigative finding.
- There will be more scrutiny on the OCG, the body administering the Reportable Conduct Scheme.
- The Act seeks to increase transparency of the reportable conduct scheme in relation to its decision-making and bring it into line with the OCG’s existing framework of administrative review.

3. Definitional changes

Change in CG Act	Current position under <i>Ombudsman Act</i>	Rationale for change	Impact of change for entities after 1 March 2020
<p>Clarifying the definition of reportable conduct</p>	<p>The definition of <i>reportable conduct</i> encompasses terms that are undefined in the legislation but described in fact sheets. At present <i>crossing professional boundaries</i> is included in the Ombudsman’s fact sheets as falling within <i>sexual misconduct</i>.</p>	<ul style="list-style-type: none"> • The Royal Commission recognised ‘uncertainty about the scope of the NSW Reportable Conduct Scheme that is problematic for stakeholders’ and ‘concerns around the definition of sexual misconduct under the NSW scheme highlight the importance of clarity in key definitions ...In particular, legislation should define key terms, such as sexual misconduct...’. • Codifying the definitions provides additional certainty and clarification for entities and employees as to what conduct comes within the scope of the Scheme. 	<ul style="list-style-type: none"> • The Act defines reportable conduct, and includes sub-definitions of its elements: <ul style="list-style-type: none"> • a sexual offence • sexual misconduct • ill-treatment of a child • <i>neglect</i> of a child • an <i>assault</i> against a child • an offence under s 43B (failure to protect) or s 316A (failure to report) of the <i>Crimes Act 1900</i>; and • behaviour that causes significant emotional or psychological harm to a child. • Approximately 50 case examples were considered in developing the definition of ‘sexual misconduct’. • Sexual misconduct is defined as conduct with, towards or in the presence of a child that is sexual in nature. • Crossing of professional boundaries will not amount to sexual misconduct in and of itself unless there is a sexual element.

			<ul style="list-style-type: none"> • The offence of grooming is included as a sexual offence. • The Children’s Guardian can also audit an entity’s reportable conduct prevention systems, including Codes of Conduct, processes and policies to ensure prevention and detection of reportable conduct.
<p>Mandatory considerations for assessing conduct</p>	<p>The legislation is silent on whether conduct is assessed at the criminal standard or the civil standard. The legislation is also silent in providing guidance regarding matters to be considered in assessing <i>reportable conduct</i>.</p>	<ul style="list-style-type: none"> • The Scheme required clear, transparent parameters around conduct that comes within scope and conduct that does not come within scope. • Less-serious matters that are outside the scope of the Scheme should be addressed through OCG’s integrated approach to child protection (Child Safe Standards, Working With Children Check, Child Safe Organisations training) 	<ul style="list-style-type: none"> • The Act clarifies that conduct is assessed at the civil standard (s 40(1)). • The definitions are to be read together with s 40(3), which requires the decision maker to have regard to professional standards, codes of conduct and accepted community standards in determining whether the reportable allegation relates to conduct that is in breach of established standards. • Clear parameters will assist agencies by refining the boundaries of reportable conduct (and other behaviours that may need to be dealt with by internal disciplinary processes) and reducing administrative burdens and costs.

4. Scope changes

Change in CG Act	Current position under <i>Ombudsman Act</i>	Rationale for change	Impact of change for entities after 1 March 2020
<p>Scope of Scheme will include <i>religious bodies</i></p>	<p>The Scheme does not consistently apply to religious bodies.</p>	<ul style="list-style-type: none"> • The Royal Commission recommended extending the Scheme to religious bodies. • The Scheme needs to target clergy and relevant persons within a religious body who have contact with children and hold or are required to hold a WWCC. • It should not be a disproportionate regulatory burden (i.e. requiring the whole religious congregation to come within the Scheme). • It should be aligned with the Working With Children Check framework. 	<ul style="list-style-type: none"> • From 1 March 2020, the Scheme will extend consistently to all religious bodies. Given the WWCC framework applies to religious services and requires the following persons within religious bodies to hold a WWCC, religious bodies will be under an obligation to report on conduct in relation to: <ul style="list-style-type: none"> - a minister, priest, rabbi, mufti or other like religious leader or spiritual officer of the organisation, or - a person in any other role in the organisation involving activities primarily related to children, including youth groups, youth camps, teaching children and child care if they hold or are required to hold a WWCC.
<p>Scope of the Scheme will be targeted to the provision of children’s services</p>	<p>Existing Scheme applies to <i>designated government agencies, designated non-government agencies and public authorities</i>. These are treated differently: 1. the Scheme applies <u>to any</u></p>	<ul style="list-style-type: none"> • Conduct outside of work is treated inconsistently by the Scheme. • If a person has engaged in sexual misconduct against a child even <u>outside</u> the work context, it is still relevant to any child-related work they undertake – such conduct should therefore come within the scope of the reportable conduct scheme. 	<ul style="list-style-type: none"> • A small, targeted expansion will extend the scheme to the outside-work conduct of employees of public authorities <u>who are required to, or do, hold a Working with Children Check for the purposes of their work with the entity</u>. • Under the proposal, public authorities within the current scheme (such as local councils) will be required to report on: <ul style="list-style-type: none"> - the inside work conduct relating to all their employees and volunteers, and - if <u>they hold a WWCC for the purposes of their work with the entity</u>, the inside and outside work

	<p><u>conduct (inside and outside of work) of employees of designated government agencies and designated non-government agencies; and</u></p> <p>2. <u>applies to conduct of employees of all public authorities which are only required to notify in relation to conduct that arises during an employee's work.</u></p>		<p>conduct relating to those employees, volunteers and contractors.</p>
<p>Scope of Scheme will clearly cover contractors</p>	<p>The framework does not clearly apply to contractors who work on behalf of an entity.</p>	<p>The Royal Commission recommended reportable conduct schemes should cover paid employees, volunteers and contractors.</p>	<ul style="list-style-type: none"> • If a relevant entity employs a contractor who is either required to, or does, hold a Working With Children Check for the purposes of their work with the entity, the head of that relevant entity would be required to report to the Children's Guardian about reportable conduct occurring both in, and out of work, in relation to those contractors. • Contractors and sub-contractors of entities to which the reportable conduct scheme applies will come within the scheme, eg if a swimming instructor engaged as a subcontractor by a local council to provide swimming services to children engages in sexual misconduct against a child outside work, that conduct will have to be

			reported as reportable conduct by the relevant entity i.e. the local council.
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