



New South Wales

Children's Guardian Bill 2019

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are to protect and promote the safety, welfare and wellbeing of children and to protect children from child abuse and exploitation.

The Bill continues the office of the Children's Guardian and provides for the appointment and functions of the Children's Guardian.

The Bill provides for the Children's Guardian to—

- (a) administer a reportable conduct scheme to prevent, identify and respond to child abuse, and
- (b) regulate the provision of out-of-home care, and
- (c) regulate the employment of children, and
- (d) accredit providers of adoption services.

The Bill also provides that the Official Community Visitor scheme, to the extent that it relates to accommodation provided to children in care, is to be administered by the Children's Guardian instead of the Ombudsman as is currently the case.

The Bill makes consequential amendments to other Acts and regulations.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Part 2 Application and interpretation

Part 2 provides for the application and interpretation of the proposed Act. The Dictionary in Schedule 6 to the proposed Act defines certain terms used in the proposed Act.

Part 3 Objects and principles

Part 3 sets out the main object of the proposed Act and the paramount consideration and guiding principles to be applied in administering the proposed Act.

Part 4 Reportable conduct

Division 1 sets out the objects of the proposed Part and defines certain terms used in the proposed Part. Under the proposed Part, the Children's Guardian will be responsible for the reportable conduct scheme that is currently administered by the Ombudsman under Part 3A of the *Ombudsman Act 1974* (that is repealed by Schedule 5.27 to the proposed Act).

Division 2 sets out key concepts for the reportable conduct scheme, which is a scheme for the Children's Guardian and relevant entities to investigate reportable allegations and to make determinations about reportable convictions. The scheme applies to the entities listed in proposed Schedule 1 and to public authorities (referred to as *relevant entities*). A *reportable allegation* means an allegation that an employee of a relevant entity has engaged in conduct that may be reportable conduct. *Reportable conduct* includes sexual offences, sexual misconduct, ill-treatment, neglect or assault of a child and other specified conduct. A conviction for an offence involving reportable conduct is a *reportable conviction*.

Division 3 requires an employee of a relevant entity to *report* to the head of the relevant entity a reportable allegation or a conviction the person considers to be a reportable conviction that relates to an employee of the relevant entity. If the matter relates to the head of the relevant entity, the matter is a *complaint* to be made to the Children's Guardian. The head of the relevant entity must give the Children's Guardian written notice (a *notification*) if the head of the relevant entity receives a report involving an employee or otherwise becomes aware of a reportable allegation or conviction considered to be a reportable conviction.

Division 4 contains procedural provisions relating to investigations and reviews under proposed Division 5 to allow investigations to be managed. Proposed Division 4 provides for the Children's Guardian to exempt a class or kind of conduct of employees of a relevant entity from being reportable conduct and exempt the head of a relevant entity from commencing or continuing an investigation of a reportable allegation or a conviction considered to be a reportable conviction.

Division 5 requires the head of a relevant entity who receives a report to investigate the reportable allegation or determine whether the conviction considered to be a reportable conviction is a reportable conviction.

Division 6 sets out the considerations for an investigation into a reportable allegation to assist in determining whether the investigation should result in a finding of reportable conduct.

Division 7 enables the Children's Guardian to require a relevant entity to provide further information about a reportable allegation or conviction considered to be a reportable conviction. The Children's Guardian may monitor the progress of a relevant entity's investigation or determination if it is in the public interest.

Division 8 enables the Children's Guardian to investigate a reportable allegation, make a determination about a conviction considered to be a reportable conviction and investigate a complaint or a relevant entity's management of a report or notification.

Division 9 requires the Children's Guardian to prepare a report after completing an investigation or determination and provides for the matters that must be included in the report.

Division 10 requires a relevant entity to have a code of conduct and policies and processes to prevent and detect reportable conduct by employees of the entity and provides for the notification and management in the Office of the Children's Guardian of reportable allegations against employees and convictions of employees considered to be reportable convictions.

Division 11 provides for the disclosure of information obtained in connection with an investigation into a reportable allegation or determination about a conviction considered to be a reportable conviction.

Division 12 exempts the Children's Guardian and staff of the Office of the Children's Guardian from the requirement to give evidence or produce documents in certain legal proceedings.

Division 13 makes it an offence to take or threaten to take certain action against a person because the person makes a report, complaint or notification to the head of a relevant entity or the Children's Guardian.

Division 14 contains miscellaneous provisions, including to provide for immunity from liability for persons acting in good faith.

Part 5 Out-of-home care matters regulated by Children's Guardian

Division 1 sets out the objects of the proposed Part and defines certain terms used in the proposed Part. Out-of-home care is currently administered under the *Children and Young Persons (Care and Protection) Act 1998* and certain provisions of that Act relating to the Children's Guardian's out-of-home care functions are transferred to the proposed Part.

Division 2 provides for the regulation of voluntary out-of-home care. The proposed Division sets the maximum duration of voluntary out-of-home care and provides for who may provide voluntary out-of-home care.

Division 3 makes it an offence for the principal officer of a designated agency to reside on the same property as a child who is in the care of the designated agency. If a child dies while in statutory or supported out-of-home care, the principal officer of a designated agency must immediately notify the parents of the child, the Children's Guardian and the Coroner.

Division 4 provides that the powers set out in proposed Schedule 2 may be exercised by an authorised person for the purpose of monitoring out-of-home care services.

Division 5 provides that the Children's Guardian may keep a register for authorised carers, residential care workers and organisations that provide or arrange out-of-home care.

Part 6 Child employment

Division 1 sets out the objects of the proposed Part and defines certain terms used in the proposed Part. Child employment is currently regulated under the *Children and Young Persons (Care and Protection) Act 1998* and certain provisions of that Act relating to the Children's Guardian's functions with respect to child employment are transferred to the proposed Part.

Division 2 makes it an offence to employ a child unless the person holds an employer's authority to employ children or is exempt from the requirement to hold an employer's authority.

Division 3 enables a person to apply to the Children's Guardian for an employer's authority to employ children or an exemption from the requirement to hold an employer's authority. An employer's authority remains in force for a maximum period of 12 months and may be subject to conditions prescribed by the regulations or imposed by the Children's Guardian. An employer's authority may be suspended or revoked at the request of the holder of the authority or at the discretion of the Children's Guardian.

Division 4 provides for the Children's Guardian to grant an exemption from the requirement to hold an employer's authority with or without conditions.

Division 5 sets out the Children's Guardian's powers with respect to child employment. Relying on powers in proposed Schedule 2, the Children's Guardian or an authorised person may enter and inspect premises without a warrant to investigate suspected contraventions of obligations with respect to child employment and to monitor compliance with the conditions of an employer's authority or exemption. The Children's Guardian may accept an undertaking in relation to the Children's Guardian's functions concerning the employment of children and may apply to the

Supreme Court to enforce an undertaking. The Children's Guardian may also request the production of certain information relating to the employment of children.

Division 6 makes it an offence to cause or allow a child to take part in employment that puts the child's physical or emotional wellbeing at risk. A child is taken to be a child in need of care and protection for the purposes of Chapter 4 of the *Children and Young Persons (Care and Protection) Act 1998* if the child is not immediately removed from a place of unlawful employment following a direction given by the Children's Guardian.

Part 7 Adoption service providers

Division 1 sets out the objects of the proposed Part and defines certain terms used in the proposed Part.

Division 2 provides for the accreditation of charitable and non-profit organisations as adoption service providers. These provisions are transferred from the *Adoption Act 2000*. The Minister may approve criteria for accreditation on the recommendation of the Children's Guardian.

Division 3 restricts access to records made in connection with the administration or execution of the proposed Part.

Part 8 Children's Guardian

Division 1 provides for the appointment of a Children's Guardian by the Governor and for the details of that office.

Division 2 sets out the circumstances in which the office of the Children's Guardian becomes vacant and the procedure for removing the Children's Guardian from office.

Division 3 provides for the appointment and removal from office of an acting Children's Guardian.

Division 4 provides for the appointment of a Deputy Children's Guardian and an Assistant Children's Guardian. Staff may be employed in the Public Service to assist the Children's Guardian to exercise the Children's Guardian's functions.

Division 5 specifies the functions of the Children's Guardian.

Division 6 provides for the preparation of annual and special reports by the Children's Guardian.

Part 9 Official Community Visitors

Division 1 defines certain terms used in the proposed Part. A *visitable service* means an accommodation service where a child in care is in the full-time care of the service provider or any other service prescribed by the regulations. Currently, premises at which those services are provided are visited by Official Community Visitors appointed under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. The provisions of the proposed Part are based on the current provisions of that Act.

Division 2 provides for the appointment of Official Community Visitors by the Minister administering the proposed Act, and the functions of Official Community Visitors in relation to visitable services. The Children's Guardian has general oversight of Official Community Visitors.

Division 3 enables an Official Community Visitor to disclose certain information to the Children's Guardian.

Division 4 protects an Official Community Visitor and a person who makes a complaint to an Official Community Visitor from retribution.

Part 10 Administrative review

Part 10 enables a person to apply to the Civil and Administrative Tribunal for administrative review of certain decisions.

Part 11 Offences

Division 1 sets out obligations and offences with respect to the disclosure of information, the provision of false and misleading information and the unlawful access to information stored by the Children's Guardian.

Division 2 deals with the personal liability of a director of a corporation for offences committed by the corporation in certain circumstances.

Division 3 makes it an offence to wilfully hinder or obstruct any person in the exercise of the person's functions under the proposed Act.

Division 4 provides for the administration of offences under the proposed Act.

Part 12 Miscellaneous

Part 12 contains various provisions relating to the general operation of the proposed Act, including provisions relating to the following—

- (a) the making of guidelines by the Children's Guardian and the Secretary of the Department of Communities and Justice,
- (b) the service of notices and other instruments,
- (c) the provision and exchange of information,
- (d) the protection of officers of the Children's Guardian from personal liability if acting in good faith,
- (e) the power to make regulations.

Schedule 1 Schedule 1 entities

Schedule 1 provides a list of the entities that are referred to as a *Schedule 1 entity*. Employees of Schedule 1 entities are subject to the scheme administered by the Children's Guardian for giving notice of, investigating and monitoring reportable allegations or convictions considered to be reportable convictions.

Schedule 2 Powers of authorised persons

Schedule 2 contains provisions relating to authorised persons and the power provided to authorised persons to enter, inspect and search premises and to require a person to produce information or attend at a time and place to answer questions and produce documents.

Schedule 3 Inquiries

Schedule 3 provides that the Children's Guardian may make or hold inquiries in relation to an investigation of a reportable allegation or a report made by an Official Community Visitor to the Children's Guardian about a child in care. The proposed Schedule applies certain provisions of the *Royal Commissions Act 1923* to an inquiry and contains offences relating to the unauthorised publication of evidence and prejudicial disclosure of information.

Schedule 4 Savings, transitional and other provisions

Schedule 4 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 5 Amendment of Acts and instruments

Schedule 5 makes consequential amendments to Acts and instruments, including the following—

- (a) to amend the *Adoption Act 2000* to omit provisions relating to adoption service providers that are transferred to the proposed Act,
- (b) to make consequential amendments to the *Child Protection (Working with Children) Act 2012*,
- (c) to amend the *Children and Young Persons (Care and Protection) Act 1998* to omit provisions relating to voluntary out-of-home care, the Children's Guardian and child employment that are transferred to the proposed Act,
- (d) to amend the *Community Services (Complaints, Reviews and Monitoring) Act 1993* to omit provisions relating to Official Community Visitors that are transferred to the proposed Act.

Schedule 5.10 amends the proposed Act to extend the reportable conduct scheme to religious bodies, providers of overnight camps, certain accommodation and respite services and providers of family group homes.

Schedule 6 Dictionary

Schedule 6 contains the Dictionary that defines certain terms used in the proposed Act.