



Legislation Review Committee

Correspondence received in response to the Legislation Review Committee
Digest No. 4/57 – 17 September 2019



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Children's Guardian Bill 2019 - Letter from the Hon Gareth Ward MP, Minister for Families,
Communities and Disability Services – 23 November 2019 **1**



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The Hon Gareth Ward MP
Minister for Families and Communities
Minister for Disability Services



Ms Felicity Wilson MP
Chair
Legislation Review Committee

By email: Legislation.Review@parliament.nsw.gov.au

Dear Chair, *Felicity,*

Digest No.4/57 of the Legislation Review Committee

I refer to your correspondence regarding the Legislation Review Committee's *Legislation Review Digest No 4/57* (the Report) in which it considered the *Children's Guardian Bill 2019*. A response to the issues raised by the Committee is set out below.

Committee Report reference to personal rights and liberties

Part 4 — Reportable conduct scheme — Right to privacy

The Report notes that the Children's Guardian's powers to make preliminary inquiries (s.44) may impact on the privacy rights of a person who is not yet the subject of an investigation or determination. The purpose of these preliminary inquiries is to inform the Children's Guardian's decision whether or not an own-motion investigation into an allegation of child abuse or mistreatment is in the public interest. This power also enables the Children's Guardian to make inquiries as to the ability or willingness of a relevant entity to deal with an allegation. This power replicates existing powers used under the current reportable conduct scheme (s.13AA, *Ombudsman Act 1974*). The paramount consideration (s.7) in decision-making under the Bill is the safety, welfare and wellbeing of children, including protecting children from child abuse. The Children's Guardian is a protective jurisdiction and the powers to make preliminary inquiries regarding an allegation of child abuse or mistreatment reflects this; particularly noting that the entities coming within the scheme include designated agencies responsible for the provision of out-of-home care to children.

Part 4 — Reportable conduct scheme — Right to privacy

The scheme already applies to the outside work conduct of a large number of employees under the scheme. Employees of *designated government agencies* (such as teachers under the Department of Education) and *designated non-government agencies* (such as approved education and care services) already have their outside-work conduct covered by the scheme (see *Ombudsman Act 1974*). The *Children's Guardian Bill 2019* makes a small, targeted amendment to ensure consistency in relation to employees of *public authorities*. However, this amendment has been deliberately contained to those employees of *public authorities* who hold, or are required to hold, a Working with Children Check. This fixes a legislative anomaly with the current scheme. It is appropriate that persons who provide services to children are treated consistently under the scheme. If a swimming instructor is employed by a local council to provide swimming services to children, they engage in child-related work. If that instructor has engaged in sexual misconduct against a child outside of the work context, it nevertheless is relevant to the child-related work they undertake with the entity and should come within the scope of the scheme. This is consistent with the treatment of outside-work conduct of a teacher for reportable conduct purposes. To cover inside-work conduct and not outside work conduct of employees of public authorities who have direct contact with children by virtue of their

holding or being required to hold a WWCC would not provide the level of protection the children of NSW deserve making the reportable conduct scheme inconsistent in its coverage.

Part 4 — Reportable conduct scheme — Procedural fairness

The Report notes that the Children’s Guardian is, in certain circumstances, exempted from the requirement to notify an employee that an investigation or determination is being carried out in relation to him or her. Significantly, the *Children’s Guardian’s Bill 2019* seeks to increase observation of procedural fairness principles. The current *Ombudsman Act 1974* does not refer to procedural fairness. In contrast, the Bill includes:

- an explicit reference to the principles of natural justice and procedural fairness being observed in decision-making under the legislation (s.8); and
- requiring relevant entities to have systems, policies, and processes about how they handle reportable conduct allegations that have regard to principles of procedural fairness [s.54(d)].

Further, the Children’s Guardian is *obliged* to advise an employee where she decides to carry out an investigation, unless doing so would compromise the investigation or put a person’s health or safety at serious risk [s.47(3)]. In contrast, s.25G of the *Ombudsman Act 1974* is silent in relation to requiring the Ombudsman to advise an employee regarding Ombudsman-led investigations of an employee. The Bill seeks to increase transparency of decision-making under the scheme, and balance this where disclosure would risk harassment or intimidation or would compromise the investigation.

Part 4 — Reportable conduct scheme — Presumption of innocence and reversed onus of proof

The Report notes that the burden of proof is reversed, in that it is on an employer to prove that an employee was dismissed for reasons other than having assisted the Children’s Guardian. This provision reflects a continuation of the existing onus of proof that applies under s.37(5) of the *Ombudsman Act 1974*. As noted in the Report, there are strong policy reasons to ensure employees feel safe in assisting in reportable conduct investigations without fear of reprisal from their employer.

Part 4 — Reportable conduct scheme — Exclusion from civil or criminal liability

The Report notes that a person who makes a report, complaint or notification to the Children’s Guardian is immune from civil and criminal liability. Significantly, the protections provided by this provision are contingent on the report, complaint, or notification being made in good faith. The *Royal Commission into Institutional Responses to Child Sexual Abuse* recognised the importance of ensuring that legislation provides comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts.

Part 5 — Out-of-home care matters — Strict liability

Part 6 — Child employment — Strict liability

The Report notes that offences relating to voluntary out-of-home care and children’s employment are strict liability offences. This reflects the existing offences under the *Children and Young Persons (Care and Protection) Act 1998*. As noted in the Report, strict liability offences are a common feature of regulatory frameworks. These offences are appropriate to ensure the integrity of the regulatory regime governing the provision of voluntary out-of-home care and children’s employment. The offences seek to ensure the effectiveness of the regulatory scheme by using the prospect of penalty as a deterrent to persons who are not registered with the Office of the Children’s Guardian to arrange or provide voluntary out-of-home care or who are engaging children in employment without authority.

Parts 8, 9, and 12 — Children’s Guardian and Official Community Visitors — exclusion from liability

The immunity from civil or criminal liability at s.132 of the *Children’s Guardian Bill 2019* reflects existing s.186B of the *Children and Young Persons (Care and Protection) Act 1998* and s.48 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. The *Royal Commission into Institutional Responses to Child Sexual Abuse* recognised the

importance of ensuring that legislation provides comprehensive protection for individuals who make reports in good faith about child sexual abuse in institutional contexts. Section 132 of the *Children's Guardian Bill 2019* is a continuation of existing immunities under the current legislative framework.

Part 11 — Offences — Strict liability

The Office of the Children's Guardian currently holds a large amount of sensitive information in relation to applicants and holders of Working with Children Checks, adoption service providers, and out-of-home care providers. This amount of sensitive information will increase with the transfer of the reportable conduct scheme and official community visitor scheme from the Ombudsman's Office to the Office of the Children's Guardian. While Part 11 of the Bill creates a strict liability offence for unauthorised access to information stored by the Children's Guardian, this is considered appropriate in the circumstances, particularly noting the comparatively small penalty for non-compliance.

Part 12 — Right to privacy and significant matter in subordinate legislation

Part 12 replicates the information exchange provision that currently applies to the Secretary of the Department of Communities and Justice under s.248 of the *Children and Young Persons (Care and Protection) Act 1998*. This will ensure that the Children's Guardian can share information with *prescribed bodies* under that legislative framework (called '*relevant bodies*' under the Bill to avoid confusion between the two schemes), including the NSW Police Force and a Public Service agency or a public authority.

The Report notes that this provision may impact on the right to privacy. Significantly, the provision is limited to sharing '*information relating to the safety, welfare and wellbeing of a particular child or class of children*'. Further, it must be '*for the purpose of exercising the functions of the Children's Guardian*'. The scope of information that may come within the words 'safety, welfare or well-being' has been closely considered by the NSW Civil and Administrative Tribunal. NCAT has made clear that these words are not a broad 'catch all'. OCG fully anticipates that information exchange under this provision will be consistent with NCAT's interpretation. Noting that the Guardian will have an expanded regulatory role in implementation of the Child Safe Standards, Reportable Conduct Scheme and her existing functions regarding regulation of the Working with Children Check and out-of-home care, this provision will enable information of concern to be provided to relevant bodies and assist in the protection of children.

Schedule 2 — Powers of authorised persons — powers of search and entry — right to privacy and freedom from arbitrary interference

The Children's Guardian has existing powers to enter, inspect, copy and remove any document or thing in places employing children and out-of-home care providers under the Care Act. Similarly, the Ombudsman has similar powers in relation to investigations. It is important that consolidation of the Children's Guardian's existing powers, functions, and responsibilities across the consolidated pieces of legislation and the transfer of the reportable conduct and OCV functions, does not result in a diminution of existing powers. Exercise of powers under the Act will continue to be used appropriately by staff of the Children's Guardian in keeping the wellbeing and safety of children at the heart of all OCG's efforts. It is equally important to emphasise that the purpose of exercising powers at Schedule 2 is to ensure compliance with the Act, the main object of which is to protect children by providing for the role and functions of the Children's Guardian (s.6). Further, the paramount consideration in the operation of the Act is the safety, welfare and wellbeing of children. Significantly, an authorised person must take all reasonable steps to cause as little inconvenience, and do as little damage, while exercising powers under Schedule 2 (Schedule 2[19]).

Schedule 2 — Powers of authorised persons — Privilege against self-incrimination

The Schedule 2 power to require a person to answer questions and provide information can only be exercised in the context of the Children's Guardian having reasonable grounds for believing there is a risk to the safety, welfare and wellbeing of a child. This power can only

be exercised under a search warrant, which is limited to an investigation triggered under Part 9 of the Bill (Official Community Visitors). It is noted that this power mirrors that which applies to the official community visitor scheme under the Ageing and Disability Commissioner (see s.17(2)(h) of the *Ageing and Disability Commissioner Act 2019*).

Schedule 5 — Right to privacy — breach of confidentiality/freedom of conscience or religion
The Report notes that the Bill expands the list of mandatory reporters. The changes in relation to mandatory reporting implements the NSW Government response to the *Royal Commission into Institutional Responses to Child Sexual Abuse*. The Royal Commission noted the benefits in having national consistency in mandatory reporter groups. It is noted that the mandatory reporter scheme in NSW already includes most of the groups recommended by the Royal Commission, with the exception of people in religious ministry and registered psychologists. Registered psychologists who provide services to children are already mandatory reporters, but registered psychologists who do not provide services to children are not. This expanded category of mandatory reporters implements the NSW Government response to the Royal Commission and may result in the increased reporting of child abuse and neglect thereby facilitating its prevention.

Schedule 5 — Restriction of access to government information
Exclusion of reportable conduct matters from the requirements of the *Government Information (Public Access) Act 2009* reflects the existing exclusion of Ombudsman information regarding 'complaint handling, investigative and reporting functions' (Schedule 2; *Government Information (Public Access) Act 2009*). This reflects the highly sensitive material considered during investigation of an employee in relation to an allegation of child abuse or mistreatment.

Committee Report reference to rights, liberties or obligations

Part 4 — Reportable conduct schemes — Ill-defined and wide powers

The ability for the head of a relevant entity to delegate his or her powers under the scheme reflects existing s.25JA of the *Ombudsman Act 1974*, which also enables delegation to any person employed in the agency. Not prescribing the circumstances or level of seniority accords with most legislation that provides for powers of delegation. It is noted that the Children's Guardian will also have the power to monitor an entity's investigation of a reportable conduct allegation if it is in the public interest to do so. This seeks to mitigate any risk that may arise regarding an entity's investigation of a particular allegation of reportable conduct.

Committee Report reference to delegation of legislative powers

Commencement by proclamation

Inclusion of certain entities in the reportable conduct scheme is subject to commencement by proclamation. While it is acknowledged that explicit commencement dates provide certainty for entities, commencement by proclamation reflects that further consultation and capacity building with these entities is required prior to their inclusion in the scheme. Thorough consultation and capacity building prior to inclusion in the scheme will ensure greater compliance with the requirements of the scheme.

Significant matters in subordinate legislation — issue one

The existing Carers Register is a centralised database of persons who are authorised, or who apply for authorisation, to provide statutory or supported out-of-home. The existing regulation-making power for the Carers Register is at s.264(1A)(k) of the *Children and Young Persons (Care and Protection) Act 1998*. This provision enables the register to include 'the information that is to be included on the register, the circumstances in which persons are required to enter information on the register, access to, and disclosure of, information on the register'. This detail in relation to the Carers Register is reflected in the *Children and Young Persons (Care and Protection) Regulation 2012*. The reference to a register for residential care workers reflects

the NSW Government response to the *Royal Commission into Institutional Responses to Child Sexual Abuse*. The NSW Response recognised that, while the Carers Register has been in place since 2015 and covers foster carers, and relative and kinship carers, there is currently no register of residential care workers. The *Children's Guardian Bill 2019* creates the legislative mechanism for the regulations to establish the detail of the register, in the same way that the detail of the Carers Register is currently contained in the *Children and Young Persons (Care and Protection) Act 1998*.

Significant matters in subordinate legislation — issue two

Section 180(3) of the Bill enables the regulations to create an offence punishable by a penalty. This is capped at 50 penalty units (currently a maximum penalty of a \$5,500 fine). This Bill consolidates the Children's Guardian's powers, including her powers in relation to adoption. Section 208 of the *Adoption Act 2000* enables a regulation to create an offence punishable by 50 penalty units. This has been replicated in the *Children's Guardian Bill 2019*, to ensure the consolidation of the Children's Guardian's functions does not result in a diminution of powers. It is noted that all legislation administered by the Office of the Children's Guardian enables regulations to create an offence, and that to date this power has been exercised with discretion and only where appropriate.

Thank you to you and the Committee for the Report on the *Children's Guardian Bill 2019*. I trust this response addresses the issues raised.

Yours sincerely,



THE HON GARETH WARD MP
Minister for Families and Communities
Minister for Disability Services

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