

Obj File Ref: A3950876

Ms Melanie Gibbons
Chair
Parliament of NSW Committee on Children and Young People

By email: childrenyoungpeople@parliament.nsw.gov.au

Dear Ms Gibbons

Re: 2018 Review of the Annual report of the Advocate for Children and Young People and functions of the Children's Guardian- Response to Questions on Notice

Please find attached my responses to the Committee's questions on notice in advance of the Committee's annual review hearing on Monday 30 April 2018.

If you would like more information about any of the information contained in the responses, please contact [REDACTED]

Yours sincerely

[REDACTED]

Janet Schorer
Children's Guardian
24 April 2018



RESPONSE TO QUESTIONS ON NOTICE

1. The *Child Protection (Working with Children) Act 2012* is being amended to implement many of the recommendations of the recent statutory review.

- a. What recommendations are outstanding, and when will they be implemented?
- b. Which recommendations may not be implemented, in full or at all? Why?

The statutory review report contains 29 recommendations for improvements to the WWCC scheme which were informed by careful consideration of the written submissions and feedback received through the statutory review process. Some of the recommendations have been implemented by amending the *Child Protection (Working with Children) Act 2012* by the *Child Protection (Working with Children) (Amendment) (Statutory Review) Act 2018* (assented to on 18 April 2018, awaiting proclamation). Others are being implemented by progressing amendments to the *Child Protection (Working with Children) Regulation 2013* and yet others are subject to further consultation and consideration with stakeholders.

A table outlining the recommendations of the statutory review report implemented by legislative amendment/to be implemented by regulatory amendment is attached at **TAB A** highlighting where they arose from a recommendation of the Royal Commission into Institutional Responses to Child Abuse.

A list of amendments that the OCG is giving further consideration to is attached at **TAB B**. They will be the subject of consultations with relevant stakeholders.

2. What are the main ways the recommendations of the statutory review differ to the approach of the Royal Commission into Institutional Responses to Child Sexual Abuse?

There are four main areas of difference to the Royal Commission's recommendations:

- i) Royal Commission Rec 7- The definition of 'contact with children' should be amended to include electronic communication: The OCG initially proposed an amendment in accordance with the Royal Commission recommendation in 2016. However, Government stakeholders advised that it could have unintended consequences and impact on individuals that should not be brought within the scope of the scheme. Later in 2016, government approved a regulatory amendment to the definition in a more targeted way than earlier proposed with a view to undertaking further consultations on the broader approach recommended by the Royal Commission. The 2016 regulatory amendments expanded the definition of direct contact to include contact where it is constituted by electronic communication in specified child-related work, being ongoing counselling, mentoring or distance education. This issue was further considered during the statutory review process but stakeholders maintained their concerns about this recommendation. As a result the OCG recommended in the statutory review report that it will consider the

appropriateness of further expansion of the definition of direct contact to all electronic communication in consultation with relevant non-government and government sectors.

- ii) Royal Commission Rec 12- That state and territories should adopt a definition of child related work that is limited to the roles and sectors identified by the Royal Commission and remove all other categories of work or roles: This recommendation was consulted on during the statutory review process and most submissions favoured retaining the current approach adopted under the NSW scheme in line with the policy objectives of the NSW scheme. The current approach in NSW identifies child related sectors and roles which can be expanded by Regulation and allows for particular roles to be exempt. Allowing certain roles to be included has for example seen the inclusion of roles that may present a potential risk to children that had previously not been considered such as those in child development, principal officers of designated out of home care agencies, youth workers, and school cleaners. Many stakeholders were of the opinion that the current approach in NSW has the advantage of providing flexibility to adapt to emerging areas of work and local arrangements which could be lost under the proposed approach.
- iii) Rec 14 Amend current laws to exempt certain proposed people and remove all other exemptions in state and territory schemes, and -prohibit people who have been denied a WWCC, and subsequently not granted one, from relying on any exemption: -As discussed at ii) above, the majority of submissions to the statutory review favoured retaining the current approach to defining who is in child related work and who is not by reference to the defined sectors, roles and exemptions. To prohibit people who have been denied a WWCC and subsequently not granted one from relying on an exemption would be contrary to existing policy objectives of the NSW scheme. As a result, the statutory review report made no recommendation in relation to removing exemptions.
- iv) Royal Commission Rec 21- Manslaughter of a child in all circumstances, including as a the result of a motor vehicle accident should automatically disqualify a person from working with children: The statutory review report did not make any recommendation in this regard. The current approach in NSW is that manslaughter of a child other than as a result of a motor vehicle accident automatically disqualifies a person from working with children. It distinguishes between manslaughter of a child as the result of a motor vehicle accident and manslaughter other than as the result of a motor vehicle accident. The rationale for not including manslaughter of a child as a result of a motor vehicle accident in Schedule 2 to the Act where it would result in an automatic refusal or cancellation of a clearance is because it is accidental and unlikely to be repeated by the offender. It can however be considered during the risk assessment process just as manslaughter of an adult in any circumstance is considered during risk assessment.



3. The Royal Commission recommended that the Commonwealth Government facilitate a national model for the Working with Children Check (Working with Children Checks report, 2015, recommendation 3(a), p 6). Can you update us on the progress of this?

The Royal Commission made 36 recommendations in its WWCCs report. The 36 recommendations are aimed at eventually achieving a single national WWCC scheme across all jurisdictions in Australia. This includes a proposed set of minimum standards until a national scheme can be developed.

The NSW scheme was already well ahead of other jurisdictions in its alignment with the proposed standards. Where the NSW scheme differed from what was recommended, we consulted on these areas through the statutory review process. See **TAB A** for amendments that arose from the Royal Commission's recommendations.

The NSW scheme now meets and exceeds most of the Royal Commission's recommendations for minimum standards. The OCG is in consultation with other jurisdictions through an interjurisdictional working group co-ordinated by the Commonwealth Department for Home Affairs to progress the Royal Commission's recommendations for nationally consistent WWCC standards. The Commonwealth is currently seeking confirmation of NSW and other jurisdictions' positions on particular issues where the standards differ from the proposed standards.

NSW and other jurisdictions have also provided in principle support for a centralised database for recording WWCC decisions from each jurisdiction, consistent with the Royal Commission's recommendation 3(a) (i).

TAB A

Recommendations from statutory review – progress of implementation

Implemented recommendations

Statutory review rec no	Description of recommendation	Method of implementation	Does recommendation arise from Royal Commission?
2	Amend the WWC Act to indicate that contact with children must be 'a usual part of and more than incidental to the child-related work'.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[3]	Yes (recommendation 8.a)
3	Retain the current approach in NSW to defining child-related work, which includes listing child-related roles and sectors and expanding the list to additional roles through regulation.	No change necessary	No
5	Amend the WWC Regulation to require parents volunteering on overnight camps with their child to have a WWCC.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 2.1[2]	Yes (recommendation 12.a.i.)
8	Amend the WWC Act to permit the Children's Guardian to give special consideration to persons turning 18 while residing with an authorised carer remaining in their care placement despite being refused a WWCC, if the Children's Guardian is satisfied that sufficient supports are in place to mitigate risk.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[11]	No
11	Amend the WWC Act to include a definition of criminal history that is consistent with the Royal Commission's recommendation 17).	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[2]	Yes (recommendation 17)
12	Amend the WWC Act to remove or replace references to criminal records with the term 'criminal history' for clarity.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[12], [18]	Yes (recommendation 17)

Statutory review rec no	Description of recommendation	Method of implementation	Does recommendation arise from Royal Commission?
13	Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include arson and firearm related offences regardless of whether the victim was a child.	By regulation	Yes (recommendation 21.c)
17	Amend the WWC Act to impose a positive obligation on applicants or holders of the WWCC to notify changes in their personal information to the OCG, with the failure to comply being an offence.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[25]	Yes (recommendation 16.d)
18	Amend the WWC Act to include a definition of "risk to the safety of children" that reflects the Supreme Court authority of <i>Commission for Children and Young People v V</i> [2002] NSWSC 949.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[2]	No
19	Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include convictions for carnal knowledge offences where the victim is over 13 years of age and has not received a sentence of full time custody for the offence.	By regulation	No
20	Amend Schedule 2 to the WWC Act (disqualifying offences) to include convictions for carnal knowledge where the victim is under 13 years of age or, if over 13 years of age, where the applicant has received a sentence of full time custody for the offence.	By regulation	No

Statutory review rec no	Description of recommendation	Method of implementation	Does recommendation arise from Royal Commission?
21	Retain the current approach in NSW to manslaughter, which distinguishes between manslaughter as the result of a motor vehicle accident and manslaughter other than as the result of a motor vehicle accident.	No change required	No (noting that the Royal Commission recommended that manslaughter of a child in all circumstances, including as the result of a motor vehicle accident, should automatically disqualify a person from working with children – see recommendation 20.b.ii)
22	Amend the WWC Act to include current court orders in factors to be considered in risk assessment by both the OCG and NCAT.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[13], [19]	No
23	Amend the WWC Act to introduce a new requirement that NCAT may impose an interim stay order subject to conditions only if satisfied that any conditions will be satisfactorily supervised by the relevant agency or employer.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[16]	No
25	Amend the WWC Act to create an offence for the failure of an employer to undertake online verification of workers in child-related work without reasonable excuse and to authorise OCG officers to serve a penalty infringement notice for this offence.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[6]	No
26	Amend the WWC Act to require prescribed licensing bodies and employment placement agencies to undertake online verification.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[6]	No
27	Amend the WWC Act to compel non-government organisations to provide the information (and not statements setting out the information) in response to notices under s31 of the WWC Act in the same way as government agencies are compellable.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[20]	No

Statutory review rec no	Description of recommendation	Method of implementation	Does recommendation arise from Royal Commission?
28	The OCG should give further consideration to a proportionate and effective response for non-compliance with a notice under s31 of the WWC Act to provide information to the OCG.	Child Protection (Working with Children) Amendment (Statutory Review) Act 2018, Sch 1[20]	No

TAB B

Recommendations yet to be implemented

Statutory review rec no	Description of recommendation	Proposed method to progress	Does recommendation arise from Royal Commission?
1	The OCG should give consideration to the appropriateness of further expanding the definition of direct contact, in line with the Royal Commission's recommendation 7a).	For further consultation and consideration	Yes (recommendation 7a)
4	The OCG should give further consideration to whether cleaners working at overnight camps and in day programs in sports centres should be required to have a WWCC clearance.	For further consultation and consideration	No
6	The OCG should give further consideration to how to best respond to out of scope applications.	For further consultation and consideration	No
7	The OCG should give further consideration to the option of imposing a nominal fee on volunteer applications, consistent with the practice in other jurisdictions.	For further consultation and consideration	No
9	The OCG should give further consideration to bringing adult household members of carers in voluntary out-of-home care within the scope of the WWCC scheme.	For further consultation and consideration	No
10	The OCG should give further consideration to clarifying the time frame of 3 weeks referred to in the defence provision at s10(5)(a) of the WWC Act.	For further consultation and consideration	No

Statutory review rec no	Description of recommendation	Proposed method to progress	Does recommendation arise from Royal Commission?
14	Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to specifically capture individuals who have been convicted of, or individuals against whom proceedings have commenced for, offences involving domestic or family violence (whether or not listed in either Schedule to the Act) sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may cause a risk to the safety of children, regardless of children being present.	For further consultation and consideration	No
15	Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include final AVOs initiated by Police in conjunction with an investigation where a child is named on the order as a person in need of protection.	For further consultation and consideration	No
16	Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include the following offences: a) Section 37 (choking, suffocation and strangulation) b) Section 93G (causing danger with firearm or spear gun) c) Section 93GA (firing at dwelling house or buildings) d) Section 195 (destroying or damaging property) e) Section 198 (destroying or damaging property with intention of endangering life) f) Section 200 (possession etc. of explosive or other article with intent to destroy or damage property).	For further consultation and consideration	No

Statutory review rec no	Description of recommendation	Proposed method to progress	Does recommendation arise from Royal Commission?
24	Amend the WWC Act to limit appeal rights where a person is subject to a parole order for any offence for the duration of that order.	For further consultation and consideration	No
29	Organisations providing services to children should incorporate the NSW Child Safe Principles developed by the OCG in their policies and principles.	For further consultation and consideration	No