

1. In regards to WWCC refusals, which are then appealed to NCAT:
a. What constitutes the 'reasonable parent' test?

The test adopted in NSW is called the "the reasonable person test" not "the reasonable parent test". A similar test has been in operation under the Victorian Working with Children legislation since 2012.

The test in NSW was introduced into the *Child Protection (Working with Children) Act 2012* by the Child Protection Legislation Amendment Act 2015 and applies in relation to matters where the Working with Children Check (WWCC) application was made to the Children's Guardian after 2 November 2015. In such cases the Children's Guardian and the NSW Civil and Administrative Tribunal (NCAT) must not determine that a person does not pose a risk to the safety of children, i.e. that a person should be allowed to work with children, unless satisfied that "a reasonable person would allow his or her child to have direct contact with the applicant that was not directly supervised by another person while engaged in child related work.

The rationale for introducing this test, as set out in the Second Reading Speech to the Child Protection Legislation Amendment Bill 2015 was "to better reflect community expectations and to apply community standards to the issues at hand".

While the Children's Guardian has commenced applying the test in the risk assessment process for applications received after 2 November 2015, the NCAT has not yet had occasion to apply the test in NSW. In considering what constitutes the test, NSW is assisted by directly relevant Victorian case law. In *VQB v Secretary to the Department of Justice [2013] VCAT 789*, Vice President Judge Macnamara said:

"The reasonable person would, in reaching his or her conclusions, acquaint him or herself with all of the matters that have been placed before me, giving an applicant for a positive assessment a right to be heard, as well as considering the material gathered by the Secretary. A reasonable person would not approach the task with a closed mind, thinking that once a person has offended, he or she can never be redeemed. The reasonable person, however, would not put aside all scepticism and reasonable caution in this most difficult area in some over-optimistic attempt to facilitate rehabilitation".

The "reasonable person" in the present context will be prudent, risk-conscious and very thoughtful and alert when it comes to looking out for possible risks and dangers. In considering whether a child is at risk of being harmed by the actions or inactions of an adult, the Children's Guardian or NCAT as the case may be in applying the reasonable person test, will take into account the circumstances and available information that existed at the relevant time. It is

for this reason that the term "reasonableness" cannot be defined with precision because it needs to remain responsive to the circumstances of each particular case.

An additional requirement introduced at the same time as "the reasonable person test" is that the Children's Guardian and the NCAT must also be satisfied that it is in the public interest to make a determination that a person does not pose a risk to the safety of children. This test is known as the "public interest test". It suggests the need to consider the greater community. The purview of the reasonable person is broadened further to consider whether the decision is a generally beneficial one to the community/public utilising all the information before the Children's Guardian and the NCAT as the case may be.

b. How many cases on appeal have been refused on 'reasonable parent grounds'?

As noted at 1. above, in NSW the test is "the reasonable person test". This test (and the public interest test) is to be applied by NCAT to matters where the WWCC application was made after 2 November 2015 to the Children's Guardian, i.e. after the commencement of the amending legislation. The NCAT has not yet had occasion to apply the test.

i) What proportion of overall refused appellate cases do these make up?

As stated above, there have been no matters where "the reasonable person test" has been applied as yet by NCAT.

ii) How many WWCC refusals are subsequently granted on appeal?

As stated above, there have been no matters where "the reasonable person test" has as yet been applied by NCAT.

2. In regards to CFY v Children's Guardian [2016] NSWCATAD 150:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

Note in relation to questions 2-9:

Matters are appealed to the Supreme Court only on an error of law – there are no other grounds of appeal to a higher court. To date there have been 14 Supreme Court Summons filed (11 filed by the applicant and three filed by the

Children's Guardian). To date, there have been no successful appeals initiated by the Children's Guardian. Of the three appeals lodged by the OCG, one was dismissed, one is pending decision and one has the final hearing listed for 15/09/2016.

- a) NCAT determined this matter on 13 July 2016. The Children's Guardian opposed the application. Legal advice was promptly sought from the Crown Solicitor's Office (CSO) in relation to the prospects of appeal.
- b) The legal advice received by the Children's Guardian from the CSO was that NCAT made no error of law in determining this application and therefore an appeal to the Supreme Court was not available.

3. In regards to CEP v Children's Guardian [2016] NSWCATAD 148:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

- a) NCAT determined this matter on 13 July 2016. The Children's Guardian opposed the application. Legal advice was promptly sought from the CSO in relation to the prospects of appeal.
- b) The legal advice received by the Children's Guardian from the CSO was that NCAT made no error of law in determining this application and therefore an appeal to the Supreme Court was not available.

4. In regards to CFE v Children's Guardian [2016] NSWCATAD 135:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

- a) NCAT determined this matter on 5 July 2016. The Children's Guardian opposed the application. Legal advice was promptly sought from the CSO in relation to the prospects of appeal.
- b) The legal advice received by the Children's Guardian from the CSO was that NCAT made no error of law in determining this application and therefore an appeal to the Supreme Court was not available.

5. In regards to BQC v Children's Guardian [2016] NSWCATAD 129:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

- a) NCAT determined this matter on 23 June 2016. The Children's Guardian opposed the application. Legal advice was promptly sought from the CSO in relation to the prospects of appeal.

- b) The legal advice received by the Children's Guardian from the CSO was that NCAT made no error of law in determining this application and therefore an appeal to the Supreme Court was not available.

6. In regards to CFH v Children's Guardian [2016] NSWCATAD 122:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

- a) No.
- b) NCAT determined this matter on 17 June 2016. The Children's Guardian did not oppose the application due to expert evidence submitted as part of the NCAT proceedings that demonstrated, on the balance of probabilities, that the Children's Guardian could no longer be satisfied the applicant posed a risk to the safety of children.

7. In regards to CFW v Children's Guardian [2016] NSWCATAD 76:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

- a) – b) NCAT determined this matter on 20 April 2016. The Children's Guardian opposed the application. Legal advice was promptly sought from the CSO in relation to the prospects of appeal.
The Children's Guardian has lodged an appeal with the Supreme Court. The Supreme Court has not yet determined the appeal.

8. In regards to CEI v Children's Guardian [2016] NSWCATAD 66:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

- a) NCAT determined this matter on 12 April 2016. The Children's Guardian opposed the application. Legal advice was promptly sought from the CSO in relation to the prospects of appeal.
- b) The legal advice received by the Children's Guardian from the CSO was that NCAT made no error of law in determining this application and therefore an appeal to the Supreme Court was not available.

9. In regards to BRC v Children's Guardian [2016] NSWCATAD 60:

- a. **Does the Children's Guardian plan to appeal this case to a higher court?**
- b. **If not, why not?**

- a) NCAT determined this matter on 5 April 2016. The Children's Guardian opposed the application. Legal advice was promptly sought from the CSO in relation to the prospects of appeal.
- b) The legal advice received by the Children's Guardian from the CSO was that NCAT made no error of law in determining this application and therefore an appeal to the Supreme Court was not available.

10. Why is the Working with Children Check Advisory Panel, which would provide advice to the Children's Guardian, regarding cases on appeal to NCAT, not currently operating?

The specialist nature of the expertise required for appointment to the Expert Advisory Panel (drawn from fields such as forensic psychology, psychiatry, criminology, indigenous issues, cyber-crime) has meant that the field of potential appointees is narrow and the response was limited. After a careful review of the applications received, a number of individuals who are nationally and internationally recognised for their research and/or experience in their respective fields have now been appointed.

By way of background we note that the Expert Advisory Panel was constituted to provide advice to the Children's Guardian about matters relating to offenders for the purposes of assisting the Children's Guardian in carrying out risk assessments and exercising functions under the WWC Act, not limited to cases on appeal to NCAT. Notably it was not constituted to provide advice on individual WWCC risk assessment matters, which the Office of the Children's Guardian has conducted for over 15 years. Although the nature of the advice received is expected to have likely application to individual matters being risk assessed as well as broader application.

The types of matters on which the expertise of the Panel is likely to be sought are particularly challenging issues, those that pose particular difficulties to the risk assessment process and have broad application, or those that arise with changing technologies and advances in research.

Examples of such matters that the Panel are anticipated to provide their expertise on include: the weight to be given to treatment and medication compliance in relation to individuals with a mental illness and their propensity for reoffending; the likely trajectories of juveniles with particular types of offending and treatment, how to assess pornography related offences and cyber-crime.

Western Australia has relied on the expertise of a panel of experts to provide advice in similar circumstances since 2006. Some of the topics on which they

have sought advice include: identifying grooming behaviour and its impact on risk to children; general issues relating to grooming; delayed disclosure issues, sibling incest, whether sexual offending against incapacitated elderly people demonstrated unacceptable risk to children.

Of particular relevance in NSW is the fact that since the commencement of the new WWCC in June 2013, there are only two outcomes to a WWCC application- either a clearance or a bar. Under the former framework, employers were provided with an assessment of a worker's risk to children, and were granted discretion as to whether or not they employed the worker. The new Check removed employer discretion, making the WWCC decision making process crucial to ensuring that high risk individuals are excluded from being able to undertake child related work.

It is noted that the Children's Guardian commissioned the Australian Institute of Criminology in 2014 and 2016 to undertake up to date research which has informed the OCG's decision-making processes under sections 17 and 18 of the *Child Protection (Working with Children) Act 2012* since that time.

Section 42A (3) provides that the Children's Guardian may make advice provided by the Panel available to the Tribunal on her own initiation or at the request of the Tribunal. It is expected that the latest research and findings on issues where the Panel lends it expertise will be placed before the NCAT for judicial notice.

How many applications have been received by the Children's Guardian for the Advisory Panel?

Ten.

11. Have any applications for the Advisory Panel been approved?

Yes, three.

13: In regards to accreditation of FACS Districts, which Districts have met the accreditation standards?

The Districts assessed as meeting the standards are:

1. Far West District
2. Southern District
3. Central Coast District

14: In regards to accreditation of FACS Districts, which Districts have substantially met the accreditation standards?

The Districts assessed as substantially meeting the standards are:

1. Hunter New England District
2. Illawarra Shoalhaven District
3. Nepean Blue Mountains District
4. Northern District
5. Northern Sydney District
6. South Eastern Sydney District
7. South Western Sydney District
8. Sydney District
9. Western Sydney District

a. Which criteria have been met and - b. Which criteria have not been met?

The decision to accredit 12 FACS Districts and to not accredit 3 Districts was based on the level of improvement and the quality of practice across each District. Those Districts fully accredited were able to demonstrate that quality services are delivered to children and young people and the practice is consistent across the District. In those Districts, all Community Service Centres have implemented systems to support continuous improvement. The Children's Guardian is satisfied that the District has demonstrated the capacity to maintain quality practice and continue ongoing practice improvement.

The Districts accredited based on *substantially* meeting the requirements were able to demonstrate sufficient improved practice across the District. Further evidence is required to show that the practice improvements achieved remain sustainable and are consistently embedded across the District. The Children's Guardian is satisfied that systems to support ongoing continuous improvement have been sufficiently developed to maintain this practice improvement over the next 12 months.

The Districts that were not accredited were able to demonstrate a level of improved practice but were not able to demonstrate that the improved practice was sustainable or consistently applied across the District.

At the time of the final assessment the Districts' continuous improvement systems were not sufficiently developed to support ongoing practice improvement. The Children's Guardian was not satisfied that the level of practice improvement required would be achievable in the next 12 months, as is required for an agency to be eligible for accreditation based on substantially meeting accreditation requirements.

15: In regards to accreditation of FACS Districts, which Districts have not met the accreditation standards?

The Districts assessed as not meeting the standards are:

1. Western District
2. Mid-North Coast District
3. Murrumbidgee District

a. Which criteria have not been met

As outlined at 14 a and b above, these Districts did not receive accreditation due to the lack of consistent District-wide quality practice and a lack of effective continuous improvement systems in place. The assessment indicated across the three districts, there was inconsistent practice in relation to most of the standards. While all districts were compliant with the Standard relating to confidentiality and privacy, there were gaps in practice and a lack of evidence to indicate minimal compliance with the remaining standards.

It is noted that the Standards set the minimum requirements for accreditation and are not a guarantee of funding. Additionally any breach of contractual arrangements in relation to an agency is the responsibility of the funder to address directly with the relevant agency.

16: In regards to accreditation of FACS Districts, in the three Districts that have not been accredited, what placement capacity do accredited NGOs in that area currently have?

Placement capacity of an NGO is not information that the OCG collects as part of its accreditation and monitoring functions. Placement capacity, including maximum capacity and vacancies, is managed by the Department of Family and Community Services through contracting arrangements.

17: Where Ms Boland states in her evidence before the Committee: "*We are looking at the options in relation to the children in those Districts at this point in time*", what does this mean?

If the three Districts fail to meet accreditation standards then children will need to be transferred to other accredited agencies and/or other accredited FACS Districts. In addition there may be other accredited agencies who may be able to operate in those Districts.

We would also expect that potential restorations, guardianship orders or adoptions in planning be progressed as a priority.

18: Does the Children's Guardian have any plans to extend the interim accreditation of those three Districts, should they fail to achieve accreditation standards?

The Children's Guardian has extended interim accreditation for the non-accredited districts for a further three months to 1 December 2016 to ensure the best interests of the children and young people are met. FACS has been required to report to the OCG on measures they have put in place during this time to ensure the children and young people in those districts are being appropriately supervised in their placements and child protection concerns are appropriately addressed. Based on the information provided by FACS, the Children's Guardian will determine whether the children should be transitioned to accredited districts or other accredited organisations.

19: In terms of ongoing monitoring of accredited agencies it was mentioned that in addition to proactive compliance there are some triggers that would prompt examination of an agency.

a. Can you elaborate on what triggers exist that would alert you to the need for a reactive review of an agency's systems?

Triggers may include:

1. Notifications of critical incidents
2. WWCC compliance issues or other concerns
3. Agency unresponsiveness or tardiness in responding to OCG feedback
4. Significant change within an organisation (Board, management, staff turnover, rapid growth, multiple new geographical locations etc)
5. Children under 12 years of age placed in residential care
6. Concerns raised by FACS or the NSW Ombudsman
7. A pattern of complaints from stakeholders (staff, carers, birth families, children and young people), or the public

b. How frequently are these triggers activated?

Points 1-3 above are not frequent matters, they may be activated once or twice a year

Points 4-7 above are more frequent and may be activated several times a year.

Point 5 above is part of the OCG's regular monitoring program but would trigger additional action where an agency had multiple numbers of children under 12 years of age placed in residential care.

c. And do you see any gaps or additional areas of information sharing, etc, that could improve ongoing monitoring of compliance with the standards?

Regular information sharing arrangements are in place with FACS and the NSW Ombudsman. Further work needs to be done to ensure the agency best placed to collate the information, not only collects the information but analyses the information for trends or areas of concern and then shares with the appropriate regulatory or monitoring agency. The Children's Guardian is considering additional strategies to strengthen the monitoring of compliance including extending the Carers Register to include a register of residential care staff. This would allow agencies to record the details of residential care staff, including any concerns or allegations against them, providing a central point of reference for other agencies to check credentials.

Additionally it is noted that comprehensive information is collected about the compliance of non-government organisations with respect to meeting Standards, performance, service delivery and other contractual issues. There is no equivalent system in place in relation to the Government provider, and this is recognised as a gap which the Children's Guardian is addressing directly with FACS.

20. A number of submissions have raised leaving care planning and supporting care-leavers to transition to independence as key areas of concern and have suggested that the accreditation standards could be strengthened in this area. To what extent do the current standards address the statutory requirements around leaving care plans, and do you have any views about how the accreditation process could attempt to improve outcomes in this regard?

Standard 12 *Living Independently* of the *NSW Child Safe Standards for Permanent Care* (previously the *NSW Standards for Statutory Out-of-Home Care*), addresses leaving care requirements. The standard provides that young people have leaving care plans that support their transition from out-of-home-care. The Standard is based on the requirements in the *Children and Young Persons (Care and Protection) Act 1998* in relation to supporting children and young people to transition to independent living.

The *NSW Child Safe Standards for Permanent Care* (previously the *NSW Standards for Statutory Out-of-Home Care*) were revised in 2015 in order to streamline the out-of-home care and adoption accreditation schemes and to strengthen permanency planning requirements in line with the Safe Home for Life child protection reforms. The Standards were revised in consultation with the out-of-home care sector and issues raised by the sector were incorporated into the revised Standards. A number of agencies specifically commented on the leaving care Standard, however the major theme in relation to this Standard was the lack of funding to provide after care services and a concern that out-of-home care providers have limited control over young people's access to affordable housing, financial assistance, education and employment. The OCG notes that a number of submissions to this inquiry suggest that the Standards could be strengthened in this area.

It is noted that Standard 23 *Strategic Planning and Evaluation*, the objective of which is to ensure that agencies strive to provide the best possible service to their clients, also requires that agencies engage in a process of continuous improvement. There is therefore no impediment in the Standards for agencies to engage in practice that exceeds the minimum requirements of the Standards and a number of non-government OOHC providers have comprehensive and innovative leaving care programs in place.

The OCG monitors agency compliance with the leaving care standard and expects to see that leaving care planning begins when a young person is 15 years of age and that the plan is regularly reviewed and amended as needs arise. Leaving care plans must include provisions for financial assistance and appropriate accommodation. Casework with young people should include supporting the development of independent living skills. While the *NSW Child Safe Standards for Permanent Care* are comprised of individual standards, the standards deliberately overlap and agencies are required to meet the standards as a whole, in order to be accredited to provide out-of-home care or adoption services. In order to be compliant with the leaving care standard, the agency must also be compliant with other related standards, for example Standard 6: *participation in decision making*, Standards 9 and 10: *Health and Education*, Standard 14: *case planning and review*, Standard 15: *casework and monitoring placements* and Standard 16: *post adoption support* (where relevant).

In assessing the quality of leaving care plans, OCG assessors consider whether the young person has been actively engaged in the development and review of the plan; whether family, significant others and other professionals have been consulted in the development of the plan; whether the leaving care plan is authentic, current and specific to the needs of the particular young person and

whether the plans include arrangements for financial assistance, accommodation and referrals to appropriate support services.

Where an agency does not demonstrate compliance with this Standard, the Children's Guardian may require the agency to develop an action plan to remediate gaps in practice and OCG assessors monitor the agency's progress with implementing practice improvements.