

Compliance and Enforcement Policy



Office of the
Children's Guardian

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Overview

The Office of the Children's Guardian's (OCG) goal is to create safe places for children and young people. We recognise that most organisations want to help keep children and young people safe. We look to facilitate this by following an escalation model of compliance and enforcement. As an organisation's attitude to compliance diminishes, our regulatory response increases.

Generally, organisations fail to comply due to:

- Not knowing that they must comply
- Not understanding why they should comply
- Not understanding what they should do to comply
- Not wanting to comply due to budget or time restraints

The Office of the Children's Guardian administers and enforces the following legislation:

- *The Children's Guardian Act 2019*
- The Children and Young Persons (Care and Protection)(Child Employment) Regulation 2015
- *The Child Protection (Working with Children) Act 2012*
- The Child Protection (Working with Children) Regulation 2013

This Compliance and Enforcement Policy sets out our approach in administering our laws through education, compliance, and administrative and enforcement actions. It is not a legal document and should not be relied upon as such. It is intended as a guide only and in no way will limit our discretion to take any action we consider necessary and appropriate to better protect children of NSW under the legislation we administer.

Objectives

To keep children safe from harm by:

- Increasing the OCG's presence within the sectors to create safe places for children and young persons.
- Identifying areas of non-compliance with the Children's Employment and Working with Children's Check legislation through our monitoring and auditing activities
- Promoting the Child Safe Standards and building an intelligence database to inform future compliance activities
- Encouraging upfront compliance by:
 - Educating employers on:
 - their obligations when employing children
 - their obligations when engaging workers in child-related work
 - Educating stakeholders on the role of the OCG and their obligations when working with children
 - Educating organisations on how to comply with the Child Safe Standards
 - Making it easier for employers and stakeholders to comply by reducing red tape
 - Developing and executing targeted compliance activities
 - Developing and implementing an enforcement plan to address and deter non-compliance and encourage a level playing field between organisations
- Liaising with industry stakeholders to identify emerging trends and issues
- Requiring employers to remove workers from working with children when they have been deemed a risk to children
- Investigating complaints, allegations, and suspected breaches of the law.

Principles

The OCG ensures all its compliance initiatives are based on the following principles.

Transparency

We ensure that all matters are dealt with in an open and transparent manner. All decisions made are subject to administrative review through the NSW Civil and Administrative Tribunal (NCAT) and the Courts

Accountability

The OCG is accountable for its compliance, administrative, and enforcement activities. It applies investigation methodologies and administrative processes with identifiable responsibilities.

Confidentiality

The OCG does not generally publicly comment on matters it may or may not be investigating. The OCG may comment on matters already in the public domain or where it is in the public's interest to do so.

Consistency

The OCG commits to giving organisation certainty by assessing, investigating, and enforcing the law consistently across comparable situations.

Targeted

The OCG makes effective use of limited resources by targeting issues in line with risks, new and emerging trends and operational priorities.

Flexibility

The OCG responds to the changing marketplace and will continually review the law to ensure that it continues to address risks of harm to children.

Effectiveness

The OCG is committed to ensuring its compliance and enforcement processes are the most appropriate to effectively achieve compliance within the sectors

Timeliness

The provision of information, advice, and feedback, and the handling of complaints and allegations are dealt with efficiently and effectively as possible within the OCG's resource allocation

Proportionality

Administrative and enforcement actions taken by the OCG are in proportion to the seriousness of the matter

Compliance Monitoring Tools

We will use a wide range of strategies and monitoring tools to assess levels of compliance and identify potential breaches of the legislation we administer and enforce. These include:

- Compliance operations
- Proactive audit programs
- Location visits
- Stakeholder intelligence/complaints
- Conducting investigations

Compliance Operations

We will undertake targeted compliance initiatives usually in the form of unannounced visits of employers focusing on a specific area of the legislation. Compliance operations allow us to assess a larger number of organisations and identify compliance trends.

Proactive audit program

We will proactively undertake audits of employers focusing on ensuring that employers are:

- Registered for the WWCC
- Verifying workers engaged in child-related work
- Maintaining proper records
- Not engaging barred or interim barred workers in child-related roles

We also undertake audits of performer representatives to ensure that they:

- Only place children in work with employers who provide their employer's authority as proof of being an authorised employer
- Maintain proper records of the child's employment
- Monitor that the child's work hours comply with the law

These audits may be undertaken face-to-face or via correspondence.

Children's Employment Location visits

We will attend a site where children are employed in the entertainment, exhibition, and modelling industries to ensure employers are complying with the law and that the children and young people are safe.

Stakeholder intelligence/complaints

We will assess all complaints received through the 'Report A Concern' portal on our website.

We will also speak to stakeholders regularly to identify any emerging trends or issues which require our intervention to keep children safe.

Conducting Investigations

We will exercise our powers and conduct investigations into alleged breaches of the legislation. Cases selected for investigation may be sourced from:

- Complaints
- Data analysis
- Referrals from audit work where the organisation is uncooperative, or the breach has a potentially high level of culpability and/or risk of harm to children
- The organisation has had previous non-compliance issues and the extent of their non-compliance needs to be qualified

Compliance and enforcement priorities

Each year we review our compliance and enforcement priorities. These priorities are determined following external consultation with stakeholders and an assessment of existing or emerging issues and their impact of the safety and wellbeing of children and young people.

Working with Children Check Compliance Priority

In 2020-21, we will be focusing on ensuring employers with workers engaged in child-related work are:

- registered as employers in the Working with Children Check system
- verifying all their workers engaged in child-related work who are not subject to an exemption

We are offering a one-off amnesty for employers to verify their workers by 30 June 2021.

This amnesty applies to employers who engage workers in child related work that:

1. are registered or should be registered as an employer for the Working with Children Check; and
2. have not previously verified any of their workers.

After this date, enforcement action will be taken against employers who have not complied with this obligation. This could result in penalty notices being issued and may also result in prosecution action.

We will also be focused on ensuring employers are not engaging persons in child-related work who are barred or interim barred from working with children. There will be no amnesty period for this breach as it places children and young persons at serious risk of harm.

Children's Employment Compliance Priority

We will have a strong focus on ensuring employers of children within the modelling industry are complying with the Children's Employment laws.

We will also continue our compliance activities to identify employers that employ a children without holding a current employer's Authority and those employers that fail to comply with the Code of Practice.

Taking Enforcement Action

We have a range of enforcement remedies available under the Act and Regulation. We use enforcement as a key tool for addressing conduct which involves directly or indirectly putting children at risk of harm or shows a blatant or persistent disregard for the law.

We may use one, or several actions to address employer behaviour to achieve our compliance and enforcement objectives.

Our responses to non-compliance fall into four categories

Administrative actions

- Issuing 'warning letters' advising of breaches identified. It requires the organisation to rectify any non-compliance issues. While no further enforcement action is taken, the letter will be placed on file and will be taken into consideration should further breaches be identified in the future. The warning letter will be used as evidence to prove that the organisation had been previously made aware of their legal obligations
- Recommending attendance of education sessions or undertake e-learning to improve awareness of their obligations under the laws we administer and enforce

- Placing conditions on an employer’s authority, or suspend or revoke and employer’s authority

Penalty notices

Issuing penalty notices (fines) for offences as prescribed by the legislation.

Enforceable undertakings

The employer provides an undertaking in writing to conduct themselves in a manner which minimises their risk to children. This undertaking is generally provided as an interim measure to avoid the matter being escalated to prosecution. The undertakings provided are enforceable by the Courts.

Prosecution

The matter is referred to the Courts for determination and appropriate judgement.

Our approach to compliance and enforcement and the range of enforcement remedies is summarised in the following diagram.

Figure 1 Enforcement Remedies



Schedule 1 - Offences

Working with Children Check – Child Protection (Working with Children) Act 2012

Legislative Reference	Offence	Penalties
Section 8(1)	Working in a child-related role without a Working with Children Check or a current application for a Working with Children Check	\$11,000 penalty, or 2 years imprisonment, or both
Section 8(2)	Working in a child-related role while subject to an interim bar	\$11,000 penalty, or 2 years imprisonment, or both
Section 9(1)(a)	Employing a worker in child-related work if the employer knows or has reasonable cause to believe that the worker does not hold a Working with Children Check or a current application for a Working with Children Check	\$11,000 penalty in the case of a corporation or \$5,500 in any other case
Section 9(1)(b)	Employing a worker in child-related work if the employer knows or has reasonable cause to believe that the worker is subject to an interim bar	\$11,000 penalty in the case of a corporation or \$5,500 in any other case
Section 9A(1)	An employer must not commence employing, or continue to employ, a worker in a child-related role unless the employer has obtained and verified the workers relevant details, and made a record of those details	\$11,000 penalty in the case of a corporation or \$5,500 in any other case if prosecuted through the Courts; or \$1,000 for a corporation or \$500 for an individual is addressed via penalty notice
Section 9A(4)	An employer who employs a worker in child-related work must keep the records updated no more than 5 working days after the expiry date for each clearance of the worker	\$11,000 penalty in the case of a corporation or \$5,500 in any other case if prosecuted through the Courts; or \$1,000 for a corporation or \$500 for an individual is addressed via penalty notice
Section 9A(5)	The employer must retain the records during the time the worker is engaged in child-related work and for a period of 7 years after the worker ceases to carry out child-related work for the employer	\$11,000 penalty in the case of a corporation or \$5,500 in any other case if prosecuted through the Courts; or \$1,000 for a corporation or \$500 for an individual is addressed via penalty notice
Section 9B	Governing body to ensure persons appointed to key positions hold clearance	\$11,000 penalty in the case of a corporation or \$5,500 in any other case if prosecuted through the Courts

Section 10	Adult person (other than an exempt person) who resides on the same property as an authorised carer, or on a property where a family day care service is provided by hold a working with children clearance or have made an application to the Children's Guardian for a clearance	\$11,000 penalty if prosecuted through the Courts or imprisonment for up to 2 years or both
Section 36(6)	A person who fails to comply with a notice served by the Children's Guardian without reasonable excuse	\$11,000 penalty in the case of a corporation or \$5,500 in any other case if prosecuted through the Courts
Section 36B	A person who holds a Working with Children Check or who has made an application to the Children's Guardian must notify the Children's Guardian of any changes to the person's personal details within 3 months of the change occurring	\$550 penalty units
Section 40(2)	A person who fails to comply with a notice issued by the Children's Guardian requiring them to produce documents and information	\$11,000 penalty in the case of a corporation or \$5,500 in any other case if prosecuted through the Courts

Child Protection (Working with Children) Regulation 2013

Legislative Reference	Offence	Penalties
Clause 24	Failure of reporting bodies to provide notification	\$2,200 penalty if pursued through the Courts

Children's Guardian Act 2019

Legislative Reference	Offence	Penalties
Section 92(1)	Employing a child in entertainment, exhibition, recorded performances, or any other activities prescribed by the Regulations without an employer's authority	\$5,500 penalty notice per offence, or up to \$11,000 through prosecution action
Section 92(2)	Causing or procuring a child to be employed knowing that the child will be employed in contravention of section 92(1)	\$5,500 penalty notice per offence, or up to \$11,000 through prosecution action
Section 92(3)	A person having care of a child must not consent to or otherwise allow the child to be employed knowing the child will be employed in contravention of section 92(1)	\$5,500 penalty notice per offence, or up to \$11,000 through prosecution action

Section 97(2)	Breaching a condition of an employer's authority	Up to \$11,000 through prosecution action
Section 106	A person who causes or allows a child to take part in employment, in the course of which the child's physical or emotional well being is put at risk	Up to \$22,000 through prosecution action

Children and Young Persons (Care and Protection)(Child Employment) Regulation 2015

Legislative Reference	Offence	Penalties
Part 3 Clause 12(3)	Employer must provide parents with a copy of the Code of Practice before the child commences employment	Penalty notice of \$110 per offence
Schedule 1 – Code of Practice		
Clause 5	Provide notification of intention to employ at least 7 days before employment commences, including risk identification and mitigation strategies	Penalty notice of \$550 per offence
Clause 7	A child must not be subjected to any form of corporal punishment, social isolation, immobilisation or any other behaviour likely to humiliate or frighten the child	Penalty notice of \$1,100 per offence
Clause 8	A child must be able to make contact with a parent, or the person nominated as the child's supervisor, and the employer must facilitate such contact whenever the child requests or whenever it is otherwise appropriate to do so in the interests of the child	Penalty notice of \$1,100 per offence
Clause 9	The employer must comply with schooling requirements	Penalty notice of \$550 per offence
Clause 13	A child must be adequately protected from the extremes of climate	Penalty notice of \$220 per offence
Clause 14	The parent must be notified if the child is injured or becoming ill, or appearing to the employer to become ill, or the child reporting that they are feeling ill	Penalty notice of \$220 per offence
Clause 17	General limitations on the hours a child can work	Penalty notice of \$330 per offence

Clause 18	Limitations on the hours a child can work in entertainment or exhibition	Penalty notice of \$330 per offence
Clause 19	Limitations on the hours a child can work in live performances	Penalty notice of \$330 per offence
Clause 22(1)	A child must be appropriately supervised having regard to their age, sex, and degree of maturity	Penalty notice of \$1,100 per offence
Clause 22(4)	Limitations on the number of children that can be supervised by one person	Penalty notice of \$1,100 per offence
Clause 22(5)	A supervisor must not have any other responsibilities other than supervising children	Penalty notice of \$1,100 per offence
Clause 24	Employer must provide appropriate facilities for a child to dress and undress in private	Penalty notice of \$1,100 per offence
Clause 25	Employer must inform the child and parent of the nature of the role or situation before the child is cast in the role or situation and the comments of the child and parent must be taken into account.	Penalty notice of \$1,100 per offence
	A child must not be cast in a role that is inappropriate for them having regard to their age, maturity, emotional or psychological development and sensitivity	Penalty notice of \$1,100 per offence
	A child must not be exposed to scenes that are likely to cause distress, or be allowed to become distressed for the purpose of obtaining a more realistic depiction.	Penalty notice of \$1,100 per offence
	A child must not be employed in any situation in which the genital area, buttocks, (or in the case of a female) the breasts of the child or any other person are exposed.	Penalty notice of \$1,100 per offence
Clause 26	Requirements for employing a child under the age of 3 years old	Penalty notice of \$550 per offence
Clause 28	Babies under 12 weeks old not to be employed unless the conditions of the employer's authority expressly authorise such employment	Penalty notice of \$550 per offence
Clause 29(1)	Requirements to be met when employing a baby under 12 weeks	Penalty notice of \$550 per offence

Clause 30	A baby must not be exposed to direct lighting in the course of the baby's employment	Penalty notice of \$550 per offence
Clause 31	Make-up must not be applied to a baby unless the make-up is non-irritating and uncontaminated	Penalty notice of \$550 per offence
Clause 32	Baby must not be handled by more than 4 people including the baby's parent and the registered nurse/midwife during any single period of employment	Penalty notice of \$550 per offence
Clause 33	A person who has a respiratory or skin infection must not be allowed to come into contact with the baby	Penalty notice of \$550 per offence
Any provision not specified above		Penalty notice of \$110 per offence