



Office of the  
Children's Guardian

Response to the *Family is Culture*  
independent review into Aboriginal  
out-of-home care in NSW

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## Introduction

The Office of the Children's Guardian ('OCG') welcomes the opportunity to provide a response to the independent review into Aboriginal out-of-home care ('OOHC') in NSW ('the Review'). The OCG acknowledges the work of the Review team in providing the first independent, systematic and comprehensive review of the experiences of Aboriginal children and young people in the NSW child protection system, led by Aboriginal people.

This submission sets out the OCG's response to the observations and recommendations relating to the Children's Guardian's functions.

The Review makes a number of observations of the accreditation and monitoring of OOHC providers in NSW, based on an analysis of publicly-available information regarding the activities of the OCG. The Review's observations, therefore, are made from the point of view of individuals external to the OOHC system. This provides useful insights for the OCG regarding how it could better communicate with the community regarding its work. However, it does not fully capture the breadth of the work of the OCG, nor the complexities of regulating the provision of human services.

This submission provides some context to a number of criticisms of the existing oversight arrangements as well as actions the OCG is already undertaking to address some of these concerns.

## Accreditation and monitoring of statutory OOHC providers

The *Children's Guardian Act 2019* ('the Children's Guardian Act') makes provision for the Children's Guardian to grant 'full' accreditation or 'provisional' accreditation<sup>1</sup>. Provisional accreditation is granted in circumstances where an OOHC provider has not provided OOHC services in the 12 months prior to the application for accreditation. Provisional accreditation applies to new agencies providing OOHC services for the first time, or former providers re-entering the OOHC system where the provider has not been delivering OOHC services for more than 12 months.

In order to be granted provisional accreditation, an OOHC provider must submit policies and procedures to the OCG for assessment. Policies and procedures must set out how the agency intends to deliver OOHC services in accordance with the NSW Child Safe Standards for Permanent Care ('the Standards'). The Standards are developed in consultation with the OOHC sector and approved by the Minister for Families, Communities and Disability Services on the

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<sup>1</sup> Children and Young Persons (Care and Protection) Regulation 2012, cl49.

advice of the Children's Guardian. The Standards are reviewed every five years and the OCG will commence a review of the current Standards, in consultation with the OOHC sector, in 2020.

An agency with provisional accreditation must notify the Children's Guardian as soon as it commences delivery of OOHC services and participate in a monitoring program in which the agency must demonstrate, over the course of its three-year accreditation, that its practices meet the requirements of the Standards. The Review implies that provisionally-accredited agencies are permitted to operate non-compliant services. This is incorrect. The OCG conducts onsite assessments of provisionally accredited agencies every three to four months to monitor practice against the Standards and where non-compliance is identified, regulatory mechanisms are used to address practice concerns.

The OCG has a number of approaches to monitoring designated agencies' provision of OOHC services, including:

- onsite assessments of practice to determine an agency's application to renew its accreditation;
- onsite assessments of practice in response to identified concerns regarding practice;
- onsite assessments of practice to monitor an agency's implementation of practice improvements plans;
- review of children and young people's circumstances via access to ChildStory;
- three-monthly onsite assessments of new providers' (provisionally accredited agencies) delivery of OOHC services;
- assessments of agencies' policies and procedures;
- analysis of notifications regarding allegations of abuse in care, deaths in care and placements of children and young people in emergency care arrangements;
- review of the OCG's holdings regarding compliance with the Working With Children Check ('WWCC') and the Carers Register requirements;
- review of the OCG's holdings regarding reportable conduct matters; and
- analysis of information provided by other bodies under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* ('Care and Protection Act').

## Regulatory responses to non-compliance

The Review correctly notes that the OCG adopts a responsive, risk-based approach to regulation of the OOHC sector, only imposing formal sanctions where less intrusive approaches have not been successful in addressing non-compliance. The Children's Guardian routinely uses a range of regulatory approaches to address non-compliance, including:

- imposing conditions on an agency's accreditation to manage specific risks or require an agency to undertake certain actions; and/or
- imposing conditions to prevent an agency from accepting further referrals of children and young people, or particular cohorts of children and young people until practice concerns are addressed; and/or
- requiring an agency to engage external experts to oversight its service delivery; and/or
- requiring an agency to implement an action plan to address specific concerns, with regular monitoring by OCG assessors; and/or
- deferring a decision regarding an agency's accreditation; and/or
- issuing a notice of intention to suspend or cancel accreditation; and/or
- referring individual matters of concern to the Department of Communities and Justice (DCJ); and/or
- requesting DCJ undertake an assessment of the safety, welfare and wellbeing of children and young people placed with an agency; and/or
- referring matters of concern to other regulators (where relevant), such as the Australian Charities and Not for Profit Commission.

The accreditation status and conditions of accreditation for all designated agencies is publicly available, on the OCG's website.

In addition to the regulatory approaches set out above the Children's Guardian has, in fact, exercised her power to suspend or cancel an agency's accreditation or registration, in respect of both statutory and voluntary OOHC providers.

In all instances where non-compliance is identified and regardless of the regulatory mechanism used to address concerns, the OCG increases the frequency of its onsite monitoring of practice. The OCG notes the Review's concerns regarding the Children's Guardian's use of the provision to defer a decision regarding an agency's application to renew accreditation. While an agency is permitted to continue to provide OOHC services whilst a decision is deferred, risks are managed through the imposition of specific conditions and increased monitoring by the OCG. Accreditation decisions are often deferred where an agency's practice is largely meeting the Standards, but where a particular area of practice requires further consolidation.

In exercising her regulatory powers, the Children's Guardian must consider the impact on children and young people, their carers and families. The ultimate sanction, cancelling an agency's accreditation, can have a significant impact on children and young people. Where an agency is no longer permitted to provide statutory OOHC services, the responsibility for these placements must transfer back to DCJ, or to another accredited non-government provider. In a sector where there is

not an abundance of providers with capacity to scale-up service delivery at short notice, the Children's Guardian must consider whether the risks to children and young people within an agency outweigh the possible disruption to their care arrangements and whether less intrusive approaches will address risks to children and young people, without unduly disrupting their care.

These considerations are particularly relevant in relation to the OOHC services provided by DCJ. NSW is unusual in that the government provider is required to meet the same standards of care as non-government providers. The purpose of having universal standards of care for government and non-government providers is to try to prevent a two-tier OOHC system emerging.

This poses a significant regulatory challenge however, where the government is the provider of first instance and last resort. The NSW child protection system relies on DCJ having the capacity to provide OOHC services and there are a number of circumstances in which DCJ's capacity to provide OOHC must be assured, regardless of its accreditation status:

- DCJ is the largest single provider of supported OOHC and this cohort of children and young people makes up a significant proportion of all children and young people in OOHC;
- DCJ manages the entry of children and young people into OOHC under Chapter 5 of the Care and Protection Act;
- the Secretary has a responsibility to supervise the placement of a child or young person if a designated agency is unable to fulfil its obligations in respect of the child or young person<sup>2</sup>, for instance if the Children's Guardian suspends or cancels an agency's accreditation; and
- the Minister for Families, Communities and Disability Services is responsible for the provision of accommodation for any child or young person for whom the Minister has sole parental responsibility or parental responsibility for residence<sup>3</sup>.

In order to balance the need to ensure the government provider meets the same standards of care as the non-government sector, while also ensuring that DCJ can meet its statutory obligations under the Care and Protection Act, the OCG has accredited individual districts and programs within DCJ, for example the Central Access Unit. This provides for one district within DCJ to oversee the OOHC service delivery of another district if a district or program is not meeting the requirements of the Standards. The OCG routinely monitors DCJ's delivery of OOHC services and has remote access to the ChildStory system. Matters of concern regarding individual children and young people are raised directly with DCJ.

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<sup>2</sup> *Children and Young Persons (Care and Protection) Act 1998* s.141

<sup>3</sup> *Children and Young Persons (Care and Protection) Act 1998* s.164

The accreditation system is not intended to be punitive and the OCG is firmly of the view that the interests of children and young people are best-served by a regulatory system that focuses on capacity building and continuous quality improvement.

The Review recommends legislative amendments to remove the Children's Guardian's capacity to defer an accreditation decision, or to accredit only those agencies that 'wholly' meet accreditation criteria. While acknowledging the rationale for this recommendation the OCG is concerned that this could have a disproportionate impact on Aboriginal agencies and reduce the number of Aboriginal agencies working with Aboriginal children and young people. In all instances where an agency is not wholly compliant with accreditation criteria, but working towards full compliance, the OCG increases its monitoring of these agencies.

### Planned review of the OOHC Standards and assessment framework

The last comprehensive review of the OOHC Standards and assessment framework was in 2010. The Standards were updated in 2015 and the OCG has undertaken to review the Standards and assessment framework again in 2020.

While many of the systemic issues identified in the report sit in the child protection sphere, there is an urgent need to improve the capacity of the OOHC sector to better meet the needs of Aboriginal children and young people as the single largest cohort of children in the OOHC system. The OCG intends to use the opportunity provided by the review of the Standards to more explicitly set out mandatory practice requirements to support culturally-appropriate care to Aboriginal children and young people, particularly those placed in the care of non – Aboriginal agencies.

To better understand practices that would create a more culturally safe OOHC system, the OCG will consult on the new accreditation criteria and assessment methodology with Aboriginal OOHC providers first. The discussions will particularly focus on practice requirements in relation to the Aboriginal Child Placement Principles, children and young people's wellbeing and cultural planning and support. Once practice requirements have been discussed with NSW Child, Family and Community Peak Aboriginal Corporation ('AbSec') and Aboriginal agencies, they will then be circulated in the wider OOHC and adoption sector for comment.

Discussions with the Aboriginal OOHC sector will also include identifying opportunities for the OCG to improve its approach to the assessment of Aboriginal service providers, particularly different approaches agencies can take to demonstrate how their practices meet the requirements of the Standards.

The OCG intends to commence these discussions in August 2020.

## Public reporting

The OCG notes the criticisms of its current approaches to public reporting regarding its activities in relation to accreditation and monitoring of OOHC providers.

While the OCG makes all information about agencies' accreditation status and conditions placed on their accreditation public, it has not, to date, made its feedback reports to agencies public. This is largely because the purpose of feedback reports is to assist agencies to address non-compliant practice.

The OCG does, however, acknowledge the importance of transparency in decision making for the public to have confidence in the OOHC system and the OCG is committed to improving its reporting on the activities of the Office and the performance of the OOHC sector. The OCG also acknowledges that some of the observations of this Review, regarding a regulatory system that appears to permit non-compliant providers to continue to operate without sanction, are in part the result of a lack of clear public reporting regarding the degree of proactive monitoring that takes place in the OOHC sector.

The OCG will include options for improved public reporting as part of the five-year review of the Standards.

## For-profit providers

The OCG notes recommendations regarding legislative amendments to provide that only a charitable or non-profit organisation may apply to the Children's Guardian for accreditation, similar to the provisions for the accreditation of adoption service providers.

The OCG acknowledges the Review's concerns regarding perverse financial incentives associated with for-profit providers. However, for-profit providers are required to meet the same standards of care as not-for-profit providers. Further consideration of the appropriateness of for-profit providers is underway.

## Expansion of the functions of the OCG

The Review notes that the functions of the OCG have expanded significantly over recent years. The OCG does not agree that this has resulted in a lack of focus on the OOHC sector. To the contrary, the OCG now has greater access to a range of information regarding the safety of children and young people in OOHC which allows the office to better-prioritise its work.

The OCG's monitoring of the OOHC sector has not diminished, however the OCG acknowledges that the Review's observations regarding the OCG's reporting of its activities may contribute to this perception.

## Oversight of the OCG

The Children's Guardian Act, introduced on 1 March 2020, expands the functions of the Joint Parliamentary Committee on Children and Young People, to oversee the WWCC and reportable conduct functions of the OCG. The Act also provides for decisions of the OCG, in relation to OOHC accreditation, to be reviewed by the NSW Civil and Administrative Tribunal. The OCG welcomes recommendations to expand parliamentary committee oversight to include the Children's Guardian's OOHC functions.

## Working With Children Check

The OCG acknowledges that the WWCC can be a barrier to Aboriginal people being authorised to care for children and young people. The WWCC system is significantly oversubscribed by organisations using the WWCC as a risk management strategy. The OCG devotes significant resources to educating the community regarding who does and does not require a WWCC, in order to minimise delays for individuals who do require a Check. The OCG has also entered into a Memorandum of Understanding with DCJ and the Children's Court to assist in prioritising WWCC risk assessments for potential carers, where a matter is before the Court.

The WWCC application process does not currently require applicants to indicate their cultural background, however records gathered during the application process may contain this information. The OCG has conducted internal reviews of risk assessment decisions in relation to Aboriginal applicants in order to better understand any systemic barriers to people persevering through the WWCC process.

As a result of these quality assurance processes the OCG identified that some Aboriginal applicants disengage from the WWCC risk assessment process, even where it was likely that they would be granted a clearance. The OCG has reviewed its correspondence and fact sheets to better-utilise less bureaucratic language. The OCG has also implemented changes to the risk assessment process and now rely more heavily on telephone discussions with applicants rather than relying entirely on written information.

The records review process has also been reviewed in acknowledgement that Aboriginal people are overrepresented in the criminal justice system and that criminal history checks may overestimate the risk an individual poses to children and young people. Where an applicant is

identified as Aboriginal, a further assessment is conducted to determine whether a risk assessment is warranted.

In June 2019, the OCG's WWCC Directorate began discussions with representatives from Maranguka, the operational arm of the Bourke Tribal Council. Discussions were focused on the consideration and endorsement of a collaboration agreement aimed at helping guide and improve the working relationship between the Bourke Aboriginal community and the OCG.

In alignment with Maranguka's guiding principles, the collaboration agreement specifically aims to facilitate increased access to and engagement with WWCC processes from the Bourke Aboriginal community. The collaboration agreement aims to promote self-determination and community governance by encouraging community participation and responsibility in decision making.

The OCG, Maranguka and the Bourke Tribal Council will work collaboratively to support Aboriginal applicants to increase engagement in WWCC processes. An increase in engagement with the WWCC will promote the importance of child safety and increase child related employment opportunities for individuals.

The OCG is also working with organisations such as Legal Aid to address systemic issues facing Aboriginal people in child-related work and children and young people leaving care, who require a WWCC.

# Recommendation to establish a Child Protection Commission

The OCG notes the Review's recommendation to establish a new independent statutory body, combining some of the oversight functions of the Children's Guardian and the NSW Ombudsman.

The Children's Guardian Act commenced on 1 March 2020 and makes a number of key provisions:

- consolidates the existing powers and functions of the Children's Guardian into one Act;
- transfers the oversight of the Official Community Visitors scheme (in relation to children) from the Ombudsman's office to the OCG;
- transfers the reportable conduct scheme from the Ombudsman's office to the OCG;
- implements recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse regarding reportable conduct schemes;
- establishes a register of residential care workers;
- strengthens the Children's Guardian's powers to share information with other bodies including Commonwealth investigative and enforcement agencies in relation to the NDIS;
- provides for the reportable conduct functions to be oversights by the Joint Parliamentary Committee on Children and Young people;
- provides for decisions of the Children's Guardian to be reviewed by NSW Civil and Administrative Tribunal;
- provides for the Children's Guardian to appoint a Deputy or Assistant Children's Guardian; and
- enshrines the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in the guiding principles of the Children's Guardian Act.

## Appointment of an Aboriginal Deputy Children's Guardian

The OCG welcomes the appointment of an Aboriginal Deputy Children's Guardian. This position will have visibility of the systems and practice issues across the sector and the platform to lead and influence change.

It is anticipated that the Deputy Children's Guardian will have responsibilities regarding implementation of Child Safe Standards and accreditation criteria in OOHC. Importantly, this will draw on the Family is Culture report and other reviews highlighting the changes needed in child protection overall.

The Review provides the OCG with an understanding of how the regulatory system is viewed and understood by people outside of the OOHC system. The OCG will use these observations and recommendations to improve upon the way we communicate to the public regarding our work.

Most importantly, the OCG will use the lessons learned from the review of individual children and young people, as well as the observations of the broader child protection system, to inform the review of the OOHC Standards and practice requirements to better-meet the needs of Aboriginal children and young people in OOHC.