

Response to the NSW Office of the Children's Guardian

Statutory Review of Children's Guardian Act 2019

August 2022



To:	NSW Office of the Children's Guardian
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Subject	Consultation Paper.
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Introduction

Barnardos Australia (Barnardos) welcomes the opportunity to provide feedback on the effectiveness and efficiency of the Children’s Guardian Act 2019 and to identify opportunities to further position the Office of the Children’s Guardian (OCG) as a contemporary, best practice regulator in NSW.

Barnardos is one of the largest children’s social care organisations, providing assistance to 15,000+ children and their families each year. This includes supporting over 1,000 children and young people in OOHC.

Barnardos is deeply committed to providing a holistic child safe environment where practice not only emphasises preventing abuse and neglect (by supporting families and safety across its Safety and Prevention programs) but also considers the importance of a child’s wellbeing and permanency throughout any out-of-home care (OOHC) placement. Since its inception, Barnardos has focussed on implementing and embedding quality, child safe practices and we welcome the opportunity to share our lengthy experience with the Child Safe Scheme and underpinning Standards. As stated previously, we look forward to information which details how the OCG will oversight the implementation and monitoring of these standards across our service delivery.

In August 2021, the OCG re-accredited Barnardos as a designated OOHC and adoption agency for a further period of five years, until August 2026. Noting that Barnardos was the very first organisation to receive NSW OOHC accreditation on initial scheme inception and were the first dually accredited organisation. Barnardos is also the only NSW designated agency with Delegated Parental Responsibility via executed Deed with the NSW Minister for Families, Communities and Disability Services. This Deed authorises the agency with aspects of parental responsibility for non-Aboriginal children placed in the sole parental responsibility of the Minister, following a final order made under the *Children and Young Persons (Care and Protection) Act 1998* (Care Act).

It is noted that the purpose of the review is to ensure the legislation provides for a “contemporary fit for purpose framework” for protecting NSW’s vulnerable children and young people. The scope of the review focusses on four area; *the effectiveness of the Reportable Conduct Scheme; the role of Official Community Visitors; the role of the Deputy Children’s*

Guardian in relation to the Family is Culture Review and the regulation of children's employment.

Barnardos continues to be concerned about the pace and volume of these reviews and reforms, and also missed opportunities to “circle back around” to entities and lack of consideration of implementation readiness.

Barnardos acknowledges that the proposed changes to the OCG's functions relating to designated agencies, adoptions and voluntary out-of-home care (VOOHC) have been subject to separate consultations processes and reforms are embedded in the Children's Guardian's Amendment Bill, which is currently awaiting assent. Barnardos would appreciate clarification regarding the application of the associated Child Safe Standards on the monitoring and accreditation of OOH and adoption services. For example, is the OCG intending to replace the existing criteria from NSW Child Safe Standards for Permanent Care, which designated agencies are presently required to meet, with the ten Child Safe Standards? If so, when and how will these changes be implemented? We request clarification of OCG priorities and further information about how organisations will be supported to respond to these changes, especially as these services will be in scope from 1 September 2022 and the application of the Child Safe Standards is mandatory for all designated agencies.

Prior to receiving this discussion paper, Barnardos had not received any direct correspondence, or noted in the OCG's recent newsletters, that the Children's Guardian Amendment Bill 2022 would remove VOOHC from the OOH range of provisions. VOOHC has now been incorporated into the substitute residential care providers framework and will be known as *specialised substitute residential care (SSRC)* and be *solely* regulated by the Child Safe Scheme (CSS). Although Barnardos has no record of any further consultation about these changes (since its response to OCG consultations regarding VOOHC in January and June 2022) we feel the changes are beneficial as they recognise that these services are not and should not be subject to the prescriptive monitoring and accreditation processes associated with the present OOH (and adoption) standards. Barnardos understands that SSRC services will be required to adhere to the CSS and commence their self-assessment in accordance with these new standards. However, Barnardos is concerned that the OCG has not provided any information on how these services will be supported to build their capability to meet these new requirements, nor has it provided any information on how the proposed self-assessments will

be monitored, Additionally, Barnardos, continues to be concerned that the Office of the Guardian has missed an opportunity to harmonise the CSS with the National Disability Insurance Scheme's Quality and Safeguards Commission standards. There is a need to focus on all efforts to ensure that services are not burdened with multiple monitoring and accreditation frameworks.

We raise concerns with discussion papers being released for comment with a month or less notice, and on at least two occasions in the last two years, responses were required in December and January, when many staff are away on annual leave. Due to Barnardos commitment to contributing to the reform agenda, including where there may be a direct impact to our services, staff are required to put aside their usual duties to complete responses, with limited time to consult internally and externally. When this occurs, there is a risk that responses may be rushed and the consultation process tokenistic, and increased unfunded administrative burden is noted. In order to address these challenges, Barnardos requests that the OCG provide the sector with an annual timeline of proposed consultations, the subject/s to be considered and the timeframe available for responses. Further, that OCG staff are provided time to engage in various forums to discuss, rather than solely relying on newsletter updates or correspondence to the head of entity. Barnardos would also appreciate alignment of the OCG's planning with that of the NSW Department of Communities and Justices (DCJ) planned changes, as our organisations are often responding to similar, if not more pressing and complex changes, in the child protection and OOHC systems.

Barnardos response to the statutory review of the Children's Guardian Act 2019 (CG Act)

4.3 Current objectives of the Reportable Conduct Scheme

1. *What are the key strengths and weaknesses of the Reportable Conduct Scheme as it current operates under the CG Act?*

Key strengths of the present Reportable Conduct Scheme are:

- The safety of children is the central premise, and their experience is prioritised in all reportable conduct investigations.
- Organisations and their employees are required to be accountable internally and externally, for providing a safe environment for the children they work with.
- The Scheme clearly defines specific criteria and thresholds for unacceptable

behaviour by employees which are accompanied with consistent, transparent, and procedurally fair procedures for head of entities to enact to investigate reportable conduct allegations.

- The Reportable Conduct Scheme is overseen by a separate, independent entity, to ensure organisations are meeting the required safety standards for children in their care.
- Investigations can lead to organisations identifying and rectifying systemic improvements in providing safe care to children, while increasing their employee's capabilities in preventing and maintaining child related safety standards.

Key weaknesses of the Reportable Conduct Scheme are:

- Few reportable conduct investigations are substantiated and a very small amount lead to criminal outcomes and although investigations are necessary, they take a lot of time and resources to complete. For example, in the last twelve months Barnardos oversighted 12 matters of which 3 were substantiated and none were criminal.
- The Scheme is not focussed on prevention, education and implementation of an organisationally safe culture, as it is designed to respond to an alleged incident of reportable conduct, after it has occurred.
- The resourcing and oversight of investigating reportable conduct allegations is not considered by funding bodies. There is insufficient funding to enable agencies of any size to establish centralised, stand-alone investigative roles or teams. Therefore, practitioners are required to perform their usual duties alongside conducting investigations, which can take significant periods of time and resources.
- The sector is experiencing overwhelming confusion with the present dual/joint investigation 'procedures' associated with DCJ's recent safety in care mandate and the completion of its mandatory alternative (safety) assessments. DCJ's policy and procedures do not align with the Reportable Conduct time frames and procedural requirements appear to be open to different interpretations by DCJ districts. This results in uncoordinated, inconsistent and limited understanding between government and non-government organisations.
- Investigations are often delayed due to NSW Police and DCJ investigation

timeframes, or timeframes for responding to an information sharing request.

- The amount of support and assistance provided by the OCG's has decreased. Barnardos has experienced delays in the OCG's feedback over the last two years and it often takes several months for the OCG to respond to our final reports. Barnardos has also struggled to gain direct access to the OCG's reportable conduct staff, as your Office appears to prefer all communication to occur electronically and at times, we have experienced lengthy delays in responses to our queries. This means our staff drop everything when the OCG calls, due to the burden of organising and not knowing how long it would take to reschedule. This does not signify a respectful relationship. Alternatively, Barnardos is pleased that we appear to have re-established regular liaison meetings with your Office, which will improve information sharing and mutually beneficial to both parties.

2. *What in your view should be the key purpose of the Reportable Conduct Scheme?*

- The key purpose of the Reportable Conduct Scheme is for organisations to respond to and investigate allegations of abuse and neglect of children by employees (a term inclusive of carers). The Scheme ensures organisations are accountable for the provision of a child safe environment by applying regulatory benchmarks which assist in identifying employees' unsafe behaviour towards children. It enables organisations to develop, implement and maintain consistent standards for employee behaviours, which are reflected in its child safety and wellbeing and risk management frameworks and systems.
- The Scheme assists with identifying ways in which employees may be supported to cease unsafe behaviour towards children, and when necessary results in sanctions for their misconduct. Finally, the Scheme provides an organisation with continuous opportunities to monitor investigations and identify areas for concern and improvement in all areas of practices impacting children's safety. The Reportable Conduct Scheme complements the CSS, which focuses on meeting broader, more universal objectives of children's safety and wellbeing.

3. *How do you consider the Child Safe Scheme and the Reportable Conduct Scheme can operate efficiently together within the context of the objects of the CG ACT as set out in Section 6 of the CG Act?*

- As suggested above, the Reportable Conduct Scheme and the CSS complement as they are underpinned by child safe guiding principles and standards. The CSS focusses on an organisation's preventative system of promoting, preventing and responding. The Reportable Conduct Scheme focusses on identifying, notifying and investigating an alleged incident of abuse or neglect.
- However, not all Child Safe Organisations are Reportable Conduct Scheme relevant entities and Barnardos is of the opinion that it would be premature to include all Child Safe Organisations within the remit of the Reportable Conduct Scheme. The former needs more time to embed sustainably and for organisations to demonstrate that they are adhering to the Child Safe Standards to the OCG's satisfaction. Any decision to expand the scope of relevant entities would need to be subject to a thorough assessment, including cost-benefit analysis and consideration of resources required to ensure adequate organisational capability.

4.4 Scope of the Reportable Conduct Scheme

4.4.1 Relevant entities

4. *Should the application of the Reportable Conduct Scheme be limited to entities that provide services to children only?*

- Barnardos supports the view that the Reportable Conduct Scheme should focus on child related services who work with highly vulnerable children.

5. *Are there relevant entities that are currently within the Reportable Conduct Scheme that should be excluded?*

- Barnardos is not aware of any.

6. *Are there any other child-related sectors that should be covered by this Scheme?*

- Barnardos is not aware of any other child related sectors that should be covered

by the Scheme. However, since the introduction of the Residential Care Worker Register (RCWR) we have a growing concern that labour hire contractors have multiplied in significant numbers and appear to have a limited understanding of their compliance obligations within the Reportable Conduct Scheme.

7. Do smaller less resourced organisations have difficulty complying with the Reportable Conduct Scheme?

- Barnardos has concerns that smaller, less resourced and in some cases, newly accredited organisations, are experiencing difficulties in complying with the Scheme. It is incumbent on the OCG and DCJ to develop and operationalise strategies to ensure these organisations are supported to build capacity and capability to meet their compliance requirements. Further, if the organisation is being assessed to be an accredited service provider for the first time, the OCG should ensure the organisation's capacity for resourcing and implementing the Reportable Conduct Scheme is sufficient, prior to approval being granted for commencement of operations.

8. Should the uncommenced provisions of the CG Act that bring within the scope of the Reportable Conduct Scheme providers overnight camps, accommodation and respite services for children that provides overnight beds for children including housing and homelessness services, and providers of family group homes be commenced?

- Barnardos agrees with the above providers being included within the Reportable Conduct Scheme. This would ensure a consistent child safe framework, inclusive of those services which, to date, have had minimal regulatory oversight to ensure children's safety.

If so, how should any potential overlap with agencies that provide substitute residential care be addressed?

- The OCG could explore database integration and/or automated reporting opportunities to reduced administrative burden on agencies. Noting NSW has positioned itself as a leader in this area, following from the Their Futures Matters led data linkage project and the cross jurisdictional Connect for Safety database.

4.4.1.2. Private schools and private hospitals

9. *Should the Reportable Conduct Scheme apply to all private hospitals?*

- Barnardos agrees the scheme should apply to private hospitals that provide services to children and young people. Whether a provider is public or provider should be irrelevant.

4.4.1.3 NSW Police Force

10. *Should the NSW Police Force be excluded from the Reportable Conduct Scheme?*

- Barnardos does not agree with the NSW Police Force being excluded from the Reportable Conduct Scheme. NSW Police have unique authority and access to children that requires strong regulation under a scheme that maintains a central focus on the safety and wellbeing of children.

11. *Has the inclusion of the NSW Police in the Reportable Conduct Scheme resulted in duplication of effort or in unnecessary oversight and monitoring?*

- It is not clear whether this question relates to police involvement in reportable conduct investigations or its internal application of the Scheme with its employees. If the query relates to the NSW Police implementation of the Reportable Conduct Scheme, Barnardos has no information to inform a comment on this query.
- If the query relates to Barnardos experiences of working with the NSW Police, Barnardos response is as follows: NSW Police tend to follow up on reportable conduct matters i.e. allegations of child abuse, independently of other entities. This lack of consultation often results in unnecessary stress and confusion for the alleged victims and Persons of Interest, as they are often interviewed without other entities present and at any time of the day or night. This is further exacerbated when local police officers attend premises to interview a child or employee (carer) with no prior training or understanding of their role or function with an alleged matter and no additional supports for the people in their homes. The police's unplanned visits are often not communicated to Barnardos or DCJ and it can take weeks for the police to advise of the actions they have taken and the decisions they have made regarding an allegation. Barnardos recommends

further protocols for joint work with the NSW Police through JCPCR teams to minimise future instances.

12. *What has been the value and oversight by the OCG (and previously by the Ombudsman) of reportable conduct matters relating to the NSW Police Force to date?*

- Barnardos is unable to comment as we are not in receipt of information about NSW Police reportable conduct investigations. The OCG would be best placed to share their analysis with the sector.

4.4.2 and 4.4.2.1 Employees and third-party employees and contractors

13. *Does the definition of employee need to be clarified further? If so in what respect?*

- Barnardos would strongly recommend that the OCG clarify the term employee. Although Barnardos understands and applies the Reportable Conduct Scheme's definition of employee, includes various categories of working roles such as volunteer, contractor, sub-contractor and kinship and foster carers. The definition continues to cause confusion. For example, a foster carer recently contested the definition of employee at NCAT proceedings in 2020, whereby it was upheld that the role and function of foster carer did not meet the criteria of employee. In the ACT a carer was granted jurisdiction in the FairWork Commissioning for a Stop Bullying Claim. It is likely the ongoing application of this definition will also continue to confuse foster carers, as some have interpreted themselves as *not* employees of our organisation, and therefore *not* subject to reportable conduct investigations.

14. *Do the contractor provisions need further clarifications? If so, in what respect?*

- Barnardos agrees with the need for further clarification regarding contractor provisions, as many entities outsource psychological and other allied health services to contractors who must hold a Working with Children's Check (WWCC) clearance, however, it is often not clear to these contractors or Barnardos if they are subject to the Reportable Conduct Scheme when they are working with a child in Barnardo's care.
- The area that requires more oversight by the OCG is when entities such as

Barnardos sub-contract a third party (such as a labour hire company) to staff a temporary care arrangement either to support an existing foster care arrangement e.g., overnight baby sitting or to provide 24 hour care for a child in a temporary crisis care situation as described below.

15. *Are there challenges in implementing the third-party employer and contractor provisions? If so, how would they best be addressed?*

- There are challenges with third party employee and contractor positions, as this is particularly relevant to Alternative Care Arrangements (ACAs) and other temporary, emerging alternative care arrangements in OOHC, whereby children are cared for in motels and looked after by staff provided by labour hire companies. These companies sub-contract staff who are not direct employees of Barnardos and on many occasions the contractor and their employees lack an understanding of their regulatory responsibilities under the Reportable Conduct Scheme and their employees often do not seem to understand that as a contractor overseeing worker who hold WWCC clearances, they are subject to the Reportable Conduct Scheme.
- Barnardos has addressed some of the challenges associated with these arrangements by only sub-contracting to reputable contractors who are willing to be party to clearly defined service agreements. The recent introduction of the RCWR has led to service agreement refinements which address the safety and well-being of children in the temporary care of sub contracted workers. The RCWR is a good start, however Barnardos agrees with the existing arrangement, whereby when an alleged reportable conduct matter involves a sub-contracted employee our organisation is responsible for leading, coordinating and overseeing an investigation. This approach facilitates mutual obligations to work collaboratively to ensure that the Person of Interest in an investigation is monitored and 'flagged' across all their work locations and the sub-contractor has taken appropriate steps to prevent and mitigate any further risk of harm to children while an investigation is occurring. Enshrining respective roles and responsibilities in legislation would be beneficial.

16. *Is expanding the Reportable Conduct Scheme to cover third-party employers providing services to children as relevant entities that have reporting and*

investigating obligations a feasible approach? What would be the difficulties with this approach?

- Barnardos assumes that these organisations would be subject to the CSS as they are providing child related services and it would be premature to include all of the organisations in the Reportable Conduct Scheme at this point in time. Many of these are community based and run by volunteers, who are too small and under resourced to meet the requirements of the Scheme. Further, they need time to understand and operationalise their responsibilities under the CSS.

4.4.3.3. Thresholds for reportable conduct

17. The Within the existing categories of reportable conduct, is there a need for greater clarity in how conduct is defined?

- Barnardos agrees that the existing reportable conduct categories would benefit from greater clarity. Ill treatment is the most frequent category investigated by Barnardos and requires further examples as it is often difficult to ascertain if the treatment was, “seriously inappropriate, cruel, improper, inhumane or cruel”. For example, many older age carers, often kinship carers, use discipline that was meted out to them in their childhood, which may meet the above definition, however, many of these carers struggle to comprehend that these methods might now considered to be ‘cruel and inhumane’.
- The category of sexual misconduct also requires further clarity. For example, is it sexual misconduct, if an employee is transporting a young person who insists on sitting in the front seat with the driver due to feeling upset and the worker pats the young person on the thigh to comfort them and the young person complains the workers actions made her feel uncomfortable. The category for sexual can be very broad and the behaviour if the worker could be responded to as a professional conduct matter, however what information would lead to the behaviour meeting the sexual misconduct category of misconduct.
- Barnardos is also concerned that that the sexual misconduct category does not provide enough information to reflect sexual grooming behaviours of a child or young person. This is a difficult area to identify and harder to investigate without additional information about its signs in the sexual misconduct category.
- The area of professional misconduct can also be quite challenging, as most may be dealt with via the code of conduct, however, the use of technology and apps

by employees with young people is emerging as a challenging area. For example, employees seeking to join a young person's social media account and shifting this arrangement to a 1:1 non-physical contact online, leads to opportunities for undue influence in the guise of being supportive of the young person. It is difficult to monitor or evidence these incidents, as they can move very quickly from an employee conduct/disciplinary matter to the remit of reportable conduct and often the allegation implies sexual misconduct. Overall the present examples provided (although not exhaustive) do not assist greatly and would benefit from further detail.

18. *Should the thresholds that amount to reportable conduct be reconsidered?*

- Barnardos agrees that ongoing review of thresholds is preferable and the recent raising of these has been beneficial in excluding 'low level' conduct issues that can be addressed by other means, such as code of conduct agreements.

19. *Should thresholds that related to assault be raised to serious physical assault? If so, how should this be defined?*

- Barnardos agrees with the proposed change and suggests that examples of serious physical assault be provided. Serious physical assault definitions may include the use of violence causing serious physical injury to a child (e.g. bleeding, bruising, and need for medical care). It should also consider other types of assault such as verbal.

20. *Should the examples of reportable conduct provided in the CG Act be clarified and expanded?*

- Barnardos would agree with the CG Act clarifying and expanding examples of reportable conduct. As discussed in the response to question 17, the provision of examples are always helpful to investigators and reviewing these regularly is advised, as entities often experience regular changes in staff and the smaller, less resourced entities would benefit from these updates. Perhaps the OCG could have a regular forum with entities to enable them to share non-identified examples we are responding to.

21. *Should breaches of established standards such as codes, professional*

standards and accepted community standards be considered reportable conduct or should this type of conduct be dealt with by employers internally, for example through disciplinary procedures?

- Barnardos agrees with keeping employee breaches of codes of conduct separate to the Reportable Conduct Scheme as these breaches can be dealt with quickly and efficiently. This frees up the higher threshold allegations to be oversighted by the Reportable Conduct Scheme. In both cases the employer's response should be managing any risks associated with an employee finding work elsewhere. Further, there are occasions when Barnardos has referenced ongoing, consistent breaches of conduct in a reportable conduct investigation, as it has been assessed as relevant and informs the overall decision making associated with the matter/s being investigated.

22. *Section 41 of the CG Act sets out the conduct that is not reportable conduct. Are these exclusions appropriate? Are there other matters that should be excluded from being reportable conduct?*

- Barnardos agrees with the present exclusions.

23. *Do you address behaviours classified as crossing professional boundaries as a breach of your code of conduct and according to your disciplinary procedures? If so, do you find this is an effective and efficient way of dealing with these behaviours?*

- Barnardos agrees this is an area that requires careful consideration as often these matters are addressed through disciplinary proceedings, however if through this process, information suggests behaviour that meets the reportable conduct threshold both procedures will be followed. Generally, Barnardos would ensure that the reportable conduct investigation informs a disciplinary investigation. However, challenges arise in the time required to complete both, and if delayed can impact on the employee subject to the investigation and stretch the organisation's resources while it completes a dual investigation.

4.4.3.4 Conduct outside the course of employment

24. *Have you or your organisation had difficulty investigating reportable conduct allegations that concerned conduct that has occurred outside of employment?*

- Although this is a very rare occurrence, Barnardos challenge in this instance is to ensure the confidentiality of the employee is respected. Additionally, ensuring objective procedural fairness while providing support during this period can be very challenging.

25. *Should all conduct that is outside the course of an employee's employment only be excluded from the application of the Reportable Conduct Scheme?*

- Barnardos does not agree with this, as many employees are involved in child related activities outside of their employment, and as WWCC holders, they are required to uphold and meet community standards across all their interactions with children, including at their workplace.

26. *Alternatively, should conduct that is outside the course of an employee's employment only be excluded if the employee does not hold or is not required to hold a WWCC clearance?*

- Barnardos is unsure about this. However, due to restraints on time and available information, we consider that that this may be the most sensible approach to follow.

27. *Should conduct outside of an employee's employment only be excluded if the employment is with a certain kind of entity or specifically named entities?*

- The exemptions may cause confusion and inconsistencies in a reportable conduct investigation.

4.5.2 Timeframes for notification and reporting

28. *Given the rationale for 7 business day notification requirement and the limited information that is required to be provided at this stage, is the time frame appropriate?*

- Barnardos supports maintaining the existing time frames.

29. *Should further information be provided in the notification to be given within the 7-day notification period?*

- Barnardos does not think this would be feasible due to the short period of time we have to submit a new matter.

30. *Is the 30-day period in which to give an entity report commencing from the time the head of entity receives the report of a reportable allegations or conviction an appropriate period?*

- Barnardos agrees with this time frame and considers it to be satisfactory.

31. *Should there be a timeframe for the provision of a final report in terms of a length of time after the allegation is made?*

- Barnardos appreciates the relatively open time frames for final reports, which reflects the occasional significant wait periods that occur when a matter is subject to NSW police investigation or court proceedings. However, six months after the first 30-day report should be a reasonable period of time to complete a report. Further, Barnardos would agree with the submission of three-monthly updates, after this period has lapsed. This arrangement or similar would enable effective monitoring of the progress of an investigation and ensure it is being conducted in a timely manner for both the alleged victims and persons of interest.

32. *Should a relevant entity be required to provide updated interim reports on the progress of an investigation? If so, how often should updated interim reports be given after the initial interim report?*

- Please see above response.

4.5.3.4 “Public Interest” test

33. *Is the OCG’s monitoring function effective in facilitating the investigation or reportable conduct by organisations? Is it perceived to be useful? Is it perceived to be too intrusive?*

- Although rare, Barnardos considers the OCG’s capacity to monitor some investigations is a useful and supportive educational tool to strengthen entities capability in their investigations. It is an active means of quality assurance of an entity’s implementation of the Scheme and may lead to improvements based on the OCG’s interventions. At times monitoring of investigations may be considered intrusive, however if the intention is as described above, the need for further monitoring may diminish as an entity’s competency grows. Finally, as mentioned previously, Barnardos has experienced the impact of the OCG’s resource

constraints and is heartened to note the office has been allocated additional funding to address this issue.

34. *The monitoring function includes discussing the investigation with the head of entity and providing guidance and advice. Have these functions been found to be useful to an entity in conducting an investigation?*

- Barnardos has not experienced this type of monitoring, however discussing the investigation with the head of entity, may be useful, especially if the advice and assistance is communicated to the relevant workers overseeing it.

35. *Is the public's interest test for the OCG's involvement in monitoring reportable conduct matters too high?*

- Barnardos supports maintaining the OCG's application of the present public interest test to remain unchanged as this is representative of a consistent benchmark, regarding acceptable standards of behaviour towards children.

36. *Should there be a public interest test at all? If so, should there be guidelines for applying the test?*

- As per the above, Barnardos supports maintaining the public interest test but welcomes guidelines on how the OCG applies it.

37. *Is there a more appropriate threshold to meet before the OCG can exercise oversight of reportable conduct process?*

- Please see above response.

38. *Should the OCG have the power to initiate an investigation if the report is about the head of a relevant entity without satisfying the "public interest test"?*

- Barnardos does not support this approach. An entity's governance framework should have a policy and procedure in place for the Board Chair to manage an allegation concerning the Head of Entity.

39. *Should it be mandatory for the OCG to investigate a reportable conduct allegation about the head of a relevant entity?*

- Barnardos does not agree with this proposed change. This should default to the

Board Chair, following appropriate governance policies and procedures.

40. *Is the type and amount of information provided under section 52 to the head of entity and the employee at the conclusion of an investigation useful and sufficient? If not, what other information should be provided?*

- Barnardos considers the information to be sufficient.

4.6.1 Powers to make orders on the conclusion of an entity's investigation

41. *Should the OCG have other powers, for example the power to direct an entity to reinvestigate a matter after a report has been given by a relevant entity or make different findings from those made by the entity orders, if the investigation is flawed or the finding is perverse? If so, do you have any views on what these powers should be and what the threshold to trigger the exercise of these powers should be?*

- Barnardos is unable to comment, as it is not clear how often the need for this may have arisen and it would prefer to be informed of any scenarios or provided with actual data which indicated this option may have been a preferred action by the OCG. Noting that no investigation should reach its final stages before it is reviewed as flawed or perverse in its findings. The OCG would be best served preventing this occurrence instead of re-investigating it. Barnardos has no views on the threshold trigger, as we require more information to consider the appropriateness of this course of action.

42. *Should an employee who has been investigated have a right to apply to the OCG for a review if the entity's finding or actions taken by the entity?*

- Barnardos agrees that providing a right to a review would strengthen procedural fairness. However, operationalising a change would need to be accompanied by additional resources for entities. Further, how would the OCG maintain independence in the review process when it was responsible for oversighting the investigation in the first place?

43. *Should the OCG have specific power to monitor an entity's interim risk mitigation measured by reviewing the adequacy and effectiveness of those interim measures to protect children while an investigation into a reportable allegation is being conducted or review an entity's failure to mitigate risk?*

- Barnardos considers there may be some benefits to children’s safety during an investigation, with the introduction of this power. Especially for smaller, less resourced agencies. However, mitigating risk is an ongoing mandatory requirement in looking after children and it is important that wherever possible the OCG assist and support entities to build their capacity in risk mitigation through education and support.

4.7 Mandatory matters for consideration in reportable conduct allegations

44. *Should the matters set out in section 40(02) be mandatory, rather than discretionary considerations for determining of a finding or reportable conduct can be made?*

- Barnardos would prefer section 40 (02) remain unchanged and remain discretionary for entities. For many years, Barnardos has consistently considered whether its reportable conduct investigation findings meet the standard of proof reflected in the concept of “balance of probabilities”. It is very beneficial when applied to investigations which have minimal corroborating evidence, such as those that consists of a child’s account of an incident compared to the employee’s account, and the employee’s defence is inconsistent and unsatisfactory. The criteria for applying the probability of misconduct enables the investigator to consider the broader context of the incident and the seriousness of the matter.
- Barnardos would recommend your Office provide further training to entities regarding methods of assessing evidence and how to apply the principles of “balance of probabilities” to an investigation’s final findings.

45. *How should the mandatory considerations in section 40 (3) inform finding of reportable conduct? Should they be used to broaden or narrow the scope of reportable conduct?*

- Barnardos would prefer further consultation with your Office regarding narrowing the scope of mandatory considerations to include criminal charges, as suggested above. Many reportable conduct investigations are limited by the lack of direct proof that an employee has engaged in harming a child. It is understood that many reportable conduct matters are non-criminal and Barnardos would be interested in the OCG’s data on the number of unsustained matters due to lack of

evidence and the degree of seriousness of these matters, prior to narrowing the scope of reportable conduct.

4.8 Concurrent investigations

46. *Should it be mandatory for the OCG or head of the relevant entity to suspend a reportable conduct investigation if there is a concurrent Police investigation into or court proceedings in relation to the same conduct?*

- Barnardos follows this practice, to ensure it does not interfere in the effective gathering of information or the outcome of court proceedings. There appears to be a possibility that entities and other investigating bodies already consider this to be mandatory practice. The OCG may wish to clarify if this view is widely held by the sector, which may inform whether the practice should be mandatory practice. Barnardos would recommend a consistent approach, to ensure entities are all following the same processes in suspending their reportable conduct investigations.

47. *Should it be mandatory for the OCG or head of the relevant entity to take steps to manage risks while a reportable conduct investigation is suspended.*

- It is not clear why this should be mandated, as Barnardos considers risk management in this instance as best practice. However, the OCG's objective to build entities' capability in reportable conduct investigations should include the development of further resources, training and advice in managing risk throughout all aspects of an investigation, including when it is suspended. If this was mandated, how does the OCG intend to monitor this and what would be the OCG's reporting requirements for these changes?

48. *Are you or your organisation aware of a matter where an investigation by relevant entity has or may have prejudice an NSW Police investigation or DPP prosecution?*

- Barnardos is not aware of this occurrence.

4.9 Class or Kind

49. *Is there a continuing need for CoK exemptions particularly if thresholds of reportable conduct are raised? If so, what are the benefits of CoK exemptions?*

- Barnardos agrees that if thresholds are raised, there is no longer a need for CoK exemptions, as low-level matters will continue to be outside of the higher thresholds and an entity will continue to investigate these matters internally.

50. *Have Class or Kind (CoK) exemptions previously granted whether by CG or Ombudsman been effective or efficient? What will result for their lapsing from 1 September 2022?*

- Up until the changes to the thresholds, the CoK investigations were effective in addressing 'low level' reportable conduct matters, which were usually investigated quickly and efficiently and the entity, such as Barnardos, was not required report these to the OCG. This arrangement reduced the external administrative oversight associated with OCG investigations and were offered conducted more quickly. However, due to the change in reportable conduct thresholds, Barnardos anticipates very few matters would meet the CoK criteria for exemption and its lapsing will have a negligible impact on its reportable conduct investigations.

51. *If the capacity to exempt certain classes or kinds of conduct from notification is to be maintained how should the criteria and processed for the grant of exemptions be determined?*

- Barnardos prefers that the organisations who have pre-existing exemptions continue to have these maintained until the tabling of the final OCG Bill in March 2023

4.10 Cross-jurisdictional issues

52. *Should there be a requirement similar to the Victorian provision to liaise with State or Territory regulators to avoid duplication?*

- Barnardos agrees with this requirement and would support establishing formal arrangements to enable effective oversight of a cross jurisdictional matters. Barnardos is very concerned that present arrangements are being applied in an ad hoc and informal manner and require further clarification. This proposal also aligns with the CSS and strengthens the extensive risks associated with the mobility of employees (carers) who may be dually authorised in multiple states and territories, who have also been subjects of sustained reportable conduct

findings in a different jurisdiction, which is not known or reported in other jurisdictions.

- This proposal is particularly pertinent to Barnardos as our organisation oversees the Reportable Conduct Scheme in the ACT and a number of NSW children reside in foster and kinship care in the ACT or reside with dually authorised carers in other states and territories. Barnardos often experiences confusion about each jurisdiction's role and responsibilities in completing investigations that relate to children on NSW care and protection orders. Overall, it would be beneficial if the OCG provided clear interjurisdictional guidelines for all entities to follow.
- Presently Barnardos is involved in a matter involving an 'employee' who is authorised as an ACT and NSW kinship carer and presently looks after 3 children under NSW orders and 2 children under ACT orders. Barnardos is seeking advice from the ACT Ombudsman about which jurisdiction should lead the reportable conduct investigation. Barnardos is also mindful that in these situations we avoid exposing children and the persons of interest to unnecessary duplication of procedures, which will potentially result in confusion, lack of procedural fairness and trauma for all. Without effective protocols and information sharing, children and persons of interest may end up having to 'tell their stories' multiple times. In order to prevent this from occurring, Barnardos strongly advocates for enhanced harmonisation.

5. OOHC matters regulated by the OCG

5.3 Legislative policy reform and post consultation

- Barnardos has previously expressed concern about the limited detail available to entities regarding the implementation of the CSS and how the accompanying child safe standards might replace all other pre-existing standards related to children in OOHC and adoption.
- Barnardos supports the need for consistency in applying the CSS across its services, however, would appreciate further advice on how the OCG intends to apply and monitor compliance with these new standards. It appears that as a Schedule 1 designated entity, all of Barnardos OOHC (including Specialised Substitute Residential Care (SSRC) and adoption) will be required to meet the Child Safe Standards from 1 September 2022. If so, will these services also be

required to meet the NSW Child Safe Standards for Permanent Care (the Standards) and in the case of SSRC providers who provide overnight services for a child funded by the National Disability Insurance Scheme (NDIS) will it also be required to meet the NDIS Safety Commissions standards for accreditation? Barnardos urgently requires clarification regarding these changes, as they immediately impact service deliver while complying with our regulatory responsibilities.

6. Child Employment

6.4 Children protected under Part 6

53. *Having regard to the history of conformity between child employment regulation and the school leaving age, should the scheme apply to children aged under 17 for all regulated activities?*

- Barnardos agrees with this proposal as it should be consistent with school leaving age, of 15 years.

6.5 Activities regulated by the Children's Guardian

54. *Should the child employment scheme continue to regulate children employed in door to door sales?*

- Barnardos agrees with continuing OCG regulation in this activity.

55. *Should the child employment scheme regulate children's employment in any other industries?*

- Barnardos does not consider it is sufficiently informed to respond to this query.

6.6 Powers of authorised persons

56. *Having regard to the objects of Part 6, should the OCG have a power to treat information identified or re the OCG being received as a complaint?*

- Barnardos supports granting the OCG the power to treat information identified or received as a child abuse complaint, as this enables the Office to act on ensuring the concerns raised are investigated. Otherwise, failure to act may place a child at risk of harm, which contradicts the OCG's primary mandate of overseeing children's right to a safe environment.

57. *Should a failure to produce information compelled under section 105 of the OCG be an offence?*

- Barnardos supports strengthening the OCG's powers to enforce a person who refuses to comply with the OCG's request to provide information. Barnardos is concerned that failure to provide the information may impact the safety and wellbeing of children. This change appears to be relevant to matters, where the OCG becomes aware of a complaint, and is unable to progress an investigation because it cannot enforce a person/s of interest to provide information relevant to the OCG's information gathering.

6.7 Endangering children in employment

58. *Should the offence of causing or allowing a child to take part in employment where the child's "physical or emotional well-being" is put at risk be clarified to ensure it can be appropriately enforced?*

- Barnardos supports this change, as the terms physical and emotional wellbeing are generic and although reflect the NSW Children (Care and Protection) (Child Employment) Amendment Act 1992, would benefit from further review to be 'fit for purpose' with clearer and more specific criteria which can be easily complied with by employees and enforced by the OCG when there is non-compliance.

59. *Given the Children Guardian's specific regulatory remit under Part 6 and considering the existence of uniform workplace health and safety laws, should this offence be confined to endangerment of a child in activities regulated by the Children's Guardian under Part 6?*

- Barnardos has limited knowledge of this area, and without further information or data on the causes of unsafe workplaces for children it is difficult to comment. However, an offence alone does not sufficiently cover the many poor practices which may cause children to be a risk in the workplace.

60. *Children's employment has historically existed as a separate form of regulation. While the contemporary children's employment scheme applies many of the Child Safe Standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, children's employment continues to be separately regulated. Given the CG Act's focus on child safe as the overarching*

regulatory framework, should children’s employment be brought within the child safe scheme?

- Barnardos has limited knowledge of this area, and without further information or data it is difficult to form a definitive position. However, any opportunity to harmonise separate accreditation or regulatory systems is supported in principle.

7. Adoption service provision- N/A not in scope.

8. Children’s Guardian and Deputy Children’s Guardian

8.1.3 Uncommented “special guardianship” provisions

61. *Do you support Section 131 of the CG Act being repealed?*

- Barnardos supports the repeal of the Children’s Guardian’s power to remove the responsibility for the daily care and control of a child or young person from an authorised carer.

62. *Do you support section 132 of the CG Act being commenced? If not why?*

- Barnardos does not support the present section which allows the OCG to apply to the Children’s Court to rescind or vary an order under the Children and Young Person (Care & Protection) Act 1998. Barnardos considers this power unnecessary and duplicative of the role and function of the Children’s Court and DCJ. Does the OCG have any examples of when this scenario may have been applicable and the circumstances of why and when intervention may be necessary by the OCG rather than via the usual child protection and channels? If the OCG did apply this action it would be at risk of being perceived as interfering in the role of the DCJ and are placing themselves to be viewed as a ‘front line’ service protecting children. It would have to be extraordinary circumstances for this to occur, as any action along these lines is at risk of being interrupted as a lack of trust in existing child protection operations.

8.3 Deputy Children’s Guardian role

8.3.2 Benefits of an identified or targeted role by having the Deputy CG filled by a First Nation’s person.

- 63. Do you support a legislative requirement that the role of the Deputy Children's Guardian be an identified role to be filled by a First Nation person? If not why not?**
- 64. What benefits do you see in the position being an identified role for a First Nation person?**
- 65. What role should the Deputy Children Guardian play to a. strengthen the independent oversight of the OOHC system for First Nation children and b. help break the cycle of over-representation of First Nation children in care?**
- Barnardos supports all three proposals, including legislating for the Deputy Children's Guardian to be filled by a First Nation person. This enshrines the intention that all First Nation children have an independent voice and representation at one of the highest levels of government. The role strengthens the OCG's oversight of organisations to ensure they are providing Aboriginal and Torres Strait Islander children with a safe, culturally sensitive and child focused experience.
 - The role has the potential for the Deputy to engage in robust, individual assessments of the overall care of First Nation children, particularly those in OOHC, and can serve to prioritise and inform the sector of best practice, while contributing to legislative and regulatory changes which may be impacting the over representation of First Nation children in care. The role has the potential to strengthen the systems, frameworks, accountabilities and compliance requirements related to the rights and care of First Nation children and enable a specialised, focus on ensuring services actively recognise and maintain First Nation children's culture and connections to family and place.

8.4 Deputy Children's Guardian - functions

- 66. Do you support the proposed high-level functions for the Deputy Children's Guardian if it is to be an identified role? Are there other functions that should be considered?**
- Barnardos supports the high-level functions of the Deputy Children's Guardian to be included in the CG Act. This includes overseeing the following OCG practices:
 - Uses culturally competent functions and decision making

- Improve how the OOHC system supports First Nations children, their families and communities to have a more culturally appropriate standard of care
- To advance the rights of First Nations children and young people
- To build capability if First Nations-controlled entities to meet the functions of the OCG.

8.4.1 Discussion

67. *Do you support the Deputy Children’s Guardian having a role in relation to individual Aboriginal children in the OOHC systems? If not why?*

- The parameters of this role require further exploration, as there are benefits to the Deputy Children’s Guardian having the power to review specific cases in OOHC that require advocacy at a systemic level to support and remediate effective change for First Nation children who are experience ‘drift’ in the system and significant alienation from their cultural and spiritual identity. One of the immediate oversights may be scrutiny of First Nation children in ACAs.

9. Official Community Visitors

68. *Should the function of the OCVs be further tailored to meet the specific needs of children and young people? Should the CG Act set out participation principles provided at section of the CYP Act 1998?*

- Barnardos is not able to provide comment on these queries until it is better informed of the impact and difference an OCV makes to children in various care settings. Barnardos acknowledges that the OCV also visit adults in the Ageing and Disability sector and holds some concerns about the OCV suitability to provide direct feedback to the OCG regarding the quality of care of children and young people. Are OCVs qualified and possess sufficient knowledge of children’s needs in OOHC? If so, how do they apply their role and function to the specific needs of children and young people under remit of the CSS?

69. *Should OCV be permitted to provide advice, reports and information to the DCJ?*

- Barnardos agrees with this proposal as it may enhance DCJ’s understanding of the impact of their decision making on children oversights by the OCV. It’s

assumed that prior to this occurring there are clear guidelines on what and how information is to be shared.

70. *Given the OCG's child safe regulatory focus on preventing and responding to child abuse in organisations should information sharing between OCVs and the OCG be further strengthened or clarified?*

- Barnardos assumes that all information obtained by an OCV would be made available to the OCG and there are clear guidelines for reporting any safety concerns they observe. Barnardos is concerned that this question implies that OCVs are not required to be forthcoming or transparent in sharing information about their visits, suggesting that they have discretionary powers to decide what they will and wont share.

9.5 Jurisdiction of OCVs – visitable services

71. *Should the jurisdiction of OCVs be set by the accommodation the children are living in or by the children in care who should be visited?*

- Barnardos supports OCVs visiting children and young people in residential care, as these children are most at risk of child protection related systems abuse.
- Barnardos urges the remit of the OCV Scheme to be extended to include all forms of OOHC involving rostered direct care employees of any organisation, including employee houseparent models – this includes but is not limited to ACAs, Individual Placement Arrangements (IPAs), Short Term Emergency Placement (STEP) and Interim Care Model (ICM) placements.

72. *Should OCVs have jurisdiction to visit private accommodation where children in full time care of a foster or kinship carer?*

- Barnardos does not agree with extending the scope to visits with home-based carers as the OCVs are best served visiting children with very high needs in residential (and quasi-residential) facilities.

73. *Should OCV jurisdiction be re-examined considering contemporary models of care? If so, what services should OCVs be empowered to visit and why?*

- Barnardos agrees with the consideration to broaden OCVs to include any and all temporary models of OOHC which involve rostered direct care employees of any

accredited or non-accredited organisation – see previous list in 71 above. This includes where children are accommodated in properties (i.e. motels, service apartments, houses or units) and cared for by paid staff (whether employed ongoingly, on a casual basis or are third party contractors).

- In these situations, a child or young person is experiencing the trauma of having nowhere to live, no one to care for them and no sense of permanency in their present or future.
- OCV oversight of arrangements such as described would strengthen the OCG's monitoring of the quality and durations of these arrangements, which may contribute to improvements in the provision of these temporary arrangements.

9.4 OCG'S powers under Part 9

74. *Does the OCG have sufficient power to deal with reports or other matters raised by OCVs?*

- Barnardos lacks specific information on the overall value of feedback from OCVs, however if the feedback is concerning and the OCG assessed the issues raised as requiring immediate attention, Barnardos is concerned that the OCG does not have sufficient powers to intervene on a child's behalf.

9.7 Appointment and removal of OCV's

75. *Should the CG Act specify particular criteria for appointing OCVs, for example, criteria specifying cultural and linguistic competencies, including demonstrated Aboriginal and Torres Strait Islander cultural competency and demonstrated ability to communicate with children and young people?*

76. *Should the CG Act clarify the scope of the Children Guardian' authority to manage the performance of the OCVs?*

77. *Should the grounds of the removal of an OCV be clarified?*

The following are responses to the above queries 75,76 and 77.

- The CG Act should specify particular criteria for appointing OCVs e.g., demonstrated cultural sensitives and competencies and ability to relate to children.
- The CG Act should clarify the scope of the OCG to manage the performance of an OCV, as this is an extraordinarily privileged position and OCVs must uphold the highest standards of integrity in their role and function.

- An OCVs position requires direct contact with very vulnerable children and young people and the positions code of conduct should prescribe clear grounds for removal.

9.8 Offences

78. *Are OCVs adequately and appropriately protected when exercising their functions?*

- Barnardos does not have enough information to respond to this query. Its acknowledged that an OCV is the ‘eyes and ears’ of the Minister and there are protections in place for the OCV to be able to perform their duties as an impartial, independent observer and to report any concerns regarding the safety and wellbeing of children in the care system.

79. *Are the protections in the CG Act sufficient to encourage a person, including a child or young persons in a visitable service, to raise complaints with OCVs?*

- Barnardos does not have enough information to ascertain if an OCV is appropriately protected when performing their duties. Nor is it very clear whether the CG Act has sufficient protections to encourage a person, child or young person to raise complaints with an OCV. Barnardos agrees that this area may need strengthening.

10. Other Issues

10.2.3 Internal review of CG’s decision

80. *The Children Guardian Amendment Bill 2022, which makes amendments to section 154, has passed both Houses of Parliament. In view of that, are there any other issues that arise in relation to the right to apply to NCAT for administrative review of decisions made under the CG Act?*

- Although Barnardos supports in principle for decisions to be reviewed by NCAT, Barnardos is concerned that the number of requests for decisions to be reviewed will become unmanageable by an already overburdened system. How will these amendments to review a decision be resourced and what expectations will be placed on entities to prepare and respond. Entities do not have the resources to accommodate additional requests.

81. *Should the types of decisions made by the Children’s Guardian that can be internally reviewed by the OCG be expanded?*

- Barnardos agrees with the new amendment for the right to apply to NCAT for an administrative review of decisions made under the CG Act. We would also support the expansion of the parameters of an internal review that may be conducted by the OCG. These proposals are consistent with enabling procedural fairness for persons subject to reportable conduct investigations to have decisions made by an entity reviewed by the OCG and allows for the OCG’s decisions to be further to reviewed by another independent body such as NCAT. This is particularly important when employee’s reliance on a WWCC and future employment is at risk of being removed which will impact their livelihood.

10.3 Part 11 Offences

82. *Are there issues that arise in relation to the types of offences that can be committed under the CG Act or penalties for the offences? Should any other actions or failures to act be an offence?*

- Barnardos agrees with the current types of offences that can be committed under the CG Act and considers the penalties to be reasonable.

10.4 Information Sharing

83. *Are there any issues that arise in relation to the miscellaneous matter dealt with in Part 12?*

- Barnardos has nothing further to add to miscellaneous matters.

84. *Should the list of bodies that the Children’s Guardian can share information with under section 180 be expanded? Are there any other issues arising in relation to information cut?*

- Barnardos does not any further bodies to add to the list of bodies that the CG can share information with.