



Office of the  
Children's Guardian

# Review of accreditation & monitoring functions

Consultation paper

November 2021

# Introduction

In November 2021 the Office of the Children's Guardian (OCG) will commence a review of the Children's Guardian's accreditation and monitoring framework for statutory out-of-home care (OOHC) and adoption service providers. The framework is currently set out in the *Children's Guardian Act 2019*, the Children and Young Persons (Care and Protection) Regulation 2012, the Adoption Regulation 2015 and the NSW Child Safe Standards for Permanent Care. The focus of this consultation process will be on the functions and powers of the Children's Guardian that are exercised under these regulations.<sup>1</sup>

The NSW accreditation scheme for statutory OOHC providers commenced in July 2003. In the eighteen years since the accreditation scheme began, the regulatory landscape has become more complex, and a number of significant reforms and reviews have taken place:

- the transition of statutory OOHC service delivery to the non-government sector;
- the commencement of the National Disability Insurance Scheme (NDIS);
- the transfer of the Working with Children Check and reportable conduct functions to the OCG
- the Safe Home for Life reforms;
- the introduction of the Permanency Support Program and the implementation of a new commissioning approach for statutory OOHC services;
- the roll back of the residential care system and the implementation of the Intensive Therapeutic Care system;
- the commencement of the NSW Carers Register;
- the anticipated commencement of the Residential Care Workers Register;
- the Royal Commission into Institutional Responses to Child Sexual Abuse; and
- the first independent review of the experiences of Aboriginal children and young people in NSW statutory OOHC (the Family is Culture report).

While the Children's Guardian's functions have been considered in the context of broader regulatory reviews, including the 2012 review of the Children and Young Persons (Care and Protection) Regulation 2000 and the Safe Home for Life reforms, a comprehensive, focused review of the accreditation and monitoring framework, set out in the regulations, is necessary to ensure the accreditation scheme reflects the contemporary service system.

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<sup>1</sup> A reference to 'the regulations' shall be to the Children and Young Persons (Care and Protection) Regulation 2012 and the Adoption Regulation 2015.

The review will address a range of challenges in the statutory OOHC and adoption sector including:

- the capacity of the sector to provide culturally safe care to Aboriginal children and young people;
- the increased complexity in OOHC service delivery requiring flexible, creative models of care that can be readily adapted to meet the specific care needs of children and young people, and
- the growing complexity in the regulatory environment and the intersection of various regulatory regimes in NSW.

This paper explores the existing accreditation and monitoring framework in the regulations and proposes amendments to the Children's Guardian's accreditation and monitoring functions within that regulatory framework. The paper also describes the intersection of the Children's Guardian's accreditation functions and the child safe scheme.

## NSW Child Safe Standards for Permanent Care

It has been the OCG's practice to review the Standards every five years in consultation with the sector. The OCG had originally intended to review the current Standards in 2021. However, feedback from designated agencies regarding their experiences of the accreditation system has focused on the OCG's processes, rather than the content of the Standards. In response to sector feedback, this paper focuses on the accreditation process and the broader framework for accreditation set out in the regulations.

Given the challenges of the pandemic on the sector, as well as the work underway in the OCG to refine its accreditation and monitoring practices, the review of the Standards will be postponed until the review of the Children's Guardian's functions is complete and the new accreditation and monitoring model is fully implemented.

## Make a submission

Comment is sought on the proposals set out in this paper. Respondents are invited to address the questions throughout this paper or provide feedback regarding any or all the proposals set out below. Feedback can be sent via email to [accreditation@ocg.nsw.gov.au](mailto:accreditation@ocg.nsw.gov.au).

Please provide any feedback by **8 December 2021**.

# Overview of the current regulatory framework

## Children and Young Persons (Care and Protection) Regulation 2012

The Care Regulation commenced on 1 September 2012, replacing the Children and Young Persons (Care and Protection) Regulation 2000.

Part 6, Division 4 of the Care Regulation sets out the framework for accreditation as a designated agency.

## Adoption Regulation 2015

The Adoption Regulation commenced on 1 September 2015, replacing the *Adoption Regulation 2003*.

Part 2, Divisions 1-3 of the Adoption Regulation sets out the framework for accreditation as an adoption service provider.

## Children's Guardian Act 2019

The CG Act commenced on 1 March 2020. Powers, functions, and responsibilities of the Children's Guardian for accrediting and monitoring adoption service providers and designated agencies were consolidated from the *Children and Young Persons (Care and Protection) Act 1998* ('the Care Act') and *Adoption Act 2000* ('the Adoption Act') into the new CG Act.

Part 5 of the CG Act sets out the OOHC matters regulated by the Children's Guardian. Part 7 sets out the Children's Guardian's functions in relation to adoption services.

The review of the CG Act will be undertaken in 2022<sup>2</sup>, with a report on the outcome of the review to be tabled in each House of Parliament by 1 March 2023<sup>3</sup>. This consultation on the Children's Guardian's accreditation and monitoring framework under the existing regulations will inform the broader review of the CG Act.

## Children's Guardian (Amendment) Regulation 2022

The principal Children's Guardian Regulation is expected to commence on 1 February 2022. The principal regulation will provide the detail to support the residential care workers register.

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<sup>2</sup> CG Act, s.183

<sup>3</sup> CG Act s.183(3)

The transitional regulatory arrangements in the CG Act<sup>4</sup> continue regulations made under the Adoption Act, the Care and Protection Act, *Community Services (Complaints, Reviews and Monitoring) Act 1993*, and *Ombudsman Act 1974*, as if they were made under the CG Act. Work is underway to transfer the Children's Guardian's powers, functions, and responsibilities from these existing regulations into the consolidated Children's Guardian Regulation under the CG Act.

The consolidation of the transferring regulations will occur by way of an amending regulation, due to commence on 1 September 2022. This consultation process forms part of that broader piece of work.

## Stronger foundation through legislative change

Amendments were made to the CG Act in 2020<sup>5</sup> to confer some relevant functions and powers that are currently exercised by the Children's Guardian under regulations. The amendments will commence on 1 September 2022 to coincide with the commencement of the CG Amendment Regulation.

Moving provisions from the regulations into the CG Act will provide a stronger, more transparent foundation for the Children's Guardian's independent oversight role.

In line with contemporary drafting practices, amendments to the CG Act relating to the accreditation and monitoring framework, will confirm that:

- designated agencies' accreditation is subject to a condition prescribed by the regulations;
- the Children's Guardian may impose a condition on the accreditation of a designated agency, or the process of accreditation of a designated agency, and may vary or revoke those conditions;
- the Children's Guardian may shorten, suspend or cancel an agency's accreditation;
- the Children's Guardian may reinstate accreditation or reduce the period by which the agency's accreditation has been shortened;
- the Minister may, on the recommendation of the Children's Guardian, approve Standards and other criteria for use in determining the requirements for accreditation as a designated agency, and the accreditation period to be granted; and
- the Children's Guardian may issue policies in relation to the transfer of accreditation.

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<sup>4</sup> Schedule 4, Part 1, Clause 2

<sup>5</sup> Stronger Communities Legislation Amendment (Courts and Civil) Bill 2020

The remainder of this paper sets out further proposed amendments to the Children's Guardian's accreditation and monitoring functions. A summary of all proposed amendments can be found at TAB A.

## 1. Accreditation of designated agencies and adoption service providers

Public Service agencies and non-government organisations providing statutory OOHC must meet mandatory standards of care to be accredited.<sup>6</sup> Organisations must be accredited before they can arrange or provide statutory OOHC<sup>7</sup> and non-government adoption providers must be accredited to provide adoption services.<sup>8</sup>

### 1.1 Agencies that may apply for accreditation as designated agencies

Under current arrangements, an organisation or a Public Service agency (referred to as 'the applicant') may apply in writing to the Children's Guardian for accreditation as a designated agency, or for the renewal of accreditation as a designated agency.<sup>9</sup> The current provisions allow for both for-profit and charitable or not-for-profit providers to apply for accreditation to provide statutory OOHC.

In her independent review of Aboriginal children and young people in NSW statutory OOHC, Professor Megan Davis raised concerns regarding the accreditation of for-profit statutory OOHC providers. Professor Davis noted that this is at odds with the requirements that only charitable or non-profit organisations may apply for accreditation to provide adoption services in NSW<sup>10</sup>.

Professor Davis also noted that although for-profit providers are required to meet the same standards of care as government and not-for-profit organisations, for-profit providers may have an inherent conflict of interest when making decisions regarding the allocation of resources and that there is a potential disincentive for for-profit providers to support children and young people to exit the statutory OOHC system<sup>11</sup>.

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<sup>6</sup> Care Regulation, cl. (49)(1)

<sup>7</sup> Care Act, s. 138

<sup>8</sup> CG Act s.112(1)

<sup>9</sup> Care Regulation, cl45(1)

<sup>10</sup> CG Act, s.112(1)

<sup>11</sup> Davis, M (2019) *Family is Culture: Independent Review into Aboriginal Out-of-Home Care in NSW*. Sydney: Family is Culture, p. 130

Very few for-profit providers have been accredited to deliver statutory OOHC services in NSW and expertise in delivering services to vulnerable children and young people and their families in NSW appears to sit with Public Service agencies and not-for-profit organisations.

**The OCG seeks the sector's views on whether the provision of statutory OOHC services should be limited to Public Service and charitable or not-for-profit organisations.**

## 1.2 Agencies that may apply for accreditation as an accredited adoption service provider

Under current arrangements, charitable or not-for-profit organisations may apply to the Children's Guardian for accreditation to provide domestic adoption services and/or intercountry adoption services; or apply for the renewal of accreditation<sup>12</sup>. The Department of Communities and Justice (DCJ) does not require accreditation to provide adoption services, however the Children's Guardian monitors the provision of adoption services, by the Department.<sup>13</sup>

**The OCG proposes to retain these provisions.**

### Key proposals

1. Applications for accreditation as a designated agency may be made by a Government Service agency or a charitable or not-for-profit organisation. This provision would only apply to new providers seeking provisional accreditation. Existing for-profit providers currently delivering services to children and young people in statutory out-of-home care would be eligible to apply for a renewal of accreditation.
2. Retain the existing provisions regarding applications for accreditation as an accredited adoption provider.

### Questions

- Should accreditation to provide statutory OOHC services be limited to Government Sector agencies and charitable or not-for-profit organisations?
- Are there benefits in having a mix of for-profit and charitable or not-for-profit providers in the statutory OOHC system?

<sup>12</sup> Adoption Regulation, cl. (6)(1).

<sup>13</sup> CG Act, s. 112(2).

## 1.3 Applications for accreditation as a designated agency

### 1.3.1 Form of an application for accreditation

Under current arrangements, an application for accreditation to provide statutory OOHC must be provided in a form approved by the Children's Guardian and must include the following information:

- The name of the proposed principal officer<sup>14</sup> and
- The address and contact details for the organisation and other corporate information<sup>15</sup>.

An applicant must also include in its application a behaviour management policy statement<sup>16</sup> that sets out:

- the behaviour management practices that may be used by authorised carers and strategies to discipline children and young people;
- the procedures for the use of physical restraint including consent, reporting, analysis and supervision of staff and support and counselling to be provided to children and young people where physical restraint has been applied;
- a statement that any physical punishment or coercion (including corporal punishment), any punishment that takes the form of immobilisation, force-feeding or depriving of food and any punishment intended to humiliate or frighten a child or young person, is prohibited; and
- a policy regarding the agency's views on the administration of psychotropic drugs for the purpose of controlling the behaviour of children and young people.

The requirement to include a behaviour management policy statement has been in place since 2003. In the intervening period the behaviour management provisions in the Care Regulation have been amended and the Standards set out expectations of agencies in developing behaviour management strategies and the supervision, training and support for staff and carers who are responsible for implementing plans.

Given that designated agencies are required to meet mandatory requirements regarding behaviour management in both the Care Regulation and the Standards, the requirement to submit additional material with an application for accreditation is unnecessary.

**The OCG proposes to remove this requirement.**

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<sup>14</sup> Care Regulation, cl45(2)(c)

<sup>15</sup> Care Regulation, cl (45)(c1-c3)

<sup>16</sup> Care Regulation cl, 45(2)(d-f)



### 1.3.2 A new requirement to support an application for accreditation

The OCG is considering a requirement that agencies applying for accreditation must provide with its application a policy statement detailing how it will meet the needs of Aboriginal children and young people and implement the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles.<sup>17</sup>

Aboriginal children and young people comprise just over 42% of the statutory OOHC population<sup>18</sup> and agencies seeking accreditation to deliver services must consider their capacity to provide culturally appropriate care, before they submit an application for accreditation.

In 2017 the NSW Child, Family and Community Peak Aboriginal Corporation (AbSec) were engaged to lead the development of the Aboriginal Case Management Policy ('ACMP') to support the Permanency Support Program. The *Family is Culture* report recommended that the ACMP be funded and implemented in the child protection and statutory OOHC sector.<sup>19</sup>

The ACMP is underpinned by key principles for working with Aboriginal children and young people, their families and communities<sup>20</sup>:

1. case management that is child focused to promote child safety and wellbeing;
2. case management that facilitates Aboriginal family-led decision making;
3. case management that values community involvement, including self-determination and advocacy;
4. case management that is culturally embedded;
5. case management that delivers holistic services tailored to the needs of Aboriginal children and families;
6. case management that is oriented to prevent harm and preserve families; and
7. case management that is accountable to Aboriginal people for outcomes achieved for Aboriginal children and their families.

The ACMP provides a practice framework for practitioners working with Aboriginal children and young people and their families, along the child protection and OOHC continuum. The Policy is

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<sup>17</sup> Care Act, s. 13.

<sup>18</sup> DCJ quarterly statistical report on services for children and young people, July-September 2020, <https://public.tableau.com/app/profile/facs.statistics/viz/FACSquarterlystatisticalreportonservicesforchildrenandyoungpeople/Dashboard1>

<sup>19</sup> Davis, M (2019) *Family is Culture: Independent Review into Aboriginal Out-of-Home Care in NSW*. Sydney: Family is Culture, p.341.

<sup>20</sup> <https://www.absec.org.au/aboriginal-case-management-policy-guidelines.html>

supported by the ACMP Case Management Rules and Guidance<sup>21</sup>, which set out practical guidance for practitioners to assist them to apply these principles in their work.

The Aboriginal and Torres Strait Islander Child and Young Person Placement Principles ('the placement principles') is comprised of five key elements<sup>22</sup>:

- *prevention*: recognising that Aboriginal children and young people should be brought up by their own family and community;
- *partnership*: recognising that Aboriginal community representatives should be involved in child protection and OOHC decision making;
- *placement*: recognising that children and young people should be placed in accordance with the placement hierarchy, in which placement with Aboriginal or Torres Strait Islander relatives or extended family members or other relatives or extended family members is the preferable placement; while placement with non-Indigenous carers or in residential care is the placement of last resort;
- *participation*: ensuring that Aboriginal children, parents and family members participate in child protection and OOHC decisions; and
- *connection*: ensuring that Aboriginal children and young people in OOHC are supported to maintain connections to family, community, culture and country.

Agencies applying for accreditation will be required to include with its application a statement articulating how the agency will implement the principles of the ACMP and the placement principles, in its work with Aboriginal children and young people, their families and communities. In preparing the statement, agencies should reflect on their current practices and identify where the agency may require capability building to better meet the needs of Aboriginal children and young people in their care.

The OCG anticipates that some agencies will require capability building to implement the ACMP and placement principles in a meaningful way. The OCG will circulate a survey in the sector to seek feedback about agencies' familiarity with the ACMP as well as capability-building needs of the sector.

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<sup>21</sup> <https://www.facs.nsw.gov.au/providers/children-families/deliver-psp/aboriginal-case-management-policy/rules-and-practice-guidance>

<sup>22</sup> SNAICC – National Voice for Our Children (2019) *Understanding and applying the Aboriginal and Torres Strait Islander Child Placement Principle: A guide to support implementation*: [https://www.snaicc.org.au/wp-content/uploads/2019/06/928\\_SNAICC-ATSICPP-resource-June2019.pdf](https://www.snaicc.org.au/wp-content/uploads/2019/06/928_SNAICC-ATSICPP-resource-June2019.pdf)

### 1.3.3 Taking over an application for accreditation

The Care Regulation<sup>23</sup> and the Adoption Regulation<sup>24</sup> provide for one agency to take over the application for accreditation of another agency. This provision has rarely been used and has no practical purpose in the contemporary OOHC and adoption sector.

**The OCG proposes to remove this provision.**

#### **Key proposals**

3. Applications must be made in a form approved by the Children's Guardian.
4. Applications for accreditation are no longer required to include a behaviour management and support policy.
5. Remove provisions regarding an agency taking on the application for accreditation of another agency.

#### **Questions**

- Do you agree that an application for accreditation should set out how the agency intends to meet the particular needs of Aboriginal children and young people?
- What things should an agency applying for accreditation consider when reflecting on its capacity to provide culturally safe care?

## 1.4 Experience and qualifications of principal officers and structure of governing bodies

While the Standards require organisations to have systems in place to support the operation of the organisation including the role of the principal officer and the governing body, there are no provisions in the legislation regarding requirements an agency must be able to meet *before* submitting an application for accreditation.

There are currently no requirements in legislation that the principal officer, who has overall responsibility for the agency's statutory OOHC or adoption services, has relevant experience or qualifications in delivering services to children and young people and their families. There are also no requirements regarding the structure and composition of the agency's governing body.

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<sup>23</sup> Cl.46

<sup>24</sup> Cl. 7

Under current arrangements, applicants for accreditation provide the Children's Guardian with policies and procedures setting out how it intends to ensure that the governing authority has relevant skills and expertise in delivering services to vulnerable children and young people, but there are no requirements that the agency already has these structures in place before applying for accreditation.

This means that the Children's Guardian must make an accreditation decision based on how the agency *intends* to deliver services but has limited capacity to consider other factors that may impact on the agency's capacity to deliver its services.

It has been the OCG's experience that regardless of the size of an organisation, the role of principal officer and an independent governing body is critical to the delivery of quality services and the creation of a child safe organisational culture. It has also been the OCG's experience that the composition of the governing body impacts on the quality of decision making. The governing body must have enough members, who are independent of the organisation to provide for effective oversight of the organisation and to identify and manage conflicts of interest when making decisions about the future of the organisation.

**The OCG proposes that having an appropriate governing body in place is a prerequisite for applying for accreditation. It is also a requirement that any person appointed to the principal officer role - once the agency is accredited - must have relevant skills and experience in delivering services to children and young people.**

#### **Key proposals**

6. An agency must be able to demonstrate that the principal officer has relevant qualifications or experience in delivering services to children and young people, noting that an agency may await the outcome of its application for accreditation before appointing a principal officer.
7. An applicant for accreditation must be able to demonstrate that it has a governing body with at least four members who are independent of the organisation (that is, not engaged by the agency as an employee, a volunteer or an authorised carer), before the Children's Guardian will consider its application for accreditation.

#### **Questions**

- Do you agree that the principal officer for an agency must have relevant skills and experience in working with children and young people?
- What skills and experience do you believe are most relevant for the principal officer role?

- Do you agree that having an appropriate governance structure in place should be a prerequisite to apply for accreditation?

## 1.5 Accreditation of new providers

Under existing arrangements, a new provider applying for accreditation must demonstrate that it meets the Standards. New providers seeking accreditation must demonstrate compliance with the Standards by submitting policies and procedures to the OCG for assessment. Where the OCG assesses that the agencies' policies and procedures meet the requirements of the Standards, the Children's Guardian may grant the agency provisional accreditation.<sup>25</sup>

There are currently no provisions to allow the Children's Guardian to prioritise applications for accreditation and there are no provisions to prevent an agency that has had its accreditation shortened, suspended or cancelled from immediately re-applying for accreditation.

**The OCG proposes that the Children's Guardian may exercise discretion in assessing applications for accreditation according to priority. The OCG will determine what factors may be taken into account in exercising discretion (that is, determining what the priority applications will be). The Children's Guardian will make these factors available in guidance material, published on the OCG website.**

The effect of this proposal is that the Children's Guardian would assess applications for accreditation based on need. The need would be determined by the Children's Guardian as the types of services children and young people need may change over time. For example, there is currently a critical need for more Aboriginal OOHC providers that have the expertise to meet the needs of Aboriginal children and young people. Applications for accreditation made by Aboriginal agencies would therefore be assessed before other applications. This will ensure that the resources of the Children's Guardian are used more effectively and that the sector can better-meet the needs of children and young people.

**The OCG also proposes that an agency that has had its accreditation shortened or cancelled, should be prevented from re-applying for accreditation for a period of two years, even if constituted as a new entity within the two-year period.**

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<sup>25</sup> Care Regulation, cl. 49.

The purpose of this provision is to require any agency that has had its accreditation shortened or cancelled and that wishes to provide OOHC or adoption services again in the future, to review and correct its systems and practices before seeking accreditation in the future.

### **Key proposals**

8. As part of fulfilling responsibilities to accredit designated agencies or adoption service providers within the available resources of the OCG, the Children's Guardian may prioritise applications for accreditation.
9. In the exercise of the Children's Guardian's discretion, the Guardian may prioritise applications from Aboriginal Community Controlled Organisations, organisations specialising in services where there may be a gap in the system, such as mental health or disability services, or organisations operating in geographical areas where there is a shortage of services. Applications from other providers would be considered after priority applications have been assessed. The OCG will make the basis for determination of priority groups publicly available.
10. An agency that has had its accreditation shortened or cancelled may not re-apply for accreditation for two years, even if constituted as a new entity within the two-year period.

### **Questions**

- Do you agree that the Children's Guardian should exercise discretion in prioritising applications for accreditation?
- Do you agree with the proposed priority groups at (9) above? Are there other organisations that should be prioritised?
- Do you agree that a designated agency or an adoption service provider that has had its accreditation shortened or cancelled should be prohibited from applying for accreditation for a period of time?

## **1.6 Accrediting 'models' of statutory OOHC**

To accommodate the increasing complexity of statutory OOHC service delivery, the OCG proposes to review its approach to accrediting agencies to provide specific types of services.

Currently, designated agencies apply for accreditation to provide a particular type of service (foster care and/or residential care). The Children's Guardian limits the type of service an agency may provide by way of conditions on the agency's accreditation (for example a condition that the

agency may provide foster care only). Where an agency wishes to add a service type to its existing accreditation, the agency must provide further evidence for assessment by the OCG, and the Children's Guardian may vary the conditions on the agency's accreditation.

There is an increasing number of care models in the sector which blend aspects of foster care and residential care service delivery, particularly where children and young people may require short-term emergency care, and the distinction between foster care and residential care is becoming less relevant.

**The OCG proposes to cease placing conditions on agencies' accreditation in relation to service types.**

As part of its application an agency will be required to describe how it will deliver services in accordance with the Standards. Agencies will also need to describe how they intend to provide short-term emergency care, for example in the event of a placement breakdown.

This approach may provide greater flexibility for agencies to respond quickly to the needs of children and young people. For example, an agency that primarily provides foster care would have greater flexibility to provide short-term residential care-type placements where a child or young person requires this type of care, rather than referring the child or young person to another agency.

This proposal does not require a regulatory amendment but will require a change to the OCG's policies and practices.

**Questions**

- Do you agree with the proposal to accredit an agency to provide statutory OOHC, rather than specifying whether the agency can provide foster care, residential care or both?
- Would this approach provide greater flexibility for the way your organisation delivers services?
- Are there any risks or challenges in providing agencies greater flexibility in how they deliver services?

## 1.7 Accrediting adoption providers

Under current arrangements, an agency may seek accreditation to provide domestic adoption services, intercountry adoption services or both<sup>26</sup>.

There are critical differences in the provision of domestic and intercountry adoption services and unlike statutory OOHC, the concept of accrediting an agency to provide any kind of adoption services would be impractical.

The provision of intercountry adoption is subject to additional Commonwealth requirements and international conventions<sup>27</sup>. As such, **the OCG proposes to retain the current distinctions between accreditation to provide domestic adoption services and accreditation to provide intercountry adoption services.**

This would mean that a designated agency that is also accredited to provide adoption services, would still need to indicate in its application for accreditation whether it seeks accreditation to provide domestic adoption, intercountry adoption, or both.

## 1.8 An alternative accreditation process for short-term emergency care providers

The intent of the NSW statutory OOHC system is to provide permanent care for children and young people. Permanency for children and young people can be achieved through restoration to parents, guardianship, adoption or long-term statutory OOHC placements.<sup>28</sup>

However, the OCG notes that some children and young people will, from time-to-time, require short-term emergency care while more appropriate, longer-term placements can be arranged. These care arrangements are often provided by non-designated agencies where individuals caring for children and young people are authorised by a designated agency to provide emergency care<sup>29</sup>. While these arrangements must be supervised by a designated agency, the organisations providing direct care to children and young people are not required to meet the same standards of

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<sup>26</sup> Adoption Regulation cl. 6

<sup>27</sup> *Convention on protection of children and co-operation in respect of intercountry adoption*

<sup>28</sup> Care Act, s.10A.

<sup>29</sup> Care Regulation, cl. 31B



care as designated agencies and are not subject to independent oversight by the Children's Guardian.

To enhance the safety and wellbeing of children and young people in emergency care arrangements, the OCG is considering options to create a new class of accreditation for agencies specifically equipped to provide short-term, emergency care arrangements. Clause 48 of the Care Regulation already provides for the Minister to approve accreditation criteria for a class or classes of applicants for accreditation.

These agencies could be required to comply with core standards applicable to providing emergency care and the Children's Guardian could impose conditions on these agencies limiting the services they can provide. Agencies accredited under these arrangements would only provide short-term care and all decision-making other than the day-to-day care of the child or young person would remain with the designated agency with case management responsibility for the child or young person.

If an agency accredited under these arrangements intends to deliver a full suite of statutory out-of-home care services, the agency would need to make a new application for accreditation and demonstrate compliance with all of the Standards.

This proposal would not require legislative amendment but would require a change in the OCG's policies and practices. It would also require Ministerial approval of Standards and other criteria for this class of applicants for accreditation.

**The OCG seeks feedback from the sector on whether there is a need for agencies within the accredited system that are specifically accredited to provide short-term emergency care only, and the possible benefits or challenges of bringing short-term emergency care providers into the accredited system.**

### Questions

- What are your views on creating a new class of accreditation for providers that provide short-term emergency care only?
- Do you agree that providers accredited to provide emergency care only, should have limits placed on the types of services they can provide?
- Do you agree that case management and decision making about the child's care should remain with a fully accredited agency?
- What risks or challenges do you foresee with the proposed model?

## 1.9 Provisionally accredited agencies progressing to full accreditation

Provisionally accredited agencies are accredited for a period of three years, on the basis of their policies and procedures. When a provisionally accredited agency receives its first placement, it must notify the Children's Guardian<sup>30</sup> and a direct evidence program monitoring the agency's service delivery commences. The practice reviewed in the direct evidence program forms the basis for the Children's Guardian's decision to grant full accreditation.

It has been the OCG's experience that newly accredited providers may not receive their first placement for many months following their accreditation, or a small number of placements are transitioned to the agency over a long period of time. This means that when the agency's accreditation is due to expire, the agency often has limited evidence of practice to support a decision to renew the agency's accreditation.

**The OCG proposes a policy change to provide that a provisionally accredited agency's accreditation commences on the date that the agency commences providing services to children and young people.**

**The OCG also proposes to provide for the Children's Guardian to have discretion to extend the accreditation period for a provisionally accredited agency that has demonstrated progress towards meeting the Standards, but where there has been insufficient time to demonstrate compliance with all of the Standards, prior to the accreditation period expiring.**

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<sup>30</sup> Care Regulation, cl.52.

This may apply, for example, where an agency gradually transitions small numbers of placements each year, over the course of its accreditation period. Agencies in this situation may be making good progress towards meeting the Standards but may not have enough placements to demonstrate how it meets all of the Standards. This proposed provision would only apply where an agency can demonstrate it is meeting all relevant Standards. It would not apply where an agency is unable to demonstrate compliance with the Standards due to poor practice.

It has also been the OCG's experience that some designated agencies may not be funded to provide statutory OOHC or adoption services, or only provide placements to a very small number of children and young people each year. If the agency has provided no, or very few placements, over the course of its accreditation the Children's Guardian must still consider the agency's application for accreditation. This requires the OCG to devote resources to assessing an agency with limited evidence of practice to support its application for accreditation and that is unlikely to deliver services, other than temporary, ad hoc arrangements, into the future.

The current provisions regarding the regulation of designated agencies do not provide sufficient flexibility to respond to the range of circumstances of agencies in the sector and requires the OCG to devote resources to regulatory activities that are of limited benefit to children and young people.

**The OCG proposes to provide for greater flexibility in regulating agencies that have provided limited services to children and young people over the course of the accreditation period.**

**Key proposals:**

11. Change to OCG policies to provide for provisional accreditation to commence on the date on which an agency first makes arrangements to provide statutory OOHC or adoption services.
12. The Children's Guardian has the discretion to extend the accreditation of a provisionally accredited agency.
13. It is a prerequisite for an application to renew accreditation that the agency has provided care in the 12 months prior to its application.

## 1.10 Assessing applications to renew accreditation

Designated agencies and accredited adoption providers may be accredited for a period of one, three or five years<sup>31</sup>. Under current arrangements, the OCG requires agencies to indicate 12 months prior to the expiration of their accreditation their intention to apply to renew accreditation.

While the legislation currently provides for an agency to apply to the Children's Guardian to renew its accreditation as a designated agency,<sup>32</sup> or an accredited adoption provider<sup>33</sup> the *process* the Children's Guardian may take in considering an application to renew accreditation is not clearly articulated in the Care Regulation.

In current practice, the assessment of an application to renew accreditation involves onsite visits to the agency to review the agency's practices as well as indirect evidence such as policies and procedures in some cases. Onsite assessment includes discussions with staff and volunteers engaged by the agency and can also include discussions with children and young people, their carers or adoptive applicants.

The renewal assessment considers the agency's compliance with each of the Standards and the agency must either wholly or substantially meet the requirements of the Standards<sup>34</sup>. Where an agency is accredited on the basis of substantial compliance with the Standards, the agency must be wholly compliant within 12 months of the accreditation decision<sup>35</sup>.

## 1.11 A new approach to monitoring and accreditation

The accreditation renewal process is resource-intensive for both agencies and the OCG. The purpose of the assessment is to determine whether an agency is compliant with the Standards to support a decision to accredit the agency or refuse their application to renew accreditation.

In late 2020 the OCG undertook consultation with Aboriginal OOHC providers to understand practices most critical to supporting the needs of Aboriginal children and young people in OOHC, as well as to understand agencies' experiences of the OCG's accreditation and monitoring process. Feedback indicated that while it is critical that there is an independent process for determining whether an agency is meeting the Standards, the renewal process does not focus on continuous improvement, but rather takes a compliance focus. Some agencies have reported that

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<sup>31</sup> Care Regulation, cl.61(2-4)

<sup>32</sup> Care Regulation cl. 45(1)(b)

<sup>33</sup> Adoption Regulation cl. 6

<sup>34</sup> Care Regulation, cl. 49(1)

<sup>35</sup> Care Regulation cl. 54(1)(a)

the OCG's monitoring processes that focus on areas of good practice and areas for improvement, are more helpful in driving practice improvements.<sup>36</sup>

**The OCG proposes to restructure its accreditation renewal and monitoring processes, to provide for briefer, but more regular monitoring of agencies' practices, for the purpose of providing feedback regarding areas of strength and areas for improvement. The information gathered from monitoring visits to the designated agency will inform the Children's Guardian's decision whether to renew the agencies' accreditation.**

Agencies will receive a monitoring visit every 12-18 months and five core standards will be reviewed at each visit as well as different, additional practice areas at each visit. The OCG will provide feedback to the agency regarding areas of good practice and areas for improvement. The agency will be required to advise the Children's Guardian how it intends to address any areas for improvement.

When the agency is due to renew its accreditation, the agency's performance over the course of its accreditation period will determine what type of accreditation renewal assessment will be required. For agencies where there have been no concerns regarding compliance with the Standards, the accreditation renewal assessment will be brief and only focus on a small number of core Standards. For agencies where there have been compliance issues, the renewal assessment will be more comprehensive.

An overview of the proposed model is attached at **TAB B**.

A similar monitoring program will also be developed for accredited adoption service providers, focusing on practices most critical to children and young people in adoption arrangements.

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<sup>36</sup> *Review of the Child Safe Standards for Permanent Care: Summary of consultation with the Aboriginal OOHC sector*, OCG, April 2021: <https://www.ocg.nsw.gov.au/ArticleDocuments/165/OOHC-Standards-ConsultationSummary.pdf.aspx?Embed=Y>

### **Key proposals**

14. The Children's Guardian will determine applications to renew accreditation based on an assessment of an agencies' compliance against the Standards and accreditation criteria. Evidence of compliance with the Standards and accreditation criteria may include:
  - (i) assessment of an agency's practices
  - (ii) assessment of indirect evidence such as policies and procedures
  - (iii) discussions with representatives of the agency
15. The Children's Guardian has discretion to determine an agency's application to renew accreditation as a designated agency or an adoption service provider based on an assessment of compliance with specific Standards, or all Standards and accreditation criteria.
16. The Children's Guardian may, in determining an agency's accreditation, consider information gathered during monitoring of the agency's compliance with the Standards and accreditation criteria over the course of the agency's accreditation period.
17. The processes for determining applications to renew accreditation as a designated agency will be replicated to the greatest extent possible for adoption service providers applying to renew accreditation.

### **Questions**

- What are your views on the proposal for more regular monitoring of agencies' compliance with the Standards and a more streamlined accreditation renewal process?
- Do you agree that the Children's Guardian should have discretion to undertake a briefer accreditation renewal assessment where an agency has demonstrated compliance with the Standards and accreditation criteria over the course of its accreditation period?
- Do you agree that information gathered by DCJ or other oversight bodies, or information gathered by the OCG for other regulatory purposes should be considered as evidence of compliance with the Standards and other accreditation criteria? What sorts of information should be relevant to the Children's Guardian's decision whether to renew accreditation?
- Do you agree that the proposed processes for determining applications for renewal for designated agencies should be replicated for adoption service providers?

## 1.12 Accreditation criteria

Standards and other criteria for determining whether an agency should be accredited as a designated agency are approved by the Minister on the recommendation of the Children's Guardian and the criteria for assessment must be available for public inspection<sup>37</sup>. The current accreditation criteria are the NSW Child Safe Standards for Permanent Care.

The accreditation criteria *must* address the following issues<sup>38</sup>:

- procedures for the assessment of authorised carers including probity testing
- the training provided to authorised carers
- the supervision provided to authorised carers
- the involvement of children and young people in the making of decisions that affect them
- the involvement of parents or other people who had parental responsibility for a child or young person before the child or young person entered OOHC, in making decisions that affect the child or young person, and
- the involvement of authorised carers in making decisions about children and young people in their care.

These provisions pre-date the establishment of the NSW Carers Register and the requirements are already set out in the Care Act. Retaining a provision that specifies certain inclusions in the Standards suggests that other requirements are less important.

**The OCG proposes to amend this provision to clarify that the accreditation criteria address practices that promote the safety, welfare and wellbeing of children and young people.**

Standards and other criteria for determining whether to accredit an adoption service provider are also approved by the Minister on the recommendation of the Children's Guardian.<sup>39</sup> To the greatest extent possible, accreditation criteria for adoption service providers must be integrated with the criteria for accreditation as a designated agency.<sup>40</sup>

**The OCG proposes to retain this provision.**

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<sup>37</sup> Care Regulation, cl. 48

<sup>38</sup> Care Regulation, cl. 48(3).

<sup>39</sup> CG Act, s.113

<sup>40</sup> CG Act, s.113(3).

### Key proposals

18. Retain existing provisions for the Minister to approve criteria and other Standards, on the recommendation of the Children's Guardian, for determining applications for accreditation as a designated agency.
19. Clarify that the Standards and accreditation criteria must address practices that promote the safety, welfare and wellbeing of children and young people.
20. Retain the existing provisions for the Minister to approve criteria and other Standards, on the recommendation of the Children's Guardian, for determining applications for accreditation as an adoption service provider.
21. Retain existing provisions regarding a requirement to integrate to the greatest extent possible, accreditation criteria for adoption service providers with accreditation criteria for designated agencies.

### Questions

- Do you agree that the provision regarding what *must* be included in the Standards should be broadened to include practices that promote the safety, welfare and wellbeing of children and young people in OOHC?

## 2 Transfer of accreditation

Under current arrangements, the accreditation of a designated agency or an accredited adoption service provider (other than a departmental designated agency) may be transferred to another entity in accordance with requirements in the Care Regulation<sup>41</sup> or the Adoption Regulation.<sup>42</sup>

A transfer of accreditation may occur where a designated agency or accredited adoption service provider wishes to transfer its accreditation to an organisation that is not accredited.

Under current arrangements<sup>43</sup> the process for transferring accreditation is:

1. The designated agency or accredited adoption service provider applies in writing to the Children's Guardian to transfer its accreditation to another entity. The agency must be able to demonstrate that it is in the best interests of children and young people for the transfer to occur.

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<sup>41</sup> Care Regulation, division 4, subdivision 2.

<sup>42</sup> Adoption Regulation, division 2.

<sup>43</sup> Care Regulation, Division 4, subdivision 2



2. The transferor and transferee must satisfy the Children's Guardian that the assets, rights and liabilities that the transferor was/is or may be responsible for or benefit from, will transfer to the transferee.
3. The transferor and transferee must demonstrate they have made all reasonable efforts for the individuals employed by the transferring agency to be continued to be employed by the transferee.
4. The transferor and transferee must satisfy the Children's Guardian that all reasonable efforts have been taken to ensure the proposed transfer will not prejudice any legal proceedings to which the transferor is, or likely to become, a party.
5. The transferee must confirm that it will adhere to the policies and procedures of the transferor as they relate to the statutory OOHC or adoption program.
6. The transferee must demonstrate it can comply with any conditions on the accreditation.
7. The transferee must provide information regarding the proposed organisational structure, principal officer, and governing authority.
8. Prior to making a decision the Children's Guardian must consult DCJ and the NSW Ombudsman.
9. The transferee must make arrangements to register as an employer and verify the Working with Children Check applications or clearances of all people in child-related work.

If the Children's Guardian approves the transfer, correspondence is sent to both agencies with a date on which the accreditation is transferred. A transfer of accreditation does not change the accreditation expiry date.

The Children's Guardian has received a small number of applications to transfer accreditation under these provisions, since the accreditation scheme commenced. The most common scenarios for a transfer of accreditation are in circumstances where:

- A designated agency is undergoing a restructure and is establishing the OOHC program as a separate entity, or
- one designated agency merges with another designated agency to create a new entity.

On the few occasions that the Children's Guardian has received an application for a transfer of accreditation, the transferee was already affiliated with the accredited agency, or the agency was establishing itself as a new entity while the day-to-day operations of the organisation remain unchanged.

**The OCG proposes to retain these provisions, including provisions for the Children's Guardian to develop guidelines for the transfer of accreditation.**

The guidelines will set out the requirements an agency must meet in order to apply to transfer accreditation, which will include that the transferee can demonstrate that it can meet the same Standards, accreditation criteria and application requirements as designated agencies. The transferee must also be able to demonstrate that it can provide continuity in its operations, for example by retaining the same governing authority or principal officer.

#### **Key proposals**

22. A designated agency or adoption service provider can apply to transfer its accreditation to another entity. The application to transfer accreditation must be in a form approved by the Children's Guardian.
23. The transfer of accreditation must be in accordance with guidelines issued by the Children's Guardian.

#### **Questions**

- Do you agree there are circumstances where it is appropriate for an agency to transfer its accreditation to another agency?

## **3 Accreditation administration**

Part 6, Division 4, Subdivision 3 of the Care Regulation and Part 2, Division 3 of the Adoption Regulation set out provisions for managing the accreditation of designated agencies and accredited adoption service providers.

### **3.1 Form and accreditation period**

Under current arrangements the Children's Guardian may grant accreditation for a period of 1, 3 or 5 years to a designated agency<sup>44</sup> or an accredited adoption service provider<sup>45</sup> being granted full accreditation, if the agency did not hold provisional accreditation immediately before being granted full accreditation.

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<sup>44</sup> Care Regulation cl.61(1)

<sup>45</sup> Adoption Regulation cl.22(2)

A designated agency<sup>46</sup> or an accredited adoption service provider<sup>47</sup> may be granted *full* accreditation for a period of 1 or 3 years if the agency held provisional accreditation immediately before it was fully accredited.

A designated agency<sup>48</sup> or an accredited adoption service provider<sup>49</sup> applying for *provisional* accreditation may be accredited for a period of three years.

It is impractical to accredit an agency for one year, as the process for assessing an application to renew the agency's accreditation would commence soon after the accreditation decision and the Children's Guardian has never used this provision.

**The OCG proposes provisions for the Children's Guardian to accredit an agency for 3 or 5 years.**

The Care Regulation<sup>50</sup> and the Adoption Regulation<sup>51</sup> also provide for the Children's Guardian to vary the accreditation periods for an agency that is accredited as both a designated agency and an adoption service provider, so the accreditation periods for both service types can be aligned. The accreditation periods of designated agencies<sup>52</sup> and accredited adoption service providers<sup>53</sup> may also be extended, where an agency applied to add accreditation as either a designated agency or an adoption service provider, to its existing accreditation.

**The OCG proposes to retain these provisions.**

## 3.2 Deferral of a decision to renew accreditation

The Care Regulation<sup>54</sup> and Adoption Regulation<sup>55</sup> provides for the Children's Guardian to defer a decision on an application to renew an agency's full accreditation. This provision is most commonly used where an agency has been unable to demonstrate compliance with all Standards in order to renew accreditation, but where the agency is working towards compliance with the Standards.

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<sup>46</sup> Care Regulation cl. 61(3)

<sup>47</sup> Adoption Regulation cl 22(3)

<sup>48</sup> Care Regulation cl 61(4)

<sup>49</sup> Adoption Regulation cl 22(4)

<sup>50</sup> cl 61(4A)

<sup>51</sup> cl 22(5)

<sup>52</sup> Care Regulation cl 61A

<sup>53</sup> Adoption Regulation cl. 23

<sup>54</sup> cl 47

<sup>55</sup> cl. 8

Where a decision is deferred the OCG requires the agency to develop action plans regarding how it will address non-compliance and the OCG visits the agency regularly to monitor progress. The Children's Guardian may also impose conditions on the agency's accreditation, for example a condition that the agency must not accept further placements until practice issues have addressed.

The Children's Guardian must inform the Minister in writing where a decision on an application to renew accreditation has been deferred for six months or more<sup>56 57</sup>. The Care Regulation<sup>58</sup> and Adoption Regulation<sup>59</sup> provides for the agency's accreditation to be extended while a decision on its application to renew accreditation is deferred.

There are currently no provisions regarding the maximum length of time a decision on an agency's accreditation may be deferred. It has been the OCG's experience that most deferred decisions are resolved within two years.

**The OCG proposes that where a decision on an agency's application to renew accreditation is deferred, the agency must participate in a risk management program approved by the Children's Guardian. Where a decision has been deferred for two years, the agency's application for accreditation is automatically refused, unless the Children's Guardian is satisfied that the risk management program should be extended for a further period.**

### 3.3 Extending accreditation to accommodate changes

The Care Regulation<sup>60</sup> and Adoption Regulation<sup>61</sup> provides for the Children's Guardian to extend the accreditation of a designated agency or an accredited adoption service provider where the Children's Guardian is of the opinion that changes or proposed changes to the administration of the OOHC or adoption sector make the extension appropriate. For example, the Children's Guardian has extended accreditation periods for agencies where new accreditation Standards and criteria have been introduced to allow agencies sufficient time to amend policies, procedures and practices prior to applying to renew accreditation. More recently, the Children's Guardian extended accreditation periods for some agencies following changes to the administration of the OOHC and adoption sector as a result of the covid-19 pandemic.

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<sup>56</sup> Care Regulation, cl.47(4)

<sup>57</sup> Adoption Regulation, cl.8(4)

<sup>58</sup> cl. 62

<sup>59</sup> cl.8

<sup>60</sup> cl. 64

<sup>61</sup> cl. 26

**The OCG proposes to retain these provisions.**

### 3.4 Conditions on accreditation and process of accreditation

Schedule 3 to the Care Regulation and Schedule 1 to the Adoption Regulations set out the conditions of accreditation that apply to all designated agencies and accredited adoption service providers.

In recent years, the OCG has imposed additional conditions on designated agencies' accreditation in accordance with clause 65(2) of the Care Regulation, requiring agencies to report certain things to the OCG. Examples of these conditions include where an agency must notify the Children's Guardian when it places a child under the age of 12 in a residential care arrangement, or conditions requiring agencies to comply with guidelines issued by the Children's Guardian regarding the emergency authorisation of staff and contractors. Given that these conditions are relevant to all designated agencies and **the OCG proposes to include these conditions in Schedule 3.**

The effect of this change will be that an agency's *Notice of Conditions of Accreditation as a Designated Agency* will only set out conditions specific to the agency and all other general conditions of accreditation relevant to all designated agencies will be set out in Schedule 3.

**The OCG also proposes to include a condition of accreditation in Schedule 3 that provides that care may only be provided in a carer's private home, where the carer has been authorised under clause 30 or clause 31 of the Care Regulation.**

This means for example, that a worker authorised to provide emergency care under clause 31B of the Care Regulation or a worker authorised by DCJ to provide special care, cannot care for a child or young person in their own home. These care arrangements are typically provided in residential-care type settings by employed staff.

Including this provision will make it explicitly clear that children and young people can only be cared for in private homes, by authorised carers (foster carers or relative/kinship carers).

The Care Regulation<sup>62</sup> and Adoption Regulation<sup>63</sup> provides for the Children's Guardian to impose other reasonable conditions (in addition to the conditions in Schedule 3 of the Care Regulation and

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<sup>62</sup> cl. 65

<sup>63</sup> cl. 27

Schedule 1 of the Adoption Regulation) on an agency's accreditation and may vary or revoke a condition on an agency's accreditation.

**The OCG proposes to retain these provisions and agencies will retain the right to apply for a review of the Children's Guardian's decision to impose a condition on the agency's accreditation.**

### **Key proposals**

24. Retain existing provisions regarding accreditation periods for designated agencies and accredited adoption services providers including provisions to vary or extend accreditation periods to align periods of accreditation for agencies that are accredited as both designated agencies and accredited adoption service providers.
25. Where the Children's Guardian defers a determination of an agency's application to renew accreditation the agency must participate in a risk management program approved by the Children's Guardian.
26. Where a determination on an application for accreditation has been deferred for two years the application is automatically refused, unless the Children's Guardian is satisfied the risk management program should be extended for a further period.
27. Retain provisions regarding accreditation periods for agencies where a decision on an application to renew accreditation has been deferred.
28. Retain provisions to extend accreditation to accommodate change in the administration of the OOHC and adoption sector.
29. Transfer conditions of accreditation requiring agencies to notify the Children's Guardian of certain things or to comply with guidelines issued by the Children's Guardian to Schedule 3
30. Impose a condition on all designated agencies that care may not be provided in a private home unless the care is provided by a person authorised as a care under clause 30 or clause 31 of the Care Regulation.
31. Retain provisions for the Children's Guardian to impose other, reasonable conditions on an agency's accreditation in addition to conditions of accreditation imposed by the regulations.

### **Questions**

- Do you agree that there should be a restriction on providing care to children and young people in a carer's private home unless the carer has been authorised under clause 30 or 31 of the Care Regulation? This means, for example that workers authorised to

provide emergency care or workers authorised by DCJ to provide special care cannot care for children in their own homes.

- Do you agree that where a decision on an agency's accreditation is deferred, the agency should be required to participate in a risk management program?

### 3.5 Shortening, suspending, or cancelling accreditation

The Care Regulation<sup>64</sup> and the Adoption Regulation<sup>65</sup> provides for the Children's Guardian to shorten, suspend or cancel accreditation in a number of circumstances including where:

- the agency or a principal officer made a statement or provided information that it knew to be false or misleading
- the agency failed to comply with a condition of accreditation
- the agency or the principal officer failed to comply with any obligations or restrictions imposed by the *Children and Young Persons (Care and Protection) Act 1998* (or the *Adoption Act 2000* in the case of an accredited adoption service provider)
- the agency has failed to either wholly or substantially satisfy accreditation criteria.

Where a designated agency's accreditation is suspended it remains a designated agency, but it cannot provide statutory OOHC services to children and young people during the period of suspension.<sup>66</sup> Similarly, an accredited adoption service provider with suspended accreditation remains an accredited adoption service provider but cannot provide adoption services to children and young people.<sup>67</sup>

It is the OCG's practice to take less restrictive regulatory approaches to addressing non-compliance with the Standards, before considering shortening, suspending or cancelling accreditation. The effect of these decisions is that children and young people must be transferred to other accredited agencies and these decisions are not taken lightly. Shortening, suspending or cancelling accreditation is usually considered where the safety and wellbeing of children and young people is compromised and where less intrusive responses such as imposing conditions are inadequate.

It has been the OCG's experience that suspending accreditation is not an effective response to non-compliance with the Standards, or where an agency has failed in its duties to children and

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<sup>64</sup> Cl. 66

<sup>65</sup> Cl. 28

<sup>66</sup> Care Regulation, cl. 67

<sup>67</sup> Adoption Regulation cl. 29

young people. The purpose of suspension appears to be to ensure that an agency does not deliver services to children and young people for a period of time while it corrects non-compliance or addresses failures to comply with conditions or other obligations. However, at the conclusion of the suspension period the Children's Guardian will have little evidence to assess to determine whether the agency can safely resume delivering services to children and young people.

For example, if an agency's accreditation has been suspended for six months, children and young people must transfer to another agency while the suspension is in place. At the conclusion of the six-month period the Children's Guardian has little evidence to determine whether an agency's *practices* have improved. Further, at the conclusion of the suspension period the agency can recommence providing services, however it may not be in children and young people's best interests to transition back to the care of the original agency.

If the purpose of these provisions is to prevent an agency with a history of poor compliance with the Standards, or where an agency has failed in its obligations to children and young people to continue providing statutory OOHC and/or adoption services, then the most effective responses are to either shorten the agency's accreditation or cancel the agency's accreditation. In both these circumstances, the agency must cooperate with the transition of children and young people and their carers (where relevant) to another designated agency prior to the agency's shortened accreditation expiring, or the cancellation taking effect.

**The OCG proposes to remove the provision to suspend an agency's accreditation but retain the provisions to shorten or cancel accreditation.**

#### **Key provisions**

32. The Children's Guardian may shorten or cancel the accreditation of a designated agency or an accredited adoption service provider in circumstances where:
- the agency or a principal officer made a statement or provided information that it knew to be false or misleading
  - the agency failed to comply with a condition of accreditation
  - the agency or the principal officer failed to comply with any obligations or restrictions imposed by the *Children and Young Persons (Care and Protection) Act 1998* (or the *Adoption Act 2000* in the case of an AAP)
  - the agency has failed to either wholly or substantially satisfy accreditation criteria.



## 4. Providing greater clarity on the Children's Guardian's functions

The OCG is seeking to provide greater clarity in the CG Act regarding the Children's Guardian's accreditation functions in relation to designated agencies and accredited adoption service providers.

Currently, the Children's Guardian's accreditation functions include monitoring and investigations, but are not described in these terms. The purpose of describing these functions more clearly is to reflect current practice with greater clarity. This will also align the Children's Guardian's accreditation functions with the functions recently transferred under the reportable conduct scheme, as well as with the proposed functions in the child safe scheme set out in the new Part 3A of the CG Act. This will provide for greater consistency in how the Children's Guardian's functions are described and implemented across the accreditation scheme, the reportable conduct scheme and the child safe scheme.

To achieve this, the OCG proposes to amend sections 128(e) and (k) of the CG Act to make clear that the primary function of the Children's Guardian in relation to designated agencies and adoption service providers includes investigation<sup>68</sup>. This clarification is necessary to provide greater certainty to the sector, in relation to the activities that the OCG is already performing.

An overview of how the current accreditation activities of the OCG will be classified under the monitoring and investigation functions can be found at **TAB C**.

### 4.1 The Children's Guardian may investigate the carrying out of agencies' responsibilities

Currently, the Children's Guardian investigates ("assesses") an agency's non-compliance with the standards or an agency's non-compliance with a condition on its accreditation. The outcome of an investigation is usually a decision regarding what actions, if any, should be taken in relation to the agency's accreditation. The outcome of an investigation could be that the Children's Guardian

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<sup>68</sup> Section 128(1) The principal functions of the Children's Guardian are as follows - ... (e) 'to accredit designated agencies and to monitor the carrying out of the agencies' responsibilities under this Act, the regulations, the *Children and Young Persons (Care and Protection) Act 1998* and the regulations under that Act, ... (k) 'to accredit adoption service providers under this Act and the regulations and to monitor the carrying out of the responsibilities, with respect to the provision of adoption services under the *Adoption Act 2000* and the regulations under that Act, of the providers and the Secretary,'

accredits an agency, refuses an application for accreditation, shortens, or cancels an agency's accreditation or imposes conditions on an agency's accreditation.

In properly classifying these activities as 'investigative' in nature, the agency will have a clearer sense of their rights and responsibilities in relation to the actions taken by the Children's Guardian.

#### **Key proposals**

33. Provide greater clarity in the CG Act regarding the Children's Guardian's current monitoring and investigation functions in relation to designated agencies and accredited adoption service providers.

#### **Questions**

- Do you agree with the proposal to provide greater clarity regarding the Children's Guardian's current work in monitoring and investigating designated agencies and accredited adoption service providers?

## **5. Intersection with the Child Safe Scheme**

The object of the *Children's Guardian Amendment (Child Safe Scheme) Bill 2021* is to embed the Child Safe Standards as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, as the primary framework that guides child safe practices in organisations in New South Wales<sup>69</sup>.

The Royal Commission's 10 Child Safe Standards are:

1. Child safety is embedded in institutional leadership, governance and culture
2. Children participate in decisions affecting them and are taken seriously
3. Families and communities are informed and involved
4. Equity is upheld and diverse needs are taken into account
5. People working with children are suitable and supported
6. Processes to respond to complaints of child abuse<sup>70</sup> are child focused
7. Staff are equipped with the knowledge, skills and awareness to keep children safe through continual education and training

<sup>69</sup> As at the date of publication of this consultation paper the Child Safe Scheme Bill is awaiting debate in the Legislative Council. The Child Safe Scheme Bill passed the Legislative Assembly on 9 June 2021.

<sup>70</sup> Note this is not limited to complaint handling and response for child sexual abuse, as recommended by the Royal Commission. This reflects the broader scope of the Child Safe Standards, which is to prevent, and improve responses and reporting for all forms of child abuse.

8. Physical and online environments minimise the opportunity for abuse to occur
9. Implementation of the Child Safe Standards is continuously reviewed and improved
10. Policies and procedures document how the institution is child safe.

The Child Safe Standards (CSS) provide a framework for making organisations safer for children. Like the NSW Child Safe Standards for Permanent Care, the CSS are holistic and interrelated, and each standard is of equal importance.

If supported by Parliament, the OCG will be responsible for implementing these mandatory Standards in NSW and the scheme will be supported by capability building<sup>71</sup>, monitoring<sup>72</sup> and investigation<sup>73</sup> function for the Children's Guardian.

As presently drafted, statutory OOHC and adoption service providers do not fall within the scope of the child safe scheme<sup>74</sup>. There is already a well-established, comprehensive regulatory scheme in place specifically designed to promote the needs of children and young people in statutory OOHC and adoption, and agencies must already comply with mandatory standards to provide services in NSW. Notwithstanding this, there are clear benefits in bringing the statutory OOHC and accredited adoption sectors into the Child Safe Scheme, primarily to avoid over-regulation of those organisations that will need to comply with both the CSS and the Standards. Many designated agencies provide child-related services in addition to OOHC and adoption and will operate under two regulatory systems.

The OCG seeks the sector's views on whether designated agencies and adoption service providers should be brought within the scope of the child safe scheme. Further, the sectors views are sought on whether the 10 Child Safe Standards as recommended by the Royal Commission, should be mandatory for the statutory OOHC and adoption sectors, in future iterations of the Standards and accreditation criteria.

The effect of this would be that the 10 Child Safe Standards would become the new mandatory standards for the sector, with additional accreditation criteria to reflect the particular responsibilities of statutory OOHC and adoption service providers. The additional accreditation criteria would be developed in consultation with the sector.

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<sup>71</sup> Part 3A, Division 4

<sup>72</sup> Part 3A, Division 5

<sup>73</sup> Part 3A, Division 6

<sup>74</sup> See proposed definition of 'Child Safe Organisation' in Schedule 6, Dictionary.

By coming within the scope of the child safe scheme, designated agencies and accredited adoption service providers would also come within the ambit of the enforcement framework. As presently drafted, the proposed Part 9A of the CG Act is made up of two key divisions that provide for two different means of enforcement action. Division 1 relates to compliance notices and division 2 relates to enforceable undertakings. A compliance notice is a formal notice given to a child safe organisation of its failure to implement the CCS. Enforceable undertakings are an alternative enforcement measure to the issue of a compliance notice, that might be used where an organisation is willing to rectify systemic issues in the organisation's approach to child safety, and there is agreement by the head of the child safe organisation about specific action that needs to be taken to address risk to child safety.

In the child safe scheme, enforcement is based on penalties<sup>75</sup>. It is envisaged, however, that where the accreditation system and the child safe scheme merge, while compliance notices and enforceable undertaking may be included, there will be no penalties for non-compliance. Enforcement decisions would continue to be linked to conditions on accreditation or shortening or cancelling an agency's accreditation, maintaining the existing compliance and enforcement framework in the accreditation scheme.

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<sup>75</sup> See offence provisions in proposed ss 152F and 152J.

### Questions

- What are your views on the statutory OOHC and adoption sectors combining under the Child Safe Scheme?
- What are your views on the 10 Child Safe Standards (and additional sector-specific accreditation criteria) becoming the new standards for the accreditation of statutory OOHC and adoption providers in the future?
- Are there benefits to having one set of standards across all child-related organisations? Or should the statutory OOHC and adoption sector remain as a separate scheme with its own Standards?
- If your agency provides other child-related services in addition to statutory OOHC/adoption, and the sector supports a separate set of standards for statutory OOHC and adoption providers, do you anticipate any challenges with operating under two sets of standards?
- If the 10 Child Safe Standards were to replace the existing standards, what other accreditation criteria should be included to reflect the particular needs of children and young people in statutory OOHC or adoption?
- What are your views on how enforcement would operate for statutory OOHC and adoption providers, under the child safe scheme?

## Next steps

Comments and feedback to the proposals contained in this paper are welcome and can be provided by email to [accreditation@ocg.nsw.gov.au](mailto:accreditation@ocg.nsw.gov.au) by **8 December 2021**.

Following feedback from the sector, the OCG will work with Parliamentary Counsel's Office to progress the proposed amendments and further consultation with the sector may occur to assist in policy development.

If supported, the amendments will commence on 1 September 2022 and information will be provided to the sector regarding the impact of any amendments on agencies' operations.

The OCG will further consider the timing of the review of the Standards, taking into account the impact of the pandemic on the workforce and sector workloads.