

LGNSW SUBMISSION

# STATUTORY REVIEW of the CHILDREN'S GUARDIAN ACT

AUGUST 2022

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.



# OVERVIEW OF THE LOCAL GOVERNMENT SECTOR



Local government in NSW employs more than **55,000 people**



Local government in NSW looks after more than **\$136 billion of community assets**



Local government in NSW spends more than **\$1.9 billion each year on caring for the environment, including recycling and waste management, stormwater management and preserving and protecting native flora and fauna**



NSW has 450 council-run libraries that attract more than **34.8 million visits each year**



Local government in NSW is responsible for about **90% of the state's roads and bridges**



NSW councils manage an estimated **3.5 million tonnes of waste each year**



NSW councils own and manage more than **600 museums, galleries, theatres and art centres**

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# OPENING

Thank you for the opportunity to provide comment on the review of the Children's Guardian Act 2019 (CG Act) This submission was endorsed by the LGNSW Board in September 2022.

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW notes that sections of the Act relating to the Child Safe Scheme are not being reviewed at this time, with the review instead focusing on the Reportable Conduct Scheme and a number of other sections. LGNSW has provided comments to a select number of consultation questions posed by the Office of the Children's Guardian (OCG).

# THE REPORTABLE CONDUCT SCHEME AS IT APPLIES TO COUNCILS

The Reportable Conduct Scheme applies to public authorities, including councils, county councils and joint organisations. The Scheme also applies to religious bodies and a range of other institutions in health, education, care and justice.

NSW councils employ over 50,000 people and also use the services of volunteers and contractors. Many council occupations have direct and indirect contact with children and young people.

Councils in NSW promote, provide and plan for the needs of children and young people as residents of local government areas (LGAs). Interaction with children and young people can occur through direct service and infrastructure provision as well as through council policy creation and planning.

# RESPONSE TO CONSULTATION QUESTIONS

## REPORTABLE CONDUCT

### Strengths and Weaknesses

1. What, in your view, are the key strengths and weaknesses of the reportable conduct scheme, as it currently operates under the *CG Act*?

A strength of the Reportable Conduct Scheme, as opposed to the Working with Children Check (WWCC) Scheme, is that it applies to all employees in a relevant entity. This creates simplicity.

In addition to employees, the Scheme also applies to volunteers who provide services to children, contractors required to hold WWCCs and the head of entity of a contractor providing services to children.

The OCG Reportable Conduct Team, during training sessions for councils in 2021, stated that there had been very few reports from councils in sections outside of early education and care (ECEC). Councils have suggested this may be the result of a few weaknesses:

- Although the Scheme applies to all employees in a relevant entity, there is a widespread assumption that the Scheme does not cover all council employees
- Lack of understanding of the scheme by managers outside ECEC
- Severe incidences (that reach the severity threshold for being reported) might be less likely to occur in cases of indirect or casual engagement with children.



**Recommendation 1:** To help raise awareness of who the Scheme applies to, there is a need for OCG to produce greater guidance for councils, including a broad range of examples of hypothetical incidences in a local government context.

Examples are also needed of incidences involving council employees who are not required to have a WWCC. Training and examples of how the Scheme applies in virtual settings would also be beneficial.

The application of the Scheme to the in-work conduct of all employees, and both in and outside of work conduct of those who hold a WWCC, can be confusing.





**Recommendation 2:** The OCG should review the number and types of reports made about outside-of-work conduct to evaluate the effectiveness of this part of the Scheme.

## Child Safe Scheme and Reportable Conduct Scheme Operating Together

**3.** How do you consider the child safe scheme and the reportable conduct scheme can operate most efficiently together within the context of the objects of the CG Act as set out in section 6 of the CG Act?

The Reportable Conduct Scheme and the Child Safe Scheme operate effectively together under the CG Act because monitoring and reporting is one part of the broader reforms under the Child Safe Scheme. The Reportable Conduct Scheme is one way to monitor how an organisation is meeting the overall objectives.

However, further changes are required to ensure the two Schemes operate most efficiently together.



**Recommendation 3:** The OCG should remove the inconsistencies as to which entities the Reportable Conduct Scheme applies and which entities the Child Safe Scheme applies. The relevant entities under each scheme should be the same.

Sporting and recreational organisations are in their own right directly subject to the Child Safe Scheme as named ‘Child Safe Organisations’. However, the same sporting and recreational organisations do not appear to be directly subject to the Reportable Conduct Scheme, as these organisations do not meet the definition of Schedule 1 entity’, ‘a public authority’ or a ‘religious body’. Many councils in NSW use third party organisations (contractors) to operate services such as aquatic and recreation centres on their behalf. As “contractors” these organisations are currently only subject to the reportable conduct scheme by virtue of their contract with the council. This is confusing and not necessarily in the best interest of the child.



**Recommendation 4:** The OCG should rectify the inconsistency that the same aquatic and recreation centre operated by an organisation other than a council, may not be subject to the Reportable Conduct Scheme whereas a council-run service is subject to the Scheme.

## Entities covered by Reportable Conduct

**4.** Should the application of the reportable conduct scheme be limited to entities that provide services to children only?

As mentioned above, if an organisation is subject to the Child Safe Scheme, the organisation should also be subject to the Reportable Conduct Scheme. This could help avoid confusion. Entities that provide services to only children are not reflective of the range of services which children access alongside people of all ages (such as

libraries, public courts and fields and sport/recreation facilities).



**Recommendation 5:** The Reportable Conduct Scheme should apply to all organisations under the Child Safe Scheme, as children are an integral participant in broad community activities.

For entities that provide services to only children, they will continue to have stricter child-related regulations as many of those roles may be subject to a Working with Children Check as well.

## Compliance

**7. Do smaller, less resourced organisations have difficulty complying with the reportable conduct scheme? How could these challenges be overcome?**

Councils provide a large range of services and regulatory functions in the community and have functions, powers and obligations as set out in the Local Government Act 1993 as well as in multiple other pieces of legislation. The increasing compliance and reporting burden on local government is placing councils under increasing financial pressure. This is the result of councils being required to meet additional requirements or functions often without any additional source of funding or resources to do so. Additionally, like many sectors since the COVID-19 pandemic, councils have been struggling with skill and labour shortages.

Under the Reportable Conduct Scheme there is an additional requirement for local government, compared to private businesses, to report. As the Reportable Conduct Scheme applies to all employees in a council, this can mean that those who don't work directly with children may struggle to understand the complexities of the Scheme. Untangling the interrelated responsibilities under the Child Safe Scheme, the Reportable Conduct Scheme, the Working with Children Check Scheme, mandatory reporting, other codes of conduct, and other laws is difficult without a legal expert or a person trained in child protection. Instructions provided by OCG need to include case study examples in different contexts such as parks, community halls and pools etc.



**Recommendation 6:** Councils need further guidance as to who falls under the Reportable Conduct Scheme, who is responsible for making a report, and how to make a report. There also needs to be more awareness raising in the local government sector that the Reportable Conduct Scheme applies to the whole of organisation. Council employees need to know where they can seek assistance in navigating the Reportable Conduct Scheme and other parts of the CG Act.

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



**Recommendation 7:** The definition of employee needs to be further clarified, particularly regarding whether Councillors are employees for the purposes of the Reportable Conduct Scheme.

Some aspects that need to be clarified in the local government context are:

- Whether the Reportable Conduct Scheme applies to Councillors and members of parliament and if so, which entity is the relevant employer in this case.
- It is inconsistent that all employees are covered by the Reportable Conduct Scheme but volunteers are only covered if they are providing services to children. As mentioned earlier, entities that provide services only to children are rare compared to the broad range of services that councils provide in the community. This causes confusion as to which volunteers are covered by the Scheme.

**14. Does the definition of “employee” need to be clarified further? If so, in what respect?**



**Recommendation 8:** It would be helpful to recognise the different ways councils use contractors and which ones the Reportable Conduct Scheme applies to, in order to clarify who is the head of entity.

Councils use contractors under a variety of conditions such as being employed for 12 or 24 months, being employed through labour hire agencies, or employing sole traders or organisations through a procurement process for a service. In some cases contractors are under the supervision of Council staff and in other cases the contractor is asked to take over the running of the service on behalf of Council. In the latter case, determining who the head of entity is can be tricky.



**Recommendation 9:** OCG should consider the inconsistency that all employees are covered under the Reportable Conduct Scheme but contractors are only under the scheme if they have a WWCC.

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



**Recommendation 10:** The OCG should address challenges with implementing the third-party and contractor provisions relating to determining which organisation is ultimately accountable, including in cases of subcontracting.

If a Council has contracted a function out, is it the Council’s head of entity or the contractor’s head of entity that OCG is going to hold accountable? In this case, if the function has been completely contracted out, then it should be the contractor’s head of entity who is held accountable, with a notification to the procuring organisation.



Sometimes sub-contractors are employed contractors e.g. A Council contracts a pool operator for the leisure centre, and the operator contracts a particular swim trainer or learn to swim school. In this case accountability should rest with who ultimately has control of the environment. In the example listed, Council is the merely the building owner, but the pool operator has control of the environment and business offerings and therefore employees of the pool operator would report to the contractor's head of entity and not the Council.

**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?**

Yes, we have suggested this above. Examples of sporting and recreation organisations that are sometimes run by third party contractors on behalf of councils include gyms, tennis courts, pools, youth services, early learning, and outside school hours care. These contracted services would be listed as relevant entities under the Reportable Conduct Scheme so they meet the same requirements as though the Council was directly operating those services.

## Categories and thresholds

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



**Recommendation 11:** More specific examples of thresholds for Reportable Conduct in a local government context would help clarify thresholds.

Thresholds that need to be clarified include:

- “In the presence of a child” – does this include online?
- What is the threshold at which cruelty, harassment and bullying might constitute Reportable Conduct?
- What is “significant”?

**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?**



**Recommendation 12:** It is best to leave breaches of employment codes of conduct in the hands of each organisation rather than have these be subject to the Reportable Conduct Scheme.

No, they should not be considered Reportable Conduct as this would be too ambiguous and too hard to apply. LGNSW also notes the discussion paper's comment that including such breaches that would otherwise not be considered reportable conduct would risk diverting attention and resources from more serious matters presenting serious risks to the safety and welfare of children.

**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?

Yes, and it is effective for councils to address breaching of professional boundaries internally at the code of conduct level. Each council has a code of conduct to help guide acceptable and unacceptable behaviour. In addition, some councils may have a child safe code of conduct separate to the council code of conduct. Depending on the service type that council is operating, such as ECEC, there may be separate codes of conduct with really specific lists, or sometimes these services have an operational procedure for each work environment.

It is effective when a code of conduct encourages reports at an internal level. This report is then ideally triaged by the appointed person in the council (i.e. managers/HR/risk and governance/internal ombudsman or other sufficiently trained officer), and then decisions are made as to which agency is notified and whether the report meets the threshold of Reportable Conduct.

## Notifications

**28.** Given the rationale for the seven-business-day notification requirement, and the limited information that is required to be provided at that stage, is the timeframe appropriate?

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

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

**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?

Regarding questions 28 – 31, there is a current requirement for the head of entity, 7 days after the reportable allegation, to provide limited information to the OCG about the internal investigation so far. The information provided after 7 days is not a complete investigation and it is therefore difficult for any conclusions to be made and

difficult for Council to indicate initial findings. Entities are then asked to provide the full report within 30 days.



**Recommendation 13:** Instead of the 7-day notification requirement, an initial, simple notification should be required within 24 – 48 hours of the alleged incident (or within 24 – 48 hours of the head of entity being made aware of the reportable allegation).

After the initial notification, the OCG should provide early feedback as to whether the incident falls within the Reportable Conduct Scheme. Then entities could be required to complete the full investigation within 30 days and hand their findings over to the OCG.



**Recommendation 14:** A timeline of no more than 30 days is seen as appropriate for the full investigation. After 30 days, if further investigations are required, the responsibility would fall to child protection experts in OCG.

A staff member at the centre of the allegation may need to be stood down for that period of time and therefore an investigation should not extend longer than 30 days. Also, any longer timeframe would put pressure on the council or entity to conduct a complex investigation that may be outside of their capacity or resourcing.



**Recommendation 15:** When an incident has occurred in an ECEC setting, only one investigation should take place, preferably by the Department of Education (which requires a separate system of incident notification).

## OCG monitoring, oversight and powers

**39.** Should it be mandatory for the Children's Guardian to investigate a reportable allegation about the head of a relevant entity?



**Recommendation 16:** The OCG should be required to investigate allegations about the head of an entity to mitigate any risks associated with an internal investigation.

It may be difficult for internal staff to investigate a head of entity.

**41.** Should the Children's Guardian have other powers, for example, the power to direct an entity to re-investigate 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 the powers should be?



**Recommendation 17:** The OCG shouldn't be able to direct an

entity to reinvestigate if the entity has completed a report.

If OCG has a reason to believe further investigation is required, then the OCG should complete the investigation, or an independent person. The report completed by an entity could be required to include information on methodology to assist the OCG to determine whether an investigation was flawed, findings were perverse and whether reinvestigation is required.

**42. Should an employee who has been investigated have a right to apply to the Children's Guardian for a review of the entity's findings or actions taken by the entity?**

Each organisation should have an internal review process for procedural fairness.



**Recommendation 18:** If an employee is not satisfied with the internal appeal process, then they should have the right to seek review by the OCG.

## CONCLUSION

The Reportable Conduct Scheme and the Child Safe Scheme now sit together in the Children's Guardian Act and this is welcome because reporting is one part of the broader Child Safe reforms. However, further changes are required to ensure the two Schemes operate most efficiently together, particularly ensuring that the organisations that each Scheme applies to are the same.

This submission has also asked for clarification of:

- The types of incidences and thresholds that councils should be reporting
- The head of entity when services have been contracted or subcontracted
- Whether, and how, councillors are covered by the Scheme.

Overall, councils would welcome many more examples of how the Reportable Conduct Scheme could/should apply in a variety of council contexts.

LGNSW would welcome the opportunity to assist with further information during this review to ensure the views of local government are considered.

To discuss this submission further, please contact Damian Thomas, LGNSW Director Advocacy at [damian.thomas@lgnsw.org.au](mailto:damian.thomas@lgnsw.org.au).

# SUMMARY OF RECOMMENDATIONS



**Recommendation 1:** To help raise awareness of who the Scheme applies to, there is a need for OCG to produce greater guidance for councils, including a broad range of examples of hypothetical incidences in a local government context.



**Recommendation 2:** The OCG should review the number and types of reports made about outside-of-work conduct to evaluate the effectiveness of this part of the Scheme.



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