

# Children's Guardian Act 2019 No 25

[2019-25]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

### Notes—

- **Does not include amendments by**  
Sch 5.10[5]–[7] of this Act (not commenced)  
[Government Sector Finance Legislation \(Repeal and Amendment\) Act 2018 No 70](#) (amended by [Children's Guardian Act 2019 No 25](#)), Sch 4.16 (not commenced)
- **See also**  
[Stronger Communities Legislation Amendment \(Courts and Civil\) Bill 2020](#)  
[Statute Law \(Miscellaneous Provisions\) Bill 2020](#)

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Children's Guardian Act 2019 No 25



New South Wales

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# Children's Guardian Act 2019 No 25



New South Wales

An Act to make provision with respect to the office of the Children's Guardian; to provide for the functions of that office; to provide for the safety, welfare and wellbeing of children; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Children's Guardian Act 2019*.

### 2 Commencement

- (1) Subject to subsection (2), this Act commences on 1 March 2020.
- (2) The following provisions commence on a day or days to be appointed by proclamation—
  - (a) section 131,
  - (b) section 132,
  - (c) items 5–7 of Schedule 5.10.

## Part 2 Application and interpretation

### Division 1 Application of Act

#### 3 Children to whom this Act applies

The functions conferred or imposed by this Act and the regulations may be exercised in relation to children—

- (a) who ordinarily live in New South Wales, or
- (b) who do not ordinarily live in New South Wales but who are present in New South Wales, or
- (c) who are—

- (i) for Part 4—subject to an event or circumstance, whether occurring in New South Wales or elsewhere, that is committed by a person who is an employee of a relevant entity (within the meaning of Part 4) and that gives rise to a report (within the meaning of Part 4), or
- (ii) otherwise—subject to an event or circumstance occurring in New South Wales that gives rise to a report.

## Division 2 Interpretation

### 4 Definitions

- (1) The Dictionary in Schedule 6 defines certain terms used in this Act.

**Note—**

The [Interpretation Act 1987](#) also contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) Notes and examples included in this Act do not form part of this Act.

### 5 References to “commencement”

- (1) In this Act, a reference to **commencement** for this Act or a provision of this Act is a reference to the time this Act or provision comes into operation.
- (2) In a provision of this Act, a reference to **the commencement** without indicating a particular Act or provision is a reference to the commencement of the provision in which the reference occurs.

## Part 3 Objects and principles

### 6 Main object of Act

The main object of this Act is to protect children by providing for the role and functions of the office of the Children's Guardian, including—

- (a) promoting the quality of organisations and persons providing services to children, and
- (b) regulating those organisations and persons in providing those services.

### 7 Paramount consideration

The safety, welfare and wellbeing of children, including protecting children from child abuse, is the paramount consideration in decision-making under this Act and the regulations and in the operation of this Act and the regulations generally.

### 8 Guiding principles

The guiding principles to be applied in administering this Act and the regulations are—

- (a) if a child is able to form views on a matter concerning the child's safety, welfare and wellbeing—
  - (i) the child must be given an opportunity to express the views freely, and
  - (ii) the views are to be given due weight in accordance with the developmental capacity of the child and the circumstances, and
- (b) in all actions taken and decisions made under this Act and the regulations that significantly affect a child, account must be taken of the culture, disability, language, religion, gender identity and sexuality of—
  - (i) the child, and
  - (ii) if relevant, the person with parental responsibility for the child, and
- (c) in deciding what action is necessary to protect a child from harm, the course to be followed must be the least intrusive intervention in the life of the child and the child's family that is also consistent with the paramount consideration, and
- (d) in decision-making under this Act and the regulations and the investigation or monitoring of persons, the Children's Guardian must observe the principles of natural justice and ensure procedural fairness, and
- (e) in decision-making under this Act and the regulations in relation to an Aboriginal child or a Torres Strait Islander child, the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles set out in section 13 of the *Children and Young Persons (Care and Protection) Act 1998*, and
- (f) if a child is placed in out-of-home care, the child is entitled to a safe, nurturing, stable and secure environment.

## **Part 4 Reportable conduct**

### **Division 1 Preliminary**

#### **9 Objects of Part**

The objects of this Part are for the Children's Guardian to protect children from harm by—

- (a) administering a scheme to report and notify a reportable allegation or a conviction considered to be a reportable conviction to the head of a relevant entity and the Children's Guardian, and
- (b) providing oversight and guidance on an investigation undertaken by the head of a relevant entity, and
- (c) conducting investigations and inquiries into reports about reportable allegations and convictions considered to be reportable convictions and the response to, and handling

of, reports by relevant entities, and

- (d) ensuring appropriate action is taken by a relevant entity, and
- (e) monitoring a relevant entity's systems for preventing, detecting and dealing with reportable conduct and reportable convictions, and
- (f) providing advice and education to relevant entities to assist relevant entities in detecting and dealing with reportable conduct and reportable convictions.

## 10 Definitions

In this Part—

**assault** see section 25.

**Children's Guardian report** see section 49.

**complaint** means—

- (a) a report given to the Children's Guardian under section 27(2)(b) or (3)(b), or
- (b) a complaint made to the Children's Guardian under section 28(1) or (2).

**contractor** includes—

- (a) a subcontractor, and
- (b) an employee of, or volunteer for, the contractor.

**employee**, of a relevant entity, see section 16.

**employment** includes engagement of a person as a volunteer or contractor taken to be an employee under this Part.

**entity report** see section 36(1).

**finding of reportable conduct** see section 26.

**head**, of a relevant entity, see section 17.

**ill-treatment**, of a child, see section 23.

**investigation**, of a matter, includes any preliminary or other inquiry into, or examination of, the matter, other than a preliminary inquiry under section 44.

**investigator** means a person conducting an investigation on behalf of the head of a relevant entity, including a delegate.

**local government authority** see section 15.

**neglect**, of a child, see section 24.

**notification** see section 29(2).

**public authority** see section 14.

**relevant entity** see section 12.

**religious body** see section 15A.

**report** means—

- (a) a report made to the head of a relevant entity under section 27(2)(a) or (3)(a), or
- (b) if the head of a relevant agency otherwise becomes aware of a matter under section 29(1)(b).

**reportable allegation** see section 18.

**reportable conduct** see section 20.

**reportable conduct scheme** see section 11.

**reportable conviction** see section 19.

**responsible Minister** means—

- (a) for a relevant entity that is a government sector agency or a person employed in a government sector agency—
  - (i) the Minister responsible for the agency, or
  - (ii) if there is more than one Minister responsible for the agency, the Minister who, in the opinion of the Children's Guardian, is most nearly connected with the conduct of the agency, and
- (b) for a relevant entity that is a local government authority—the Minister administering the [Local Government Act 1993](#), and
- (c) for a relevant entity, not referred to in paragraph (a) or (b), involved in the administration of an Act or part of an Act—the Minister administering the Act or the relevant part of the Act, and
- (d) for a Schedule 1 entity that is not referred to in paragraphs (a)–(c)—
  - (i) the Minister whose portfolio has, in the opinion of the Children's Guardian, sufficient funding or regulatory responsibility for the entity to warrant involvement on the Minister's part in relation to the entity, or
  - (ii) otherwise—the Minister who is, in the opinion of the Children's Guardian, a



Minister sufficiently concerned with the conduct of the entity, and

- (e) for a person employed by a political office holder under Part 2 of the *Members of Parliament Staff Act 2013*—the Premier, and
- (f) for any other relevant entity—the Minister who, in the opinion of the Children's Guardian, is the most closely concerned with the conduct of the entity.

**Schedule 1 entity** see section 13.

**sexual misconduct** see section 22.

**sexual offence** see section 21.

## Division 2 Key concepts for Part

### 11 Meaning of “reportable conduct scheme”

**Reportable conduct scheme** means the scheme established under this Part to investigate reportable allegations and make determinations in relation to reportable convictions.

### 12 Meaning of “relevant entity”

**Relevant entity** means—

- (a) a Schedule 1 entity, or
- (b) a public authority, or
- (c) a religious body.

### 13 Meaning of “Schedule 1 entity”

**Schedule 1 entity** means—

- (a) an entity mentioned in Schedule 1, or
- (b) an authorised carer that is not employed by, or in, an entity mentioned in Schedule 1, or
- (c) an adult who, under section 10 of the *Child Protection (Working with Children) Act 2012*, is required to hold a working with children check clearance because the adult resides on the same property as an authorised carer for 3 weeks or more, or
- (d) an entity, or part of an entity, prescribed by the regulations for this definition.

### 14 Meaning of “public authority”

**Public authority** means—

- (a) a government sector agency within the meaning of the *Government Sector Employment Act 2013*, or
- (b) a person specified in section 5(1)(a), (b) and (d)–(f) of the *Government Sector Employment Act 2013*, or
- (c) a local government authority, or
- (d) a statutory body representing the Crown, or
- (e) a statutory officer, or
- (f) a body, whether incorporated or unincorporated, established for a public purpose under the provisions of a legislative instrument, or
- (g) a State-owned corporation, or
- (h) a university established under an Act, or
- (i) an Aboriginal Land Council within the meaning of the *Aboriginal Land Rights Act 1983*, or
- (j) an entity, or part of an entity, declared by the regulations to be a public authority for this definition.

#### **15 Meaning of “local government authority”**

**Local government authority** means a council, county council or joint organisation under the *Local Government Act 1993*.

#### **15A Meaning of “religious body”**

**Religious body** means—

- (a) a body established for a religious purpose, and
- (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

#### **16 Meaning of “employee”**

(1) **Employee**, of a relevant entity, means the following—

- (a) for a Schedule 1 entity—
  - (i) an individual employed by, or in, the Schedule 1 entity, or
  - (ii) if the entity is an individual—the individual, or
  - (iii) if an individual is engaged directly, or by a third party, as a volunteer to

provide services to children—the volunteer, or

(iv) if an individual is engaged directly, or by a third party, as a contractor and the contractor holds, or is required to hold, a working with children check clearance for the purpose of the engagement—the contractor,

(b) for a public authority—

(i) an individual employed by, or in, the public authority, or

(ii) if the public authority is an individual—the individual, or

(iii) if an individual is engaged directly, or by a third party, as a volunteer to provide services to children—the volunteer, or

(iv) if an individual is engaged directly, or by a third party, as a contractor and the contractor holds, or is required to hold, a working with children check clearance for the purpose of the engagement—the contractor, or

(c) for a religious body—an individual who holds, or is required by the religious body to hold, a working with children check clearance for the purpose of engagement with the religious body.

(2) For a public authority, a person is also an employee of the authority if—

(a) the person exercises official functions or acts in a public official capacity in the service of the authority, or

(b) the person is otherwise in the service of the Crown.

(3) Also, for the purposes of this Part, an employee includes—

(a) a visiting health practitioner if the visiting health practitioner holds, or is required to hold, a working with children check clearance for the purpose of appointment with the entity, and

(b) a person employed under Part 2 of the *Members of Parliament Staff Act 2013*, and the person is taken to be an employee of a public authority.

(4) If an employee is an employee of a Schedule 1 entity that is also a public authority, the provisions relating to the Schedule 1 entity apply to the employee for this Part.

(5) In this section—

**health care services** means a service ordinarily provided by a health practitioner.

**health practitioner** has the same meaning as in the *Health Practitioner Regulation National Law (NSW)*.

**visiting health practitioner** means a person who is appointed, employed,

contracted or otherwise engaged by a Schedule 1 entity to provide health care services.

### **17 Meaning of “head” of relevant entity**

- (1) **Head**, of a relevant entity, means—
- (a) for an entity that is a Department—the Secretary of that Department or the Secretary's delegate, or
  - (b) if the regulations prescribe a person or a class of persons as the head of the entity—the prescribed person or a person belonging to the class of persons prescribed, or
  - (c) otherwise—
    - (i) the chief executive officer of the entity, however described, or
    - (ii) if there is no chief executive officer, the principal officer of the entity, however described, or
    - (iii) if there is no chief executive officer or principal officer, a person approved by the Children's Guardian under section 66.
- (2) In relation to a person employed under Part 2 of the *Members of Parliament Staff Act 2013* by a member of Parliament, the member of Parliament is taken to be a public authority and the head of the authority.

### **18 Meaning of “reportable allegation”**

- (1) **Reportable allegation**, in relation to an employee of a Schedule 1 entity, means an allegation that the employee has engaged in conduct that may be reportable conduct, whether or not the conduct is alleged to have occurred in the course of the employee's employment with the Schedule 1 entity.
- (2) **Reportable allegation**, in relation to an employee of a public authority, means—
- (a) if the employee holds, or is required to hold, a working with children check clearance for the purpose of employment with the public authority—an allegation that the employee has engaged in conduct that may be reportable conduct, whether or not the conduct is alleged to have occurred in the course of the employee's employment, or
  - (b) if the employee is not required to hold a working with children check clearance for the purpose of employment with the public authority—an allegation that the employee has engaged in conduct that may be reportable conduct, unless the conduct is alleged to have occurred outside the course of the employee's employment with the public authority.

- (3) A reference in this Part to a reportable allegation includes an allegation in respect of conduct occurring before the commencement.

### **19 Meaning of “reportable conviction”**

- (1) **Reportable conviction** means a conviction, including a finding of guilt without the court proceeding to a conviction, in this State or elsewhere, of an offence involving reportable conduct—
- (a) in relation to an employee of a Schedule 1 entity—whether or not the conduct occurred in the course of the employee’s employment with the Schedule 1 entity, or
  - (b) in relation to an employee of a public authority—
    - (i) if the employee holds, or is required to hold, a working with children check clearance for the purpose of employment with the public authority—whether or not the conduct occurred in the course of the employee’s employment, or
    - (ii) if the employee is not required to hold a working with children check clearance for the purpose of employment with the public authority—unless the conviction relates to conduct that occurred outside the course of the employee’s employment with the public authority.
- (2) A reference in this Part to a reportable conviction includes a conviction in respect of conduct occurring before the commencement.

### **20 Meaning of “reportable conduct”**

**Reportable conduct** means the following conduct, whether or not a criminal proceeding in relation to the conduct has been commenced or concluded—

- (a) a sexual offence,
- (b) sexual misconduct,
- (c) ill-treatment of a child,
- (d) neglect of a child,
- (e) an assault against a child,
- (f) an offence under section 43B or 316A of the *Crimes Act 1900*,
- (g) behaviour that causes significant emotional or psychological harm to a child.

**Examples of indicators of significant emotional or psychological harm for paragraph (g)—**

- 1** displaying behaviour patterns that are out of character
- 2** regressive behaviour
- 3** anxiety or self-harm

## 21 Meaning of “sexual offence”

**Sexual offence** means an offence of a sexual nature under a law of the State, another State, a Territory, or the Commonwealth, committed against, with or in the presence of a child.

### Examples of sexual offences—

- 1 sexual touching of a child
- 2 a child grooming offence
- 3 production, dissemination or possession of child abuse material

## 22 Meaning of “sexual misconduct”

**Sexual misconduct** means conduct with, towards or in the presence of a child that—

- (a) is sexual in nature, but
- (b) is not a sexual offence.

### Examples of sexual misconduct—

- 1 descriptions of sexual acts without a legitimate reason to provide the descriptions
- 2 sexual comments, conversations or communications
- 3 comments to a child that express a desire to act in a sexual manner towards the child or another child

## 23 Meaning of “ill-treatment”

**Ill-treatment**, of a child, means conduct towards a child that is unreasonable and seriously inappropriate, improper, inhumane or cruel.

### Examples of ill-treatment—

- 1 making excessive or degrading demands of a child
- 2 a pattern of hostile or degrading comments or behaviour towards a child
- 3 using inappropriate forms of behaviour management towards a child

## 24 Meaning of “neglect”

**Neglect**, of a child, means a significant failure to provide adequate and proper food, supervision, nursing, clothing, medical aid or lodging for the child, that causes or is likely to cause harm to a child, by—

- (a) a person with parental responsibility for the child, or
- (b) an authorised carer of the child, or
- (c) an employee, if the child is in the employee's care.

### Examples of neglect—

- 1 failing to protect a child from abuse
- 2 exposing a child to a harmful environment, for example, an environment where there is illicit drug use or illicit drug manufacturing

## 25 Meaning of "assault"

**Assault** means—

- (a) the intentional or reckless application of physical force without lawful justification or excuse, or
- (b) any act which intentionally or recklessly causes another to apprehend immediate and unlawful violence.

**Examples of assault—**

- 1 hitting, striking, kicking, punching or dragging a child
- 2 threatening to physically harm a child

## 26 Meaning of "finding of reportable conduct"

**Finding of reportable conduct** means a finding, by a relevant entity or the Children's Guardian, as a result of an investigation conducted under this Part, that a reportable allegation is sustained.

## Division 3 Reports, complaints and notifications

### 27 Who must give report of reportable allegation or conviction

- (1) This section applies if a person (the **first person**) becomes aware of either of the following matters in relation to an employee of a relevant entity—
  - (a) a reportable allegation,
  - (b) a conviction the person considers is a reportable conviction.
- (2) If the first person is also an employee of the relevant entity, the person must, as soon as practicable after becoming aware of the matter—
  - (a) report the matter to the head of the relevant entity, or
  - (b) if the employee to whom the matter relates is the head of the relevant entity, report the matter to the Children's Guardian.
- (3) If the first person is not also an employee of the relevant entity, the person may—
  - (a) report the matter to the head of the relevant entity, or
  - (b) if the employee is the head of the relevant entity, report the matter to the Children's Guardian.

### 28 Complaints to Children's Guardian

- (1) If a person who gives a report is dissatisfied with the response of the head of the relevant entity to the report, the person may make a complaint to the Children's

Guardian.

- (2) Another person or other entity dissatisfied with the response of the head of the relevant entity to the report may also make a complaint to the Children's Guardian.

## **29 Children's Guardian to be given notification of reports**

- (1) This section applies if the head of a relevant entity—
- (a) receives a report in relation to an employee of the relevant entity, or
  - (b) otherwise becomes aware of a reportable allegation in relation to an employee of the relevant entity or a conviction that is considered to be a reportable conviction.
- (2) The head of the relevant entity must give the Children's Guardian a written notice (a **notification**) about the reportable allegation or conviction considered to be a reportable conviction that states—
- (a) that a report has been received in relation to an employee of the relevant entity, and
  - (b) the type of reportable conduct the subject of the report, and
  - (c) the name of the employee, and
  - (d) the name and contact details of the relevant entity and the head of the relevant entity, and
  - (e) for a reportable allegation—whether the Commissioner of Police has been notified of the allegation, and
  - (f) if a report has been made under section 24 of the *Children and Young Persons (Care and Protection) Act 1998*—that the report has been made, and
  - (g) the nature of the relevant entity's initial risk assessment and risk management action, and
  - (h) any other information prescribed by the regulations.
- (3) The notice must also include the following, if known to the head of the relevant entity—
- (a) details of the reportable allegation or conviction considered to be a reportable conviction,
  - (b) the date of birth and working with children number, if any, of the employee the subject of the report,
  - (c) for a reportable allegation of which the Commissioner of Police has been notified—the police report reference number,



(d) if a report has been made under section 24 of the *Children and Young Persons (Care and Protection) Act 1998*—the report reference,

(e) the names of other relevant entities that employ or engage the employee, whether or not directly, to provide a service to children, including as a volunteer or contractor.

(4) The head of the relevant entity must give the Children's Guardian the notice within 7 business days after the head of the entity is made aware of the report, unless the head of the relevant entity has a reasonable excuse.

Maximum penalty—10 penalty units.

(5) The head of the relevant entity may give the employee the subject of the report written notice that a report about a reportable allegation or conviction considered to be a reportable conviction has been made.

(6) The Children's Guardian may publish guidelines in relation to the matters that are appropriate for the head of a relevant entity to have regard to in deciding whether to provide the employee with written notice under subsection (5).

(7) In this section—

**working with children number** has the same meaning as in the *Child Protection (Working with Children) Act 2012*.

## **Division 4 Exempt conduct, managing investigations and determinations**

### **30 Children's Guardian may exempt conduct from reporting**

(1) The Children's Guardian may exempt a class or kind of conduct of employees of a relevant entity from being reportable conduct.

(2) The Children's Guardian may exempt a class or kind of conduct of employees of a relevant entity from being reportable conduct only if the Children's Guardian—

(a) has followed the procedures for exempting a class or kind of conduct prescribed by the regulations, and

(b) is satisfied the relevant entity, in relation to the exempt class or kind of conduct, meets the criteria, if any, prescribed by the regulations.

(3) For an exemption under this section, the Children's Guardian must—

(a) notify the relevant entity of the exemption, and

(b) publish the details of the class or kind of conduct and relevant entity with an exemption on the Office of the Children's Guardian's website.

- (4) The procedures and criteria referred to in subsection (2)(a) and (b) must also be published on the Office of the Children's Guardian's website.

### **31 Exemptions about investigations and investigation reports**

- (1) The Children's Guardian may, by written notice given to the head of a relevant entity, exempt the head from commencing or continuing either of the following—
- (a) an investigation into a reportable allegation,
  - (b) a determination as to whether a conviction considered to be a reportable conviction is a reportable conviction.
- (2) An exemption under subsection (1) applies until the head of the relevant entity is otherwise notified, in writing, by the Children's Guardian that the exemption is revoked.
- (3) An exemption under subsection (1) is taken to be an exemption from the requirement for the relevant entity to provide an entity report or an interim report.
- (4) Without limiting subsection (1), the Children's Guardian may exempt the head of a relevant entity if a matter is already being investigated by another relevant entity.
- (5) The Children's Guardian may also exempt the relevant entity from the requirement to provide an entity report or an interim report in relation to a matter after the Children's Guardian receives the notification for the matter.

### **32 Notice to require relevant entity to defer investigation**

- (1) This section applies if, in relation to an employee of a relevant entity—
- (a) the Children's Guardian intends to—
    - (i) investigate a reportable allegation or a matter arising from a reportable allegation, or
    - (ii) determine whether a conviction considered to be a reportable conviction is a reportable conviction, and
  - (b) an investigation or determination under section 34 has not been finalised.
- (2) The Children's Guardian may, by written notice given to the head of the relevant entity, require the head to defer the investigation or determination.
- (3) The Children's Guardian may, by further written notice to the head of the relevant entity, require the head to—
- (a) commence, continue or finalise the investigation or determination deferred under this section, or

(b) end the investigation or determination and take no further action.

### **33 Concurrent investigations or proceedings**

- (1) This section applies if the Commissioner of Police or the Director of Public Prosecutions advises the Children's Guardian, or the head of a relevant entity, that an investigation or determination under this Part is likely to prejudice a police investigation or court proceeding.
- (2) The Children's Guardian or head of the relevant entity may—
  - (a) suspend the investigation or a determination until otherwise advised, and
  - (b) after consulting the police officer in charge of the investigation or the Director of Public Prosecutions, take steps to manage any risks while the investigation or determination is suspended, and
  - (c) if the investigation or determination was being conducted by the head of a relevant entity—
    - (i) advise the Children's Guardian about the suspension under this section, and
    - (ii) advise the Children's Guardian of the steps being taken to manage risks.
- (3) Before making a decision about whether or not to suspend an investigation or determination, the Children's Guardian, or head of the relevant entity, must consult with the Commissioner of Police, or the Director of Public Prosecutions, who provided the advice under subsection (1).
- (4) If the Children's Guardian or head of the relevant entity decides not to suspend the investigation or determination, the Children's Guardian must ensure the investigation is conducted in a way that does not prejudice the police investigation or the court proceeding.
- (5) An investigation or determination by a relevant entity, suspended by operation of this section, is taken to be exempt from the requirement to provide an entity report or an interim report until the period of 30 days after the suspension has ended.
- (6) This section does not affect the operation of any other Act.
- (7) For the purposes of this section—
  - (a) a reference to a police investigation includes a reference to an investigation by the Australian Federal Police, an international investigation the Australian Federal Police are aware of, or a police investigation in another State or Territory, and
  - (b) a reference to a court proceeding includes a reference to a court proceeding in another State or Territory, and

- (c) a reference to the Commissioner of Police or the Director of Public Prosecutions includes a reference to a person holding the equivalent office in another State or Territory.

## **Division 5 Investigation or determination and report by relevant entity**

### **34 Investigation or determination by head of relevant entity**

- (1) As soon as practicable after receiving a report, the head of the relevant entity must—
  - (a) investigate, or arrange for an investigator to investigate, the reportable allegation, or
  - (b) determine whether the conviction considered to be a reportable conviction is a reportable conviction.
- (2) During an investigation or a determination, an employee the subject of a reportable allegation or a conviction considered to be a reportable conviction may give the head of the relevant entity a written submission concerning the allegation or conviction for the purpose of determining what, if any, disciplinary or other action should be taken in relation to the employee.
- (3) The investigation or determination must be completed within a reasonable time.

**Note—**

Section 138 requires information to be reported in particular circumstances.

### **35 Mandatory considerations**

The head of the relevant entity, or the investigator, in conducting an investigation into a reportable allegation must have regard to the matters in Division 6.

### **36 Report by relevant entity about investigation or determination**

- (1) After an investigation or determination is completed, the head of the relevant entity must prepare a report for the Children's Guardian (an **entity report**), unless—
  - (a) an exemption applies under section 31, or
  - (b) the head of the relevant entity has a reasonable excuse, or
  - (c) the Children's Guardian consents to an extension of time for the head of the relevant entity to prepare the report.

Maximum penalty—10 penalty units.

- (2) The entity report must be provided to the Children's Guardian within 30 days after the head of the entity receiving the report of the reportable allegation or conviction

considered to be a reportable conviction, unless the head of the relevant entity gives the Children's Guardian—

- (a) an interim report under section 38 within 30 days after receiving the report of the reportable allegation or conviction considered to be a reportable conviction, and
- (b) a reason for not providing the report within 30 days, and
- (c) an estimated time frame for the completion of the entity report.

Maximum penalty—10 penalty units.

- (3) Despite subsection (2), if the Children's Guardian consents to an extension of time under subsection (1)(c), the report is due by the date granted under the extension.
- (4) The entity may give the entity report to the employee of the relevant entity the subject of the report.

### **37 Contents of entity report**

- (1) The entity report must include the following—
  - (a) in relation to a reportable allegation—
    - (i) information about the facts and circumstances of the reportable allegation, and
    - (ii) the findings the head of the relevant entity has made about the reportable allegation after completing the investigation, including whether the head of the relevant entity has made a finding of reportable conduct, and
    - (iii) an analysis of the evidence and the rationale for the findings,
  - (b) in relation to a conviction considered to be a reportable conviction—
    - (i) information about the conviction considered to be a reportable conviction, and
    - (ii) the determination the head of the relevant entity has made about the conviction, including whether the head of the relevant entity has determined the conviction is a reportable conviction,
  - (c) a copy of any written submission made by the employee under section 34(2),
  - (d) information about what action has been, or will be, taken in relation to the reportable allegation or conviction considered to be a reportable conviction, including the following—
    - (i) remedial or disciplinary action in relation to the employee,
    - (ii) whether information about the matter has been referred to a different entity,
    - (iii) changes to systems or policies,

- (iv) if no further action is to be taken—that no further action is to be taken,
  - (e) the reasons for the action taken, including taking no further action,
  - (f) any other information prescribed by the regulations.
- (2) The entity report must also be accompanied by any copies of documents in the relevant entity's possession that are relevant to the report, including transcripts of interviews and copies of evidence.

### **38 Interim report**

An interim report must—

- (a) include the following information—
  - (i) in relation to a reportable allegation—if known, the facts and circumstances of the reportable allegation,
  - (ii) in relation to a conviction considered to be a reportable conviction—any known information about the conviction,
  - (iii) action taken since the Children's Guardian received a notification about the reportable allegation or the conviction considered to be a reportable conviction,
  - (iv) further action the head of the relevant entity proposes to take in relation to the reportable allegation or conviction considered to be a reportable conviction, including if the head of the relevant entity proposes to take no further action,
  - (v) the reasons for the action taken and the action proposed to be taken or the reasons for the decision to take no further action,
  - (vi) other information prescribed by the regulations, and
- (b) be accompanied by copies of documents in the relevant entity's possession, including transcripts of interviews and copies of evidence.

## **Division 6 Mandatory matters for consideration for reportable allegations**

### **39 Application of Division**

- (1) This Division applies in relation to a report, complaint or notification of a reportable allegation received by the head of a relevant entity, or by the Children's Guardian.
- (2) This Division does not apply in relation to a reportable conviction.

### **40 Assessing conduct**

- (1) The head of the relevant entity or the Children's Guardian must make a finding of

reportable conduct if it is satisfied that the case against the employee the subject of the reportable allegation has been proved against the employee on the balance of probabilities.

- (2) Without limiting the matters the head of the relevant entity or the Children's Guardian may take into account in deciding whether it is satisfied the case has been proved on the balance of probabilities, the head of the relevant entity or the Children's Guardian may take into account—
- (a) the nature of the reportable allegation and any defence, and
  - (b) the gravity of the matters alleged.
- (3) The head of the relevant entity or the Children's Guardian must consider whether the reportable allegation relates to conduct that is in breach of established standards applying to the employee of the relevant entity, having regard to the following—
- (a) professional standards,
  - (b) codes of conduct, including any professional or ethical codes,
  - (c) accepted community standards.

#### **41 Conduct that is not reportable conduct**

Reportable conduct does not include—

- (a) conduct that is reasonable for the purposes of discipline, management or care of a child, having regard to—
  - (i) the age, maturity, health or other characteristics of the child, and
  - (ii) any relevant code of conduct or professional standard, or
- (b) the use of physical force if—
  - (i) in all the circumstances, the physical force is trivial or negligible, and
  - (ii) the circumstances in which it was used have been investigated and the result of the investigation has been recorded in accordance with appropriate procedures, or
- (c) conduct of a class or kind exempted from being reportable conduct by the Children's Guardian under section 30.

##### **Example of conduct for paragraph (a)—**

a school teacher raising his or her voice in order to attract attention or restore order in a classroom

##### **Examples of conduct for paragraph (b)—**

- 1 touching a child in order to attract the child's attention

- 2 momentarily restraining a child to prevent the child hurting themselves or others
- 3 touching a child to guide or comfort the child

## **Division 7 Children's Guardian's powers in relation to reportable allegations and reportable convictions**

### **42 Children's Guardian may require further information**

After receiving a notification, the Children's Guardian may require the relevant entity to provide further information in relation to—

- (a) the reportable allegation or conviction considered to be a reportable conviction, or
- (b) the relevant entity's response to the notification.

### **43 Children's Guardian may monitor relevant entity's investigation or determination**

- (1) The Children's Guardian may, on the Children's Guardian's own initiative or because of a complaint, monitor the progress of an investigation or determination by the head of a relevant entity into a report if the Children's Guardian considers the monitoring is in the public interest.
- (2) Without limiting subsection (1), the Children's Guardian may do the following to monitor an investigation—
  - (a) observe interviews carried out for the purposes of the investigation,
  - (b) discuss the investigation with the head of the relevant entity,
  - (c) provide guidance and advice to the relevant entity about the investigation,
  - (d) by written notice, require the head of the relevant entity or the investigator to provide to the Children's Guardian documents or other information, including records of interviews, relating to the investigation,
  - (e) a thing prescribed by the regulations for this section.

## **Division 8 Investigation and report—Children's Guardian**

### **44 Preliminary inquiries**

- (1) The Children's Guardian may make preliminary inquiries to decide whether to carry out an investigation or determination under section 46.
- (2) The preliminary inquiries may be made whether or not the Children's Guardian has received a complaint or notification about a matter to which the complaint or notification relates.
- (3) Without limiting subsection (1), the Children's Guardian may, by written notice given to the entity that made the complaint or notification, require the entity to give the



Children's Guardian further written information about the matter the subject of the complaint or notification within the time stated in the notice.

- (4) Sections 16, 17, 18 and 19(1) of the *Privacy and Personal Information Protection Act 1998* do not apply to information disclosed under this section.
- (5) Despite the *Health Records and Information Privacy Act 2002*—
  - (a) a person may disclose health information, within the meaning of that Act, to the Children's Guardian in relation to preliminary inquiries by the Children's Guardian under this section, and
  - (b) the Children's Guardian may use the information for the purposes of this Part.

#### **45 Further information after receiving entity report**

- (1) After receiving an entity report, the Children's Guardian may require the head of the relevant entity to provide additional information the Children's Guardian considers necessary to enable the Children's Guardian to determine—
  - (a) whether—
    - (i) the reportable allegation was properly investigated, or
    - (ii) the conviction considered to be a reportable conviction was properly determined, and
  - (b) whether appropriate action was, or can be, taken as a result of the investigation or determination.
- (2) In this section—

**appropriate action** includes a penalty for the making of a reportable allegation that is shown to be false or misleading.

#### **46 Children's Guardian may investigate or determine**

- (1) The Children's Guardian may, if the Children's Guardian reasonably believes it is in the public interest—
  - (a) investigate a reportable allegation, or
  - (b) make a determination about a conviction considered to be a reportable conviction, or
  - (c) investigate the way in which a relevant entity has dealt with, or is dealing with, a report, complaint or notification.
- (2) An investigation or determination under subsection (1) may be carried out—
  - (a) on the Children's Guardian's own initiative, or

- (b) because of a complaint or notification, or
- (c) because the Children's Guardian is satisfied the head of a relevant entity is unable or unwilling to—
  - (i) investigate or determine a report, or
  - (ii) engage an investigator to carry out an investigation.

(3) The investigation or determination must be completed within a reasonable time.

**Note—**

Section 138 requires information to be reported in particular circumstances.

**47 Notice for Children's Guardian investigation or determination**

- (1) On deciding to carry out an investigation or determination, the Children's Guardian must, by written notice given to the following entities, advise the entities about the decision—
  - (a) for an investigation or determination because of a report, complaint or notification involving an employee of a relevant entity—
    - (i) the employee and the relevant entity, and
    - (ii) if a complaint has been made—the entity that made the complaint,
  - (b) for an investigation in relation to the way in which a relevant entity has dealt with a report or notification—the relevant entity,
  - (c) an entity prescribed by the regulations.
- (2) The notice must describe the reportable allegation or the conviction considered to be a reportable conviction the subject of the investigation or determination.
- (3) Subsection (1)(a)(i) does not apply if giving the notice to the employee or relevant entity would compromise the investigation or put a person's health or safety at serious risk.

**48 Investigation by Children's Guardian**

- (1) For an investigation into a reportable allegation, the Children's Guardian must have regard to the matters in Division 6.
- (2) An investigation under this Division must be carried out in the absence of the public.
- (3) Schedule 2 provides for powers that may be exercised by an authorised person for the purpose of conducting the investigation.
- (4) For the purposes of an investigation under this Part, the Children's Guardian may

conduct an inquiry.

(5) Schedule 3 provides for the Children's Guardian's powers to make or hold an inquiry.

## **Division 9 Outcome of investigation or determination by Children's Guardian**

### **49 Children's Guardian reports**

(1) After completing an investigation or determination the Children's Guardian must prepare a report (a ***Children's Guardian report***).

(2) The Children's Guardian report must include the following—

(a) in relation to a reportable allegation—

- (i) information about the facts and circumstances of the reportable allegation, and
- (ii) the findings the Children's Guardian has made about the reportable allegation after completing the investigation, including whether the Children's Guardian has made a finding of reportable conduct, and
- (iii) analysis of the evidence and the rationale for the findings,

(b) in relation to a conviction considered to be a reportable conviction—

- (i) information about the conviction considered to be a reportable conviction, and
- (ii) the determination the Children's Guardian has made about the conviction, including whether the Children's Guardian has determined the conviction is a reportable conviction,

(c) a copy of any written submissions made by the employee under section 34(2),

(d) recommendations for action to be taken in relation to the reportable allegation or conviction considered to be a reportable conviction, including any of the following recommendations—

(i) remedial or disciplinary action against—

(A) the employee, or

(B) if the complaint is about the head of a relevant entity—the head of the relevant entity,

(ii) referring the matter to a different entity,

(iii) changes to systems or policies,

(iv) that no further action should be taken,

- (e) reasons for the findings or determination,
- (f) any other information prescribed by the regulations.

#### **50 Recommendations by Children's Guardian**

- (1) If the Children's Guardian proposes to recommend in the Children's Guardian report that the relevant entity take particular action, the Children's Guardian must consult with the relevant entity about the recommendation before finalising the report.
- (2) Subsection (1) does not apply to the extent the Children's Guardian reasonably believes consulting with the relevant entity would—
  - (a) put a person's health or safety at serious risk, or
  - (b) put a person who made a report, complaint or notification, or other person, at risk of being harassed or intimidated, or
  - (c) prejudice an investigation or inquiry.
- (3) Recommendations the Children's Guardian may make include recommendations that—
  - (a) the reportable conduct or reportable conviction be considered or reconsidered by the relevant entity, or by any person in a position to supervise or direct the relevant entity or employee in relation to the conduct, or
  - (b) action be taken to rectify, mitigate or change the reportable conduct or the consequences of the reportable conduct, or
  - (c) a law or practice relating to the conduct be changed, or
  - (d) other steps be taken.

#### **51 Notice to particular persons of reportable conduct or reportable conviction**

- (1) This section applies if—
  - (a) the Children's Guardian makes a finding of reportable conduct or a determination that a conviction is a reportable conviction in relation to an employee of a relevant entity, and
  - (b) in the Children's Guardian report the Children's Guardian makes a recommendation for dismissal, removal or punishment of the employee.
- (2) The Children's Guardian must advise the following persons of the finding or determination, the recommendation and the reasons—
  - (a) the Minister,

- (b) the head of the relevant entity,
  - (c) if the finding or determination has been made about a person employed in, or by, a government sector agency within the meaning of the *Government Sector Employment Act 2013*—the Secretary of the Department of Premier and Cabinet,
  - (d) the employee the subject of the finding or determination.
- (3) The Children's Guardian may advise the following persons of the finding or determination, the recommendation and the reasons—
- (a) the responsible Minister for the relevant entity concerned,
  - (b) if the investigation or determination arose from a complaint—the entity that made the complaint.
- (4) Subsection (2)(d) does not apply to the extent the Children's Guardian reasonably believes advising the employee would—
- (a) put a person's health or safety at serious risk, or
  - (b) put a person who made a report, complaint or notification, or other person, at risk of being harassed or intimidated, or
  - (c) prejudice any other investigation or inquiry.

## **52 Recommendations and provision of report**

- (1) At the conclusion of an investigation or determination by the Children's Guardian, or on a recommendation by the Children's Guardian to refer a reportable allegation, reportable conduct or a reportable conviction back to the relevant entity, the Children's Guardian must give the relevant entity and the employee the subject of the Children's Guardian report—
- (a) the recommendations for action to be taken, and
  - (b) necessary information relating to the recommendations.
- (2) The Children's Guardian may give a copy of the report to the relevant entity the subject of the Children's Guardian report or the employee the subject of the Children's Guardian report.
- (3) Subsection (1) does not apply to the extent the Children's Guardian reasonably believes giving the relevant entity or employee the information would—
- (a) put a person's health or safety at serious risk, or
  - (b) put a person who made a report, complaint or notification, or other person, at risk of being harassed or intimidated, or

(c) prejudice any other investigation or inquiry.

### **53 Action taken by head of relevant entity on receipt of advice**

The head of a relevant entity may, and on request by the Children's Guardian must, notify the Children's Guardian of any action taken or proposed as a result of the recommendations provided under section 52.

## **Division 10 Other measures about reportable conduct**

### **54 Relevant entities to have systems about reportable conduct**

The head of a relevant entity must ensure the entity has systems including a code of conduct, policies and processes for the following—

- (a) preventing and detecting reportable conduct by an employee of the entity,
- (b) requiring an employee of the relevant entity to give a report, as soon as possible, in relation to a reportable allegation or conviction considered to be a reportable conviction involving an employee of the entity,
- (c) enabling a person, other than an employee of the relevant entity, to give a report to the head of the relevant entity about a reportable allegation or conviction considered to be a reportable conviction involving an employee of the relevant entity,
- (d) handling or responding to a reportable allegation or conviction considered to be a reportable conviction involving an employee of the relevant entity, having regard to principles of procedural fairness,
- (e) receiving, handling and disclosing information relating to reportable allegations, convictions considered to be reportable convictions and information relating to investigations and determinations,
- (f) identifying and dealing with matters relating to the prevention of reportable conduct by employees of the relevant entity.

### **55 Children's Guardian may require information about systems**

- (1) The Children's Guardian may, at any time by written notice, require the head of a relevant entity to give the Children's Guardian, within the reasonable time stated in the notice, information about the entity's systems under section 54.
- (2) If the relevant entity does not, without reasonable excuse, give the Children's Guardian the information required under subsection (1), the Children's Guardian may publish the following on the Children's Guardian's website—
  - (a) the name of the relevant entity,
  - (b) that the entity has failed to comply with the requirements for systems about

reportable conduct under this Part.

## **56 Reporting within the Office of the Children's Guardian**

- (1) If a finding of reportable conduct or a determination has been made that a conviction is a reportable conviction, the Children's Guardian must provide, to the Working with Children Check Unit within the Office of the Children's Guardian, a report made under this Part, if the finding relates to the following types of conduct—
  - (a) sexual misconduct,
  - (b) a sexual offence,
  - (c) a serious physical assault.
- (2) Also, if the Children's Guardian is of the opinion that there is a real and appreciable risk to the safety of children during the course of an investigation, the Children's Guardian must refer information about the employee the subject of the investigation to the Working with Children Check Unit, for the purpose of considering an interim bar under section 17 of the *Child Protection (Working with Children) Act 2012*.
- (3) In this section—

**Working with Children Check Unit** means that part of the Office of the Children's Guardian that exercises functions in relation to working with children check clearances under the *Child Protection (Working with Children) Act 2012*.

## **Division 11 Information sharing**

### **57 Disclosure of information**

- (1) This section applies to a person who is, or was, any of the following persons—
  - (a) the Children's Guardian,
  - (b) the head of a relevant entity or an investigator for the relevant entity, to which a report of a reportable allegation or a conviction considered to be a reportable conviction, in relation to an employee of the relevant entity, was given.
- (2) A person must not disclose relevant information unless subsection (3) or (4) applies.  
Maximum penalty—10 penalty units or imprisonment for a period not exceeding 12 months, or both.
- (3) A person to whom this section applies must disclose relevant information to the following persons unless the person is satisfied the disclosure is not in the public interest—
  - (a) a child to whom the information relates,

- (b) a parent of the child,
  - (c) if the child is in out-of-home care—an authorised carer that provides out-of-home care to the child.
- (4) Relevant information may be disclosed if—
- (a) it is for the purpose of promoting the safety, welfare or wellbeing of a child, or class of children, to whom the information relates, and
  - (b) the information is disclosed to—
    - (i) if the disclosure is made by the head of a relevant entity or investigator—the Children's Guardian, or
    - (ii) if the disclosure is made by the Children's Guardian—the head of a relevant entity, or
    - (iii) if the employee the subject of the reportable allegation or conviction considered to be a reportable conviction is a contractor—the head of an entity, other than the relevant entity, that engaged the employee as a contractor, or
    - (iv) if the Secretary or Minister has parental responsibility for a relevant child under the *Children and Young Persons (Care and Protection) Act 1998*—the Secretary or Minister of the Department, or
    - (v) a person who, under the *Children and Young Persons (Care and Protection) Act 1998*, has daily care and control of a relevant child, whether or not that care involves custody of the child, or
    - (vi) the Civil and Administrative Tribunal, for the purposes of an application under Part 10, or
    - (vii) a person, if necessary for the purpose of investigating the reportable allegation or determining the conviction considered to be a reportable conviction, or
    - (viii) a person prescribed by the regulations.
- (5) The Children's Guardian may publish guidelines for the matters a person specified in subsection (1) must have regard to in deciding whether or not to disclose relevant information under this section.
- (6) Nothing in this section prevents the Children's Guardian from entering into an arrangement or procedure with another entity in relation to the exchange of information relating to the safety, welfare and wellbeing of a child or class of children.
- (7) In this section—



**relevant child** means a child or a member of a class of children—

- (a) against whom an employee of an entity is alleged to have committed reportable conduct, and
- (b) to whom the relevant information relates.

**relevant information** means the following information relating to a reportable allegation or conviction considered to be a reportable conviction—

- (a) information about the progress of the investigation,
- (b) information about the findings of the investigation,
- (c) information about action taken in response to the findings.

#### **58 Disclosures by Children's Guardian or officer of Children's Guardian**

- (1) The Children's Guardian must not disclose any information obtained in the course of an investigation or determination into reportable conduct or a conviction considered to be a reportable conviction, unless the disclosure is made—
  - (a) if the person who is the subject of the investigation or determination holds, or is required to hold, a working with children check clearance—to that person, or
  - (b) if the information relates to a public authority, including a Schedule 1 entity that is a public authority, and where the information is obtained from a relevant entity—with the consent of the head of the relevant entity, or of the responsible Minister, or
  - (c) if the information relates to the safety, welfare or wellbeing of a particular child or class of children—to a police officer, the Department or any other public authority that the Children's Guardian considers appropriate in the circumstances, or
  - (d) if the Children's Guardian believes on reasonable grounds that disclosure to a person is necessary to prevent or reduce the likelihood of harm being done to another person—to the person, or
  - (e) where the information is obtained from any other person—
    - (i) if the information relates to the person—with the consent of the person, or
    - (ii) for the purpose of proceedings with respect to the discipline of police officers before the Commissioner of Police or the Industrial Relations Commission, or
  - (f) for the purpose of proceedings under section 167A of the *Police Act 1990*, or
  - (g) for the purpose of proceedings under section 20 or 20B of the *Public Interest Disclosures Act 1994*, or

- (h) for the purpose of criminal proceedings resulting from an investigation under this Act, or
- (i) for the purpose of any proceedings under section 161 or 169 of this Act or under Part 3 of the *Royal Commissions Act 1923* or Part 4 of the *Special Commissions of Inquiry Act 1983*, or
- (j) to a registered medical practitioner or registered psychologist in relation to the provision by that health practitioner of medical or psychiatric care, treatment or counselling, including psychological counselling to the Children's Guardian or an officer of the Children's Guardian, or
- (k) to an Official Community Visitor for the purpose of exercising the Official Community Visitor's functions under this Act, or
- (l) to a complainant, for the purposes of responding to a complaint about a relevant entity's handling of a reportable allegation or conviction considered to be a reportable conviction, or
- (m) for the purpose of discharging the Children's Guardian's functions under this or any other Act.

Maximum penalty—10 penalty units.

- (2) Subsection (1) does not operate to make admissible in evidence in proceedings a document that would not have been admissible if this section had not been enacted.

## **59 Other States, the Commonwealth and Territories**

- (1) Section 58 does not prevent the Children's Guardian from giving information obtained under this Part to a relevant person in relation to—
  - (a) a matter relevant to the exercise of a law of any other State, the Commonwealth or a Territory, or
  - (b) an undertaking that is or was being carried out jointly by New South Wales and any other State, the Commonwealth or a Territory.

- (2) In this section—

**relevant person** means a person exercising functions under a law of another State, the Commonwealth or a Territory, similar to those exercised by the Children's Guardian under this Act.

## **60 Lawful disclosure**

- (1) Nothing in this Division limits disclosure that is required or permitted by law.
- (2) The *Privacy and Personal Information Protection Act 1998* and the *Health Records and*

*Information Privacy Act 2002* do not prevent disclosure that is authorised by, or under, this Act.

## **Division 12 Other proceedings**

### **61 Children's Guardian, officer or expert as witness**

- (1) In relation to an investigation under this Part, the Children's Guardian, or officer of the Children's Guardian, must not be compellable to give evidence or produce any document in legal proceedings in respect of any information obtained by the Office of the Children's Guardian.
- (2) Subsection (1) does not apply to the following—
  - (a) proceedings for an offence under this Part,
  - (b) proceedings under Part 3 of the *Royal Commissions Act 1923*,
  - (c) proceedings under Part 4 of the *Special Commissions of Inquiry Act 1983*,
  - (d) proceedings under Part 5 of the *Government Information (Public Access) Act 2009* arising as a consequence of a decision made by the Children's Guardian in respect of an access application under that Act,

**Note—**

Matters in relation to reportable conduct are prescribed as excluded information under Schedule 2 to the *Government Information (Public Access) Act 2009*.

- (e) proceedings under section 167A of the *Police Act 1990*,
  - (f) proceedings under section 20 or 20B of the *Public Interest Disclosures Act 1994*,
  - (g) criminal proceedings resulting from an investigation under this Part.
- (3) Subsection (1) applies to the following persons in the same way it applies to the Children's Guardian and an officer of the Children's Guardian—
  - (a) a former Children's Guardian,
  - (b) a former officer of the Children's Guardian,
  - (c) an Australian legal practitioner who is, or was, appointed under clause 1(5) of Schedule 3 to assist the Children's Guardian,
  - (d) a person whose services are, or were, engaged under section 67.

### **62 Limits on secrecy and privilege**

- (1) This section applies if the Children's Guardian requires a person, under this Part, or under Schedules 2 or 3 in relation to an investigation or inquiry under this Part—

- (a) to give a statement of information, or
  - (b) to produce a document or other thing, or
  - (c) to give a copy of a document, or
  - (d) to answer a question.
- (2) The Children's Guardian must set aside the requirement if it appears to the Children's Guardian that a person has a ground of privilege, whereby—
- (a) in proceedings in a court of law, the person might resist a similar requirement, and
  - (b) it does not appear to the Children's Guardian that the person consents to compliance with the requirement.
- (3) The powers may be exercised despite—
- (a) a rule of law which, in proceedings in a court of law, might justify an objection to an inspection of the premises or document or thing or to production of the document or thing on grounds of public interest, or
  - (b) any privilege of a relevant entity which the relevant entity might claim in a court of law, or
  - (c) any duty of secrecy or other restriction on disclosure applying to a relevant entity.

## **Division 13 Offences for Part**

### **63 Retribution by employer**

- (1) An employer who dismisses an employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Children's Guardian is guilty of an indictable offence.
- Maximum penalty—200 penalty units or imprisonment for 5 years, or both.
- (2) In proceedings for an offence against subsection (1), it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (1).
- (3) In this section, a reference to a person assisting the Children's Guardian is a reference to a person who—
- (a) has appeared, is appearing or is to appear as a witness before the Ombudsman, or
  - (b) has complied with or proposes to comply with a requirement under Part 5 of Schedule 2, or

(c) has assisted, is assisting or is to assist the Ombudsman in some other manner.

#### **64 Protection against retribution**

(1) This section applies if a person, acting in good faith, gives, or proposes to give—

- (a) a report to the head of a relevant entity or the Children's Guardian, or
- (b) a complaint or notification to the Children's Guardian.

(2) A person must not take, or threaten to take, detrimental action in respect of a person specified in subsection (1), because of the report, complaint or notification.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

(3) For subsection (1), a report, complaint or notification is not given in good faith if—

- (a) the report, complaint or notification was made or proposed in bad faith, or
- (b) a material allegation was known, by the person giving the report, complaint or notification, to be false.

(4) In this section—

**detrimental action** means action causing, comprising or involving the following—

- (a) injury, damage or loss,
- (b) intimidation or harassment,
- (c) discrimination, disadvantage or adverse treatment in relation to employment,
- (d) dismissal from, or prejudice in, employment,
- (e) prejudice in the provision of a community service,
- (f) disciplinary proceedings.

### **Division 14 Miscellaneous**

#### **65 Head of relevant entity may delegate functions**

The head of a relevant entity may delegate any of the functions of the head of the relevant entity under this Part to an employee of the entity.

#### **66 Children's Guardian approval of head of relevant entity in certain circumstances**

(1) This section applies to a relevant entity—

- (a) that—
  - (i) is not a Department, and

- (ii) does not have a chief executive officer or principal officer, and
  - (b) if the regulations do not prescribe a person or a class of persons as the head of the entity.
- (2) For this Part, the relevant entity may nominate a person or the holder of a position in the entity to be the head of the entity.
  - (3) The Children's Guardian may approve, or refuse to approve, by written notice given to the entity, the person as the head of the entity.
  - (4) The approval given by the Children's Guardian under this section may be revoked by written notice, given to the entity, at any time.

### **67 Expert assistance**

For the purposes of the exercise of the Children's Guardian's functions in relation to this Part, the Children's Guardian may engage the services of a person for the purpose of getting expert assistance.

### **68 Immunity from liability**

- (1) This section applies to—
  - (a) a person who gives a report, or
  - (b) a person who makes a complaint, or
  - (c) a person who gives the Children's Guardian a notification.
- (2) The person is not subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, for giving the report, complaint or notification, if the person is acting in good faith.

### **69 Evidential immunity for individuals complying with Part**

- (1) Subsection (2) applies if an individual gives or produces information or a document to the head of the relevant entity, or a person conducting an investigation on behalf of the head of the relevant entity or the Children's Guardian, under this Part.
- (2) Evidence of the information or document, and other evidence directly or indirectly derived from the information or document, is not admissible against the individual in a proceeding to the extent it tends to incriminate the individual, or expose the individual to a penalty, in the proceeding.
- (3) Subsection (2) does not apply to a proceeding about the false or misleading nature of the information or anything in the document or in which the false or misleading nature of the information or document is relevant evidence.

## **70 Cabinet information and proceedings**

- (1) This Act does not enable the Children's Guardian—
- (a) to require any person—
    - (i) to give any statement of information, or
    - (ii) to produce any document or other thing, or
    - (iii) to give a copy of any document, or
    - (iv) to answer any question, or
  - (b) to inspect any document or thing,  
that relates to Cabinet information.
- (2) For the purposes of this section, a certificate of the Secretary or General Counsel of the Department of Premier and Cabinet that—
- (a) information is Cabinet information, or
  - (b) any information, document, thing or question relates to confidential proceedings of Cabinet or of a committee of Cabinet,
- is conclusive of that fact.
- (3) In this section—
- Cabinet information** means—
- (a) Cabinet information under the [Government Information \(Public Access\) Act 2009](#),  
or
  - (b) confidential proceedings of Cabinet or a committee of Cabinet.

## **Part 5 Out-of-home care matters regulated by Children's Guardian**

### **Division 1 Preliminary**

#### **71 Objects of Part**

The objects of this Part are—

- (a) to monitor and regulate out-of-home care to ensure a high standard in the provision of out-of-home care, and
- (b) to ensure the rights of and obligations to children in out-of-home care are safeguarded and promoted, and

- (c) to provide a model for the organisation of voluntary out-of-home care, including by registering organisations that provide or arrange voluntary out-of-home care, and
- (d) to clarify the roles and responsibilities of agencies and persons involved in the provision of out-of-home care, and
- (e) to ensure agencies and persons providing out-of-home care to children are appropriately regulated to promote the safety, welfare and wellbeing of the children, and
- (f) to promote the best interests of all children in out-of-home care, and
- (g) to assess the suitability of agencies for accreditation and to monitor the carrying out of accredited agencies' responsibilities, and
- (h) to register agencies that provide or arrange voluntary out-of-home care and to monitor the carrying out of registered agencies' responsibilities, and
- (i) to establish and maintain a register for the purpose of the authorisation of individuals as authorised carers, and
- (j) to establish and maintain a register of residential care workers.

**Note—**

The *Children and Young Persons (Care and Protection) Act 1998* provides for the oversight of children in statutory out-of-home care and supported out-of-home care.

## **72 Meaning of “designated agency”**

- (1) In this Act, **designated agency** means any of the following that are accredited under the regulations as a designated agency to provide or arrange out-of-home-care and the accreditation is in force—
  - (a) a government sector agency or part of a government sector agency,
  - (b) an organisation, or part of an organisation, that arranges the provision of out-of-home care.
- (2) The regulations may make provision for the accreditation process and the standards with which an applicant for accreditation must comply in order to be accredited as a designated agency.

## **73 Meaning of “registered agency”**

In this Act, **registered agency** means any of the following that are registered by the Children's Guardian under a regulation to provide or arrange voluntary out-of-home care—

- (a) a government sector agency or part of a government sector agency,



- (b) an organisation, or part of an organisation, that provides or arranges voluntary out-of-home care.

#### **74 Meaning of “principal officer”**

- (1) The **principal officer** of a designated agency means—
  - (a) for a designated agency that does not provide or arrange voluntary out-of-home care—the person who has the overall supervision of the agency's arrangements for providing statutory out-of-home care and supported out-of-home care, or
  - (b) otherwise—
    - (i) the person who has the overall supervision of the agency's arrangements for providing statutory out-of-home care and supported out-of-home care, or
    - (ii) if a different person has the overall supervision of the agency's arrangements for providing and arranging voluntary out-of-home care—that other person.
- (2) If more than one person is the principal officer of a designated agency under subsection (1)(b), a reference in this Act or another Act to the principal officer of the designated agency is a reference to—
  - (a) if the reference relates only to statutory out-of-home care or supported out-of-home care—the person referred to in subsection (1)(b)(i), or
  - (b) if the reference relates only to voluntary out-of-home care—the person referred to in subsection (1)(b)(ii), or
  - (c) otherwise—each of the persons.
- (3) The **principal officer** of a registered agency means the person who has the overall supervision of the agency's arrangements for providing and arranging voluntary out-of-home care.

#### **75 Actions of principal officer**

- (1) Anything done by, or with the approval of, the principal officer of a designated agency or a registered agency in relation to out-of-home care is, for this Act and the regulations, taken to be done by the designated agency or registered agency concerned.
- (2) Nothing in subsection (1) affects the personal liability of the principal officer.

### **Division 2 Voluntary out-of-home care**

#### **76 Voluntary out-of-home care**

- (1) In this Act, **voluntary out-of-home care** is out-of-home care for a child that is

arranged by a parent of the child, but does not include—

- (a) out-of-home care that is provided by an individual in a private capacity, or
- (b) out-of-home care that is provided outside New South Wales.

- (2) For subsection (1)(a), out-of-home care is provided by an individual in a private capacity if it is provided by an individual who is not acting on behalf of, or under an arrangement with, an entity or other organisation.

#### **77 Restrictions on voluntary out-of-home care**

- (1) A child may remain in voluntary out-of-home care for more than a total of 90 days in a period of 12 months only if the care is—
- (a) provided by a designated agency, or
  - (b) supervised by a designated agency or the Children's Guardian.
- (2) A child may remain in voluntary out-of-home care for more than a total of 180 days in a period of 12 months only if the designated agency providing or supervising the care, or the Children's Guardian, has ensured there is a plan that addresses the child's needs under the arrangement.

#### **78 Contravening restrictions on voluntary out-of-home care**

- (1) A child is taken to be at risk of significant harm for the purposes of Parts 2 and 3 of Chapter 3 of the *Children and Young Persons (Care and Protection) Act 1998* if—
- (a) the child remains in voluntary out-of-home care in contravention of section 77(1) or (2) of this Act, and
  - (b) the Children's Guardian decides the contravention is a significant contravention.
- (2) In deciding whether the contravention is a significant contravention the Children's Guardian must have regard to any relevant guidelines issued by the Secretary under section 175 of this Act.

#### **79 Only certain persons may provide or arrange voluntary out-of-home care**

- (1) A person must not provide voluntary out-of-home care for a child unless the person is—
- (a) a relevant agency, or
  - (b) an individual who is authorised by a relevant agency or the Children's Guardian to provide voluntary out-of-home care.

Maximum penalty—200 penalty units.

- (2) A person, other than a relevant agency or the Children's Guardian, must not—
- (a) arrange with a parent of a child for the child to be placed in voluntary out-of-home care, or
  - (b) advertise or hold themselves out as being willing to arrange for a child to be placed in voluntary out-of-home care.

Maximum penalty—200 penalty units.

- (3) In this section—

**relevant agency** means—

- (a) a designated agency, or
- (b) a registered agency.

### **80 Children's Guardian to develop procedures**

The Children's Guardian is to develop policies and procedures about voluntary out-of-home care to ensure—

- (a) children are not placed in voluntary out-of-home care if adequate services can be provided to enable the children to remain with their family, and
- (b) proper case planning occurs for all children placed in voluntary out-of-home care.

## **Division 3 Oversight of designated agencies**

### **81 Principal officer of designated agency must not reside with children under agency's care**

- (1) The principal officer of a designated agency must not reside on the same property as a child who is in statutory out-of-home care or supported out-of-home care supervised by the designated agency.

Maximum penalty—200 penalty units.

- (2) Subsection (1) does not apply if the principal officer resides with the child at a facility of the designated agency at which out-of-home care is provided.

### **82 Supervisory responsibility of designated agency**

A designated agency that places a child in the out-of-home care of an authorised carer has a responsibility to supervise the placement (**supervisory responsibility**).

### **83 Notification of deaths of children in statutory out-of-home care or supported out-of-home care**

If a child dies while in statutory out-of-home care or supported out-of-home care, the

principal officer of the designated agency having supervisory responsibility, within the meaning of section 82, for the child must immediately cause notice of the death to be given to the following persons—

- (a) the parents of the child if the parents can reasonably be located,
- (b) the Children's Guardian,
- (c) the Coroner.

## **Division 4 Monitoring and accreditation**

### **84 Powers of authorised persons**

Schedule 2 provides for powers that may be exercised by an authorised person for the purpose of monitoring and accreditation under this Part or under the regulations in relation to out-of-home care.

## **Division 5 Registers**

### **85 Registers to be kept**

- (1) The Children's Guardian may keep the following registers—
  - (a) a register for authorised carers,
  - (b) a register for residential care workers,
  - (c) a register for organisations that provide or arrange voluntary out-of-home care.
- (2) The regulations may provide for the following—
  - (a) the information to be kept under each register,
  - (b) the way the information must be recorded, including amendments to the register,
  - (c) when information must be kept, or updated, on the register,
  - (d) the checks a person who is kept on the register is to be subject to and the ways to record the outcomes of the checks,
  - (e) persons who may access the register, or particular information kept on the register,
  - (f) how the register may be used,
  - (g) the way the register may be kept.

### **86 General access to registers**

- (1) The Children's Guardian must ensure that information on the register is not disclosed

except—

- (a) as provided by this Division, or
  - (b) as required or permitted to be disclosed under another Act or law.
- (2) A residential care provider must have access to the information on the register in relation to—
- (a) a person who has applied for a role with the residential care provider, and
  - (b) a residential care worker employed by the residential care provider.
- (3) The Children's Guardian must provide access to information held on the register to any of the following persons if asked by the person—
- (a) the Secretary,
  - (b) the Minister for Families, Communities and Disability Services,
  - (c) the Ombudsman.

#### **87 Permission to access register**

- (1) This section applies—
- (a) to a person whose details are included on the register, and
  - (b) in addition to any requirement under section 14 of the *Privacy and Personal Information Protection Act 1998*.
- (2) The person may ask any of the following entities to give the person all the information that is included on the register in relation to the person—
- (a) the Children's Guardian,
  - (b) an employing residential care provider.
- (3) The Children's Guardian or employing residential care provider must comply with the request as soon as practicable after the request is made.
- (4) Despite subsection (3), information included on the register in relation to the person must not be provided if—
- (a) the information is about a reportable allegation or reportable conviction, or
  - (b) a reportable conduct flag is on the register in relation to the person, applies to the information.
- (5) It is an offence for a person to access or amend the register except as provided by this Act or the Regulations.

Maximum penalty—100 penalty units.

(6) In this clause—

***employing residential care provider*** means a residential care provider that employs, or has previously employed, a residential care worker making a request.

### **88 Requirement to amend register in particular circumstances**

A residential care provider with access to the register must remove a reportable conduct flag for a person if the finding of the investigation or determination to which the flag applies is that the person does not pose a real and appreciable risk to a child or children.

## **Part 6 Child employment**

### **Division 1 Preliminary**

#### **89 Objects of Part**

The objects of this Part are—

- (a) to promote the safety, welfare and wellbeing of children under the age of 16 years in relation to employment by assessing and granting employers' authorities and exemptions, and
- (b) to prevent the exploitation and abuse of children in employment, and
- (c) to provide for the circumstances in which a child may be employed that ensure the employment does not compromise the child's personal or social development and ability to benefit from education, including the granting and revocation of exemptions from the requirement to hold an employer's authority.

#### **90 Definitions**

In this Part—

***child*** means—

- (a) in relation to employment as a model—a person under the age of 16 years, or
- (b) otherwise—a person under the age of 15 years.

***employment*** means—

- (a) paid employment, or
- (b) employment under which a material benefit is provided.

#### **91 Extension of employment relationship**

If a relationship of employment may not otherwise exist, a person is also taken, for this

Part, to employ a child if—

- (a) the regulations declare that persons of a class to which the person belongs are taken to employ children of a class to which the child belongs, or
- (b) the Children's Guardian has, by written notice given to the person, declared that the person is, for this Part, taken to employ a child or children of the class to which the child or children belong.

## **Division 2 Requirement to hold employer's authority or employer's exemption**

### **92 Requirement to hold employer's authority for certain employment**

- (1) A person must not employ a child to carry out the following activities unless the person holds an employer's authority that authorises the person to employ children to carry out the activity—
  - (a) taking part in an entertainment or exhibition,
  - (b) taking part in a performance that is recorded for use in a subsequent entertainment or exhibition,
  - (c) offering anything for sale from door-to-door,
  - (d) an activity prescribed by the regulations for this section.

Maximum penalty—100 penalty units.

- (2) A person must not cause or procure a child to be employed knowing the child will be employed in contravention of subsection (1).

Maximum penalty—100 penalty units.

- (3) A person having the care of a child must not consent to or otherwise allow the child to be employed knowing the child will be employed in contravention of subsection (1).

Maximum penalty—100 penalty units.

### **93 Exemptions from requirement to hold employer's authority**

A person who employs a child to carry out an activity mentioned in section 92(1) is not required to hold an employer's authority for the employment if—

- (a) the child is employed for the purpose of a fundraising appeal, within the meaning of the [Charitable Fundraising Act 1991](#), by a person lawfully conducting the appeal, or
- (b) the child is employed for the purpose of an occasional entertainment or exhibition, the net proceeds of which are to be applied wholly for a charitable purpose, or

- (c) the person is exempt under the regulations from the requirement to hold an employer's authority for the employment, or
- (d) the person is exempt by the Children's Guardian under section 102 from being required to hold an employer's authority.

## **Division 3 Employers' authorities and employers' exemptions**

### **Subdivision 1 Applications for authorities or exemptions**

#### **94 How to apply**

- (1) A person may apply to the Children's Guardian for—
  - (a) an employer's authority, or
  - (b) an exemption from the requirement to hold an employer's authority (an ***employer's exemption***).
- (2) An application for an employer's authority or employer's exemption must be—
  - (a) made in the approved form, and
  - (b) accompanied by the fee prescribed by the regulations for the purposes of this section.
- (3) The regulations may also provide for the waiver, reduction or refund, including part refund, of the fee.

### **Subdivision 2 Employers' authorities**

#### **95 Decision about application for authority**

- (1) Within 14 days after receiving an application for an employer's authority, the Children's Guardian must decide to—
  - (a) grant the authority to the applicant, with or without conditions, or
  - (b) refuse the authority.
- (2) The Children's Guardian may grant the application if the Children's Guardian is satisfied—
  - (a) the applicant has the capacity to comply with this Part and any conditions to which the proposed authority will be subject, and
  - (b) the applicant will comply with this Part and the conditions.
- (3) For subsection (1), the Children's Guardian and the applicant may agree to vary the period in which the application must be decided.



- (4) The Children's Guardian must give the applicant written notice of the decision and, if the Children's Guardian refuses the application, state the grounds on which the application has been refused.

#### **96 Term of employer's authority**

- (1) Unless sooner revoked, an employer's authority remains in force for the period, not exceeding 12 months, stated in the authority, commencing on the date the authority is granted, or a later date stated in the authority.
- (2) If an application is made by the holder of an employer's authority for a further employer's authority while the other employer's authority is still in force, the other employer's authority remains in force until the application is finally dealt with, whether or not on appeal.

### **Subdivision 3 Conditions**

#### **97 Conditions of authority**

- (1) An employer's authority is subject to the following conditions—
  - (a) a condition prescribed by the regulations—
    - (i) for all employers' authorities, or
    - (ii) for a class of employers' authorities to which the authority belongs,
  - (b) a condition imposed by the Children's Guardian.
- (2) The holder of an employer's authority must not employ a child in contravention of the conditions of the authority.

Maximum penalty—100 penalty units.

#### **98 Change in conditions**

- (1) The Children's Guardian may, at the request of the holder of an employer's authority or on the Children's Guardian's own initiative, change the conditions to which the authority is subject by—
  - (a) revoking or varying a condition of the authority, or
  - (b) imposing a further condition on the authority.
- (2) If the Children's Guardian decides to change the conditions, the Children's Guardian must give the holder of the employer's authority a written notice that states—
  - (a) the Children's Guardian's decision, and
  - (b) the reason for the decision.

- (3) The change to the conditions takes effect on—
  - (a) the date stated in the notice, or
  - (b) if no date is stated in the notice, the day the notice is given to the holder of the employer's authority.
- (4) This section does not apply to a condition prescribed by the regulations unless the regulations provide that this section applies.

## **Subdivision 4 Suspension and revocation of employer's authority**

### **99 Voluntary suspension or revocation of authority**

- (1) The Children's Guardian may suspend or revoke an employer's authority at the request of the holder of the authority.
- (2) If the holder of an employer's authority has requested the authority be suspended or revoked, the Children's Guardian may, by written notice given to the holder of the authority—
  - (a) suspend the authority for the period, not exceeding 6 months, stated in the notice, or
  - (b) revoke the authority.

### **100 Suspension and revocation of authority**

- (1) The Children's Guardian may decide to suspend or revoke an employer's authority if the Children's Guardian believes the holder of the authority has contravened—
  - (a) this Act or the regulations, or
  - (b) a condition of the authority.
- (2) If the Children's Guardian believes a ground exists to suspend or revoke an employer's authority, the Children's Guardian must give the holder a show cause notice, in writing, that states—
  - (a) the action the Children's Guardian proposes taking (the **proposed action**), and
  - (b) the ground for the proposed action, and
  - (c) if the proposed action is suspension of the employer's authority—the proposed period, not exceeding 6 months, for the suspension, and
  - (d) that the holder may make written submissions to the Children's Guardian, within 28 days after receiving the notice, about why the proposed action should not be taken.

- (3) After the 28 days under subsection (2) have passed, the Children's Guardian may, after considering any submissions made during that period by the holder—
  - (a) suspend the employer's authority for the period, not exceeding 6 months, stated in the notice, or
  - (b) revoke the employer's authority.
- (4) The suspension or revocation must be given to the holder of the employer's authority by a further notice, and state the ground on which the authority is suspended or revoked.

#### **101 Effect of suspension**

- (1) This section applies to an employer's authority suspended under this Subdivision.
- (2) If an employer's authority has been suspended for a period, the Children's Guardian may, during the period, end the suspension by giving the person who holds the authority written notice that the suspension has ended.
- (3) An employer's authority is taken not to be in force during the period for which it is suspended.

### **Division 4 Exemption**

#### **102 Exemption by Children's Guardian**

- (1) The Children's Guardian may exempt a person from being required to hold an employer's authority—
  - (a) if written notice of the exemption has been given to the person setting out the conditions, if any, on which the exemption was granted, and
  - (b) until the person contravenes a condition on which the exemption was granted.
- (2) The Children's Guardian may revoke an exemption by a written notice given to the exempt person but only after—
  - (a) notice has been given to the person and the notice sets out the reason the Children's Guardian intends to revoke the exemption, and
  - (b) the Children's Guardian has taken into consideration any written submission made to the Children's Guardian by the person within 28 days after the notice was given.
- (3) Without limiting the reasons for which an exemption may be revoked, an exemption may be revoked if a condition of the exemption is contravened.
- (4) The Children's Guardian may revoke an exemption—
  - (a) which applies because the employer is lawfully conducting a fundraising appeal,

but only with the agreement of the Minister administering the *Charitable Fundraising Act 1991*, or

- (b) granted by the regulations, but only if the regulations allow the Children's Guardian to revoke the exemption.

## **Division 5 Powers for matters relating to child employment**

### **103 Powers of authorised persons**

Schedule 2 provides for powers that may be exercised by an authorised person for the purpose of investigating a complaint or an offence under this Part.

### **104 Enforcement of undertakings**

- (1) The Children's Guardian may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to the Children's Guardian's functions under section 128 (relating to the employment of children).
- (2) Without limiting subsection (1), an undertaking that the Children's Guardian may accept includes an undertaking to carry out a restorative justice activity.
- (3) The person may withdraw or vary the undertaking at any time, but only with the consent in writing of the Children's Guardian.
- (4) The consent of the Children's Guardian is required even if the undertaking purports to authorise withdrawal or variation of the undertaking without that consent.
- (5) The Children's Guardian may apply to the Supreme Court for an order under subsection (6) if the Children's Guardian considers that the person who gave the undertaking has breached the terms of the undertaking.
- (6) The Supreme Court may make all or any of the following orders if the Court is satisfied the person has breached a term of the undertaking—
  - (a) an order directing the person to comply with the term of the undertaking,
  - (b) an order directing the person to pay to the State an amount not exceeding the amount of a financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach,
  - (c) an order the Court thinks appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach,
  - (d) an order suspending or revoking an employer's authority,
  - (e) any other order the Court considers appropriate.

### **105 Power to compel production of information**

- (1) The Children's Guardian may, by written notice, request that a person provide the Children's Guardian with information, including documents, relevant to the exercise of the Children's Guardian's functions under section 128 relating to the employment of children.
- (2) A notice under subsection (1) may be given for the purposes of—
  - (a) preparing submissions to the Supreme Court under this Act, or
  - (b) investigating a complaint relating to the employment of children.
- (3) A person given the notice is authorised to provide the Children's Guardian with the information requested.
- (4) A notice under this section may state the day on or before which the notice must be complied with.
- (5) If documents are given to the Children's Guardian under this section, the Children's Guardian—
  - (a) may take possession of, and make copies of or take extracts from, the documents, and
  - (b) may keep possession of the documents for the period necessary for the purposes of preparing the submission or investigating the complaint, and
  - (c) if a person would otherwise be entitled to inspect the documents if the documents were not in the possession of the Children's Guardian—must permit the person to inspect the documents at all reasonable times.

## **Division 6 Miscellaneous**

### **106 Endangering children in employment**

A person who causes or allows a child to take part in employment, in the course of which the child's physical or emotional wellbeing is put at risk, is guilty of an offence.

Maximum penalty—200 penalty units.

### **107 Removal of child from place of unlawful employment**

A child is taken to be a child in need of care and protection under Chapter 4 of the *Children and Young Persons (Care and Protection) Act 1998* if—

- (a) a person (other than a relative of the child) is employing the child in contravention of this Act at any place, and
- (b) the Children's Guardian requests a person responsible for the child to remove the

child from the place, and

(c) the child is not immediately removed.

## **Part 7 Adoption service providers**

### **Division 1 Preliminary**

#### **108 Objects of Part**

The objects of this Part are—

- (a) to provide a framework for the accreditation of adoption service providers to ensure accredited adoption service providers comply with the objects of the *Adoption Act 2000*, and
- (b) to emphasise that the best interests of the child concerned, both in childhood and later life, must be the principal consideration in adoption law and practice, and
- (c) to ensure that adoption law and practice assist the child to know and have access to the child's birth family and cultural heritage, and
- (d) to recognise the changing nature of practices of adoption, and
- (e) to ensure equivalent safeguards and standards that apply to children adopted from within the State apply to children adopted from overseas, and
- (f) to encourage openness in adoption, and
- (g) to allow access to certain information relating to adoption.

#### **109 References to "child"**

In this Part—

**child** means—

- (a) a person who is less than 18 years of age, or
- (b) a person who is 18 or more years of age in relation to whom an adoption is sought or has been made.

#### **110 Meaning of "principal officer" of adoption service provider**

- (1) The **principal officer** of an accredited adoption service provider is the person who has the overall supervision of the provision, by the accredited adoption service provider, of adoption services.
- (2) Anything done by, or with the approval of, the principal officer of an adoption service provider in relation to adoption services is, for this Act and the regulations, and the

[Adoption Act 2000](#) and the regulations under that Act, taken to be done by the adoption service provider concerned.

- (3) Nothing in this section affects the personal liability of the principal officer.

## **Division 2 Adoption service providers accreditation**

### **111 Operation of Part**

This Part and Chapter 3 of the [Adoption Act 2000](#), provide—

- (a) that individuals must not make their own adoption arrangements, either personally or through private institutions, and
- (b) for the accreditation of charitable and non-profit organisations to provide adoption services.

### **112 Accreditation and review of adoption service providers**

- (1) A charitable or non-profit organisation may apply to the Children's Guardian for accreditation as an adoption service provider to provide adoption services specified by the Children's Guardian.
- (2) The Children's Guardian is to monitor whether the Secretary and accredited adoption service providers are carrying out their responsibilities with respect to the provision of adoption services in accordance with this Act and the regulations, and the [Adoption Act 2000](#) and the regulations under that Act.

#### **Note—**

Section 11 of the [Adoption Act 2000](#) provides that it is an offence for a person to provide an adoption service unless the person is the Secretary or accredited under this Act as an adoption service provider.

- (3) A person who makes a statement, orally or in writing, that the person knows to be false for the purposes of or in connection with subsection (1) or (2) is guilty of an offence.

Maximum penalty—25 penalty units or imprisonment for 12 months, or both.

- (4) Subsection (3) does not apply to a document if the person, when giving the document—
  - (a) tells the Children's Guardian or an officer of the Children's Guardian, to the best of the person's ability, how it is false or misleading, and
  - (b) if the person has, or can reasonably obtain, the correct information—gives the correct information.

### **113 Accreditation criteria**

- (1) On the recommendation of the Children's Guardian, the Minister may, from time to

time by order published in the Gazette, approve standards and other criteria for use in determining—

- (a) whether to grant an application for accreditation as an accredited adoption service provider, and
  - (b) the period for which accreditation is to be granted.
- (2) Standards and criteria may be approved under subsection (1) in relation to a class of applicants.
  - (3) Without limiting subsection (1), the criteria approved under subsection (1) are to be integrated, to the greatest extent practicable, with the criteria for accreditation of a designated agency under this Act.
  - (4) Failure to comply with subsection (3) does not affect the validity of a decision of the Children's Guardian to accredit or not to accredit an applicant.

## **Division 3 Miscellaneous**

### **114 Restriction on inspection of records**

- (1) Except as provided by this Act or the regulations, records made in connection with the administration or execution of this Part are not to be open to inspection by, or made available to, any person, including any party to proceedings before the Court under this Act.
- (2) Subsection (1) does not apply to any record or report if so ordered by the Court.
- (3) In this section—

**Court** means the Supreme Court of New South Wales.

**record** means any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means.

## **Part 8 Children's Guardian**

### **Division 1 Appointment**

#### **115 Appointment of Children's Guardian**

- (1) There is to be a Children's Guardian.
- (2) The Children's Guardian is appointed by the Governor.

#### **116 Term of office**

- (1) The Children's Guardian holds office for the term, not more than 5 years, stated in the



instrument of appointment.

- (2) The Children's Guardian is eligible for re-appointment.
- (3) However, a person may not be appointed for more than 2 terms of office as Children's Guardian, whether or not the terms are consecutive.

### **117 Full-time office**

The office of Children's Guardian is a full-time office and the holder of the office is required to hold it on that basis, except to the extent permitted by the Minister.

### **118 Eligibility for appointment**

A person is not eligible for appointment as Children's Guardian if the person is a member of the Legislative Council or the Legislative Assembly or is a member of a House of Parliament of another State or of the Commonwealth.

### **119 Employment and remuneration**

- (1) Subject to this Part, the employment of the Children's Guardian is on the terms and conditions stated in the instrument of appointment.
- (2) The following provisions (the **relevant provisions**) of, or made under, the [Government Sector Employment Act 2013](#) relating to the employment of Public Service senior executives apply to the Children's Guardian—
  - (a) provisions relating to the band in which an executive is to be employed,
  - (b) provisions relating to the contract of employment of an executive,
  - (c) provisions relating to the remuneration, employment benefits and allowances of an executive.
- (3) For subsection (2), in applying the relevant provisions to the Children's Guardian, a reference to the employer of a Public Service senior executive is taken to be a reference to the Minister.

### **120 Children's Guardian not Public Service employee**

- (1) The office of Children's Guardian is a statutory office.
- (2) The provisions of the [Government Sector Employment Act 2013](#) relating to the employment of Public Service employees do not apply to the office.

## **Division 2 Vacancy and removal from office**

### **121 Vacancy in office of Children's Guardian**

- (1) The office of Children's Guardian becomes vacant if the holder—

- (a) attains the age of 65 years, or
- (b) engages in any paid employment outside the duties of the office, or
- (c) is nominated for election as a member of the Legislative Council or the Legislative Assembly or as a member of a House of Parliament of another State or of the Commonwealth, or
- (d) resigns the office by instrument in writing addressed to the Governor and the Governor accepts the resignation.

- (2) If the office of Children's Guardian becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

#### **122 Removal from office**

- (1) The Governor may, at any time, remove the Children's Guardian from office upon the address of both Houses of Parliament.
- (2) To remove any doubt, the Children's Guardian cannot be removed from office under Part 6 of the [Government Sector Employment Act 2013](#).

### **Division 3 Acting Children's Guardian**

#### **123 Acting Children's Guardian**

- (1) If a person is appointed to act in the office of Children's Guardian, the acting Children's Guardian is entitled to be paid the remuneration and allowances decided by the Minister.
- (2) The Governor may remove a person from the office of acting Children's Guardian.

### **Division 4 Office of the Children's Guardian**

#### **124 Deputy Children's Guardian and Assistant Children's Guardian**

- (1) The Children's Guardian may appoint one or more Deputy Children's Guardian and Assistant Children's Guardian.
- (2) Section 118 applies to and in respect of a Deputy Children's Guardian and an Assistant Children's Guardian in the same way the provision applies to and in respect of the Children's Guardian.
- (3) The offices of Deputy Children's Guardian and Assistant Children's Guardian—
  - (a) are statutory offices, and
  - (b) except as applied by section 125(2), the provisions of the [Government Sector Employment Act 2013](#) relating to the employment of Public Service employees do

not apply to the offices.

- (4) A Deputy Children's Guardian or an Assistant Children's Guardian holds office for the term, not exceeding 5 years, stated in an instrument of appointment, and is eligible for re-appointment.

#### **125 Employment of Deputy Children's Guardian or Assistant Children's Guardian**

- (1) The employment of a Deputy Children's Guardian and an Assistant Children's Guardian is to be governed by a contract of employment between the Deputy Children's Guardian or Assistant Children's Guardian and the Children's Guardian.
- (2) The following provisions (the **relevant provisions**) of, or made under, the [Government Sector Employment Act 2013](#) relating to the employment of Public Service senior executives apply to a Deputy Children's Guardian or an Assistant Children's Guardian—
  - (a) provisions relating to the band in which an executive is to be employed,
  - (b) provisions relating to the contract of employment of an executive,
  - (c) provisions relating to the remuneration, employment benefits and allowances of an executive,
  - (d) provisions relating to the termination of employment of an executive.
- (3) For subsection (2), in applying the relevant provisions to a Deputy Children's Guardian or an Assistant Children's Guardian, a reference to the employer of a Public Service senior executive is taken to be a reference to the Children's Guardian.

#### **126 Vacancy of office of Deputy Children's Guardian or Assistant Children's Guardian**

- (1) The office of a Deputy Children's Guardian or an Assistant Children's Guardian becomes vacant if the holder—
  - (a) dies, or
  - (b) completes a term of office and is not re-appointed, or
  - (c) resigns the office by instrument in writing addressed to the Children's Guardian, or
  - (d) becomes bankrupt, applies to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounds with the holder's creditors or makes an assignment of the holder's remuneration for the holder's benefit, or
  - (e) becomes a mentally incapacitated person, or
  - (f) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted of an offence that, if committed in New

South Wales, would be an offence punishable by imprisonment for 12 months or more, or

(g) is nominated for election as a member of the Legislative Council or the Legislative Assembly or as a member of a House of Parliament of another State or of the Commonwealth, or

(h) is removed from office under section 125(2).

(2) A Deputy Children's Guardian or an Assistant Children's Guardian appointed as acting Children's Guardian under section 123, does not, on that account, cease to be Deputy Children's Guardian or an Assistant Children's Guardian.

### **127 Staff of Office**

Persons may be employed in the Public Service under the [Government Sector Employment Act 2013](#) to enable the Children's Guardian to exercise the Children's Guardian's functions.

**Note—**

Section 59 of the [Government Sector Employment Act 2013](#) provides that a person employed may be referred to as an officer or employee, or member of staff, of the Children's Guardian. Section 47A of the [Constitution Act 1902](#) precludes the Children's Guardian from employing staff.

## **Division 5 Functions**

### **128 Functions of Children's Guardian**

(1) The principal functions of the Children's Guardian are as follows—

(a) to exercise functions relating to persons engaged in child-related work, including working with children check clearances, under the [Child Protection \(Working with Children\) Act 2012](#),

(b) to promote the best interests of all children in out-of-home care,

(c) to ensure the rights of all children in out-of-home care are safeguarded and promoted,

(d) to establish a register for the purpose of the authorisation of individuals as authorised carers, and to maintain that register,

(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,

(f) to register organisations that provide or arrange voluntary out-of-home care and to monitor the carrying out of the organisations' responsibilities under this Act and the regulations,

- (g) to exercise functions relating to the employment of children, including the making and revoking of exemptions from the requirement to hold an employer's authority,
  - (h) to develop and administer a voluntary accreditation scheme for persons working with persons who have committed sexual offences against children,
  - (i) to develop and administer a voluntary accreditation scheme for programs for persons who have committed sexual offences against children,
  - (j) to encourage organisations to develop the organisations' capacity to be safe for children under the Children's Guardian's public awareness and advice functions specified in the *Child Protection (Working with Children) Act 2012*,
  - (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,
  - (l) to establish and maintain a register for the application and engagement of individuals as residential care workers,
  - (m) to administer a reportable conduct scheme and work with relevant entities to prevent, identify and respond to reportable conduct and promote compliance with the scheme,
  - (n) to educate and provide advice to relevant entities, monitor investigations by relevant entities, make recommendations to relevant entities and investigate reportable allegations or make determinations about convictions considered to be reportable convictions,
  - (o) to co-ordinate the Official Community Visitor scheme in relation to Official Community Visitors.
- (2) Also, the Children's Guardian has any other functions conferred or imposed on the Children's Guardian by or under this Act or any other Act.
- (3) The Children's Guardian is not subject to the control or direction of the Minister.

### **129 Restriction on functions**

The Children's Guardian must not carry out the following functions—

- (a) an investigation into the death of a child that is or has been subject to—
  - (i) an investigation under the *Coroners Act 2009*, or
  - (ii) a review or an investigation under the *Ombudsman Act 1974*,
- (b) the investigation or resolution of a matter that is, or was, the subject of a

community services complaint within the meaning of Part 4 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, unless the Ombudsman has agreed.

### **130 Appointment of advisory committees**

- (1) The Children's Guardian may appoint advisory committees to assist in the exercise of the Children's Guardian's functions.
- (2) The procedure of an advisory committee is to be decided by—
  - (a) the Children's Guardian, or
  - (b) if directed by the Children's Guardian—the committee.
- (3) A member of an advisory committee is entitled to the allowances decided by the Minister.
- (4) The Children's Guardian may disband an advisory committee at any time.

### **131 Removal of responsibility for daily care and control from an authorised carer**

The Children's Guardian may, by notice in writing given to an authorised carer, remove the responsibility for the daily care and control of a child or young person from the authorised carer.

### **132 Application for review of order of the Children's Court**

The Children's Guardian may apply to the Children's Court at any time for the rescission or variation of any order made under the *Children and Young Persons (Care and Protection) Act 1998* by the Children's Court as if the Children's Guardian were a party to the proceedings in respect of which the order was made.

### **133 Delegation of functions**

- (1) Subject to subsection (2), the Children's Guardian may delegate to an officer of the Children's Guardian the exercise of a function of the Children's Guardian.
- (2) The Children's Guardian may not delegate the exercise of—
  - (a) a function to make a report under this Act, other than to an Assistant Children's Guardian, or
  - (b) a function conferred by clause 1(2) of Schedule 3, other than to an Assistant Children's Guardian, or
  - (c) the power of delegation under subsection (1).
- (3) An officer to whom the exercise of a function has been delegated under subsection (1) may subdelegate the exercise of the function to—

- (a) another officer of the Children's Guardian, or
- (b) a person, or a member of a class of persons, prescribed by the regulations or approved by the Children's Guardian.

### **134 Referral of matters to police and other investigative agencies**

- (1) This section applies if information obtained by the Children's Guardian in the course of exercising the Children's Guardian's functions is—
  - (a) information relating to a possible criminal offence under an Act or other law, or
  - (b) information relating to grounds for possible disciplinary action under an Act or other law.
- (2) The Children's Guardian may refer the information to—
  - (a) the Commissioner of Police, or
  - (b) the Ombudsman, or
  - (c) the Secretary, or
  - (d) a NSW, interstate or Commonwealth investigative or disciplinary government agency the Children's Guardian considers appropriate.
- (3) However, this section does not apply to information obtained in the course of exercising functions under section 40A of the *Child Protection (Working with Children) Act 2012*.
- (4) Nothing in this section limits or affects the operation of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*.

### **135 Protection from liability**

- (1) This section applies to the following entities—
  - (a) the Children's Guardian,
  - (b) an advisory committee,
  - (c) a member of an advisory committee,
  - (d) a person acting under the direction of the Children's Guardian,
  - (e) an Official Community Visitor.
- (2) A matter or thing done, or omitted to be done, by an entity in good faith for the purposes of executing this or any other Act, does not subject the entity personally to any action, liability, claim or demand.

**Note—**

See also section 181 for protection from liability for an officer of the Children's Guardian.

## **Division 6 Reports**

### **136 Report required before commencement of Part 4**

- (1) Before the commencement of Part 4 of this Act, the Children's Guardian must give to the Committee on Children and Young People a report, and copies of policies and procedures to be adopted by the Children's Guardian, in relation to the exercise of the Children's Guardian's functions under this Act or another Act.
- (2) The report must include information about how perceived or actual conflicts of interest associated with the exercise of the Children's Guardian's functions under this Act or another Act are to be minimised or removed.
- (3) In this section—

**Committee on Children and Young People** means the Parliamentary Joint Committee constituted under section 36(1) of the [Advocate for Children and Young People Act 2014](#).

### **137 References to "Presiding Officers"**

- (1) In this Division, a reference to a Presiding Officer of a House of Parliament is a reference to the President of the Legislative Council or the Speaker of the Legislative Assembly.
- (2) If there is a vacancy in the office of President, the reference to the President is taken to be a reference to the Clerk of the Legislative Council.
- (3) If there is a vacancy in the office of Speaker, the reference to the Speaker is taken to be a reference to the Clerk of the Legislative Assembly.

### **138 Annual reports to Parliament**

- (1) The Children's Guardian must—
  - (a) prepare, within the period of 4 months after 30 June in each year, a report about the Children's Guardian's operations during the year ending on 30 June, and
  - (b) give the report to the Presiding Officer of each House of Parliament.
- (2) A report by the Children's Guardian under this section must include the following—
  - (a) a description of the activities of the Children's Guardian in relation to the functions of the Children's Guardian,
  - (b) details of each exemption given under section 30,



- (c) any recommendations for changes in the laws of the State, or for administrative action, the Children's Guardian considers should be made as a result of the exercise of the functions of the Children's Guardian,
  - (d) an evaluation of the response of relevant entities to the recommendations of the Children's Guardian,
  - (e) a description of matters relating to reportable conduct, including trends, investigations and reports,
  - (f) a description of the work and activities of Official Community Visitors, including information about—
    - (i) the number of referrals made by the Children's Guardian under section 150, and
    - (ii) the outcome of an investigation by the Children's Guardian arising from a report by an Official Community Visitor,
  - (g) the number of investigations or determinations, in relation to reportable allegations or reportable convictions, that have not been completed by a relevant entity or the Children's Guardian within 6 months after the commencement of the investigation or determination,
  - (h) the number of persons on the residential care workers register kept under section 85(1)(b) who have a reportable conduct flag noted, if the investigation or determination has not been completed by a relevant entity or the Children's Guardian within 6 months after the commencement of the investigation or determination,
  - (i) copies of policies and procedures to be adopted by the Children's Guardian, in relation to the exercise of the Children's Guardian's functions under this Act or another Act, and information about how perceived or actual conflicts of interest associated with the exercise of the functions are to be minimised or removed.
- (3) Despite subsection (2), the report on the work and activities of Official Community Visitors may be a separate annual report.

### **139 Special reports to Parliament and to Minister**

- (1) The Children's Guardian may—
  - (a) prepare a special report on a matter relating to the functions of the Children's Guardian, and
  - (b) give the report to the Presiding Officer of each House of Parliament.
- (2) Also, the Children's Guardian, if requested by the Minister—

- (a) must prepare a special report on a matter relating to a function of the Children's Guardian, other than a function under Part 4, and
  - (b) may prepare a special report on a matter relating to a function of the Children's Guardian under Part 4.
- (3) A special report prepared at the request of the Minister may be given by the Children's Guardian to the Presiding Officer of each House of Parliament within 6 months after giving the report to the Minister.

#### **140 Giving draft reports to Minister**

- (1) The Children's Guardian—
- (a) must give the Minister a draft of each of the reports to be given to the Presiding Officers under this Division, other than a special report mentioned in section 139(2)(b), and
  - (b) may give the Minister a draft of a special report to be given to the Presiding Officers mentioned in section 139(2)(b).
- (2) A draft report that is required to be given to the Minister under subsection (1) must be given to the Minister at least one month, or a shorter period agreed by the Minister, before the report is given to the Presiding Officers.
- (3) The Minister may—
- (a) give the Children's Guardian comments about a draft report, and
  - (b) require the Children's Guardian to consult further in relation to the report.
- (4) The Children's Guardian is not required to amend the report because of comments made by the Minister but must, before finalising the report and giving it to the Presiding Officers, consider the comments.

#### **141 Provisions relating to reports to Parliament**

- (1) A copy of a report, given to the Presiding Officer of a House of Parliament under this Division, is to be laid before the House within 15 sitting days of the House after it is received by the Presiding Officer.
- (2) The Children's Guardian may include a recommendation that the report be made public.
- (3) If a report includes a recommendation by the Children's Guardian that the report be made public, the Presiding Officer of a House of Parliament given the report under this Division must, within 14 days after receiving the report, make it public whether or not the House is in session and whether or not the report has been laid before the House.

- (4) If a report is made public by a Presiding Officer of a House of Parliament before it is laid before the House, it attracts the same privileges and immunities as if it had been laid before the House.
- (5) A Presiding Officer need not inquire whether all or any conditions precedent have been satisfied in relation to a report given to the Presiding Officer under this Division.
- (6) The *Annual Reports (Departments) Act 1985* is, in its application to the annual report of the Children's Guardian, modified to the extent necessary for the purposes of this Division.

## Part 9 Official Community Visitors

### Division 1 Preliminary

#### 142 Objects of Part

The objects of this Part are—

- (a) to protect and promote the rights of children in visitable services, and
- (b) to protect children from abuse, neglect and exploitation.

#### 143 Definitions

In this Part—

**child in care** means a child under the age of 18 years—

- (a) under the parental responsibility of the Minister administering the *Children and Young Persons (Care and Protection) Act 1998*, or
- (b) for whom the Secretary or a designated agency has responsibility due to the operation of section 49 of the *Children and Young Persons (Care and Protection) Act 1998*, or
- (c) who is a protected person under section 135A(3) of the *Children and Young Persons (Care and Protection) Act 1998*, or
- (d) who is the subject of an out-of-home care arrangement under this Act or under the *Children and Young Persons (Care and Protection) Act 1998*, or
- (e) who is the subject of a sole parental responsibility order made under section 149 of the *Children and Young Persons (Care and Protection) Act 1998*, as in force immediately before its repeal by the *Child Protection Legislation Amendment Act 2014*, or
- (f) who is otherwise in the care of a service provider.

**service** includes a statutory or other function, and **providing** a service includes exercising such a function.

**service provider** means—

- (a) the Department, or
- (b) an implementation company under the *National Disability Insurance Scheme (NSW Enabling) Act 2013* while the company is a public sector agency of the State under that Act, or
- (c) the Minister, or
- (d) an authorised carer or designated agency, or
- (e) a person or organisation funded, authorised or licensed by the Children's Guardian or the Minister to provide a service, or
- (f) a person or organisation prescribed by the regulations.

**visitable service** means—

- (a) an accommodation service where a child in care using the service is in the full-time care of the service provider, or
- (b) a service prescribed by the regulations as a visitable service.

## **Division 2 Appointment and functions**

### **144 Appointment of Official Community Visitors**

- (1) The Minister may, on the recommendation of the Children's Guardian, appoint a person as an Official Community Visitor if the person, in the opinion of the Minister—
  - (a) has appropriate knowledge and expertise in the matters relating to children in care, and
  - (b) has a commitment to the objects of this Act and the following Acts—
    - (i) the *Adoption Act 2000*,
    - (ii) the *Children and Young Persons (Care and Protection) Act 1998*,
    - (iii) the *Children (Education and Care Services) Supplementary Provisions Act 2011*,
    - (iv) the *Disability Inclusion Act 2014*,
    - (v) the *Community Welfare Act 1987*,
    - (vi) the *Community Services (Complaints, Reviews and Monitoring) Act 1993*,

- (vii) the *Guardianship Act 1987*, and
  - (c) has skills in the solving of problems about access to, and the use of, services for children in care, and
  - (d) is not employed within the Department or the Office of the Children's Guardian.
- (2) An Official Community Visitor holds office for the term, not exceeding 3 years, stated in the instrument of appointment, and is eligible for re-appointment.
  - (3) A person may not be appointed as an Official Community Visitor for consecutive terms totalling more than 6 years.
  - (4) The provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to an Official Community Visitor.
  - (5) An Official Community Visitor is not a separate public sector agency and is to be regarded as part of the Department for the purposes of the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.
  - (6) The Minister may, on the recommendation of the Children's Guardian, remove an Official Community Visitor from office for incompetence, incapacity or misbehaviour.
  - (7) To remove any doubt, an Official Community Visitor who has a disability (other than mental incapacity) may not be removed from office under subsection (6) on the ground of incapacity unless the disability renders the Official Community Visitor incapable of performing the functions of an Official Community Visitor.

#### **145 Functions of Official Community Visitors**

- (1) An Official Community Visitor may—
  - (a) enter and inspect a place where a visitable service is provided at a reasonable time, and
  - (b) confer alone with a child who is resident or person employed at the visitable service, and
  - (c) inspect a document held at a visitable service, if the document relates to the operation of a visitable service, having regard to the wishes of a child resident at the visitable service to whom the document relates, and
  - (d) provide the Minister and the Children's Guardian with advice or reports on any matters relating to the conduct of a visitable service, and
  - (e) inform the Minister and the Children's Guardian on matters affecting the welfare,

interests and conditions of children using visitable services, and

- (f) encourage the promotion of legal and human rights of children using visitable services, including the right to privacy, confidentiality, adequate information and consultation in relation to visitable services and the right to complain, and
  - (g) consider matters raised by children using visitable services, staff of providers of visitable services and people having a genuine concern for the welfare, interests and conditions of children using visitable services, and
  - (h) provide information about independent advocacy services to help children in the presentation of a grievance or matter of concern and, in appropriate cases, assist children to obtain the services, and
  - (i) facilitate, if reasonable and practicable, the early and speedy resolution of grievances or matters of concern affecting children using visitable services by referring grievances or matters to the providers of the relevant services or other appropriate bodies, and
  - (j) exercise functions prescribed by the regulations for the purposes of this section.
- (2) An Official Community Visitor must, in exercising a function under this section, act in a manner that preserves, as far as possible, the privacy of each child resident at the premises at which a visitable service is provided.

#### **146 Co-ordination of Official Community Visitors**

- (1) The Children's Guardian has a general oversight and co-ordination role in relation to Official Community Visitors and may determine priorities for the services to be provided by Official Community Visitors.
- (2) The Children's Guardian may convene meetings of Official Community Visitors, and take other action, as may be necessary for the exercise of the Children's Guardian's functions.
- (3) At least one meeting is to be held each calendar year.

### **Division 3 Reports to the Children's Guardian**

#### **147 Report may be made to Children's Guardian**

- (1) An Official Community Visitor may make a report to the Children's Guardian about a child in care if the Official Community Visitor reasonably suspects the child's safety, welfare or wellbeing is at risk.
- (2) The report does not need to be in writing.
- (3) The Children's Guardian may make preliminary inquiries for the purposes of deciding

how to deal with a report and may request further information from the Official Community Visitor making the report.

- (4) The Children's Guardian may, in respect of a report—
  - (a) conduct an investigation, or
  - (b) make a referral to an entity, or
  - (c) decline to take action on the report.
- (5) If an Official Community Visitor, acting in good faith, makes a report to the Children's Guardian under this section, the person is not liable to civil or criminal action, or disciplinary action, for making the report.
- (6) The Children's Guardian may, at the Children's Guardian's own initiative, decide to deal with a matter as a report under this section if the matter relates to a child in care that the Children's Guardian reasonably suspects is not safe, or if the Children's Guardian has concerns for the welfare or wellbeing of the child.

#### **148 Powers of authorised persons**

Schedule 2 provides for powers that may be exercised by the Children's Guardian or an authorised person under this Act in relation to an investigation under this Part.

#### **149 Powers of Children's Guardian to conduct inquiry**

- (1) For the purposes of an investigation of a report under section 147, the Children's Guardian may conduct an inquiry.
- (2) Schedule 3 provides for powers that may be exercised by the Children's Guardian for the inquiry.

#### **150 Referral to other agencies**

- (1) This section applies if the Children's Guardian is of the opinion that a report, or part of a report, given under section 147 constitutes a report, complaint or other matter that may be made to one or more of the following entities—
  - (a) the Commissioner of the NDIS Quality and Safeguards Commission under the *National Disability Insurance Scheme Act 2013* of the Commonwealth,
  - (b) the Ageing and Disability Commissioner under the *Ageing and Disability Commissioner Act 2019*,
  - (c) the Secretary,
  - (d) the Ombudsman,
  - (e) an entity prescribed by the regulations.

- (2) The Children's Guardian must refer the report, or the part of the report, to the entity.
- (3) The Children's Guardian must determine, with the entity the report is referred to, the most appropriate entity to conduct the investigation of the report.
- (4) Despite subsection (3), if the Children's Guardian is of the opinion that conducting an investigation may be necessary to protect the safety, welfare or wellbeing of a child, or class of children, the Children's Guardian may conduct an investigation of the report referred to the entity, including in consultation with the entity.

#### **151 Provision of information to Children's Guardian**

- (1) This section applies to information of a class that the Children's Guardian has determined is information relevant to the exercise of the functions of the Children's Guardian in connection with the accreditation or registration of a designated agency or registered agency.
- (2) An Official Community Visitor is required to provide to the Children's Guardian, and the Children's Guardian is authorised to collect and use, information belonging to a class referred to in subsection (1), if the Children's Guardian has notified the Official Community Visitor the information belongs to the class.
- (3) A provision of an Act or law that prohibits or restricts the disclosure of information does not operate to prevent the provision of information, or affect a duty to provide information, under this section.

### **Division 4 Offences for Part**

#### **152 Protection of complainant against retribution**

- (1) A person must not take or threaten to take detrimental action—
  - (a) against an Official Community Visitor, or
  - (b) in respect of a person because that person, in good faith, makes, or proposes to make, a complaint under this Part.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

- (2) For subsection (1)(b), a complaint is not made in good faith if—
  - (a) the report, complaint or notification was made or proposed in bad faith, or
  - (b) a material allegation was known, by the person giving the report, complaint or notification, to be false.

- (3) In this section—

**community service** has the same meaning as in the *Community Services*



*(Complaints, Reviews and Monitoring) Act 1993.*

**complaint** includes providing information, documents or evidence in relation to a complaint under this Part.

**detrimental action** means action causing, comprising or involving any of the following—

- (a) injury, damage or loss,
- (b) intimidation or harassment,
- (c) discrimination, disadvantage or adverse treatment in relation to employment,
- (d) dismissal from, or prejudice in, employment,
- (e) prejudice in the provision of a community service,
- (f) disciplinary proceedings.

## **Part 10 Administrative review**

### **153 Definition**

In this Part—

**service provider** has the same meaning as in section 143, and also means a relevant entity under Part 4.

### **154 Applications to Civil and Administrative Tribunal for administrative review**

- (1) An application may be made to the Civil and Administrative Tribunal under the *Administrative Decisions Review Act 1997* for administrative review of the following decisions—
- (a) a decision of a person, authorised by or under this Act or the regulations to make the decision, not being the Children's Court, to accredit or not to accredit a government sector agency or an organisation, or part of a government sector agency or organisation, as a designated agency,
  - (b) a decision of the Children's Guardian—
    - (i) to grant an employer's authority, or
    - (ii) to impose a condition or further conditions on, or to vary or revoke a condition of, an employer's authority, or
    - (iii) to suspend or revoke an employer's authority,
  - (c) a decision of the Children's Guardian to declare under section 91(b) that a person

is taken to be the employer of a child,

- (d) a decision of the Children's Guardian to grant an exemption under section 102, to revoke the exemption or to impose conditions on the exemption,
  - (e) a decision to grant or refuse an application for accreditation as an adoption service provider,
  - (f) a decision as to the specification of the adoption services that may be provided by an accredited adoption service provider, or a variation of the decision,
  - (g) a decision in relation to the process of accreditation as an adoption service provider,
  - (h) a decision to impose or not to impose a condition on the accreditation of an adoption service provider or a decision to vary or revoke a condition imposed,
  - (i) a decision to shorten the accreditation period, or suspend or cancel the accreditation, of an accredited adoption service provider, other than a decision requested by an accredited adoption service provider,
  - (j) a decision to refuse to make a decision referred to in paragraphs (a)–(i) that the Children's Guardian is empowered and has been requested to make,
  - (k) a decision made by the Children's Guardian in relation to an investigation by the Children's Guardian, arising from a reportable allegation or a conviction considered to be a reportable conviction under Part 4, if the investigation has been finalised and a finding under section 49(2) has been made,
  - (l) a decision of the Children's Guardian belonging to a class of decisions prescribed by the regulations for this section.
- (2) The Minister is not to recommend the making of a regulation containing provisions for the purposes of subsection (1)(l) unless the Minister certifies that the Minister administering the *Civil and Administrative Tribunal Act 2013* has agreed to the provisions.
- (3) Section 53 of the *Administrative Decisions Review Act 1997* does not apply to a decision under Part 4 that may be reviewed by the Tribunal.

### **155 Persons who may make application**

- (1) An application may be made by a person who demonstrates to the satisfaction of the Civil and Administrative Tribunal a genuine concern in the subject-matter of the decision.
- (2) Without limiting subsection (1), an application may be made by a person who is responsible for, is a next friend of or is appointed by the Civil and Administrative

Tribunal to represent the person to whom the application relates.

- (3) The Tribunal may, on application, grant leave to apply for a review of a decision to any person who was entitled to, but did not, apply for a review of the decision within the time allowed for an application.
- (4) A person found by the Civil and Administrative Tribunal to be unjustifiably interfering in a matter is not entitled to apply to the Civil and Administrative Tribunal for a review in relation to the matter.
- (5) In determining whether a person is unjustifiably interfering in a matter, the Tribunal is to take into account, to the extent practicable, the wishes and interests of persons who have an interest in the matter.

### **156 Representative applications**

- (1) The Civil and Administrative Tribunal may, on application, give leave for an application for a review of a decision to be dealt with as a representative application if it is satisfied—
  - (a) 3 or more persons are entitled to apply to the Civil and Administrative Tribunal for a review of a decision arising from the same, similar or related circumstances to which the application relates but a joinder of the applicants is impracticable, and
  - (b) the applicant is one of the persons and the others consent to a representative application, and
  - (c) the application is made in good faith, and
  - (d) the applicant is capable of adequately advocating the interests of the persons entitled to apply for a review, and
  - (e) a representative application would be to the advantage of the persons entitled to apply for a review, and
  - (f) a representative application would be an efficient and effective means of dealing with the claims of the persons entitled to apply for a review.
- (2) The Civil and Administrative Tribunal may make orders about the making, notification, conduct and determination of a representative application.
- (3) The decision of the Civil and Administrative Tribunal on a representative application is binding on the persons.

### **157 Alternatives to Tribunal determining matter**

- (1) The Civil and Administrative Tribunal must take reasonable steps to encourage the parties to an application for review to effect an amicable agreement.

- (2) The Tribunal may, before it hears an application, or before it determines a matter the subject of an application, refer the application or matter—
  - (a) to the service provider for resolution at a local level, or
  - (b) to the Children's Guardian recommending that consideration be given to investigation or resolution of the matter under this Act, or
  - (c) for investigation by any other appropriate investigative authority.
- (3) The powers conferred on the Tribunal by this section are in addition to any other powers that the Tribunal has under the *Civil and Administrative Tribunal Act 2013* with respect to the use of resolution processes.

### **158 Additional powers of Tribunal**

- (1) The Civil and Administrative Tribunal may decline to hear or determine an application if, in the opinion of the Tribunal—
  - (a) the applicant has available an alternative and satisfactory means of redress, or
  - (b) the applicant has not made appropriate attempts to have the matter to which the application relates otherwise resolved, or
  - (c) the ground for the application is unacceptable having regard to the frequency of applications previously made by or on behalf of the applicant in respect of the same subject-matter.
- (2) In giving a decision on an application, the Tribunal may make recommendations for consideration by the person who made the decision concerned or the Minister, if the decision was made by a service provider.
- (3) If recommendations are made, the parties affected by the decision are entitled to be informed—
  - (a) of action taken in relation to the recommendations, or
  - (b) that it is not proposed to take any action.
- (4) Nothing in this section limits the powers of the Tribunal under Division 3 (Powers on administrative review) of Part 3 of Chapter 3 of the *Administrative Decisions Review Act 1997*.

## **Part 11 Offences**

### **Division 1 Offences about use and disclosure of information**

#### **159 Disclosure of information**

- (1) A person who discloses information obtained in connection with the administration or execution of this Act is guilty of an offence unless the disclosure is made—
  - (a) with the consent of the person from whom the information was obtained, or
  - (b) in connection with the administration or execution of this Act or the regulations, or
  - (c) for the purposes of legal proceedings, or a report about legal proceedings, arising out of this Act or the regulations, or
  - (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or
  - (e) with a lawful excuse.

Maximum penalty—10 penalty units or imprisonment for a period not exceeding 12 months, or both.

- (2) It is not an offence under this section for the Children's Guardian to disclose information to an Official Community Visitor, who has made a report under section 147, concerning action taken as a consequence of the report if the Children's Guardian is of the opinion that disclosure of the information is not inconsistent with the objects and principles of this Act.

#### **160 Disclosure of information for research purposes**

- (1) The Children's Guardian may enter into arrangements with a researcher or a research organisation for the purposes of permitting the disclosure of information to the researcher or research organisation (including health information and personal information) that is held by the Children's Guardian, a designated agency or an accredited adoption service provider.
- (2) The Children's Guardian is not to enter into arrangements under this section unless satisfied that the arrangements will ensure—
  - (a) reasonable steps will be taken to de-identify information disclosed under the arrangements, and
  - (b) information disclosed under the arrangements will be treated by the researcher or research organisation as confidential, and
  - (c) as far as reasonably practicable, no publication that uses or is based on information disclosed under the arrangements will enable the identity of an affected person to be ascertained, and

- (d) as far as is reasonably practicable, personal information disclosed under the arrangements will be used or dealt with in accordance with the information protection principles set out in sections 12, 17, 18 and 19 of the *Privacy and Personal Information Protection Act 1998* as those principles would apply if the researcher or research organisation were a public sector agency.

**Note—**

The *Privacy and Personal Information Protection Act 1998* requires public sector agencies to deal with personal information in accordance with the information protection principles set out in that Act.

- (3) A disclosure of information made in good faith under the arrangements does not—
- (a) constitute a contravention of a provision as to confidentiality in this Act, and
  - (b) constitute a contravention of the *Health Records and Information Privacy Act 2002* or the *Privacy and Personal Information Protection Act 1998*.
- (4) The provisions of the *Health Records and Information Privacy Act 2002* apply to health information disclosed under the arrangements as if the researcher or research organisation were a private sector person (within the meaning of that Act).

**Note—**

The *Health Records and Information Privacy Act 2002* requires a private sector person that collects, holds or uses health information to comply with the health privacy principles set out in that Act.

- (5) In this section—

**health information** has the same meaning as in the *Health Records and Information Privacy Act 2002*.

**personal information** has the same meaning as in the *Privacy and Personal Information Protection Act 1998*.

**research organisation** means an organisation prescribed by the regulations or under the *Adoption Act 2000*.

## **161 False and misleading information**

- (1) A person must not, in relation to the administration of this Act or the regulations, give information that the person knows is false or misleading in a material particular to the Children's Guardian, an officer of the Children's Guardian or an authorised person.

Maximum penalty—10 penalty units.

- (2) Subsection (1) applies whether or not the information was given in response to a specific power under this Act.
- (3) Subsection (1) does not apply to a document if the person, when giving the document—

- (a) tells the Children's Guardian, officer of the Children's Guardian or authorised person, to the best of the person's ability, how it is false or misleading, and
- (b) if the person has, or can reasonably obtain, the correct information, gives the correct information.

(4) Also, subsection (1) does not apply to information given under section 112.

**Note—**

See section 112(3) in relation to false and misleading information given under that provision.

(5) In this section—

**information** includes a statement, document or notification.

### **162 Unlawful use of stored information**

(1) A person must not access information stored by the Children's Guardian unless the person is authorised, approved or delegated to perform a function of the Children's Guardian.

Maximum penalty—10 penalty units.

(2) Subsection (1) does not apply to—

- (a) stored information that cannot be used to discover the identity of a person, or
- (b) accessing stored information if the access is authorised under another law.

## **Division 2 Directors and corporate liability**

### **163 Definition**

In this Division—

**director** has the same meaning as in the [Corporations Act 2001](#) of the Commonwealth.

### **164 Executive liability offences**

For this Division, an **executive liability offence** is an offence against any of the following provisions of this Act that is committed by a corporation—

- (a) section 79(1),
- (b) section 79(2),
- (c) section 92(1),
- (d) section 92(2),
- (e) section 92(3),

- (f) section 97(2),
- (g) section 106,
- (h) section 159(1),
- (i) section 161(1),
- (j) section 162(1),
- (k) section 180(2),
- (l) Schedule 2, clause 15(1),
- (m) Schedule 2, clause 16(1).

**165 Executive liability offences committed by person**

- (1) A person commits an executive liability offence if—
- (a) a corporation commits an executive liability offence, and
  - (b) the person is—
    - (i) a director of the corporation, or
    - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence, and
  - (c) the person—
    - (i) knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and
    - (ii) fails to take all reasonable steps to prevent or stop the commission of that offence.

Maximum penalty—

- (a) for an offence under section 161(1)—100 penalty units, or
  - (b) for an offence under section 162(1)—50 penalty units, or
  - (c) otherwise—the maximum penalty for the executive liability offence if committed by an individual.
- (2) This section does not affect the following—
- (a) the liability of the corporation for the executive liability offence, and applies whether or not the corporation is prosecuted for, or convicted of, the executive



liability offence,

- (b) the application of any other law relating to the criminal liability of persons, whether or not directors or other managers of the corporation, who are accessories to the commission of the executive liability offence or are otherwise concerned in, or party to, the commission of the executive liability offence.

(3) In this section—

**reasonable steps**, in relation to the commission of an executive liability offence, includes, but is not limited to, action of the following kinds that is reasonable in all the circumstances—

(a) action towards—

- (i) assessing the corporation's compliance with the provision creating the executive liability offence, and
- (ii) ensuring that the corporation arranged regular professional assessments of its compliance with the provision,

(b) action towards ensuring that the corporation's employees, agents and contractors are provided with information, training, instruction and supervision appropriate to them to enable them to comply with the provision creating the executive liability offence so far as the provision is relevant to them,

(c) action towards ensuring that—

- (i) the plant, equipment and other resources, and
- (ii) the structures, work systems and other processes,

relevant to compliance with the provision creating the executive liability offence are appropriate in all the circumstances,

(d) action towards creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with the provision creating the executive liability offence.

#### **166 Prosecution of executive liability offence**

- (1) The prosecution bears the legal burden of proving the elements of an executive liability offence.
- (2) An executive liability offence can only be prosecuted by a person who can bring a prosecution for the executive liability offence.

#### **167 Liability of directors etc for offences by corporation—accessory to commission of**

**offences**

- (1) For the purposes of this section, a **corporate offence** is an offence against this Act or the regulations that is capable of being committed by a corporation, whether or not it is an executive liability offence.
- (2) A person commits an offence against this section if—
  - (a) a corporation commits a corporate offence, and
  - (b) the person is—
    - (i) a director of the corporation, or
    - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the corporate offence, and
  - (c) the person—
    - (i) aids, abets, counsels or procures the commission of the corporate offence, or
    - (ii) induces, whether by threats or promises or otherwise, the commission of the corporate offence, or
    - (iii) conspires with others to effect the commission of the corporate offence, or
    - (iv) is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.

Maximum penalty—the maximum penalty for the corporate offence if committed by an individual.

- (3) This section does not affect the following—
  - (a) the liability of the corporation for the corporate offence, and applies whether or not the corporation is prosecuted for, or convicted of, the corporate offence,
  - (b) the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are concerned in, or party to, the commission of the corporate offence.

**168 Evidence as to state of mind of corporation**

- (1) Without limiting a law or practice regarding the admissibility of evidence, evidence that an officer, employee or agent of a corporation, while acting in that capacity, had, at any particular time, a particular state of mind, is evidence that the corporation had that state of mind.
- (2) In this section—

**state of mind**, of a person, includes—

- (a) the knowledge, intention, opinion, belief or purpose of the person, and
- (b) the person's reasons for the intention, opinion, belief or purpose.

### **Division 3 Other offence**

#### **169 Obstructing authorised person or other person**

(1) A person must not obstruct—

- (a) an authorised person, or a person helping an authorised person, exercising a function under Schedule 2, unless the person has a reasonable excuse, or
- (b) a person in the exercise of the person's functions under this Act.

Maximum penalty—10 penalty units.

(2) If a person has obstructed an authorised person, a person helping an authorised person, or a person exercising a function under this Act (each a **relevant person**), and the relevant person decides to proceed with the exercise of the function, or to continue to perform the functions, the relevant person must give a warning to the person obstructing the relevant person that—

- (a) it is an offence to cause an obstruction unless the person has a reasonable excuse, and
- (b) the relevant person considers the person's conduct an obstruction.

(3) In this section—

**obstruct** includes assault, hinder, resist, attempt to obstruct and threaten to obstruct.

### **Division 4 Administration of offences**

#### **170 Time for instituting proceedings**

- (1) Proceedings for an offence under this Act or the regulations may be commenced not later than 6 months after the offence was alleged to have been committed.
- (2) Proceedings for an offence against this Act or the regulations may also be commenced within but not later than 6 months after the Children's Guardian became aware of the alleged offence.
- (3) If subsection (2) is relied on for the purpose of commencing proceedings for an offence, the court attendance notice or application must contain particulars of the date on which evidence of the alleged offence first came to the attention of the Children's Guardian and need not contain particulars of the date on which the offence was alleged to have been committed.

- (4) The date on which evidence first came to the attention of the Children's Guardian is the date stated in the court attendance notice or application, unless the contrary is established.
- (5) This section applies despite anything in the *Criminal Procedure Act 1986* or any other Act.
- (6) In this section—  
**evidence** of an offence means evidence of an act or omission constituting the offence.

### **171 Proceedings for offences**

- (1) Proceedings for an offence against this Act or the regulations may be dealt with summarily before the Local Court or before the Supreme Court in its summary jurisdiction.
- (2) If proceedings for an offence against this Act or the regulations are taken before the Local Court, the maximum monetary penalty the Local Court may impose is, despite any provision of this Act to the contrary, 200 penalty units or the maximum monetary penalty provided by this Act for the offence, whichever amount is the smaller.
- (3) If proceedings for an offence against this Act or the regulations are taken before the Supreme Court, the Supreme Court may impose a penalty not exceeding the maximum penalty provided by this Act or the regulations for the offence.

### **172 Penalty notices**

- (1) An authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.
- (2) A penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.
- (3) The *Fines Act 1996* applies to a penalty notice issued under this section.

**Note—**

The *Fines Act 1996* provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount stated in the notice and is not liable to any further proceedings for the alleged offence.

- (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations, not exceeding the maximum amount of penalty that could be imposed for the offence by a court.
- (5) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.

(6) In this section—

**authorised officer** means—

- (a) a police officer, or
- (b) a person employed in the Office of the Children's Guardian who is authorised in writing by the Children's Guardian as an authorised officer for the purposes of this section.

## **Part 12 Miscellaneous**

### **173 Powers of authorised persons**

Schedule 2 provides for powers that may be exercised by the Children's Guardian or an authorised person under this Act.

### **174 Children's Guardian may make guidelines**

- (1) The Children's Guardian may make guidelines for the purpose of exercising the Children's Guardian's functions.
- (2) Without limiting subsection (1), the Children's Guardian may make guidelines about the following—
  - (a) in relation to a placement of a child with a designated agency—
    - (i) particular classes of people, in addition to parents and including persons significant to the child, who should normally receive information concerning the placement, and
    - (ii) particular types of information concerning the placement that should normally be disclosed, and
    - (iii) guidance as to persons who should not receive information concerning the placement,
  - (b) guidance as to how the child concerned is to participate in any decision-making processes relating to the disclosure of information concerning the authorised carer of the child,
  - (c) processes to follow to ensure procedural fairness and natural justice for employees the subject of an investigation or determination under the reportable conduct scheme,
  - (d) information sharing within the Office of the Children's Guardian.
- (3) A guideline issued by the Children's Guardian must be published on the Office of the Children's Guardian's website.

**175 Secretary may make guidelines**

- (1) The Secretary may make guidelines for the purposes of this Act.
- (2) Without limiting subsection (1), the Secretary may make guidelines about voluntary out-of-home care, including guidance about what constitutes a significant contravention of section 78.
- (3) A guideline issued by the Secretary must be published on the Department's website.

**176 Approval of forms**

- (1) The Children's Guardian may approve forms for use under this Act.
- (2) A form approved under subsection (1) must be published on the Office of the Children's Guardian's website.

**177 Manner of giving notice**

- (1) A notice or other instrument required or authorised by this Act to be given to a person may be—
  - (a) given personally or by prepaid post, or
  - (b) left with a person who is apparently of or above the age of 16 years at the address last known to the Children's Guardian of the person, or
  - (c) given by email to an email address specified by the person for the service of documents of that kind, or
  - (d) if no address of the person is known to the Children's Guardian—published or otherwise given by a method prescribed by the regulations for the notice or instrument.
- (2) If the notice or instrument is—
  - (a) sent by post, the notice or instrument is taken to have been given at the time the notice or instrument would be delivered in the ordinary course of post, or
  - (b) published or otherwise given under subsection (1)(d), the notice or instrument is taken to have been given at a time prescribed by the regulations.

**178 Records**

- (1) A record made under this Act or the regulations may be kept in written or electronic form.
- (2) A record under this Act for an Aboriginal child or Torres Strait Islander child must be kept permanently.

- (3) The regulations may make provision for or with respect to the keeping of and access to records.

### **179 Delegation by Minister**

The Minister may delegate to the Secretary, or any other person, the exercise of any of the Minister's powers under this Act or the regulations, other than this power of delegation.

### **180 Provision and exchange of information**

- (1) The Children's Guardian may, for the purpose of exercising the functions of the Children's Guardian—
- (a) give a relevant body information relating to the safety, welfare and wellbeing of a particular child or class of children, and
  - (b) direct a relevant body to give the Children's Guardian information relating to the safety, welfare and wellbeing of a particular child or class of children.
- (2) A relevant body, other than the Secretary or a government sector agency, must comply with the direction under subsection (1)(b) within the reasonable time specified in the direction.

Maximum penalty—10 penalty units.

- (3) Information given under subsection (1)—
- (a) is not, in proceedings before a court, tribunal or committee, to be held to constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, and
  - (b) does not incur liability for defamation, and
  - (c) does not constitute a ground for civil proceedings for malicious prosecution or for conspiracy.
- (4) A reference in subsection (3) to information given extends to information given in good faith and with reasonable care for the purposes of that subsection.
- (5) A provision of an Act or law that prohibits or restricts the disclosure of information does not operate to prevent the information being given, or affect a duty to give information, under this section.
- (6) Nothing in subsection (5) affects an obligation or power to provide information.
- (7) Information given or directed to be given under subsection (1) must be done in a way, or in accordance with requirements, if any, prescribed by the regulations.

(8) In this section—

**relevant body** means—

- (a) a prescribed body under section 248 of the *Children and Young Persons (Care and Protection) Act 1998*, and
- (b) a body, including an unincorporated body, or a class of bodies, prescribed by the regulations for the purposes of this section.

### **181 Personal liability**

A matter or thing done, or omitted to be done, by an officer of the Children's Guardian, does not, if the matter or thing was done or omitted to be done in good faith, for the purposes of executing this Act, subject the officer acting personally to any action, liability, claim or demand.

**Note—**

See also section 135 for protection from liability for other entities.

### **182 Act binds Crown**

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

### **183 Review of Act**

- (1) The Minister is to review this Act to determine whether—
  - (a) the policy objectives of the Act remain valid, and
  - (b) the terms of the Act remain appropriate for achieving the objectives.
- (2) The review is to be undertaken as soon as practicable after the period of 2 years from the commencement.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.

### **184 Regulations**

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to a matter that, by this Act, is required or permitted to be prescribed, or that is necessary or convenient to be prescribed, for carrying out or giving effect to this Act.
- (2) Without limiting subsection (1), the regulations may provide for the following—
  - (a) arrangements for voluntary out-of-home care,
  - (b) the establishment or continuance of a register to monitor the carrying out of the responsibilities of organisations providing or arranging voluntary out-of-home care,



- (c) the registration of a government sector agency or an organisation, or part of a government sector agency or organisation, as a registered agency for the purpose of providing or arranging voluntary out-of-home care,
  - (d) the regulation, monitoring and oversight of entities providing or arranging voluntary out-of-home care,
  - (e) the authorisation of persons, by designated agencies, as authorised carers on a provisional basis,
  - (f) the accreditation of organisations as adoption service providers and the provision of adoption services by adoption service providers,
  - (g) requirements to be observed in relation to the conduct of an internal review of decisions made by the Children's Guardian under this Act,
  - (h) the oversight and co-ordination of the Official Community Visitor scheme in relation to Official Community Visitors under this Act,
  - (i) the payment of fees for a service provided under this Act, including the waiver, reduction or refund, including part refund, of fees payable under this Act.
- (3) A regulation may create an offence punishable by a penalty not exceeding 50 penalty units.
- (4) The regulations may apply, adopt or incorporate, wholly or in part and with or without modifications, any standard, rule, code, specification or other document prescribed or published by any entity (whether of New South Wales or elsewhere) and as in force at a particular time or from time to time.

## **Schedule 1 Schedule 1 entities**

section 13

- 1** the Department of Education, including a government school within the meaning of the *Education Act 1990*
- 2** the Ministry of Health
- 3** a local health district within the meaning of the *Health Services Act 1997*
- 4** a non-government school within the meaning of the *Education Act 1990*
- 5** a designated agency
- 6** an approved education and care service within the meaning of the *Children (Education and Care Services) National Law (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011*
- 7** that part of Youth Justice within the Department of Communities and Justice comprising the group

of staff who are principally involved in the administration of an Act administered by the Attorney General, and Minister for the Prevention of Domestic Violence and the Minister for Families, Communities and Disability Services

- 8 that part of the Department of Communities and Justice comprising the group of staff who are principally involved in the administration of an Act administered by the Minister for Families, Communities and Disability Services
- 9 a statutory health corporation within the meaning of the *Health Services Act 1997*
- 10 an affiliated health organisation within the meaning of the *Health Services Act 1997*
- 11 the Ambulance Service of NSW within the meaning of the *Health Services Act 1997*
- 12 the TAFE Commission within the meaning of the *Technical and Further Education Commission Act 1990*
- 13 an agency providing substitute residential care for children

## Schedule 2 Powers of authorised persons

sections 48, 84, 103, 148 and 173

### Part 1 General provisions about authorised persons

#### 1 Interpretation

In this Schedule—

**authorised officer** has the same meaning as in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

**authorised person** see clauses 3 and 4.

**film** includes photograph, videotape and record an image in any way.

**general power** see clause 13(1).

**inspect**, in relation to a thing, includes open the thing and examine its contents.

**occupier**, of a place, includes the following—

- (a) if there is more than 1 person who apparently occupies the place—any 1 of the persons,
- (b) any person at the place who is apparently acting with the authority of a person who apparently occupies the place,
- (c) if no-one apparently occupies the place—any person who is an owner of the place.

**of**, in relation to a place, includes at or on the place.

**place** includes premises.

**premises** includes—

- (a) a building or other structure, and
- (b) part of a building or other structure, and
- (c) a caravan or vehicle, and
- (d) premises held under more than 1 title or by more than 1 owner.

**public place** means a place, or part of a place—

- (a) that the public is entitled to use, is open to members of the public or is used by the public, whether or not on payment of money, or
- (b) the occupier of which allows, whether or not on payment of money, members of the public to enter.

## **2 Functions**

An authorised person has the following functions—

- (a) to facilitate the exercise of powers under this Act,
- (b) for Part 5 of the Act—to monitor and accredit agencies and persons providing out-of-home care,
- (c) otherwise—to investigate, monitor and enforce compliance with this Act.

## **3 Children's Guardian is authorised person**

The Children's Guardian is an **authorised person**.

## **4 Children's Guardian may appoint authorised persons**

The Children's Guardian may appoint an officer of the Children's Guardian as an **authorised person**.

## **Part 2 Miscellaneous provisions**

### **5 References to exercise of powers**

If—

- (a) a provision of this Act refers to the exercise of a power by an authorised person, and
- (b) there is no reference to a specific power,

the reference is to the exercise of all or any authorised persons' powers under this Act or a warrant, to the extent the powers are relevant.

## **6 Reference to document includes reference to reproductions from electronic document**

A reference in this Schedule to a document includes a reference to an image or text—

- (a) produced from an electronic document, or
- (b) not yet produced, but reasonably capable of being produced, from an electronic document, with or without the aid of an article or device.

## **Part 3 Entry of places by authorised persons**

### **Division 1 Power to enter**

#### **7 General power to enter places**

- (1) An authorised person may enter a place if—
  - (a) an occupier at the place consents under Division 2 to the entry and clause 10 has been complied with by the authorised person, or
  - (b) it is a public place and the entry is made when the place is open to the public, or
  - (c) it is for the purposes of the exercise of the functions the Children's Guardian to accredit designated agencies and to monitor their responsibilities under this Act or the regulations, or
  - (d) for entry for an investigation under Part 4 of this Act—the entry is to premises occupied or used by a relevant entity being investigated by the Children's Guardian, or
  - (e) for entry to investigate a complaint or an offence under Part 6 of this Act—the entry is authorised under Part 8 of this Schedule, or
  - (f) for entry for a matter under Part 9 of this Act—the entry is authorised under a warrant issued under clause 31.
- (2) If the power to enter arises only because an occupier of the place consented to the entry, the power is subject to any conditions of the consent and ceases if the consent is withdrawn.
- (3) The consent may provide for re-entry and is subject to the conditions of the consent.

### **Division 2 Entry by consent**

#### **8 Application of Division**

This Division applies if an authorised person intends to ask an occupier of a place to consent to the authorised person entering the place.

## **9 Entry to request access**

For the purpose of asking the occupier for the consent, an authorised person may, without the occupier's consent or a warrant—

- (a) enter land around premises at the place to the extent that is reasonable to contact the occupier, or
- (b) enter part of the place the authorised person reasonably considers members of the public are ordinarily allowed to enter when they wish to contact an occupier of the place.

## **10 Matters authorised person must tell occupier**

Before asking for the consent, the authorised person must—

- (a) explain to the occupier the purpose of the entry, including the powers intended to be exercised, and
- (b) tell the occupier that—
  - (i) the occupier is not required to consent, and
  - (ii) the consent may be given subject to conditions and may be withdrawn at any time.

## **11 Consent acknowledgement**

- (1) If the consent is given, the authorised person may ask the occupier to sign an acknowledgement of the consent.
- (2) The acknowledgement must state—
  - (a) the purpose of the entry, including the powers to be exercised, and
  - (b) that the occupier has been given an explanation about the purpose of the entry, including the powers intended to be exercised, and
  - (c) that the occupier has been told—
    - (i) that the occupier is not required to consent, and
    - (ii) that the consent may be given subject to conditions and may be withdrawn at any time, and
  - (d) that the occupier gives the authorised person consent to enter the place and exercise the powers, and
  - (e) the day and time the consent was given, and
  - (f) any conditions of the consent.

(3) If the occupier signs the acknowledgement, the authorised person must, as soon as practicable but no later than 1 business day after the acknowledgement is signed, give a copy to the occupier.

(4) If—

(a) an issue arises in a proceeding about whether the occupier consented to the entry, and

(b) a signed acknowledgement complying with subclause (2) for the entry is not produced in evidence,

the onus of proof is on the person relying on the lawfulness of the entry to prove the occupier consented.

## **Part 4 General powers of authorised persons after entering places**

### **12 Application of Part**

- (1) The powers under this Part may be exercised if an authorised person enters a place.
- (2) However, if the authorised person enters under clause 7(1)(a), the powers under this Part are subject to any conditions of the consent.

### **13 General powers**

- (1) The authorised person may do any of the following (each a **general power**)—
  - (a) search any part of the place,
  - (b) inspect, examine or film any part of the place or anything at the place,
  - (c) take an extract from, or copy, a document at the place or take the document to another place to copy,
  - (d) remain at the place for the time necessary to achieve the purpose of the entry.
- (2) The authorised person may take any necessary steps to allow the exercise of a general power.
- (3) If the authorised person takes a document from the place to copy it, the authorised person must copy the document and return the document to the place as soon as practicable.

## **Part 5 Other information-obtaining powers of authorised persons**

### **14 Power to require information or attendance**

- (1) This clause applies if—

- (a) an authorised person reasonably believes—
    - (i) an offence against this Act has been committed, and
    - (ii) a person may be able to give information about the offence, or
  - (b) the Children's Guardian is monitoring a person, entity or organisation in the exercise of the Children's Guardian's functions, or
  - (c) an authorised person reasonably believes a person may be able to give information about a matter being investigated by the Children's Guardian in the exercise of the Children's Guardian's functions.
- (2) The authorised person may, by written notice given to the person, require the person to—
- (a) give the authorised person stated information related to an offence, a matter being monitored or a matter being investigated, at a stated reasonable time and place, or
  - (b) attend before the authorised person at a stated reasonable time and place to answer questions, or produce a document or thing, related to the offence, matter being monitored or matter being investigated.
- (3) The notice must—
- (a) specify or describe the document or thing the person must produce, and
  - (b) state the time and place the person must attend.
- (4) For information that is an electronic document, the requirement is satisfied by giving a clear image or written version of the electronic document.

### **15 Offence to contravene information requirement**

- (1) A person of whom a requirement is made under clause 14(2)(a) must comply with the requirement unless the person has a reasonable excuse.

Maximum penalty—10 penalty units.

- (2) It is a reasonable excuse for an individual not to give the information if giving the information might tend to incriminate the individual or expose the individual to a penalty.

### **16 Offence to contravene attendance requirement**

- (1) A person of whom a requirement is made under clause 14(2)(b) must not fail, without reasonable excuse, to—

(a) attend as required by the notice, and

- (b) continue to attend as required by the authorised person until excused from further attendance, and
- (c) answer a question the person is required to answer by the authorised person, and
- (d) produce a document the person is required by the notice to produce.

Maximum penalty—10 penalty units.

- (2) It is a reasonable excuse for an individual to fail to answer a question or produce a document if answering the question or producing the document might tend to incriminate the individual or expose the individual to a penalty.

## **Part 6 Miscellaneous provisions relating to authorised persons**

### **17 Duty to avoid inconvenience and minimise damage**

In exercising a power, an authorised person must take all reasonable steps to cause as little inconvenience, and do as little damage, as possible.

### **18 Impersonating authorised person**

A person must not impersonate an authorised person.

Maximum penalty—10 penalty units.

### **19 Observing and conversing with persons, including children**

- (1) An authorised person, and any police officer or medical practitioner accompanying the person, may observe and converse with any person present in any premises or at any place entered by the person.
- (2) Nothing in subclause (1) authorises the examination of a person.

## **Part 7 Entry without warrant for a reportable conduct investigation**

### **20 Application of Part**

- (1) This Part applies if the entry to premises is for premises occupied or used by a relevant entity being investigated by the Children's Guardian under Part 4 of this Act.
- (2) This Part does not limit the operation of Parts 1–6 of this Schedule.

### **21 Entry to premises and inspection**

An authorised person may—

- (a) enter and inspect the premises occupied or used by a relevant entity, and
- (b) inspect any document or thing in the premises.



## **22 Privilege as regards entry and inspections on public premises**

The authorised person must not exercise powers under clause 21 if it appears to the authorised person that section 62 of this Act would apply as if the entry and inspection were a requirement under section 62(1).

## **Part 8 Entry in relation to employment matters**

### **23 Application of Part**

- (1) This Part applies in relation to an inspection of premises under Part 6 of this Act.
- (2) This Part does not limit the operation of Parts 1–6 of this Schedule.
- (3) Nothing in this Part authorises the entry of a dwelling.

### **24 Entry without warrant into premises—places of employment**

An authorised person may, at any time, enter and inspect premises without the need for any authority other than that conferred by this clause for the purpose of—

- (a) ensuring that the provisions of Part 6 of this Act and the regulations, and of any conditions imposed on an employer's authority, are being complied with at premises that are a place of employment of a person who is the holder of an employer's authority, or
- (b) ensuring that the conditions of any employer's exemption are being complied with at premises that are a place of employment of an employer exempt from holding an employer's authority.

### **25 Entry without warrant into premises—suspected employment of children**

- (1) This clause applies to any premises that an authorised person reasonably suspects is a place at which a person is employing a child in contravention of Part 6 of this Act.
- (2) An authorised person may, at any time, enter and inspect any premises to which this clause applies without the need for any authority other than that conferred by this clause for the purpose of ensuring that the provisions of Part 6 are being complied with.

### **26 Powers exercisable on entry under Part**

A person who is authorised under this Part to enter and inspect any premises may also exercise the powers specified in clause 29.

## **Part 9 Entry of premises subject to control or regulation**

### **27 Application of Part**

- (1) This Part applies to any premises that are subject to control or regulation under this

Act or the regulations, whether by means of a licence or otherwise.

(2) This Part does not limit the operation of Parts 1–6 of this Schedule.

## **28 Entry without warrant into premises subject to control or regulation**

(1) The Children's Guardian may, at any time, enter and inspect any premises to which this Part applies without the need for any authority other than that conferred by this clause for the following purposes—

- (a) making an inquiry in relation to an application under this Act with respect to the premises,
- (b) ensuring that the provisions of this Act and the regulations with respect to the premises, and of any conditions imposed on a licence or other authority with respect to the premises, are being complied with,
- (c) ensuring that the conditions of any exemption relating to the premises are being complied with.

(2) This clause does not apply to premises to which Part 8 of this Schedule applies.

## **29 Powers exercisable on entry and inspection**

(1) An authorised person acting on an authority under this Part, or under a search warrant issued under this Act, to enter and inspect any premises, may do any one or more of the following—

- (a) enter the premises,
- (b) inspect the premises,
- (c) make such examination and inquiry as the authorised person thinks necessary in order to exercise functions under this Act and the regulations,
- (d) take such photographs, films and audio, video and other recordings, as the authorised person considers necessary,
- (e) make copies of, or take extracts or notes from, any records, books, documents or other things,
- (f) for the purpose of further examination, take possession of, and remove, any of those records, books, documents or other things,
- (g) require the owner or occupier of the premises to provide the authorised person with such assistance and facilities as is or are reasonably necessary to enable the authorised person to exercise functions under this Act or the regulations,
- (h) require any person in or about the premises to answer questions or otherwise

furnish information,

- (i) require any person to produce any records, books, documents or other things in the possession or under the control of the person that relate to, or that the authorised person making the entry and inspection believes on reasonable grounds relate to, the operation or administration of the premises or any activity conducted on or from the premises,
- (j) if the authorised person making the entry and inspection considers it necessary to do so for the purpose of obtaining evidence of the commission of an offence, seize any document or other thing inspected.

- (2) A person must comply with any requirement of the authorised person making the entry and inspection under this clause.

Maximum penalty—10 penalty units.

- (3) Despite subclause (2), for a requirement made in relation to the exercise of a power under Part 8 of this Schedule, a person must comply with any requirement under this clause of the authorised person making the entry and inspection.

Maximum penalty—200 penalty units.

## **Part 10 Search warrants**

### **30 Application of Part**

- (1) This Part does not limit the operation of Parts 1–6 of this Schedule.
- (2) This Part applies to an investigation under Part 9 of this Act.

### **31 Search warrants**

- (1) For the purposes of an investigation, the Children's Guardian may apply to an authorised officer for a search warrant if the Children's Guardian has reasonable grounds for believing that there is on any premises a risk to the safety, welfare and wellbeing of a child.
- (2) If the authorised officer is satisfied there are reasonable grounds, the authorised officer may issue a search warrant authorising the Children's Guardian, or an officer of the Children's Guardian named in the warrant, to enter premises specified in the warrant and do any or all of the following—
  - (a) examine and inspect any part of the premises for evidence a child is not safe, or evidence indicating the welfare or wellbeing of the child is at risk,
  - (b) take any photographs, films and audio, video or other recordings that the Children's Guardian or officer of the Children's Guardian considers necessary,

- (c) require documents to be produced for inspection,
  - (d) examine and inspect any documents,
  - (e) copy or take notes from any documents,
  - (f) for the purpose of further examination, take possession of, and remove, any documents or other things,
  - (g) require the owner or occupier of the premises to provide the Children's Guardian or officer of the Children's Guardian named in the warrant with any assistance or facilities that are reasonably necessary to enable the Children's Guardian or officer to conduct an investigation,
  - (h) require any person in or about the premises to answer questions or otherwise provide information.
- (3) If the person executing a warrant under this clause is accompanied by a relevant health practitioner, the relevant health practitioner may inspect the premises and observe and speak with any child or adult apparently residing at the premises.
- (4) If the Children's Guardian, or officer of the Children's Guardian named in the warrant, removes any goods from the premises when executing a warrant under this clause, the Children's Guardian or officer of the Children's Guardian must provide a written receipt to the person apparently in charge of the premises.
- (5) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this clause.

**Note—**

Under Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, a person may execute a search warrant with the aid of any assistants the person considers necessary (including a police officer or health practitioner).

- (6) In this clause—

**relevant health practitioner** means a medical practitioner or other health practitioner of a class prescribed by the regulations.

## **Part 11 Immunity for particular compliance**

### **32 Evidential immunity for individuals complying with Schedule**

- (1) Subclause (2) applies if an individual gives or produces information or a document to an authorised person under this Schedule.
- (2) Evidence of the information or document, and other evidence directly or indirectly derived from the information or document, is not admissible against the individual in any proceeding to the extent it tends to incriminate the individual, or expose the

individual to a penalty, in the proceeding.

- (3) Subclause (2) does not apply to a proceeding about the false or misleading nature of the information or anything in the document or in which the false or misleading nature of the information or document is relevant evidence.

## Schedule 3 Inquiries

sections 48(5) and 149(2)

### 1 Inquiries

- (1) The Children's Guardian may make or hold inquiries in relation to—
- (a) an investigation by the Children's Guardian under Division 8 of Part 4 of this Act, or
  - (b) an investigation of a report by an Official Community Visitor to the Children's Guardian, or a matter dealt with as a report on the Children's Guardian's own initiative, under Part 9 of this Act.
- (2) For the purposes of any inquiry under this clause—
- (a) the Children's Guardian has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923*, and
  - (b) the *Royal Commissions Act 1923*, other than section 13 and Division 2 of Part 2 of that Act, applies to a witness summoned by or appearing before the Children's Guardian in the same way as it applies to a witness summoned by or appearing before a commissioner.
- (3) However, section 11(2) of the *Royal Commissions Act 1923* has effect subject to section 62 of and clause 22 of Schedule 2 to this Act.
- (4) A witness appearing before the Children's Guardian is to be paid an amount prescribed by the regulations that does not exceed the amount that would be payable to the witness if the witness were a Crown witness subpoenaed by the Crown to give evidence.
- (5) The Children's Guardian may appoint an Australian legal practitioner to assist the Children's Guardian for the purposes of an inquiry held by the Children's Guardian and the Australian legal practitioner may appear before the inquiry.
- (6) For the purposes of conducting an inquiry under this Schedule, the Children's Guardian is not bound by the rules of evidence and may be informed on any matter in issue at the inquiry in the manner the Children's Guardian considers appropriate.
- (7) The Children's Guardian may give directions as to the procedure to be followed at, or

in connection with, the inquiry.

## **2 Restriction on publication of evidence**

- (1) The Children's Guardian may direct that the following must not be published, or must not be published except in a manner, and to particular persons, as the Children's Guardian specifies—
  - (a) evidence given before an inquiry held by the Children's Guardian,
  - (b) the contents of a document, or a description of a thing, produced to the Children's Guardian,
  - (c) information that might enable a person who has given or may be about to give evidence before an inquiry to be identified or located,
  - (d) the fact that any person has given or may be about to give evidence before an inquiry.
- (2) The Children's Guardian is not to give a direction under this clause unless satisfied that the direction is necessary or desirable in the public interest.
- (3) A person must not make a publication in contravention of a direction given under this clause.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

- (4) It is not a contravention of a direction given under this clause to publish any evidence, contents of a document or information to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling, including psychological counselling, to a person who has given or may be about to give evidence before an inquiry.

## **3 Publication of evidence given at inquiry**

- (1) A person present at an inquiry must not publish, or permit to be published, evidence given before the inquiry or the contents of a document produced at the inquiry, except to the Children's Guardian, an officer of the Children's Guardian or an Australian legal practitioner appointed under clause 1(5) or as permitted by the Children's Guardian or the regulations.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

- (2) Nothing in this clause affects clause 2, but a person cannot be punished under both clauses for the same publication.
- (3) This clause does not apply to an officer of the Children's Guardian or an Australian legal practitioner appointed under clause 1(5).

- (4) It is not a contravention of this clause to publish evidence or contents of a document to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling, including psychological counselling, to a person who has given or may be about to give evidence before an inquiry.

#### **4 Disclosures prejudicing investigations**

- (1) A person who is, by a summons under clause 1, required to give evidence or produce a document or other thing, must not disclose information about the summons that is likely to prejudice the investigation to which it relates.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

- (2) Subclause (1) does not apply to a summons unless it specifies that information about the summons must not be disclosed.

- (3) A person does not contravene this clause if—

- (a) the disclosure is made to an employee, agent or other person in order to obtain information to comply with the summons and the employee, agent or other person is directed not to inform the person to whom the information relates about the matter, or
- (b) the disclosure is made to obtain legal advice or representation in relation to the summons, or
- (c) the disclosure is made for the purposes of, or in the course of, legal proceedings, or
- (d) the disclosure is made to a registered medical practitioner or registered psychologist in relation to the provision by that health practitioner of medical or psychiatric care, treatment or counselling, including psychological counselling, to the person required to give evidence by the summons, or
- (e) the disclosure is made in accordance with guidelines issued by the Children's Guardian or in accordance with the regulations.

- (4) A reference in this clause to the disclosure of any information about a summons includes a reference to—

- (a) a disclosure about the existence or nature of the summons or of the investigation to which it relates, and
- (b) a disclosure of any information to a person from which the person could reasonably be expected to infer the existence or nature of the summons or of the investigation to which it relates.

## Schedule 4 Savings, transitional and other provisions

### Part 1 General

#### 1 Transitional regulation-making power

- (1) A regulation (a **transitional regulation**) may make provision about a matter for which—
  - (a) it is necessary to make provision to allow or facilitate the doing of any thing to achieve the transition from the operation of the relevant provisions to the operation of this Act, and
  - (b) this Act does not make provision or sufficient provision.
- (2) A transitional regulation may have retrospective operation to a day not earlier than the day of commencement.
- (3) A transitional regulation must declare it is a transitional regulation.
- (4) This clause and any transitional regulations expire 2 years after the day of commencement.
- (5) In this clause—

**relevant provisions** means a provision of the following Acts omitted or amended by this Act—

- (a) the *Adoption Act 2000*,
- (b) the *Children and Young Persons (Care and Protection) Act 1998*,
- (c) the *Community Services (Complaints, Reviews and Monitoring) Act 1993*,
- (d) the *Ombudsman Act 1974*.

#### 2 Regulations continued

- (1) This clause applies to regulations made under the following Acts—
  - (a) the *Adoption Act 2000*,
  - (b) the *Children and Young Persons (Care and Protection) Act 1998*,
  - (c) the *Community Services (Complaints, Reviews and Monitoring) Act 1993*,
  - (d) the *Ombudsman Act 1974*.
- (2) A provision of a regulation made under an Act listed in subclause (1) continues in force despite the commencement of this Act or a regulation under this Act, as if the provision of the regulation were made under a provision of this Act, with the necessary



modifications.

(3) This clause expires on 1 March 2021.

## **Part 2 Provisions consequent on enactment of this Act**

### **3 Appointment of Children's Guardian continued**

The appointment of the Children's Guardian under the *Children and Young Persons (Care and Protection) Act 1998* is continued as if the appointment were made under this Act.

### **4 Existing accreditation and applications for accreditation**

- (1) An organisation that, immediately before the commencement, was accredited as an adoption service provider under Part 2 of Chapter 3 of the *Adoption Act 2000* is taken to have been accredited under this Act for the period and subject to the conditions to which it was subject.
- (2) An application for accreditation made by an organisation under Part 2 of Chapter 3 of the *Adoption Act 2000* before the commencement of this Act, and not finally dealt with, is to continue to be dealt with under that Part unless the applicant elects to have the application dealt with under this Act.

### **5 Criteria for accreditation under Adoption Act 2000**

The standards and other criteria, approved under section 13 of the *Adoption Act 2000*, are taken to be standards and other criteria under section 113 of this Act.

### **6 Principal officers**

Section 75 of this Act extends to things done by, or with the approval of, a principal officer under section 5A of the *Children and Young Persons (Care and Protection) Act 1998*.

### **7 Existing Official Community Visitors**

- (1) A person who, immediately before the commencement, was an Official Community Visitor for the purposes of Part 2 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, is taken to have been appointed as an Official Community Visitor under section 144 of this Act for the term for which the person was appointed under section 7 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.
- (2) Nothing in this clause limits any function an Official Community Visitor may have under any other Act.

### **8 Existing approvals for out-of-home care**

- (1) This clause applies to the following entities registered or otherwise authorised to arrange or provide voluntary out-of-home care in accordance with the *Children and*

*Young Persons (Care and Protection) Act 1998* (each a **voluntary out-of-home care agency**)—

- (a) a designated agency,
  - (b) a registered agency,
  - (c) an individual authorised by a relevant agency (within the meaning of section 156 of that Act) or the Children's Guardian to provide voluntary out-of-home care.
- (2) A voluntary out-of-home care agency, registered under the *Children and Young Persons (Care and Protection) Act 1998* and the regulations under that Act to arrange or provide voluntary out-of-home care, is, on commencement, taken to be—
- (a) the equivalent type of voluntary out-of-home care agency under this Act, and
  - (b) registered under this Act for the period and subject to the conditions to which it was subject under the *Children and Young Persons (Care and Protection) Act 1998*.
- (3) An application for registration as a voluntary out-of-home care agency made under the *Children and Young Persons (Care and Protection) Act 1998* and the regulations under that Act is, on commencement, taken to be an application for registration as the equivalent type of voluntary out-of-home care agency registration and is to be determined in accordance with this Act.

## **9 Records to be transferred**

- (1) Records kept in relation to Part 3A of the *Ombudsman Act 1974* are to be transferred to the Office of the Children's Guardian on commencement.
- (2) A transferred record is to be treated for the purposes of a law of the State as if it were a record that the Children's Guardian had lawfully obtained in the performance of the Children's Guardian's functions.
- (3) However, the provisions of the *Ombudsman Act 1974*, as in force immediately before the commencement of this Schedule, continue to apply to records transferred by operation of this clause, as if they had not been transferred.
- (4) This clause has effect despite section 21 of the *State Records Act 1998* and section 34 of the *Ombudsman Act 1974*.
- (5) Nothing in this Act prevents the Ombudsman from accessing records transferred under this clause, in the way agreed to by the Children's Guardian.

## **10 Reportable allegations and reportable convictions under the *Ombudsman Act 1974***

- (1) On commencement, an existing matter is taken to be a reportable allegation or reportable conviction made to the Children's Guardian under this Act.

(2) In this clause—

**existing matter** means an investigation, notification or disclosure in relation to a reportable allegation or reportable conviction under Part 3A of the [Ombudsman Act 1974](#) that is not finally dealt with on commencement.

## **Part 3 Provisions with delayed application**

### **11 Offences under Part 4**

If an entity commits an offence against a provision of Part 4 of this Act, other than an offence under Division 13 or Part 11 of this Act, the entity is taken not to have committed the offence for the period starting on commencement and ending 3 months after commencement.

### **12 Annual reports not required in first 12 months of commencement**

Division 6 of Part 8 of this Act does not apply, in relation to an annual report, until 12 months after commencement of this Act.

## **Schedule 5 Amendment of Acts and instruments**

### **5.1-5.9**

(Repealed)

### **5.10 Children's Guardian Act 2019**

#### **[1]-[4] (Repealed)**

#### **[5] Schedule 1 Schedule 1 entities**

Insert at the end of the Schedule, with appropriate item numbering—

providers of overnight camps

#### **[6] Schedule 1**

Insert at the end of the Schedule, with appropriate item numbering—

accommodation and respite services for children that provide overnight beds for children, including housing and homelessness services

#### **[7] Schedule 1**

Insert at the end of the Schedule, with appropriate item numbering—

providers of family group homes

**[8] (Repealed)**

**5.11-5.31**

(Repealed)

**Schedule 6 Dictionary**

section 4

**Aboriginal child—**

- (a) means a child descended from an Aboriginal person, and
- (b) includes a child the Children's Court has determined is an Aboriginal child under section 5(2) of the *Children and Young Persons (Care and Protection) Act 1998*.

**Aboriginal person** has the same meaning as in the *Aboriginal Land Rights Act 1983*.

**accredited adoption service provider** means an organisation accredited by the Children's Guardian to provide adoption services.

**adoption service** has the same meaning as in the *Adoption Act 2000*.

**adoptive parent** has the same meaning as in the *Adoption Act 2000*.

**adult** means an individual who is 18 years or more.

**advisory committee** means an advisory committee established under section 130.

**assault**, for Part 4, see section 25.

**authorised carer** has the same meaning as in the *Children and Young Persons (Care and Protection) Act 1998*.

**authorised officer**, for Schedule 2, see clause 1 of Schedule 2.

**authorised person** see clause 1 of Schedule 2.

**business day** means a day that is not—

- (a) a Saturday or Sunday, or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be done or may be done.

**care responsibility** has the same meaning as in the *Children and Young Persons (Care and Protection) Act 1998*.

**child—**

- (a) for Part 6—see section 90, or

(b) for Part 7—see section 109, or

(c) otherwise—means an individual under the age of 18 years.

**child in care**, for Part 9, see section 143.

**Children's Court** means the Children's Court of New South Wales constituted by the [Children's Court Act 1987](#).

**Children's Guardian** means the Children's Guardian appointed under section 115.

**Children's Guardian report**, for Part 4, see section 49(1).

**commencement** see section 5(1).

**Commissioner of Police** means the Commissioner of Police appointed under the [Police Act 1990](#).

**complaint**, for Part 4, see section 10.

**contractor**, for Part 4, see section 10.

**Department** means the Department of Communities and Justice.

**designated agency** see section 72.

**director**, for Division 2 of Part 11, see section 163.

**employee**, for Part 4, see section 16.

**employer's authority** means an employer's authority that has been granted by the Children's Guardian under Division 3 of Part 6.

**employer's exemption** see section 94(1)(b).

**employment**—

(a) for Part 4—see section 10, or

(b) for Part 6—see section 90.

**entity** includes a person and an unincorporated body.

**entity report**, for Part 4, see section 36(1).

**executive liability offence**, for Division 2 of Part 11, see section 164.

**film**, for Schedule 2, see clause 1.

**finding of reportable conduct**, for Part 4, see section 26.

**general power**, for Schedule 2, see clause 1.

**head**, of a relevant entity, for Part 4, see section 17.

**ill-treatment**, of a child, for Part 4, see section 23.

**inspect**, in relation to a thing, for Schedule 2, see clause 1.

**investigation**, for Part 4, see section 10.

**investigator**, for Part 4, see section 10.

**kin**, of a child, means a person who shares a cultural, tribal or community connection with the child that is recognised by that child's family or community.

**local government authority**, for Part 4, see section 15.

**married** means—

- (a) 2 persons who are legally married to each other, or
- (b) 2 Aboriginal or Torres Strait Islander persons who are living together in a relationship that is recognised as a marriage according to the traditions of an Aboriginal community or Aboriginal or Torres Strait Islander group to which they belong.

**neglect**, for Part 4, see section 24.

**notification**, for Part 4, see section 29(2).

**occupier**, for Schedule 2, see clause 1.

**of**, in relation to a place, for Schedule 2, see clause 1.

**Official Community Visitor** means an Official Community Visitor appointed under section 144.

**out-of-home care** has the same meaning as in the [Children and Young Persons \(Care and Protection\) Act 1998](#).

**parent**, of a child, means a person having parental responsibility for the child.

**parental responsibility**, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.

**place**, for Schedule 2, see clause 1.

**premises**, for Schedule 2, see clause 1.

**principal officer**—

- (a) for an adoption service provider—see section 110, or
- (b) for a designated agency or a registered agency—see section 74.

**public authority**, for Part 4, see section 14.

**public place**, for Schedule 2, see clause 1.

**registered agency** see section 73.

**relative** of a child means any of the following—

- (a) a parent, step-parent, or spouse of a parent or step-parent, of the child,
- (b) a grandparent, brother, sister, step-brother, step-sister, cousin, niece or nephew, uncle or aunt (whether by blood, marriage, affinity or adoption) of the child,
- (c) a person who has parental responsibility for the child (not being the Minister, the Secretary or a person who has parental responsibility other than in his or her personal capacity),
- (d) a person who has care responsibility for the child under the [Adoption Act 2000](#) (not being the Minister, the Secretary or a person who has care responsibility other than in his or her personal capacity),
- (e) for an Aboriginal child or a Torres Strait Islander child—a person who is part of the extended family or kin of the child.

**relevant entity**, for Part 4, see section 12.

**religious body**, for Part 4, see section 15A.

**report**, for Part 4, see section 10.

**reportable allegation** see section 18.

**reportable conduct** see section 20.

**reportable conduct flag**, in relation to a person, means a notation on a register that the person is the subject of an investigation or determination under the reportable conduct scheme.

**reportable conduct scheme** see section 11.

**reportable conviction** see section 19.

**reside**, on a property, has the same meaning as **reside on a property** in the [Child Protection \(Working with Children\) Act 2012](#).

**responsible Minister**, for Part 4, see section 10.

**Schedule 1 entity**, for Part 4, see section 13.

**Secretary** means the Secretary of the Department.

**service**, for Part 9, see section 143.

**service provider**—

- (a) for Part 9—see section 143, or
- (b) for Part 10—see section 153.

**sexual misconduct**, for Part 4, see section 22.

**sexual offence**, for Part 4, see section 21.

**spouse**, of a person, means the following but, if more than one person would qualify as the person's

spouse, means only the latest person to qualify—

- (a) a person to whom the person is legally married (including a husband or wife of the person),
- (b) the person's de facto partner.

**statutory out-of-home care** has the same meaning as in the *Children and Young Persons (Care and Protection) Act 1998*.

**step-parent**, in relation to a particular person, means a person who—

- (a) is not a birth parent, parent or adoptive parent of the particular person, and
- (b) is married to the particular person's birth parent or adoptive parent or is the de facto partner of the birth parent or adoptive parent.

**substitute residential care** means care—

- (a) involving the provision of accommodation together with food, care and other support, and
- (b) in the State for more than 2 nights, and
- (c) of a type ordinarily provided to children in a home environment, provided by persons other than the child's parents or relatives.

**supported out-of-home care** has the same meaning as in the *Children and Young Persons (Care and Protection) Act 1998*.

**the commencement** see section 5(2).

**Torres Strait Islander child**—

- (a) means a child descended from a Torres Strait Islander person, and
- (b) includes a child the Children's Court has determined is a Torres Strait Islander child under section 5(3) of the *Children and Young Persons (Care and Protection) Act 1998*.

**Torres Strait Islander person** means a person who—

- (a) is descended from a Torres Strait Islander person, and
- (b) identifies as a Torres Strait Islander person, and
- (c) is accepted as a Torres Strait Islander person by a Torres Strait Islander community.

**under**, for an Act or a provision of an Act, includes—

- (a) by, and
- (b) for the purposes of, and
- (c) in accordance with, and
- (d) within the meaning of.



**visitable service**, for Part 9, see section 143.

**voluntary out-of-home care** see section 76.

**working with children check clearance** has the same meaning as in the [Child Protection \(Working with Children\) Act 2012](#).