Children's Guardian Amendment (Child Safe Scheme) Bill 2021

Submission from Freedom for Faith

January 2021

About Freedom for Faith

Freedom for Faith is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond.

It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, the Seventh-Day Adventist Church in Australia, and the Anglican Church Diocese of Sydney. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia.

This submission was prepared by Prof. Patrick Parkinson AM in consultation with the Board and church leaders.

1. Preliminary observations

In commenting on the proposed legislation, we must emphasise our support for having Child Safe Standards and for the general intent and purpose of the Bill. We are also aware that all the denominations with which we have connections have already developed very thorough child safe policies and practices (and many of these long pre-date the Royal Commission). They are committed to working collaboratively with the Children's Guardian to keep improving their practices and to help other organisations to do the same.

Notwithstanding this strong commitment to the safety of children, we have concerns about the proposed Bill. In particular, church leaders have expressed to us serious concerns that the legislation introduces a very substantial new level of regulation by government of religious bodies, however minimal or tangential is the involvement of those under 18 in their activities, while leaving out of regulation most of the non-government sector that does not have a religious purpose. We anticipate a widespread view that this is unacceptable. Regulation must have a principled basis which is not perceived as discriminatory.

Furthermore, there are difficult policy issues that ought to be carefully considered about how far the Government should go in regulating and supervising the work of non-government organisations in the area of care of children. These vary enormously from large, and substantially government-funded welfare organisations, to small associations reliant entirely on volunteers

that receive no public funding. Regulation has to be proportionate and well-targeted. It was an issue to which the Royal Commission itself gave serious consideration. The requirements and legal responsibilities that might appropriately be placed on large organisations may not be proportionate in relation to small organisations. For example, if liability rules change and consequently there are substantial increases in insurance costs, a large publicly-funded organisation can find ways of passing on that cost in its negotiations on funding with the relevant government. An organisation that charges fees – for example for out-of-school hours care – could cover increased insurance costs by raising those fees. Another organisation, operating locally and entirely run by volunteers, might consider it can no longer provide the relevant activity or service and must close. The NSW Government was previously very conscious of these issues when it determined whether and how to implement the recommendations of the Royal Commission on changes to liability rules.

With respect, we see a similar discussion is needed in relation to this Bill. Particular comments follow.

2. The definition of religious body

There is no definition of this term in Part 3A. There is a definition in Part 4 (s.15A), but it is applicable only to that Part (see s.10).

Assuming that the Government intends the definition in section 15A to be applicable to Part 3A as well, it is important to observe how broad that definition is. It includes any "body established for a religious purpose" irrespective of whether that body works with children.

A great many religious bodies, or bodies established for a religious purpose, do not have any involvement in work with children. Freedom for Faith, a registered association in NSW, is an example. These bodies would have quite significant obligations under s.8BA of the proposed legislation.

We assume that this is just a drafting error (and section 15A of the Act arguably contains a similar drafting error). What we think that the Government intends, is that any religious organisation that provides programs or activities for children is to be covered. The Royal Commission was quite clear about the scope of its recommendations. See recommendation 6.9. As far as faith-based organisations are concerned, it considered the Child Safe Standards should apply to activities or services of any kind, under the auspices of a particular religious denomination or faith, through which adults have contact with children.

We note, even still, the need for a carefully drafted and targeted definition that is not over-inclusive. If the Royal Commission's definition were adopted, the rules would apply to every religious organisation that has children present at its community gatherings, irrespective of whether adults ever have the opportunity for *unsupervised* contact with children (which was the basis of the original efforts made to require Working with Children checks). An organisation that is established for a religious purpose would fall within the Royal Commission definition if it had no children's activities at all, but children, together with their parents, came to a church family

barbeque. What if all the organisation does is to run a mothers and toddlers group in which the children are supervised by their own mothers and the other mothers who are present?

Further thought needs to be given to the kinds of activities that should and should not be captured by the relevant definitions so that relevant definitions in the Bill are neither over-inclusive nor under-inclusive.

For the reasons given below, we generally support the view taken in the earlier consultations by the Office of the Children's Guardian. We do not support the definition of a child safe organisation as currently contained in the Bill (s.8AA).

3. The absence of regulation of non-religious bodies

A rather startling feature of the proposed legislation is that it is so selective about which organisations are required to adopt these Standards.

For reasons we find difficult to understand, the proposed legislation does not impose the same requirements, or give the Office of the Children's Guardian the same responsibilities, in relation to non-religious organisations working with children. The contrast is striking. The Bill covers religious groups where the risk of child abuse is very low in the context of the activities being undertaken. It excludes non-government sector groups where the risk, at least of sexual abuse, is high.

The key to understanding which organisations are and are not covered is to look at Schedule 1 of the *Children's Guardian Act 2019*. This is cross-referenced in the proposed Bill to define the child-safe organisations that are within its scope. Most are government agencies. Non-government schools and child care facilities are included, as are non-government providers of out of home care. The new Bill adds to this list a public authority or a religious body.

This is directly in contradiction to the outcomes of the consultation process which indicated:[1]

> Most responses suggested that any organisation that falls within one of the sectors described in the definition of 'child-related work' under the Working With Children Check legislation should also be required to implement child safe standards.

It is also in contradiction to the recommendations of the Royal Commission. Amongst the situations recommended by the Royal Commission to be covered (Recommendation 6.9) are:[2]

- activities or services where clubs and associations have a significant membership of, or involvement by, children;

[1] Consultation report: https://www.kidsguardian.nsw.gov.au/ArticleDocuments/316/Standards_Consultation_report_full.pdf.aspx?Embed=Y p.6.

[2] https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf

- coaching or tuition services for children;
- commercial services for children, including entertainment or party services, gym or play facilities, photography services, and talent or beauty competitions.

We note the very high risk of child sexual abuse associated with any situation where an adult (or older adolescent) spends significant time alone with a child. Coaching and tuition services are examples, including sports organisations offering individual coaching, such as in swimming or gymnastics, or musical and artistic bodies providing individual tuition to children.

If the Bill is to be justified as a means of implementing the Royal Commission's recommendation about child safe standards, then it must apply to all relevant organisations, including sporting and community groups. The original outcome of the consultation process led the Office of the Children's Guardian to conclude:[3]

> A regulated entity would be an organisation where at least one person in the organisation is required to hold or holds a Working With Children Check in New South Wales. An organisation is engaged in child-related work if the services it provides involves the following:
>
> 1. direct contact with children and young people, and
> 2. that contact is a usual part of and more than incidental to the organisation's work, and
> 3. is in connection with the categories aligned to those under the WWCC scheme.

It will be clear from this how little of the Children's Guardian's original proposal has survived.

We are unable to discern valid reasons why the Government has departed from this sensible approach. In the ultimate analysis, the scope of work of a watchdog organisation has to be negotiated with Treasury because it has implications for the size of the staff needed by the watchdog. Perhaps the objection is that implementing the original proposal of the Children's Guardian would expand enormously the number of organisations that come within the Children's Guardian's regulatory responsibilities, including many small community organisations. True; but including all religious organisations already gives the legislation considerable scope. The Bill will apply to a very large number of small independent churches and other religious bodies which will be difficult to reach with information. Depending on their size and range of activities, they may or may not be the organisations that most need to be targeted by the legislation.

There has to be a principled basis for the legislation's scope. It has to include all organisations in which the risk of child abuse is more than remote.

We support the scope as originally proposed by the Office of the Children's Guardian, but for legislative drafting purposes, it needs a little further refinement. The words "or holds [a WWCC]" creates an effect which we think is unintended, because it means that an organisation which happens to employ someone who has a WWCC, irrespective of whether that has anything to do with the organisation's activities, will be a "regulated entity" on this definition.

[3] Consultation report, above n.1, p.6.

Secondly, there is no connection in the definition above between the category of "regulated entity" and the category of "organisation engaged in child-related work". We think the legislation might appropriately be drafted along the following lines:

> A child safe organisation is an organisation where at least one person in the organisation is required to hold a Working With Children Check in New South Wales *because of the provision of child-related work by that organisation.*

In summary, we cannot support a proposal that is sub-optimal in terms of child protection and which singles out religious organisations in a manner that cannot be justified in terms of policy and principle. The Royal Commission's work demonstrated the great array of different contexts within which children and young people may be at risk of sexual abuse.

4. The Guide developed by the Children's Guardian

Section 8EA authorises the development of guidelines to assist child safe organisations to implement the Child Safe Standards. They seem to have a modest role for the most part. Section 8EA(4) provides that:

> An organisation that adopts a guideline developed under this section may rely on the guideline as evidence of appropriate practice by the organisation.

However, the guidelines may have more 'teeth' if failure to comply with one or more of them triggers investigations, recommendations or compliance notices.

Given the potential role of the guidelines, it is of the greatest importance that they gain broad community acceptance, in particular from those organisations that will be under a particular obligation to consider the guidelines in the course of developing their policies and practices. There will be resistance to the guidelines if relevant organisations, or those within them, form the view that recommendations from a well-respected Royal Commission concerned with child sexual abuse are being used to empower a government to impose particular obligations on matters unrelated to child protection that conflict with their beliefs and values. Governmental organisations, of course, need to be sensitive to the range of values and beliefs in the (extraordinarily diverse) Australian community.

A Guide, of the kind developed by the Office of the Children's Guardian for faith-based organisations, [4] is a different document from "guidelines". However, it may readily be appreciated how the Guide might be understood as presaging the kind of guidelines that might be made under the legislation. So far as it deals with Standard 4, the Guide has aroused serious concerns in some quarters, and it is for this reason that a request was made for Freedom for Faith to get involved. We expect that the Children's Guardian did not intend for the Guide to be read in this way. We understand that the purpose of the document was to do little more than to

[4] https://www.kidsguardian.nsw.gov.au/ArticleDocuments/838/CSS_ImplementationGuideFaithOrganisations.pdf.aspx?Embed=Y

showcase examples of what faith-based organisations are already doing, as an example to other faith-based organisations of what they could do to implement the child safe standards.

The concern now arises because the Bill does not only authorise the Children's Guardian to develop guidelines, but implies that these could be used as the basis for investigation and enforcement measures. The concern is that a strong governmental enforcement regime, or less intrusive 'soft power', may intrude upon the right of religious organisations to adhere to their own beliefs on matters of sexual ethics and gender identity. No doubt the Office of the Children's Guardian did not intend this, but this is how the Guide for faith-based organisations, in conjunction with the draft legislation, could be read.

The relevant document does not disclose to what extent the text on standard 4 gained endorsement from the broad range of faith groups which were represented in the process of consultation. We note that it does not appear that the Islamic community was represented, according to the list given in the Foreword to that document.

Whatever the merits of the guidelines may be, we anticipate that the Office of the Children's Guardian will find that they are not acceptable to some religious organisations that otherwise would be very supportive of the goals and aspirations of this legislation if they go beyond the purpose for the Standards advanced by the Royal Commission. This is because of 'thin end of the wedge' concerns about creeping governmental regulation of faith bodies. It is important for that reason, that we draw the Children's Guardian's attention to the ways in which her work may be misinterpreted or misunderstood in ways that will hinder, rather than advance, the work of child protection.

We offer the following observations on ways in which the text of the Guide on Standard 4 could be revised to conform more closely to the original intent of the Royal Commission, to achieve the proposed Outcome, and to avoid causing unnecessary disquiet amongst faith communities.

5. The text of the Guide on Standard 4

The Royal Commission, in proposing this Standard, was only concerned with sexual abuse. It recognised that children who are vulnerable for a range of reasons are more likely to become victims of child sexual abuse. The evidence for this is very strong, and well-reviewed in the Royal Commission's reports and commissioned research.[5]

In other contexts, equity and diversity can mean a range of different things. Used by critical theorists, they reflect a worldview that the society is inherently divided into the oppressors and oppressed. Various advocacy groups use these terms to make claims for particular group identities, often reflecting a rather narrow view of diversity. Others may use the term 'equity' as synonymous with non-discrimination or the need to treat everyone fairly irrespective of background or other characteristics. It follows that the terms 'equity' and 'diversity' are not

[5] Parkinson P and Cashmore J, *Assessing the different dimensions and degrees of risk of child sexual abuse in institutions*. Report for the Royal Commission on Institutional Responses to Child Sexual Abuse (2017).

uncontroversial and can give rise to a range of different policy prescriptions as applied in particular contexts.

The Office of the Children's Guardian chose to focus on just four groups. We think it is important to recognise great diversity even within these groups. The category of 'disability' covers a broad spectrum, and these give rise to different levels of risk, at least of child sexual abuse.[6] Proper attention to diversity requires that these differential levels of risk of children living with disabilities be understood and, so far as possible, taken into account in developing child protection policies.

There is also a lot of diversity within what might broadly be called 'sexual minorities'. An acronym used in the Guide, (LGBTIQ+) treats as one group, young people that have very diverse experiences and needs. Sexual orientation, which can be quite fluid in the teenage years,[7] gives rise to one set of issues for young people. Being bisexual gives rise to other issues. Having one of the many forms of intersex condition means dealing with another set of issues, if they have not been satisfactorily resolved early in childhood. Experiencing gender incongruence or dysphoria gives rise to another set of issues again. Furthermore, the different groups within this one acronym may have divergent views, interests and perspectives, some of which may sharply conflict.[8]

We recognise that issues of sexual orientation and gender identity give rise to the need for sensitive pastoral care, and these are issues which the churches are working through at the present time and will continue to work through within the broad framework of their beliefs.

We recognise also that some young people who identify as same-sex attracted or as 'trans' may be vulnerable in various ways. This is true also of a great many other young people who do not fall within one of the groups typically nominated in 'diversity' policies. Mental health is an issue for a substantial proportion of young people.[9] We do not think that respect for diversity means

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[6] Jones, L., Bellis, M., Wood, S., Hughes, K., McCoy, E., Eckley, L., & Officer, A. (2012). Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies. *The Lancet, 380*, 899–907; Sullivan, P. & Knutson, J. (2000). Maltreatment and disabilities: a population-based epidemiological study. *Child Abuse & Neglect, 24*, 1257–1273.

[7] Hu, Y., Xu, Y. & Tornello, S. (2016). Stability of self-reported same-sex and both-sex attraction from adolescence to young adulthood. *Archives of Sexual Behavior, 45,* 651-59; Katz-Wise, S., (2015). Sexual fluidity in young adult women and men: associations with sexual orientation and sexual identity development. *Psychology & Sexuality,* 6, 189-208; Ott, M., Corliss H., Wypij D, Rosario M, & Austin S. (2011). Stability and change in self-reported sexual orientation identity in young people: application of mobility metrics. *Archives of Sexual Behavior* 40, 519-32; Savin-Williams, R. & Ream, G. (2007). Prevalence and stability of sexual orientation components during adolescence and young adulthood. *Archives of Sexual Behavior,* 36, 385-94; Savin-Williams, R., Joyner, K. & Rieger, G. (2012). Prevalence and stability of self-reported sexual orientation identity during young adulthood. *Archives of Sexual Behavior* 41, 103-10.

[8] See eg Sheila Jeffreys, *Gender Hurts*: *A Feminist Analysis of the Politics of Transgenderism* (2014).

[9] Lawrence D, Johnson S, Hafekost J, Boterhoven De Haan K, Sawyer M, Ainley J, Zubrick SR (2015). *The Mental Health of Children and Adolescents. Report on the second Australian Child and Adolescent Survey of Mental Health and Wellbeing*. Department of Health, Canberra.

excluding a focus on the wellbeing of vulnerable children and young people who do not fall within particular group identities. Singling out some groups for special mention as the document does, may be read as excluding others in a manner which is not respectful of diversity.

Gender incongruence in childhood and adolescence is a particularly complex issue, since so many young people, mostly natal females, who now identify as 'trans' are on the autism spectrum[10] and have multiple comorbidities.[11] This is giving rise to a vigorous debate amongst medical practitioners and psychiatrists concerning the aetiology of gender incongruence and the best ways of assisting and supporting young people who may at one time of their lives fervently identify as 'trans', but later come to regret irreversible medical treatments. These issues are very challenging for the medical profession, mental health professionals, schools, and all organisations working with children and young people. The High Court in England, in *Bell v Tavistock* has recently intervened to impose significant restrictions on the prescription of puberty blockers (and, a fortiori, cross-sex hormones) to young people under 18, recognising the risks of such treatment and uncertainties about long-term benefits and detriments.

Some have expressed a concern to us that the Office of the Children's Guardian is seeking to promote one particular point of view or idea about pastoral care when even experts hold sharply different views. We see no need for the Office of the Children's Guardian to involve itself in matters of social, religious, medical or political controversy. Whatever Guidelines it devises need to be inclusive and unifying. Guidelines suggested for faith communities need to be sensitive to their doctrines, values, practices and policies. To be effective they need to be capable of acceptance by all faith leaders of goodwill with a heart for child protection.

For these reasons, we respectfully suggest that the Children's Guardian may need to clarify that the guidance for faith-based organisations was not intended to be an example of the kind of guidelines that might be promulgated under the legislation if and when it is enacted. It may also be wise to produce a second edition of the document that responds to criticisms and concerns. Such revised guidance should focus on core child protection issues, and recognise the diversity of reasons for which children and young people may be vulnerable to abuse or mental health issues.

6. Large and small organisations

[10] A. de Vries and others, 'Autism Spectrum Disorders in Gender Dysphoric Children and Adolescents' (2010) 40(8) *Journal of Autism and Developmental Disorders* 930. See also A. van der Miesen and others, 'Autistic Symptoms in Children and Adolescents with Gender Dysphoria' (2018) 48(5) *Journal of Autism and Developmental Disorders* 1537. The data is summarized in John Whitehall, 'Gender Dysphoria and the Fashion in Child Surgical Abuse' (2016) 60(12) *Quadrant* 23.

[11] TA Becerra-Culqui and others, 'Mental Health of Transgender and Gender Nonconforming Youth Compared With Their Peers' (2018) 141(5) *Pediatrics* e20173845; R. Kaltiala-Heino and others, 'Gender Dysphoria in Adolescence: Current Perspectives' (2018) 9 *Adolescent Health, Medicine and Therapeutics*, 31; G.L. Witcomb and others, 'Body Image Dissatisfaction and Eating-Related Psychopathology in Trans Individuals: A Matched Control Study, (2015) 23(4) *European Eating Disorders Review* 287.

Finally, we return to the issue of proportionality. It seems to us that the proposed Scheme is reasonably workable for large denominations and large religious welfare organisations. Indeed, an audit would probably demonstrate that the great majority already have policies and practices in place that a go a long way to satisfying the requirements of s.8BA.

However, the appropriateness of the requirements needs to be tested on whether they represent too onerous a burden on small, voluntary organisations with limited resources. Either that, or small voluntary organisations need to be given less onerous obligations. Take as a hypothetical, but very realistic example, the independent church of around 100 people somewhere in NSW that is not part of an established denomination. It may be entirely independent – many are – or part of a fellowship of congregations, but one without a bishop, president, moderator or CEO beyond the person who, in practice, is pastoring that independent church. It may actually be a team of elders who share responsibility.

Now consider the obligations under s.8BA and the definition of head of a child safe organisation. Are the obligations proportionate to the size of the church and its voluntary nature? Can the head be readily identified? How will the Office of the Children's Guardian reach all these different churches? These are practical questions that need to be considered in determining the extent of the obligations and the capacity of the Office of the Children's Guardian to monitor their implementation.

Conclusion

We suggest this Bill needs far more consultation than this present process allows, limited in time as it has been. Sending out complex material over the Christmas period with a response time in late January does not allow for proper consideration and consultation. It takes time for the relevant leaders in an organisation even to become aware that a particular proposal has far-reaching ramifications – as this one does.

It may be objected that the Office of the Children's Guardian has already undertaken a consultation process. It has,[12] but the current proposals depart markedly from the proposals reached as a result of that prior consultation.

The Bill needs to be rethought in significant respects, and this will no doubt involve further conversations with Treasury and other stakeholders.

[12] Above n.1.