COMMISSION FOR CHILDREN AND YOUNG PEOPLE

Submission to the Department of Health and Human Services

Review of Victoria's Child Safe Standards

CCYPD/19/2632

The Commission respectfully acknowledges and celebrates the Traditional Owners of the lands throughout Victoria and pays its respects to their Elders, children and young people of past, current and future generations.

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Overview

The Commission for Children and Young People (the Commission) is an independent statutory body that promotes improvement in policies and practices for the safety and wellbeing of vulnerable children and young people in Victoria.

The Commission is led by Liana Buchanan, Principal Commissioner, and Justin Mohamed, the Commissioner for Aboriginal Children and Young People. At the Commission we:

- provide independent scrutiny and oversight of services for children and young people, particularly those in out-of-home care, child protection and youth justice
- advocate for best practice policy, program and service responses to meet the needs of children and young people
- support and regulate organisations that work with children and young people to prevent abuse and ensure these organisations have child-safe practices
- bring the experiences of children and young people to government and the community
- promote the rights, safety and wellbeing of children and young people.

The Commission's functions and powers are set out in the *Commission for Children and Young People Act 2012* and the *Child Wellbeing and Safety Act 2005* (the Act).

The Commission welcomes the review of the Child Safe Standards (the Standards). The review is timely considering the release of the final report from the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in December 2017 after the Victorian Standards had commenced. The review also provides a good opportunity to consider the early learnings from the operation of the Standards. Furthermore, as a result of the findings of the Royal Commission, we expect that a number of Australian jurisdictions are currently working towards implementing mandatory Standards. Given this, the review will also play an important role in assisting other jurisdictions to implement their own Standards in accordance with the Royal Commission recommendations.

Overall it is our view that the Standards, if properly implemented together with an appropriately designed regulatory system, provide a sound base to drive cultural change and embed a focus on child safety by placing children's rights and wellbeing at the top of an organisation's priorities.

This submission

This submission provides an overview of the Commission's experience in administering the Standards and highlights some key learnings. In particular, the submission explores five key themes relating to the design of the regulatory system that underpins the Standards. The five themes are:

- improving responses to individuals with non-compliance concerns
- enhancing information gathering powers
- enhancing powers to enforce compliance
- reducing unnecessary duplication between the Commission and relevant authorities
- gaining clarity regarding entities' relevant authorities.

The Commission makes 16 recommendations set out in Attachment 1.

The submission then discusses four key issues relating to implementing recommendations made by the Royal Commission. The four key issues are:

- National Principles for Child Safe Organisations
- action areas supporting the National Principles
- the scope of the National Principles
- delegation of the responsibility for monitoring and enforcing the Standards.

The Commission's positions in relation to each issue are set out in Attachment 2.

The Commission suggests that the Department should consider the following principles when considering feedback to this Review:

- the improvement of safety outcomes for Victorian children should take precedence over other considerations
- consistent safety outcomes for children should occur across all sectors
- risk-based regulation should include the ability for swift action to be taken to address recalcitrant non-compliant organisations
- relevant information relating to child safety issues should be able to be shared between the Commission and other relevant parties in a timely fashion
- the respective roles and functions of the Commission and respective authorities should be clearly articulated.

Key observations

In considering the Standards, the Commission takes the view that:

- systemic and cultural issues that contribute to or facilitate the abuse of children still exist in many Victorian organisations and mandatory Standards are crucial for addressing these issues
- the current co-regulatory system should be confirmed, clarified and strengthened
- resource restrictions limit both the Commission's and relevant authorities' capacity to raise awareness of, and drive compliance with, the Standards
- any approach to implementing Royal Commission recommendations should maximise the benefits of national harmonisation but not at the cost of reducing safety outcomes for Victorian children.

An introduction to the Victorian Standards

Who is required to comply with the Standards?

The Standards first commenced on 1 January 2016, with the Commission assuming responsibility for their administration on 1 January 2017.

The Standards apply to over 50,000 Victorian organisations (called 'entities' in the Act). Victorian organisations, whether incorporated or unincorporated, will usually be required to comply with the Standards if they do one of the following:

- provide services specifically for children
- provide facilities specifically for use by children who are under the organisation's supervision
- engage a child as a contractor, employee or volunteer to assist the organisation in providing services, facilities or goods.

These organisations may be highly organised and regulated, for example, schools, hospitals, and child protection services. There are also many organisations covered by the Standards that are small and community based, for example sports clubs, youth organisations or playgroups where families and community members contribute voluntarily to the delivery of those services. Religious bodies, including churches, are also required to comply with the Standards.

What do the Standards require?

The Act gives the Minister power to set standards that organisations (also called 'entities') must comply with.[1] Currently, there are seven standards in Victoria, being:

- Standard 1: Strategies to embed an organisational culture of child safety, including through effective leadership arrangements

[1] *Child Wellbeing and Safety Act 2005,* s. 17.

- Standard 2: A child safe policy or statement of commitment to child safety
- Standard 3: A code of conduct that establishes clear expectations for appropriate behaviour with children
- Standard 4: Screening, supervision, training and other human resources practices that reduce the risk of child abuse by new and existing personnel
- Standard 5: Processes for responding to and reporting suspected child abuse
- Standard 6: Strategies to identify and reduce or remove risks of child abuse
- Standard 7: Strategies to promote the participation and empowerment of children.

In complying with each of the above standards, an organisation must also include the following three principles as part of their response to each standard:

- promoting the cultural safety of Aboriginal children
- promoting the cultural safety of children from culturally and/or linguistically diverse backgrounds
- promoting the safety of children with a disability.

Broadly, the Standards and Principles are concerned with driving cultural change in organisations and embedding a focus on child safety by placing children's rights and wellbeing at the forefront of the organisation's mind.

The Standards are intended to be applied in a flexible, tangible way to best address the issues in each individual organisation that works with children. There is no 'one size fits all' approach to implementing the Standards. Each organisation should consider how to best apply the Standards, taking into account the size and nature of the organisation, the services and activities provided, and the nature of the organisation's interactions with children.

Who oversees the Standards?

Since 1 January 2017, the Act has contained oversight and enforcement powers to ensure that organisations are meeting their requirements. The Act sets out a regulatory system that underpins the Standards which is premised on the involvement of multiple regulators. Part 6 of the Act gives regulatory roles to:

- the Commission in respect of all entities, and
- 'relevant authorities' (i.e. departments and the Victorian Registration and Qualifications Authority) in respect of the entities they fund or regulate.

The precise nature of the regulatory roles is discussed in more detail below. However, it is clear that the intent was to design a regulatory system that reflects that there are obligations on multiple government bodies to ensure that organisations are child safe, consistent with the general idea that 'child safety is everyone's responsibility'.[2] The system was also intended to encourage collaboration between the Commission and relevant authorities in the discharge of this collective responsibility.

For organisations that do not have a relevant authority, the Commission is the sole regulator enforcing compliance with the Standards.

Our experience so far

The Commission is responsible for administering both the Reportable Conduct Scheme and the Standards in Victoria. It is important to make a few preliminary observations about the Reportable Conduct Scheme, especially given there are many close connections with the Standards.

[2] State of Victoria, *Hansard,* Legislative Assembly, 14 September 2016, p 3482 (Hon. Martin Foley MP)

Implementing the Reportable Conduct Scheme

Complementing the Standards, the Reportable Conduct Scheme had a staged commencement with organisations being brought into scope in three phases. The first organisations came into scope on 1 July 2017, followed by the second phase of organisations on 1 January 2018. The final phase of organisations became subject to the Reportable Conduct Scheme on 1 January 2019.

The Reportable Conduct Scheme requires heads of organisations to notify the Commission of allegations of reportable conduct against children by their workers or volunteers, to investigate those allegations and report findings to the Commission. The Commission must support and guide organisations that receive allegations to conduct fair, effective, timely and appropriate investigations. In addition, the Commission must independently oversee, monitor and, where appropriate, make recommendations to improve investigations of those organisations.

The mandatory reporting requirement, and the Commission's non-discretionary role in overseeing investigations, has meant that administering the Reportable Conduct Scheme has been a key focus for the Commission. With limited resources, the Commission has not been able to focus as many resources on education and enforcement in relation to the Standards as would be desirable for such an important regulatory system.

The value of the Standards and Reportable Conduct Scheme has been affirmed by the Royal Commission. In its final report, the Royal Commission reinforced the importance of both the Standards and the Scheme in preventing and responding to allegations of child sex abuse and recommended these regulatory regimes for all Australian states and territories.

Victoria's arrangements are unique, in that it is the only jurisdiction with both mandatory Standards and a Reportable Conduct Scheme. The Standards and the Scheme create distinct sets of responsibilities for organisations but are designed to complement one another.

The Commission has now had over 18 months' experience in administering these regulatory systems together. We see the advantages on a daily basis of administering both the Standards and the Scheme. We are able to take a holistic approach, focusing attention on culture and systems to prevent and respond to child abuse through the Standards, as well as providing oversight to ensure individual allegations of child abuse are properly reported and investigated through the Reportable Conduct Scheme. Our work in relation to the Scheme frequently alerts us to organisations that need to focus further effort on the Child Safe Standards, allowing us a broader preventive mandate with those organisations.

Our experience so far has highlighted the critical importance of the Standards. Since the start of the Reportable Conduct Scheme through until 31 January 2019:

- 1,193 mandatory notifications were received
- these related to 1,935 allegations of reportable conduct
- of the 1,193 mandatory notifications, 401 (34 per cent) had been closed
- this equates to 655 allegations, of which 31 per cent had been found to be substantiated.

Taking into account the likelihood of under reporting and the highly variable quality of investigations, these figures show us that child abuse and harmful conduct towards children is still occurring in Victorian organisations, and the need for a mandatory proactive duty to establish systems to ensure the safety of children remains high.

The Royal Commission highlighted the importance of organisations having adequate policies, procedures and culture necessary to prevent abuse and keep children safe.[3] It established that many organisations have minimised, dismissed or concealed harm to children. Still more

[3] Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report: Volume 2, Nature and Cause , p. 172.

have been found to not have the policies, practices and culture necessary to prevent abuse and keep children safe.

Many organisations we engage with work with us constructively, in a spirit of seeking to improve outcomes for children. However, there is no doubt that some high-risk organisations have been slow to act. The fact that the Standards are mandated in legislation has greatly assisted the Commission in engaging with a small number of such organisations to improve the safety of Victorian children. We have found that the force of law can effectively influence an organisation's priorities to ensure a focus is placed on child safety. In the absence of mandatory requirements, it is our view that some organisations would not direct sufficient attention to implementing the Standards.

The systemic and cultural issues identified by the Royal Commission that contribute to the incidence of child abuse, and that prevent appropriate responses, remain in many Victorian organisations. As previously mentioned, in our administration of the Reportable Conduct Scheme we have received over 1,935 allegations of reportable conduct against children and approximately 30 per cent of these allegations closed to date have been substantiated. We also see that many of the misconceptions about children and child abuse detailed throughout the Royal Commission continue to influence organisations' responses to alleged abuse. Children, whether as alleged victims or witnesses, are often not interviewed or, if they are, their evidence is, at times, minimised relative to the evidence of adults.

Education and capacity building activities

In 2016–17, in the lead up to assuming responsibility for administering the Standards and during the first six months of administration, the Commission undertook extensive activities to raise awareness, promote, and support organisations to comply.

To help organisations understand and comply with the Standards we:

- ran a digital awareness campaign
- held 23 information sessions in eight locations across Victoria, attended by 794 participants
- published a range of information material including guidance on:
    - cultural safety for aboriginal children
    - safety of children with a disability
    - empowerment and participation of children
    - safety of children from culturally and linguistically diverse backgrounds
    - what to look for in a child safe organisation
- funded training partnerships with community-based peak bodies including:
    - Australian Tutoring Association
    - Our Community
    - Victorian Council of Churches
    - Vicsport
    - Australian Nanny Association
    - Victorian Aboriginal Child Care Agency
    - Victorian Cooperative on Children's Services for Ethnic Groups
    - Centre for Excellence in Child and Family Welfare
- developed a new website.

During the 2017–18 financial year, we continued the significant work commenced in the year before to raise awareness of the regulatory requirements and support organisations to meet their obligations under the Standards and the Reportable Conduct Scheme.

The significant number of organisations within the Commission's regulatory remit and the diversity of sectors covered have made this task challenging. Working with relevant authorities and peak bodies is a key part of the Commission's approach to amplifying messages about

the need to comply with legislative requirements and change organisational practice and culture to better protect children.

Key actions in 2017–18 included:

- publishing a range of new information sheets, guides and posters on the Commission's website providing guidance, advice and information to organisations about the Standards
- delivering regular in-person information sessions on the Standards to 618 participants
- publishing narrated presentations on the Standards and the Scheme on the Commission's website
- delivering train-the-trainer programs to over 50 people to assist peak bodies and Victorian government departments to build capacity in specific sectors.

A focus for the Commission is ensuring that useful information is available to duty holders and the public via our website. For the period 1 January 2017 to 31 January 2019 our website had:

- 177,912 visits to Standards related pages
- 14,302 Standards specific resources downloaded
- 11,684 views of Standards related video content.

We have also mailed out over 4,000 hard copies of our Guide for Creating a Child Safe Organisation.

Compliance activities

While the Standards have applied to some organisations for over three years, with oversight by the Commission for more than two years, awareness and compliance has been inconsistent. The Commission has encountered some organisations that have progressed significantly, with a well-developed approach to maintaining the safety of children. There have also been a number of organisations who were unaware of their obligation to comply with the Standards but were committed to implementing the Standards after contact with the Commission. Despite the extensive awareness raising activities undertaken by the Commission, a significant amount of work is still required in this space.

The Commission has also encountered organisations that have significant daily engagement with children and based on the findings of the Royal Commission and Betrayal of Trust Inquiry might be considered high risk, yet display concerning lapses and slow progress in improving their approach to child safety.

The Commission has yet to employ its enforcement powers available to it under the Act. In part this is due to the number of organisations who demonstrate a commitment to child safety and to moving voluntarily to implement the Standards once they have engaged with the Commission. Consistent with a graduated approach to enforcement, the Commission will assume a more robust role in enforcement going forward. Unfortunately, the resources available to the Commission for administering the Standards are limited, and this necessarily impacts the ability of the Commission to undertake enforcement activity. The Standards apply to over 50,000 Victorian organisations, and currently the number of staff dedicated to assessing, supporting and enforcing compliance is five.

In addition to resource limitations, a number of legislative barriers impact the Commission's efficient and effective exertion of enforcement powers. These barriers are discussed in detail later in this submission.

In 2016–17, the Commission took action to address concerns of non-compliance with the Standards for 12 organisations. This included either directly engaging with the organisation or referring the matter to a relevant authority. This increased to 58 organisations in 2017–18.

This increase, due largely to an increase in members of the public contacting the Commission to advise of their concerns that an organisation may not be compliant, demonstrates a growing

awareness about the Standards and the role of the Commission in enforcing them. The Commission anticipates that the number of concerns about organisations will continue to grow for the remainder of 2018–19 and beyond due to increasing expectations from the community that action will be taken to reduce risks of child abuse within organisations, and increasing awareness of the Standards and the Commission's role.

As at the end of January 2019, the Commission had 114 active cases of Standards non-compliance concerns at various stages of compliance activity from triage through to final assessment. Of this figure, 58 cases related to organisations with a relevant authority and 56 related to organisations of which the Commission is the sole regulator.

While the Commission considers that there will always be value in engaging with and responding to community concerns about non-compliance, the Commission's intent is to move this year towards more proactive, risk-based approaches to its compliance activity.

The Commission already takes a risk-informed approach to its role as a regulator and is currently developing a formalised risk-based approach to regulating the Standards. This will assist the Commission to make decisions on the use of its limited resources to best support the prevention of child abuse to make the greatest impact to child safety. Based on evidence from the Royal Commission, this will consist of a suite of tools that the Commission will use to assess the risk organisations and sectors present to children. The tools will include:

- a risk identification tool used to assess broad risks for an organisation or group of organisations. This will enable the Commission to develop an understanding of the overall level of risk, help inform and target broad activities such as information provision and education, and identify areas where more detailed assessment or follow-up is needed
- a risk analysis tool for assessing organisations individually and in more depth. The risk ratings developed using this tool will help inform the approach to organisations based on the organisation's child safety policies, culture, and the needs of the children in the organisation
- a reportable conduct tool to assess an organisation's capacity and commitment to conducting appropriate investigations under the Reportable Conduct Scheme.

These tools, once implemented, will allow the Commission to tailor its responses to organisations and sectors with an evidence-based understanding of risk. These risk-based tools are currently being tested. Full implementation will commence this financial year.

Improving responses to individuals with non-compliance concerns

Theme-at-a-glance

The Commission is routinely contacted by individuals who raise concerns that entities do not comply with the Standards. The Act does not contemplate that this would occur. The Act should empower individuals to raise their concerns with the Commission and provide protections for those who choose to raise concerns.

Formalising a process for raising non-compliance concerns

Establishing processes for raising and responding to concerns

The Commission often receives information from members of the public (often parents, children or victim/survivors) about an organisation's potential non-compliance with the Standards. Due to the sensitive nature of information received and gathered by the Commission, strict and broad confidentiality requirements are contained in the Act. However, as a result of these confidentiality requirements, the Commission is usually legislatively prohibited from providing updates or information to individuals who have raised concerns with the Commission about non-compliance or about the actions taken by the Commission or organisation.

This inhibits the Commission's capacity to engage in best-practice complaint handling. The Commission notes that some relevant authorities, including the VRQA, have the ability to actively engage with complainants and provide information regarding the outcome of the complaint. This means as soon as we refer a matter to the VRQA the complainant can be provided information by the VRQA, but not the Commission, about action taken. The inability to share even limited information can have the effect of undermining public confidence in the responsiveness of the Commission.

The ability to provide limited information to members of the public, parents and victim survivors who raise concerns around an organisation's compliance should be included in Part 6 of the Act. This would increase transparency and increase public confidence in the responsiveness of the Commission in protecting children. We note there would need to be adequate limitations regarding who the Commission could provide information to and the type of information that could be provided.

Recommendation 1

The Government should amend the Act to:

a) enable individuals to disclose concerns about non-compliance with the Standards to the Commission

b) enable the Commission to disclose relevant information to that individual

c) impose a duty on the Commission to consider what actions to take in response to concerns about non-compliance. A non-exhaustive list of actions should be prescribed, and reflect the powers available to the Commission, including deciding to take no action.

Providing protections to individuals who raise concerns

An individual who discloses their concern that an organisation may not comply with the Standards could be accused of making defamatory statements, breaching privacy requirements or face other negative consequences (particularly if their concerns relate to their employer).

While the Act gives immunities and other protections to relevant authorities and relevant entities when they disclose information, members of the public who provide information are

not afforded the same level of protection. This has a potential chilling effect on the ability of individuals to raise their concerns and exposes individuals to adverse consequences.

Recommendation 2

The Government should amend the Act to protect individuals who, in good faith, disclose information about their concerns that an organisation is not complying with the Standards.

Enhancing information gathering powers

Theme-at-a-glance

The Act currently empowers the Commission to:

- make written requests for information or documents from an entity
- request consent of the head of an entity to inspect their premises
- issue the entity with a notice to produce documents.

The way that these powers are expressed in the Act creates practical barriers for the Commission to access important information.

Existing powers should be clarified, and new powers introduced, to ensure the Commission can more readily access important information.

Empowering relevant entities to disclose more information

Section 26 of the Act permits the Commission to request an entity to provide any information or document that is reasonably required to determine compliance with the Standards.

The legislation gives relevant authorities the ability to comply with requests for information from the Commission even where there are other applicable confidentiality or privacy restrictions.[4] Relevant entities should have the same ability to freely disclose information. This will assist to ensure entities can disclose information requested by the Commission to assist in assessing compliance with the Standards.

Creating new powers to inspect premises without consent

The Commission has powers to conduct inspections of premises to observe activities carried out in the premises, inspect documents, and request any person to provide information.[5] However, the Commission can only inspect a premises with the consent of the head of the entity and after giving written notice.[6] In exceptional circumstances and with the consent of the entity, written notice is not required.[7]

If the head of the entity does not consent to the inspection, as is likely in recalcitrant organisations or those who perceive reputational risk if their practices are revealed, then the Commission is prohibited from performing the inspection. While voluntary inspections are valuable, broadening the power to allow mandatory announced and unannounced inspections would facilitate the Commission's ability to detect behaviours or collect evidence that a deliberately non-compliant entity is trying to hide.

Consistent with inspection powers held by other Victorian regulators,[8] such provisions could address:

- the appointment of inspectors
- the powers of appointed inspectors including to require assistance, inspect and take material and documents, require the production of documents and information, and require people to answer questions
- penalties including infringements for hindering, obstructing or hiding things from an inspector

[5] Ibid., s.30
[6] Ibid., s.29
[7] Ibid., s.29(3)
[8] See *Australian Consumer Law and Fair Trading Act 2012, s.142; Occupational Health and Safety Act 2004, ss.95-103 and 124; Environmental Protection Amendment Act 2012, s.242, 246, 251-254*

- imposing requirements on inspectors to carry and produce identification and imposing any controls on the taking photos or copies of documents as well as seizing then returning any property.

Inspection powers could then be used both to confirm whether an organisation is compliant as well as to verify action has been taken in response to other enforcement action, such as a notice to comply (discussed in more detail below).

Tailoring notices to produce requirements to ensure that they are fit for purpose

Where an entity fails or refuses to respond to the Commission's requests for information or an inspection, the Commission's only recourse is to issue a notice to produce. Failing to comply with a notice to produce can result in a civil penalty or declaration being issued by a court.

Lowering the threshold for issuing a notice to produce

The requirements for the Commission to be able to issue a notice to produce create substantial practical barriers to obtaining information. A notice to produce can only be issued once the Commission has formed a belief on reasonable grounds that an entity is not complying, or is not reasonably likely to comply, with the Standards. Further, any notice to produce must specify the reasons the Commission believes that the entity is not complying, or is not reasonably likely to comply, with the Standards.

Where the Commission is unable to obtain any information from the entity (or from the public domain) it is our view that the Commission is placed in a difficult position by being required to form a particular belief in the absence of information.

Accordingly, the threshold should be lowered to ensure a notice to produce can be issued where the Commission does not know whether an organisation is compliant.

In addition, the Commission should be able to issue a notice to produce to an entity in order to ascertain whether that entity is required to comply.

The availability of notices to produce in these circumstances is particularly important for high-risk organisations that are reluctant or recalcitrant and/ or closed communities with very limited or no publicly available information about their activities.

Broadening notices to enable undocumented information to be produced

Notices to produce should also extend to obtaining information more broadly, rather than being limited to documents. For example, there can be gaps in the Commission's ability to obtain relevant material if the information is not documented. This can be particularly important in smaller organisations where significant information about an organisation's activities may be undocumented.

Imposing meaningful consequences for a failure to comply with a notice to produce

Even where the Commission can issue a notice to produce, if the entity does not comply, a cumbersome process is required that has little consequence for the entity. In particular, the Commission must apply to a court for a declaration that the entity has failed to comply and/ or a pecuniary penalty.[9] The maximum penalty is 60 penalty units (currently $9671.40). While this can be a deterrent, for larger organisations the penalty is quite low, and the process for levying the fine can be costly and complex. It is anticipated that the Commission's costs of seeking a penalty will be greater than the amount of the penalty.

Importantly, even if the Commission successfully applies to a court in respect of an entity that fails to comply with a notice to produce, the court is not given an express power to order that the documents be produced to the Commission.

[9] Ibid., s.33

Further, the Commission notes that entities providing documents in response to a notice to produce under section 30 of the Act do not have the benefit of the protections under section 41A. Further, the notice to produce power does not expressly say whether documents must be produced to the Commission, despite other statutory requirements or privileges.

Considering additional modern regulatory tools

The Commission notes that other modern oversight and regulatory regimes expressly give regulators preliminary inquiry powers to gather information necessary to determining whether matters fall within the scope of their jurisdiction.

Other modern regulators are empowered to issue an infringement notice or accept an enforceable undertaking when an organisation has breached the rules. If the organisation pays the penalty or complies with the undertaking, then the regulator cannot prosecute them for the breach. However, if the organisation declines to pay or breaches the undertaking, then the regulator may choose to take them to court. In addition to rectifying the issues outlined above, Government should also consider these and other modern regulatory mechanisms to ensure the Commission is able to access relevant information.

Recommendation 3

The Government should enhance, strengthen and modernise the Commission's information gathering powers, including to

a) amend the Act to:
    i) give great protections to entities complying with requests for information
    ii) enable announced and unannounced inspections of an entity's premises, without consent
    iii) enable notices to produce to be issued to determine whether an entity must comply and is complying, with the Standards
    iv) enable the Court to order relevant documents be produced
    v) increase the penalty for non-compliance with a notice to produce.
b) consider amending the Act to include other modern regulatory information gathering powers.

Conferring powers to obtain information from third parties

Currently, the Commission can only request information or documents from relevant authorities and entities.[10] As the Standards apply to a broad range of service and organisation types, relevant information could be obtained from members of the public or other organisations that have interactions with an organisation. Information from third parties can also help identify if the strategies, policies and procedures being implemented are effective. The Commission should be able to request information from third parties and any party that complies with a request should be protected by the Act.

Recommendation 4

The Government should amend the Act to allow the Commission to:

a) request any information that the Commission reasonably requires to determine whether a relevant entity is complying with the Standards from 'any person'
b) issue a notice to produce to any person.

[10] Ibid., s.26 and 28

Anticipating the need to share information with interstate regulators

As we move towards a nationally harmonised approach to the Standards, the ability for regulators to share information with interstate counterparts will become more important. One of the key potential benefits of a nationally harmonised approach will be the ability of child safety regulators to collaborate with each other to effectively support and enforce compliance.

For example, in the case of large organisations that operate in multiple states, it may be more effective for the regulator in the jurisdiction where the organisation's head office is located to take the lead on engagement with the organisation for certain matters. This approach would substantially reduce the regulatory burden on the organisation by minimising the number of regulators it would need to engage with. However for this approach to work, interstate regulators would need to be able to share information regarding the compliance of the organisation. A broad information sharing power would enable to Commission to collaborate with interstate regulators effectively to ensure a streamlined and effective approach to regulation.

Furthermore, the Royal Commission recognised that there is a strong case for enabling information exchange between oversight bodies with responsibilities related to children's safety and wellbeing.[11] The Royal Commission also concluded that the safety and wellbeing of children is paramount and should be a guiding principle when considering the exchange of information.[12] The Commission, while performing its functions, may become aware of information relating to non-compliance with the Standards of an interstate entity. The ability to provide this information to an interstate body tasked with administering the Standards will ensure that interstate child safety issues are able to be quickly addressed.

Recommendation 5

The Government should amend the Act to allow the Commission to share information with interstate bodies that that are responsible for administering a law corresponding to Part 6 of the Act.

[11] Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report: Volume 8, Record Keeping and Information Sharing, p. 141.
[12] Ibid., p. 224.

Enhancing powers to enforce compliance

Theme-at-a-glance

There are only limited tools under the Act to enforce compliance by an entity.

The power to issue a notice to produce should be strengthened so that there are meaningful consequences for a failure to comply with a notice. Clearer powers should also be given to publicly report on non-compliance by entities. New powers should also be introduced to enable the outcomes of compliance activities to be verified.

Lack of available enforcement powers undermines risk-based regulation

While the Act contains broad requirements that entities must comply with the Standards,[13] there are few mechanisms for enforcing compliance requirements. This makes it difficult for the Commission to implement a proportionate, risk-based approach to compliance and enforcement.

Risk-based regulation involves targeting compliance and enforcement according to the level of risks to children, and the extent to which the organisation's attitude to compliance exacerbates those risks. The Commission has largely adequate tools to deal with low risk, cooperative organisations but there are gaps that affect its ability to address non-compliance by reluctant or recalcitrant organisations, or to escalate its response if an organisation continues not to comply.

Such gaps undermine the incentives for entities to comply, because others may be seen to flout the law without consequences. This undermines confidence and support for the Standards and puts children at greater risk.

Strengthening notice to comply powers

The Commission's main statutory tool for addressing non-compliance by recalcitrant or reluctant organisations is the issue a notice to comply. A notice to comply directs an entity to take specified actions to comply with the Standards.[14] If the entity fails to comply with a notice to comply, the Commission can:

- where there is a relevant authority, inform that authority and request any action that is available under the applicable law, contract or agreement be taken.[15] The Commission cannot oblige the relevant authority to take action, but can report such a failure in its Annual Report.
- apply to the Court for a declaration/ or and a pecuniary penalty (being for the same amount as a penalty for failing to comply with a notice to produce: 60 penalty units or $9671.40).[16]

While the notice to comply gives the Commission powers to enforce the Standards, there are gaps in these powers.

Importantly, the Commission lacks less onerous and more cooperative tools such as voluntary and enforceable undertakings, that could be used to encourage a relevant entity to take ownership of their response to compliance. In addition, again the penalty for failure to comply with a notice to comply is relatively low (a maximum of $9671.40) and enforcement is complex and costly, including requiring consultation with all relevant authorities, and needing the Court to determine and impose any penalty. For well-resourced organisations such as large multi-

[13] *Child Wellbeing and Safety Act 2005*., ss. 20-21, 36
[14] *Child Wellbeing and Safety Act 2005,* s. 31
[15] Ibid., s.32
[16] Ibid., s.33

jurisdictional child care service operators or large religious organisations, the existing penalty is unlikely to provide an adequate deterrence.

Shining a light on non-compliant entities

Outside its Annual Report, the Commission lacks express powers to encourage compliance by publishing information about non-compliant entities.

The Commission's Annual Report is required to detail entities' compliance with the Standards,[17] and may include information on systemic and recurrent issues.[18] The Minister or the Department of Health and Human Services can request the Commission prepare other reports.[19] These reports must be tabled in Parliament.[20] While the Commission can report concerns about compliance to a relevant Minister, the Secretary of a relevant department, or relevant authority,[21] it cannot make this information visible in a timely way that reinforces the importance of compliance and the consequences of non-compliance to relevant entities and the general public.

Powers to enable verification of outcomes of enforcement activity

The Commission has limited powers to verify that changes identified as part of enforcement activity have been effectively implemented.

The Commission can ask a relevant entity to voluntarily report on implementation.[22] However, it may have difficulty checking whether the information provided is correct and complete as the Commission cannot rely on issuing a notice to produce power to independently assess the information provided. This is because the Commission may only issue a notice to produce if it believes an entity is not compliant with the Standards. Further, as outlined above, where an entity refuses to provide any information to the Commission, there are powers that can influence or lead an entity to producing the documents, but no specific power that ensures information must be produced. Increasing the scope of notices to produce, as discussed above, would assist in addressing this issue.

The Commission considers that further powers are necessary to conduct or require audits to be undertaken to confirm if changes have been implemented and the entity is now compliant. This could include amendments to allow the Commission to perform an audit or to require that the entity arrange an independent audit to be undertaken, to demonstrate their compliance. The Commission considers that such measures would assist the effectiveness of the Commission's role and the Standards.

Recommendation 6

The Government should enhance, strengthen and modernise the Commission's enforcement powers, including to:

a) amend the Act to enable:

   i) entities to enter voluntary and enforceable undertakings in relation to non-compliance with the Standards

   ii) the Commission to issue infringements notices for non-compliance with a notice to comply, and/or the size of the existing penalty at section 32 of the Act should be increased

[17] Ibid., s.41K
[18] Ibid., s.41L
[19] Ibid., s.41K(2)
[20] Ibid., s.41O
[21] Ibid., s.41D
[22] Ibid., s.26

iii) the Commission to publish information about non-compliant entities

iv) the Commission to conduct or require a follow-up audit to be undertaken after a notice to comply is issued, to confirm if changes have been implemented

b) consider amending the Act to include other modern regulatory enforcement powers.

Reducing unnecessary duplication between the Commission and relevant authorities

Theme-at-a-glance

The Act lacks clarity as to the proper role of relevant authorities. While the Act suggests relevant authorities oversee, promote, assess and require compliance, there is little to explain how these roles should be performed. The Act should be amended to confirm that relevant authorities can and must fulfil these roles, both through the exercise of existing regulatory or funding levers, and through new specific relevant authority powers.

If relevant authorities are both required and sufficiently empowered and resourced to enforce compliance, this would enable the Commission to acquit its responsibility to ensure compliance by entities with a relevant authority by monitoring and auditing how relevant authorities use their powers. Although this would reduce the Commission's involvement in responding to individual concerns of non-compliance by entities with relevant authorities, it would shift the Commission's focus to a more systemic role of ensuring consistency in child safety outcomes across sectors.

Articulating the functions and objectives of relevant authorities

Relevant authorities have no express functions or objectives under the Act.[23] However, the Act does contemplate that relevant authorities:

- have a role in '*overseeing'* compliance'[24]
- have a role in '*promoting*' compliance[25]
- have a role in determining or assessing compliance with the Standards[26]
- can utilise pre-existing regulatory or funding levers to '*require'* compliance.[27]

However, there is extremely limited guidance in the Act as to how and when relevant authorities can, should or must fulfil their roles. The Commission's view is that these roles would at least involve a relevant authority taking steps to:

- raise awareness, educate and guide their entities on the implementation of the Standards,
- gather relevant information for the purposes of deciding whether their entities comply with the Standards, and
- taking appropriate and lawful action to enforce compliance.

In the absence of clarity as to the role of relevant authorities, particularly vis-à-vis the Commission, relevant authorities appear to have adopted different approaches to their responsibilities under the Act.

Some relevant authorities seem to take the view that, due to a lack of enforcement capabilities or resources, they have little to no role to play and consider that the Commission should be solely responsible for oversight and enforcing compliance with the Standards.

The Commission considers there are clear benefits in empowering all relevant authorities that have existing regulatory or funding relationships with entities to take on responsibility for enforcing compliance by the entities they fund or regulate. Relevant authorities should have a role in enforcing compliance because (among other things), they:

- have specialist knowledge of the sectors they fund and regulate

[23] cf, ibid., ss. 24 and 25.
[24] Ibid.
[25] Ibid.
[26] Ibid, s. 27(1).
[27] Ibid, s38(3)(b) and 32(2).

- are influential within the sectors they regulate or fund
- can capitalise on existing relationships to promote compliance
- are able to streamline the number of interactions that entities have with government, particularly where relevant authorities are able to dovetail their activities in relation to compliance with the Standards with any other compliance activities.

Accordingly, the Commission considers that it is critical that more relevant authorities adopt consistent and proactive approaches to their roles in overseeing, promoting, assessing and enforcing compliance.

The Commission considers that the Act should be amended to insert new objectives and functions provisions which clearly confirms relevant authorities' existing roles in overseeing, promoting, assessing and enforcing compliance. Further, the Act should be amended to place a positive duty on relevant authorities to ensure that they proactively fulfil their roles and ensure that the Commission is notified of concerns of non-compliance by their entities and any actions taken by that relevant authority in response.

Recommendation 7

The Government should amend the Act to:

a) confer express functions and objectives on relevant authorities in relation to overseeing, promoting, assessing and enforcing compliance by their entities

b) place duties on relevant authorities to proactively fulfil those functions.

By contrast, some relevant authorities appear to take the view that, as an existing and established regulator in their sector, they should take a lead role in administering the Standards, with the Commission having little role or no role.

The Commission can see some policy merit in an approach whereby some or all of the relevant authorities assume exclusive regulatory responsibility for all the entities that they regulate, with an independent regulator given responsibility for the balance (i.e. those only those entities who do not have relevant authorities). Certainly, there would be opportunities to reduce cost and streamline regulation. This approach may also avoid duplication and any inconsistencies that may arise if relevant authorities and the Commission were to separately assess the same entity's compliance with the Standards. However, such an approach would carry increased risks that different regulators could adopt inconsistent approaches in the assessment of the quality of implementation of the Standards. This, in turn, carries significant risk of inconsistent safety outcomes for children in different sectors, which is clearly an undesirable result.

On balance, the Commission prefers a system that retains an overarching regulator which has broad responsibility for the Standards across all sectors. That is because an overarching regulator is uniquely able to ensure that:

- the Standards are implemented in a way that leads to consistent safety outcomes for children across Victoria
- there is a specific focus on, and the development of specialist expertise in, the regulation of institutional child abuse prevention and response (with this developing field of expertise to be leveraged to support relevant authorities, who must also develop expertise in the context of their portfolio)
- there is a single initial point of contact for organisations and the public (if parents, children or members of the public want to report child safety concerns, they can simply report to the Commission rather than trying to identify the relevant authority for an entity)
- there is a central point for the oversight of institutional child abuse prevention and responses across Victoria, enabling trends and issues to be identified.

Confirming the availability of existing relevant authority powers

Currently, the only specific power given to relevant authorities under Part 6 to achieve their roles under the Act is the power to request information voluntarily be provided from an entity for the purposes of assessing compliance.[28]

The Commission's view is that the intention of this system is that relevant authorities should utilise their pre-existing regulatory structures, powers and funding relationships to enforce compliance.

Some relevant authorities may have regulatory experience and be equipped with enforcement tools, under their own legislation, to drive compliance of entities they regulate. Other relevant authorities, in the absence of other enforcement powers, may need to rely on the information gathering provisions in the Act[29] and/or the threat of withdrawing funding.

The Commission is aware of concerns from some relevant authorities that their ability to use existing regulatory or funding levers to assess or require compliance may be impaired. Without any express statutory provision or contractual terms to enable existing funding or regulatory levers to be used to require compliance by an entity, the validity of a relevant authority's actions could be called into question.

While the Commission does not necessarily share those concerns, the lack of clarity as to the availability of pre-existing regulatory or funding levers to require compliance is undesirable. In any event, it would appear onerous and likely to produce inconsistency if each relevant authority were required to separately review and seek amendments to their existing regulatory regimes and funding agreements to enable them to fulfil the roles already contemplated by the Act.

Further, the Commission understands that there may be ambiguity about whether the terms of existing funding agreements supply a sufficient legal basis for relevant authorities to take action to assess and ensure compliance. Ideally, moving forward, there should be consistent terms in funding agreements which ensure that relevant authorities can take appropriate action in response to non-compliance.

Recommendation 8

The Government should:

a) amend the Act to confirm pre-existing regulatory powers of a relevant authority can be used to oversee and enforce compliance by that relevant authority's entities

b) release guidance for departments on model clauses of funding agreements with entities that could be adopted to ensure appropriate action can be taken to assess and require compliance.

The role of the Commission and relevant authorities

Ensuring consistency of powers between relevant authorities and the Commission

While the changes to confirm the availability of regulatory and funding levers (as outlined above) are important for clarity, such changes are not sufficient to ensure that organisations are child safe. The Commission considers that Government should go further by ensuring that all departments and authorities can access the full suite of regulatory tools available to the Commission to ensure consistent and appropriate responses to non-compliance with the Standards.

[28] Ibid., s. 27

[29] Ibid., s. 27

For departments that fund entities, the most significant, available lever to ensure compliance would be to cease funding for (or refuse to fund) entities that do not comply with the Child Safe Standards. However, this may not be effective or appropriate in all cases. For example:

- termination of a low-value funding agreement (particularly with larger well-resourced organisations) may not provide sufficient incentive for an organisation to comply,
- termination of a high-value funding arrangement (particularly with smaller organisations with limited resources), may be a disproportionate response to certain non-compliance concerns.

If departments that fund entities had access to the same suite of regulatory tools as the Commission, they would be able have greater choice in how they tailor their responses to non-compliance concerns and assist to ensure more consistent enforcement action across sectors.

For departments that regulate entities, the enforcement powers can vary. Ensuring that those departments can access at least the same powers as the Commission would promote consistency in responses to non-compliance concerns.

If the Commission and relevant authorities had broadly consistent assessment and enforcement powers, and there was clarity as to which government body is responsible for enforcing compliance of each entity (see the theme below), the Commission would see little utility in having more than one government body responsible for performing individual assessments of, and taking enforcement action against, the same entity. Such arrangements have the potential to lead to unnecessary duplication of effort by regulators, unnecessary duplication of regulatory burden for relevant entities, and can undermine confidence in the Standards.

The Commission would prefer to avoid a situation whereby multiple government bodies were responsible for undertaking concurrent consideration of a single concern of non-compliance. Instead, where there is a relevant authority that has clear functions, powers and resources to ensure compliance, the Commission would prefer to narrow its focus to ensuring that different relevant authorities effectively and consistently ensure compliance, so that child safety is addressed in a meaningful way, across all sectors.

This could be achieved by giving the Commission statutory powers and duties to set frameworks for relevant authorities to adhere to when exercising their functions and powers in relation to the Standards. This would involve the Commission clearly articulating how relevant authorities must fulfil their functions and exercise powers in relation to the Standards. The Commission should then have powers to monitor and audit relevant authorities' compliance with those frameworks and give advice or recommendations to relevant authorities on their compliance with the framework. In the event that there were serious failures by a relevant authority to properly carry out its functions, the Commission should be able to report that failure to the relevant responsible Minister and/or Parliament. This would assist the Commission to ensure accountability, while avoiding a situation where the Commission may be seen as conducting a form of merits review for decisions by relevant authorities as to whether an entity is compliant or not.

The Commission, as an independent statutory regulator, is and should continue to be transparent and accountable for its actions. To promote transparency and accountability, the Commission should be required to report on its performance in relation to its Child Safe Standards functions under the Act. This could include reporting on the Commission's compliance with relevant frameworks.

<u>Ensuring information is shared between the Commission and relevant authorities</u>

Given that the Commission may receive information regarding non-compliance from members of the public, via the Reportable Conduct Scheme, and other sources, it is also important that the Commission is able to refer non-compliance concerns to relevant authorities for their consideration and action.

Relevant authorities should also be required to notify the Commission if they become aware of non-compliance concerns which relate to one of their entities and inform the Commission of any subsequent action taken by the relevant authority in response to the concerns. This will enable the Commission to continue to oversee and monitor trends in relation to compliance by all entities and inform the development of education and capacity building tools.

The combination of measures outlined above would support consistent and collaborative approaches by relevant authorities and the Commission to ensuring compliance by reduce unnecessary duplication.

Recommendation 9

The Government should amend the Act to:

a) clearly confirm the Commission's role as overarching regulator

b) give relevant authorities the same powers as the Commission in relation to their entities

c) give the Commission an express power to refer non-compliance concerns to relevant authorities for action (with the relevant authority to notify the Commission of any action taken in response)

d) require that the Commission issue frameworks for relevant authorities to follow in fulfilling their roles under Part 6 of the Act

e) enable the Commission to monitor and audit relevant authorities' compliance against frameworks

f) enable the Commission to give advice or recommendations to relevant authorities on how to improve their compliance with frameworks

g) require the Commission to report to Parliament annually on relevant authorities' performance against the frameworks

h) require the Commission to report on its performance in relation its Child Safe Standards functions

i) give the Commission an express power to report to the Parliament any serious failures by a relevant authority to properly carry out its functions

j) preclude the Commission from taking assessment or enforcement action in respect of an entity that has a relevant authority.

An alternative approach to the Commission's role in relation to relevant authorities

If recommendation 9 is not accepted by Government, and instead the Government prefers that both the Commission and relevant authorities retain concurrent responsibility for compliance, then the Commission considers that there would need to be measures in place to ensure that any duplication can be avoided or at least minimised and that enforcement action can be taken in a timely manner.

The Act could be amended to give the Commission emergency step-in powers. This could involve the Commission issuing a direction to a relevant authority to cease (or refrain from taking) any Standards compliance activity and handover any relevant information to the Commission, so that the Commission may take action itself. The availability of such an extraordinary emergency power should only be available in prescribed circumstances such as:

- in response to serious or imminent threats to children
- in response to broad systemic issues affecting a large number of children, or

- if the Commission otherwise decides it is necessary to do so to ensure potential non-compliance is addressed.

Further, the Commission could also be given a power to require a relevant authority to take action in response to a concern and report back on the outcomes of its action. It may be appropriate to do so where the Commission considers a relevant authority is better placed to take any necessary action. The power to require specific actions by a relevant authority could also be used to give the relevant authority comfort as to its lawful basis for taking action. The power would also assist to ensure that the Commission was able to satisfy itself that immediate risks to children were being addressed without needing to take unilateral action.

Finally, to ensure accountability, the Commission considers that it should be given a power to report to the Parliament any serious failures by a relevant authority to properly carry out its functions in relation to the Standards.

Recommendation 10

If recommendation 9 is not accepted by Government, the Government should:

a) amend the Act to give the Commission emergency 'step in' powers,

b) ensure that the Commission is adequately resourced to utilise its emergency step in powers

c) amend the Act to give the Commission the power to direct a relevant authority to take action in response to non-compliance concern and provide the Commission with information relating to the results of their action

d) amend the Act to give the Commission a power to report to the Parliament any serious failures by a relevant authority to properly carry out its functions in relation to the Standards.

Removing the Commission's consultation obligations which can impair timely action

If recommendation 9 is accepted, then there would be no need to continue to have mandatory consultation obligations under the Act because the Commission would be expressly excluded from undertaking enforcement action in relation to a relevant authority's entities.

However, even recommendation 9 is not accepted, the mandatory consultation obligations should be repealed.

The Commission values consultation, cooperation and collaboration with other departments and authorities. The Commission appreciates the support it has been given by departments and authorities as we routinely draw upon the specialist knowledge of departments and authorities to inform our responses to concerns of non-compliance.

Even if there were no consultation provisions in the Act, the Commission would endeavour to consult with other departments and authorities to the maximum extent considered reasonably practicable.

However, the current provisions place unnecessarily broad obligations on the Commission to consult. In particular, Commission must consult with each relevant authority for an entity before the Commission uses any of the following powers:

- requesting any information or document under section 26
- conducting an inspection of premises under section 29
- giving the relevant entity a notice to produce under section 30
- giving a relevant entity a notice to comply under section 31
- making an application to the court under section 33.

The Commission is unable to exercise its powers if the relevant authority advises the Commission that it plans to take action to either determine the compliance of the relevant entity, or promote and require compliance of the entity.

The Act does provide for the Commission to exercise its powers where the relevant authority fails or is unable to take action within a reasonable time.[30] However, before exercising powers under this provision the Commission is required to further consult with the relevant authority. In practice this results in a framework whereby the Commission's enforcement capabilities are compromised due to an inability to take timely enforcement action with non-compliant entities.

Where there are multiple relevant authorities (or potential relevant authorities) this further limits the Commission's ability to exercise its powers as it must identify, consult with, provide information to, and wait for responses from multiple relevant authorities before taking action. In the event that any one of the relevant authorities proposes to take action (even if just to make enquiries regarding compliance) then the Commission is unable to exercise its powers.

The Commission considers that it would be preferable to remove the current consultation obligations from the Act, and leave the Commission to exercise its discretion, on a case by case basis, to engage with a department or authority in an appropriate manner and at an appropriate time. Consultation arrangements could be agreed and reflected in Memoranda of Understanding between the Commission and each department or authority.

Recommendation 11

The Government should amend the Act to remove the current consultation obligations.

Resourcing relevant authorities to increase awareness and build greater capacity

The Commission has encountered mixed levels of awareness and capacity among relevant authorities in relation to the Standards. The legislation that supports the Standards is principles-based, and therefore provides for considerable discretion in the methods organisations use to achieve compliance, but still requires them to achieve the required legislated outcomes. This level of discretion helps to ensure implementation is proportionate to different levels of risk and can be adapted to the circumstances in different sectors. It can, however, also be confusing for some organisations, who lack the expertise or experience to interpret the requirements to accurately and develop appropriate responses.

It is important in such circumstances for relevant authorities to provide support to help entities better understand their obligations. As mentioned, the Commission undertakes considerable education and capacity building activities. However, relevant authorities have a deeper understanding of the sectors they regulate which would allow them to develop sector tailored compliance guidance and advice.

The Commission is aware that adequate resourcing to support and enforce the Standards can be an issue for relevant authorities. For the most part, relevant authorities do not receive additional funding to support entities in complying with the Standards. This, in conjunction with a number of relevant authorities not viewing the support or enforcement of the Standards as their 'core business', can negatively impact efforts to support compliance.

Addressing the issues relating to the broad definition of *relevant authority* (discussed below) will go some way to improving the regulatory capabilities of relevant authorities. However adequate resources for relevant authorities to administer the Standards is critical to ensuring that relevant entities are adequately supported.

[30] Ibid., s. 38(4)

Recommendation 12

The Government should ensure that relevant authorities are adequately resourced to effectively perform their roles in relation to the Standards.

Gaining clarity as to who relevant authorities are for entities

Theme-at-a-glance

When non-compliance concerns arise, too much time is spent considering whether a particular department or authority is the 'relevant authority' for a specific entity. This is due to the use of an imprecise and excessively broad definition of relevant authority and associated practical barriers to determining whether the definition applies. Amendments should be made to specify which entities each department or authority is responsible for.

Where there are multiple relevant authorities, the Commission should have the power to appoint a 'lead' that is required to assume primary responsibility for ensuring compliance and keep other relevant authorities and the Commission informed.

Barriers to identifying relevant authorities and breadth of the statutory definition

Any effective regulatory system must be based on clearly articulated roles and obligations. In the context of the Standards, this includes having absolute certainty as to whether a department or authority is a '*relevant authority*'.

The Act contains a very broad definition of *relevant authority,* which includes:

(a) a department that is responsible for regulating the relevant entity
(b) a department that provides funding to the relevant entity
(c) the Victorian Registration and Qualifications Authority
(d) any other authority
    i. that regulates or funds the relevant entity; and
    ii. that is prescribed to be a relevant authority. [31]

The Commission's experience has been that there can be real practical difficulties in determining whether a department '*provides funding'* or is *'responsible for regulating*' an entity. These terms are not defined by the Act.

The Commission has experienced challenges in gathering documents and information to inform decisions about whether one or more departments or authorities '*provides funding*' to an entity. With a few exceptions (such as annual reports and Ministerial press releases), the Commission's experience has been that typically there is extremely limited publicly available information to ascertain an entity's funding arrangements. Enquiries often need to be made of multiple departments or the entity itself to establish whether it has a relevant authority.

Even where information can be easily gathered about an entity's funding sources, the current definition of relevant authority contains little guidance on the criteria for whether the payment or transfer of monies from a department or authority to an entity would constitute '*funding*' for the purposes of the Act. For example, the Act does not expressly specify:

- whether there is a minimum or maximum amount of funds that must be provided before a department or authority will be deemed to be a relevant authority
- whether there must be a minimum or maximum period of time over which funding must be provided by a department or authority to an entity, before that department or authority will be deemed to be a relevant authority (e.g. are short term funding agreements or even '*one off'* grants types of '*funding'* for the purposes of the definition of relevant authority? If a '*one off*' grant does not equate to '*funding*', could multiple consecutive grants amount to '*funding*'?)
- whether the definition applies to '*funding*' provided by a department or authority for any specific or excluded purposes
- whether the definition only applies to '*funding*' under contracts that contain terms that could enable the department, authority or Minister to assess compliance, recall

[31] *Child Wellbeing and Safety Act 2005,* s.3(1).

previous funding, or refuse to provide future funds, by reason of non-compliance with the Standards
- whether the definition can apply to funding arrangements the department gives funding to a peak organisation, that is responsible for distributing monies to its member organisations, so that the department is the relevant authority for both the peak and its member organisations
- what impact, if any, termination or cessation of a funding agreement would have on a department's or authority's status as a relevant authority.

In relation to the expression '*responsible for regulating*', it can be difficult for the Commission to anticipate the full extent of each department's or authority's interactions with an entity (or individuals within an entity), and it may be unclear whether that interaction constitutes '*regulating*' for the purposes of the Act. For example, the Act does not expressly specify:

- whether a relevant authority must have specific powers or controls it can exercise over the activities of the entity to ensure compliance with the Standards
- whether the nature of the regulatory responsibilities and powers must relate in any way to child wellbeing and safety (e.g. the extent to which, if any, business regulators with broad regulatory remits are '*relevant authorities*')
- whether a department that is responsible for regulating an aspect of an entity's services or activities, is deemed to be a relevant authority in respect of all aspects of that entity's services or activities, as well as all other services or activities performed by the entity (e.g. whether the Department of Education and Training's regulatory responsibilities under the *Children's Services Act 1996* in relation to children's services licensees, which includes certain local councils, mean that the Department of Education and Training is the relevant authority for the entirety of that local council's services and activities).

The use of these broad expressions has the effect of requiring case-by-case assessments of the funding and regulatory arrangements between each entity and each department or authority. Such assessments invariably depend on questions of fact, degree and opinion. The Commission's position is that the responsibilities of departments and authorities in relation to the Standards should not be dependent on such highly discretionary judgments.

Further, the Commission's experience is that, on occasion, the ambiguity in the definition of '*relevant authority*' has contributed to departments expressing a high degree of reluctance to be considered as a relevant authority. This leaves the Commission with the task of attempting to resolve this issue with departments regarding their status as relevant authorities. This process can be time and resource intensive for both the Commission and relevant authorities. It can also result in a situation whereby non-compliance by an entity is not addressed in a timely fashion, thereby increasing the length of time that children are exposed to risk of harm.

The Commission anticipates that the current definition of '*relevant authority'* can create uncertainty for entities seeking to ascertain who they can or should approach to obtain support to comply and who is responsible for assessing and enforcing their compliance.

Having regard to the matters outlined above, the Commission's view is that the current definition of '*relevant authority*' should be repealed and Government should make necessary amendments to clarify whether a particular department or authority is the relevant authority for an entity.

Options for increasing clarity as to relevant authority status

The Commission proposes two options that Government should consider to increase clarity.

Governor in Council Orders

The Act could be amended to give the Governor in Council the power to make orders specifying which department or other authority is the relevant authority for an entity or class of entities.

Before making an order, the Governor in Council could be required to consider whether a specific relevant authority has any pre-existing regulatory, funding, or other responsibilities in relation to specific entities. The Commission could also be consulted prior to making orders.

The order could take the form of a table which broadly mirrors Schedules 1 and 2 of the Act with the addition of a new column to assign a specific relevant authority to each item in the Schedules. To illustrate, for Schedule 1, the order could indicate as follows:

ITEM	DESCRIPTION	RELEVANT AUTHORITY
1	An applicable entity that operates a registered school within the meaning of *the Education and Training Reform Act 2006*	Victorian Registration and Qualifications Authority
…		
3	An approved provider within the meaning of the Education and Care Services National Law (Victoria).	Department of Education and Training
…		
9	A hospital listed in Schedule 1 to the *Health Services Act 1988* as a public hospital.	Department of Health and Human Services

The obvious advantage of such an approach is that it can ensure clarity by shifting away from ad-hoc and discretionary decision-making regarding the ambit of the responsibilities of departments and authorities, to a formal and structured process for determining that is nonetheless informed by considerations as to whether a department or authority has existing regulatory, funding or other relationships with entities or classes of entities.

Further, giving this power to make an order to the Governor in Council is both appropriate and consistent with similar orders that govern the existence and responsibility of departments under the *Public Administration Act 2004* and the *Administrative Arrangements Order Act 1983*. As part of machinery of government changes, the Governor in Council could issue new orders to reflect the evolving responsibilities of departments.

Setting relevant authorities by using the items in the Schedules

Alternatively, the Act and the Schedules could be amended to divide entities between those subject to oversight by:

- a relevant authority and the Commission (Group 1), and
- only the Commission (Group 2).

Ideally, this should be reflected in Schedules 1 and 2. As a result, some of the entities currently listed in Schedule 2 are likely to need to be moved to Schedule 1.

The Act could also be amended to provide that, where a Group 1 entity is required to comply with the Standards because it:

- '*receives funding under a State contract*' (e.g. items 7 and 18-23 of Schedule 1), only that department which is a party to that contract should be deemed to be the relevant authority
- is '*approved*' or '*registered'* under an Act, only that person or body empowered to grant or revoke that approval or registration should be deemed to be a relevant authority
- is defined in another Act, only the relevant responsible Minister for that Act (as set out in the General Order) should be deemed to be the relevant authority.

Of course, careful consideration should be given to ensure that the Commission and relevant authorities are adequately resourced especially if, as a consequence of changes to the definition of relevant authority, either:

- the Commission becomes solely responsible for regulating more entities, or
- relevant authorities become responsible for more entities.

Recommendation 13

The Government should repeal the current definition of '*relevant authority*' and ensure amendments are made so it is clear which department or authority (if any) is the relevant authority for each entity.

Appointing lead relevant authorities

Relevant entities can be funded or regulated by more than one department or authority. For example, more than one department and/or the VRQA may have responsibility for overseeing, promoting, assessing and enforcing compliance with the Standards. The Commission has encountered a number of instances where an entity has more than one relevant authority.

Even if amendments are made to the definition of relevant authority, there may remain risks of overlap.

An example of a type of organisation that is likely to have multiple relevant authorities is a local council. Councils can receive funding from a number of government departments for services, facilities and programs. Councils may also be regulated by multiple departments. Depending on the services, activities and funding arrangements for each council, relevant authorities may vary. Identifying the relevant authorities for each council is a resource intensive process for the Commission. Some local councils have more than four departments as relevant authorities.

Having multiple relevant authorities for an entity can be undesirable because:

- an entity may have to engage with multiple relevant authorities and the Commission
- time and effort may not be effectively utilised by relevant authorities and the Commission where there is overlap or duplication of effort in ensuring compliance
- there are increased risks of inconsistency, especially in assessments of compliance with the Standards
- the Commission is required to consult with all relevant authorities before exercising any of its enforcement powers. Relevant authorities are, however, not legally required to consult with each other.

To simplify and streamline regulatory efforts, the Commission currently works to identify and establish administrative arrangements whereby a lead relevant authority (who is prepared to assume primary responsibility for an entity's compliance and ensure that other relevant authorities are kept informed of developments) is appointed. In the absence of an express power to appoint a lead relevant authority, this process involves clarifying roles and obligations, negotiating a commitment to a consistent response to non-compliance, and seeking consent of all parties. This is both time and resource intensive and results in considerable delay in addressing potential risks to the safety and wellbeing of children.

Recommendation 14

The Government should amend the Act to:

a) give the Commission the power to appoint a 'lead' relevant authority in cases where there are or may be multiple relevant authorities

b) require a lead relevant authority to assume primary responsibility for ensuring an entity's compliance and ensure that the other relevant authorities and the Commission is informed of developments.

Royal Commission recommendations

Ultimately, the Commission considers that the Victorian Government's approach to implementing the Royal Commission's recommendations should ensure that there is, as much as possible, a harmonised approach between jurisdictions. However it is important that harmonisation does not result in a reduction in safety outcomes for Victorian children.

National Principles for Child Safe Organisations

The Commission notes that the National Principles have now been unanimously endorsed by the Commonwealth and state and territory governments.

The Commission notes that there are 7 Child Safe Standards in Victoria, as opposed to the 10 National Principles for Child Safe Organisations (National Principles).

Currently in Victoria organisations must also incorporate the three overarching principles when implementing the Standards. The Standards and the principles are designed to work together to help create a child safe organisation. Independently, each standard addresses a specific element of child safety within an organisation.

The content of the Victorian Standards/ Principles and the National Principles broadly align, with the key differences being:

- National Principle 3 has specific reference to involving families and communities and keeping them informed
- National Principle 8 contains a specific reference to safety in physical and online environments
- National Principle 4 expressly relates to Aboriginal and Torres Strait Islander children, children with a disability, children from culturally and linguistically diverse backgrounds, and lesbian, gay, bisexual, transgender and intersex (LGBTI) children and young people
- the National Principles do not contain an explicit reference to 'empowerment of children'.

The Commission considers that in practice the application of the National Principles are unlikely to result in any material change in safety outcomes in comparison to the current Victorian Standards. Exclusion of any reference to the empowerment of children in the National Principles is a noteworthy exception. This is discussed further below.

Reference to families and communities (National Principle 3)

The Commission recognises that consultation with families and the community is an integral component of developing a child safe organisation. As such, community and family engagement are interwoven through the Implementation and Action Plan Tool in guidance the Commission has released to assist organisations in complying with the Standards. Clearly articulating this requirement in the Standards would further clarify this requirement.

Reference to physical and online environments (National Principle 8)

Standard 6 of the Victorian Standards requires that organisations identify hazards and then implement assessment and control strategies. While the Standard does not explicitly reference either physical or online environments, applying a risk management approach to these areas is integral in demonstrating compliance with Standard 6.

Equity and diverse needs (National Principle 4)

In Victoria, the needs of Aboriginal children, children with disabilities and children from culturally and linguistically diverse communities are covered by the principles that underpin the Standards.

In practice the Commission considers that the application of the current Victorian Standards compel organisations to address the safety and needs of LGBTI children.[32] However the explicit reference in the National Principles is helpful and would ensure that organisations are abundantly clear that this factor must be considered when implementing the Standards.

Pros and cons of alignment

Nationally consistent Standards will enable greater collaboration between interstate regulators on the development of guidance material and aligned enforcement models. Furthermore, larger organisations operating in multiple jurisdictions may see regulatory burden reductions as a result of not having to comply with multiple different Standards in different jurisdictions.

However, while the adoption of the COAG endorsed National Principles is unlikely to result in a material change in safety outcomes, organisations will need to review their systems and policies to align with new terminology. Smaller organisations that only operate in Victoria will benefit less from a nationally harmonised system due to not operating interstate. Therefore any change may disproportionately impact small organisations. Small organisations also usually have fewer resources available to review systems and policies.

Additionally, a substantial amount of change has occurred recently for regulated Victorian organisations. Some organisations have had to comply with both Standards and the Reportable Conduct Scheme within a relatively short time frame. Some organisations such as small religious organisations are being regulated by the government for the first time via the Standards and Reportable Conduct Scheme. Additional change in this space may result in confusion and undermine momentum. The review should include a robust cost benefit analysis to assess the impact of implementing changes to Standards for impacted organisations.

An adequate transition period will need to be applied to provide organisations time to review and update their systems and policies.

The need for an explicit requirement to empower children

The Commission also notes with concern that the National Principles do not contain an explicit requirement to promote the empowerment of children. Facilitating the empowerment of children enhances a culture of child safety and of listening to children within an organisation. A positive duty to actively empower children to have their say is important as it focuses an organisation to provide an environment whereby children are more likely to participate and engage in decisions that impact them. Empowering children requires more than merely providing them with information in an accessible way.

Crucially, children are more likely to report abuse or concerns if they feel safe and empowered in the organisation. Arguably a comprehensive approach to implementing National Principle 2 would require an organisation to empower children to actively participate in decisions affecting them. The Commission takes the strong view that an explicit requirement to empower children is required.

The need for mandatory standards

As noted above, there has been significant utility in introducing mandatory legislated Child Safe Standards. This greatly assists the Commission to improve the safety of Victorian children. The force of law can effectively influence an organisation's priorities to ensure a focus is placed on child safety. It would be, in our view, a retrograde step if Victoria were to move to voluntary standards in the pursuit of national consistency.

[32] Commission for Children and Young People *A Guide for Creating a Child Safe Organisation* (2018) p. 19

Our position

The Commission supports in-principle the adoption of nationally consistent child safe standards, providing that:

a) Victoria does not lose the current express reference to having strategies to promote the participation and empowerment of children

b) the Department of Health and Human Service's review of the Child Safe Standards finds that adopting the National Principles would positively impact the safety outcomes for Victorian children

c) Victoria retains legislated, mandatory standards irrespective of the pace of such reform in other jurisdictions.

Core components and action areas

The Royal Commission recommended that each of its standards contain 'core components' to guide organisations in the implementation of each standard. The National Principles also provide guidance on how to implement each principle through 'action areas' against each principle. These 'action areas' are equivalent to the Royal Commission's 'core components'.

The Commission agrees that action areas provide a useful guide for organisations who will be required to implement the Standards. However, it is important that action areas can be easily amended to reflect new or unforeseen risks.

Our position

The Commission supports the inclusion of action areas. However, the Commission takes the view the action areas should not be prescribed within legislation, so they can be updated or amended without legislative amendment.

Possible approaches for achieving this include empowering the Commission to develop statutory guidance or compliance codes and including the action areas within these documents.

Ensuring that the Victorian Standards continue to apply to current entities

The Commission takes the strong view that any move to reduce the number of organisations subject to the Standards would result in an unacceptable reduction in safety outcomes for Victorian Children.

Differences in scope

The Royal Commission's recommendation regarding institutions that should be subject to mandatory standards is stated in relatively broad terms and focuses on the child related activities or services being provided. This is due to the list being derived from the Royal Commission's proposed definition of 'child-related work'. This definition was developed for the purposes of articulating the categories of occupation that should require a Working With Children Check.

By comparison Schedule 1 and 2 of the Act are entity focussed and clearly articulate the class of entity to which the Standards apply.

It is therefore difficult to categorically identify the exact differences in scope between the Royal Commission recommendation and the law in Victoria. A number of the categories recommended by the Royal Commission appear to broadly align with those prescribed under Schedules 1 and 2 of the Act.

However, the narrower focus of the Royal Commission recommendation appears to not cover:

- a large part of the State government (including a range of government departments and statutory bodies)
- local councils
- a range of family violence, sexual assault, alcohol and drug services, housing and homelessness services and other charities.

Exemption provisions

The Commission considers that the current provisions at section 22 of the Act provide a useful framework for exempting prescribed entities from needing to comply with the Standards. This provision exempts an organisation from needing to comply with the Standards providing it does not do any of the following:

- provide any services specifically for children
- provide any facilities specifically for use by children who are under the entity's supervision
- engage a child as a contractor, employee or volunteer to assist the entity in providing services, facilities or goods.

The exemption provisions effectively ensure that those organisations that are prescribed in Schedule 1 or 2 of the Act, but that do not engage with children, are not required to implement the Standards.

It is the Commission's view that clearly prescribing classes of entities and retaining the current exemption provisions is preferable to the narrower, services-based, approach suggested by the Royal Commission. This is because:

- the Standards are designed to drive cultural change and embed a focus on child safety throughout an organisation. Preventing child abuse should be seen as the ordinary responsibility of all adults at all levels of an organisation and clear governance arrangements should be used to evolve child safety as a focus within an organisation. This type of cultural shift requires buy in from the entire organisation
- a services-based approach may result in a lack of clarity and confusion within many entities, particularly where an entity uses the same staff to support the provision of a range of different services.

If a similar service-based approach were to be implemented in Victoria the Commission takes the view that the legislation would need be clear that if an entity provides one of the services listed, then the Standards would apply to the entire organisation (e.g. a local council providing child care services should need to implement the Standards across the entire organisation).

However, consideration should be given to whether the exemption provisions in respect of the Standards and Reportable Conduct Scheme should be further aligned. There is currently potential for an organisation to be required to comply with the Reportable Conduct Scheme but be exempt from the Standards.

Our position

The Commission does not support reducing the scope of the organisations required to comply with the Standards. The Commission suggests that the Royal Commission's recommended scope should be considered as the minimum recommended coverage.

Delegation of responsibility

Royal Commission recommendation 6.10(b) states that an independent oversight body should be able to delegate the responsibility for monitoring and enforcing the Standards to another

government body such as a sector regulator. The Royal Commission does not elaborate further regarding the nature of the proposed delegation.

Our position

The Commission considers that if Government adopts recommendation 11 (above), there will be broad alignment with the Royal Commission's recommendations.

Concluding statement

This submission has highlighted some specific issues with the current Standards framework. The Commission considers that any approach to addressing the highlighted issues needs to take a holistic approach and carefully consider the flow on impact of changing any aspect of the framework.

The Commission looks forward to engaging with the Department further during the review of the Standards.

Appendix 1- Table of recommendations

Improving responses to individuals with non-compliance concerns	
1.	The Government should amend the Act to: a) enable individuals to disclose concerns about non-compliance with the Standards to the Commission b) enable the Commission to disclose relevant information to that individual c) impose a duty on the Commission to consider what actions to take in response to concerns about non-compliance. A non-exhaustive list of actions should be prescribed, and reflect the powers available to the Commission, including deciding to take no action.
2.	The Government should amend the Act to protect individuals who, in good faith, disclose information about their concerns that an organisation is not complying with the Standards.

Enhancing information gathering powers	
3.	The Government should enhance, strengthen and modernise the Commission's information gathering powers, including to : a) amend the Act to: i) give great protections to entities complying with requests for information ii) enable announced and unannounced inspections of an entity's premises, without consent iii) enable notices to produce to be issued to determine whether an entity must comply and is complying, with the Standards iv) enable the Court to order relevant documents be produced v) increase the penalty for non-compliance with a notice to produce. b) consider amending the Act to include other modern regulatory information gathering powers.
4.	The Government should amend the Act to allow the Commission to: a) request any information that the Commission reasonably requires to determine whether a relevant entity is complying with the Standards from 'any person' b) issue a notice to produce to any person.
5.	The Government should amend the Act to allow the Commission to share information with interstate bodies that that are responsible for administering a law corresponding to Part 6 of the Act

Enhancing powers to enforce compliance

6. The Government should enhance, strengthen and modernise the Commission's enforcement powers, including to:

   a) amend the Act to enable:

      v) entities to enter voluntary and enforceable undertakings in relation to non-compliance with the Standards

      vi) the Commission to issue infringements notices for non-compliance with a notice to comply, and/or the size of the existing penalty at section 32 of the Act should be increased

      vii) the Commission to publish information about non-compliant entities

      viii) the Commission to require a follow-up audit to be undertaken after a notice to comply is issued, to confirm if changes have been implemented

   b) consider amending the Act to include other modern regulatory enforcement powers.

Reducing unnecessary duplication between the Commission and relevant authorities

7. The Government should amend the Act to:

   a) confer express functions and objectives on relevant authorities in relation to overseeing, promoting, assessing and enforcing compliance by their entities

   b) place duties on relevant authorities to proactively fulfil those functions.

8. The Government should:

   a) amend the Act to confirm pre-existing regulatory powers of a relevant authority can be used to oversee and enforce compliance by that relevant authority's entities

   b) release guidance for departments on model clauses of funding agreements with entities that could be adopted to ensure appropriate action can be taken to assess and require compliance.

Reducing unnecessary duplication between the Commission and relevant authorities	
9.	The Government should amend the Act to: a) clearly confirm the Commission's role as overarching regulator b) give relevant authorities the same powers as the Commission in relation to their entities c) give the Commission an express power to refer non-compliance concerns to relevant authorities for action (with the relevant authority to notify the Commission of any action taken in response) d) require that the Commission issue frameworks for relevant authorities to follow in fulfilling their roles under Part 6 of the Act e) enable the Commission to monitor and audit relevant authorities' compliance against frameworks f) enable the Commission to give advice or recommendations to relevant authorities on how to improve their compliance with frameworks g) require the Commission to report to Parliament annually on relevant authorities' performance against the frameworks h) require the Commission to report on its performance in relation its Child Safe Standards functions i) give the Commission an express power to report to the Parliament any serious failures by a relevant authority to properly carry out its functions j) preclude the Commission from taking assessment or enforcement action in respect of an entity that has a relevant authority.
10.	If recommendation 9 is not accepted by Government, the Government should: a) amend the Act to give the Commission emergency 'step in' powers, b) ensure that the Commission is adequately resourced to utilise its emergency step in powers c) amend the Act to give the Commission the power to direct a relevant authority to take action in response to non-compliance concern and provide the Commission with information relating to the results of their action d) amend the Act to give the Commission a power to report to the Parliament any serious failures by a relevant authority to properly carry out its functions in relation to the Standards.
11.	The Government should amend the Act to remove the current consultation obligations.
12.	The Government should ensure that relevant authorities are adequately resourced to effectively perform their roles in relation to the Standards.

Gaining clarity as to who relevant authorities are for entities	
13.	The Government should repeal the current definition of '*relevant authority*' and ensure amendments are made so it is clear which department or authority (if any) is the relevant authority for each entity.
14.	The Government should amend the Act to: a) give the Commission the power to appoint a 'lead' relevant authority in cases where there are or may be multiple relevant authorities b) require a lead relevant authority to assume primary responsibility for ensuring an entity's compliance and ensure that the other relevant authorities and the Commission is informed of developments.

Appendix 2 - Royal Commission recommendations

Topic	Our position
National Principles for Child Safe Organisations	The Commission supports in-principle the adoption of nationally consistent child safe standards, providing that: a) Victoria does not lose the current express reference to having strategies to promote the participation and empowerment of children b) the Department of Health and Human Service's review of the Child Safe Standards finds that adopting the National Principles would positively impact the safety outcomes for Victorian children c) Victoria retains legislated, mandatory standards irrespective of the pace of such reform in other jurisdictions.
Core components and action areas	The Commission supports the inclusion of action areas. However, the Commission takes the view the action areas should not be prescribed within legislation, so they can be updated or amended without legislative amendment. Possible approaches for achieving this include empowering the Commission to develop statutory guidance or compliance codes and including the action areas within these documents.
Ensuring that the Victorian Standards continue to apply to current entities	The Commission does not support reducing the scope of the organisations required to comply with the Standards. The Commission suggests that the Royal Commission's recommended scope should be considered as the minimum recommended coverage.
Delegation of responsibility	The Commission considers that if Government adopts recommendation 11 (above), there will be broad alignment with the Royal Commission's recommendations.