

1 February 2021

Mr Mark Follett
A/Executive Director
Policy, Reform and Legislation Branch
Department of Communities and Justice
By email: policy@justice.nsw.gov.au

Attn: Ms Pritha Zaman, Legal Officer, Policy Reform and Legislation Branch
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Dear Mr Follett

Review of the *Children and Young Persons (Care and Protection) Regulation 2012*

Thank you for your letter of 18 December 2020 seeking preliminary feedback from key stakeholders about amending the Care Regulation. I note your advice that formal public consultation on remaking the Care Regulation will occur in March 2021.

To inform your preparation for the formal public consultation process, ACWA has consulted with, and prepared the following observations and comments on behalf of, NCOSS, Youth Action and FAMS.

Table of proposed amendments

Clause 8 Prescribed bodies

We strongly support the inclusion of the NSW Courts (including the Children's Court), Australian Federal Police, National Disability Insurance Agency, NDIS Quality and Safeguarding Commission, the Commonwealth departments of Social Services and Health, and disability service providers as prescribed bodies for the purposes of section 248 and Chapter 16A of the Act.

To avoid the need for the Regulation to be further amended in future to reflect departmental name changes, we recommend that the following text be included after each NSW or Commonwealth agency listed as a prescribed body: "or any successor of that Department".

This would be consistent with the text that currently appears after the references to the Commonwealth Department of Immigration and Border Protection, the Indigenous Affairs Group within the Commonwealth Department of the Prime Minister and Cabinet, and child protection authorities in other states and territories.

Clause 28 Arrangements and services that are not out-of-home care

We have no objection to the proposed amendment to clause 28(1)(h) which updates and clarifies that Specialist Homelessness Services do not fall within the definition of out-of-home care for the purposes of section 135(3)(c) of the Act.

Clause 40 Information to be provided to designated agency

CI 40(2) states that an authorised carer must notify the designated agency if certain events occur, including if the child or young person leaves the care of carer; or is expelled or suspended from school; or is absent without permission from care of carer for more than 24 hours; or if the child suffers a serious accident, injury or illness, or dies.

We have no objection to the proposal to amend clause 40(2) to also require an authorised carer to notify the designated agency if a child is charged with a criminal offence. However, we note that as this information relates to the safety, welfare or wellbeing of a child, it can and should already be pro-actively provided to the designated agency by the NSW Police Force, pursuant to Chapter 16A of the Act, where the young person's care status is known to police.

Clause 41 Management of behaviour of children and young persons

Clause 41 provides that authorised carers must notify the designated agency as soon as practicable if they find that behaviour management practices that are approved by the designated agency are not sufficiently effective to correct or manage behaviour of children in care. A designated agency may address the issue by (a) providing advice, support and training to the carer and appropriate support to the child; or (b) changing the placement arrangements.

For the sake of clarity and promoting the best interests of the child, we support the proposal to amend cl41(3) to:

- (a) include adjusting the approved behaviour management practices for a child and preparing a behaviour management plan as alternatives to changing a child's placement arrangements when determining what action should be taken to address a child's behaviour, and
- (b) require a designated agency to consider alternative options in cl 41(3) before changing the child's placement arrangements.

Clause 42 Cancellation or suspension of authorisations by designated agencies

We support the proposal to amend the note at clause 42 to correctly reference section 245(1)(a1) of the Act.

Clause 42CA Presumption that authorisation will be cancelled

Cl 42CA(1)(a) provides there is a presumption that an authorised carer's authorisation will be cancelled where he or she has not provided out of home care to that child or young person for 3 months or more, unless the designated agency is satisfied the authorisation should not be cancelled in the particular case. Section 245(1)(a1) of the Act provides that a decision to cancel an authorisation where such a presumption arises is not reviewable.

We support the proposal to amend clause 42CA to provide that the presumption does not apply where an investigation into whether the authorisation should be cancelled takes longer than three months and where a review of a reviewable decision is pending.

Additional comments

In addition to the above comments on the items included in the table of proposed amendments, we provide the following feedback.

Prescribed bodies and definition of children's services and welfare services

Clause 8 lists prescribed bodies for the provision and exchange of information under sections 248(6) and 245B(1) of the Act.

The Royal Commission considered whether the definition of 'prescribed body' for the purpose of Chapter 16A of the Act should specifically include religious and sporting and recreation bodies and concluded that while it may be beneficial, further consultation is needed.¹ On this matter, we

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final report, Vol. 8: Recordkeeping and information sharing*, 2017, p192.

refer you to the NSW Ombudsman's 2016 report, *Strengthening the oversight of workplace child abuse allegations*, which examined the Solicitor General's advice about the inclusion of these bodies in the reportable conduct scheme, and why it would be beneficial to align designated agencies under that scheme with prescribed bodies under Chapter 16A.² The report includes several case studies highlighting the value of agencies within the reportable conduct scheme, along with the oversight body, having 'prescribed body' status to enable information sharing.

The NSW Ombudsman also submitted to the Royal Commission that consideration should be given to broadening the definition of 'prescribed body' to include organisations exercising management responsibilities in respect of prescribed bodies. This issue arises in the context of some religious organisations – for example, while Catholic schools or Catholic community services would fall within the definition of 'prescribed body', the Catholic Diocese responsible for those bodies might not. Management bodies of this kind possess, and should be able to readily receive and disclose, child protection-related information.

Section 245B(2A) of the Act states that a reference to a prescribed body is a reference to all the parts of that body (however described). However, that may not be sufficient to extend the Chapter 16A framework to a related entity that has a separate legal identity.³⁴

As you know, the reportable conduct scheme was amended (from 1 March 2020) to include religious entities and its reach will be further broadened to include the sporting and recreation sector. Given the structured mentoring and leadership programs that a number of these entities deliver in the children's service and educational/welfare spheres, it can be argued that a number of these services would already meet the definition of prescribed body (see above) as a provider of 'children's services' or 'education/welfare services'. However, ambiguity in the legislation means that the meaning of these terms has been the subject of considerable debate. We suggest that there would be a clear benefit in amending the legislation to eliminate this ambiguity.

I look forward to the formal public consultation on the Care Regulation in March. In the meantime, please do not hesitate to contact me or Ms Julianna Demetrius (julianna@acwa.asn.au or 0418 671 402) if you wish to clarify anything in this submission.

Yours sincerely,

Signatories:

Steve Kinmond, **CEO, ACWA**

Kate Munro, **CEO Youth Action**

Julie Hourigan-Ruse, **CEO FAMS**

Joanna Quilty, **CEO NCOSS**

² NSW Ombudsman, *Strengthening the oversight of workplace child abuse allegations*, February 2016.

³ It is important to note that increasingly, the delivery of child safeguarding services is being viewed as children's services.

⁴ NSW Ombudsman, *The JIRT Partnership: 20 years on*, October 2018, Appendix 2, p318.