

10 May 2021

Ms Janet Schorer  
NSW Children's Guardian  
Office of the Children's Guardian  
By email: RCWRFFeedback@kidsguardian.nsw.gov.au

Dear Ms Schorer,

### **Submission on the proposed Children's Guardian Regulation (2021)**

The Association of Children's Welfare Agencies (ACWA) appreciates the opportunity to comment on the draft Children's Guardian Regulation 2021 and related regulatory impact statement. Thank you for providing an extension of time for us to do so.

In preparing this submission, ACWA has consulted with and prepared the following observations and comments on behalf of its member agencies.

#### ***General observations***

While we recognise that the purpose of the current consultation is to elicit feedback on the proposed Regulation, as the Office of the Guardian (OCG) is aware from its consultation with ACWA and its member agencies on 30 April 2021, we have significant concerns regarding critical implementation issues; most notably, the administrative burden that is likely to result from delays in the provision of information held by the Department of Communities and Justice (DCJ) to residential care providers to inform the mandated worker check, unless a clear and appropriately resourced process is developed (this issue is discussed further below).

In relation to the Regulation specifically, our view is that it provides an adequate legislative framework to guide the operation of the Register, noting that there may be merit in considering making certain changes to strengthen and/or clarify particular provisions – our suggestions in this regard are detailed below.

ACWA is committed to working with the OCG in helping to ensure that the implementation of the Residential Care Workers' Register is efficiently executed, and in doing so, will continue to support our member agencies to identify and put forward practical options for streamlining the checking process. In this regard, we note your advice that the Regulation is due to come into effect in Spring 2021, which provides a window of opportunity for DCJ to hold discussions with the OCG and sector over the next 2-3 months to outline its plans to meet its obligations.

#### ***Application to residential care provider***

We believe that the following amendments warrant consideration with a view to reducing the potential 'handling time' in relation to individual applications:

- Cl.7(2) requires the residential care provider to 'immediately' after receiving an application for employment, notify the applicant that if they reach the 'referee checking stage', the information outlined in cl.10(2) will be recorded on the Register. While we appreciate that in practice, agencies could make this obligation clear in all advertisements for residential care worker roles, it would appear to make more sense for the legislated notification requirement on agencies not to take effect unless and until applicants reach the referee checking stage, rather than at the application stage, with the advice potentially being contained in application vetting forms post initial screening.
- Cl.7(3) requires providers to ask applicants 'who reach the referee check stage' for information about their gender or Aboriginal and Torres Strait Islander status (unless already provided), even though it is not compulsory for the information to be supplied by the applicant. While again, we appreciate that the legislation doesn't prohibit this information being provided at an earlier stage, it would make more sense if this type of information was simply listed in cl 7(1) as part of the list of information that both 'must' be contained in any application from a worker and the information that 'may' be provided. (We note that cl.11(2) includes this type of approach and contains a number of 'must' and 'may' sub-clauses).

In our view, making the above drafting changes in the proposed Regulation will help to guide efficient practice as the current provisions could be read as though the above steps must occur sequentially as stepped out in the Regulation.

### **Residential care provider must conduct certain checks**

Cl.8(1) requires providers to undertake a number of checks for people who reach the 'referee check' stage, including a Community Services 'check' (see cl. 8(1)(c)).

#### Existing employees

While we appreciate that a period of two years and three months (from the commencement of the Regulation) has been prescribed to allow for checks to be carried out with respect to all existing employees, we hold significant concerns about DCJ's capacity to review its child protection holdings relating to the thousands of workers that are currently in the system, based on the average turnaround time over recent years for DCJ to conduct and supply Community Services checks to providers relating to carers and household members, as well other parties in connection with reportable conduct investigations.

For existing employees, there will also be an additional challenge for providers in relation to ensuring that their response to any risks identified through information shared via the Community Services check or other means, conforms with employment law and related best practice principles regarding human resource management.

#### New employees

In addition, any delay in providing information arising from a Community Services check will have a significant impact on the ability of residential care providers to efficiently conduct checks on any new workers. In this regard, it is worth noting that some providers are checking up to 30-40 job applicants per month, with the vast majority of these applicants progressing to induction stage. The continual recruitment process is already very time consuming and time sensitive, with workers having to be mobilised quickly to respond to need as it arises, which means that providers can ill afford to absorb any additional delays outside their control.

At this stage, there is no guarantee that the necessary worker checks will be carried out quickly enough to ensure that residential care providers can retain their full staffing complement. This presents a very significant problem for providers and most importantly, for the children and young people in their care.

#### Labour hire workers

As the Guardian is aware, all residential care providers can face challenges in maintaining their staffing complement, necessitating the use of 'labour hire' staff to fill required shifts and deliver safe and stable care environments. While we appreciate that the OCG has produced a fact sheet designed to provide agencies with tips on avoiding emergency placements, the measures suggested will not resolve the problem of substantial numbers of labour hire company staff not having fully completed the worker registration process by the time they are needed to deliver care at the coalface. In particular, it is not feasible for providers to screen a pool of workers on the off chance that they may one day utilise them (for example, we are advised that one labour hire company has a pool of around 390 staff).

#### *Options for streamlining the Community Services check process*

Against this background, we would welcome discussion around how labour hire companies could be utilised to facilitate the more efficient provision of necessary information to providers to inform the checking process. In this regard, we believe there is merit in considering labour hire companies being given a responsibility to seek, access and initially assess, information arising from Community Services checks (and information available on the Register), to screen their existing and any potential new workers for the purposes of determining their suitability for their own worker pool, with the relevant information obtained via the Community Services check being shared by the labour hire company with relevant providers when they are seeking to engage a particular worker.

It should be stressed that this suggested approach in no way seeks to remove the important obligation on providers to assess the suitability of any worker referred by the labour hire company on a case-by-case basis.

Alternatively, if the OCG is not comfortable with the above suggestion regarding labour hire companies, there may be merit in the OCG giving consideration to taking on this responsibility on a fee for service basis.

Regardless of the approach adopted, the sector considers it essential for DCJ to outline to the sector how it plans to execute the critical Community Services check component of the proposed system, in a way that is both timely and administratively efficient, as soon as possible.

### **‘Second provider’**

Throughout the proposed Regulation (see cl. 8, 9, 10 and 11) there are references to ‘a second provider’ and ‘a second provider check’ and ‘one or more second provider checks’ with regard to information that may be held about a worker, either as a concurrent employer or a previous employer; or in reference to information that should be shared with the ‘second provider’.

While we appreciate the importance of observing any legislative interpretation conventions aimed at distinguishing any other provider from ‘the provider’ with the current obligation under the Regulation, given that a worker could concurrently be engaged by more than 2 employers, and or previously have been engaged by more than 2 providers who may hold ‘relevant information’, we suggest that there would be merit in considering using alternative language to reflect this. For example, substituting references to ‘second provider’ with ‘any other provider’ or ‘additional provider(s)’, as the relevant provisions could be read too narrowly.

In addition, there is no definition of ‘second provider’ in the dictionary. Whatever term is used to describe additional providers should ideally be defined.

### **Definition of relevant applicant and additional checks required**

The definition of relevant applicant for the purposes of cl.8(1)(a) to (c) is contained at cl.8(d). However, it might be clearer for the reader if the requirements outlined at cl.8(1)(d) regarding ‘relevant applicants’ was instead listed in the next sub-clause (that is, cl.8(2)) and within the same sub-clause defining a ‘relevant applicant’, as this definition currently doesn’t appear until cl. 8(4).

### **Outcome of checks**

Cl.10(d)(ii) requires providers to record on the register ‘the outcome of the check’. While we appreciate that further guidance on completing this field could be delivered via a fact sheet or guideline, there could be merit in considering the inclusion of basic categories in the legislation relating to potential outcomes of the checking process to ensure consistency, fairness and the appropriate recording of outcomes.

### **Concluding remarks**

Thank you again for the opportunity to provide feedback on the proposed Regulation. We look forward to continuing to work productively with the OCG, our member agencies and other stakeholders to drive the success of the Residential Care Worker Register.

Yours sincerely

A handwritten signature in black ink, appearing to read "S. Kinmond". The signature is fluid and cursive, with a large initial "S" and a long, sweeping underline.

Steve Kinmond, OAM  
**CEO ACWA**