

3 May 2021

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

Dear Ms Schorer

### **Draft Children's Guardian Regulation 2021**

Legal Aid NSW welcomes the opportunity to make a submission to the Office of the Children's Guardian (**OCG**) on the draft Children's Guardian Regulation 2021 (**draft Regulation**).

Overall, Legal Aid NSW supports the establishment of the Residential Care Workers Register (**Register**). In our view, the provisions for the proposed Register provide a detailed mechanism of recording information by ensuring that the four probity checks are conducted against an applicant for employment, and that there is capacity to record other information (such as reportable allegations or conduct).

We provide some comments below on the provisions of the draft Regulation.

#### **Second provider check**

Under clause 8 of the draft Regulation, for applicants who reach the referee check stage, the residential care provider must record the applicant's basic identification information, and conduct four prescribed probity checks, including a "second provider check".

Legal Aid NSW broadly supports a requirement for residential care providers to seek and obtain information relevant to an applicant from another residential care provider that employs or has employed that person. The effectiveness of the second provider check would rely on there being information recorded on the Register about an applicant – either as a current employee of a residential care provider, or as a previous employee of a provider where it has indicated on the Register that it has information about the person that is relevant to the safety, welfare or wellbeing of a child.

We query whether and how previous employment at a residential care provider would be captured before there was a requirement to record information on the Register. That is, we query whether the draft Regulation should apply retrospectively – for a certain period of time, or at all.

We also query how providers that have recently been phased out as “residential care providers” (as part of the transition to intensive therapeutic care services) but continue to provide some care services to children, would be captured by the Register or a second provider check. That is, whether there is still a mechanism for information to be requested from these residential care providers about previous employees.

We consider that residential care providers would want to know not only about any relevant information recorded on the Register relating to current or previous employment at another residential care provider, but other agencies as well. The nature of the funding and work has resulted in a highly casualised workforce in the residential out-of-home care sector. It is not unusual that an applicant may have worked at seven different non-government organisations, and it may be relevant to have information on any history or pattern of reportable allegations or findings of misconduct.

We also query how access to the Register and the second provider check will work operationally. We note that access, and restrictions on access, to information held on the Register are provided for at a high level by sections 86 and 87 of the *Children’s Guardian Act 2019* (NSW). Appendix 3 of the Regulatory Impact Statement (**RIS**) provides that “[w]hen an agency conducts a recruitment for a residential care worker, the applicant’s current or past associations with another agency will be visible to the recruiting agency... The recruiting agency will be required to contact these other agencies to request relevant information relating to any risk the individual may pose to the safety, welfare or wellbeing of a child or class of children.” The RIS further provides that “to support agencies to consistently request relevant information through the Second Provider Check, the proposed Regulation requires this check to be completed using a form approved by the Children’s Guardian.”<sup>1</sup>

We seek clarification on the following operational matters:

- Who will have access to the Register? Will it be open to all staff of a residential care provider, or will access be restricted to certain staff members?
- How will the information on the Register be accessed or made “visible” to the residential care provider?

Further consideration should be given to appropriate safeguards in order to balance the need for residential care providers to access the Register for a permitted purpose

---

<sup>1</sup> Office of the Children’s Guardian, *Regulatory Impact Statement: Children’s Guardian Regulation 2021* (March 2021) 26 (*‘RIS’*).

with the need to protect the privacy of workers listed on the Register. For example, consideration could be given to implementing limits on which staff members can access the database, a log recording when the database has been accessed and by whom, and a requirement that a staff member declare that they are accessing the database for a permitted purpose.

### **Exemption for emergency authorisation of staff and contractors**

Clause 6 of the draft Regulation provides an exemption for a residential care provider from undertaking all four probity checks and recording a person on the Register if the provider has authorised the person under clause 31B of the *Children and Young Persons (Care and Protection) Regulation 2012 (NSW)* (**Care Regulation**),<sup>2</sup> and the care is provided to a child for up to 72 hours. The exemption under clause 6 may only be used once by the provider for that person.<sup>3</sup>

Legal Aid NSW acknowledges that the exemption under clause 6 may help to overcome any impracticalities and operational concerns associated with the probity check requirements when urgent care is needed. However, we are concerned that a person could be hired multiple times by different providers without probity checks being conducted, potentially putting a child at risk of harm.

We submit that consideration be given to the “once only” requirement applying to the worker, instead of the residential care provider in relation to the worker.

### **Exclusion of workers authorised to provide special, or respite, care**

The draft Regulation will not expressly capture workers authorised under clauses 32 or 33 of the Care Regulation to provide special, or respite, out-of-home care.<sup>4</sup> The RIS acknowledges that this is a gap, and that the OCG proposes to reconsider extending the scope of the draft Regulation to this group of workers following implementation.<sup>5</sup>

Legal Aid NSW shares similar concerns to those noted in the RIS. Children and young people placed in special out-of-home care are highly vulnerable. As defined in clause 32 of the Care Regulation, these are children and young people with an intellectual, psychiatric, sensory, physical or similar impairment that is permanent or likely to be permanent, and results in a significantly reduced capacity in one or more major life activities, such as communication, learning, mobility, decision-making or self-care.

Given their particular vulnerabilities, we consider that any worker authorised to provide care to this cohort should be subject to the requirements of the draft Regulation. The

---

<sup>2</sup> Clause 31B of the *Children and Young Persons (Care and Protection) Regulation 2012 (NSW)* outlines when a designated agency may authorise an employee, including a contractor and employee of a contractor, to provide residential care in an emergency situation.

<sup>3</sup> Draft Children’s Guardian Regulation 2021 (NSW) cl 6(2) (*‘Draft Regulation’*).

<sup>4</sup> RIS (n 1) 21.

<sup>5</sup> Ibid.

number of children or young people in this group would be low, but most likely require the most intensive level of support and care (e.g. 24-hour, one-on-one care). They would likely be exposed to more circumstances of risk, and would likely have more limited capacity to voice any concerns. In our view, these factors justify a need to have this group of workers subject to the rigour of the probity checks.

### **Exclusion of child protection caseworkers employed by the Department of Communities and Justice (DCJ)**

Child protection caseworkers employed by DCJ are not “residential care workers” for the purposes of the draft Regulation, if the caseworker provides residential care in emergency accommodation.<sup>6</sup> The RIS provides the rationale for this exclusion, including that these caseworkers would already be subject to most of the probity checks if they are employed by DCJ.<sup>7</sup>

In our view, excluding DCJ caseworkers is inconsistent with the purpose of the draft Regulation to promote the safety, welfare and wellbeing of children in residential care. We understand that emergency accommodation (e.g. hotel and motel rooms) has become increasingly common and often involves one-on-one care. We are concerned that the exclusion of DCJ caseworkers would create a two-tiered system whereby DCJ caseworkers are subject to less scrutiny than non-government workers, even though they would both provide direct care in emergency accommodation and the same risk factors would exist.

### **Consideration of information obtained through probity checks**

The draft Regulation requires the outcome of the probity checks on an applicant to be recorded on the Register,<sup>8</sup> however it does not indicate how a residential care provider should take into account any information obtained through these checks in deciding whether to employ an applicant. For example, if a second provider check indicates that an applicant has had a reportable allegation made against them and the outcome of the investigation is pending, it is unclear whether the residential care provider may still employ the applicant.

We note that the RIS provides that significant care has been taken “to ensure the proposed Regulation does not displace agency discretion in recruitment decision-making”.<sup>9</sup> We consider that guidelines should be developed for residential care providers to clarify the scope of their discretion in this regard.

Thank you for the opportunity to provide a submission on the draft Regulation. Should you require any further information, please contact Meagan Lee, Senior Law Reform Officer, on [REDACTED], or at [REDACTED]

---

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Draft Regulation (n 3) cl 10(2)(c) and (d).

<sup>9</sup> RIS (n 1) 8.

Yours sincerely

Brendan Thomas  
**Chief Executive Officer**