

# **Children and Young Persons (Care and Protection) Regulation 2022**

## **Regulatory Impact Statement**

### **Copyright information**

© State of New South Wales, through NSW Department of Communities and Justice 2022.

You may copy, distribute, download and otherwise freely deal with this information provided you attribute the Department of Communities Justice as the owner. However, you must obtain permission from the Department of Communities and Justice if you wish to: 1) modify, 2) charge others for access, 3) include in advertising or a product for sale, or 4) profit from the information.

# Table of Contents

- How to make a submission ..... 5**
- Summary of abbreviations ..... 6**
- Introduction..... 7**
- Context ..... 8**
- Options ..... 13**
- Evaluation of options ..... 13**
- The proposed Regulation ..... 17**
  - 1. New prescribed bodies under Chapter 16A ..... 17
  - 2. Notification to a designated agency if a child or young person is charged with a criminal offence . 18
  - 3. Addressing challenging behaviour through behaviour management plans ..... 19
  - 4. Limiting the application of the presumption that an authorisation will be automatically cancelled .. 20
- Attachment A: Proposed Children and Young Persons (Care and Protection) Regulation 2022 ..... 24**
- Attachment B: Comparison table of proposed changes to Children and Young Persons (Care and Protection) Regulation 2012..... 24**



## How to make a submission

Interested organisations and individuals are invited to make a submission on any matter relevant to the proposed Children and Young Persons (Care and Protection) Regulation 2022 (**proposed Regulation**), including provisions not specifically addressed in this Regulatory Impact Statement (**RIS**).

Submissions can be made via email to [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au) or mailed to:

Director, Civil Justice, Vulnerable Communities and Inclusion  
Policy, Reform and Legislation  
NSW Department of Communities and Justice  
Locked Bag 5000  
Parramatta, Sydney NSW 2124

If you would like to provide comments in an alternative format, please contact us on [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au).

**The closing date for submissions is Friday 22 July, 2022.**

Copies of the proposed Regulation and this RIS are available:

- on the Have your Say website [here](#)
- on the NSW Department of Communities and Justice [here](#)
- by emailing [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au)

The *Children and Young Persons (Care and Protection) Act 1998* (**Care Act**) and the current Children and Young Persons (Care and Protection) Regulation 2012 (**existing Regulation**) are available online at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

Please note that submissions may be made public. Any requests to treat submissions on a confidential basis will be considered, subject to the *Government Information (Public Access) Act 2009*.

There is no set format for submissions; however short comments that refer to the part or section of the proposed Regulation are encouraged. Only comments relating to the proposed Regulation will be considered. Comments may or may not be reflected in the final Regulation.

After the Minister for Families and Communities has endorsed the final Regulation, it will be submitted to the Governor for approval. Once approved, the Regulation will be published on the official NSW Government legislation website at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

## Summary of abbreviations

Abbreviation	Summary
amending Regulation	Children and Young Persons (Care and Protection) Amendment (Authorise Residential Care Workers) Regulation 2022
Care Act	<i>Children and Young Persons (Care and Protection) Act 1998</i>
Children's Court	Children's Court of NSW
Department	Department of Communities and Justice
existing Regulation	Children and Young Persons (Care and Protection) Regulation 2012 (its provisions are called 'clauses')
NCAT	NSW Civil and Administrative Tribunal
NCRC	National Criminal Record Check
OCG	Office of the Children's Guardian
OOHC	Out-of-home care
proposed Regulation	Proposed Children and Young Persons (Care and Protection) Regulation 2022 (its provisions are called 'sections' following new style guide adopted by the NSW Parliamentary Counsel's Office)
Register	Residential Care Worker Register
RIS	Regulatory Impact Statement
ROSH	Risk of significant harm
WWCC	Working With Children Check

# Introduction

## Why is the proposed Regulation being made?

The existing Regulation is due to be automatically repealed under the provisions of the *Subordinate Legislation Act 1989* on 1 September 2022.

If it lapses and no regulation is made to take its place, the Care Act will continue without any accompanying regulation to support and operationalise many of its provisions.

## Purpose of this Regulatory Impact Statement

The *Subordinate Legislation Act 1989* governs the process for making regulations in New South Wales. Its aims are to reduce unnecessary regulation by government, and therefore provides for regulations to be automatically repealed after five years. When a regulation is due for repeal, the responsible agency must review the regulation, its social and economic impacts, and the need for the regulation. The agency must prepare a RIS reporting its findings and whether it considers the regulation should be remade.

The Department of Communities and Justice (**Department**) has reviewed the existing Regulation to determine whether there is a continued need for regulation and if so, whether any amendments are needed.

In 2020, the Department called for submissions from key stakeholders about any provisions of the existing Regulation that they felt required amendment. A number of submissions were received for consideration. In January 2021, the Department sought feedback on specific proposals from key government and non-government agencies, including peak bodies. All submissions supported the continued need for regulation and the majority supported remaking the existing Regulation with some amendments to reflect current law, standards and practices.

The views of stakeholders have been carefully considered and have informed the proposed Regulation, which is now released for public consultation together with this RIS.

The RIS examines the costs and benefits of the following options against the objectives of the regulatory proposal:

1. Do nothing and allow the Regulation to lapse
2. Remake the Regulation without change
3. Remake the existing Regulation with amendment.

This RIS proposes that the existing Regulation be remade, with amendments, under the regulation-making powers set out in the Care Act. The proposed Regulation at **Attachment A** would implement the preferred option.

## Context

The safety, welfare and wellbeing of children and young people is a shared responsibility across the government and non-government sector, parents and the wider community. While parents and carers have primary responsibility for the safety, welfare and wellbeing of children in their care, protecting children and young people from abuse, exploitation and neglect is the responsibility of the whole community.

Child protection approaches in Australia and internationally now recognise that protecting children is everyone's business and that parents, communities, governments, non-government organisations and businesses all have a role to play. There are many reasons why children and young people are at risk of abuse, exploitation and neglect. The way in which we prevent and respond to this as a community is a reflection of our values and priorities.

The primary objective of the Care Act is to facilitate the care and protection of children and young people. Together with the existing Regulation, the Care Act underpins statutory child protection services, providing the legislative framework for the child protection and out-of-home care (**OOHC**) systems.

While it is the principal legislation governing child protection in NSW, the Care Act and its regulations form part of a broader legislative framework whose primary aim is to promote the safety, welfare and wellbeing of children and young people. Other legislation within this framework include:

- the *Children's Guardian Act 2019*, under which the Office of the Children's Guardian (**OCG**) is established, and whose functions include oversight of the OOHC system, the implementation and monitoring of compliance with the Child Safe Standards, oversight of the reportable conduct scheme and responsibility for official community visitors who visit residential care settings for children and young people,<sup>1</sup> and
- the *Child Protection (Working with Children Check) Act 2013*, which requires persons engaged in child-related work (including authorised carers and their adult household members) to be screened and hold clearance notices.

### A snapshot of the child protection system

Over the last decade, the number of children and young people reported to the Child Protection Helpline has doubled. In the year ending 30 June 2021, the Child Protection Helpline received a total of 454,998 child and young person concern reports, which was 13.3% higher than the previous year. Almost 61% (or 276,932) of these reports, involving 126,818 children and young people, were assessed as reaching the risk of significant harm (**ROSH**) threshold. The increase in reporting is attributed to two key reasons. First, mandatory reporters are increasingly aware of their statutory responsibilities to report child protection concerns, including new offences introduced in the *Crimes Act 1900* to implement key recommendations of the Royal Commission into Institutional Responses to

---

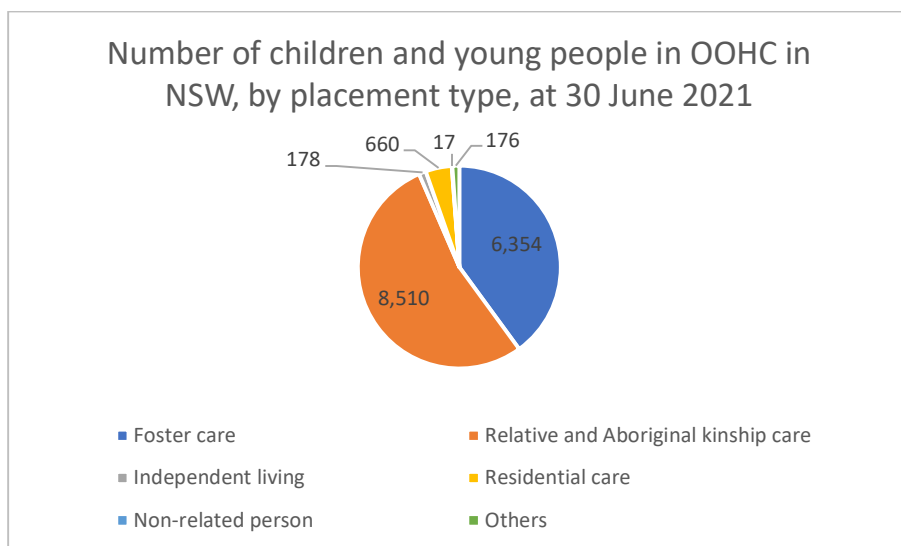
<sup>1</sup> In 2019, Chapters 10 and 13 of the Care Act which, respectively, established the OCG and provided for the functions of the Children's Guardian (to accredit designated agencies and regulate children's employment) were transferred to a dedicated *Children's Guardian Act 2019*. Other functions which were previously administered by the NSW Ombudsman, such as oversight of the reportable conduct scheme and the community visitor scheme as it relates to children, were also transferred to the Children's Guardian.



Child Sexual Abuse.<sup>2</sup> Secondly, making child protection reports has become easier, particularly since the introduction of an online (eReport) portal in 2017.

In 2020-2021, actual harm or risk of harm was substantiated from field assessments for 18,104 children and young people involved in ROSH reports. In the year to 30 June 2021, 2,406 children came into OOHC, 75% for the first time. This was an increase of 9% from the previous year. A disproportionate number of entries into OOHC were of Aboriginal children (46%). 1,030 children and young people exited OOHC to permanency through restoration to parents, or via guardianship or adoption orders.

The number of children and young people in care in NSW is the lowest it has been in the past 10 years, with 15,895 children in OOHC at 30 June 2021. Aboriginal children remain over-represented in the OOHC system, making up 43% (or 6,829) of the total number. As at 30 June 2021, over half of all children in OOHC are in relative and Aboriginal kinship care (8,510 or 53.5%) and 40% (6,354) are in foster care. The table below shows the placement type for children in OOHC. 56.5% of all children and young people in statutory OOHC are in the case management responsibility of non-government designated agencies.



<sup>2</sup> *Crimes Act 1900*, section 316A.

## Objectives of the proposed Regulation

The central purpose of the proposed Regulation is to support the Care Act to ensure that it achieves its objectives effectively and efficiently.

The objects of the Care Act are to provide that:<sup>3</sup>

- a) children and young people receive the care and protection necessary for their safety, welfare and wellbeing, having regard to the capacity of their parents or other persons responsible for them; and
- b) the primary means of providing for the safety, welfare and wellbeing of children and young people is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with permanent placement principles, and
- c) all institutions, services and facilities responsible for the care and protection of children and young people provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity; and
- d) appropriate assistance is given to parents and others responsible for children and young people in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

The main objectives of the proposed Regulation are to:

- support a transparent and accountable child protection system
- promote consistent decision-making in the best interests of the child or young person
- improve outcomes for children and young people in OOHC.

## Outline of the proposed Regulation

The proposed Regulation is divided into eight Parts as follows:

- Part 1 Preliminary  
This Part contains general machinery provisions such as the name of the Regulation, when it is to commence, and definitions of key words.
- Part 2 General  
This Part contains provisions dealing with general matters, namely:
  - matters that may be taken into account by the Children's Court of NSW (**Children's Court**) in determining whether there has been 'significant change' for the purposes of rescission and variation of care orders, and
  - providing for bodies to be prescribed under sections 245B(1) and 248(6) of the Care Act to enable those bodies to share information relating to the safety,

---

<sup>3</sup> Care Act, section 8.

welfare or wellbeing of children and young persons under Chapters 16A and 17 of the Care Act.

- Part 3 Records, reporting and information  
This Part contains provisions dealing with records, reporting and information. Among other things, it sets out the process for persons, who are entitled under section 14(2) of the Care Act, to request access to records relating to Aboriginal and Torres Strait Islanders. It clarifies that mandatory reporting obligations apply to persons who provide disability services to children and young people, or who hold management positions in organisations that provide, or directly supervise the provision of disability services to children and young people. It also extends the alternative reporting arrangements under section 27A of the Care Act to allow the NSW Health Child Wellbeing Unit to receive and record child protection reports from a range of persons working in the health sector, outside the public health system.
- Part 4 Care Plans and alternative parenting plans  
This Part provides for requirements of care plans and alternative parenting plans, with the detail set out in Schedules 3 and 4.
- Part 5 Guardianship orders  
This Part contains provisions relating to guardianship orders, which were introduced in the Care Act as part of the Safe Home for Life reforms in 2014. It deals with the form and manner of the consent that must be given by a child or young person to a guardianship order, and the form and content of suitability statements for prospective guardians that must be prepared to support an application for a guardianship order.
- Part 6 Out-of-home care  
This Part prescribes what is not OOHC for the purposes of the Care Act and deals with how applications to the Children's Court for reviews of temporary care arrangements are to be made. It also sets out a comprehensive framework regarding authorised carers, including:
  - the process and requirements for the authorisation of persons as authorised carers by designated agencies, including authorisation on a provisional basis, in emergency situations and to give respite to other authorised carers,
  - the conditions of authorisation, such as complying with the Code of Conduct for Authorised Carers and requirements to provide certain information to designated agencies,
  - provisions relating to cancellation, suspension and surrender of authorisations, and
  - behaviour management practices that may be used by authorised carers in managing the behaviour of children and young people in OOHC.
- Part 7 Medical examination and treatment  
This Part contains provisions dealing with medical examination and treatment, in particular, requirements on carers and designated agencies when psychotropic drugs are administered to children and young people in OOHC.

- Part 8 Miscellaneous  
This Part provides for savings and transitional provisions.
  
- Schedules 1 to 5
  - Schedule 1 provides a prescribed form of notice of medical examination for the purposes of section 173(1) of the Act.
  - Schedule 2 provides for uniform suitability assessment requirements, being information that must be obtained and checks that must be conducted, for prospective guardians, people who have applied to be authorised carers and certain people living with them.
  - Schedules 3 and 4 prescribe requirements for the form and content of, respectively, care plans and alternative parenting plans.
  - Schedule 5 lists the prescribed bodies for the purposes of information exchange under sections 248(6) and 245B(1) of the Care Act.

Importantly, the Parts and provisions of the existing Regulation dealing with the Children's Guardian's functions do not form part of this review, including Part 6, Divisions 4-6, Part 7 and Schedules 3-4. The relevant sections of the Care Act under which these provisions were made were transferred to the *Children's Guardian Act 2019*. The relevant regulatory provisions are to be transferred to the Children's Guardian Regulation 2022 by 1 September 2022.

## Options

Three options are considered in this RIS to achieve these objectives:

1. Do nothing and allow the Regulation to lapse
2. Remake the Regulation without change
3. Remake the existing Regulation with amendment.

## Evaluation of options

In evaluating each of these options, the Department has considered the extent to which each is capable of achieving the objectives of the proposed Regulation and the cost effectiveness of each of the options, in terms of costs and benefits to children and young people and their families, carers, service providers and government.

Additionally, in assessing which of the alternatives will bring the greatest net benefit or the least net cost to the community in general, the Department has also been mindful that the proposed Regulation should:

- remain child-focused
- provide practical assistance to those who use the legislation, and
- not be unduly onerous.

### Option 1: Do nothing and allow the Regulation to lapse

This option would mean the Care Act would operate without any accompanying regulation and other non-regulatory alternatives would need to be considered.

Allowing the existing Regulation to lapse will result in some significant gaps in the legislative framework that would adversely affect the ability of the service sector and Government to identify and respond appropriately to concerns of harm to children and young people. For example, there would be no mandatory reporting obligations on disability service providers, which would reduce the protections afforded to children with disability.<sup>4</sup> Similarly, if the existing Regulation lapses, the NSW Health Child Wellbeing Unit will not lawfully be able to receive and record child protection reports from employees and contractors of affiliated health organisations, relevant Aboriginal organisations and private general practitioners and nurses who are currently prescribed in the existing Regulation for the purposes of alternative reporting arrangements.<sup>5</sup> Information relevant to the safety, welfare and wellbeing of children and young people could also not be lawfully exchanged between a number of classes of persons and bodies prescribed for the purposes of Chapter 16A of the Care Act.<sup>6</sup>

Some other matters in Parts 1 to 4 of the existing Regulation could potentially be dealt with in policy documents, guidelines or service contracts, such as provisions relating to the

---

<sup>4</sup> Existing Regulation, clause 15.

<sup>5</sup> Ibid, clauses 16-18.

<sup>6</sup> Ibid, clause 8.

storage of, and access to records, and the form and content of care plans and alternative parenting plans. However, this would not promote consistent practice across the sector and enforceability would be significantly compromised, which could potentially result in a lowering of standards and compliance issues. Leaving a requirement to the realms of contracts increases the likelihood of inadvertent non-compliance due to contracts being amended over time or the contracting parties not understanding the mandatory nature of the terms.

Incorporating these matters in service contracts would also increase the administrative burden on government and service providers as work is constantly replicated. It would lead to uncertainty as to the nature of the requirements, which would be subject to review each time service contracts are negotiated. The enforcement mechanism would be in contract, which would potentially delay enforcement of standards and requirements and increase the costs of compliance. The risks of inconsistency in quality and variation in standards between service providers would be increased and transparency significantly reduced.

Other matters, including factors the Children's Court can take into account when determining whether to grant leave to apply for a variation or rescission of an order, and the interpretation of specific terms, could be left to general legal principles at common law. However, this raises equity and access to justice issues, particularly for self-represented parties, who may not be easily able to find and understand what law applies. It would also likely compromise the efficient conduct of proceedings.

Alternative regimes lack the transparency, accountability and enforcement provisions of statutory rules. The absence of clear guidance should these alternatives be adopted is likely to have a significant social and economic cost on government, service providers and families as their ability to understand, fulfil and consistently comply with requirements under the Care Act will be impaired. This will have a consequent detrimental impact on the level of community trust and confidence in the child protection sector.

The service system in child protection and OOHC is large and the legislative framework can be quite complex. Coordinating the service system in a way that is transparent and consistent and that imposes the lowest level of transaction and other costs on people and agencies who interact with it is best achieved through a single published statutory instrument that everyone has access to, can understand, and comply with consistently. In this way the system maintains its integrity and operates to provide the best outcomes for children and young people.

It was Parliament's intention for the details for a range of measures under the Care Act to be prescribed by regulation. Not remaking the regulation undermines Parliament's clear intention these matters be prescribed through regulation.

The existing Regulation and its precursor have been in place for over 20 years. Agencies and service providers are accustomed to operating within that framework and would incur costs and burdens in having to set up non-regulatory alternatives to achieve the same results and outcomes.

On balance, the Department considers that the costs of Option 1 outweigh the benefits and therefore Option 1 is not recommended.

## **Option 2: Remake the Regulation without change**

This option means the existing Regulation would continue in its present form to provide administrative detail and clarification for the smooth operation of the Act.

The benefit of remaking the existing Regulation without amendment is that it would maintain the status quo. The existing Regulation has been operating for almost a decade and the community is familiar with its provisions. There would therefore be no need to educate staff, service providers and clients on changes to the regulatory structure. However, if the existing Regulation is remade without the changes proposed, it will not entirely reflect current law, or current operating standards and practices. Its capacity to effectively and efficiently support the Care Act to achieve the aims of the legislation will consequently be limited.

It is also not legally possible to remake the existing Regulation without change. A significant number of provisions of the existing Regulation relate to the functions of the Children's Guardian which were transferred to the *Children's Guardian Act 2019* when that legislation was enacted.<sup>7</sup> Those functions of the Children's Guardian remain in force pursuant to a transitional provision in Schedule 4 of the *Children's Guardian Act 2019* which itself expires on 1 September 2022.

The Children's Guardian's functions in the existing Regulation, such as Divisions 4-6 of Part 6 and Part 7, will be consolidated in the Children's Guardian Regulation 2022. Accordingly, provisions in the existing Regulation that relate to these functions cannot be remade. Those provisions are not considered as part of this RIS.

For this reason, the Department does not consider this Option provides the most benefit to the public and therefore does not recommend Option 2.

### **Option 3: Remake the existing Regulation with amendment**

This option would update, clarify and amend the existing Regulation so that it reflects and supports current legislative provisions, operating practices and standards, and provides clear practical guidance to service providers, government, families and carers to ensure the Care Act operates efficiently and effectively.

The proposed Regulation preserves the vast majority of the existing provisions, but makes some important amendments to:

- update the regulation to reflect legislative and policy and practice changes
- provide for information exchange with additional Commonwealth bodies and disability service providers to enable better collaboration and service co-ordination to children, young people and their families
- ensure that children and young people in care receive appropriate assistance and their needs are met
- support carers to manage challenging behaviours of children and young people in their care
- preserve a carer's right to seek administrative review of a decision to cancel their authorisation
- improve the experience of children and young people in OOHC and their carers.

---

<sup>7</sup> Ibid, Divisions 4-6 of Part 6 and Part 7.

The amendments to the existing Regulation, which are considered in more detail below, were identified by stakeholders and received wide stakeholder support during preliminary consultation, and are consistent with the objectives in section 8 of the Care Act, outlined above.

Remaking the existing Regulation with these amendments will bring about the greatest net benefit and the least net cost to the community. The proposed Regulation will provide clear and up-to-date guidance to those who are affected by, or work within the child protection sector.

Remaking the existing Regulation (with some changes) will minimise additional administrative and compliance costs on government and the community, as service providers and community services already have established systems and practices to operate within the current regulatory framework. Importantly, remaking the existing Regulation with changes will promote consistency in practice across the sector and ensure the system maintains its integrity and operates to provide the best outcomes for children and young people.

**Accordingly the Department recommends Option 3: remaking the existing Regulation with amendment.**



# The proposed Regulation

The changes proposed to the existing Regulation, which are reflected in the proposed Regulation at **Attachment A**, are considered in detail below. The proposed changes were developed based on stakeholder feedback following consultation on the proposed reforms with key external and internal stakeholders in 2021-2022.

The NSW Parliamentary Counsel's Office has adopted a new style guide, and provisions of regulations are now referred to as 'sections'. Accordingly, throughout this document, the provisions of the proposed Regulation are referred to as 'sections'. The provisions of the existing Regulation continue to be referred to as 'clauses'. A comparison table between the proposed Regulation and the existing Regulation is at **Attachment B**.

## 1. New prescribed bodies under Chapter 16A

The proposed Regulation expands the current list of bodies who are prescribed as prescribed bodies for the purposes of Chapter 16A of the Care Act to include certain Commonwealth agencies and disability service providers.

The list of prescribed bodies is moved to Schedule 5 in the proposed Regulation.

Chapter 16A of the Care Act commenced in 2010. It implemented a key recommendation of the 2008 Report of the Special Commission of Inquiry into Child Protection Services in NSW to enable greater information sharing between government and non-government organisations to ensure that services to children, young people and their families were delivered in a collaborative, co-ordinated and timely way.

A 'prescribed body' is a body specified in section 248 of the Care Act, which includes the NSW Police Force, public service agencies, government and non-government schools, public and private health facilities, and any other person, body, or class of persons or bodies prescribed by the regulations. Organisations prescribed by the regulations pursuant to section 248 are 'prescribed bodies' for the purposes of exchanging information under Chapter 16A relating to the safety, welfare and wellbeing of children.<sup>8</sup>

The existing Regulation prescribes a number of bodies for the purposes of Chapter 16A, including designated agencies, accredited adoption service providers, and some Commonwealth bodies including the family courts, the Department of Immigration and Border Protection or its successor and the Department of Human Services (which was intended to bring Centrelink and Medicare within scope). Over the intervening period since Chapter 16A was first introduced, a number of additional persons and organisations have been prescribed for the purposes of section 248 and Chapter 16A of the Care Act, including, for example, registered community housing providers.

Clause 8(1)(j) of the existing Regulation is a 'catch-all' provision which prescribes any other organisation whose duties include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children.

---

<sup>8</sup> Care Act, section 245B(1)(a).

There is often confusion about whether clause 8(1)(j) extends to organisations outside NSW, and this uncertainty can lead to situations where relevant information about the safety, welfare and wellbeing of children and young people is not shared at all, or in a timely way.

For clarity and certainty, the proposed Regulation provides for the following Commonwealth agencies to be prescribed:

- Australian Federal Police (Schedule 5, section 1(g))
- Commonwealth Department of Health (Schedule 5, section 1(h))
- Commonwealth Department of Social Services (Schedule 5, section 1(j))
- National Disability Insurance Agency (Schedule 5, section 1(l))
- NDIS Quality and Safeguards Commission (Schedule 5, section 1(m)).

It is important to note that, under section 245I of the Care Act, prescribing Commonwealth agencies and interstate bodies does not impose a requirement on those bodies to share information under Chapter 16A. However, it does enable a NSW prescribed body to lawfully share relevant information about the safety, welfare and wellbeing of a child or young person with those interstate agencies provided it is within the terms of Chapter 16A.

The proposed Regulation also amends clause 8(1)(j) to expressly include disability service providers as prescribed bodies. Prior to the introduction of the National Disability Insurance Scheme (**NDIS**) in NSW, disability services were provided, or funded, under the *Disability Inclusion Act 2014* by the then NSW Department of Ageing, Disability and Home Care, which, as a public service agency, was a prescribed body for the purposes of Chapter 16A. Since 1 July 2019, all disability services are provided under the NDIS.

Clause 8(1)(j) of the existing Regulation allows for information to be shared with bodies who provide 'welfare' services which may be interpreted broadly, consistently with the beneficial nature of Chapter 16A, to include disability services. However, for clarity, it is proposed to amend the regulation to expressly prescribe disability services for the purposes of Chapter 16A. This is provided for in Schedule 5, section 1(p)(ii) of the proposed Regulation.

The proposed changes enhance the ability to provide services to children in a collaborative and co-ordinated way by allowing these additional bodies to share information relevant to safety, welfare and wellbeing of children and young people.

## **2. Notification to a designated agency if a child or young person is charged with a criminal offence**

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

Under the proposed amendment in section 33(2)(c) of the proposed Regulation, the authorised carer of a child or young person in OOH must immediately notify the

designated agency if the child or young person is charged with a criminal offence for which a penalty of imprisonment of 12 months or more may be imposed. The reason for the notification is to ensure appropriate assistance and support can be provided to the child or young person, and safety and risk assessments can be conducted for the child or young person and any other child or young person in the household.

This information is likely already provided by the carer to the caseworker as part of usual casework so the change is unlikely to create any additional regulatory burden. However, it is appropriate that the regulation should formally clarify that such a criminal charge must be notified to the designated agency given the seriousness of a child or young person being charged with a criminal offence with a penalty of 12 months or more imprisonment and its likely repercussions.

### **3. Addressing challenging behaviour through behaviour management plans**

Clause 41(2) of the existing Regulation 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 or young people in OOHC. A designated agency may presently address the issue by:

- providing advice, support and training to the carer and appropriate support to the child or young person; or
- changing the placement arrangements.

Section 46(4) of the proposed Regulation inserts two additional ways the agency can address challenging behaviour in the child or young person, by:

- adjusting the approved behaviour management practices for a child or young person; or
- preparing a behaviour management plan for the child or young person.

Importantly, the proposed Regulation provides that a designated agency must consider the three alternative options in section 46(4) before considering changing the child's placement arrangements under section 46(5). This refinement of the existing Regulation ensures that changing a child's or young person's placement is an option of last resort, to be used only where the other options have been considered and exhausted. This will help to secure the continuity of placement of a child or young person, which will increase their opportunity to develop secure attachments.<sup>9</sup> The new alternative methods may decrease the likelihood of removal of the child or young person from their present carers, resulting in benefits to the child or young person and carers involved.

---

<sup>9</sup> Harriet Ward, *Patterns of Instability: Moves Within the Care System, Their Reasons, Contexts and Consequences* (2019) 4.

#### 4. Limiting the application of the presumption that an authorisation will be automatically cancelled

Clause 42CA(1)(a) of the existing Regulation provides there is a presumption that an authorised carer's authorisation will be cancelled where they have not provided OOHC to that child or young person for three months or more. A designated agency must cancel the carer's authorisation when this happens, unless satisfied the authorisation should not be cancelled in the particular case. Section 245(1)(a1) of the Care Act provides that a decision to cancel an authorisation where such a presumption arises is not reviewable.

The application of this automatic cancellation can disadvantage carers, particularly in circumstances where a child has been removed from their care, and the investigation or review of that placement change decision takes longer than three months. If the carer's authorisation is cancelled by operation of the automatic cancellation provision, the carer cannot seek review of the decision through the NSW Civil and Administrative Tribunal (NCAT).

To address these issues, section 39(2) of the proposed Regulation amends clause 42CA to provide that the presumption that a carer's authorisation is automatically cancelled if they have not provided OOHC to a particular child or young person under the authorisation for three months or more does *not* apply if:

- a) an investigation into whether the person's authorisation should be cancelled is underway, or
- a) the person has applied for an internal review of a decision to cancel the person's authorisation and the review is underway, or
- b) the person has applied for the review of a reviewable decision and NCAT has not given a decision.

The amendment also reduces the burden of having to reauthorise a carer if a carer's authorisation is automatically cancelled because of other administrative or technical delays.

#### 5. Authorisation of residential care workers

The proposed Regulation contains amendments to the existing Regulation that are to be made by the Children and Young Persons (Care and Protection) Amendment (Authorised Residential Care Workers) Regulation 2022 (**amending Regulation**). This amending regulation complements and supports the establishment of the Residential Care Worker Register (**Register**) by the OCG. The Register implements a recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse and sector feedback about the need to prevent unsuitable people from moving between services that provide residential care for children and young people in OOHC.

The amending Regulation will amend the existing Regulation to enable residential care workers providing direct care to children and young people in OOHC to be authorised as authorised carers. Providing for the authorisation of residential care workers will ensure that workers are appropriately assessed as capable and suitable to provide direct care to children and young people in residential settings. The amendments will commence on 18 July 2022, to coincide with the commencement of the Register.

In summary, section 22 of proposed Regulation amends clause 31B of the existing Regulation to provide that residential care workers may be authorised by a designated agency in an emergency, once only, for up to 72 hours. No changes are made to the existing checks for authorising workers under this emergency provision. A designated agency that authorises a person in an emergency under this provision is not required to record the person on the Register, but must notify the Children’s Guardian within 72 hours of the authorisation of the details of the person including their name, date of birth and Working With Children Check (**WWCC**) details.<sup>10</sup>

New section 23 of the proposed Regulation provides for the authorisation of residential care workers in non-emergency situations. It requires designated agencies to assess the capability and suitability of a person to be authorised based on the same probity checks conducted in order to comply with the Register requirements set out in the Children’s Guardian Regulation 2022. These checks are:

- WWCC
- National Criminal Record Check (**NCRC**)
- Residential Care Provider Check.

A Residential Care Provider Check is a check of the Register by a designated agency to determine whether a person is a ‘relevant individual’ for another agency. A relevant individual is a former or current worker employed by a residential care provider about whom there is information on the Register related to the safety, welfare or wellbeing of children.

Transitional provisions apply for existing and new workers during the 180 day transition period from commencement. Designated agencies will have 90 days from 18 July 2022 to put details of existing residential care workers on the Register.<sup>11</sup> Under these transitional provisions, existing residential care workers and new workers engaged during those first 90 days, will be deemed to be authorised as authorised residential care workers for the first 90 days, provided they have had a NCRC and WWCC. Designated agencies will have six months from commencement to ensure existing workers and new workers hired in the first 90 days are authorised as authorised carers. This timeframe allows agencies to undertake a Residential Care Provider Check after 90 days, when all existing workers will have been added to the Register.

### ***Interstate residential care workers***

Section 26 of the proposed Regulation is a new provision providing for the authorisation of interstate residential care workers, which is designed to address the practical challenges that designated agencies will face to comply with the new requirements for authorising residential care workers as outlined above.

Children and young people in statutory OOHC often reside in other jurisdictions to be closer to kin, community, or to access health or educational services. The majority of children and young people live in relative or kin arrangements. A small number reside in residential care arrangements.

Supporting a child to reside or remain in another jurisdiction should be a priority where it is in the child’s best interest to do so, to retain and build these connections. Further, children

---

<sup>10</sup> Children’s Guardian Regulation 2022, section 6.

<sup>11</sup> Ibid, Schedule 1, section 3.

and young people living interstate need local services and facilities to meet their support needs. This is especially important for children and young people who experience mental health and/or a disability where access to residential respite services is critical. They will struggle to receive these services in that State if the staff at those services are required to be authorised under NSW legislation.

The amendments in sections 22-23 require all interstate staff working directly with the child or young person to be authorised, including any contingent agency staff. This will be logistically challenging to coordinate for interstate residential care workers, especially in facilities where contingent agency staff are used regularly. A child in a residential respite facility can have up to 10 or more people working with them directly over a 12 month period. Authorising large volumes of staff in any one interstate residential facility would also be unduly onerous as this authorisation would need to be undertaken for each employee in the residential care setting. Privacy legislation in different jurisdictions may also limit the ability to share information that a designated agency needs in order to authorise workers, creating additional barriers to the timely authorisation of workers.

Furthermore, requiring NSW-centric probity standards (such as a NSW WWCC clearance) is unlikely to provide relevant risk information if a residential care worker has never resided in NSW. Local equivalents would be more relevant in decision-making about safety and risk for the child or young person.

New section 26 addresses these practical challenges by providing for residential care workers who provide residential care to children and young people in OOHC outside NSW to be deemed to be authorised by a designated agency in particular circumstances. The worker must be employed or engaged by the interstate child welfare agency, or by a service provider funded or contracted by the interstate child welfare agency to provide residential care to children and young people. Additionally, the interstate agency or service provider that employs or engages the residential care worker must satisfy the designated agency that all persons employed or engaged by them have been assessed as capable and suitable to provide residential care to children and young people and meet relevant minimum probity checks comprising a current WWCC clearance in their home State, and a satisfactory NCRC.

NSW designated agencies would not need to personally verify these checks for each employee, but would rely on information provided by the interstate agency or service provider that all its workers comply with those minimum mandatory probity checks and have been assessed as capable and suitable to provide residential care to children and young people.

The Department will develop a declaration template that the agency signs to verify that their staff meet the minimum probity requirements and have been assessed as capable and suitable. The declaration will be attached as a file note on ChildStory.

Service level agreements will also be strengthened to outline the contractual obligations between the Department and the provider. These expectations include the provider furnishing regular reports about the child's or young person's progress, incident reports, a requirement to report any ROSH concerns, provision of health and education management to the young person, and attendance at regular meetings between the interstate service provider and the Department.

### ***Consultation on amending Regulation***

The Department consulted with service providers on the amending Regulation in May 2022. Stakeholders were generally supportive, but expressed some concerns about the resource impact caused by additional probity check requirements for residential care workers. This issue has been mitigated by requiring the same probity checks for residential care workers as are already required in the Children's Guardian Regulation 2022 – meaning that agencies will not need to duplicate probity checks.

The Department welcomes further submissions and comments on these new provisions, as part of this process for remaking the existing Regulation.

**Attachment A:** Proposed Children and Young Persons (Care and Protection) Regulation 2022. See separate link to consultation copy of Regulation.

**Attachment B:** Comparison table of proposed changes to Children and Young Persons (Care and Protection) Regulation 2012. See separate link.