THE LAW SOCIETY
OF NEW SOUTH WALES

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22 July 2022

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

By email: policy@justice.nsw.gov.au

Dear Sir/ Madam,

Proposed Children and Young Persons (Care and Protection) Regulation 2022

Thank you for the opportunity to comment on the proposed Children and Young Persons (Care and Protection) Regulation 2022 ("the proposed Regulation"). The Law Society's Children's Legal Issues and Indigenous Issues Committees have contributed to this submission.

New prescribed bodies under Chapter 16A

Schedule 5(1) of the proposed Regulation effectively expands the list of prescribed bodies in clause 8(1) of the *Children and Young Persons (Care and Protection) Regulation 2012* ("the existing Regulation") to include the:

- 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)); and
- NDIS Quality and Safeguards Commission (Schedule 5, section 1(m)).

It also expressly includes disability service providers as prescribed bodies (Schedule 5, section 1(p)(ii)).

The Law Society supports the more expansive approach in Schedule 5(1), which would enable greater collaboration, coordination and information sharing between relevant organisations, including Commonwealth agencies. In addition, we suggest that consideration should be given to including the following as 'prescribed bodies' under the revised Schedule 5(1):

- Labour hire agencies that supply staff to designated agencies and other agencies servicing and supporting children; and
- Sporting organisations and sports clubs.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

Notification to a designated agency if a child or young person is charged with a criminal offence

Section 33(2)(c) of the proposed Regulation provides that the authorised carer of a child or young person in out-of-home care ("OOHC") 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 Law Society supports in principle the requirement for carers to notify a designated agency if a child or young person is charged with a criminal offence that carries a penalty of imprisonment of 12 months or more. To assist carers to comply with this notification requirement, we suggest greater education should be provided to carers as to which offences must be notified.

Addressing challenging behaviour through behaviour management plans

The Law Society supports strengthening the continuity of placements of children and young persons in OOHC, noting the significant negative impacts of unstable placements on children's health, educational outcomes and emotional wellbeing. We note that strategies aimed at appropriately addressing challenging behaviour are vital, not only in the interests of creating stable living arrangements, but also to decrease the likelihood of a young person's future involvement in the criminal justice system. In this regard, the implementation of an effective behaviour management plan is one possible strategy to achieve improved behavioural outcomes, while ensuring that placing arrangements are not modified unnecessarily. In certain circumstances, it may be appropriate to actively involve the child or young person in the process of developing a behaviour management plan.

Section 46 of the proposed Regulation provides:

> (3) An authorised carer who finds the approved behaviour management practices are not sufficiently effective to correct or manage the behaviour of a child or young person must notify the designated agency of that fact as soon as practicable.
>
> (4) On receiving a notification under subsection (3), the designated agency, after assessing the situation, must determine if the problem should be addressed by one or more of the following—
>
> (a) providing appropriate advice, support and training to the authorised carer and appropriate support to the child or young person,
>
> (b) adjusting the approved behaviour management practices for the child or young person,
>
> (c) preparing a behaviour management plan for the child or young person.
>
> (5) If the designated agency concludes action under subsection (4) has been, or will be, ineffective to correct or manage the behaviour of the child or young person the agency may change the placement arrangements.

We note this change effectively amends clause 41 of the existing Regulation to require designated agencies to consider the alternatives in section 46(4) before modifying a child's placement arrangements under section 46(5). However, we suggest that section 46 be amended so as to require the alternatives in section 46(4) be implemented rather than merely considered before any determination under section 46(5) is made. In our view, it is important that these alternative options are exhausted before a designated agency takes the disruptive step of altering placement arrangements.

We also suggest consideration be given to using the term “challenging behaviour” in section 46 (4), instead of the word “problem” which may carry an unnecessary negative connotation or stigma.

In relation to section 46(5), we suggest consideration be given to amending the provision such that any decision to change the placement arrangements should be done in consultation with the child or young person.

It is essential to note that where placement arrangements concern Indigenous children or young people, challenging behaviour is often the direct result of placement outside the Aboriginal or Torres Strait Islander family, kinship group or community. Accordingly, greater consideration should be given to the impact of such placements on Indigenous youth, in seeking to achieve positive behavioural outcomes through the implementation of the proposed Regulation.

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

The Law Society considers clause 42CA(1)(a) of the existing Regulation may unfairly disadvantage carers, given the typical administrative delays involved in an investigation or review of a decision to remove a child from their care.

Accordingly, the Law Society supports in principle section 39(2) of the proposed Regulation, which provides:

> (2) Cancellation of an authorisation under subsection (1) is not to occur if—
> (a) an investigation into whether the person’s authorisation should be cancelled is underway, or
> (b) the person has applied for an internal review of a decision to cancel the person’s authorisation and the review is underway, or
> (c) the person has applied for the review of a reviewable decision and the Civil and Administrative Tribunal has not given a decision, or
> **Note**— see the Act section 245 for decisions administratively reviewable by NCAT.
> (d) the agency is satisfied the authorisation should not be cancelled in the particular case.

However, the Law Society suggests amending subsections (2)(a) and (b) above, so that a cancellation cannot occur until 28 days after the carer is notified of the outcome of any investigation or internal review. Notwithstanding that the cancellation of an authorisation under this subsection does not give rise to a review through NCAT, the additional 28-day period is nonetheless reasonable to allow the carer to seek advice and consider what, if any, other options for appeal may be available.

Authorisation of residential care workers

The Law Society does not wish to comment on the specific proposals relating to the authorisation of residential care workers. However, we consider that the issues canvassed in the Regulatory Impact Statement under the subheading “Interstate residential care workers” highlight the need to address the inconsistency and non-portability of Working with Children Checks (“WWCCs”) regimes between jurisdictions in Australia and the need to move towards a single, integrated approach.

The disparate WWCCs schemes in each state and territory in Australia are complex, inconsistent and create a significant administrative burden for carers and organisations involved in child-related work across multiple jurisdictions.

The Law Society supports the need for states and territories in Australia to harmonise WWCCs laws and facilitate the free movement of labour. In this regard, we note the Report of the Royal Commission into Institutional Responses to Child Sexual Abuse, which recommended, *inter alia*, that the Commonwealth Government facilitate a national model for WWCCs;[1] and that all state and territory governments amend their laws to enable cross-jurisdictional recognition and acceptance of WWCCs.[2]

If you wish to discuss these issues or require further information, please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 or email nathan.saad@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaat
President

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working With Children Checks Report* (2015) 6.
[2] Ibid, 14.