



22 April 2021

Ms Janet Schorer PSM
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Dear Ms Schorer

CHILDREN'S GUARDIAN REGULATION 2021

Thank you for the opportunity to make a submission to the Office of the Children's Guardian's public consultation on the proposed Children's Guardian Regulation 2021 (the Regulation).

About the IPC

The Information and Privacy Commission NSW (IPC) oversees the operation of privacy and information access laws in New South Wales.

The Privacy Commissioner has responsibility for overseeing and advising NSW public sector agencies on compliance with the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Information Privacy Act 2002* (HRIP Act).

The Information Commissioner has responsibility for overseeing the information access rights enshrined in the *Government Information (Public Access) Act 2009* (GIPA Act). These rights are realised by agencies authorising and encouraging proactive public release of government information; and by giving members of the public an enforceable right to access government information.

Children's Guardian Regulation 2021

The Residential Care Workers register is an important initiative which will provide organisations within the residential care sector with a valuable tool to promote the safety, welfare and wellbeing of children and young people in statutory out-of-home care. Implementation of the register will play a central role in improving transparency and accountability within the sector.

The *Children's Guardian Act 2019* (the CG Act) and the proposed Regulation provide for the recording of appropriate identity and probity information about employees and applicants for employment within the residential care sector, and provides a mechanism for the disclosure of this information to residential care providers that balances the safety and welfare of children in care with a respectful approach to the privacy of the individual.

Privacy safeguards

It is pleasing to observe that the Regulation carefully balances privacy obligations, accountability, and transparency.

The Regulation includes a number of appropriate privacy safeguards, including:

- limitations on the information to be recorded on the register
- access arrangements for individuals whose information is recorded on the register
- mechanisms to update information held on the register.

It is noted that the CG Act also contains privacy safeguards to protect against misuse of information contained within the register. In particular, section 87(5) which makes it an offence to access or amend the register except as provided by the CG Act or the regulations.

Access to information

The object of the GIPA Act is to maintain and advance a system of responsible, and representative democratic government that is open, accountable, fair, and effective.

The GIPA framework is based on principles of proactive disclosure, an explicit presumption in favour of public disclosure of information, and a public interest decision-making test. The GIPA Act provides four pathways of information access and disclosure, which NSW government agencies are required to use to disclose government information.

The information contained within the register will fall within the definition of 'government information' under the GIPA Act and will therefore be subject to the making of an access application under that Act.

It is noted that some information held within the register, namely information relating to reportable conduct allegations, is excluded information under Schedule 2 of the GIPA Act. Section 45 of the GIPA Act, provides that an access application cannot be made to an agency for access to excluded information of the agency. In this regard, I note the requirement under section 87(4) of the CG Act which, in relation to an access request by an individual whose information is recorded on the register, prohibits the disclosure of information about a reportable allegation or reportable conviction, or the existence of a reportable conduct flag on the register in relation to the person.

It is recommended that the OCG amend its agency information guide (AIG), consistent with the requirements under section 20 of the GIPA Act, to reflect the data holdings contained within the register. In particular, we note the requirement under section 20(1)(d) that the AIG must identify the various kinds of government information that are held by the agency.

The OCG may also wish to consider the application of section 23 of the GIPA Act, which defines an agency's policy documents for the purpose of open access information under sections 6 and 18 of the GIPA Act. This definition applies to documents concerning the decision-making functions of an agency that 'affect or are likely to affect rights, privileges or other benefits, or obligations, penalties or other detriments, to which members of the public are or may become entitled, eligible, liable or subject'.

Given the inherent public interest in ensuring a safe, accountable and transparent system for the care of children and young people in statutory out-of-home care, I propose that consideration be given to the data holdings that will be generated by the register and the potential for the publication of de-identified and aggregated data as open data where appropriate.

Implementation of the Register

The Privacy Commissioner takes this opportunity to provide some additional comments in relation to the implementation of the register.

Privacy governance

Most residential care providers are private sector organisations and will not be subject to the PPIP Act regime. It is likely that the majority of these will be captured by the *Privacy Act 1988* (Cth), however some smaller organisations may fall within the small business exemption under that legislation. Consideration should be given to how the OCG will manage privacy governance in relation to these small providers.

Access controls and audit requirements

Given the sensitive nature of the information recorded on the register, it is vital that appropriate policies and procedures are developed to govern access controls for users of the register. As a matter of best practice these policies should ensure that only limited and authorised personnel can access information in the register, which must be accessed with secure access controls.

Similarly, it is recommended that the OCG consider development of audit requirements to regularly audit whether access and use of information recorded in the register is consistent with the legislative requirements.

Privacy notices and Privacy Management Plan

It is recommended that the OCG consider the development of a privacy notice for the register that addresses the matters outlined under section 10 of the PPIP Act. It is noted that the OCG will be collecting personal information from third parties rather than directly from an individual as envisaged under section 10. However, as a matter of best practice, a privacy notice of this kind will ensure that residential care providers are fully aware of the information being collected, the purpose of collection and how this information will be used or disclosed.

It may also be useful to consider the development of a factsheet or similar resource for residential care providers providing them with advice on the notice requirements that will apply to them in relation to the collection of personal information from employees or applicants for employment. Separate resources for public sector and private sector residential care providers may be required given the different privacy regimes that apply to these sectors.

Additionally, relevant updates should be made to the OCG's privacy management plan in relation to privacy compliance requirements of the register.

Please do not hesitate to contact us if you require any further information. Alternatively, your officers can contact [REDACTED], Senior Project Officer, Legal Counsel and Regulatory Advice on [REDACTED] or via email: [REDACTED].

Yours sincerely

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