

# Review of the Children's Services Regulation 2004



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# 1 INTRODUCTION

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## 1.1 Purpose of the review

The NSW Department of Community Services (DoCS) regulates children's services to ensure the health, safety and wellbeing of children who attend them.

Children's services in New South Wales (NSW) include long day care, preschools, mobile services, family day care, home-based services, school-based children's services and occasional care. These are all regulated and required to be licensed under the *NSW Children and Young Persons (Care and Protection) Act 1998* (the Act) and the NSW Children's Services Regulation 2004 (the Regulation).

The Regulation is being reviewed in accordance with statutory requirements that regulations be reviewed every five years. The review provides an opportunity to re-examine both the effectiveness and the efficiency of the regulatory framework for NSW children's services.

Following the review, a new regulation will be drafted and then reviewed by Parliament before any changes are implemented.

A new regulation is expected to take effect during 2010.

## 1.2 Purpose of the discussion paper

The review will ask fundamental questions about the regulation of children's services in NSW. This discussion paper is intended to stimulate debate among the wide range of people interested in children's services to help DoCS develop a new regulation.

This paper does not attempt to question or propose a position on every aspect or clause of the current Regulation. Rather, its primary focus is on considering the content of the new regulation. To this end, the discussion paper poses questions and puts forward options on the major elements of the Regulation and particularly those that are a priority for improvement.

Subsequent chapters of this discussion paper deal with:

- what children's services should we regulate?
- staff-to-child ratios, group sizes and child numbers
- qualifications and roles of staff
- safety, health and development of children in children's services
- compliance, penalties and enforcement
- probity and related checks of licence applicants
- licensing model

Each chapter ends with a small number of questions on the issues raised within it. The questions are intended to stimulate thought and your views about the major issues under consideration. The questions also summarise the major issues raised in each chapter. When you provide input to the review you may wish to comment on just some, or all, of these questions. Alternatively, you can comment on aspects of the Regulation that are not covered in this discussion paper.

## 1.3 Consultation

The release of this discussion paper marks the start of the first of two major stages of consultation for the Regulation review.

This first stage will run from October through to early December 2008. The second stage will be in 2009 and centre on a draft Regulation and Regulatory Impact Statement.

For this first stage of the review, DoCS will hold 16 regional briefings from 24 October through to mid-November 2008. The briefings will be based around the discussion paper, and provide an opportunity for people to discuss and put forward their views on issues about the Regulation and its review.

Registration for the briefings is open to everyone with an interest in the Regulation, but the main audience is intended to be children's services providers. Details about the regional briefings and how to register are on the DoCS website.

An online survey will make it easier for people to give feedback on the discussion paper. The survey will be available from 24 November 2008 on the DoCS website [www.community.nsw.gov.au](http://www.community.nsw.gov.au), via the link to the Children's Services Regulation Review page.

To help parents have a say, there will be focus groups and a separate online survey. Consultants will organise the focus groups and arrange them so that a cross-section of parents' interests are represented. The focus groups will not be public forums. More information about these arrangements will be on the DoCS website.

Please note that throughout this discussion paper, the term 'parent' is used broadly to mean a person having parental responsibility for a child, for example, carers and other family members. This is consistent with the definition used in the Act.

You may wish to make a written submission to the review. It will help the review team if your submission addresses the questions posed in the discussion paper; however, you are welcome to raise other issues that are relevant to the development of a new children's services regulation. Written submissions are due on 12 December 2008.

Submissions we receive from major peak groups and service providers will generally be posted on the DoCS website. Please advise the review team if you do not want your submission made public.

If a submission includes data collected to support its content, it is important that the methodology is supplied to DoCS so that it can be given proper consideration.

Written submissions can be posted to:

**Review of the NSW Children's Services Regulation  
Children's Services Directorate  
NSW Department of Community Services  
Locked Bag 4028  
ASHFIELD NSW 2131**

Submissions can be emailed to: [CSRegRev@community.nsw.gov.au](mailto:CSRegRev@community.nsw.gov.au) and will be acknowledged by return email.

The Industry Reference Group (established in August 2008) will give DoCS specialist insight and expertise on both the consultation process and the design of a new

regulation. Organisations represented on the Industry Reference Group and its terms of reference are in Appendix 1.

In summary, you can have your say in any or all of the following ways:

- attend a regional briefing
- complete an online survey for service providers and others with an interest
- complete an online survey for parents
- make a written submission
- put your views forward via a representative body on the Industry Reference Group.

When this first stage of consultation is complete, DoCS will analyse the information gathered and provide feedback via its website and to the Industry Reference Group.

## 1.4 Governance

DoCS Children's Services Directorate is leading the review, in conjunction with an Internal Steering Committee whose members are Department staff with significant practical, policy, legal and economic analysis experience and skills.

## 1.5 Summary of next steps

ACTIVITY	TIME FRAME
Regional briefings	24 October – mid-November 2008
Parent focus groups	November 2008
Online surveys operating	24 November – 12 December 2008
Deadline for written submissions and formal close of first consultation period	12 December 2008
Analysis of information collected	December – January 2009
Feedback on first stage of consultation	Early February 2009
Development of new regulation and Regulatory Impact Statement	March – July 2009
Second stage of consultation – draft regulation	Mid 2009
New regulation commences	During 2010

## 1.6 Snapshot of licensed children's services in NSW

There are 3,447 licensed children's services in NSW with a maximum licensed capacity of 152,109 places per day.<sup>1</sup> According to the most recent census of

<sup>1</sup> DoCS Children's Services Information System (CSIS) data extraction, 25 June 2008.

childcare services, some 191,272<sup>2</sup> children under the age of six years attend these services.

The licensed children's services in NSW are operated by 2,393 licence holders. The dominant model of service provision is a licensee operating a single children's service, with some 60%<sup>3</sup> of services falling into this category. At the other end of the scale, eight major licensees account for some 500 children's services. These major providers include commercial, not-for-profit and local government organisations.

A profile of NSW children's services is in Appendix 2.

## 1.7 Context for the review

There has been a steady increase in the number of children attending children's services across Australia.<sup>4</sup> In NSW, children under three years attending formal services increased from 22% in 2002 to 26% in 2005, and for children aged 3–4 years went from 41–46% over the same period.<sup>5</sup>

Several factors are driving this trend. Parents are increasingly aware of the importance of early childhood education, its impact on children's development and their later life chances. This knowledge may be encouraging parents to use children's services who would not previously have done so.

Increased economic prosperity over the last decade has also increased families' disposable income and enabled greater access to children's services. Simultaneously, the number of women in paid employment has increased markedly over the past 20 years, measured most recently at 58.4% compared with 53.9% in 1998.<sup>6</sup> NSW families are now more likely to have both parents in employment. More than 60% of couple families with dependent children are employed.<sup>7</sup>

The reduction in extended family structures, increased worker mobility and the subsequent loss of informal care arrangements, have all contributed to the increased use of children's services. At the same time, changing work patterns, notably an increase in casual and shiftwork, have resulted in the creation of new types of children's services that cater to the needs of these workers.

### 1.7.1 Changing expectations of early childhood

There is a growing understanding of the impact of early childhood experiences both within families and in formal early childhood services. The early years are a crucial stage of life in a child's development. There is increasing evidence that the early years of life are the period in which the foundations for competence and coping skills, that affect long-term learning, behaviour and health, are established.

Research has shown that development from the prenatal period to the age of six is rapid and dramatic, and shapes long-term outcomes.<sup>8</sup> The quality of care received

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<sup>2</sup> Department of Education, Employment and Workplace Relations, *2006 Australian Government census of child care services*, Department of Education, Employment and Workplace Relations, Canberra, 2006.

<sup>3</sup> DoCS, CSIS extraction, 25 June 2008.

<sup>4</sup> Australian Bureau of Statistics (ABS), 2005, *4402.0 – Child care*, ABS, [www.abs.gov.au](http://www.abs.gov.au).

<sup>5</sup> ABS, 2008, *1338.1 – New South Wales in focus*, ABS, [www.abs.gov.au](http://www.abs.gov.au).

<sup>6</sup> ABS, 2008, *6202.0 – Labour force*, ABS, [www.abs.gov.au](http://www.abs.gov.au).

<sup>7</sup> ABS, 2008, *1338.1 – New South Wales in focus*, ABS, [www.abs.gov.au](http://www.abs.gov.au).

<sup>8</sup> McCain MN and Mustard JF, *The early years study three years later: from early child development to human development*, The Founders Network, Toronto, 2002.

during this period strongly influences not only early development, but also extends into adulthood.<sup>9</sup> The evidence is particularly clear that children from disadvantaged backgrounds are the most responsive to the positive effects of quality early childhood experiences and make the greatest gains from them.<sup>10</sup> Research also indicates that disadvantaged children significantly benefit from good quality early childhood experiences, especially when with a mixture of children from different social backgrounds.<sup>11</sup>

There is a growing appreciation of this research across governments, by policy makers and also in the community more broadly. Along with this knowledge is a new awareness that early investment in human capital should not just focus on school and tertiary education, but also directed to quality early childhood education and care.

Children's services are critical not only for the benefits to all children, but particularly for their importance to children at risk. Research tells us that early intervention in the early years (0–8) can produce a sustained change in children's health, welfare and educational attainment.<sup>12</sup>

Vulnerable children are most responsive to the positive effects of high quality care and make the greatest gains. However, vulnerable children are also the most susceptible to the negative effects of poor quality care.

Evidence suggests that of all single-strategy interventions, high quality childcare is the most effective in improving child outcomes and providing disadvantaged children with a chance to start school on a more equal footing with their more advantaged peers. To be effective, childcare does not need to be all day throughout the whole year, but it must be high quality and programs must be goal-oriented.

### **1.7.2 Why regulation of children's services is necessary**

Young children need a high level of protection to ensure their safety, welfare and wellbeing while in care. In particular, the youngest children, who are the most vulnerable, require the greatest level of protection. Young children have limited capacity to tell their parents about the quality of their care. They cannot remove themselves from the service and choose not to return to a poor quality service. It is not easy for parents to assess the quality of care, as they are not typically present when it is provided, and the impact of poor quality care may not be immediately evident.

There is research into the quality of children's services that documents a relationship between jurisdictions with weak regulations and a higher proportion of poor quality centres in those areas.<sup>13</sup> Regulation is, therefore, critical in providing a minimum standard that all children's services must adhere to. It is a key instrument in supporting and enhancing the quality of early childhood education and care, and a

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<sup>9</sup> Shonkoff J and Phillips D (Eds), *From neurons to neighbourhoods: the science of early child development*, National Academy Press, Washington, 2000.

<sup>10</sup> Melhuish EC, *A literature review of the impact of early years provision upon young children, with emphasis given to children from disadvantaged backgrounds. Report to the Comptroller and Auditor General*, National Audit Office, London, United Kingdom, 2004.

Farrington D and Welsh BC, 'Family based prevention of offending: a meta-analysis', *The Australian and New Zealand Journal of Criminology*, vol. 36(2), 2003, Australian Academic Press, pp. 127–151.

<sup>11</sup> Sylva K, Melhuish E, Sammons P, Siraj-Blatchford I and Taggart B, *The effective provision of pre-school education (EPPE) project: findings from pre-school to end of key stage 1*, 2004, [www.dfes.gov.uk](http://www.dfes.gov.uk).

<sup>12</sup> DoCS Literature Review, *Prevention and Early Intervention*, 2005.

<sup>13</sup> Friendly M., Doherty G and Beach J, *Quality by design: what do we know about quality in early learning and child care and what do we think? A literature review*, 2006, [www.childcarecanada.org](http://www.childcarecanada.org).

means of assuring parents that services provide appropriately for their children's safety and developmental needs.

This is reflected in two priorities of the NSW State Plan:

- F6: Increased proportion of children with skills for life and learning at school entry
- F7: Reduced rates of child abuse and neglect.

A challenge for regulators and stakeholders, and for the review, is to strike a balance between driving for quality and maintaining an affordable and responsive supply of places.

When seeking to implement a regulatory response to a perceived problem, governments must be able to show that intervention is warranted. There is a range of reasons why governments would take an active role in the children's services sector:

- The quality of care matters. Good quality care can improve developmental outcomes that affect future social and learning achievements and long-term life opportunities.
- Poor quality care can be detrimental to childhood development and has costs to the community over time.
- Many parents need access to children's services so that they can undertake paid employment or to participate in unpaid activities such as study.
- Some parents have limited or no choice of provider. Even when parents are dissatisfied with their child's care, there may not be any alternative providers in their local area or the cost of other arrangements may be prohibitive.
- It can be difficult for parents to get information about the quality of care their children receive and to assess that information.

### **1.7.3 NSW regulatory reform agenda**

The NSW Government is committed to reducing any unnecessary regulatory burden as stated in Priority 3 Cutting red tape, in the NSW State Plan.

To support this priority, the Government has established the Better Regulation Office and developed the *Guide to better regulation*. The guide sets out the following seven principles for good regulatory practice:

- the need for government action should be established
- the objective of government action should be clear
- the impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options
- government action should be effective and proportional
- consultation with business and the community should inform regulatory development
- the simplification, repeal, reform or consolidation of existing regulation should be considered
- regulation should be periodically reviewed, and if necessary, reformed to ensure its continued efficiency and effectiveness.

These principles will be applied during the review of the Regulation.

The *Guide to better regulation* explores the difference between more traditional prescriptive regulatory instruments and outcomes-based regulatory frameworks. An outcomes-based approach to regulation can encourage flexibility, innovation in service provision and reduce administrative burden. It also gives the regulated party greater flexibility about how they achieve the required outcome whilst still setting clear goals.

In developing the new regulation, the review will look for opportunities to take an outcomes-based approach where appropriate. However, most regulation is a combination of outcomes-based measures mixed with prescriptive requirements for matters that are considered essential or non-negotiable. Where the new children's services regulation deals with matters that are fundamental to the most important outcomes for children, a prescriptive approach will be appropriate.

Prescriptive provisions may also be considered desirable in instances where it is:

- simpler and clearer for the industry than an outcome statement
- essential to the goal of enforceability
- not an area where industry innovation is particularly sought, or likely to deliver significant benefit.

#### **1.7.4 National early childhood agenda**

While responsibility for licensing children's services lies with the States and Territories, the Commonwealth Government assists some families with the cost of children's services. It does this through payment of the Child Care Benefit (CCB), where children attend approved children's services, and the Child Care Tax Rebate.

The Commonwealth Government also administers a children's services quality assurance system through the National Childcare Accreditation Council (NCAC). The accreditation system, which operates in addition to state and territory regulatory requirements, applies to long day care, occasional care, family day care and before and after school care. Services must be accredited by the NCAC in order for parents to receive CCB.

The Commonwealth Government has made substantial commitments to enhancing the provision of early childhood education and care. These include:

- universal access for all children in the year before formal schooling
- the National Early Years Workforce Strategy
- enhanced childcare quality standards
- an early years learning framework
- 260 additional childcare centres across Australia (38 in NSW).

Through the Council of Australian Governments (COAG), the Commonwealth and state and territory governments are working to implement these commitments. This work is progressing quickly and the NSW Regulation review will take account of the outcomes of these negotiations as they proceed.

#### **1.7.5 Outside school hours care regulation**

A new regulation is also being made for outside school hours care (OSHC) in NSW, running in parallel to the development of the new children's services regulation.

While the OSHC regulation will be developed to suit the particular characteristics of middle childhood, there are also shared issues, as many centre-based, family day care and home-based carers are also OSHC providers. The review will ensure that each regulatory development process takes account of the other.

## **1.8 Guiding principles for the review**

The review has prepared a set of principles to guide the development of the new children's services regulation. Under these principles, the regulation should:

- intervene in the provision of children's services only in proportion to the risks to child safety and wellbeing or the opportunities to contribute to positive outcomes for children
- where appropriate, use outcome-orientated language that spells out the required results for children and performance of providers, promotes certainty, encourages consistent interpretation and is expressed plainly
- be readily enforceable, and involve an approach to enforcement and compliance that is commensurate to the risks for children
- engender greater openness about the regulated sector and greater availability of information for parents, for example, in relation to levels of compliance across the sector, the handling of complaints, adverse events in services, and the regulatory responses of DoCS
- remove unnecessary regulatory burden to improve the efficiency of the regulation for both the sector and Government
- be informed by broad sector and community consultation.

## **1.9 Outcomes of the regulation**

Sections 201 and 202 of the Act currently provide the overarching objectives and principles for the provision of children's services in NSW.

As the review aims to establish a greater focus on the outcomes achieved in regulating children's services, it is important to identify what outcomes the NSW Government wants and for whom it is trying to achieve them.

With this in mind, the review has developed an outcomes framework which recognises that children's services are for both children and parents. Each group has different needs and the regulation must respond to those needs in different ways.

The proposed outcomes framework also recognises the substantial impact of the regulation on children's services' providers, and the objectives of Government and the community, in regulating for a quality early childhood education and care system.

## **1.10 Determinants of quality in children's services**

Research into quality in children's services has predominantly adopted a developmental perspective. Under this approach, high quality care is defined as promoting optimal child outcomes across all the domains of child development, while low quality care is associated with negative developmental outcomes for children.

Research that measures quality in children's services makes a distinction between structural quality, which looks at the readily measurable features of children's services, and process quality, which focuses on what actually happens in a children's service.

The structural components of quality include staff qualifications, staff:child ratios, group sizes and factors on health, safety and space. These aspects of an early childhood environment create the conditions conducive to achieving high process quality. They are more easily included in a regulatory framework as they relate to quantitative or specific measures that can be clearly defined and observed.

The process components of quality include adult:child and child:child interactions; children's engagement with activities and materials; staff stability; the nature and implementation of the curricula and good communication between staff and parents. The qualitative nature of these aspects of quality makes them more difficult to capture in regulation, evaluate and enforce.

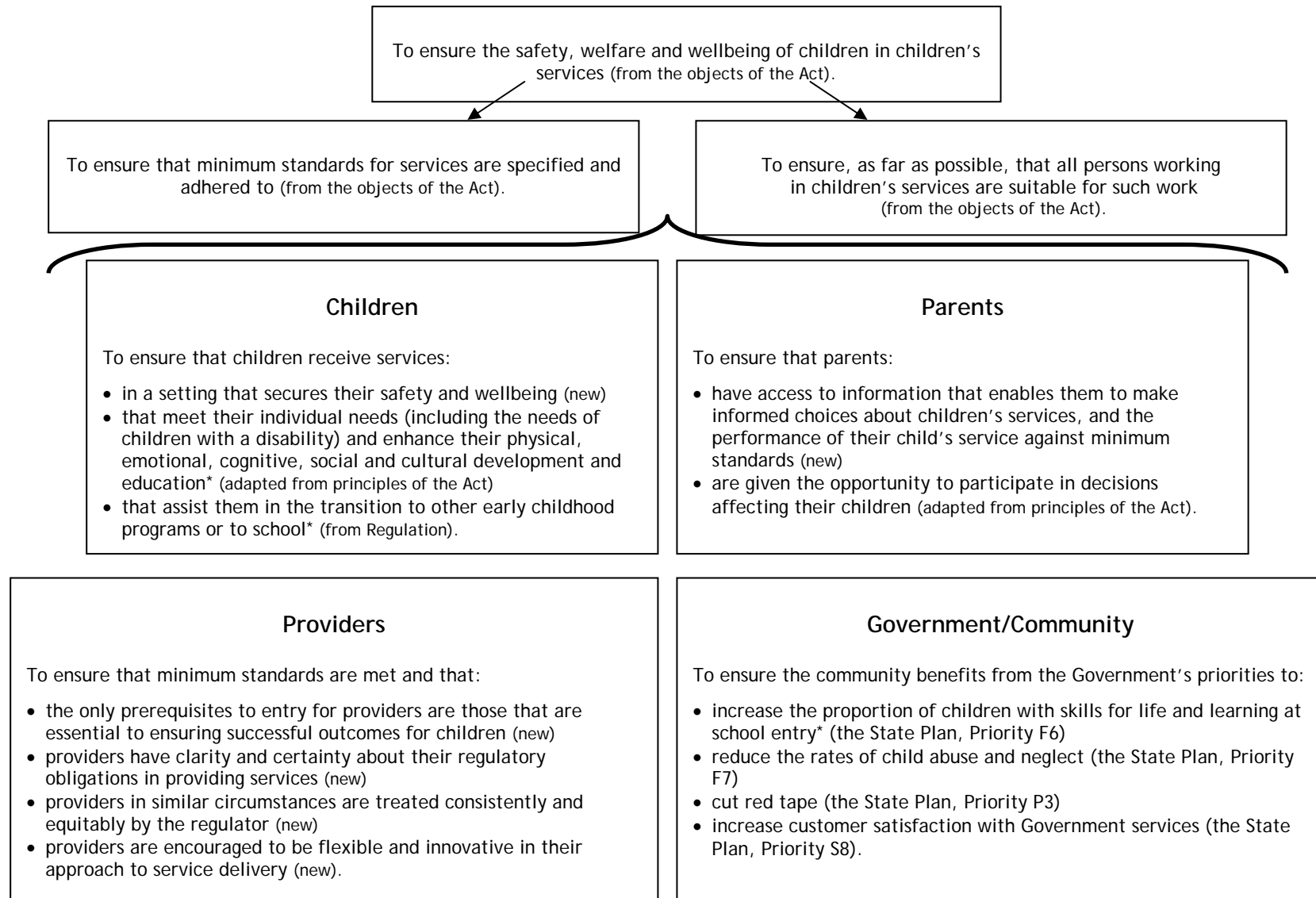
Much research has focused on the structural components of quality, and more research has been done on centre-based rather than home-based care. The weight of evidence favours the following conclusions:

- most significant factor affecting quality appears to be care giver education, qualifications and training
- higher adult:child ratios are associated with higher process quality, with the ratio being more significant for infants than children over three years
- larger group size is associated with lower process quality, but the connection is not as strong as for the adult:child ratio
- stability of care, in the sense of low staff turnover, is also associated with positive child outcomes.<sup>14</sup>

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<sup>14</sup> DoCS Literature Review, 2007 (unpublished).

## NSW REGULATES CHILDREN'S SERVICES TO ACHIEVE THESE OUTCOMES



## 1.10.1 Level of care giver education

The link between the level of care giver education and/or specialised qualifications, process quality and child outcomes is perhaps the strongest in research on quality.<sup>15</sup>

Children develop in the context of their relationships with others. It is therefore essential that they can have trusting and responsive relationships with their adult care givers. The extensive UK longitudinal study, the Effective Provision of Preschool Education (EPPE) Project, found that children's services whose staff have higher qualifications also have higher quality scores. It also found that the children attending those services make more progress in both intellectual and social/behavioural development.

The findings of this study particularly emphasise the importance of warm, interactive relationships between teachers and children, and settings that view educational and social development as complementary. Trained teachers also provide strong leadership and support for less qualified staff.<sup>16</sup>

## 1.10.2 Staff:child ratios

As with care giver education, the ratio of staff members to children is a critical element in creating an environment where care giver and children can develop warm and supportive relationships. Higher staff to child ratios enable more positive and frequent interactions, deeper staff engagement with children in their play and learning, and lower levels of child distress. Better ratios also allow for closer and more active supervision of children which enables better safety outcomes for children.

Research shows that the number of children per staff member is critical to achieving higher overall quality in children's services<sup>17</sup> and better child outcomes.<sup>18</sup>

The positive impact of higher staff:child ratios has been found to be strongest on very young children<sup>19</sup> and those from disadvantaged backgrounds.<sup>20</sup> Vandell and Wolf have

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<sup>15</sup> Sylva et al, 2004.

Goelman H, Doherty G, Lero DS, Lagrange, A and Tougas J, *You bet I care! Caring and learning environments: quality in child care centres across Canada*, Centre for Families, Work and Wellbeing, University of Guelph, Ontario, 2000.

Burchinal M, Howes C and Kontos S, 'Structural predictors of child care quality in child care homes', *Early Childhood Research Quarterly*, vol. 17(1), 2002, Elsevier, pp. 87–105.

Peisner-Feinberg ES and Burchinal MR, 'Relations between preschool children's child care experiences and concurrent development: the cost, quality and outcomes study', *Merrill-Palmer Quarterly*, vol. 43, 1997, Wayne State University Press, pp. 451–477.

NICHD Early Child Care Research Network, 'Characteristics of infant child care: factors contributing to positive caregiving', *Early Childhood Research Quarterly*, vol. 11(3), 1996, pp. 296–306.

<sup>16</sup> Sylva et al, 2004.

<sup>17</sup> Goelman et al, 2000; Burchinal et al, 2002.

<sup>18</sup> Love JM, Harrison L, Sagi-Schwarz A et al, 'Child care quality matters: how conclusions may vary with context', *Child development*, vol. 74(4), 2003, pp. 1021–1033.

Sagi A, Koren-Karie N, Gini M, Ziv Y and Joels T, 'Shedding further light on the effects of various types and quality of early child care on infant-mother attachment relationships: the Haifa study of early child care', *Child development*, vol. 73, 2002, pp. 1166–1186.

Sylva et al, 2004; Burchinal et al, 2002.

<sup>19</sup> Cleveland G, Forer B, Hyatt D, Japel C and Krashinsky M, *An economic perspective on the current and future role of non-profit provision of early learning and child care services in Canada, Final Report*, 2007.

de Schipper EJ, Riksen-Walraven M and Guerts SAE, 'Effects of child-caregiver ratio on interactions between caregivers and children in child-care centers: an experimental study', *Child development*, vol. 77(4), 2006, pp. 861–874.

<sup>20</sup> Melhuish, 2004.

suggested the merits of an age-related strategy for improving process quality. Based on analyses of the National Institute of Child Health and Human Development (NICHD) study at different assessment points, they note that ratios (and group size) may be more critical for quality infant care, while care giver training and education may be more critical for providing quality care to preschoolers<sup>21</sup>.

### 1.10.3 Group size

Group size refers to the maximum number of children arranged and supervised as a group, as stipulated by the regulation. Group size varies according to age, with groups for younger children being smaller.

Approaches to group size vary considerably within Australia and internationally. While some jurisdictions (including NSW) prescribe group size in regulation, many others do not stipulate group size requirements.

Like care giver education and staff:child ratios, group size has been the subject of a considerable body of research. Many studies have found that where the number of children in a group was of the recommended size or below, measures of process quality were higher. Amongst the findings are that:

- children are more cooperative, compliant and exhibit more reflection than children in larger groups with the same ratio of care givers<sup>22</sup>
- care givers with small groups are more responsive and spend more time interacting with children, and less restrictive than care givers in larger groups<sup>23</sup>
- smaller group size is associated with more developmentally-appropriate classroom activities than larger group size.<sup>24</sup>

However, a number of studies have found that group size is not significantly linked with other quality indicators.<sup>25</sup> Others have noted the inconsistency in findings on group size and argued that the way researchers currently measure environments in children's services is flawed.<sup>26</sup>

Given this variation in research findings, group size appears to be less significant than other structural variables. However, its impact may be difficult to tease out as research

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<sup>21</sup> Vandell DL and Wolf B, *Child care quality: does it matter and does it need to be improved?*, 2000, <http://www.aspe.hhs.gov/hsp/ccquality00/report.pdf>.

<sup>22</sup> Clarke-Stewart A, Gruber CP and Fitzgerald LM, *Children at home and in day care*, Lawrence Erlbaum Associates, New York, 1994.

<sup>23</sup> NICHD, 1996.

<sup>24</sup> Howes C, Phillips D and Whitebook M, 'Teacher characteristics and effective teaching in child care: findings from the national child care staffing study', *Child and youth care forum*, vol. 21, 1992, pp. 399-414.

<sup>25</sup> Blau DM, 'The production of quality in child care centers: another look', *Applied developmental science*, vol 4(3), 2000, pp. 136-148

Dunn L, Beach SA and Kontos S, 'Quality of the literacy environment in day care and children's development', *Journal of research in childhood education*, vol. 9, 1994, pp. 24-34.

Raspa MJ, McWilliam RA and Ridley SM, 'Child care quality and children's engagement', *Early education and development*, vol. 12(2), 2001, pp. 209-224.

<sup>26</sup> Layzer JI and Goodson BD, 'The 'quality' of early care and education settings', *Evaluation Review*, vol. 30(5), 2006, pp. 556-576.

on group size is often combined with other key variables, such as staff qualifications and training, or staff:child ratio.<sup>27</sup>

#### 1.10.4 Stability of carers

In line with the fundamental importance of relationships to children's development, stability of carers has been found to be strongly, consistently and positively related to child outcomes.<sup>28</sup> High staff turnover is associated with lower quality services and poorer child outcomes.<sup>29</sup>

Staff turnover is consistently high across studies of children's services in various countries, including Australia. Research across a range of countries puts turnover of children's services staff at somewhere between 30–50% annually.<sup>30</sup> Other research has found that staff wages are strongly predictive of service quality.<sup>31</sup>

Increasing staff retention rates to enhance the stability of care appears to be one of the major challenges to improving the quality of children's services and overall child outcomes, although this is not a matter that can easily be regulated.

#### 1.10.5 Programming and planning

Providing a stimulating early childhood program that encourages children's engagement with activities and materials, and enhances their development is another important aspect of a quality children's service. Effective programming relies on the ability of care givers to observe the children in their care, understand their development, build on their interests, recognise their needs and develop a program accordingly.

Doherty (2004) suggests that one of the characteristics of a high quality early childhood program is a daily planned program that exposes children to language and ideas. It also provides many play-based opportunities for interaction with peers, exploration of the environment, experimentation and problem-solving.<sup>32</sup> Other research has found that children's development is enhanced when teaching staff are trained and

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<sup>27</sup> Munton T, Mooney A, Moss P, Petrie P, Clark A and Woolner J, *International review of research on ratios, group size and staff qualifications and training in early years and child care settings*, Thomas Coram Research Unit, Institute of Education, University of London, 2002.

Fiene R, *13 Indicators of quality child care: research update*, United States Department of Health and Human Services, 2002, <http://aspe.hhs.gov/hsp/cquality-ind02>.

<sup>28</sup> Loeb S, Fuller B and Kagan S et al, 'Child care in poor communities: early learning effects of type, quality and stability', *Child development*, 75, 1, 2004, pp 47– 65.

<sup>29</sup> Helburn S (ed), *Cost, quality and child outcomes study*, Denver CO, Department of Economics, Center for Research and Social Policy, University of Colorado, Denver, 1995.

Howes et al, 1992; Love, Harrison and Sagi-Schwarz et al 2003.

<sup>30</sup> Fenech M, Sumsion J and Goodfellow J, 'The regulatory environment in long day care: a double-edged sword for early childhood professional practice', *Australian Journal of Early Childhood*, vol. 31(3), 2006, pp. 49–58.

Smith PR, 'Caring for paid caregivers: linking quality child care with improved working conditions', *University of Cincinnati Law Review*, vol. 73, 2004, pp. 399–431.

Vandell and Wolf, 2000.

<sup>31</sup> Goelman et al, 2000.

Phillipsen LC, Burchinal MR, Howes C and Cryer D, 'The prediction of process quality from structural features of child care', *Early Childhood Research Quarterly*, vol. 12, 1997, pp. 281–303.

<sup>32</sup> Friendly et al, 2006, citing Doherty G, 2004.

encouraged to reflect upon their own practice. They observe the responses of children to their practice, and plan and revise their approaches and activities accordingly.<sup>33</sup>

The findings of the Effective Provision of Pre-School Education study also support the importance of programming and planning. It found that children's cognitive outcomes are directly related to the quantity and quality of focused group work that is planned and initiated by care givers.<sup>34</sup>

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<sup>33</sup> Friendly et al, 2006, citing Bowman BT, Donovan MS and Burns MS, 2001.

<sup>34</sup> Sylva et al, 2004.

## **2 WHAT CHILDREN'S SERVICES SHOULD WE REGULATE?**

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### **2.1 Introduction**

The definition of a children's service in the Act, and the exclusions from that definition, establish what types of services need to be licensed in NSW. In this respect, NSW has a clear and relatively comprehensive definition that is relatively well understood by the children's services industry.

The definition came into effect when the current Act commenced in 1998. The Act says that prescribed children's services cannot be operated without a licence. It defines those services as centre-based services, mobile services, home-based care and family day care. From 1 July 2008, school-based children's services were included in that definition. The Act also expressly excludes some services from that definition.

This chapter considers the definition of a children's service. It also discusses whether there are some services that are not currently licensed that should be, and others that are currently licensed that need not be.

### **2.2 Definition of a children's service**

The principal definition of a 'children's service' is in s. 200(1) of the Act. It defines a children's service as:

*'a service that provides education or care (other than residential care), or both education and care, whether directly or indirectly, for one or more children under the age of 6 years and who do not ordinarily attend school (disregarding any children who are related to the person providing the care).'*

The Act and the Regulation also contain a number of further definitions that are specific to different types of children's services. This approach allows for the introduction of new service types into the regulatory framework if the need arises.

This has provided an effective framework for defining children's services in NSW. The review proposes to keep this structure for defining the regulatory scope in the Act and new regulation.

Central criteria for defining a children's service are the age and number of children being cared for. No changes are proposed to these aspects of the legislation.

### **2.3 Potential new exclusions from the definition of a children's service**

Section 200(2) of the Act lists types of services that are specifically excluded from the requirement to be licensed. The exclusions apply to:

- the type of service already being regulated under other legislation, e.g. ‘designated agencies’ that provide out-of-home care or formal education services
- the proximity of the person with parental responsibility for the child to the service, e.g. a crèche in a facility being used by parents, such as a gym
- services where the primary function is to instruct children in a particular activity, e.g. classes and activities that children typically attend, generally for short periods of time, such as ballet or tennis.

The exclusions in the NSW Act have not been the subject of debate and it is therefore thought that they are generally considered appropriate and relevant. Nonetheless, the review is an opportunity to update the current provisions to exclude other services for children, to clarify that they are not a children’s service.

### **2.3.1 School orientation programs**

The recent incorporation of school-based children’s services into the regulatory framework has raised the question of whether ‘orientation’ classes offered by some schools are captured by the current definition of a children’s service.

Schools provide orientation classes with the distinct purpose of introducing children, who will be starting kindergarten the following year, to the school environment. Schools organise orientation classes in different ways, such as a single day, a regular weekly session during the last school term, or a couple of hours a day over a one or two week period.

The purpose of orientation classes is not consistent with the programming requirements for children’s services which are intended to stimulate the developmental needs and potential of children over time. Nor would it be appropriate to apply regulatory requirements about the physical environment for children’s services to orientation classes, which usually operate for relatively short periods of time from within established school facilities.

For these reasons, it is not considered appropriate to apply the regulation to orientation programs. It is acknowledged that to do so could make their operation untenable. It is proposed that orientation programs be specifically excluded from the definition of a children’s service.

### **2.3.2 Proximity of parents to children**

One reason for excluding services from the definition of a ‘children’s service’ is that a person with parental responsibility for the child remains in close proximity to the service. The current exclusions under s. 200(2)(d1) of the Act are restricted to particular facilities (in a hospital, health service, recreational or commercial facility) and to situations where the service is conducted by, or on behalf of, the person operating the facility, for example, the owner of a gym.

The question has arisen whether to broaden this exclusion to any circumstances where a person with parental responsibility for the child remains in close proximity to the service. However, enforcing a broad requirement that parents stay close to the service would not be possible in practice. It is therefore considered that such a broad exclusion is undesirable.

Another alternative the review is considering, is to create a limited exclusion for short-term or one-off care arrangements which do not operate within the definition of a children's service. This exclusion could be limited to situations where children are cared for so the parent (or person with parental responsibility) can attend a meeting, function or similar activity at the same or adjacent premises. This exclusion would not extend to situations related to the parent's paid employment. Similar provisions exist in Queensland and the Australian Capital Territory.

The review is interested in views about the merits of the exclusion options described above.

## **2.4 Broadening the scope of the Regulation**

The NSW Regulation does not currently cover in-home care and in-venue care. DoCS is in the process of developing a regulatory framework for out of school hours care (OSHC) services in NSW. These service types are regulated in some other jurisdictions and users of these services are eligible for the Commonwealth Government's Child Care Benefit. The review is considering whether these services should be included in the scope of the new children's services regulation.

### **2.4.1 Out of school hours care**

The regulation of OSHC services is the most pressing question. In recent years, OSHC services have grown substantially to support the needs of working families with school-aged children. The NSW Government is in the process of developing a regulatory framework for the OSHC sector.

Other Australian jurisdictions that regulate OSHC<sup>35</sup> already include it in the concept of a 'children's service'. They cover both middle and early childhood services under one regulatory framework.

In NSW, it would be possible, and potentially desirable, to incorporate OSHC services into the regulatory framework for early childhood children's services. This is because a significant share of OSHC places are provided by centre-based and family day care services. However, there are also some advantages to developing a separate OSHC regulation for NSW at the present time.

OSHC in NSW has not previously been regulated, and while the sector generally welcomes regulation, its introduction may pose some challenges as providers adapt to operating in the new regulatory environment.

The review therefore proposes that the new regulation not incorporate OSHC services at this stage, but move towards including them into an overarching children's services regulatory framework in future.

### **2.4.2 In-venue care**

In-venue care is a flexible form of family day care provided in a community venue rather than in the carer's home. It is a Commonwealth Government strategy to give

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<sup>35</sup> Queensland, Tasmania, Western Australia and the Australian Capital Territory.

access to childcare for families in regional and remote areas where mainstream children's services are not available. Commonwealth funding for in-venue care is limited to those localities only.

In-venue care may operate from a primary school, preschool, community centre or a health facility. The Commonwealth requires it to be provided under the auspice of a family day care scheme to ensure quality outcomes for children and adequate support for carers. As part of its funding requirements, the Commonwealth requires that in-venue care is permitted under the relevant state and territory regulations.

Under the current NSW legislation in-venue care would generally require a licence anyway (as either a centre-based or mobile service) and possibly because of this the model has not developed in NSW.

In general, providers have not shown strong interest in establishing in-venue care services in NSW, although there has been some near the NSW-Victorian border. This may be because the Regulation's provisions for mobile children's services allow flexibility for services to be provided from local facilities at regular intervals and is sufficient to meet local childcare demands. In-venue care is not provided in other jurisdictions that licence family day care.<sup>36</sup> Victoria, which does not currently regulate this type of care, is the only jurisdiction where in-venue care is widely used.

As there is little demand for this service type and the Regulation already supports flexible services for families in regional and remote areas, the review does not propose to recognise in-venue care under the NSW regulatory framework. However, the review is interested to hear whether the community and the children's services industry share this view.

### **2.4.3 In-home care**

In-home care refers to arrangements where children are cared for in their own home. It covers situations such as the employment of a 'nanny' to care for a child in the child's own home or a 'shared nanny' where children from two families are cared for in one family's home.

The Commonwealth funds in-home care in circumstances where families have no access to other forms of childcare services. This includes families located in rural or remote areas, or where parents work shifts or non-standard hours and cannot use standard children's services. Across other jurisdictions, approaches to regulating in-home care vary considerably.<sup>37</sup>

Traditionally, in-home care has not been regulated in NSW. This decision was made on the basis that care arranged by parents for their children in their own home is a private contractual arrangement. Further, the physical environment where the care is provided is controlled by the child's parents. This is an important distinction between in-home care and home-based care (which is regulated), where the carer controls the care environment.

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<sup>36</sup> Family day care is also licensed in Queensland, Western Australia, Tasmania and the Australian Capital Territory.

<sup>37</sup> In-home care is regulated in South Australia, Tasmania and the Northern Territory, but is specifically excluded from regulation in Queensland, Victoria, Western Australia and the Australian Capital Territory.

In-home care does not lend itself easily to regulation as it potentially covers a wide range of care situations, all of which occur within the domain of a family home. There is not significant public demand for regulation of private in-home care arrangements. If regulation was introduced, provisions could only apply to the carer, as it would not be feasible to regulate the physical environment of family homes. In this respect, agencies that arrange the provision of in-home care already need to conduct a Working With Children Check on prospective carers under the *Commission for Children and Young People Act 1998*.

The review proposes not to include in-home care in the new regulation. However, it is interested to hear community and industry views about whether there may be a case for including greater regulation of in-home care in future.

## **2.5 Child-minding services in retail shopping centres**

The Regulation currently provides for a specific type of service called 'child-minding services in retail shopping centres'. This is defined as 'a centre-based children's service that is a child-minding service provided at premises forming part of a retail shopping centre for the use of customers of the shopping centre'.

These services are not required to be licensed but are instead given an 'approval' to operate. They must only comply with the provisions in Schedule 1A of the Regulation.

The definition of 'child-minding services in retail shopping centres' only includes services that are provided independently by individuals who are not connected with the retail shopping centre. By contrast, child-minding services in retail shopping centres that are provided by, or on behalf of, the operators of a shopping centre fall within the exclusion from licensing in s. 200(2)(d1) of the Act. All child-minding services in retail shopping centres, currently operating in NSW, are provided by the operators of the centre and therefore excluded from the scope of the Regulation.

Since Schedule 1A of the Regulation was introduced in 2005, DoCS has received only a small number of enquiries from people considering setting up this particular service type. None has resulted in an application for approval of a service. The industry's lack of interest in taking up this model may show that it is not commercially viable unless provided in connection with, and as part of, a larger commercial facility.

As the provisions of Schedule 1A have never been used, it is difficult to justify the need for regulatory coverage. Accordingly, the review is considering deleting these provisions from the Regulation.

### **Questions**

1. In relation to the Regulation's scope and definitions, which features of the current Regulation are most important to retain, and what are the highest priorities for change?
2. Are there any service types that should be included in, or excluded from, the definition of a children's service?

# 3 RATIOS, GROUP SIZE AND MAXIMUM CHILD NUMBERS

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## 3.1 Introduction

Much of the research that has measured the quality of children's services has focused on the 'structural' aspects of quality. This refers to the more tangible features of a children's service, including staff:child ratios and group size. These aspects of a service are readily dealt with by regulation as they can be quantified.

## 3.2 Research

There is no research that proves or disproves the necessary or optimum staff:child ratios correlated with the greatest benefits to child outcomes or the marginal benefit of one ratio over another. However, all the available evidence shows a strong link between higher ratios and improved outcomes for children.

Much research has focused on the effect of staff:child ratios on the quality of care. It finds for example, that the number of children per staff member is critical to achieving higher overall quality in children's services<sup>38</sup> and better child outcomes.<sup>39</sup> The positive impact of higher staff:child ratios is strongest for very young children<sup>40</sup> and those from disadvantaged backgrounds.<sup>41</sup>

Where higher staff:child ratios are in place, children's services are better able to deliver the less tangible, 'process' aspects of quality service provision. Higher staff:child ratios provide the conditions for staff to develop closer relationships with children; interact more often and positively; engage more deeply in children's play and learning; and supervise children more actively.

Like ratios, group size has also been researched extensively. However, research findings on group size are less consistent. On the one hand, several research studies found that, where the number of children in a group is of the recommended size or below, measures of process quality are higher. Findings include that:

- children are more cooperative, compliant and reflective than children in larger groups with the same ratio of care givers<sup>42</sup>
- care givers with small groups spend more time interacting with children and are less restrictive than care givers in larger groups<sup>43</sup>
- smaller groups are associated with more developmentally appropriate classroom activities than larger groups.<sup>44</sup>

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<sup>38</sup> Goelman et al 2000; Burchinal et al 2002.

<sup>39</sup> Love et al, 2003; Sylva et al 2004; Burchinal et al 2002.

<sup>40</sup> Cleveland et al, 2007; de Schipper et al, 2006.

<sup>41</sup> Melhuish, 2004.

<sup>42</sup> Clarke-Stewart et al, 1994.

<sup>43</sup> NICHD, 1996.

On the other hand, several studies found that group size is not significantly associated with other quality indicators,<sup>45</sup> or noted the inconsistent findings on group size and argued that the way researchers currently measure early care environments is flawed.<sup>46</sup>

Given this variation across the research, it appears that group size may be less significant than other structural variables for children’s services. However, its impact is difficult to tease out as research on group size is often combined with other key factors such as staff:child ratios, staff qualifications and training.<sup>47</sup>

Some researchers have suggested a link between the age of children and priorities for process quality in early childhood services. Analyses of the US National Institute of Child Health and Human Development (NICHD) study showed that group size and child:adult ratios were stronger predictors of process quality for infants. However, they were less critical to achieving process quality for preschoolers, who instead benefited more from higher levels of care giver training and education.<sup>48</sup>

### 3.3 Ratios in centre-based and mobile services

Clause 53(1) of the NSW Regulation establishes the staff:child ratios for centre-based and mobile services as follows:

**NSW carer:child ratios**

Age	Staff-to-child ratio
0 to under 2 years	1:5
2 to under 3 years	1:8
3 to under 6 years	1:10

It can be difficult to directly compare age group ratios across Australian jurisdictions because there is some variation in each state and territory. However, NSW’s ratio of 1:5 for 0–2 year olds is the same as for most other jurisdictions. The NSW staff:child ratio for 2–3 year olds is lower than most (other states tend to have a ratio of either 1:5 or 1:6 for this age group). By contrast, the NSW ratio for 3–5 year olds is one of the best in Australia.

The appropriateness of ratios for children under two years has attracted the most attention. Queensland and Western Australia have had a staff:child ratio of 1:4 for 0–2 year olds in place for almost 20 years. Internationally, ratios of either 1:3 or 1:4 for 0–2 year olds are in place in many Canadian provinces, the United Kingdom and Denmark.

The NSW Government has previously considered improving the staff:child ratio for 0–2 year olds. While the research evidence to support higher ratios of staff to children is strong, past proposals have faltered on analysis of the potential economic impact on children’s services and parents. Places for 0–2 year olds are the most expensive to provide and increasing staff to child ratios would increase this cost.

<sup>44</sup> Howes et al, 1992.

<sup>45</sup> Blau D, 2000; Dunn et al, 1994; Raspa et al, 2001.

<sup>46</sup> Layzer et al, 2006.

<sup>47</sup> Munton et al, 2002; Fiene, 2002.

<sup>48</sup> Vandell and Wolf, 2000.

The concerns of some parts of the children's services sector about the cost implications of introducing a higher ratio are acknowledged. However, the strength of research evidence about the importance of staff:child ratios for children under two years, makes it necessary to revisit this aspect of service provision.

In the lead up to the current review of the Regulation, DoCS commissioned Booz and Company to conduct an independent economic analysis of the impact of implementing a staff:child ratio of 1:4 for children under two years of age. The NSW Government will consider the findings of the economic impact analysis report.

If the NSW Government did decide to introduce a 1:4 ratio for 0–2 year olds there would be cost implications for some services that provide places for infants. In this case, the review is an opportunity to consider ways in which any increased costs may be offset by other measures. There are a number of options that could be considered.

- 1. A phased implementation process.** Under this scenario, larger services would introduce the 1:4 ratio ahead of smaller services. The rationale for this approach is that smaller services have less capacity to deal with the cost impacts, and could be assisted by a longer adjustment period. All services would have to meet the new ratio within a set time after the new regulation comes into effect.
- 2. A targeted approach.** Services would only need to apply the 1:4 staff:child ratio during core operating hours, say 9 am–5 pm. This would reduce costs for services but deliver poorer outcomes for children across the day; could be confusing for parents; add complexity to staffing; and may be difficult to enforce.
- 3. A flexible-age range approach.** The new regulation could adapt the staff:child ratio and group size standards that apply in Queensland. For example, it requires a ratio of 1:4 for a group of children aged 0–2 years, but allows a lower ratio if the group has no children aged less than 15 months.
- 4. A 1:4 ratio replaces the 1:5 ratio.** The new regulation could simply introduce a 1:4 ratio to replace the current 1:5 staff:child ratio for children under two years of age.

Alternatively, the Government may decide to retain the current 1:5 staff:child ratio in the new regulation. If this were to occur, then the review would be especially interested in views on what other aspects might be strengthened, or in some way improved, to provide for better outcomes for children under two years of age.

### **3.4 Ratios in family day care and home-based care**

The current NSW Regulation establishes the ratio for children in family day care and home-based care through the maximum number of children allowed per carer. The maximum number is one carer to seven children, five of whom do not ordinarily attend school.

The maximum of seven children is generally consistent with other Australian jurisdictions. Reducing this number could cut the overall supply of family day care and home-based care places. It could also increase the price of family day care and home-based care.

Chapter 3 of this paper notes that the Government is expected to consider whether a higher 1:4 ratio for 0–2 year olds should apply to centre-based and mobile services. The review is considering whether the same ratio should also apply to family day and

home-based care. This is particularly relevant as workers in centre-based and mobile services have the support of other staff members, whereas family day and home-based carers supervise children alone. In a home-based setting, it may be challenging for a person working alone to provide appropriate care for five infants.

There are a number of ways in which such a change could work. For example, a carer could be limited to a maximum of seven children, five of whom do not ordinarily attend school, and no more than four may be aged 0–2 years. Alternatively, carers could be allowed no more than four children in total, if they are aged between 0–2 years. Under the second scenario there would be a consistent ratio for infants across all service types.

Some family day care schemes self-regulate to restrict the number of 0–2 year olds that a carer may look after. Typically, schemes set the limit at two children under two years. The review is also considering whether another option could be to set a limit of two or three, 0–2 year olds in the new regulation, while retaining a maximum of seven children, five of whom do not ordinarily attend school.

Any of these proposals could reduce supply of 0–2 places but would support the health, safety and developmental needs of very young children.

### 3.5 Group size

The NSW Regulation stipulates group size as twice the ratio for each age group. Clause 61 sets the group sizes for centre-based or mobile children's services as follows:

Age of children	Group size
0 to under 2 years	Up to 10 children
2 to under 3 years	Up to 16 children
3 to under 6 years	Up to 20 children

Caring for children in appropriate groups is important to their wellbeing. Group size can potentially influence noise, children's stimulation and stress levels, the effectiveness of supervision, and relationships between staff.

Many children's service providers raise concerns that group size requirements create inflexibility in managing child and staff numbers on a day-to-day basis. They claim it is of marginal benefit to children if appropriate staff:child ratios are in place.<sup>49</sup> On the other hand, given that it is a simple multiple of ratios, it is not clear that group sizes should greatly restrict or complicate service management.

As the research evidence on the contribution of group size to service quality is less conclusive than for other aspects of children's services, the review is considering whether there is scope to relax the group size requirements in the new regulation.

One option is to keep group size requirements for 0–2 year olds only, or for both 0–2 and 2–3 year olds, as the research is clearer on the benefits of smaller groups for younger children.

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<sup>49</sup> NSW and Queensland are the only Australian jurisdictions that regulate group size.

Another option is to remove the group size requirements entirely and replace them with an outcome statement requiring services to care for and supervise children in groups that meet their individual needs and enhance their development and education.

These proposals would give service providers greater flexibility about how they provide their services. It would enable the movement of children between groups and spaces that reflect their developmental stage rather than their physical age.

### **3.6 Maximum number of children in centre-based and mobile services**

Clause 58 of the Regulation currently sets the maximum of up to 90 children at any one time for centre-based and mobile services.

Clause 58(2) also requires that a centre may have no more than 30 children aged 0–2 years and no more than 60 children aged two to under six years (not ordinarily attending school).

As with group size, the total number of children attending each day may have an impact on noise and stimulation levels, children's (and staff) stress levels and the quality of staff interactions with children. However, this impact will be less likely if the service employs an appropriate number of staff and is able to comply with the physical space requirements for a larger number of children.

The review is not aware of any research about the specific impact of service size. Larger services may be able to operate more efficiently which could help to maintain lower fee levels or enable reinvestment in service quality.

Across Australia, there is considerable variation to the limit on the total number of children attending a children's service at one time. While NSW and the Australian Capital Territory (ACT) set an upper limit of 90 children per day, Queensland and the Northern Territory (NT) have an upper limit of 75. In contrast, Victoria, Western Australia (WA) and Tasmania do not set a maximum number.

The review is considering options to increase flexibility on the maximum number of children (total licensed places) who may attend a centre-based or mobile service at any one time.

One option may be to allow services a small increase (between 5–10%) in total child numbers over the whole year. This would make it easier for services to accommodate the movement of children across age groups without a significant negative impact on children's safety, health and wellbeing. Such a provision would allow services to start the year closer to full capacity, rather than having to keep places free to enable movement between age groups during the year.

A more far-reaching alternative would be to remove the maximum number requirement altogether from the NSW Regulation, in line with the approach in Victoria, WA and Tasmania.

## 3.7 Excursion ratios

The provisions for the conduct of excursions are set out in clauses 77–79 of the NSW Regulation. The ratios for excursions are as follows:

Type of excursion	Adult-to-child ratio	Service type
Routine excursion	1 adult:2 children under 3 1 adult:5 children over 3	Centre-based and mobile services
Excursion involving public transport or crossing a major road	1 adult:2 children under 3 1 adult:4 children over 3	Centre-based and mobile services
Water – learning to swim	1 adult:1child (regardless of age)	All licensed services
Beach, river, lake or other place where there is a significant water hazard	1 adult for every child under 3 1 adult for every 2 children aged 3 to school age 1 adult for every 5 children who normally attend school	All licensed services

The excursion provisions in the NSW Regulation are highly prescriptive. This recognises that taking groups of young children to unfamiliar environments presents risks that are not present in the everyday setting of the children’s service. Serious accidents are more likely to occur, and have occurred, on excursions.

However, the table above shows that the Regulation has different excursion requirements for family day carers and home-based carers than for centre-based and mobile services.

The review considers that where it is necessary to protect children’s safety, a prescriptive regulatory approach is warranted. In this light, the same adult:child ratios should apply across all service types. This means that increased carer:child ratios would apply to family day care and home-based carers when going on routine excursions.

The review is also considering enhancing the clarity of other provisions about excursions. Some of the existing provisions are difficult to interpret and do not give services clear guidance about planning for, and undertaking, safe excursions. For example, clauses 78(1) and (8) require that all excursions must be ‘conducted in a safe manner’.

An option is to include a requirement that a service must undertake an assessment of the risks posed by an excursion as part of planning for the trip. This would ensure that staff identify potential risks before the excursion and plan for the management of those risks.

### Questions

1. In relation to the Regulation’s child number requirements, which features of the current Regulation are most important to retain, and what are the highest priorities for change?

2. The NSW Government is considering the introduction of a 1:4 ratio for 0–2 year olds. If this proposal proceeds what is your preferred implementation option and why?
3. The review is considering limiting the number of 0–2 year olds that a family day or home-based carer can care for at one time. If a limit is included in the new regulation, what should that limit be and how should it relate to the maximum number of children a carer may care for?
4. What are your views about relaxing group size requirements, especially in relation to 3–6 year olds?
5. What are your views about the following options on the maximum number of children in a licensed service:
  - allowing a service to increase the total number of children by a set percentage of its total number of licensed places (e.g. 5–10%), during the second half of the year
  - retaining the current maximum of thirty 0–2 year olds, removing the limit of sixty 2–6 year olds, and allowing a service to increase the number of 2–6 year olds over the course of the year.
6. What are your views about the proposal to apply the excursion provisions so that the same ratios apply for all types of excursions across all service types?

# 4 QUALIFICATIONS AND ROLES OF STAFF

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## 4.1 Introduction

Children develop in the context of their relationships with others. The staff in children's services are vital to the development and education of children who are in their care. They are significant in caring for, educating and supporting the development of the children who attend children's services, and are important adults in their lives.

The link between the level of staff education and/or specialised qualifications, quality and child outcomes, is perhaps the strongest in research on quality in children's services.<sup>50</sup> In light of this evidence, the review presents an opportunity to consider whether the current requirements of the NSW Regulation are best suited to the needs of children and expectations of parents.

The review is also taking place at a time when the Commonwealth Government has committed to a range of early childhood reforms. These include undertakings to provide universal access to high quality early childhood education programs for all children, in the year before formal school, and delivered by degree-qualified early childhood teachers. The Commonwealth is also committed to addressing the well-documented shortage of trained early childhood teachers by both increasing the quality and supply of these staff.

The review does not propose any reduction in current staff qualification requirements, but is considering proposals to enhance them. The review is very aware of the potential for cost impact given that staff costs represent approximately 70% of the total costs of providing a children's service. Improvements to qualification standards are likely to affect the price of care and, potentially, the supply of places.

It is also important to consider the expectations of parents. While parents associate qualifications with the quality of care, they are also sensitive to the potential cost implications of higher qualification requirements, in the form of higher fees.<sup>51</sup>

## 4.2 Current NSW arrangements

The NSW Regulation sets out staffing requirements for centre-based, mobile services, family day care and home-based care. These requirements are to achieve the following objects and principles of the Act:

### **Objects (s. 201)**

1. to ensure the safety, welfare and wellbeing of children in children's services
2. to promote certain standards for those services

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<sup>50</sup> Sylva et al, 2004; Goelman et al, 2000; Burchinal et al, 2002; Peisner-Feinberg and Burchinal, 1997; NICHD Early Child Care Research Network, 1996.

<sup>51</sup> Victorian Government, *Children's services regulation review – feedback report, 2008*, p 18.

3. to ensure, as far as possible, that all persons working in children’s services are suitable for such work.

**Principles (s. 202):**

1. the paramount consideration in the provision of children’s services is the best interests of children
2. children should receive services that meet their individual needs (including the needs of children with a disability) and enhance their physical, emotional, cognitive, social and cultural development.

The NSW Regulation identifies certain staff positions as needing particular qualifications or skills and experience, depending on the services’ nature and the position. Formal qualification requirements are summarised in Appendix 4.

Clause 52(1) of the Regulation specifies the number of qualified teaching staff members who must be employed depending on the number of children attending the service as follows:

<b>Total number of children</b>	<b>Number of teaching staff members</b>
Up to 29 children	0
30–39 children	1
40–59 children	2
60–79 children	3
80 or more children	4

In some respects, the NSW requirements for staff qualifications compare favourably with those in most other Australian jurisdictions.

NSW is unique in that it requires teachers<sup>52</sup> to be employed in all centre-based or mobile services with more than 29 children. Other Australian jurisdictions apply a more rigid distinction between ‘education’ (centre-based services operating as preschools) and ‘care’ (centre-based services operating as long day care centres). They only require university-trained teachers in preschools serving children aged 4–5 years old.

NSW is the only jurisdiction that takes an integrated regulatory approach to care and education of children across all age groups, regardless of the type of centre-based care.

The requirement for a qualified teacher also applies to school-based children’s services. This provision ensures that school-based services retain a strong focus on the needs of young children, in the much larger operating environment of a school.

NSW also has higher qualification requirements for staff working with children under two years than some other jurisdictions. NSW requires that at least one qualified primary contact staff member is available at the service while children under two years are being cared for.

Like NSW, Western Australia also makes provision for staff with specialist qualifications for children under two years. Victoria and South Australia have qualification

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<sup>52</sup> These staff generally hold a three-year university-level qualification in early childhood education.

requirements for staff caring for children under three years. Queensland requires a minimum Certificate III for all staff in 'assistant' positions. Tasmania, the Northern Territory and ACT do not have specific qualification requirements for caring for young children.

## **4.3 Opportunities for improvement**

### **4.3.1 An entry-level qualification**

NSW currently has no formal entry-level qualification requirement for primary contact staff in centre-based and mobile services or for family day and home-based carers. Queensland has introduced a requirement that staff in all 'assistant' positions must have at least a Certificate III in Children's Services.

The review is considering the effectiveness and feasibility of introducing a minimum qualification requirement. Introducing an entry-level qualification would ensure that all staff have a reasonable knowledge and understanding of children's needs before they begin work in a children's service. It has the potential to increase the status and profile of primary contact staff but also has the potential to increase wages; a cost that may be passed on to parents as higher fees.

One option is a minimum qualification for all primary contact staff across all service types – thus establishing a consistent and equitably applied standard. It is acknowledged that many existing staff have the skills and experience to meet this qualification level. Workplace assessment of competency could be an option for existing staff to reduce the likelihood of experienced staff leaving the childcare industry rather than undertaking training.

Alternatively, a minimum qualification requirement could be introduced for primary contact staff in only some service types. On one hand, a minimum qualification requirement could be introduced for primary contact staff in centre-based and mobile services only. Not extending the requirement to family day care and home-based care would recognise that these arrangements are desired for their intimate, family-like nature rather than for the carers' formal qualifications.

On the other hand, a minimum qualification could be required for family day carers and home-based carers only. In family day care settings, the authorised supervisor is not present at the place where the service is delivered. Compared with the supervision of primary contact staff in centre-based and mobile services, the work of family day carers is less directly overseen by the authorised supervisor of the family day care scheme. Home-based carers, as sole operators, must rely on their own skills and training.

Given the nature of family and home-based care environments, it may be more important to ensure that these carers have a minimum qualification. If this option was implemented, consideration would need to be given to recognising the skills and knowledge of experienced carers.

### **4.3.2 Qualified teachers in services licensed for less than 30 children**

The NSW Regulation does not require centre-based and mobile services licensed for fewer than 30 children to employ a qualified early childhood teacher. The review is

considering options to increase children's access to early childhood teachers in services with fewer than 30 children.

There are currently 1,183 centre-based and mobile children's services in NSW that are licensed for less than 30 children.<sup>53</sup>

The lack of a requirement to employ a teaching staff member recognises that smaller children's services have less capacity to carry higher wage costs. The current Regulation, in not imposing this standard, enables the supply of services that may otherwise be unviable, for example in some rural and regional areas.

However, the number of services licensed for less than 30 children is currently almost one third of all NSW's licensed children's services. This indicates that the lack of a requirement to employ a teacher may be an incentive for services to provide less than 30 places. This is a concern given the research evidence showing the clear link between the presence of trained teachers and children's outcomes in formal care settings. Most parents also have a reasonable expectation that their children have access to qualified teachers regardless of the service size.

It is nonetheless acknowledged that the current shortage of early childhood teachers is a significant, short-term challenge to changing the current provisions.

The number of services now operating without a teaching staff member means that many children do not have access to the skills of qualified teachers in leading the development and delivery of programming. This situation does not give children equitable access to the skills of trained early childhood teachers and is at odds with NSW's integrated approach to care and education.

One option is to introduce a requirement that all licensed centre-based and mobile children's services must employ a qualified teacher, regardless of their size. This would ensure all children have access to teachers. However, this option does not recognise that smaller services have less capacity to carry higher wage costs and could result in the closure of some services. Such a proposal could also require a very long transition period given the current shortages in trained early childhood teachers.

A second option is to lower the threshold number of licensed places at which a service must employ a trained teacher. The new regulation could require services with, say, 10 or more children, or 20 or more children in attendance, to employ a teaching staff member. If the benchmark was set at 20 or more children, then this would impact some 1,055 children's services, or around 89% of services with 29 or less licensed places.<sup>54</sup>

Under this proposal, the vast majority of smaller services would need to employ a teacher. This would be in keeping with the intent of the NSW Regulation, whilst continuing to recognise the viability issues of some very small services. If such a measure were introduced, services would need a transition period in which to comply with the new requirements.

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<sup>53</sup> CSIS data extraction, 1 July 2008.

<sup>54</sup> CSIS data extraction, 1 July 2008.

### 4.3.3 Wider application of first aid and child protection requirements

The review presents an opportunity to consider the Regulation's provisions on first aid and child protection training.

At present, cl. 52(3) requires that at least one staff member with a current approved first aid qualification is on the premises at all times when children are being provided a service. Clause 84 requires that all family day carers and home-based carers must hold a current approved first aid qualification.<sup>55</sup>

In centre-based and mobile services, it is necessary that more than one staff member is trained in first aid, to deal with staff rosters over the course of the day. However, the Regulation sets a low standard – only one trained staff member needs to be on duty at any given time.

The review is considering strengthening this requirement. The first object of the Act is 'to ensure the safety, welfare and wellbeing of children in children's services'. Ensuring that staff in children's services are available and equipped to deal with accidents and emergencies is fundamental to achieving this object.

While one person can deal with minor accidents or injuries, these events always impact on a service's capacity to respond to the injured child and continue effective supervision of the other children. Having two first aid trained staff members available to help injured children would ensure that such situations are managed more effectively. It would also share the weight of this responsibility between staff. The review is considering whether to extend the current requirement from one staff member with first aid training to be on the premises when children are present, to two staff members during core opening hours.

The review is also looking at strengthening the Regulation's provisions on child protection. Clause 15(2)(e) requires that the authorised supervisor of a children's service must have successfully completed an approved child protection course.<sup>56</sup> Under cl. 51(4), the licensee must ensure that all primary contact staff of centre-based and mobile services understand their responsibilities under the child protection legislation.

For family day care and home-based care, the provisions are different and apply at the point of licence application. Under cl. 13(2), a family day care licence applicant must demonstrate how he/she intends to ensure that all family day care staff understand their responsibilities under child protection legislation. Under cl. 13(3), a home-based care licence applicant must show that they understand their responsibilities under the child protection legislation.

In the case of family day care and home-based care, child protection requirements do not have to be demonstrated beyond an 'intention'.

The first object of the Act is to ensure the safety, welfare and wellbeing of children in children's services. Ensuring that people who are responsible for children are able to

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<sup>55</sup> The qualifications approved by the Director-General of DoCS for this purpose are *HLTFA301B: Apply First Aid* or *HLTFA402B: Apply Advanced First Aid* under the National Competency Framework.

<sup>56</sup> The qualification approved by the Director-General of DoCS for this purpose is *CHCCHILD1C Identify and Respond to Children and Young People at Risk of Harm* under the National Competency Framework.

recognise and respond to child abuse and neglect is fundamental to achieving this object. Childcare workers are mandatory reporters under the Act and it is important that they understand their responsibilities and respond appropriately when they have concerns for children in their care.

While only the authorised supervisor needs to have child protection training, it is likely that other staff, particularly qualified staff, are also trained in child protection, either as part of their training or provided by the employer.

One option may be to increase the requirement for the number of staff who have undertaken the approved child protection training course. For centre-based and mobile services, this could be put into effect by requiring that all qualified staff members must have successfully completed the training.

For home-based carers the new regulation could require that the licensee has completed the approved child protection training course. For family day care schemes the new regulation could strengthen the current requirement, so that the licensee must show that individual carers understand their responsibilities under the child protection legislation.

#### **4.3.4 Introducing a four-year teaching qualification requirement**

Clause 52(4) of the Regulation for a centre-based or mobile service with more than 29 children requires a certain number of staff to have a university degree or diploma in early childhood education with a minimum of three years full-time study (or part-time equivalent).

As noted earlier, the requirement for university-qualified teaching staff in all centre-based and mobile services (not just preschools) is a hallmark of NSW's integrated approach to early childhood care and education. Other states and territories have lower qualification requirements for services operating long day care services, but similar qualifications for preschool equivalent services.

The Commonwealth Government's early childhood education and care agenda includes a commitment to provide universal preschool in the year before school delivered by degree-qualified early childhood teachers. Its National Early Years Workforce Strategy includes measures to increase the number of early childhood education university places from 2009.

In this context, the Commonwealth has decided that an early childhood education qualification is a four-year qualification. At a state level, the NSW Institute of Teachers also sets the minimum for new teacher graduates at four years of university study, although its ambit does not currently extend to early childhood teachers.

The review presents an opportunity to consider whether the new regulation should continue to stipulate a three-year full-time (and part-time equivalent) university qualification as the minimum standard or whether it should instead require a four-year degree. This would allow for alignment with the Commonwealth's reform agenda, the NSW Institute of Teachers and current university practice. It also enables a gradual rise in teacher qualification standards.

Given the profile of the current body of trained staff and the known teacher shortage, it would not be realistic to apply this requirement retrospectively to existing teaching staff. There would also need to be a transition period.

### **4.3.5 Clarifying the role and responsibilities of early childhood teachers and primary contact staff for children under two years**

The current Regulation provides for licensed centre-based and mobile services to employ qualified early childhood teachers (called the 'teaching staff member') and primary contact staff members with specialist training for 0–2 year olds.

As the presence and leadership of appropriately qualified staff in a children's service is a predictor of quality outcomes for children, the review is considering whether the new regulation should be clearer about the outcomes expected from these positions. Currently the Regulation is silent on the potentially significant role these positions can have in the service.

The new regulation could also clarify their role in developing and overseeing delivery of the early childhood program, and supporting and providing leadership for the work of other staff members. This would make more explicit the benefit the position brings to the service.

## **4.4 Summary**

It is challenging to envisage major improvements to staff qualifications in an environment where there is a shortage of trained early childhood teachers. However, the Commonwealth Government is leading efforts to bolster the size and quality of the early childhood workforce that will take effect over time.

Apart from the issue of staff availability, significant enhancement of staff qualification requirements is very likely to increase the cost of care and childcare fees. This is a fundamental consideration in any decision to improve qualification levels. However, the strong connection between the level of care giver education, childcare process quality and children's outcomes, makes it essential to consider whether NSW's regulatory settings are appropriate or could be improved.

This chapter has put forward a number of proposals for improving qualification requirements in the new regulation. Some proposals are significant in scope, have matching cost implications and would be challenging to implement in the current climate of staff shortages. Other proposals are more contained, could be implemented relatively easily and do not carry major costs.

Proposals have not been costed at this stage. This will be done during preparation of the Regulatory Impact Statement for the new regulation.

### **Questions**

The review is interested in views about proposals on staff qualification levels in the new NSW regulation.

1. In relation to the Regulation's qualified staff requirements, which features of the current Regulation are most important to retain, and what are the highest priorities for change?
2. Which of the proposals outlined in this chapter have the most potential to achieve the outcomes for children intended by the Regulation?:
  - an entry-level qualification for staff across all major service types (centre-based, mobile, family day and home-based care)
  - an entry-level qualification for staff of centre-based and mobile services
  - an entry-level qualification for family day carers and home-based carers
  - employing a qualified early childhood teacher in all services regardless of total number of licensed places
  - employing a qualified early childhood teacher in all services licensed for 10 or more children
  - employing a qualified early childhood teacher in all services licensed for 20 or more children
  - increasing the early childhood teacher requirement to a four-year degree
  - clarifying the outcomes that the Regulation expects from employment of teaching staff members, and primary contact staff members for 0–2 year olds.
3. How important are the proposed changes to first aid training and child protection training requirements to improving outcomes for children?

# 5 SAFETY, HEALTH AND DEVELOPMENT OF CHILDREN

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## 5.1 Introduction

A fundamental objective of regulating children's services is to provide a safe and stimulating environment for children attending formal childcare<sup>57</sup>.

The current Regulation seeks to achieve these goals through the provisions set out in Part 3 – Facilities and equipment and Part 6 – Operational requirements. These parts contain many of the major requirements that ensure the safety, welfare and wellbeing of children in children's services. Together, they cover a total of 49 regulatory requirements grouped into nine broad areas.

Much of the content of these parts of the NSW Regulation is derived from the national standards for childcare that were agreed upon by commonwealth, state and territory ministers in 1993.

Many of the requirements take a highly prescriptive regulatory approach. This level of prescription is warranted in some areas, as these parts of the Regulation are intended to set clear, minimum standards for the physical environment of children's services. The risks associated with non-compliance in these aspects of the Regulation are significant and both service providers and DoCS, as the regulator, require a high level of certainty.

Nonetheless, a number of weaknesses with these aspects have been identified over the life of the current Regulation which, in turn, affects its practical application. Firstly, they lack a logical and coherent structure. Although many requirements between the two parts are interrelated, the fact that they are split across separate parts of the Regulation means the reader has to constantly cross-refer to get a full picture of what is required. For instance, swimming pools (cl. 38) is in Part three and pool safety (cl. 69) is in Part six.

Secondly, there is an inconsistent approach to prescription and enforceability across these provisions, as high levels of prescription are not necessarily attributed to those requirements that present the greatest risks to children. For instance, provisions on animals (cl. 71) are unnecessarily detailed. As well, some requirements are difficult to enforce given the potential for subjective interpretation. For instance, requirements on food preparation facilities (cl. 33) refer to them being 'safe' with little explanation as to what this means in practice.

Thirdly, responsibility for ensuring compliance with these parts of the Regulation is variously applied to the licensee, the authorised supervisor and sometimes to both roles. This can create uncertainty about the responsibilities of each role.

These two sections of the Regulation also include requirements that children's services comply with other legislation. These are generally duplicative and unnecessary. For example, clauses 41 and 48 require children's services to comply with the

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<sup>57</sup> Refer to sections 201 and 202 of the Act.

*Occupational Health and Safety Act 2000*. The review proposes that these references are removed from the Regulation unless there are very strong reasons to keep them.

Finally, there are separate clauses for different service types when the same provisions could often apply to them all.

As a result, these parts of the Regulation are unnecessarily complex and hinder clear interpretation and compliance, precisely where a clear and unambiguous regulatory approach is essential.

## **5.2 Approaches in other jurisdictions**

While the 1993 National Standards provided the basis for the facilities and equipment content of children's services regulations across Australia, some jurisdictions are now taking a different approach to regulating services. In this regard, both the NSW and Victorian governments are moving towards outcomes-based approaches to regulation. In Victoria, much of the prescriptive detail for children's services is now found in additional resources such as best practice guides.

The move to a more outcomes-based approach is also apparent internationally. In the United Kingdom, the national standards for services for children under eight years old, enforced by the Office for Standards in Education, Children's Services and Skills (OFSTED), are based around 14 quality outcomes. Each outcome area includes criteria to support compliance.

## **5.3 Better regulating for children's safety, health and development**

The review presents an opportunity to rethink these standards under a set of outcome areas about the protection, safety and development of children. It would establish a more logical, cogent structure for these provisions that would make the regulation easier to use. It would also give services more certainty about what outcomes for children they should be seeking to achieve.

Each outcome area would have an outcome statement to guide compliance supported by a combination of outcome-based and prescriptive measures. A prescriptive approach would apply to matters that are fundamental to the most important outcomes for children, such as assuring children's safety in the event of a fire for instance.

The outcome areas the review is considering are set out below, together with proposed outcome statements:

### **Outcome Area 1: Safety**

- To ensure proper precautions are taken to promote safety within the setting, on excursions, to prevent accidents and respond to emergencies.

### **Outcome Area 2: Health**

- To promote the good health of children and respond to illness, accidents and emergencies.

### **Outcome Area 3: Staff interactions with children**

- To ensure that the dignity and rights of each child being provided with the service are maintained at all times.

### **Outcome Area 4: Developmental and educational programs for children**

- To stimulate and enhance each child's social, physical, emotional, cognitive and language development.

### **Outcome Area 5: Facilities and physical environment**

- To ensure the premises are safe, secure and suitable for their purpose of promoting children's care and development.

### **Outcome Area 6: Equipment**

- To provide furniture and play equipment which are appropriate for their purpose and help to create an accessible and stimulating environment. They are of suitable design and condition, well-maintained and conform to relevant safety standards.

### **Outcome Area 7: Food and drink**

- To ensure that each child provided with the service is given food and drinks that are nutritious, safe, varied, adequate and appropriate.

### **Outcome Area 8: Documentation**

- To maintain records, policies and procedures, which are required for efficient and safe management, and to promote the welfare, care and learning of children. Records about individual children in the service are shared with the child's parents or carers.

### **Outcome Area 9: Working in partnership with parents and carers**

- To ensure that the licensee and staff work in partnership with parents to meet the needs of the children, both individually and as a group, and that information about the child and the service is shared with parents and carers.

Some of the newly proposed outcome areas reflect current research evidence about early childhood. For example, developmental and educational programs for children responds to the strong body of international research that early childhood is a crucial stage of life in terms of children's development. The prenatal period to the age of six years is now understood as a period of rapid and dramatic development that lays the foundations for competence and coping skills that affect long-term outcomes.<sup>58</sup>

Similarly, the proposed outcome area of food and drink responds to research evidence about children's nutrition and overall health. Childhood obesity is a major health issue in Australia. In 2004, 26% of boys and 24% of girls across school years 2–10 were above a healthy weight. By comparison, only 11% of boys and 12% of girls (aged 5–16 years) were above a healthy weight in 1985.<sup>59</sup>

As an influential and nearly universal system in the years before school, children's services can play a role in reducing childhood obesity through education, encouraging physical activity and providing healthy food options. The current Regulation already includes provisions in this regard, however, children's eating and exercise habits are

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<sup>58</sup> McCain MN and Mustard JF, *Reversing the real brain drain. Early years study final report*. The Founders' Network of the Canadian Institute for Advanced Research, Toronto, 1999.

<sup>59</sup> Booth M, Okely AD, Denney-Wilson E, Hardy L, Yang B, Dobbins T, *NSW schools physical activity and nutrition survey (SPANS) 2004: summary report*, NSW Department of Health, Sydney, 2006.

not predominantly set by children's services, rather they are primarily developed in the home.

The Commonwealth Government has committed to developing new Healthy Eating and Physical Activity Guidelines for early childhood settings. Once developed, these may be included in national standards that further support children's services practice in these areas. At this stage, the review is not proposing to include stricter measures about food and exercise in the new regulation.

Finally, outcome areas of health and safety are also proposed. These recognise that keeping children safe from harm and responding appropriately to accidents, injuries and other health and safety risks, are the most fundamental responsibility of children's services.

The current NSW Regulation includes strong provisions on health and safety. However, there is little data available at the NSW level about health and safety in children's services. The NCAC publishes national data on compliance with its quality assurance system, which indicates that:

- 32% of long day care centres gained an unsatisfactory rating in regard to staff ensuring that potentially dangerous products, plants and objects were inaccessible to children<sup>60</sup>
- 24% of long day care centres gained an unsatisfactory rating in regard to the centre ensuring that buildings and equipment were safe;<sup>61</sup> and 20% of family day care schemes gained an unsatisfactory rating in regard to ensuring that the environment provided for children was safe.<sup>62</sup>

While this is national data that has not been disaggregated for NSW services, it still shows that a significant number fail to comply with health and safety provisions of the quality assurance system.

The review presents a timely opportunity for DoCS to consider how it could enhance its data collection and public reporting about compliance with the Regulation. This is canvassed more extensively in this discussion paper's chapter on enforcement and compliance activities. For instance, on health and safety outcomes for children, DoCS could report on matters such as reportable accidents and injuries at each children's service. This would require services to collect and report on information on a regular basis.

As the regulator, the Department's monitoring and compliance response will be guided by the prioritisation of these outcome areas and through the weighting of penalty points. It is therefore important to develop a shared understanding about where the greatest efforts – of both children's services providers and DoCS – should be focused. For example, less prescription in certain parts of the Regulation could enable more focus by both the regulator and licensees on developmental programming and planning.

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<sup>60</sup> National Childcare Accreditation Council, *Quality Improvement and Accreditation System, Quality Trends Report*, December 2007, p. 11, at [http://www.ncac.gov.au/report\\_documents/OIAS\\_trends\\_dec07.PDF](http://www.ncac.gov.au/report_documents/OIAS_trends_dec07.PDF).

<sup>61</sup> *Ibid.*

<sup>62</sup> National Childcare Accreditation Council, *Family Day Care Quality Assurance, Quality Trends Report*, December 2007, p. 10, at [http://www.ncac.gov.au/report\\_documents/FDCQA\\_trends\\_dec07.PDF](http://www.ncac.gov.au/report_documents/FDCQA_trends_dec07.PDF).

## 5.4 Extra guidance on caring for 0–2 year olds

The purpose of regulating children's services is to ensure that young children are given safe and developmentally-appropriate care. Governments' longstanding regulation of these services is, to a large extent, based on recognition of the inherent vulnerability of young children. Within the population of children who attend children's services, those under two years old are the most vulnerable to poor quality care. This is because of their more intensive care needs and limited ability to communicate with their parents about the care they receive.

In the United Kingdom, the National Standards for full day care, include additional criteria that services must meet when caring for infants under two years. This covers matters that relate solely to babies such as bottle preparation, the availability of a consistent carer at frequent intervals during the day, and qualifications and experience for staff working with under two year olds.

This approach could be incorporated into the new NSW regulation under a separate outcome area for 0–2 year olds. This would provide greater regulatory attention to the particular needs of infants in formal care and give services more specific guidance about the outcomes they should be achieving when caring for babies.

### Questions

1. What are your views about establishing a framework of outcome areas for these regulatory issues? Will the framework provide greater clarity for children's services providers in promoting the safety, health and development of children?
2. Are there specific matters currently covered by Part 3 and Part 6 of the Regulation where you consider a more or less prescriptive approach should be taken in the new regulation?
3. How important is an increased emphasis on early childhood development and education, to improving children's outcomes in the new regulation?
4. What benefits or difficulties could there be in creating a separate outcome area on caring for children aged 0–2 years in the new regulation?

# 6 COMPLIANCE, ENFORCEMENT AND PENALTIES

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## 6.1 Introduction

An overarching reason why the NSW Government regulates children's services is to ensure that minimum standards for services are specified and adhered to.

Ensuring high rates of compliance with these standards is the regulator's primary role. High levels of compliance are critical to outcomes for children, parents and the community in general.

In every regulatory system, there will be participants who fail to comply, either wilfully or inadvertently. Sometimes non-compliance occurs because the regulation is difficult to interpret or inflexible.

While an effective compliance system should encourage licensees to comply to the greatest extent possible, not all will comply or respond to enforcement efforts in the same way. A successful compliance system needs a range of tools that enables it to respond swiftly, proportionately and effectively to different types of non-compliance. As well, it requires that the regulator uses these powers in a consistent and proficient manner.

DoCS has taken steps to refocus the role of its field staff on effective regulatory intervention by:

- reducing their administrative and non-regulatory responsibilities
- providing more expert support in the field
- enhancing training
- introducing other arrangements to increase consistency of decision-making.

Further improvements to the way DoCS administers its role in children's services regulation are planned, but independent of the legislative review.

The review is an opportunity to consider weaknesses in the current compliance, penalty and enforcement provisions of the legislation, and explore options for a more effective compliance system that contributes to the overall quality of children's services in NSW.

## 6.2 Current NSW approach

The NSW legislation currently provides wide powers<sup>63</sup> of entry and inspection to monitor compliance with the legislation and investigate allegations of serious breaches. However actions to enforce compliance are limited to either:

- initiating a criminal prosecution in a NSW Local Court
- taking administrative action to restrict the ability of a person to provide a children's service. The action includes revoking, suspending or varying a licence by imposing a further condition or refusing to grant a further licence.

These are strong measures that are generally best suited to dealing with serious instances of non-compliance. They are appropriate and necessary sanctions in situations where there is either an unacceptable risk to the health, safety and wellbeing of children at the service or deliberate and ongoing non-compliance. However, they are not suitable for all instances of regulatory non-compliance.

For example, in circumstances where regulation breaches are relatively minor or few in number, prosecution is neither an appropriate nor desirable response. Instead, the focus should be on ensuring that the problem is fixed quickly and the service complies with the Regulation.

The current legislation provides few methods for responding appropriately to the different nature and incidence of non-compliance. The only options currently available to the regulator to deal with less serious non-compliance are persuasion and negotiation. Officers issue letters to inform the service of breaches of the legislation and that they must rectify the breaches. When services do not comply, officers seek to gain compliance through encouragement, persuasion and negotiation with the licensee.

While some licensees respond quickly to any identified breaches, DoCS experience is that others are slow to comply or do not comply at all. If a service does not comply, the legislation provides no statutory means of enforcing and encouraging compliance, other than to take legal action in the Local Court or consider altering the terms of a service's licence. In practice, this lack of enforcement options gives little incentive for some providers to prevent or rectify non-compliance, and results in many instances of unresolved non-compliance.

## 6.3 Options for an improved approach to compliance and enforcement

The review is considering options for a more layered enforcement system. This would give the regulator a wider range of enforcement tools to deal quickly, effectively and proportionately with different levels of non-compliance by children's services providers.

Literature on enforcement in regulatory systems suggests that the elements required for an effective enforcement framework are that the:

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<sup>63</sup> Section 235 (Entry without a warrant into premises – generally) and s. 241 – Powers exercisable on entry and inspection allow authorised officers to monitor compliance with the provisions of the legislation, investigate complaints and report incidents involving the health, safety and wellbeing of children attending licensed children's services.

- penalty should be proportional to the likely harm
- detection of a breach is likely
- response to a breach is swift and predictable<sup>64</sup>
- duty holders are motivated to prevent non-compliance by the design of the compliance and enforcement framework.

Other industries with comparable levels of regulation have more extensive and nuanced enforcement frameworks. Such frameworks are found in the fields of occupational health and safety, industrial relations and environmental protection. The suite of enforcement methods that apply to these sectors enable regulators to tailor their responses to the seriousness of non-compliance in question, and the differing motivations of the regulated parties.

The review is considering the need for enforcement methods that can encourage licence holders to:

- develop management systems that prevent non-compliance
- focus on fixing problems as quickly as possible
- concentrate resources on providing quality children's services, rather than risk involvement in expensive and time-consuming prosecution, which may result in a criminal conviction.

The options that are of particular interest to the review are discussed below.

### **6.3.1 The proportionality of penalties**

Under NSW's current compliance and enforcement model, breaches of the Regulation have a reasonable likelihood of detection. DoCS officers regularly and comprehensively monitor services and inform licensees in writing of any breaches that are identified during visits. However, some licensees have little incentive to comply with the Regulation because of the limited enforcement options and as non-compliance rarely results in a penalty.

Penalties need to be proportional to the likely harm caused by the particular instance of non-compliance. This is a weakness in the current legislation, as the link between the seriousness of a matter and the level of penalty is uncertain. The new regulation is an opportunity to create better alignment between the nature and level of the non-compliance and the enforcement sanctions available, to encourage compliance and ensure resolution of on-going or serious non-compliance.

The review is interested to hear views about which instances of non-compliance with the Regulation pose the greatest risk to children. For example, some areas which can result in a serious risk of harm to children are:

- staffing breaches (failure to comply with requirements on the total number of staff, staff:child ratios, presence of qualified staff and excursion ratios)
- adequate record-keeping breaches
- hazards identified in the physical environment of the service

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<sup>64</sup> Tietenberg T H, *Environmental and natural resource economics*, Harper Collins Publishers, New York, 1992.

- breaches about hygiene or food preparation
- breaches about the quality of the educational program.

The review is an opportunity to clarify in the new regulation which types of non-compliance cause the greatest risk of harm to children.

### **6.3.2 Compliance notices**

A compliance notice is issued when, during an inspection, an officer identifies a breach which they believe is likely to continue. The notice sets out what action the service provider needs to take to correct the breach, and specifies the time frame in which it must be done.

Once the time frame specified on the notice has elapsed, the service is visited to ensure that all matters are satisfactorily dealt with.

A compliance notice does not impose a penalty on a service but instead aims to direct compliance more effectively. It encourages non-compliance to be resolved quickly after it is detected.

Failure to follow up on a compliance notice would be an offence unless the person has a reasonable excuse for the non-compliance. The offence may attract a penalty infringement notice or prosecution action.

### **6.3.3 Penalty infringement notices**

A penalty infringement notice (PIN) imposes a fine for particular breaches of the legislation. It is intended to motivate prevention of non-compliance and speedy rectification of non-complaint behaviour.

Once the penalty is paid and the breach rectified, the matter is finalised. No criminal conviction is recorded. The person served with the PIN may object and choose to have the matter resolved in court.

PINs may be appropriate for a range of offences and both minor and serious breaches. The offences that could be dealt with by PINs would be prescribed in the new regulation.

The decision to issue a PIN would only be made according to clear guidelines about the breaches that warrant such a notice. To ensure transparency these guidelines would be public. While PINs are issued as 'on the spot' fines in some regulated fields, this approach is not proposed for NSW children's services. Rather, a PIN would only be issued after internal processes to ensure consistent application and guard against any excessive or inappropriate use.

### **6.3.4 Enforceable undertakings**

An enforceable undertaking is a written commitment to carry out remedial measures in lieu of prosecution. Typically, an enforceable undertaking is entered into as an alternative to court action when relevant legislation is breached. They are enforceable in court. A number of state and federal government regulators use enforceable undertakings as part of their compliance/enforcement strategy.

Such undertakings are available only within clearly articulated legislative parameters to avoid the misuse of power and uncertainty for service providers. The acceptance of an undertaking would be governed by strict guidelines.

Enforceable undertakings are seen as an efficient and flexible way of dealing with breaches of legislation, as well as avoiding litigation costs. They provide an open and effective way of getting companies and individuals to comply with the law. They often achieve outcomes which could not have otherwise been sought from a court.

The main advantage of an enforceable undertaking is that its outcomes can be practical. They also have the potential to create sustainable improvements in the quality of the service being delivered, rather than merely correcting problems as they arise.

The power to enter into enforceable undertakings must be provided by legislation and would involve amendments for:

- entering into the undertaking
- maintaining a register of enforceable undertakings
- publishing the undertaking
- keeping a record of the undertaking
- withdrawal and/or amendment to the undertaking
- consequences for contravening the undertaking.

Most legislation provides for an applicant to contact the government agency to apply to enter into an enforceable undertaking.

For example, the Queensland Department of Industrial Relations (QDIR) uses enforceable undertakings under the *Workplace Health and Safety Act (Qld) 1995*. QDIR has a three-member expert advisory panel which reviews applications for enforceable undertakings. This panel makes recommendations to the Director-General. The QDIR legislation also creates an offence for failing to comply with an enforceable undertaking.

Other approaches restrict the use of enforceable undertakings to matters that are the subject of a court application. Enforceable undertakings are only considered where applicants make some sort of admission.

### **6.3.5 Clarifying investigative powers to compel people to attend interviews and produce documents when the CSA is not on the premises**

The legislation currently gives authorised officers, known as Children's Services Advisors (CSAs), powers to enter and inspect premises at any time without needing a warrant or to notify the licensee of the service. Once on the premises, CSAs have wide powers to inspect, collect evidence, remove documents and require all people on the premises to answer questions and furnish information.

These powers are important because they allow CSAs to respond quickly to complaints or serious incidents involving children at services. However, they can, at present, only be exercised when the CSA is on the premises of the service.

The review is considering whether these powers could be broadened so that authorised officers can compel individuals to attend interviews offsite and produce documents, without the CSA actually being at the premises of the children's service.

Extending these powers would provide greater flexibility and convenience for both the regulator and children's services. For example, it is difficult to interview staff at a children's service during working hours, as a service must still have the required number of staff to supervise children, so that it does not breach the Regulation.

In addition, as the licensee will not necessarily work at the children's service, it would be easier if interviews could be held in a location other than just at the premises of the licensed service.

Extending these powers to compel people to attend would also enhance DoCS investigations into serious incidents or allegations of past non-compliance. This often involves interviewing licensees, authorised supervisors or staff, who may have been witnesses to the event. If witnesses are not on the premises at the time of entry or have since left the licensee's employment, DoCS has no powers to require people to attend an interview.

In addition, where documents about the management of the service are kept off premises, the current legislative powers do not enable these to be produced. DoCS officers would benefit from increased powers in the new regulation, to require services to produce relevant documents for investigation.

### **6.3.6 Enhanced information collection and public reporting to increase the knowledge of parents about licensed services, and significant events that occur in services**

The review proposes that DoCS be more publicly accountable for reporting on its regulatory activities. This enables greater transparency about, and openness with, the regulated sector. Making information about regulatory activities publicly available will provide greater incentives for compliance. It also helps people make more informed decisions about the services they want for their children.

The Department has already begun to move down this path. It publishes details on its website about licensees found guilty by a court of offences under the NSW children's services legislation and/or where DoCS has taken action to suspend, revoke or place additional conditions on their licence.

In addition to these measures, the review is an opportunity to consider other options for increasing information available to parents about licensed services. For example, the legislation could require DoCS to make available the licence details for all licensed services in NSW on its website. This would help parents find potential services for their children, and increase information about who is responsible for service provision.

Another option to consider is whether the regulator should get a broad legal power to advise parents, or require the licensee to advise parents, of significant matters about the conduct of the service, or that are in the public interest. This might include:

- inspections of the service for regulatory compliance
- investigation of a service and the result
- rates of compliance and non-compliance by the service

- serious accidents and injuries to children at the service
- number of substantiated complaints made about a service.

At present, DoCS collects information about most of these matters but none of it is publicly available. Improved information collection and analysis capability on regulatory compliance is a priority for DoCS. The benefits of this capability can be improved targeting of monitoring and enforcement efforts to services with poor compliance records. This is particularly relevant where non-compliance relates to Regulation breaches that pose a greater risk of harm to children. These measures allow for greater transparency about the industry, and the activities and effectiveness of the regulator.

If this proposal is adopted, the obligation to advise parents of such matters could rest either with the Department and/or with the licensed service. If it were the licensee, it may also be necessary to include a range of offences to deal with situations where services fail to make the required information available to parents.

### **6.3.7 Adverse publicity orders**

An adverse publicity order is a court order that requires the licensee to disclose or publish specified information about an offence of which they are found guilty.

Where regulators use adverse publicity orders, they are intended to increase the knowledge of, and information available to consumers, and to deter non-compliance. The adverse publicity order option differs from DoCS current approach, where it publishes basic information on its website about successful prosecutions that are already on the public record.

If an adverse publicity order option was created it would in practice go further. For example, the licensee holder would need to make information public about what non-compliance had occurred, why it had occurred and what steps were being taken to prevent re-occurrence.

There can also be some drawbacks to adverse publicity orders, for example, their effect can be unpredictable and encourage the use of 'counter-publicity' to frustrate the effects of the court order.

The review is interested in views about the proposals set out above.

#### **Questions**

1. In your view, which breaches of the Regulation pose the greatest risks to positive outcomes for children, and should be the focus of DoCS compliance and enforcement efforts?
2. Which of the options outlined in this chapter will be most beneficial to the outcomes for children that the Regulation seeks to achieve?

# 7 PROBITY AND RELATED CHECKS FOR LICENCE APPLICANTS

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## 7.1 Introduction

Children's services legislation in NSW establishes prerequisites for being granted a licence. Such prerequisites are common to licensing models which seek to set the right conditions for desired regulatory outcomes. In regulatory literature, prerequisites to enter an industry are often referred to as 'entry tests'.

Entry tests are not intended to set a barrier to the supply of services. Regulators typically use them to manage risk, by assessing whether a prospective operator can reasonably be expected to provide a compliant service, before granting a licence. Such tests commonly require an applicant to show that they have the qualifications, skills and abilities, resources, understanding of the nature of the activity to which the licence applies, and are of good character for the particular activity.

Entry tests impose costs on the industry but can have a major benefit in terms of protecting the interests of children. Caring for children in the absence of their parents involves a high degree of trust and responsibility. Parents and the wider community expect government to ensure, as far as possible, that people who are responsible for the care of children have always acted in the best interests of children.

National Competition Policy<sup>65</sup> is relevant to this discussion. It states that regulation should not restrict competition unless it can be shown that the benefits of the restriction as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

## 7.2 Current NSW approach

Entry tests are intended to support the objects of the Act which include to:

- ensure the safety, welfare and wellbeing of children in children's services
- ensure, as far as possible, that all persons working in children's services are suitable for such work.

In NSW children's services, entry tests are applied when a prospective or existing licensee seeks to establish a new children's service or a licensee wants to renew their licence.

NSW legislation includes broad and very specific entry requirements. The Regulation also requires a licence applicant to provide documents so that DoCS can assess the

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<sup>65</sup> *Competition principles agreement 1995*. This is one of the three intergovernmental agreements that underpin the National Competition Policy.

applicant's suitability against the entry tests. The current tests and information gathering provisions are:

**General requirements (ss. 207 & 220 of the Act; cls. 11 & 117 of the Regulation)**

- power to refuse to grant a licence if there is an unacceptable risk to safety, welfare, and wellbeing of children
- power for probity checks on all persons engaged in operation and management of a children's service
- broad 'fit and proper' requirement
- probity checks must be conducted to establish if licence applicant is fit and proper.

**Skills and experience (cls. 9, 11 & 14 of the Regulation)**

- qualifications, experience and training
- involvement in youth-related activities
- qualifications
- two work or training-related written references
- skills, experience and knowledge requirements, specifically for home-based carers.

**Probity (cls. 9, 11 & 119 of the Regulation)**

- criminal convictions
- charges
- disciplinary action or departmental proceeding
- two written character references
- Australia-wide criminal record check
- check for relevant apprehended violence orders or completed disciplinary proceedings
- relevant check of previous employment history and other activities
- assessment of risk to children.

**Other (cls. 7, 11, 18 & 109 of the Regulation)**

- the licence applicant's right to occupy the licensed premises
- provision of statements and undertakings about the facilities, equipment, administration and policies of the service
- may be required to provide 'other' information to demonstrate the applicant is fit and proper (i.e. not limited by cl. 11(3)(a-c))
- onus on licensee to disclose a change in capacity to provide a children's service (including financial circumstances).

As this list shows, the current tests to enter the children's services sector are extensive. In practice, the wide scope and administrative burden of complying with these tests may unnecessarily discourage people from entering the industry or participating in the management of organisations that run children's services. For example, this can be a

problem for community-based children's services seeking to establish a management board from parents involved with the service.

## 7.3 Options to revise entry tests

The review is considering whether the entry tests are still a good fit for the structure, risks and management arrangements in children's services. The review is an opportunity to remove tests that no longer achieve their original intent and consider whether any new tests should be introduced.

The review believes that appropriate entry tests should be effective and proportional, readily understood, cost-effective and applicable, irrespective of the entity that is providing the children's service.

For the purposes of operating a licensed children's service, the overriding aim of any entry test should be to protect and reduce risk to children who attend the service. The NSW Regulation already seeks to achieve this by:

- limiting licence applicants to persons or entities that own or lease the premises, or have some other approved arrangement relating to occupation of the premises (cl. 7(1))
- requiring that an individual licence applicant must be at least 21 years old (cl. 7(2))
- establishing who the entry tests will apply to in circumstances where the licence applicant is an individual, a public authority, a non-government organisation, or if the applicant is a corporation, extending the entry tests to the management of any corporation that has a majority shareholding in the applicant (cl. 9(1))
- requiring an applicant to establish his/her identity (cl. 10)
- requiring an applicant to self-declare any convictions, charges or disciplinary proceedings for child-related offences which are then double-checked by DoCS through background checking (cls. 9 & 119)
- requiring an applicant to give a range of undertakings about facilities, equipment, administration and policies of the service (cl. 18).

The review considers that the tests could better focus on evidence that a licensee may pose a risk to children, that is, criminal convictions for offences against children and child protection-related matters. For example, in Victoria, a person found guilty of an offence against the *Children, Youth and Families Act 2005*, or any previous corresponding Act, will not qualify as a fit and proper person.

One option for NSW is to extend the current provisions to include any prosecutions under the *Children and Young Persons (Care and Protection) Act 1998* and the *Commission for Children and Young People Act 1998*.

For licensees seeking to renew their licence, the review is considering whether the regulator should take into account their previous history of compliance (and non-compliance) with the Regulation. For example, compliance and enforcement information that DoCS holds could be used to assess a licensee's capacity and willingness to ensure the safety, welfare and wellbeing of children, as required by the legislation.

There are clear arguments for strengthening tests that focus on an individual's probity. However, the review suggests that some existing tests contribute little to assessing a

licence applicant's fitness for the task of operating a children's service. These tests impose an unnecessary administrative burden for both the licence applicant and the regulator.

The requirement for two written character references (cl. 11(3)(b)) is one example. These references are easily falsified and add little value if other probity tests are met. If a question about a person's character does arise during fit and proper testing, it could be pursued via the general powers in the legislation.

The review considers that requirements about the qualifications, experience and training of the prospective licensee (cls. 9(2)(f)-(g) and 11(3)(a), (c)) are also outmoded, duplicative and impose a considerable paperwork burden. The legislation does not intend or require that the licence holder must be intimately involved in the day-to-day operation of the service, and the industry structure reflects this arrangement.

There are few arguments for asking a licensee to provide relevant child-related qualifications, experience and training given that these are not genuine prerequisites for the licensee role. The review proposes that requirements for every service to employ suitably qualified staff are maintained or strengthened (see Chapter 4 on qualifications).

Finally, while not strictly an entry test, the current Regulation requires a licence applicant to provide a range of personal information documents to prove their identity (cl. 10). These requirements exceed the 100-point identity test that is commonly applied in other regulated industries and for purposes such as applying for a passport, opening a bank account or undertaking a Working With Children Check. One option is to reduce the amount of identity information that licence applicants must provide and replace it with the standard 100-point identity test.

## Questions

1. In relation to the Regulation's probity provisions, which features of the current Regulation are most important to retain?
2. What are your views about the proposed removal of the following entry tests to hold a children's services licence from the Regulation?:
  - qualifications, experience and training
  - involvement in youth-related activities
  - qualifications
  - two written character references
  - two work or training-related written references.
3. What are your views about the proposals to strengthen the probity tests in the new regulation to:
  - include any prosecutions under the *Children and Young Persons (Care and Protection) Act 1998* and *Commission for Children and Young People Act 1998*
  - require DoCS to take into account any history of serious non-compliance with the Regulation when considering applications for licence renewals.

# 8 LICENSING MODEL

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## 8.1 Introduction

This chapter discusses the pros and cons of current NSW children's services licensing arrangements, proposes some objectives against which improvement options might be tested, and describes some of these options.

## 8.2 The benefits of licensing

A licensing scheme similar to that in NSW is a central feature of children's services regulation in each Australian state and territory. Licensing as a regulatory method is well-suited to children's services because it:

- is preventative – by working proactively to minimise risk of harm
- establishes pre-conditions to market entry – for example, probity tests and certainty about who is responsible for operating a children's service
- provides a level of assurance to parents, carers and the community – that children's services meet at least minimum standards, which are sufficient to ensure the health, safety and wellbeing of very young children
- is readily designed to facilitate enforcement – for example, information and reporting requirements can help tailor enforcement effort. As well, a licence model sets out clearly how, when and where a service will operate, before it is established.

## 8.3 Some weaknesses of licensing models

Literature<sup>66</sup> identifies some inherent weaknesses with licensing as a regulatory method. For example, licensing:

- is prone to setting unreasonable restrictions to market entry
- often involves administrative mechanisms that impose a significant compliance burden
- unnecessarily limits business practices and innovation.

Some of these weaknesses are evident in NSW children's services Regulation. For example, in NSW some 1,350 licenses (40%<sup>67</sup> of total) were held by licensees who operated more than one children's service. The current Regulation requires these providers to replicate parts of the licence application process each time they apply for a licence. Some of these processes are repeated at licence renewal every three years.

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<sup>66</sup> Smith F and Ward R, 'Regulatory architecture: practitioner perspectives' in *Essays in Australian Consumer Affairs*, Department of Justice, Victoria, 2005.

<sup>67</sup> CSIS data extraction, 25 June 2008.

The progressive centralisation of DoCS licensing is lessening some of the administrative load for providers, but the current model still generates unnecessary burden for both the industry and regulator.

Another possible weakness of licensing is unnecessary restriction on market entry and innovation. There may be evidence for this in NSW where there is a large number of very small providers. The current licensing model may inhibit providers from growing or amalgamating their businesses because opportunities for economies of scope and scale are diminished by the model's complexity.

The administrative burden of the NSW children's services licensing system was identified in the NSW Independent Pricing and Regulatory Tribunal's 2006 report, *Investigation into the Burden of Regulation and Improving Regulatory Efficiency* (IPART Report). This report noted that organisations, such as local government, that had multiple services of different types found the licensing requirements especially onerous.

An inefficient licensing system has the potential for negative impacts on the quality of children's services and outcomes for children. Business resources and attention may be diverted from the core task of early childhood education and care by the administrative complexity of licensing. If so, then this is a further argument for reforming the present licensing model so that its positive features are kept and costs minimised.

There are many alternatives to licensing as the basis for regulation, such as accreditation, coregulation and negative licensing. For example, coregulation can involve industry and government jointly developing rules, and typically, responsibility for ensuring compliance is then shared between them. This type of regulation can be most useful in sectors which are relatively homogenous, where results are readily assessable, and risks from non-compliance are relatively low. The review does not consider these are features of the children's services sector.

In selecting the optimum regulatory model, the review is aware that COAG is promoting an agenda of greater regulatory alignment between the states and territories. In this context it may be untimely for NSW alone, to move away from a licensing model.

## **8.4 Retention of a licensing model**

The review proposes that the new regulation retain a licensing system, but that it is significantly streamlined to reduce regulatory burden. The system will need to retain the positive features of licensing which can best safeguard the interests of preschool age children, and meet the expectations of the broader community.

The rationale for maintaining a licensing system can be summarised as follows:

- the positive attributes of licensing make it ideally suited to regulation of children's services
- alternatives to the licensing model, such as negative licensing, simple registration, or certification, are unlikely to adequately deliver the outcomes that are sought from regulation of early childhood services (see section 1.7.2)
- there is significant room for streamlining the current system to reduce regulatory burden, while maintaining the benefits of licensing
- it would be untimely for NSW to move radically out of step with other jurisdictions, given the goals of the COAG early childhood reform agenda.

While licensing is well-suited to children's services regulation, it is preferable to have a mix of regulatory interventions, including statutory regulation for minimum standards. This is necessary to address the diverse motivations of providers and the degree of risk associated with market failure.

The review proposes that the new regulatory framework for NSW children's services will deploy a greater range of regulatory tools than at present. These new approaches will include:

- stronger and broader powers for sanctions and enforcement
- greater responsibility on the regulator to be transparent about its regulatory activities, to deter non-compliance and increase the knowledge of parents
- a more strategic and evidence-based approach to monitoring and enforcement.

Options for some of these approaches are considered in other chapters of this discussion paper. However, to be successful, a streamlined licensing model should be developed with these approaches in mind. For example, greater transparency of regulatory effort and effect may mean licence holders have to divulge more information about their operations than at present, and this in turn could require particular licence conditions.

The rationale for, and costs of, retaining a licensing system will need further consideration when a Regulatory Impact Statement is prepared for the new regulation.

## 8.5 Tests for a new licensing model

In considering options for an improved licensing system, the review proposes five tests against which any new proposals can be tested. An improved licensing model will provide:

- certainty about who is responsible for the care and education of children when they attend a children's service. This is essential to outcomes for children, parents and regulatory compliance
- a system that maintains or improves on current minimum standards in those areas that are most critical to child safety, health and developmental outcomes
- ease of administration, cost-effectiveness and regulatory efficiency
- no unnecessary barriers to innovation in service delivery, reshaping supply availability of suitable premises and industry reconfiguration
- common applicability, as far as practicable, across all service types.

The review is particularly interested in views on these objectives.

## 8.6 Reforming the licensing model

This section discusses proposals for improving the present licensing system. It is expected that other options and ideas will emerge during consultation on this discussion paper.

**It is important to note that the proposals discussed below can be considered individually or in conjunction with one another.** Analysis of the costs and benefits

of competing proposals will be provided in the Regulatory Impact Statement for the new regulation.

Under all licensing reform proposals outlined below, primary responsibility for compliance would remain with the licence holder.

### **8.6.1 Replace one licence for each service operated by a licensee with a master licence**

A 'master' licence would be a new type of children's service licence. Rather than the current model where each licence is for a particular service, a master licence would cover all the services that a licensee operates.

Many of the same features and safeguards of the current licensing model would be retained under a master licence. For example, the role of an authorised supervisor would be kept, along with the need to specify premises where this was appropriate. Applying for a master licence would still be a prerequisite to providing a children's service in NSW. The requirement that a licensee undertakes to comply with the Regulation would also be retained. A benefit of the master licence is that additional licences are not needed to operate multiple services.

A master licence could be for only one service, or for a number of service types. For example, a local council may operate four long day care services, two preschools, a mobile service and a family day care scheme. Under this proposal, there might be one licence for centre-based and mobile services, and another licence for the family day care scheme. Alternatively, one licence could cover all eight services.

To be workable, the regulator would need the power to require the licence holder to provide information about each children's service that they operate. This could be a reporting requirement, a licence condition, or a system of compulsory service registration.

While the concept of a service premises would be kept, the relationship between the master licence and the premises would change. Under the current model these elements are closely linked, meeting the objective of creating certainty about who is responsible for service provision. If a master licence model is adopted, care would be needed to ensure this positive attribute of the licensing model is retained.

This proposal has advantages for both the industry and the regulator, in terms of reduced paper flow and administration. The option could also allow a licence holder to operate no services. For example, a small community-based service may close temporarily while its premises are refurbished, or it moves to new premises. In this example, the licence would continue unaffected during these events.

If this model were adopted there would need to be a re-design of compliance and enforcement arrangements. The industry and consumers must clearly understand which events would lead to enforcement action against the licensee for a particular premises, and where the regulator takes action on the licensee's licence. To increase certainty for all parties, this option could be designed so that only licence holders could be approved to operate a children's service.

### **8.6.2 A longer period of licence**

The current model has a fixed licence period of up to three years. Instead, a licence could be issued for up to five years. In simple terms, this measure alone could reduce

the approximately 1,150 licence renewals each year by 40%, to around 690. The savings from this measure would benefit both the industry and regulator, and may be passed on to parents in some markets.

### **8.6.3 Premises registration by non-licence holders**

This approach varies from the first proposal in allowing a non-licence holder to have children's services premises registered, but not deliver that service. For example, a local council or an entrepreneur may want to develop new premises, but be unwilling to have ongoing responsibility for managing the children's service. In this scenario, the local council or entrepreneur could use their expertise to develop the premises and have it registered (approved to operate in principle). They would then need to find a suitable entity to hold the licence and deliver the children's service.

A major benefit of this approach is that it could stimulate the market for the supply of new and refurbished premises for children's services. For example, a developer may specialise in constructing and/or converting new premises that come 'pre-registered' into the market. This allows the developer to best use their expertise in efficient supply of suitable premises. The licence holder uses their professional skills in providing early childhood education and care, after purchasing or leasing ready-to-occupy premises. Nothing in this option would preclude licence holders from registering premises.

### **8.6.4 Introduce greater self or third-party certification to the licensing model**

The current approach includes some elements of self-certification and third-party certification. For example, licence applicants declare that they will meet certain aspects of the Regulation. The regulator grants a licence expecting this, and does not need to see the service operating beforehand. Similarly, the regulator can accept a statement from an architect that the premises comply with Part 3 of the current Regulation, and issue a licence on this basis.

Under this proposal, the draft regulation would incorporate proposals that extend these types of arrangements. For example, a licence holder could be approved to register additional children's services and operate them, as long as they were registered, but each registration would be automatic and not subject to decision-making by the regulator.

The potential benefits of this type of arrangement could include:

- significant cost benefits via an automatic process of information capture and maintenance (web-based licensing systems)
- introduction of a significant incentive for compliance, if this option were restricted to just those licence holders who have a strong history of compliance.

### **8.6.5 Introduction of a licence fee**

At present the Government bears the full cost of the regulator's activities. The introduction of a licence fee would make the regulator's role more cost-effective and efficient, as it allows for a degree of cost recovery. This would increase costs to the industry, which in some markets may be passed on to consumers. Licence fee administration is also an additional cost to the regulator.

If fees were introduced, the basis on which the fee levels are set would need to be clear to ensure transparency of the process. The design of the fee model would also be critical. For example, cost recovery models should improve equity, so that those who use additional administrative resources bear the costs. In practice, one way this might work is that a licensee who wants a quick assessment may need to pay a higher fee. It would be essential that fee levels were not set so high that they could be seen as a tax on services.

At present, fees are charged in Queensland, Victoria and Tasmania, and at the Commonwealth level. The Victorian model is a useful example as it includes a graded schedule of fees, which addresses the issue of equity, by being pegged to the estimated amount of administrative resources used.

## **8.7 Related considerations – the role of authorised supervisors**

An aspect of the current licensing model not discussed above is that of the authorised supervisor. Licensees nominate an authorised supervisor in their licence application.

There are opportunities to revise the regulatory provisions for authorised supervisors to improve clarity and certainty for all parties. The review would welcome comments on this issue, however, it does not propose any fundamental revision of the place of authorised supervisors in the NSW regulatory scheme.

The review proposes that the new regulation retain a central role for authorised supervisors, as qualified on-site managers and representatives of the licence holder. However, under options one and three above, there may be some arguments for strengthening the requirement for children's services to operate with an authorised supervisor. For example, if the process of starting up a new service became much simpler for some licensees, then parents might reasonably expect some greater level of certainty around the presence of an on-site licensee representative.

### **Questions**

1. In relation to the Regulation's licensing model, which features of the current Regulation are most important to retain, and what are the highest priorities for change?
2. What are your views on the 'tests' that should be applied to any new licensing models?
3. Of the proposals outlined in this chapter, which have the most potential to achieve the intended outcomes of children's services regulation, particularly for providers and government?

# APPENDICES

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## Appendix 1 Industry Reference Group – terms of reference and membership

### INDUSTRY REFERENCE GROUP FOR THE REVIEW OF THE CHILDREN'S SERVICES REGULATION 2004

#### TERMS OF REFERENCE

Consultation on children's services regulatory policy is important to ensure that the legislative framework for children's services is effective in achieving the primary regulatory outcomes of ensuring the safety, welfare and wellbeing of children in children's services, while remaining responsive to the current and future arrangements for the provision of children's services in NSW.

The Industry Reference Group has been established as the lead forum for discussion between the industry and the Department of Community Services during the children's services regulatory review process, and to provide expertise and industry knowledge to inform the review of the Regulation.

In keeping with this goal, the Industry Reference Group will focus on providing:

- expertise and industry knowledge to inform the review of the Children's Services Regulation 2004
- advice to the Department of Community Services on possible approaches to the new regulation
- advice to the Department of Community Services on the process by which the Children's Services Regulation 2004 is reviewed, including the approach to sector consultation and communications, and suitable sources of information about the children's services sector.

#### MEMBERSHIP

- ABC Developmental Learning Centres
- Association of Independent Schools
- Campbelltown City Council
- Catholic Education Commission
- CFK Childcare Centres
- Child Care NSW
- Community Child Care Co-operative
- Country Children's Services Association
- Early Childhood Australia
- Ethnic Child Care, Family and Community Services Co-operative
- Family Day Care Carers' Association of NSW

- KU Children's Services
- Local Government and Shires Associations
- Mobile Children's Services Association
- NSW Department of Community Services
- NSW Department of Education and Training
- NSW Family Day Care Association
- Occasional Care Association
- SDN Children's Services
- Secretariat of National Aboriginal and Islander Child Care (SNAICC)
- Unions NSW
- Uniting Care Children's Services

## Appendix 2 NSW industry profile

### NSW INDUSTRY PROFILE AS AT 25 JUNE 2008

#### Total number of licensed children's services by service type:

Service type	Number of licensed services	%
Centre-based services	3,161	91.8
Mobile services	60	1.7
Family day care schemes	104	3
Home-based care	122	3.5
<b>Total</b>	<b>3,447</b>	<b>100</b>

NB: In this table, the count for family day care, is of licensed 'schemes' and it should be noted that these schemes are responsible for some 3,632 carers.<sup>68</sup>

#### Number and profile of licence holders:

Licensees with	Number of licensees
1 service	2,100
2–5 services	254
6–9 services	24
10–14 services	3
15–19 services	4
20 or more services	8
<b>Total</b>	<b>2,393</b>

#### Number of licensed places (children 0–6 years) per day:

Age group	Maximum capacity of licensed places
0–2 year olds	36,488
2–3 year olds	67,774
3–6 year olds	119,866
<b>Total</b>	<b>152,109</b>

NB: The total in this table is less than the age group sub-totals because many licences are issued so that they are flexible within their total capacity.

#### Distribution of children's services by DoCS region:

DoCS region	Number of licensed services	%
Sydney Metro Central	1,085	31.5
Sydney Metro South West	432	12.5
Sydney Metro West	547	15.9
Western NSW	326	9.4
Northern NSW	388	11.2
Hunter/Central Coast	371	10.8
Southern NSW	300	8.7
<b>TOTAL</b>	<b>3,447</b>	<b>100</b>

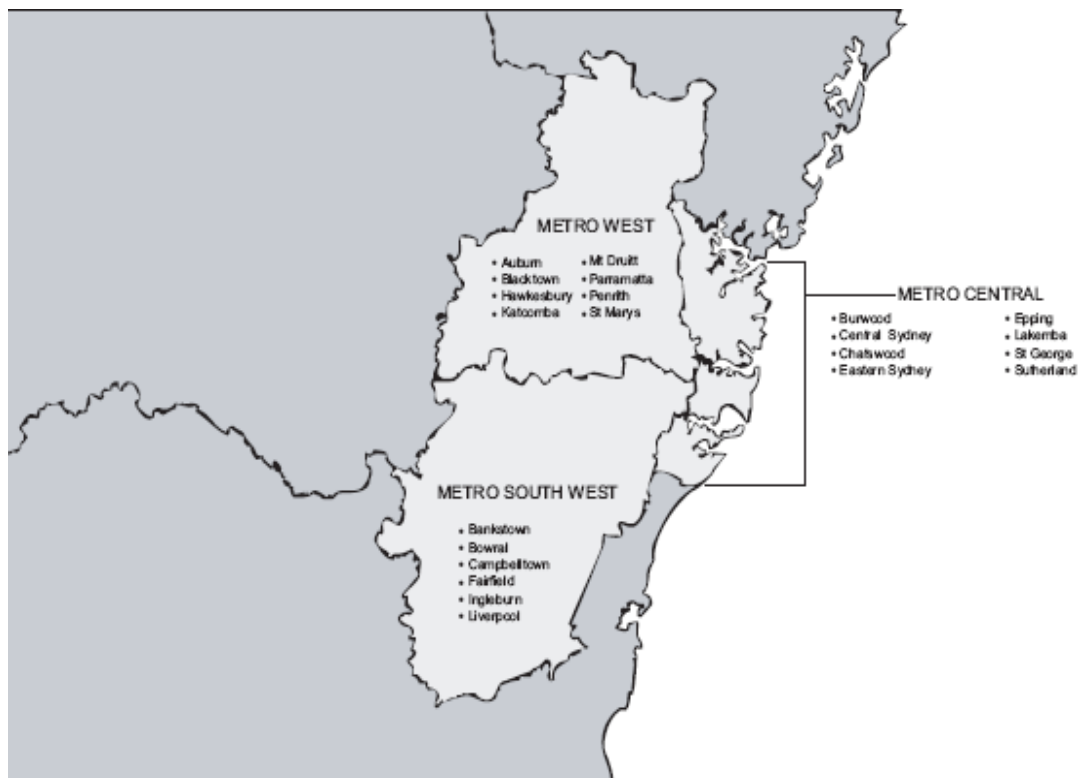
<sup>68</sup> Department of Education, Employment and Workplace Relations, 2006 Australian Government Census of Child Care Services, Department of Education, Employment and Workplace Relations, Canberra, 2006.

## Appendix 3 DoCS regions



2.

## DoCS metropolitan regions



## Appendix 4 Formal qualifications of children's services staff

Position	Clause	Requirement for formal qualifications
<b>Centre-based and mobile services</b>		
Authorised supervisor	Cl. 15(2)&(3)	A degree or diploma in early childhood education from a university (course duration of 3 years full time); or A Child Care Certificate, a Certificate of Child Care Studies or an Associate Diploma of Social Science (Child Studies) from a registered training organisation; or A Diploma of Community Services (Children's Services) from a registered training organisation (including a course unit in administration and service management); or Another approved qualification; <u>and</u> 12 months full-time experience (or equivalent part-time experience as a primary contact staff member; Successful completion of a child protection course approved by the Director-General, DoCS.
Authorised supervisor – services that are part of a school	Cl. 15(5)	In the case of a service that forms part of a school (within the meaning of the <i>Education Act 1990</i> ) the authorised supervisor requirement may be met if the person is the school principal or some other member of the teaching staff <u>and</u> ; Has tertiary qualifications in the field of education; <u>and</u> Has an active role in the management of the early childhood curriculum at the school.
Teaching staff member	Cl. 52(4)	A degree or diploma in early childhood education from a university (course duration of 3 years full-time); or Some other approved qualification; or Some other approved training and approved experience.
Primary contact staff member – children under 2 years	Cl. 52(2)	An enrolled nurse (mothercraft) or an enrolled nurse who has obtained: A Certificate IV from TAFE on completion of a course in Parenthood, or A Certificate III from a registered training organisation on completion of a course in Children's Services, or A registered nurse who has had previous work experience in providing a children's service or has other approved qualifications, or A Child Care Certificate, a Certificate of Child Care Studies or an Associate Diploma of Social Science (Child Studies) from TAFE, or A Diploma of Community Services (Children's Services) from a registered training organisation, or Some other approved qualification.
Cook	Cl. 54	A certificate relating to training in food safety and nutrition
<b>Family Day Care/Home-Based Care</b>		
Authorised supervisor	Cl. 15(2)(e)	Child protection qualification requirement consistently required for all children's services.
Family Day carer	Cl. 100(2)(d)	Must hold a current approved first aid qualification or is otherwise appropriately qualified to deliver first aid.
Home-based carer	Cl. 84	Must hold a current approved first aid qualification.

## Appendix 5 Glossary

<b>Act</b>	A Bill that has been passed by Parliament, received royal assent and become law.
<b>Amendment</b>	An alteration to an Act or Regulation.
<b>Enforcement</b>	Action taken to compel compliance or to punish non-compliance.
<b>Legislation</b>	Laws passed by Parliament.
<b>Objectives</b>	The purpose of an entity or instrument, particularly with regard to its regulatory role.
<b>Outcomes-based regulation</b>	A rule or statement that specifies desired outcomes or objectives, but not the specific means by which those outcomes or objectives must be met. Also commonly referred to as performance-based regulation.
<b>Parent</b>	Throughout the discussion paper on the Review of the Children's Services Regulation 2004 the term 'parent' is used broadly to mean any person having a parental responsibility for a child. This would include, for example, a family member who has primary care of the child or an appointed guardian. This is consistent with the definition of 'parent' in the <i>Children and Young Persons (Care and Protection) Act 1998</i> .
<b>Penalties</b>	Any sanction, including de-authorisation (e.g. withdrawal of a licence), fines and suspension, imposed on a regulated entity by a regulator in response to conduct deemed contrary to regulatory requirements.
<b>Prescriptive regulation</b>	A rule or statement that specifies in relatively precise terms what is required to be done.
<b>Primary legislation</b>	The principal instrument under which an entity or environment is regulated. Primary legislation sets up the powers for the making of supporting regulations and statutory rules.
<b>Regulator</b>	A government entity charged with administering particular primary and/or subordinate legislation. In the context of the review of the Children's Services Regulation 2004, a reference to the regulator will generally mean the NSW Department of Community Services.
<b>Regulatory framework</b>	The legislation and supporting instruments applicable to a regulated entity or environment.

<b>Stakeholder</b>	Any party that has an interest, financial or otherwise, in a regulated industry or environment, including providers, employees, customers, management, the community and government.
<b>Subordinate legislation</b>	Statutory rules or regulations made under the authority of an Act.
<b>Sun-setting</b>	The automatic lapsing of a law or subordinate legislation after a fixed period, unless something happens to keep it in place.

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