

Subordinate Legislation Act 1994

**HUMAN RIGHTS CERTIFICATE
(Section 12A)**

Children's Services Regulations 2020

I, James Merlino, Minister for Education and Minister responsible for administering the **Children's Services Act 1996** (primary Act), certify that, in my opinion, the proposed Children's Services Regulations 2020 (proposed Regulations) do not limit any human right set out in the **Charter of Human Rights and Responsibilities Act 2006** (Charter).

Human rights engaged by the proposed Regulations

The proposed Regulations engage the following human rights under the Charter—

- (a) the right to protection of children under section 17(2);
- (b) the right to protection of families under section 17(1);
- (c) the right to privacy under section 13(a);
- (d) the right to freedom of expression under section 15(2);
- (e) the right to freedom of movement under section 12.

Sections 17(1) and 17(2) of the Charter respectively provide that families are the fundamental group unit of society and are entitled to be protected by society and the State, and that every child has the right, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child.

Section 13(a) of the Charter provides that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

Section 15(2) provides that every person has the right to freedom of expression, which includes the freedom to, or not to, seek, receive and impart information and ideas of all kinds.

Section 12 provides that every person within Victoria has the right to move freely within Victoria.

Right to protection of families and children

The proposed Regulations prescribe various matters to give effect to the regulatory scheme for children's services established under the primary Act, once amended by the **Children's Services Amendment Act 2019** (Amendment Act). Section 8(1) of the primary Act, as amended by the Amendment Act, will provide that the objectives of the Act are:

- (a) to ensure the safety, health and wellbeing of children attending children's services;

- (b) to improve the educational and developmental outcomes for children attending children's services; and
- (c) to promote continuous improvement in the provision of quality children's services.

Section 8(2) of the primary Act will provide that the guiding principles of the Act include:

- (a) that the rights and best interests of the child are paramount;
- (b) that children are successful, competent and capable learners;
- (c) that the principles of equity, inclusion and diversity underlies the Act;
- (d) that Australia's Aboriginal and Torres Strait Islander cultures are valued;
- (e) that the role of parents and families is respected and supported; and
- (f) that best practice is expected in the provision of children's services.

As the proposed Regulations support the administration of the primary Act by prescribing matters for the purposes of the substantive provisions of the Act, the proposed Regulations are effectively subject to the same objectives and guiding principles set out in section 8. Accordingly, bearing in mind the objectives and guiding principles of the primary Act, it is my view that the proposed Regulations promote the rights to the protection of families and children under the Charter.

Provider approvals and service approvals

Parts 2 and 3 of the proposed Regulations prescribe various matters and information that must be provided as part of applications relating to provider approvals and service approvals.

A number of provisions in Parts 2 and 3 of the proposed Regulations engage the rights to privacy under section 13(a) of the Charter and to freedom of expression (which includes the right not to express oneself) under section 15(2). In particular:

- Part 2 of the proposed Regulations prescribes information, including personal information and sensitive information (including relating to a person's criminal history), that must be submitted to the Regulatory Authority as part of applications for provider approvals, applications for amendment of provider approvals, applications for voluntary suspensions of provider approvals, applications by executors, legal personal representatives or guardians for provider approval after the death or incapacitation of an approved provider;
- Divisions 1, 2 and 3 of Part 3 of the proposed Regulations prescribe information, including personal information of nominated supervisors and of approved providers that must be submitted to the Regulatory Authority as part of an application for a service approval, a service approval amendment (including a change to, or the addition of a new, nominated supervisor) or a service approval transfer.

As mentioned in the statement of compatibility for the Children’s Services Amendment Bill 2019, the right to privacy protects an individual’s interest in the freedom of their personal and social sphere. Where a person chooses to undertake activities in a highly regulated industry, particularly one where the rights and interests of children are paramount, the need to provide identifying information and relevant criminal history, is reasonably proportionate to the legitimate purpose of protecting the safety and wellbeing of children. Accordingly, the requirement for provision of that information to the Regulatory Authority for the purposes of assessing applications is neither unlawful nor arbitrary and does not limit the right to privacy.

Further, the right to freedom of expression may be subject to lawful restrictions, including the compulsion of the provision of certain information reasonably necessary to respect the rights of other persons, or for the protection of public health (section 15(3) of the Charter). Parts 2 and 3 reasonably require the provision of information to ensure that the Regulatory Authority can effectively discharge its functions and exercise its powers under Part 5C of the primary Act, as amended by the Amendment Act, including those that protect the safety and wellbeing of children.

Importantly, the prescription of personal and sensitive information under Parts 2 and 3 of the proposed Regulations promotes the rights of children to be protected under section 17(2) of the Charter as that information is critical to the Regulatory Authority assessing the fitness and propriety of approved providers and nominated supervisors, thereby protecting children from possible risks of harm associated with attending children’s services. Accordingly, these provisions are compatible with the Charter.

Medication, enrolment and attendance records

Under regulation 61(1) of the proposed Regulations, approved providers must ensure that a medical record is kept for each child to whom medication is or is to be administered by the children’s service. These records include a child’s medical information, including the name of any medication that is to be administered to a child at the children’s service. Similarly, regulation 110 requires certain health information to be kept in the enrolment record of each child. While these provisions engage the right to privacy under section 13(a) of the Charter, they do not unlawfully or arbitrarily interfere with the child’s privacy. The requirements are aimed at ensuring the service is aware of any relevant health information of children attending a service, including how to safely administer medicine to children attending the service.

Similarly, regulations 107, 108 and 109 of the proposed regulations require attendance records and enrolment records to be kept in respect of each child attending a children’s service. Those records include personal and sensitive information of:

- (a) the child;

- (b) each parent of the child;
- (c) persons to be notified of an emergency involving the child when a parent cannot be immediately contacted; and
- (d) authorised nominees.

While these provisions engage the right to privacy under the Charter, they do not unlawfully or arbitrarily interfere with the privacy of these individuals as they promote the safety and wellbeing of children by allowing the children's service to monitor a child's attendance at the service, contact important persons during emergencies and only give the child into the care of a person authorised to collect the child from the service. Accordingly, these provisions are compatible with the Charter.

Staff records

Subdivision 7, Division 11 of Part 4 of the proposed Regulations requires an approved provider of a children's service to ensure a staff record is kept containing personal information of each staff member including:

- (a) nominated supervisors;
- (b) each student or volunteer that participates at the service;
- (c) the responsible person while children are at the service;
- (d) educators working directly with children;
- (e) for occasional care services, early childhood teachers satisfying the minimum staffing requirements.

While these provisions engage the right to privacy under section 13(a) the Charter, they do not unlawfully or arbitrarily interfere with the privacy of these individuals as they promote the safety and wellbeing of children by recording the identify, qualifications and the periods for which those staff members work directly with children. Accordingly, these provisions are compatible with the Charter.

Compliance and enforcement information

Regulation 131 of the proposed Regulations prescribes, for the purposes of section 165(3)(a) of the primary Act, certain personal and sensitive information about enforcement actions taken against approved providers, nominated supervisors and other individuals prosecuted for an offence under the primary Act. Accordingly, the provision engages the right to privacy under section 13(a) the Charter.

As noted in the statement of compatibility for the Children's Services Amendment Bill 2019, to the extent that the proposed Regulations support the publication of private information, any interference with an individual's right to privacy under section 165(3) is neither unlawful nor arbitrary. The purpose of publishing compliance and enforcement information is to allow families and members of the public to make informed decisions about their choice of, and

interactions with, children's services. Further, there is rich evidence of the positive effect of publishing such information, including encouraging compliance (or deterring non-compliance), both generally and from an individual service perspective. Further, approved providers, nominated supervisors and prosecuted individuals have voluntarily decided to participate in this regulated industry, where that regulation seeks to ensure that only appropriate persons provide children's services, thereby promoting and protecting the rights and interests of the children attending a service.

As further noted in the statement of compatibility, "the publication of the identifying details of an approved provider or a nominated supervisor or person who is subject to a prosecution for an offence under the Act, or for public interest reasons, is reasonable and necessary in a scheme where the right to young children's safety and protection is paramount". Accordingly, these provisions are compatible with the Charter.

Leaving a children's service premises

Regulation 68 of the proposed Regulations requires approved providers and nominated supervisors of a children's service to ensure that a child attending the service does not leave the children's service premises except where:

- (a) the child is given into the care of a parent, authorised nominee or person authorised by the parent;
- (b) the child is taken on an excursion;
- (c) is given into the care of some other person because of an emergency or the child requires medical attention.

Regulation 71 further provides that approved providers or nominated supervisors of a children's service must ensure that a child being educated and cared for by the service is not taken outside the children's service premises on an excursion unless written authorisation has been given by a parent or authorised nominee.

These provisions engage the right to freedom of movement under section 12 of the Charter. The right to move freely throughout the state does not depend on any particular purpose or reason for the movement. It also includes the right not to be forced to move to or from, or remain at, a particular location.

Regulations 68 and 71 limit the ability of staff members and children at children's services from leaving the premises (either on excursions or for other reasons such as to be returned to the care of the child's parents) unless the relevant authorisations are in place.

The right to freedom of movement is not absolute and may be subject to reasonable limitations in accordance with section 7(2) of the Charter. Regulations 68, 69 and 71 ensure that children are protected from exposure to unauthorised, inappropriate or risky absences while in the care of a children's service, and that the proper risk assessments are conducted

prior to excursions being authorised (regulation 68). Further, they ensure that children are not given into the care of unauthorised or inappropriate persons, thereby protecting the safety and wellbeing of those children.

There are no less restrictive means available to achieve the purposes behind these provisions and, therefore, any possible limits on the right to freedom of movement are demonstrably justifiable and the provisions are compatible with the Charter.

Display of information, notification of changes to policies and procedures and other notifications

Regulation 115 of the proposed Regulations require the approved provider of a children's service to ensure that parents of children enrolled at the service are notified at least 14 days (or as soon as possible to reduce the risk to the safety, health or wellbeing of any child) before making any changes:

- (a) to a policy of the service that may have a significant impact on the service's provision of education and care to any child enrolled at the service;
- (b) to a policy of the service that may have a significant impact on the family's ability to utilise the service;
- (c) that will affect the fees charged or the way fees are collected.

Further, regulation 116 of the proposed Regulations prescribe certain personal information (of individual approved providers and nominated supervisors) that must be displayed in a clearly visible position from the main entrance of the children's service premises for the purpose of section 112 of the primary Act.

Regulations 118 and 119 of the proposed Regulations prescribe other matters that approved providers must notify the Regulatory Authority of under section 114 of the primary Act.

These provisions may engage the right to freedom of expression under section 15(2) of the Charter, as that right includes the freedom to *not* impart information and ideas. However, section 15(3) of the Charter provides that special duties and responsibilities attach to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons, or for the protection of national security, public order, public health or public morality.

To the extent that these regulations engage the right not to express oneself, it is my view that they are captured by section 15(3) of the Charter as they are reasonably necessary to respect and protect the rights of children to protection (consistent with section 17(2) of the Charter). They are reasonably necessary for the protection of public health and order, particularly those of children attending children's services. Accordingly, these provisions are compatible with the Charter.