Parliament of New South Wales

Legislation Review Committee

Correspondence received in response to the Legislation Review Committee Digest No. 34 – 12 October 2021

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NSW GOVERNMENT
The Honourable Kevin Anderson MP
Minister for Better Regulation and Innovation

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Mr David Layzell MP
Chair
Legislation Review Committee
Parliament of New South Wales
By email: legislation.review@parliament.nsw.gov.au

Dear Chair David

Thank you for your correspondence about the Legislation Review Digest No. 34/57 concerning the Legislative Review Committee's views on the Building and Development Certifiers Amendment (Cladding) Regulation 2021, Design and Building Practitioners Amendment (Miscellaneous) Regulation 2021, Residential Tenancies (COVID-19 Pandemic Emergency Response) Amendment Residential Tenancies Regulation 2021, and Strata Schemes Management Amendment (COVID-19) Regulation 2021.

Building and Development Certifiers Amendment (Cladding) Regulation 2021

I note the Committee's views that the Building and Development Certifiers Amendment (Cladding) Regulation 2021 (the Regulation) trespasses unduly on personal rights and liberties and may adversely impact on the business community.

The NSW Government developed the Regulation in recognition of the ongoing pressures that certifiers are facing regarding the availability of professional indemnity insurance due to the inherent risks in the construction industry. Since July 2018, it has been increasingly difficult for private certifiers to purchase new, or renew existing, insurance without exclusions for cladding work. During this time premiums have more than doubled and are continuing to rise.

The NSW Government has consulted with key industry associations and stakeholders to consider short-term, medium and long-terms options available to help improve market conditions. As one measure, the Regulation extends the operation of the current provisions so that insurance policies that contain cladding exclusions continue to be accepted for compliance with requirements under the *Building and Development Certifiers Act 2018*. If this provision lapses, without available underwriters willing to offer insurance without exclusions, the vast majority of certifiers would be unable to secure compliant insurance.

The NSW Government is committed to working with the insurance industry to address the unacceptable risks that have made the NSW construction industry an unfavourable insurance market. A number of legislative reforms have commenced in NSW to strengthen the accountability of all practitioners, not only certifiers, in the building and construction industry. These reforms aim to increase transparency and accountability of all practitioners and allow customers to seek compensation from any practitioner who caused a defect of loss, rather than having to solely rely on the insurance coverage of the certifier.

The insurance market is starting to see more insurers re-entering the market for professional indemnity insurance. The NSW Government is also exploring the introduction of a decennial

liability insurance product in the NSW construction sector in an effort to encourage higher building standards and enhance consumer protections against building defects.

The Committee's remaining comments on the other Regulations have been noted.

Thank you for bringing these matters to my attention.

Yours sincerely

Kevin Anderson MP
Minister for Better Regulation and Innovation

Date: 9-11-2021

The Hon Sarah Mitchell MLC
Minister for Education and Early Childhood Learning
Deputy Leader of the Government in the Legislative Council

Mr Dave Layzell MP
Chair
Legislation Review Digest No 34/57
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RML21/4676

Legislation.Review@parliament.nsw.gov.au

Dear Mr ~~Layzell~~ Dave

Thank you for your letter of 14 October 2021, and for the opportunity to respond to the matters raised in the Legislation Review Digest No 34/57 of the Legislation Review Committee.

I have considered the issues raised in the Digest relating to the *Education and Care Services National Amendment Regulations 2021*.

Context and purpose of the amendment

On 8 July 2021, the Education Ministers Meeting made amendments to the Education and Care Services National Regulations in a number of areas, including the display of quality ratings.

As noted in the Committee's Digest, section 172(d) of the Education and Care Services National Law contains an offence where an approved provider of an education and care service fails to display the prescribed information about the quality rating of the service. The information must be clearly visible from the main entrance to the service premises, with contravention resulting in a maximum penalty of $3,000 for an individual and $15,000 in any other case.

Regulation 173(1)(d) of the National Regulations prescribes information that must be displayed for the purposes of section 172(d) of the National Law. That is, the requirement in section 172(d) of the National Law is satisfied where the current rating levels for each quality area stated in the National Quality Standard (NQS) and the overall quality rating of the service are displayed, so long as the information is clearly visible from the main entrance to the service premises.

Mail: GPO Box 5341, Sydney NSW 2001
Phone: (61 2) 8574 5950

However, prior to the amendments in 2021, there was no legislative requirement for education and care services to display the prescribed information about the rating of the service in a particular format. The Department was concerned approved providers were permitted to display their services' quality ratings in any format they wished, including formats that were developed by unauthorised third parties.

Through national decision making forums, the issue was referred to other states and territories, the Australian Government, and the National Authority, the Australian Children's Education and Care Quality Authority (ACECQA). All jurisdictions agreed that, if approved providers could determine for themselves the format in which their services' ratings are displayed or access them from unauthorised their parties, there was a risk the integrity of the ratings and the operation of the ratings system may be undermined as:

- it increased the risk of inaccuracy in the display of ratings;
- it may cause confusion for families, by having different and inconsistent formats used by different services; and
- it potentially undermined the policy objectives underpinning the requirement to have ratings displayed (including to ensure families as consumers understand the NQS rating of each service to aid and guide decisions about which service to enrol their children in).

This risk was particularly significant for NSW due to its focus on improving families' understanding of quality through the introduction of a new visual graphic to display ratings in a family friendly format. The new visual graphic was introduced in August 2020 specifically to respond to a lack of community understanding of the quality ratings system, with the purpose being in line with the objectives of the National Law, primarily those set out in sections 3(2)(b), (c) and (e).

To minimise the risks outlined above, new regulation 173(3) was made to require an approved provider to display information relating to the rating of the service by displaying the certificate issued by or on behalf of the Regulatory Authority or, where applicable, the National Authority.

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the Legislation Review Act 1987 (LRA)

Strict liability offence

I note the Committee's comment that strict liability offences are not uncommon in regulatory contexts to encourage compliance. I further note, under the National Quality Framework (NQF), there are many strict liability offences prescribed in the National Regulations.

As the Committee has noted, the intent of new regulation 173(3) is to provide better clarity and accuracy in respect of a service's rating levels for families utilising the education and care services. In particular, it was intended to raise family and community awareness of the NQS and improve families' ability to make informed choices based on service quality. On this basis, and consistent with other similar strict liability offences under the NQF, I am of the opinion the new offence is appropriately characterised as a strict liability offence.

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Significant matters in subordinate legislation – creation of offences

I note the Committee's comment that, generally, significant matters should be included in primary, rather than subordinate, legislation. The Committee further noted the National Regulations currently contain a number of offence provisions and this is not necessarily uncommon in a regulatory context.

Section 172(d) of the National Law establishes an offence where an approved provider fails to *display* the prescribed information about the rating of the service. However, regulation 173(3) of the National Regulations prescribes the *format* in which the information about the rating of the service must be displayed.

While it is possible an approved provider could be prosecuted under the new offence provision in regulation 173(3) for a failure to display any rating information whatsoever, the intention is that the offence in section 172(d) would be relied on by regulatory authorities in those circumstances. The offence in regulation 173(3), on the other hand, is intended to apply where an approved provider has complied with section 172(d) of the National Law (i.e. by displaying the prescribed information) but has failed to display the information in the format prescribed in the regulation (i.e. being the certificate issued to the approved provider by the Regulatory Authority or the National Authority). The Department, as the Regulatory Authority, has a regulatory discretion to decide which offence to pursue, depending on the seriousness of the conduct.

There was a considered policy decision by the Education Ministers' Meeting to impose a lower penalty of $2,000 for the commission of the offence under regulation 173(3) as it was seen to be less serious than failing to display any rating information at all. That is, a complete failure to display the rating of the service was considered to be a more serious breach than a failure to display the information in the requisite format and, therefore, the new offence justified a lower penalty of $2,000.

The National Regulations, by virtue of section 302(4)(g) of the National Law, may, and do, impose penalties not exceeding $2,000 for offences prescribed in the regulations. As such, I can advise the new offence provision under regulation 173(3), and its penalty, are consistent with other similar offence provisions currently contained in the National Regulations.

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Application of penalties

I note the Committee's comments regarding the applicable penalty for a contravention of section 172(d) of the National Law in light of the new offence provision under regulation 173(3) of the National Regulations.

As noted above, it is possible that an approved provider could be prosecuted under the new offence provision in regulation 173(3) of the National Regulations for a failure to display any rating information whatsoever. However, it is intended that Regulatory Authorities would prosecute such a contravention under section 172(d) of the National Law.

I note the Committee's comment relating to the infringement penalty. I am willing to raise with other education and early childhood education ministers on the issue of whether an infringement notice should be an alternative sanction for contraventions of regulation 173(3).

Finally, prior to the commencement of the *Education and Care Services National Amendment Regulations 2021*, the Department has communicated to the sector about the new regulatory requirement and accompanying offence. Nationally, the changes to the National Regulations were communicated by ACECQA via its website. I understand states and territories are intending to provide further guidance to the sector about the new offence provision and consider amendments to the national administrative guidance in consultation with ACECQA and other regulatory authorities, including in relation to the interaction of the two offence provisions and the circumstances in which each provision applies.

Should you wish to further discuss the matters raised in this letter, you may contact Ms Sharon Gudu, Executive Director, Quality Assurance and Regulatory Services, by telephone on [redacted] or email at [redacted]

Yours sincerely

Sarah Mitchell

Sarah Mitchell MLC
15 December 2021