



Submission of

Child Care New South Wales

To

Productivity Commission – Issues Paper

**Annual Review of Regulatory Burdens on Business:
Social and Economic Infrastructure Services**

February 2009

Introduction

Child Care New South Wales is pleased to contribute to the Productivity Commission's "Annual Review of Regulatory Burdens on Business: *Social and Economic Infrastructure Services*".

We are also pleased to see the continuation of the important work done by the Taskforce on Reducing Regulatory Burdens on Business.

This Annual Review is to help ensure that the current stock of regulation is efficient and effective and to identify priority areas where regulation needs to be improved, consolidated or removed. The task for the Commission is to:

1. identify specific areas of Australian Government regulation that duplicate regulation in other jurisdictions,
2. shortlist priority areas for removing or reducing regulatory burden having the potential to deliver the greatest productivity gains to the economy,
3. for that shortlist, identify regulatory options or provide recommendations to alleviate the regulatory burden in those priority areas, including for small business, and
4. for the shortlist, identify reforms that will enhance consistency across jurisdictions or reduce duplication or overlapping regulation or in the role of regulatory bodies in relation to the sector under review.

Our submission follows the approach suggested at p.15 of your Issues Paper:

"In recent years, there have been many reviews of regulatory matters, and some participants have made extensive submissions to them. The Commission is currently reviewing submissions relating to social and economic infrastructure services to the Regulation Taskforce and other reviews. While participants should feel free to provide any previous submissions and other material to the Commission as a submission – perhaps with a covering document that brings it up-to-date and draws attention to its relevance for this review – they need not repeat points they made in submissions to those earlier reviews".

Accordingly, this submission:

1. Attaches our previous submission and accompanying materials (at attachment "A"),
2. Lists key events since the Regulation Taskforce reported,
3. Explains the relevance of those events, and
4. Explores possible options for future action.

Key Events

Since the Regulation Taskforce reported in early 2006, there has been a lot of activity at the policy level, but not much to show for it. We begin our update with a quick summary of Child Care New South Wales' Submission.

1. Child Care New South Wales Submission to the Regulation Taskforce

The submission:

- identified the nature and extent of duplication between the Commonwealth childcare Quality Improvement and Accreditation System, and NSW childcare regulation,
- canvassed system-level ideas for improving childcare regulation,
- argued that the best option (to remove duplication, and to prevent it from re-emerging), would be to improve coordination, and argued that the best way to improve coordination would be through *enforcing best-practice regulation*.

We regret that the nature and extent of the duplication has not changed. In a practical sense, nothing is different.

The other thing which has not changed is the best solution – that is, finding ways to ensure that decision-makers actually follow best-practice regulation principles.

That is not to say there has been no activity. There has been much policy-level activity both before and after the Federal 2007 election, part of which has encompassed the duplication problem.

So, have the decision-makers engaged in that activity followed best-practice regulation?

Initially, they did not.

Child Care New South Wales (together with Child Care Centres Association of Victoria) raised our concerns about that inadequate process in our 2008 submission to the COAG Productivity Agenda Working Group consideration of a National Quality Framework for Early Childhood Education and Care, details of which follow. A copy of that joint submission is at attachment “B”.

It looks like our submission hit the mark. Very recent Departmental information suggests improved process. Nevertheless, there are worrying signs that the decision-making is still directed more towards policy-based evidence than to evidence-based policy.

There has been an acceptance that the decision-making needs to at least appear to comply with COAG’s “*Best Practice Regulation – Guide for Ministerial Councils and National Standards Setting Bodies*”. But Child Care New South Wales is nervous that ideology and sectional-interest, pushing for ‘speed’ rather than ‘quality’ will be used to trump proper methodology, especially - proper data, proper analysis, and proper transparency.

We return to the list of key events.

2. The Regulation Taskforce Recommendations – April 2006

The Regulation Taskforce largely accepted Child Care New South Wales’ submission concerning the nature and extent of the duplication, and our suggestions for exploring solutions.

Recommendation 4.41:

“The Australian Government should commission an independent public review of:

- the role of the Australian government and state and territory governments in regulating the childcare sector, including possible mechanisms to reduce duplication in regulation between governments;
- measures to enhance the efficiency of the childcare sector to deliver desired quality outcomes; and
- the merits of aligning regulatory approaches across jurisdictions towards achieving minimum effective regulation of the sector.

The Regulation Taskforce expressed the general view that:

“...there is a particular need to address areas of regulation involving overlaps and inconsistencies between the Australian government and state and territory governments, and between the States and Territories themselves”.(Final Report, page 168)

The Taskforce identified “nine key areas for future action”. One of those is childcare.

For reviews involving Commonwealth-state overlaps, the Regulation Taskforce listed what it saw as “warranting some priority”. At the top of that list of priorities is “Childcare accreditation and regulation”.

The Taskforce added:

“A review should examine practical ways of reducing overlapping regulations between governments and explore measures to enhance the capacity of services to deliver affordable and quality outcomes. (p.181)

Based on their potential significance for business and for the wider community, such reviews would “warrant *independent* and *public* reviews in most cases”. (p. 180, our emphasis)

3. The Australian Government response to the Taskforce —August 2006

The Australian Government agreed in principle with the Recommendation.

Their response referred to their announcement (in May 2006) of a review of the three levels of the National Quality Assurance system.

That review was to consider “any possible overlap”.

“Bilateral discussions will then occur with state and territory governments to identify ways to address these issues”.

The review of the three different service types of national quality assurance was not in our view originally intended to focus on regulatory duplication. Nevertheless, a good deal of policy work was eventually directed towards that issue. Child Care New South Wales, along with other states was invited to contribute and there were encouraging signs that the work might lead to a reduction in duplication as well as to a significant reduction in the

complexity of the QIAS itself. That work has magically disappeared into the current COAG exercise.

The Australian Government response also referred to 'a Review to be presented to the Community and Disability Services Ministers Conference in July 2006'. The Commonwealth response says that "Ministers will decide the most appropriate way forward".

Child Care New South Wales is not aware of what the Ministers decided. However, we do want to acknowledge the strategic importance of the recommendations of that 2006 Review – "*A review of the approach to setting national standards and assuring the quality of care in Australian childcare services*", a project commissioned by the Children's Services Subcommittee of the Community Services Ministers Advisory Council.

Although the initial COAG Productivity Agenda Working Group Discussion Paper of August 2008 did not seem to understand, or follow, the approach suggested by that 2006 Review, there are now signs that the current decision-making may be heading back onto the sensible paths suggested by the 2006 Review. We canvass this aspect in our September 2008 Submission on the National Quality Framework, and we particularly invite the Commission's attention to this matter.

4. NSW Independent Pricing and Regulatory Tribunal —October 2006

IPART conducted its own "*Investigation into the burden of regulation in NSW and improving regulatory efficiency*" concurrently with the work of the Regulation Taskforce.

IPART noted the findings of the Regulation Taskforce explaining the development of the regulatory overlap in the childcare sector and undertook a "preliminary desktop comparison of the Commonwealth QIAS with the NSW Children's Services Regulation (to) highlight the apparent areas of overlap".

Their analysis reveals that, for the 33 QIAS Principles of Quality Care, there is "some overlap" or "significant overlap" for 28 of them. In other words, an 85% overlap.

IPART reported:

"... The two schemes are regulating the delivery of the same service, albeit in different ways, to achieve substantially similar policy objectives. There are inefficiencies involved in the separate administration of the schemes and in the duplication that has emerged in the scope of NSW children's services regulation and Commonwealth accreditation requirements for both service providers and government. In these areas of duplication, service providers must demonstrate compliance with the relevant standard to both DoCS and an NCAC validator. While service providers and clients of children's services may support and gain comfort from this duplicated regulation, the cost of duplication is primarily being borne by the taxpayer."

"With Commonwealth and State and Territory regulation, however, numerous aspects of the delivery of children's services are regulated by way of both inputs and outputs-based regulation that is clearly duplicative." (see p. 133)

After briefly canvassing possible regulatory models, IPART recommended:

“That the Government support a COAG review of the role of the Commonwealth and state and territory governments in regulating the children’s services sector to:

- (a) identify areas of regulatory duplication that can be immediately addressed; and
- (b) identify options to enhance the efficiency of regulating the children’s services sector, including consideration of a single national regulatory model and a single national regulator”.

The NSW Government responded in August, 2007:

“The NSW Government is working with other jurisdictions to develop by 2008 an intergovernmental agreement on a national approach to quality assurance and regulations for early childhood education and care. This agreement aims to address overlaps and duplication between State and Commonwealth regulations and reduce red tape for service providers”.

Child Care New South Wales has had no involvement with the development of that intergovernmental agreement and has no idea as to its status. We presume that development of the agreement has been incorporated into COAG’s Human-Capital Reform Agenda. Perhaps the Commission might be able to use this Annual Review to improve the transparency of these developments.

5. New Government, New Agenda

Following the change of national government in November 2007, COAG identified reform in the areas of education and early childhood development, to deliver improvements in human capital outcomes.

In March 2008 COAG endorsed a set of aspirations, measures and policy directions. The agreed aspiration is that children are born healthy and have access to the support, care and education that will equip them for life and learning, delivered in a way that engages parents and meets parents’ workforce participation needs. These aspirations were (correctly) seen as critical to achieving long-term participation and productivity gains for Australia.

The Commonwealth Budget 2008 – 09 set out a plan to make the early childhood years a national priority. The plan involves reforms to early childhood education and care and a greater focus on healthy childhood development.

COAG’s Productivity Agenda Working Group is delivering the early childhood agenda. The Commonwealth Government’s commitment to universal access by 2013 to good-quality early childhood development in the year before formal schooling is complemented by proposals across the sector especially in relation to quality assurance. The Early Childhood Development Sub-group has established four working parties, one of which is considering “quality standards”.

COAG’s Productivity Agenda Working Group has identified five policy directions, one of which is to enhance and integrate the provision of early childhood education and care services.

Each of these elements is part of the development of a new “National Quality Framework for Early Childhood Education and Care”.

Early explanations of the 'National Quality Framework' said it was to consider streamlining or integrating licensing, regulation and accreditation arrangements to increase national consistency.

The Productivity Agenda Working Group released a Discussion Paper in August 2008, "*A national quality framework for early childhood education and care*".

The Discussion Paper presented a confused policy picture and misunderstood COAG regulation-making requirements. Our ability to respond meaningfully to the questions in the Discussion Paper was hindered by our uncertainty about whether new standards would be mandatory, what form any new standards would take, which level of government would 'own' the new standards, and when any new mandatory standards would begin.

At 4.5.1 on "Timing", the discussion paper said:

"Initial consultations on the framework will be undertaken during August and September 2008. The input from the consultations, together with advice from the Expert Advisory Panel, will inform the development of draft quality standards, a model for a rating system, and the approach to streamline or integrate licensing, regulation and accreditation requirements.

These draft proposals will be the basis for further consultation during October and November 2008. Final approval of the reforms will then be sought at the COAG meeting in December 2008. Implementation of the standards and rating system is scheduled for 1 July 2009".

On the face of it, the suggested process left no room for policy and regulatory decisions to be guided by proper impact analysis. Instead, it appeared to be a matter of 'regulate first – ask questions later'.

Child Care New South Wales and Child Care Centres Association of Victoria explored these concerns in our September 2008 submission.

Before turning to that submission in Item 6 below, we note that the August Discussion Paper did acknowledge that the current arrangements for setting, assessing and monitoring quality in the early education and care sectors are fragmented and complex.

"In particular, the current arrangements involve significant overlap between Commonwealth Government and state and territory government activities. For example, policies and practices are often checked by both licensing and accreditation. This is particularly problematic from the service providers' perspective because it imposes an increased and unnecessary administrative burden and may reduce the focus on quality". (Discussion Paper, p. 10)

It seems, therefore, that an important milestone has been reached. There now seems to be agreement that the duplication exists, and that it should be removed.

It seems that the 'excitement' generated by the emerging desire to reengineer the whole system has overcome previous resistance to the notion of duplication between Commonwealth and state child care regulation.

Child Care New South Wales is of course pleased with the acknowledgement of the duplication but we are concerned that a new regulatory-design issue has emerged. The now apparently common desire to fix the duplication has created the risk that the whole QIAS baby will be thrown out with the bathwater. Certain people seem to have forgotten

that the QIAS has succeeded partly because it is *not* formal regulation. Australia's QIAS is world renowned as the only quasi-regulatory system in the world that links well-targeted parent subsidies with workable quality-improvement incentives. But any attempt to use QIAS as *formal* regulation may, unless very carefully designed, undermine the very features that have made QIAS successful. We explore this in our submission to the National Quality Framework – at pages 27–29.

6. Child Care New South Wales and Child Care Centres Association of Victoria Submission to National Quality Framework Discussion Paper—September 2008

As indicated above, a copy of our submission is at attachment “B”.

Without repeating them here, we draw your particular attention to the Executive Summary at page 3, to our introductory comments at page 5 – 6, to our concerns about the regulation decision-making process set out in attachment “A” to that 2008 submission, and to our summary of Productivity Commission material in support of the need not to regulate first and ask questions later, set out in attachment “B” to that submission.

Child Care New South Wales and Child Care Centres Association of Victoria have had no response, no acknowledgement, and no subsequent involvement of any sort on these issues, other than raising them with Departmental officials.

As indicated above, it seems that our warnings on the need for proper process were noticed.

Consultants have been appointed to gather what we understand will be baseline data, and information on the Department web-site from January 2009 includes a noticeable change in language.

7. National Quality Framework for Early Childhood Education and Care—January 2009

A Summary of the first wave of public consultations includes the first reference to any regulation impact analysis that we are aware of:

“Further consultations on these draft documents and on a Regulatory Impact Statement for the reform proposals (including a cost benefit analysis) will occur in the first half of 2009.”

“As part of this development process, there will be some focused engagement with selected early childhood education and care providers early in 2009. The aim of this phase of the development process will be to test initial drafts of the documents, testing assumptions, identifying issues and refining details. This should ensure that the draft documents taken to the next wave of public consultations are practical proposals for genuine, achievable reform.”

8. Where to from here? and how?

It is one thing to get the Department to acknowledge the need for a Regulation Impact Statement.

It is another thing to make sure that the Regulation Impact Statement is properly designed and properly executed.

Child Care New South Wales will of course do whatever it can to encourage proper adherence to best-practice regulation.

But we need the Commission's help. No one knows better than the Commission why evidence-based decision-making is at the heart of good governance, what evidence based decision-making means in practice, and the implications for public administration. Child Care New South Wales' chances of securing best-practice regulation will be improved greatly if the Commission finds ways to communicate its knowledge and experience to relevant stakeholders, hopefully using this Annual Review as the vehicle.

This "Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services" is an extension of the Regulation Taskforce.

The Taskforce recommended that the review of this regulatory issue in the childcare sector should be both independent and public.

The COAG process is neither independent, nor sufficiently public.

An example of the consequential problems is evident in what the Department says about the forthcoming regulation impact statement.

The Summary of Public Consultations referred to above is ambiguous. It may be saying that the Department intends to consult on a *draft* Regulation Impact Statement, but we suspect that is not the case.

It should be the case.

Child Care New South Wales believes that the Working Party should seek specific input on the design of the RIS:

- from the Productivity Commission,
- from the Office of Best Practice Regulation,
- from peak bodies which represent private operators who in turn supply approximately 75% of the Long Day Care places around Australia. Those bodies are – Childcare Queensland, Child Care Centres Association Victoria, and Child Care New South Wales.

The success of this whole childcare regulation reform exercise hinges on the quality of that Regulation Impact Statement.

A well-designed Regulation Impact Statement is one that will satisfy the criteria and challenges so aptly summarised by the Chairman of the Productivity Commission in his February, 2009 paper, *"Evidence-based policy-making: What is it? How do we get it?"*.

Child Care New South Wales contends that the Chairman's observations are highly relevant for this Review, and for the COAG Productivity Working Group, especially as his comments apply to the design and implementation of the Regulation Impact Statement. He captures the general design principles that we believe must be followed, and we want to quote him at length:

“In an address to senior public servants in April last year, the Prime Minister observed that, “evidence-based policy making *is at the heart of being a reformist government*”. Tonight I want to explore why that is profoundly true; what it means in practice, and some implications for those of us in public administration”. (p. 3)

“It is as important that we have a rigorous, evidence-based approach to public policy in Australia today as at any time in our history”.

“COAG’s National Reform Agenda embraces much of what is needed – not just the completion of the old competition agenda, but getting further into good regulatory design and the reduction of red tape, efficient infrastructure provision, and the human capital issues which will be so important to this country’s innovation and productivity performance over time”.(p. 2)

“Even in the competition area, rather than further deregulation, we are confronting the need for regulatory refinements which are quite subtle and complex to assess. In the new agenda to do with enhancing human capital, complexities abound”.

“These are all long-term issues. They also have an interjurisdictional dimension, bringing with it the challenge of finding national solutions to problems that have been dealt with by individual states and territories in the past. This has ‘upped the ante’ on having good analysis and good processes to help avoid making mistakes on a national scale which previously would have been confined to particular jurisdictions”. (p. 3)

The Chairman summarised the “essential ingredients” of an evidence-based approach:

“For evidence to discharge these various functions ... it needs to be the right evidence; it needs to occur at the right time and be seen by the right people. That may sound obvious, but it is actually very demanding”.

Child Care New South Wales contends that these are exactly the challenges confronting the exploration for improvements to Australia’s childcare policy and regulation. This Annual Review can help ensure that those essential ingredients *are* part of the mix.

We want to highlight further aspects of these essential ingredients:

Methodology matters

“Half the battle is understanding the problem. Failure to do this properly is one of the most common causes of policy failure and poor regulation. Sometimes this is an understandable consequence of complex forces, but sometimes it seems to have more to do with a wish for government to take action regardless”.

“In situations where government action seems warranted, a single option, no matter how carefully analysed, rarely provides sufficient evidence for a well-informed policy decision. The reality, however, is that much public policy and regulation are made just that way, with evidence confined to supporting one, already preferred way forward. Hence the subversive expression, ‘policy-based evidence’”. (p.8)

- A well-designed RIS will test why policy action will be effective – ultimately promoting community well-being,
- It will also reveal what impacts should be observed if it is to succeed,

- It will have a serious treatment of the counterfactual – what would happen in the absence of action?
- It will quantify impacts (including estimates of how effects vary for different groups),
- It will have the ability to be tested and, ideally, replicated by third parties.

Real evidence is open to scrutiny

“Much policy analysis...occurs behind closed doors. A political need for speed, or defence against opportunistic adversaries, are often behind that. But no evidence is immutable. If it hasn't been tested, or contested, we can't really call it 'evidence'. And it misses the opportunity to educate the community about what is at stake in a policy issue, and thereby for it to become more accepting of the policy initiative itself.

“Transparency ideally means ‘opening the books’ in terms of data, assumptions and methodologies, such that the analysis could be replicated. The wider the impacts of a policy proposal, the wider the consultation should be, not just with experts, but also with the people who are likely to be *affected* by the policy, whose reactions and feedback provide insights into the likely impacts and help avoid unintended consequences. Such feedback in itself constitutes a useful form of evidence”.
(p.14)

Independence can be crucial

“Evidence is never absolute; never ‘revealed truth’. The choice of methodologies, data, assumptions, etc can all influence the outcome, and they do.”

“Given unavoidable need for judgment in evaluation, evidence is more likely to be robust and seen to be so if it is not subjected to influence or barrow-pushing by those involved. Good research is not just about skilled people, it is also about whether they face incentives to deliver a robust product in the public interest.”
(Page 17)

A ‘receptive’ policy-making environment is fundamental

“Even the best evidence is of little value if it is ignored or not available when it is needed. An evidence-based approach requires a policy-making process that is *receptive* to evidence; a process that begins with a question rather than an answer, and that has institutions to support such inquiry.”

“Ideally we need systems that are open to evidence at each stage of the policy development ‘cycle’: from the outset when an issue or problem is identified for policy attention; to the development of the most appropriate response, and subsequent evaluation of its effectiveness.”

“The ongoing struggle to achieve effective use of regulation assessment processes within governments ... tells us how challenging that can be to implement. These arrangements require that significant regulatory proposals undergo a sequence of analytical steps designed firstly to clarify the nature of the policy problem and why government action is called for, and then to assess the relative merits of different options to demonstrate that the proposed regulation is likely to yield the highest

(net) benefits to the community. These steps simply amount to what is widely accepted as 'good process'. That their documentation in a Regulation Impact Statement has proven so difficult to achieve, at least to a satisfactory standard, is best explained by a reluctance or inability to follow good process in the first place."(p.18)

Child Care New South Wales believes that such 'reluctance' or 'inability' to follow good process has been very much on show up to now regarding the development of childcare regulation improvements.

Although there are signs of changed attitudes, we doubt whether such reluctance will be overcome without the ongoing involvement and support of the Commission.

Concluding remarks

We conclude our submission with the following ideas about why best-practice regulation is so important to children, families, jobs, centres, and to improved productivity and participation.

Child Care New South Wales is concerned that well-meaning regulatory proposals to lift service-quality standards might end up hurting the very children and families that all parties are trying to help, as well as damaging jobs, parent workforce-participation, Australian productivity, and centres themselves.

Our experience is that, in the absence of best practice regulation analysis, the debate about regulatory proposals ignores the extent to which *existing* regulations influence the way the childcare sector is structured and the way centres are conducted.

Many centres, certainly in New South Wales, have been built to reflect current regulations. In the absence of careful regulatory impact analysis, such centres will only be able to comply with increased staffing requirements for under-twos by *reducing* the amount of childcare places they currently offer. This reduction in accessibility will effectively force many families into unregulated, higher risk scenarios, thus reducing overall quality, not improving it.

This is just one of the unintended consequences that in our opinion are likely to follow from decisions based on inadequate prior analysis.

Another major risk is that the cost of (already good-quality childcare centre services) will become unaffordable for ordinary families. The risk is that costs will (needlessly) rise to a point where many ordinary families will not be able to afford the higher standards, and thus be forced to make use of lower quality but lower cost backyard alternatives.

Yet another major risk is the mistaken belief that service-quality depends more on teacher qualifications than on the quality of teacher performance and service-management.

At the very least, the government which is going to be expected to pay for increased parent subsidies in order to overcome affordability issues needs to be properly engaged in understanding what those costs are likely to be, and whether increased costs are likely to be matched by commensurate increases in quality.

Problems with availability of baby places, and with affordability, can be managed, but only through the proper application of best practice regulation decision-making.

As the Chairman noted in his February speech – “Good intentions, bad consequences; very, very difficult to remedy.”

Childcare regulatory burdens have been identified, they have been shortlisted, they have been prioritised.

What our members need are reforms that will improve cooperation and coordination, improve consistency across jurisdictions, reduce duplication in regulation and in the role of regulatory bodies.

The solution is also clear. The immediate opportunity to deliver improved childcare regulation is to ensure that the COAG Productivity Agenda Working Group follows best-practice regulation.

We ask the Commission to so recommend, and to provide the necessary support to the COAG decision-making.

Thank you again for the opportunity to share these ideas. Child Care New South Wales would of course be very pleased to elaborate on any aspect.

A handwritten signature in blue ink, reading "Lyn Connolly".

Lyn Connolly
President – for and on behalf of
Child Care New South Wales