

# Submission on Draft Regulations and Regulatory Impact Statement for Social Services.



July 2023



**VCOSS is the peak body for Victoria's social and community sector, and the state's premier social advocacy body.**

We work towards a Victoria free from poverty and disadvantage, where every person and community is supported to thrive. We work relentlessly to prioritise wellbeing and inclusive growth to create prosperity for all.

We achieve these goals through policy development, public and private advocacy, supporting and increasing the capabilities of the state's social service bodies, forging strong coalitions for change, and explaining the true causes and effects of disadvantage.

VCOSS's strength comes from its members and the people they serve. Our members include frontline service groups, peak bodies, advocacy organisations and individuals passionate about a fair, sustainable and inclusive Victoria.



#### Acknowledgement of Traditional Owners.

VCOSS acknowledges the traditional owners of Country, and pays respect to Elders past and present, and to emerging leaders. Our office is located on the sovereign, unceded lands of the Wurundjeri people of the Kulin nation.

#### Lived experience statement

VCOSS thanks all those who shared with us their personal stories, experiences and insights. Every person is shaped by their history and environment. Many people have endured trauma or hardship. For some, this trauma and its effects continue today. By sharing your experiences and insights with VCOSS, you have enriched both our understanding of the issues and our recommendations for change. Thank you for your courage and generosity.

**This work is approved and authorised by VCOSS CEO Emma King.**

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## Executive summary

VCOSS is the peak body for Victoria's social and community sector, and the state's premier social advocacy body. We work towards a Victoria free from poverty and disadvantage, where all people and communities are supported to thrive. We champion wellbeing and inclusive growth. VCOSS supports and advocates on behalf of its members.

VCOSS welcomes the opportunity to provide feedback on the draft regulations and Regulatory Impact Statement for the new social services regulatory scheme in Victoria. VCOSS also acknowledges the submission to this consultation made by the non-government members of the Social Services Regulation Taskforce.

VCOSS recognises that social services play a critical role in supporting Victorians experiencing vulnerability and that the safety of service users is paramount. VCOSS is supportive of the Victorian Government's regulatory intentions to enhance safety, quality and outcomes of social services and welcomes efforts to improve and streamline regulation of the sector.

However, VCOSS is concerned that the draft regulations impose significant new compliance burdens on a sector that is predominantly reliant on government funding to deliver the regulated services, without a concomitant commitment by the Victorian Government to increased funding and associated measures to support new compliance activities.

We are concerned that the new regulatory scheme may therefore lead to unintended consequences, including the risk of service providers leaving the sector due to new burdens imposed by the scheme and the costs associated with compliance. We are also concerned that the scheme's heavy focus on compliance may work to de-value quality assurance and continuous improvement within service providers and may ultimately undermine the safety of service users.

The sector is currently facing significant pressures. With an increasing volume and complexity of caseloads, many community organisations were struggling to keep up with demand even before the pandemic. The sector now faces substantially increased community needs while also being hit hard by post pandemic-related challenges including loss of volunteers, high inflation and workforce skills shortages.

Community organisations operate in a precarious funding environment and are not being adequately funded to meet the true cost of delivering services. The new social services regulatory scheme comes at a time when organisations lack ongoing clarity about indexation and funding contract length, alongside significant increases to pricing, employers' superannuation contribution payments and WorkCover premiums. The sector is also

contending with concurrent consultations around the State Government's proposed Jobs Code, which may impose additional burdens that impact organisations' ability to meet costs of regulatory compliance.

In our experience, most deficiencies in social service provision are the result of limitations in funding and resources, rather than providers routinely or intentionally "doing the wrong thing". Ultimately, what the sector most needs from government to support the safety and quality of social services is not a blunt regulatory instrument. It needs (i) certainty of funding at a level that reflects true costs of delivering safe and quality services, and (ii) service contracts of sufficient length and security to enable organisations to confidently invest in continuous improvement (including the retention and development of workers and the maintenance of premises and equipment).

The draft Regulations and Regulatory Impact Statement are complex and dense documents. VCOSS is aware that many service providers, particularly smaller organisations, have not had sufficient time and resources to fully analyse the risks and benefits of the new regulatory regime. VCOSS' submission also reflects the limitations of a 50-day consultation period in terms of incorporating sector feedback and expert advice on the impacts of the draft regulations.

Moreover, there are still significant gaps in the overall regulatory scheme, exacerbated by the discretionary nature of many requirements in the draft Regulations and the absence of a Regulator to clarify their interpretation. We provide the following recommendations in this context.

***Recommendations:***

1. Delay the introduction to the regulatory scheme to January 2025, then implement a phased introduction
2. Clarify and refine the scope of services covered by the Regulations
3. Simplify, streamline and remove duplication in the Regulations
4. Establish an oversight and consultative mechanism in the form of an ongoing Social Services Sector Board
5. Ensure that the Regulator's discretion is appropriately fettered by requirements in the Regulations
6. Articulate in the Regulations how continuous improvement will be encouraged, supported, monitored or promoted
7. Reduce scope of infringement offences
8. Amend service requirements to minimise overall regulatory burden
9. Amend the confidentiality notice to include all information required under the Act

## Recommendation 1: Delay the introduction to the regulatory scheme to January 2025, then implement a phased introduction

It is understood that at this stage, the new Social Services Regulator is not likely to be appointed before late 2023. This timeframe allows only six months for the Regulator to develop guidance and to define and communicate their regulatory approach to service providers and service users prior to commencement of the Social Services Regulation regime on 1 July 2024.

This is of concern for soon-to-be regulated providers, especially new entrants to the scheme, because there are still significant gaps in public information and sector understanding of how the Social Services Regulation regime will work in practice. This is negatively affecting readiness for the reforms. VCOSS endorses the recommendation made by Safe and Equal in calling for the Regulations to come into effect from 1 January 2025.

This delay should be followed by a phased introduction to the regulatory scheme to enable new entrants to the scheme to prepare for the reforms. The Victorian Government took a similar approach in its introduction of compulsory Child Safe Standards in two phases from 2016 to 2017.

The first phase of the Social Services Regulation implementation could apply from January 2025 to services already registered under an existing scheme, which will be automatically registered to the new scheme. The second phase could apply from July 2025 for service providers which have not previously been subject to this type of regulation.

This would provide an opportunity for new entrants to the scheme to implement new systems, processes and policies to ensure compliance with the service and registration requirements, all of which will result in new costs for service providers. Specific funding should be available to support service providers with these costs. An amnesty period, during which penalties for non-compliance do not apply, would provide further assurance for new entrants to the scheme.



## Recommendation 2: Clarify and refine the scope of services covered by the Regulations

The draft Regulations define social services at the level of ‘service or activity’. As such, it does not matter whether service providers exclusively deliver social services within the scope of the Social Services Regulation regime, or whether they only offer one prescribed service and are otherwise out of scope. Once in scope, the full suite of obligations applies.

For non-government service providers, this approach means that organisations predominantly funded by sources other than the Department of Families, Fairness and Housing (DFFH) – including those funded by other Victorian Government departments such as the Department of Justice and Community Safety (DJCS) or the Department of Government Services (DGS) – will be required to comply with the Social Services Regulations in full if they receive a single funding contract from DFFH that includes in-scope services. Many members of VCOSS, such as community legal centres, financial counselling services and disability service providers, receive the majority of funding from non-DFFH sources but are supplemented by key project funds from DFFH. For these organisations, the Regulations are likely to impose significant new burdens outside their “business as usual” compliance activities, which could deter them from taking on DFFH funding to deliver services to Victorians experiencing vulnerability at the heart of the new scheme.

The draft Regulations define social services largely by reference to whether they are “specifically for” certain types of service users and whether they are “provided or funded by the Secretary” [DFFH]. This approach raises several issues that are leading to uncertainty about the scope of the scheme in practice.

Firstly, it is unclear why some services are within scope if they are provided/funded “specifically for” particular cohorts of service users (see definitions of ***sexual assault services*** and ***family violence services***) while others are not in scope unless they also “involve contact with” service user cohorts (see cf. definitions of ***homelessness support service*** and ***out of home care services***). VCOSS submits that only services which are “specifically for” and “involve contact with” service users should be prescribed. This is consistent with the focus of the Social Services Regulation regime on the needs and safety of service users.

Secondly, many prescribed services are broadly defined, and include activities such as training and skill development and early intervention. These terms are undefined in the draft Regulations and can be unclear given the wide range of interventions delivered by the social services sector. For example, in the definition of ***community based child and family service***, catch-all phrases such as “other support services” and references to program aims (e.g. “support services that aim to address issues that may lead to family breakdown”) will require further regulatory guidance to help the sector to understand what is in scope (and what is

not). Similarly in the definition of *sexual assault service*, the reference to “including early intervention” potentially captures a broad range of gender equity activities and will require further regulatory guidance on scope.

Thirdly, as mentioned above, the definitions of most prescribed social services have regard to whether the services are funded by DFFH. This means that the scope of the scheme in large part turns on what is included in contracts between DFFH and service providers. A non-government service provider may not know definitively whether they are in or out of the scheme in the absence of a DFFH service agreement. While many service providers will be confident to assess themselves as within scope, new entrants and “occasional” social service providers may not appreciate that DFFH-funded services will fall within the scheme until they negotiate their service contract. In such a case, there may be little to no time for them to prepare for compliance with the scheme.

Fourthly, VCOSS does not agree with DFFH’s preliminary view that the functions of Family Safety Victoria in Orange Door settings are not within scope of the draft Regulations. In this respect, VCOSS endorses the recommendation made by Safe and Equal in their submission to this consultation, and submits that DFFH/FSV’s functions in the Orange Door should be regarded as social services and covered by the Social Services Regulations.

In general, more clarity is needed on the scope of services covered by the Regulations to prevent unintended consequences such as the withdrawal of service providers from activities to avoid regulation, leaving service users with reduced choices, or no choices at all in already thin markets. Another possibility is that service providers will ‘over-comply’ with the Regulations at unnecessary additional cost.



## Recommendation 3: Simplify, streamline and remove duplication in the Regulations

### Embed greater coordination and streamlining with other regulatory schemes

The new social services regulatory regime was intended to decrease the burden and duplication associated with compliance in the design and delivery of human services, and to achieve better coordination between some Victorian supervision and reporting requirements. The scheme was also designed to acknowledge parallel processes exist at the Commonwealth level, particularly in the delivery of services to people with a disability.

These regulatory intentions are not sufficiently realised in the draft Regulations. For example, no comprehensive attempt has been made to formalise recognition of reporting across the new Social Services Regulations and other schemes. There appears to be confusion in obligations to report incidents to different bodies, using different definitions. While the Regulator may be able to develop guidance to assure the regulated sector of a coordinated approach, the draft Regulations do not safeguard such coordination or streamlining between regulators. As a result there remains significant potential for regulatory duplication and increased administrative burden for providers.

#### Case study:

A VCOSS member described the challenges:

‘Not-for-profit providers of human services are now amongst the most heavily regulated bodies in Australia. We work with some of the most vulnerable people, so requirements about safety and quality are essential, as are compliance and monitoring obligations. But when governments regulate the same things in slightly different ways, overseen by disconnected processes, time and resources are wasted. No one receives better or safer services as a result and it is likely some people miss out because of the cost and complexity of the compliance burden.’

In comparable regulatory schemes such as the Australian Charities and Not-for-profits Commission (ACNC), a ‘Report Once, Use Often’ framework has been designed to reduce duplicative requirements imposed on the sector. This framework means that charities can report once to the ACNC, and then other authorised government agencies can then access this information as required through a formal process. A similar approach could be implemented by the Social Services Regulator.

### Simplify the registration and service requirements for social service providers

There is doubling-up between the requirements for registration and the Service Standards – both require (in slightly different terms) organisations to demonstrate governance, workforce, leadership and environmental controls and practices.

For example, compare:

- Service Standard 6 “Safe workforce” requirements, vs Registration – Qualifications, skills or experience
- Service Standard 5 “Accountable organisational governance” requirements vs Registration – Suitability of provider, and Suitable arrangements
- Service Standard 3 – “Safe service environment” vs Registration – Suitability of premises

While VCOSS notes the conclusion in the RIS that extensive registration requirements can provide a higher level of assurance to the Regulator that a service provider is able to meet the Service Standards and service requirements, VCOSS’s view is that the Regulator’s focus should be on supporting organisations to comply with the Service Standards *sustainably and consistently over time* – rather than relying on a “once off” registration process potentially at the expense of effective ongoing education, compliance monitoring and enforcement action by the Regulator.

### Avoid “dual track” notifications for service providers automatically transitioned to the new scheme

Draft Regulation 402 requires relevant organisations to notify the Regulator of additional matters including, in certain circumstances, the matters in Schedule 2. Organisations required to notify of these additional matters include providers that are automatically transitioned to the new Regulator under Part 11 of the Act, ie. all existing service providers registered under the *Child, Youth and Families Act 2005* (Vic), *Disability Act 2006* (Vic), and *Supported Residential Services (Community Visitors) Act 2010* (Vic).

There is no express wording in the legislation or draft Regulations as to how long a transitional registration is to last. It seems likely that a service provider transitioned to the new scheme may remain under the application of Part 11 of the Act for a long period, ie. until its registration is suspended, cancelled or revoked.

This potentially creates a “dual track” notification regime, whereby some organisations (including child and family services and disability services) are required to notify at a much more granular level than service providers registered “fresh” under the new scheme. There does not seem to be a strong rationale for this distinction and VCOSS submits that it should be streamlined to avoid creating extra burden for no sensible reason.

## **Recommendation 4: Establish an oversight and consultative mechanism in the form of an ongoing Social Services Sector Board**

During the debate on the Social Services Reform Bill in Parliament, the government committed to establishing a Social Services Regulation Taskforce to support and guide the development of the regulation process for 12 months from July 2023, ahead of the scheme's proposed commencement in July 2024.

It is critical that the regulated sector's voice continues to be represented beyond the planning phase, via an oversight and consultative mechanism in the form of an ongoing Social Services Sector Board. Sector input is vital to ensure that the new Regulator's approach is informed by the perspectives and expertise of service providers and service users, and that the Regulator's processes and communications are based on a keen understanding of the sector. The educative function of the Regulator should also be explored.

In comparable regulatory schemes such as the ACNC, the Commissioner reports to an Advisory Board appointed by the Minister. A similar body could support the new Social Services Regulator to develop guidance for the sector on how to interpret the requirements in the Regulations, and how the Regulator will approach its compliance and enforcement responsibilities.

## Recommendation 5: Ensure that the Regulator’s discretion is appropriately fettered by requirements in the Regulations

The Regulator has wide discretion under the draft Regulations on a range of matters. Part 2 of the Regulations gives the Regulator power to make certain decisions including:

- (a) whether a person is suitable to be a social service provider;
- (b) whether a person has suitable arrangements in place to provide the service (by reference to whether various matters are “appropriate”);
- (c) whether a social service provider has the relevant qualifications, skills or experience to provide a safe service; and
- (d) whether the premises used by a social service provider for the provision of the social service are suitable for the safe delivery of the social service.

In the absence of a Regulator having been appointed, there is little clarity at present on what terms such as “appropriate” and “suitable” will require of organisations in practice.

Looking at this scheme from a long-term viewpoint, VCOSS is concerned that the draft Regulations empower the Regulator to have regard to a very broad range of matters – and do not require the Regulator to have regard to any matter in particular – in deciding suitability of a provider under Part 2. This leaves open the possibility of vastly different approaches from one Regulator to the next. Providing clearer and more explicit parameters for the Regulator’s decision making would help the sector understand what is required and function as a safeguard on the exercise of discretionary decision-making by Regulators across the life of the scheme.

VCOSS recommends the addition of a requirement in the Regulations that the Regulator must act in accordance with the Regulator’s objects and guiding principles under the Act when making decisions or exercising powers under the Regulations. This approach is consistent with the similar requirements imposed on a regulator under the Children Youth and Families Act (see section 8) and Disability Act (see section 5(5)).

## Recommendation 6: Articulate in the Regulations how continuous improvement will be encouraged, supported, monitored or promoted.

The Social Services Regulation Act 2021 focuses on compliance and penalties for non-compliance, removing or reducing incentives for investing in continuous improvement.

The new regulatory regime removes the requirement to submit to mandatory audits of compliance against the Human Services Standards. Under the new scheme, regulated service providers will undertake self-assessment against the Social Services Standards framework.

### Case study:

According to one VCOSS member, the 'savings' the change produces represent a false economy.

'Compliance audits help to test, through independent eyes, how systems and processes measure up to what you aspire to achieve and what the standards say you must meet. Removing that test might save money short-term but moving to the revised Social Services Standards framework, based entirely on self-assessment, sounds dangerous.'

While it is possible that the Regulator will make continuous improvement a priority, it is not required of them to do so. The Regulations should clearly articulate how continuous improvement will be encouraged, supported, monitored, or promoted to ensure systematic, ongoing efforts to improve the quality of care and services.

## Recommendation 7: Reduce scope of infringement offences

The Regulations prescribe 48 offences under the Act as infringement offences. While a number of these have comparable offences under existing legislation such as the Children, Youth and Families Act 2005 and the Disability Act 2006, many are not infringement offences in comparable regimes.

The significance of these offences being prescribed as infringement offences is that the Regulator (or an authorised officer) can serve an infringement notice (sometimes referred to as an 'on the spot fine') on a person if it reasonably believes that the person committed such an offence, without the need to prove in court that the offence was committed.

As an example, a service provider could be fined 'on the spot' \$1,923.10 if the Regulator reasonably believes it failed to notify of a required matters in section 47(1), including:

- Change to the volume and type of social service provided;
- Staffing change that materially impact service delivery;
- Organisational change that materially impact service delivery;
- Change to premises at which the social services are provided that materially impact service delivery;
- Change to any information provided on Registration.

This appears to be possible even if the provider had a reasonable excuse for its failure to notify.

### Case study:

According to a regional service provider member of VCOSS, reporting requirements meeting the descriptions in section 47 of the Act would have been triggered routinely over the last three years. Changes outside of providers' control that might have required reporting include the impacts of the pandemic, natural disasters and ongoing government reform.

'Collecting information for its own sake, that is beyond a provider's control, or which does not place a service user at increased risk, is just burdensome, for both reporting bodies and the regulator. It is vital that compliance requirements are relevant to the purposes of the Act and contribute in meaningful ways to quality and safety.'

There is a significant regulatory impact associated with the notifications provisions of the Social Services Regulation scheme, as the case study above demonstrates.

In addition, we note that if a service provider were in a position where DFFH required them to quickly deliver a prescribed social service – for example, in the aftermath of a natural disaster – and the Regulator reasonably believed that the organisation provided that service before registering under Part 3 of the Act (even inadvertently), that service provider could be served an infringement notice for more than \$11,000. This is a significant amount of money for a community service organisation.

The problematic issues would be best fixed by amending the principal legislation (for example by adding “without reasonable excuse” to offences such as under section 47(1) and 135(1)) and VCOSS encourages the Government to consider amendments to the legislation prior to commencement of the new regime. However, as the legislation stands, VCOSS considers these offences should not be infringement offences and it should be left to the Regulator to pursue serious acts of non-compliance as offences under the Act.



## Recommendation 8: Amend service requirements to minimise overall regulatory burden

There are 28 service requirements in the Regulations. At a minimum, all regulated providers will need to demonstrate that they have considered each one, decided what is required in their circumstances, taken relevant actions and documented this. This is a considerable undertaking, especially for new entrants that have not previously been regulated by a scheme of this type.

The service requirements extend beyond requirements for the delivery of in-scope services per se; they include a range of broader operational, workforce and governance requirements that apply at a whole-of-organisation level. It is not clear that the overall regulatory burden is justified in light of the safety and quality risks that the regime seeks to address.

Some of the service requirements impose requirements that appear to be more suited to aspirational outcomes and will be difficult or impossible to comply with in practice.

For example, many service providers will find it difficult to comply with registration and service requirements relating to suitability of premises or environment because they operate out of leasehold or shared spaces such as co-working or community hubs. Adding qualifying language such as “to the extent reasonably practicable” to these requirements would recognise the limited capacity of service providers operating from leased and shared premises.

## **Recommendation 9: Amend the confidentiality notice to include all information required under the Act**

The template confidentiality notice set out in Schedule 6 to the Regulations does not include details such as the circumstances in which the confidentiality notice expires, and exceptions to the confidentiality notice such as disclosure for the purpose of legal advice. These matters are required to be included in the notice under section 201(2)(c) of the Act.

The person issued the notice needs to be aware of these details so they are not under the impression that the confidentiality notice has broader application than it actually does.

