

**Report on the Review of the NSW *Commission*  
*for Children and Young People Act 1998***

June 2011

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## 1. Statutory Requirements

The NSW Commission for Children and Young People was established in 1998 by the *Commission for Children and Young People Act 1998*.

A review of the legislation is prescribed under section 53 of the Act which requires the Minister to review the Act at five year intervals. The purpose of the review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Section 53 also outlines requirements that guide the process of the review.

When carrying out the review, the Minister is required:

- a) to consult with government and non-government agencies that provide or deal with services or issues affecting children;
- b) to consult, as far as practicable, with children, utilising the means of consultation developed by the Commission under section 13, and
- c) to invite and consider public submissions relating to the review of the Act.

A report on the outcome of the review is to be tabled in each House of Parliament within twelve months at the end of the period of 5 years.

On 15 April 2010 the Minister for Youth, the Hon Peter Primrose MP, announced the Legislative review of the NSW Commission for Children and Young People. The timing of the review was brought forward following a report by the Auditor-General on the Working With Children Check in April 2010.

The legislative review announcement was accompanied by a call for submissions and the appointment of Mr Michael Eyers AM, to head the review. Mr Eyers reported on his work in August 2010.

In accordance with the statutory requirements, several processes informed the review including:

- Call for public submissions
- Release of a discussion paper
- Consultation with government and non-government agencies
- Consultation with children and young people
- Preparation of review findings and recommendations.

### 1.1. Process

Submissions to the review were invited to consider two distinct sets of issues:

- the Commission's policy, advocacy, research and education functions [Part 1]; and
- the Commission's child-related employment screening, the Working with Children Check [Part 2].

Key questions were posed to guide submissions. The detailed call for submissions is attached at Appendix 1.

To ensure the review was promoted as widely as possible the Terms of Reference and related information were placed on the Communities NSW website and linked to the NSW Commission for Children and Young People website. Agencies that were identified as key

stakeholders were informed of the review and invited to prepare submissions. The closing date for Submissions was 31 May 2010.

Following analysis of submissions a discussion paper was released to guide further consultation (attached at Appendix 4).

The review process included sixteen consultation sessions with young people, individuals, government agencies and organisations that had made written submissions. Several organisations and key stakeholders were directly approached and consulted.

The review invited organisations to participate in formal consultation sessions. Altogether six consultations were held, two with current and past members of the Commission's Young People's Reference Group, and four with organisations that had made submissions to the review. A list of groups and organisations involved in these consultations is available at Appendix 2.

Mr Evers reported on his findings in August 2010. Following this, Communities NSW and the Commission for Children and Young People were charged with further consulting with key stakeholders on the findings and proposed directions and developing an approach for implementing the recommended changes.

## 2. Consultations

The consultation process consisted of written and verbal feedback on the questions posed in the call for submissions. Forty-two written submissions were received. All the individuals and organisations that made submissions, apart from the three private individuals who wished to remain anonymous, are listed at Appendix 3.

### 2.1. Commission's Policy, Advocacy, Research and Education functions

Submissions made the following comments in response to the Commission's policy, advocacy, research and education functions:

- the past and present work of the Commission in its research, policy and advocacy roles is strongly endorsed;
- the term "safety, welfare and well-being of children", used in s11 of the Act was considered out-dated. Eleven submissions suggested that this term should be replaced with "well-being of children" as "well-being" includes the concepts of "safety" and "welfare".
- the Commission should periodically report to Parliament on the "well-being of children".
- the Commission's legislation should continue to give priority to vulnerable children; some suggested a rights-based approach to the Commission's work.
- the Commission may benefit from additional powers to obtain information to use in its monitoring and research functions.

Mr Evers invited the individuals and agencies that had made submissions to the review to attend further consultations about these issues. A discussion paper was released to guide these consultations.

At these consultations there was consensus that existing legislative provisions are adequate for the continuation of the Commission's policy, research, monitoring and advocacy

functions. There was agreement that the term “safety, welfare and well-being” in the Commission’s Act needed amendment.

Overall the consultations supported the Commission continuing as an independent advocate for children’s wellbeing, working within government and in the wider community. Promoting child-safe and child-friendly organisations was also seen as particularly important, especially within the context of a new system for the Working With Children Check.

## **2.2. The Working With Children Check**

Submissions about the Working With Children Check overwhelmingly supported changing to a new system where a periodically renewed clearance is linked to an individual rather than a position.

Submissions suggested that:

- the current Working With Children Check was excessively complex and that definitions needed to be simplified
- the differences in process for paid employees and volunteers is not justified as volunteers can pose the same risks to children as paid workers
- more records should be available to the Working With Children Check
- the Relevant Employment Proceedings provisions need review to allow reviews, appeals and modification of notifications
- ensure that there is adequate evidence and proper investigation of notified matters and allow downgrading or removal of records relating to minor one-off conduct
- prohibited persons should be able to seek a review of their status
- employer responsibilities are not clear enough and too onerous
- more regulatory support is needed to ensure the Check is effective; this is supported by the findings of the Auditor General’s report on the Check in 2010
- a national scheme or mutual recognition between interstate Checks is desirable.

Participants in further consultations endorsed these comments and recommended further analysis of:

- relevant employment proceedings policy settings and processes
- the range of records that trigger a risk assessment
- definitions of “child-related” and “primary child-related” employment.

Consultations supported the Commission’s continuing role in promoting child-safe organisations.

Participants in these consultations also noted that the new system would need to consider:

- the impact of a user fee on low paid employees
- costs for volunteers and volunteer organisations
- the governance, regulation and oversight arrangements for the new system.

## **2.3. Findings from public consultations**

Mr Evers recommended that:

- the policy objectives of the Act remain valid
- there be some minor amendments to the Act’s wording to reaffirm and clarify the role, functions and powers of the Commission
- a new style of person-based Working With Children Check should replace the current position-based model
- the new Check should apply equally to child-related volunteers and paid workers
- a user fee should be introduced to fund the new Check.

#### **2.4. Further stakeholder consultation**

The former Communities NSW and the Commission for Children and Young People were charged with consulting key agencies and partners on options for implementing these recommendations, including the detail of amendments that would be required to the *Commission for Children and Young People Act 1998*. These further consultations involved a number of government agencies, professional associations and unions.

The consultations endorsed the proposed change to a new model for the Working With Children Check on the basis of the extended benefits the new scheme would offer employers, employees and the community.

### **3. Reaffirming the Commission's policy, research and advocacy role**

Since its establishment in 1999 the Commission has played a vital role in providing a voice for the children and young people of New South Wales, conducting research and advising on policy and program developments to improve the lives of children and young people. Its governance arrangements, reporting through the Parliamentary Joint Committee for Children and Young People, have guaranteed its independence and bi-partisan support.

### **4. Proposed new Working With Children Check**

Most of the features of the NSW Working With Children Check have proved effective and have been adopted in other Working With Children Checks around Australia, and will remain part of the proposed system for NSW. These features include:

- definitions of child-related employment
- definitions of records that prohibit a person from working with children
- definitions of records that require assessment to determine whether a person should be able to work with children
- provisions for appealing decisions to prohibit a person from working with children
- obligations on employers to check applicants before engaging them in child-related roles.

Some features of the NSW Working With Children Check, however, require change to overcome complexities developed over ten years of ad hoc changes, and to provide a starting point for future moves toward a nationally consistent check. For example:

- The current WWCC imposes delays on recruitment because the WWCC must be done after the job has been offered. Only 75% of WWCC are completed within two days, with a further 15% completed within two weeks. Many remain unfinished after 2 months. These delays result from challenges in obtaining information about applicant records. Employees subject to these delays can miss out on jobs, as employers select an alternative person whose WWCC is finished more quickly.
- The current WWCC results in an estimate of risk provided to the prospective employer. That employer then needs to determine whether they will engage the applicant or not. This is a challenging decision for most employers.

#### **4.1. A lasting clearance instead of multiple checks**

The current NSW WWCC requires a person to have a new WWCC each time they are considered for a new child-related job. For the casual workforce and new graduates, this means multiple applications for the WWCC every year.

All interstate WWCCs have applicant-based checks that last for several years and can be used with any employer. Employers, employees and volunteers have indicated that they

prefer this system as it is more efficient and simpler to administer. It also allows job applicants to be confident of their WWCC status before they seek child-related work.

A new WWCC would provide a lasting authority instead of a pre-engagement check. It would give or refuse a clearance to work with children in any role, instead of assessing an individual's risk profile against a particular child-related role and repeating the exercise each time the applicant is seeking a new position.

This new WWCC would last for five years, and be renewable.

#### **4.2. Emergency appointment pending a Working With Children Check**

It is proposed that applicants will need to apply for a WWCC within a week of entering a child-related job. This week's grace period allows emergency placements to be made without breaking the law. Once a person has applied for a WWCC, he or she may remain in child-related employment while the application is determined, unless the applicant is issued with an interim bar.

Workers would be able to apply for a WWCC before they look for child-related work. This provides certainty and confidence for employers and employees and the children involved.

#### **4.3. Interim bar during application process**

During the course of a WWCC risk assessment, the Check Agency may find information that suggests a significant risk, but be unable to obtain all the information needed to assess that risk immediately. In these situations, it is proposed that an interim bar be issued. This would protect children from unjustifiable risks while the application is being assessed.

#### **4.4. Continuous checking for people with a WWC Clearance**

The current WWCC is repeated every time an applicant seeks new child-related work. Each new check identifies up-to-date national criminal records, up-to-date NSW child-related AVOs and up-to-date NSW employment proceedings. A person who does not change jobs will never have an updated records check.

The proposed new WWCC will last for five years and will rely on continuous updates to manage emerging new risks over that period.

The new WWCC database will also alert operators when an authorised person is the subject of a new employer proceeding or relevant AVO. The Check Agency will initiate its risk assessment process in these cases.

#### **4.5. Broader appeal rights**

The Review proposes expanding the existing appeal rights so that all people refused a WWC Clearance may appeal. This will deliver greater transparency and natural justice

Currently the only appeal rights in the WWCC relate to people automatically barred (prohibited persons). Since 2007, the Commission's legislation has prevented certain people from appealing an automatic prohibition – anyone convicted of a sexual offence cannot appeal if they were more than three years older than their victim. This ruling has captured many people convicted of carnal knowledge (but with an otherwise clear record) where the victim and offender were in a consensual relationship and later married and had children. These offenders remain permanently barred from working with children.

It is proposed to avoid this problem by extending appeal rights to these and other barred people, as was the case before 2007.

In addition, a person aggrieved by the outcome of a risk assessment currently has no avenue for appeal.

The new system would provide a higher level of natural justice and transparency. A person who has been refused a WWC Clearance, whether because of an automatic bar or a risk assessment, should be able to appeal that decision to the Administrative Decisions Tribunal. This will make sure that these administrative decisions are soundly based.

#### **4.6. Recognition that some offences need special consideration**

The Review proposes removing the automatic bar for offences committed as a juvenile and suggests continuing consideration of how to treat offences in the nature of “carnal knowledge” under the Working With Children Check.

Applicants with a juvenile barring offence would have a risk assessment instead of being automatically barred from working with children. This approach to juvenile offending is proposed on the basis that juvenile offences do not provide as clear an indicator of risk as offences of mature adults. In many cases, the offending conduct is not targeting children, but is peer focused, where the peer happens to be a child. Over the last five years, 74 of the 99 appeals in this group were successful.

The offence of carnal knowledge (no longer in use) was almost exclusively related to teenagers under 16 who had sexual relations they could not legally consent to. Over the last five years almost 90% people barred because of carnal knowledge convictions were successful in appealing the bar.

#### **4.7. Removing reference to the Child Protection Register as an automatic bar**

The vast majority of offences for which a person may be listed on the Child Protection Register are already listed as prohibiting offences. Listing some additional Commonwealth offences as prohibiting records will mean that every offence for which a person may be placed on the Register will also be a prohibiting offence. This means there will be no need to separately prohibit a person listed on the Child Protection Register.

It is proposed to simplify and clarify barring offences by adding

- those Commonwealth sex offences (relating to child sex tourism and importing child pornography) that have no equivalent in the NSW criminal laws, and
- the offence of kidnapping children (other than your own).

#### **4.8. More focus on relevant records in risk assessment**

It is proposed that the new WWCC would receive the following records:

- full criminal history, including charges and spent convictions
- AVOs taken out by a Joint Investigative Response Team
- relevant employment proceedings.

Some criminal records will impose an automatic bar. Other criminal records (mostly relating to violence or charges for sex offences) will trigger a risk assessment. These “trigger records” will be defined in a regulation. Many criminal records are not related to children and their holders will not be prevented from working with children.

Concerns about the use of AVOs and Relevant Employment Proceedings (REPs) in the Check were raised in both the 2010 Auditor-General's Performance Review of the Working With Children Check and during the independent review of the Commission's legislation. Currently, all AVOs that protect a child are included as relevant records, even though they require a low level of evidence or investigation. It is proposed to clarify the legislation so that only serious AVOs, supported by well documented investigations, are notified.

Concerns were raised about the reliability of REPs, particularly since the legislation provides:

- a very broad definition of assault
- insufficient definition of key terms
- a requirement to report findings even where the evidence was not robust enough to determine that the conduct occurred
- no appeals against notification or assessment outcomes
- no capacity for the Commission to remove REPs that are minor or trivial.

It is proposed to clarify the legislation so that only serious findings against employees – for example those involving sexual misconduct, grooming or serious physical assaults - are notified as REPs.

#### **4.9. Access to full criminal and employment history for risk assessment**

Unlike other jurisdictions, the NSW Check allows Police to release only relevant criminal records, so an applicant's full criminal history cannot inform a risk assessment. Other states are able to access a person's whole record to determine whether there is a risk to children. It is proposed that the new WWCC has access to the applicant's full criminal history.

#### **4.10. Extending the definition of child-related employment**

The current WWCC applies differently to volunteers, paid workers, authorised carers and their household members and self employed people. The new WWCC will provide one model of WWCC for all affected groups.

Not all volunteers in child-related employment are currently subject to the full WWCC. It is proposed to extend the new WWCC to volunteer groups. Providing the Check to volunteers in child-related work will bring the NSW Check into alignment with all interstate WWCCs.

The WWCC is currently very prescriptive about who may be checked. While it is important to limit the WWCC to children's organisations and to roles that have contact with children, the new WWCC acknowledges that employers may identify some high risk areas outside the statutory range. In these cases, employers will be able to seek approval for extending the range of the WWCC to cover these areas of work. An example of the type of work that the WWCC may be extended to is where employees access confidential information about vulnerable children.

#### **4.11. Exemptions**

It is proposed that there be provision for exempting certain groups from the WWCC. These exemptions would be modelled on those used in interstate WWCCs, for example:

- children
- volunteer parents of participating children (in team or club events or at schools)
- co-employees, work supervisors or work placement supervisors
- work in a children's entertainment or party service involving provision of food, equipment or venues, but does not involve work with children
- privately arranged babysitting
- interstate volunteers and workers visiting for one-off events like jamborees and tours.

Exempted groups will be subject to education and monitoring under the Commission's Child Safe Organisations Program.

#### **4.12. User Fees**

As the current Check is fully government-funded, extending it to more workers and volunteers would have significant resource implications. All interstate WWCCs involve a user fee for paid workers; in some jurisdictions, there is also a small fee for volunteer checks. It is

proposed that the new Check include a user payment for paid workers, with further consideration to be given to a small user fee for volunteers.

#### **4.13. Relationship to employer based “probity” checking**

The WWCC has never been a probity check and cannot be considered a substitute for the careful recruitment practices employers should adopt for people working with children. For many positions, employers will be satisfied that the WWCC is an adequate criminal records check, and that no additional probity check is required. For the remaining positions, where employers need additional records checking to consider particular risks associated with a position, a separate probity check will be required.

#### **4.14. How the new WWCC will operate**

The current WWCC uses 12 year old technology based on faxed and posted documents. Applications are manually entered into the ageing database.

The new WWCC will operate through a contemporary on-line paperless system, where every step of the process is managed through an on-line database. Applicants will complete an application form on-line. They then visit a local provider for verification of their identity and payment of the user fee.

This system provides significant savings over systems where written applications must be transformed into electronic data and checked for accuracy against the original.

It is proposed to use a virtual WWCC card providing authorisation through a unique number like a tax file number. Employers will need to verify that unique number online before they engage the person to work with children.

Police have indicated that this unique number-based approach is a good fraud reduction strategy, when accompanied by a robust complementary system for establishing an applicant’s identity. A similar system is in place in the United Kingdom.

#### **4.15. National consistency**

Five jurisdictions currently operate a WWCC; another two are on the verge of commencing them. Every Checking jurisdiction except NSW operates a person-based Check that clears an individual for work in any child-related role over the life of the authority (3-5 years).

While a national Working With Children Check is likely to be some way off, a person-based system in NSW is the first step towards mutual recognition of interstate outcomes of such Checks. Border communities and employers with national businesses have indicated their strong support for either a national Check or a system of mutual recognition of existing Checks.

In 2009, all Checking jurisdictions agreed to the sharing of criminal history information for the Working With Children Check. This means that every jurisdiction’s Check can access the same information about an applicant. Since this agreement came into effect, each state’s Check of the person is very likely to result in the same outcome.

#### **4.16. Internal consistency**

The current Check is operated by four Approved Screening Agencies: the Office of Communities and the Office of Education within the Department of Education and Communities, NSW Health and the Catholic Commission for Employment Relations. It is proposed to operate the new Check through a single agency.

It is proposed that an intergovernmental committee be established to guide the implementation of the new WWCC and the establishment of a central Check Agency.

## 5. Recommendations

Following the review of the *Commission for Children and Young People Act 1998* the Government proposes:

1. To retain the policy objectives of the Act and the terms of the Act as they remain valid and appropriate.
2. To remove the words "safety" and "welfare" from the definition of the Commission's functions, recognising that the word "well-being" already captures these concepts.
3. To implement a new model for the Working With Children Check, with the following key features:
  - 3.1. the WWCC will allow any child-related work for a set period, instead of re-checking an individual for each new child-related job.
  - 3.2. people with certain records (barring records) will be automatically refused a WWC Clearance.
  - 3.3. people whose barring records were juvenile offences will be subject to risk assessment rather than an automatic refusal.
  - 3.4. any person refused a WWC Clearance can appeal the decision.
  - 3.5. a person's full criminal record will be available to the Check Agency when it conducts the WWCC.
  - 3.6. continuous alerts of new relevant records will be provided for people with a WWC Clearance; new risks identified will be assessed and the Clearance withdrawn if necessary.
  - 3.7. it will be possible to exempt defined groups from needing a WWC Clearance, for example children, volunteer parents etc.
  - 3.8. AVOs will be clearly defined to capture serious conduct.
  - 3.9. Relevant Employment Proceedings will be clearly defined to capture serious conduct in workplaces.
  - 3.10. volunteers, paid workers, self employed people and other workers currently subject to aspects of the WWCC will all be subject to the same WWCC.
  - 3.11. some additional workers whose contact with children is not direct, but whose roles may place children at risk, will be subject to the WWCC.
  - 3.12. there will be a user fee for paid workers, as in other states' WWCCs.
4. To introduce legislation to implement these changes as soon as possible.
5. To monitor and further consider the way the offence of carnal knowledge is managed in the WWCC.
6. To establish an interagency committee to oversight the implementation of the new WWCC.

## Appendices

## Appendix 1: Details of call for submissions

### Part 1

Issues associated with the Commission's policy, advocacy, research and education functions, for example:

*The Commission was established in 1999 as an independent voice in government to promote respect and understanding for the interests, participation and needs of children and young people; and to work cooperatively with government and non-government organisations that provide services to children and young people. Do these objectives remain valid?*

*In light of the emphasis on greater multi-agency responsibility for children and vulnerable families that has occurred over the last few years, what is the appropriate policy role for the Commission?*

*Has this changed policy context altered the nature of the Commission's advocacy, education and research roles?*

*Are the consultation and advisory mechanisms established in the Act to assist the Commission to fulfil its functions appropriate?*

### Part 2

Issues associated with the Commission's child-related employment screening, i.e. the WWCC, for example:

*Do the definitions that apply to the administration of the Working with Children Check remain valid (for example what constitutes child-related employment, reportable conduct, prohibited persons etc)?*

*Do the procedures for the review of applications for an exemption to the prohibition of employment remain valid?*

*What are the limitations of the current approach to screening, including background checking, and what improvements should be made to address these limitations?*

*What are the advantages and/or disadvantages of adopting an accreditation model similar to that in place in jurisdictions such as Queensland and Victoria?*

*Should a different approach be maintained for certain employment categories (for example, volunteers and self employed people)?*

*Does the Act contain sufficient auditing functions and compliance measures to support the operation of the Working with Children Check?*

**Appendix 2: Organisations and groups in Consultations**

1. Child Care NSW
2. Youth Action and Policy Associations (YAPA) NSW
3. Inspire Foundation
4. Football NSW (also representing NSW Sports Federation)
5. Community Child Care Co-operative
6. Australia Post
7. State Library NSW
8. Youth Justice Coalition
9. 2010 Young People's Reference Group
10. Members from the 2009 and 2006 Young People's Reference Group
11. Independent Education Union
12. Liquor Hospitality and Miscellaneous Union
13. State Emergency Service
14. Association of Independent Schools
15. NSW Teachers Federation
16. Association of Children's Welfare Services
17. Youthsafe
18. Kidsafe
19. National Children's & Youth Law Centre
20. Multicultural Youth Issues Network NSW
21. The Benevolent Society
22. National Investment for the Early Years

**Appendix 3: Organisations that made submissions to the review**

1. Association of Childrens' Welfare Agencies
2. Association of Independent Schools of NSW
3. Australia Post
4. Carers NSW
5. Catholic Commission for Employment Relations
6. Child Care NSW
7. Childrens Court
8. Commission for Children and Young People
9. Community Child Care Coop
10. CrimTrac
11. Department of Education & Training
12. Department of Health
13. Education Centre Against Violence
14. Expert Advisory Committee
15. Family Day Care Association
16. Football NSW
17. Gillian Calvert AO
18. Inspire Foundation
19. Kidsafe
20. Multicultural Youth Issues Network
21. National Children's Youth Law Centre
22. NCOSS
23. NIFTeY (National Investment for the Early Years)
24. NSW Community Services
25. NSW Family Services
26. NSW Ombudsman
27. NSW Sports Federation
28. NSW Teachers Federation
29. NSW/ACT Independent Education Union
30. Save The Children
31. The Benevolent Society
32. The Children's Guardian
33. Unions NSW
34. Volunteer Home Visiting Service
35. YAPA (Youth Action Policy Association)
36. Youth Justice Coalition
37. Youth Off The Streets
38. Youthsafe
39. Confidential – Department of Community Services
40. Confidential
41. Confidential
42. Confidential

## Appendix 4: Discussion Paper

# Statutory Review of the *Commission for Children and Young People Act 1998*

## Discussion Paper – Working With Children Check July 2010

Submissions to the review have been invited in relation to two main sets of issues which are set out in Appendix 1. A separate discussion paper deals with issues connected with the role of the Commission; this paper deals with Working With Children Check issues. This paper assumes familiarity with the Check.

### THE CHECK IS EFFECTIVE, AS FAR AS IT GOES

5.1.1. Part 7 of the *Commission for Children and Young People Act 1998* is the legislative basis for the Working With Children Check. Originally, the Check focussed on whether prospective employees are a danger to children. But significant risks also arise from people who volunteer for positions involving contact with children and from people whose contact with children does not arise from employment, such as associates of employers or the self-employed.

5.1.2.

5.1.3. Successive legislative amendments made to address these situations have stretched the usual meaning of many of the terms used in the Act, and the Check has become complicated.

5.1.4.

5.1.5. The Act's current process has two objectives:

1. A *prohibited person* is excluded from *child-related employment*, which is defined widely enough to include working as a volunteer or as a self-employed person.
2. *Background checking* may be undertaken on anyone "who is employed or who has applied to be employed in child-related employment"<sup>1</sup> and is mandatory before a person can be offered *primary child-related employment*.

5.1.6.

5.1.7. Background checking is confined to applicants for primary child-related employment. This category does not include most volunteers. For most volunteers and for self-employed persons, only the first objective is relevant in the way the Check currently operates: is this a prohibited person?

5.1.8.

The evidence is that at least in the *background checking* process, the Working With Children Check achieves its deterrent objective. But it cannot be overlooked that the Working with Children Check can only find those who have already acquired a relevant criminal record or other record checked at the first inquiry. It can only be part of the protections that children should receive. The fact that so few applications lead to either exclusion as a prohibited

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<sup>1</sup> Section 34

person or a risk assessment indicates that the Check deters applications from those with records, in line with its objective.

## **AN ACCREDITATION SYSTEM FOR NSW?**

A number of submissions raised concerns about the current Working With Children Check. These concerns were about the need for background checks for volunteers, avoiding multiple checks and significant delays. Other concerns were that the Check is only valid on the day of issue and does not detect further offending.

The submissions that addressed these issues generally supported an accreditation system. The Queensland 'blue card' was often referred to – although strictly speaking what the individual applicant receives is a clearance number.

Further details need attention such as the period of accreditation, how to apply, the administrative cost, and whether applicants would have to pay, but overall the submissions show the need to improve on the weaknesses of the current checking system and to move to an accreditation model similar to those that have been successfully operating in Western Australia, Victoria and Queensland.

There is also general agreement in the submissions that the same checks should apply as far as possible to employees, volunteers and self-employed people.

## **FEATURES OF AN ACCREDITATION SYSTEM**

### ***Offending behaviour and accreditation***

An accreditation system is a yes/no approach to allowing someone to work with children. The legislation would determine which criminal records prohibit someone from working with children and which records would trigger a risk assessment. It is important to make sure that criminal records indicative of risk to children in the workplace are considered.

Convictions that prohibit a person from child related employment are quite extensive and in NSW are generally in line with other jurisdictions. One submission said that juvenile convictions should be considered differently, and this is the case in Victoria and WA.

Under the current NSW legislation, risk estimates are triggered by 'relevant records' which include charges for all sex offences, and other offences involving a child victim that are capable of carrying a 12 month custodial sentence. A number of submissions said that a wider range of offences should be considered for accreditation and both charges and convictions should be available.

### ***Relevant employment proceedings (REPs) and AVOs***

The Working with Children Check currently considers AVOs naming children as a protected person and Relevant Employment Proceedings (REPs) arising from reportable conduct.

CCYP has identified a number of problems with the reliability of AVOs as an indicator of risk to children. Two submissions said that AVOs should not be considered as part of background checking and one submission disagreed. Other jurisdictions do not use AVOs in their background checking.

The definitions of 'reportable conduct' are broad and the thresholds for a requirement to report are complex. The submissions identified a number of problems with the reliability of

REPs and a number focused on the issue of fairness. The most common issues were a lack of an appeal process other than to the Supreme Court, the paucity of evidence and investigation information and the fact that the employer does not have the discretion to downgrade less serious notifications. There is also the criticism that the notifications remain on a database indefinitely, the employee has no right to ask for the removal and the Commission has no power to remove of its own accord.

Three submissions supported the use of REPs in background checking and noted the use of disciplinary information in Victoria and Queensland.

In other jurisdictions the only employment proceedings considered as a relevant record are those that have been determined through a judicial or quasi-judicial process – like an industrial court determination, or a registration made by a registration or licensing authority.

### ***Risk Assessments***

New South Wales uses less information than some other Australian jurisdictions in risk assessments. Other Australian jurisdictions use the applicant's entire criminal history to assess risk and are able to consider a wide range of offences. A number of submissions supported this approach.

What is needed are guidelines and protocols for the weight to be given to the various items. The AWARE protocol should be revised with input from major employer agencies.

### ***Obligations on employers when recruiting employees<sup>2</sup>***

In an accreditation system it is likely that employers would be required to be registered. The requirement would be to register with the body administering the Working With Children Check if the person or organisation has any employees, volunteers or other categories of persons (including self-employed persons) in child-related employment.

The obligation on employers would be to offer or make available child-related employment only to accredited persons. Employers would therefore be required to check the validity of an applicant's accreditation prior to confirming employment.

The onus to decide whether a position involves child-related employment would be on the employer and there would probably be a need for an exemption for urgent situations, such as when a teacher is needed urgently in a one-teacher school.

Accreditation and selection for employment could occur at separate times, but there would be no bar to a prospective employer assisting a prospective employee with an application.

### ***Obligations on employers to maintain child-safe workplaces***

In an accreditation system two components of the current Working With Children Check may have little or no weight in risk assessment: assessment of the particular employer and of the particular position. An accreditation system would break the nexus between applicant and a particular position.

While the provision of resources and education would continue to be an important part of promoting child-safe employer organisations, if employer registration is required it would be

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<sup>2</sup> The word 'employer' is used in this Discussion Paper to mean all employers, organisations that use volunteers, and self-employed workers in child-related employment – and the word 'employee' means employees, volunteers and self-employed persons.

necessary to monitor whether employers do in fact have systems to meet child-safe standards.

An accreditation model would address many issues that have been raised in the submissions and successful models already in operation in other jurisdictions may provide valuable guidance if this type of scheme is adopted in NSW.

## Appendix 1

Submissions to the review were invited in relation to two main sets of issues against which a series of questions were posed:

### **Part 1. Issues associated with the Commission's policy, advocacy, research and education functions, for example:**

- The Commission was established in 1999 as an independent voice in government to promote respect and understanding for the interests, participation and needs of children and young people; and to work cooperatively with government and non-government organisations that provide services to children and young people. Do these objectives remain valid?
- In light of the emphasis on greater multi-agency responsibility for children and vulnerable families that has occurred over the last few years, what is the appropriate policy role for the Commission?
- Has this changed policy context altered the nature of the Commission's advocacy, education and research roles?
- Are the consultation and advisory mechanisms established in the Act to assist the Commission to fulfil its functions appropriate?

### **Part 2. Issues associated with the Commission's child-related employment screening (the Working with Children Check), for example:**

- Do the definitions that apply to the administration of the Working with Children Check remain valid (for example what constitutes child-related employment, reportable conduct, prohibited persons etc)?
- Do the procedures for the review of applications for an exemption to the prohibition of employment remain valid?
- What are the limitations of the current approach to screening, including background checking, and what improvements should be made to address these limitations?
- What are the advantages and/or disadvantages of adopting an accreditation model similar to that in place in jurisdictions such as Queensland and Victoria? (*For more information see [www.ccypcg.qld.gov.au/employment/index.html](http://www.ccypcg.qld.gov.au/employment/index.html) and [www.justice.vic.gov.au/workingwithchildren](http://www.justice.vic.gov.au/workingwithchildren) respectively.*)
- Should a different approach be maintained for certain employment categories (for example, volunteers and self employed people)?
- Does the Act contain sufficient auditing functions and compliance measures to support the operation of the Working with Children Check?