



CROWN SOLICITOR
NEW SOUTH WALES

Advice

Interaction with WWC Act, Chapter 16A Care Act & Criminal Records Act - Corrigendum

Contents

1. Summary of advice	2
2. Background.....	2
3. Corrigendum.....	2

5

Prepared for: CHG645 Office of the Children's Guardian

Date: 18 December 2014

Client ref: Sharminie Niles

CSO ref: 201401152 T01 John McDonnell

1. Summary of advice

- 1.1 I have reconsidered my previous advice (CSO ref: 201401152 Advice 6), and have concluded that I was incorrect in stating that information obtained by the Children's Guardian under s. 31 of the *Child Protection (Working With Children) Act 2012* ("the *WWC Act*") may not be disclosed pursuant to s. 245C of the *Children and Young Persons (Care and Protection) Act 1998* ("the *Care Act*"). I have now reached the opposite view. I am also of the opinion that such information may be disclosed in response to a direction of the Director-General under s. 248 of the *Care Act*.
- 1.2 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 On 24 November 2014 I provided advice (CSO ref: 201401152 Advice 6) in which I concluded that information obtained pursuant to s. 31 of the *WWC Act* could not be disclosed under s. 245C of the *Care Act*. I have now reconsidered that conclusion and have reached the opposite view.

3. Corrigendum

- 3.1 In my previous advice, I considered the meaning of "lawful excuse" under s. 45(1)(d) of the *WWC Act*. I stated (at [4.13]):

"In context, it seems to me that the preferable construction of "lawful excuse" in s. 45(1)(d) is that it requires that the person disclosing the information be engaged in an activity that is positively permitted by the law (including the common law)."

- 3.2 My previous advice did not take into account the comments of the Court in *Attorney-General (Cth) v Breckler* (1999) 197 CLR 82. In that case, the plurality considered (albeit in a different context) the meaning of the words "lawful excuse" and stated, at 103 (footnote omitted):

"A trustee will have a lawful excuse for failure to comply with an order, direction or determination of the Tribunal if the trustee has a reason recognised by law as sufficient justification for such failure, whether by way of answer, defence, justification or other legal right or immunity."

- 3.3 Having regard to s. 45(1)(d) of the *WWC Act*, and incorporating the words of the above excerpt, it will be necessary for a person who discloses relevant information to have "a reason recognised by law as sufficient justification" for such disclosure. On reflection, it is my view that the words of s. 245C of the *Care Act* provide such justification, if not authorisation, for the disclosure of the information.

- 3.4 Section 248(2) of the *Care Act* provides that a prescribed body (which includes the Children's Guardian) is under a "duty" to provide information to the Director-General where the Director-General has given the prescribed body a direction to do so under s. 248(1)(b). Again, having regard to the above, it is my view that this will come within the meaning of "lawful excuse" for the purpose of s. 45(1)(d) of the *WWC Act*.
- 3.5 I reiterate that any disclosure contemplated under either s. 245C or s. 248 of the *Care Act* will only be lawfully justified if it falls within the terms of those provisions. Accordingly, it must be information "relating to the safety, welfare and well-being of a particular child or young person or class of children or young persons". If the disclosure takes place under s. 245C, it must be to a prescribed body within the meaning of Ch. 16A of the *Care Act*. If it takes place under s. 248, it must be information that is the subject of a direction by the Director-General.

Signed:

John McDonnell
Assistant Crown Solicitor
for Crown Solicitor