



# Royal Commission into Institutional Responses to Child Sexual Abuse

## ISSUES PAPER 1

### Responses to questions from the Royal Commission Issues Paper 1 – Working with Children Check

My responses to the questions from the Royal Commission are:

#### 1. Should there be a national WWCC?

Yes.

Developing a nationally consistent approach to Working with Children Checks and child safe organisations across jurisdictions was agreed by the Council of Australian Governments (COAG) as part of the broader National Framework for Protecting Australia's children in April 2009. On 4 June 2010, the Community and Disability Services Ministers' Conference (CDSMC) also agreed to progress a nationally consistent approach to Working With Children Checks (WWCC). To date the implementable progress towards this outcome has been disappointingly glacial. The Exchange of Criminal History Information for People Working with Children (ECHIPWC) and a 30 day exemption for cross jurisdictional work with children after 3 years is not astounding especially given the ECHIPWC was agreed in principle in 2007 and its trial began in 2009, and the cross jurisdictional work was already available for varying time periods in most States and Territories.

I acknowledge that this is complex work due to the differing WWCC structures in place across State and Territory jurisdictions. Whilst a WWCC is an easily agreed to outcome, the presence of a WWCC, and consistency in the records checked and for whom in each State and Territory without Commonwealth direction is not. I also find it hard to believe that without a Commonwealth legislated national WWCC, States and Territories will be quick to adopt a suggested national standard, especially if one considers New South Wales has just rolled out its new WWCC this year. States and Territories are very wedded to their current WWCCs and will not willingly overhaul legislation and processes, and incur the costs associated with change without Commonwealth mandated direction.

More importantly and central to all arguments, the level and effectiveness of protection afforded each and every child within Australia whose carers undergo a WWCC is not standardised. Why is a child in Queensland more deserving of his or her carers having a comprehensive, ongoing WWCC completed than a child in Tasmania? In the reported case of Tasmanian ex-Minister of Parliament, Terry Martin who was

convicted of having sexual intercourse with a person under the age of 17, there were no child protection laws in place he could be charged under. Tasmania has been developing its own WWCC for years and the absence, still, of a WWCC in Tasmania is an indication of a less financial jurisdiction being able to provide a check, let alone meet a proposed national standard. The care of children is on the national agenda and should be regulated nationally by the Commonwealth in conjunction with the States and Territories.

For national organisations and Commonwealth bodies which operate in every State and Territory within Australia the ability to operate across jurisdictions whilst encompassing a myriad of employment and volunteer personnel is difficult to negotiate. The differing WWCCs and resulting legal requirements create confusion within organisations; give rise to folklore and legend as personnel on the ground apply homespun interpretations to rulings from States or Territories legislation in the absence of clear, easy to access guidance or knowledge which can be applied to their unique workplace situations; and they necessitate the writing of complex policies to encompass the many variations between the States and Territories and employer/employee/volunteer relationships. The various bodies within the States and Territories which provide information to the public about the WWCC are, in some cases, slow to respond to policy queries due to their own need for legal guidance prior to providing their response, or the State bodies are non-existent as is the case in Tasmania.

The fact that there is no legislated necessity for Commonwealth employees to hold a WWCC creates an issue for public servants. The absence of direction, other than should they break a State or Territory child protection law they will be prosecuted, is indicative of the need for national Commonwealth driven standards to cover all employees and volunteers. The Public Service Act which outlines the conditions of engagement of persons employed within Commonwealth Departments to do certain jobs including the obtaining of 'clearances' required to do those jobs or perform those duties is superior to State and Territory legislation. The State and Territory legislation requiring employees/volunteers to get a WWCC can not be applied to Commonwealth employees as it is inconsistent with the requirements of the superior Commonwealth Public Service Act (S.109 of the Constitution). Given the requirement that the need to obtain a WWCC has not always been applied in Commonwealth bodies which provide services for children it is not beyond the realms of possibility that unsuitable persons have been employed, and are employed, to provide services to children.

The education and protection of employees and volunteers that look after children is unnecessarily complicated by the varying State and Territory standards. Risks include the application of prior knowledge related to legislation from another State or Territory, or the misinterpretation of legislation through confusion or ignorance. This level of complexity and the resulting uncertainty deters many organisations and people from engaging in child related activities or employees and volunteers. The 2010 Volunteering Australia Survey cited background checking as the second most frequently reported negative public policy impact on volunteering for organisations. The same report indicated that 93.6% of individuals' were not deterred from volunteering by the need for background checking. The difference between the two perceptions is potentially being the subject of the check, as opposed to the organisation trying to negotiate and complete the WWCC process to obtain the necessary clearance for an employee or volunteer. A single screening system applied

nationally would alleviate much of the negativity associated with getting a check completed.

The differing structures do not necessarily reflect or capture convictions, charges or investigations due to the differences between what background information is considered under a State or Territory's particular WWCC, or the time periods which the WWCC can cover e.g. spent convictions. These differences can potentially enable offenders and undetected offenders to move across jurisdictions and still engage in child related employment or volunteering. Situational crime prevention studies identify this as an avenue of opportunity for potential offenders to enter organisations such as organisations that operate nationally.

It also creates issues in being able to quickly respond to reports of offenders' whereabouts. Alleged offenders and offenders can move freely between jurisdictions with a degree of anonymity and with the knowledge that cross jurisdictional process and procedure can slow down police response times. By the time the necessary cross jurisdictional paperwork and notifications occur offenders who are aware of their detection can move on. An example of this was seen in the reported case of Sascha Chandler who was abused by Andrew McIntosh. McIntosh moved backwards and forwards between Queensland and Northern New South Wales abusing children between 1977 and the 1990s.

As a person who acts as an interpreter of legislation to implementers at the coal face in a major Commonwealth government department with responsibilities for the care and safety of children, I believe there is only one solution - a national WWCC regulated by the Commonwealth and implemented by the States and Territories.

## **2. What features should be included in any national scheme?**

Features that should be included in any national scheme include:

- A national screening database fed by Commonwealth, State and Territory judicial and policing bodies (such as the expansion and amalgamation of the "Exchange of Criminal History Information for People Working with Children" and the Australian Government Security and Vetting Agency capabilities) ;
- Ongoing monitoring and notifications of changes in criminal histories;
- Reviews of disciplinary information of professional organisations and Commonwealth, State and Territory Government employees;
- Renewal of WWCC every three years;
- Cross jurisdictional recognition of a WWCC regardless of where it was applied for;
- Checking of operators, employees and volunteers, regardless of age, in child related businesses, occupations or activities;
- Inclusion of charges and convictions (including spent convictions) for any Class One or Two offence, sexual offence, violent offence, drug offence, drink driving offence, assault, ill-treatment, neglect of, or psychological harm to a child, any registrable offence, offences of attempting, or of conspiracy, or incitement to commit any of the previous offences;

- Consideration of relevant matters committed as a juvenile and findings of guilt; unheard or yet to be finalised matters; matters proven but not leading to a conviction; and dismissed, withdrawn or discharged matters;
- Consideration of Apprehended Violence orders and Personal Violence orders; relevant employment proceedings related to conduct involving or in the presence of a child;
- Consideration of police investigations into allegations of serious child-related offences even if no charges are laid because the child was unwilling or unable to proceed;
- Consideration of relevant matters related to the execution of employment duties (e.g. drink driving charges for persons who provide transport for children);
- State and Territory Screening Units to receive and process applications;
- Public education program;
- Public information website to access information and lodge applications electronically;
- Facility to lodge applications through Australia Post.

**3. If there is no national scheme, should there be minimum requirements for each state and territory scheme?**

Yes - the Exchange of Criminal History Information for People Working with Children could be a base line.

It is important to note that whilst a set of minimum requirements could be agreed upon the more important element would be cross jurisdictional recognition. A WWCC which is transportable across borders and renewable in each State or Territory regardless of where it was originally applied for is the only truly national scheme. Without these facilities a national WWCC or standard would only fulfil part of what national organisations require.

The 30 day cross jurisdictional exemption is of course an improvement on the old situation however it does not provide an outcome desired by national organisations.

**4. How long should any clearance be granted for?**

Three years.

**5. Should a person be able to commence work before the check is completed?**

No as the risk to children and organisations is too great.

**6. How should child-related work be defined?**

Child related work or activities should be defined as any work or activities where in the absence of children cannot be conducted as intended. For example a school bus driver cannot provide a school bus run if there are no children, therefore participates in a child related activity. Conversely, a bus driver who transports children and adults on

a regular bus runs can carry out his or her work and therefore, would not require a check.

## **7. How should child-related sectors and roles be defined?**

Child-related sectors and roles should be defined as work or activity carried out in a sector or role in the presence of, related to or for the benefit of children. If a sector or role cannot exist in the absence of children then it is not child specific. "Related to" encompasses any administrative position which has requires access to personal records of children. Any sector or role could conceivably be adapted to provide outcomes only for children.

Trying to define child related as work, sectors and roles as "primarily" for children leaves it to open to interpretation and the resulting ambiguity confuses those trying to understand if they do or do not need a WWCC.

## **8. Are current exemptions for a WWCC adequate or appropriate – in particular, should a WWCC apply to those:**

a. living in the homes of children in out-of-home care?

- Cannot comment on this situation

b. parent volunteers?

- Exemptions for parent volunteers where originally designed for situations where every parent who attended the work or activities remained with their children while the work or activities were carried out. An example of this is play groups for mothers and small children, or parents assisting in a classroom under the supervision of a teacher.
- In some States and Territories this has been expanded over time (due to wider application by individuals) to include (where organisational policy has not added to legislative requirements) activities and work where parents leave their children in the care of team coaches and adult volunteers. If these coaches or volunteers have children who also participate in these activities or workplaces then they are not required to be checked by legislation in some cases. This is the type of ambiguity which requires some consideration and clarification.

Another consideration should include children who turn 18 whilst still participating in work or activities with children under the age of 18. If the 18 year old participants have authority and power over the children in these activities then the need for them to be checked should be included.

Where an employment relationship is recognised between an employer and a person under 18 years of age no check should be required. Nor for work experience students under the age of 18 who are placed with businesses - as persons conducting a business or undertaking employers should ensure that their employees are provided with a safe working environment which is free from all forms of abuse regardless of age.

Work experience students in placements which give them access to children should not be checked provided they are constantly supervised by a person who holds a current WWCC.

### **9. What records should be included in the check? For example, should the check include juvenile records?**

As listed above the checking of operators, employees and volunteers records, regardless of age, in child related work (as defined above);

- inclusion of charges and convictions (including spent convictions) for any Class One or Two offence, sexual offence, violent offence, drug offence, drink driving offence, assault, ill-treatment, neglect of, or psychological harm to a child, any registrable offence, offences of attempting, or of conspiracy, or incitement to commit any of the previous offences;
- consideration of relevant matters committed as a juvenile and findings of guilt; unheard or yet to be finalised matters; matters proven but not leading to a conviction; and dismissed, withdrawn or discharged matters;
- consideration of Apprehended Violence orders and Personal Violence orders; relevant employment proceedings related to conduct involving or in the presence of a child;
- consideration of relevant matters related to the execution of employment duties (e.g. drink driving charges for persons who provide transport for children);
- juvenile records (especially given that police statistics on alleged sex offenders from Victoria, Queensland and South Australia released by the Australian Institute of Criminology show young sex offenders (10-16 years of age) comprised 8% of the sex offender population in 2000-01 (Australian Institute of Criminology, 2002). The Australian Institute of Criminology also found that approximately 13% of physical assault offenders in 2000-01 were young offenders); and
- consideration of police investigations into allegations of serious child-related offences even if no charges are laid because the child was unwilling or unable to proceed.

### **10. How should an appeal process operate?**

An appeal process should operate much as the current systems of appeal do through screening units that liaise with organisations or individuals who require the WWCC to be done and then advise the organisation or individual if the appeal was successful.

A single standard screening process based on best practice and taken from the States and Territories current screening units should be decided upon.

### **11. What issues arise from the current regime of records that result in automatic barring of a person from working with children?**

None – organisations should not engage persons who are unsuitable to work with children in those roles that involve children.

## **12. The adequacy of the risk assessment process.**

The adequacy of the risk assessment process carried out by screening agencies is unknown but should be responsive to change in light of any cases where an offender or perpetrator of child abuse can access children through institutions.

Given that some offenders have moved from State to State with a degree of anonymity and been able to obtain work or volunteer in institutions suggests the current individual State and Territory systems would benefit from a single, national database.

## **13. To what degree should the WWCC minimise the need for institutions to establish clear processes for responding to inappropriate behaviour of staff in child-related positions?**

The WWCC should not minimise the need for institutions to establish clear policies and processes for recruiting staff and volunteers, supervision, training, responding to inappropriate behaviour of staff and risk assessments in child-related positions. The WWCC is just another tool in the prevention of child abuse within institutions.

## **14. How should the effectiveness of any existing or proposed WWCC be evaluated and / or monitored?**

Commonwealth and independent auditing of WWCC system and data collection; cross referencing with offender data and disclosure statistics; client feedback and lessons learned from any errors in screening results that occur should ensure the system is constantly updated and responsive to faults detected.

On going periodic reviews of the whole child protection system by independent bodies can highlight successes and systemic changes that may be required to improve the outcomes for organisations and individuals along with children who depend on the system for protection.