

# ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

## Issue Paper 1 – Working with Children Check

The Western Australian Government is pleased to provide information to the Royal Commission about the Working with Children (WWC) Check. The Western Australian *Working with Children (Criminal Record Checking) Act 2004 (WWC Act)* has been successfully implemented by the Department for Child Protection and Family Support since January 2006 through its WWC Screening Unit.

The information provided in response to the fourteen questions is premised on the purpose of the WWCC being the protection of children from risk of harm in those circumstances where services are predominantly for children, and people are in positions of authority and power over them. The protection of a child from harm must be paramount, and must outweigh any perceived right to pursue work with a child where such a risk has been identified. Western Australia's responses are also based on developments and learnings over more than seven years including the:

- importance of positioning a WWC Scheme within a range of child safeguarding strategies at a local level;
- increased understanding of what is required to make decisions that are in the best interests of children;
- high level of expertise that is required both in the behavioural sciences and legal arenas to make decisions about eligibility for child related work;
- high investment that is required to put in place information systems and agreements that facilitate timely access to the records required for assessment;
- importance of targeting any WWC Check scheme to those people who have work relationships of trust and authority with children and to utilise alternative methods of screening for other types of contact; and
- increasing capacity needed for effective local compliance activities to adequately address organisational and individual behaviour that poses a risk of harm to children.

Western Australia has been an active participant and taken a lead role in many national forums and initiatives, via its WWC Screening Unit. It is clear that WWC schemes are developing not only on a national but an international basis. There is still much to learn and opportunities must be taken to share skills and develop the evidence to support effective and consistent approaches.

While it is not appropriate to support a uniform national WWC scheme, Western Australia will continue to be an active participant in developing informed consistent approaches.

The WWC Act was reviewed in late 2011 and findings from that review have been referred to throughout the response. Reference is also made to significant case law that has been established.

## 1. Should there be a national WWCC?

*While appropriate national consistency is supported the development of a uniform national scheme, or model legislation or a single centrally managed WWC scheme is not supported.*

The major reasons for this are:

- WWC Check legislation in each jurisdiction does not stand alone but operates as part of a suite of complementary legislation to protect children, monitor and manage offenders and regulate different occupations and industries. In Western Australia, for example, the *Working with Children (Criminal Record Checking) Act 2004* (WWC Act) is constructed to better protect children alongside the *Children and Community Services Act 2004*, *Community Protection (Offender Reporting) Act 2004*, *Education and Care Services National Law (WA) Act 2012*, the *Teacher Registration Act 2012* and other legislation. Therefore the 'scope' of who is captured by WWC Check legislation is influenced by whether adequate screening is provided in other ways.

WWC Check legislation and its operation is also constructed to build on strengths of local policies and operations. For example, while WWC Checks are focussed on persons undertaking services or providing activities for children, the Western Australian Government also subsidises criminal record checks for other volunteers. So where volunteers are exempt from the WWC Act, such as parents volunteering in activities with their own children, (or volunteers working with other vulnerable people), suitable screening is available without the inappropriate impacts and net widening of imposing the WWC Check legislation.

It is not feasible to construct model national WWC legislation without substantial inconsistency for the wide variety of child related services and affected occupational groups. There would be little benefit in the protection of children from harm, and significant resource impact and operational problems in aligning and implementing state legislation, infrastructure and operation.

- There is also a lack of recognition that WWC Check schemes are not limited to consideration of criminal and other records to make a once off decision about eligibility to work with children. Jurisdictions implementing WWC legislation, including Western Australia (WA), operate schemes with three focus areas.
  - (a) *Past behaviour.* Checking of criminal and other records to identify if there has been known behaviour which indicates the applicant may harm a child in the course of child-related work. Issuing of cards (or other authorisation) where a person is considered eligible for child-related work and prohibiting such work if they are not.
  - (b) *Current behaviour.* Where persons have been issued authorisation to work with children, monitoring for new offences of concern so that reassessment can occur (currently only possible within the jurisdiction and not nationally); also undertaking other compliance activities with persons or organisations at risk of breaching the legislation. These functions require strong networks within jurisdictions. In WA there is an estimated 20 000 employers and close to 400 000 active applicants or persons with notices.
  - (c) *Future behaviour.* Promotion of child safeguarding and risk management strategies to organisations that provide services to children and to parents.

A WWC Card can only signify that available records have been assessed but cannot signify a person is suitable to work with children.

It is well known that not all offences and other harmful behaviour towards children are reported and also that people 'offend' for the first time. Also there are many adults who have contact with children but are not working with them such as visitors to schools or adults watching their children's activities. Good governance that includes child safeguarding strategies is important in developing child safe organisations.

*Considerable consideration of the above and other factors has influenced deliberation that jurisdictions should work towards consistency but that a uniform national scheme is not feasible. This is reflected in:*

- The development and implementation between 2005 and 2009 of a framework and Memorandum of Understanding (MOU) in relation to the exchange of expanded criminal history information. The agreement was brokered to improve the exchange and consistency of criminal record information considered by jurisdictions beyond standard convictions disclosed in national criminal record checks.

The Council of Australian Governments (COAG) Working Group explicitly considered a uniform legislative scheme and determined this was not feasible or desirable. The endorsed recommendations included:

- (a) *In the longer term, and ongoing, child-related employment screening should be informed and improved by increased research and effective sharing of evidence-based learning to achieve consistent practices, with consideration of the scope for achieving mutual recognition of existing schemes.*
- (b) *The most appropriate framework for exchange of criminal history information is to seek inter-jurisdictional agreement on the type and scope of information to be exchanged, while leaving each jurisdiction to determine for itself to what extent and how to use the information received to make decisions relevant to the safety of children.*

A trial MOU was successfully evaluated and an Intergovernmental Agreement (IGA) to make this exchange of information arrangement permanent was recently signed by the Prime Minister. This agreement continues to support exchange between jurisdictions operating under different legislation but with common purposes and participation standards.

- In 2010 Community and Disability Service Ministers agreed to progress nationally consistent approaches to WWC Checks. This included support for work undertaken by the National (WWC) Operators Forum such as improving consistency of assessments and led to a Working with Children Checks Working Group which has progressed sensible harmonisation on exemptions for persons who may work with children across jurisdictions.

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

A national uniform scheme is not supported for the reasons described in the response to Question 1. The key elements of a nationally consistent approach to WWC schemes that accepts variance in legislation and operation is discussed in response to Question 3.

In addition, Western Australia together with other state and territory representatives on the Working with Children Checks Working Group, established by the Community and Disability Services Advisory Council (CDSMAC), were concerned that a stand-alone focus on achieving national consistency by legislative harmonisation and alignment of screening processes would not afford sufficient protection to children. A response reliant on legislative reform alone would ultimately fail to adequately protect children when enforcement mechanisms breakdown.

The frustration for organisations that must travel between jurisdictions is appreciated. More can and should be done to work towards appropriate national consistency including mutual recognition of cards and prohibition notices for periods of time provided that there is a robust national updating of new offences for those authorised to work with children and a system in place for this to be communicated to the jurisdiction issuing the notice as well as the jurisdiction to which the individual is travelling. The review of such notices would have to be undertaken by the issuing jurisdiction.

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

A nationally consistent approach to WWC Checks should cover the three focus areas (*Past, Current and Future Behaviour*) described in response to Question 1. Additional minimum requirements essential for a scheme established to determine whether a person should be permitted to work with children include:

- (a) the best interests of children as the fundamental consideration and reflect the principle that working with children is a privilege not a right;
- (b) a triggering mechanism (e.g. certain criminal offence/ disciplinary finding) requiring an assessment of risk for the purpose of preventing future potential harm (as opposed to an assessment of guilt for punitive purposes). As such the assessment, once triggered, should consider all conduct relevant to risk (whether that behaviour is criminal or otherwise) and not be confined to the circumstances of a person's criminal record or disciplinary finding (e.g. grooming behaviour);
- (c) consideration of a full range of criminal records (all convictions, pending charges and non-conviction charges) and other records of relevance to the task of assessing risk, and providing legislative authority to authorise the exchange and collection of that information for that purpose;
- (d) continuous and ongoing checking of the criminal records of persons permitted to work with children to enable quick and effective action to be taken should there be a new offence with identified risk to children;
- (e) that principles of natural justice are reflected and underpin the decision making of the scheme and there are rights of review from decisions made;
- (f) the setting out of a clear framework that authorises the assessment and weighing of information to the issue of risk of potential future harm (this must appropriately reflect the dynamics of offending against children, and clearly distinguish that assessment analysis from traditional legal approaches which deal with proof of offences for punitive purposes);

- (g) emphasis that protection of children requires a whole of community approach and encourage child safeguarding practices alongside the WWC Check;
- (h) automatic barring from child-related work for certain serious offences (considering the response to Question 11);
- (i) the checking applying *only* to those who engage in child-related work, given the intrusive nature of the WWC Check and the consequence of an adverse decision; and
- (j) strict requirements for confidentiality of information and decisions made.

At present, each jurisdiction that has legislation regulating persons who apply to work with children has provisions that reflect these minimum requirements to some degree.

Over the seven year period that the WWC Act has been implemented, there have been substantial developments and improved understandings about how to make decisions that appropriately consider the range and type of offending and behaviours that may present a risk of harm to children from people who may work with them. Fundamentally underpinning any scheme that involves consideration of people working with children is the paramount consideration – the best interests of children. Working with children should be viewed as a privilege not a right with the focus upon the risk to children rather than upon the view that individuals have a pre-existing right to work with children.

Clearly a scheme for determining whether a person may work with children has the potential to cause prejudice to people, and there must be sufficient checks and balances to ensure that decisions do not unnecessarily do so. However, the purpose of any scheme must be the protection of children from risk of harm in those circumstances where the service is predominantly for children and people are in positions of authority and power over them. This ultimate purpose to protect children can become obscured by a perceived view that Government is removing a person's ability to earn a livelihood in their chosen field. Prejudice to a person seeking to work with children should not be a relevant consideration; it is the protection of a child from harm that must outweigh any perceived right to pursue work with a child where such a risk has been identified.

This also highlights the importance of ensuring that the scope of WWC legislation is focused and does not include areas of incidental contact with children or contact that is not work. Unless the scheme is appropriately focused, the impact of prohibition may indeed be unjust. The person has a right to work but not with children.

Decision making under the WWC Act involves the assessment of risk of potential harm to children. The legislation mandates consideration of a range of information in addition to criminal records in order to identify and analyse potential risk.

Consideration of whether a person should be permitted to work with children should not be left at large. Where there is no criminal record (or no significant disciplinary findings or police intelligence information) then the person should be permitted to work with children. However, there should also be some offences whereby a person should never be permitted to work with children and do not require an assessment of risk; the offences by their very nature indicate that the risk can never be negated. Currently in the WWC Act these are offences where the person as an adult has been convicted of an offence of sexual penetration of a child under the age of 13 years. These are offences for which it is reasonable and justifiable to impose a lifelong, automatic ban on

ever working with children, without assessment of the context of the offence or avenues for future cancellation of the ban.

Currently in the WWC Act, where an applicant has a criminal record which falls between the above two extremes, an exercise of discretion is triggered which requires an assessment of risk. This involves the assessment of information and its consideration according to legislative factors. In the Report of the Review of the WWC Act<sup>1</sup> it has been recommended that relevant disciplinary findings from prescribed employers and professional associations and certain police intelligence information,<sup>2</sup> also be triggers for consideration under the decision making power in s 12.

Once triggered, an assessment of risk requires an analysis of all relevant material properly before the decision maker. This includes information relating to the offences on the criminal record but is not confined to that information. It includes records providing evidence of alleged non-criminal behaviour (whether or not that is connected to the offence) such as evidence in the manner of sexual grooming.<sup>3</sup> The assessment is as to risk not guilt. The WA State Administrative Tribunal has found that conduct described as “grooming behaviour” while never leading to a proven sexual offence is sufficient to satisfy the Tribunal or decision maker “that such behaviour was a reliable indicator that sexual harm may occur in the future”.<sup>4</sup>

While not specifically referred to in the WWC Act, the Court of Appeal has found that the notion of ‘unacceptable risk’ reflects the evident policy of the WWC Act. Ultimately the test under the WWC Act as developed by the Court of Appeal, is whether on the basis of the information and other material properly before the decision maker, and after having regard to the criteria in s 12(8), there is an ‘unacceptable risk’ that the applicant might cause sexual or physical harm to children, in the course of carrying out child-related employment.<sup>5</sup> The object of the WWC Act is to assess such risk but not to determine whether the person would commit an offence.

The information considered, the legal tests applied and approaches taken are different in other jurisdictions. Working towards a nationally consistent *approach* is feasible, however it will be difficult to reconcile the differences in the interpretation of the legislation in each jurisdiction without potentially diluting the important advancements made by each.

The principles of natural justice are fundamental to any scheme. The decision maker must be impartial and must have no personal stake in the matter to be decided. Where an adverse decision is to be made, a person seeking to work with children, should have the opportunity to be heard and be able to submit information and material to support why they should be permitted to work with children. The person should therefore be apprised of the information that has been considered and invited to provide information and materials they consider relevant to the assessment of risk.

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<sup>1</sup> Western Australia, *Review of the Working with Children (Criminal Record Checking) Act 2004*, (July 2012), Tabled Paper No 4919 (Legislative Council), Tabled on 13 September 2012, 40 – 43.

<sup>2</sup> Reliance upon police intelligence information is to be limited and meet certain prescribed requirements similar to the provisions in the Queensland *Commission for Children and Young People and Child Guardian Act 2000* before the information can be used as a trigger for the assessment of an application.

<sup>3</sup> *Chief Executive Officer, Department for Child Protection v Hardingham* [2011] WASCA 262, paragraph [52].

<sup>4</sup> *Hardingham and Chief Executive Officer, Department for Child Protection* [2012] WASAT 153.

<sup>5</sup> *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] WASCA 28; (2008) 36 WAR 39, paragraph [81].

A scheme needs to have effective, continuous checking of changes in the criminal records of persons who are permitted to work with children. Current Western Australian WWC Cards are monitored through Western Australia Police as to whether the cardholder commits an offence during the life of the WWC Card that would require a reassessment of the suitability of the person to hold a WWC Card. There is presently no capacity to receive updates of new offences from other jurisdictions. There needs to be an ability to have ongoing national checking with the residents of Australia being able to move regularly and freely between States.

Western Australia together with state and territory representatives on the Working with Children Check Working Group strongly support progress towards a nationally consistent approach to WWC Checks. This can be achieved by reaching agreement on actions, such as those proposed by the National Operators Forum, such as embedding child safeguarding practices at the operational level. It is at the operational level where children interact with organisations and where children are also at greatest risk of exposure to unsafe adults. It is the view of the state and territory representatives on the Working Group that the protection of children can be achieved in the absence of nationally harmonised legislation.

States and territories have already made significant commitments to enable inter-jurisdictional exchange of police criminal history information although there is more work to be done.

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

Currently the Western Australian WWC Card is valid for three years unless there are new offences of concern. It is considered preferable for the card to be valid for five years supported by CrimTrac developing the capacity to update the police records of all card holders at least weekly so that any new offences can be assessed and eligibility to continue working with children reassessed if required.

This continuous monitoring of cardholders is currently undertaken through information system links with the Western Australia Police for WA offences only. Persons who offend in other jurisdictions while travelling or living temporarily elsewhere are not picked up. Similar limitation exist in other jurisdictions.

Increasing the validity of the WWC Card to five years would reduce the cost of the scheme for government and for employers and organisations.

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

Yes. An applicant should be able to commence work before the outcome of a WWC Check. It can take time for a WWC Check to be completed.

In Western Australia, a person can start or continue in child-related work, provided they have made an application for a WWC Check (unless they have a Class 1 conviction as an adult) and present a receipt from Australia Post as proof that their application has been lodged.

Requiring an applicant to wait until the outcome of their WWC Check before commencing work would be an economic and service strain and would unnecessarily disadvantage the majority of applicants who will go on to receive their WWC Card. It would be unreasonable to stop a person from being employed and for services for children to be impacted while this process is occurring.

In Western Australia where there is not a criminal record (about 83% of applicants) the WWC Card is received by about 90% of applicants within two weeks. It takes longer where the application form is inaccurately completed, identity issues to be resolved, initial false matches, high peak demand or issues with information systems. Where a person has a criminal record, cards are issued for over 50% within 30 days and for 93% within 90 days.

Gathering further information about criminal records from sources such as the Office of the Director for Public Prosecutions, the Courts, corrective services and interstate jurisdictions can take months. Furthermore, once that information is received, the assessment and decision making process can be complex and must also provide opportunity for the applicant to make submissions and for further information to be obtained or corroborated.

Where there is a record, the WWC Screening Unit, like other jurisdictions, must triage and prioritise those at highest risk. This enables prompt action to be taken to issue an Interim Negative Notice prohibiting the applicant from performing child-related work while the application is assessed. There is public concern particularly about persons who have convictions for child sex offences and this process enables these high risk applicants to be promptly barred from child-related work.

If legislation required a person to have the WWC Card or other authorisation before commencing work then this would require a significant increase in the budget allocation to provide more staff and resources to screening units. There would also need to be increased resources allocated to agencies which must provide the information relied upon to make decisions; also robust inter-jurisdictional agreements and processes (including information system links) would need to support the flow of information. Even with a massive increase in resources to bolster screening capacity, services would not be able to quickly employ persons to replace key staff who were suddenly unavailable.

Given the current economic climate this is not a feasible solution. In turn, preventing applicants, apart from those issued with an Interim Negative Notice, from working would be unjust.

Of course the best interests of children is always the paramount consideration and with this in mind, it is important that organisations do not rely solely on the WWC legislation to keep children safe. The WWC Check is only one of the strategies responsible organisations should use to make sure children are safe.

A WWC Card is not a guarantee that an individual is suitable to work with children and does not replace workplace supervision. (See Question 9)

To summarise, working while awaiting the outcome of a WWC Check application is acceptable given that:

- the majority of applicants will not have a criminal record of concern in relation to working with children;
- those individuals who do have a criminal record of significant concern can be issued an Interim Negative Notice to prevent them from commencing their child-related employment until the finalisation of their assessment;
- there will be a significant negative impact to the workforce, services to children and also the individual if they were not able to commence employment; and

- the WWC Check does not stand alone and organisations should already have policies and procedures in place to promote the safety of children, including supervision and training which should be increased when there are new workers.

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

The definition of child-related work will always represent a challenge as any definition that is static or overly prescriptive can potentially fail to provide protections where circumstances would clearly warrant it or widen the net too far. However a definition that is too broad or ambiguous can lead to uncertainty and unnecessarily expose persons to intrusive criminal record checking or, on worst case scenario, prohibit them from employment in areas where involvement with children is insignificant.

Presently the WWC Act defines work as child-related in s 6 if, the usual duties of the work involve, or are likely to involve, contact with a child in connection with at least one of the categories of child-related work listed. In the Report of the Review of the WWC Act it has been recommended that there should be consultation with stakeholders and amendments drafted to reduce the ambiguity of the term “child-related work”.<sup>6</sup>

Any definition of child-related work needs to capture those work relationships where there is the opportunity for the development over time relationships of trust and authority with a child, and capture those situations where there is the inherent opportunity for abuse to occur in situations of extreme vulnerability, such as overnight camps. It is important to identify those institutions and services that are directed to or primarily aimed at children. Child-related work should be defined according to where people are working, the type of work and whether or not contact with children actually occurs or is likely to occur as part of usual work duties. People who are paid, unpaid, volunteers, students on placement and self-employed should be captured.

Any definition of child-related work needs to be flexible to ensure that such a rigorous and invasive checking process applies only to those persons who will or will likely have contact with a child in order to carry out their child-related work duties. Any definition needs to avoid the potential for complacency and reliance upon the WWC Check rather than adopting a whole-of-community approach and the WWC Check being just one part of a raft of strategies for the protection of children.

Contact with children should be an essential element of any definition and that term broadly defined. In Western Australia the presence of supervision is not a consideration for exclusion as it is known that persons can groom children in the presence of adults and also that harm can occur to children outside of but met through work relationships.

Exemptions and exclusions from the definition should be provided as appropriate to target the checks, engender the necessary balance and other policy considerations (for example exemption where there is other sufficient screening in place). Refer also to the response to Question 8.

In a recent article by Chief Justice French of the High Court of Australia a preference for laws which set out broadly stated principles was expressed. His Honour stated:

*“... we have to accept that complexity in the law in one guise or another is always with us. In my opinion, the democratic legitimacy of our laws is more likely to be*

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<sup>6</sup> Western Australia, *Review of the Working with Children (Criminal Record Checking) Act 2004*, (July 2012), Tabled Paper No 4919 (Legislative Council), Tabled on 13 September 2012, 15 – 20.

*threatened by the complexity involved in over-detailed, prescriptive and inaccessible language, than in laws which set out broadly stated principles. Such laws give those charged with their administration a degree of flexibility and leave it to the courts to determine on a case-by-case basis in the tradition of the common law how the law applies to particular circumstances. There are, of course, those who will say this builds uncertainty into the law. But every word in a statute has a degree of uncertainty about its meaning. The more words, the more possibilities there may be for debate about their meaning. .... certainty is not enhanced by the use of more words. It must be accepted that sometimes complex and detailed drafting is the only way of dealing with a particular problem. However, simplicity which fosters an organic and responsive growth of the law is to be preferred where that option is open.<sup>7</sup>*

Given the complexity of employment relationships that exist and which afford the opportunities to create the relationships or vulnerable situations referred to above, a definition of child-related work that allows a degree of flexibility as described by His Honour is preferable.

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

Many occupations have contact with children to the extent that they can develop relationships of trust and authority. Specific occupations and professions have not been specified in the WWC Act. The WWC Act has not defined “child-related work” according to a person’s trade, profession or job title such as “psychologist”, “nurse” or “teacher” as there are many in these professions who do not necessarily work with children.

The definition of child-related work should not be place or activity specific as this may potentially over capture persons who would be required to apply for a WWC Check. There needs to be realistic parameters so as to not inadvertently capture persons, who may, for example, be on school grounds fixing electrical problems outside of school hours.

Extension of WWC schemes can have unintended consequences. This has been demonstrated by the experience in the United Kingdom where the government suspended the centralised Vetting and Barring Scheme (VBS) implemented between 2007 and 2010. This action was in response to public outcry based on privacy, regulatory burden and cost, primarily because of over extension of the scheme into peripheral areas of work and some private domains. The VBS scheme would have seen vetting of individuals in unprecedented numbers as a community safeguard against the abuse of children and vulnerable people. The suspension also unfortunately lost much expertise and sound process as to the use and consideration of screening to protect children. The UK experience highlights that screening more people is not necessarily better and vetting systems are not substitutes for proper vigilance by individuals and society.

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<sup>7</sup> Chief Justice Robert French AC “Law – Complexity and Moral Clarity”, (Speech delivered at North West Association and Murray Mallee Community Legal Service, Mildura, 19 May 2013, <http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>)

- 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?**
  - b. parent volunteers?**

The current exemptions for a WWC Check in Western are adequate and enable the WWC Check to be targeted to where there is an employment (including volunteer) relationship, where a tertiary student is on placement, where a child-related business is conducted and where the type of contact is consistent with that envisaged by the Act

It should be noted that there are alternative record checks and strategies more suitable than WWC Checks where there is contact with children that occurs as part of private and community life rather than work situations. For example, adults living in the homes of children in out of home care, and who are not undertaking child-related work (e.g. providing activities or respite to support the placement) are required to undergo screening for non-work situations (Department for Child protection and Family Support (DCPFS) screening and National Police Checks).

Western Australian Government policy is for a balanced and sensible application of the WWC Act. Exemptions are a tool to target the Act to circumstances where the type of contact is most likely to result in relationships of trust and authority and where the level of risk to children is greater than would occur in general social situations such as going to the beach, visiting friends or general retail.

- An 'exemption' is where a category of person or type of work that may otherwise be 'in scope' is excluded by the Act or Regulations from the definition of child-related work.
- Persons who are 'exempt' are not in child-related work and are therefore not entitled to apply for a WWC Check. They cannot be compelled by an employer to make application, and the WWC Screening Unit has no authority to consider applications from persons who are not in child-related work as defined in the Act.
- Exemptions can be general in nature, applying to all categories of child-related work, or specific to a particular category of child-related work only.

The following are common exemptions:

- volunteers and students on unpaid placement who are under 18 years;
- employers of children and people who work alongside children as fellow employees, unless otherwise doing child-related work;
- parents volunteering in connection with their child's activity may be exempt (this exemption does not apply to parents volunteering in connection with overnight camps);
- short term visitors to WA.

It must be highlighted that the WWC Check is only one of the measures to achieve safety for children in workplaces. The WWC Check is not a substitute for parental or workplace responsibility and supervision. In addition, where employees, volunteers or students are exempt from the WWC Check, employers and organisations can require a National Police Certificate or National Police Check for Volunteers to assess any risks.

### Other adults living in the homes of children in out-of-home care

The WWC Act is premised on a person having usual duties of work that involve contact with children; also that the work is undertaken either for another person/or agency or that there is a child-related business. A person with no work duties with the children and who is simply living in a household cannot meet these legislative requirements.

The WWC Check aims to prevent people *working* in positions of trust and authority where they may cause harm to children. The aim is not to limit where people may live. There is other legislation which applies in these situations including the *Children and Community Services Act 2004* and *Community Protection (Offender Reporting) Act 2004*. As household compositions change, and there is no 'employer' of these household members, it would not be feasible for the WWC Screening Unit to enforce compliance.

In Western Australia standards for placement are properly the responsibility of the Department for Child Protection and Family Support (DCPFS) which is in a better position to know who is resident in the placement. Foster or relative carers (i.e. often the married couple or de facto partnership) are required to have WWC Checks as they are considered to have usual duties of work in the provision of the placement.

Where the carers have their own adult children, or lodgers, other adult family members or adult visitors who also reside at the house, these individuals are not required to have a WWC Check - unless they are also doing some of the child-related work such as providing activities or respite to support the placement. However, these people are required to undergo DCPFS screening and National Police Checks which is the appropriate screening for a situation that is not 'work'.

### Parent Volunteers

There has been on-going debate about the pros and cons of the exemption for parents who volunteer in most activities with their children.

The Western Australian government does not consider that the voluntary work done by parents to support their children should be controlled by legislation and therefore supports the parent volunteer exemption for the following reasons:

- Parents have substantial contact with children other than their own outside of voluntary work. Compulsory criminal record checks of those doing voluntary work may increase complacency and lead to less vigilance for all the types of contact, reducing the safety of children. There are child safeguarding measures which are more workable and effective in these situations.
- It is not possible, or desirable, to require all adults who have contact with children to have a WWC Check. As part of normal life, children regularly have contact with adults who do not have any criminal record check. This includes contact with the parents of their friends and classmates, as well as with adults they don't know. For example, children visit their friends' homes and their friends' parents attend their sports days. All parents can attend school functions and be on school premises even if not a 'volunteer' so the focus must be on other child safeguarding practices.
- A WWC Check would be impractical and ineffective to implement for parent volunteers because of the many different roles parents can have. For example, parents may informally support individual children; take on a formal volunteer role; occasionally help out; or watch activities from the side lines. When does

accompanying your own child in activities and helping his/her friends become volunteering? It would be impossible for organisations and parents to separate out these different activities to decide which constitute 'volunteering', who must have a WWC Check and to ensure compliance.

It should be noted that if an organisation identifies specific activities where a criminal record check would improve safety, they can require through policy that parent volunteers must have either a National Police Check for Volunteers or a National Police Certificate. Information about the different types of criminal record checks is available on [www.checkwwc.wa.gov.au](http://www.checkwwc.wa.gov.au).

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

All records relevant to risk of potential harm should be included where the relevant record triggers an exercise of discretion and assessment of risk of harm. Information sharing is vital to the protection of children from potential future harm and strong legislative provisions allowing the collection of information for this purpose are vital.

The type of criminal records that should be considered as part of a WWC Check includes:

- Convictions (including spent convictions)
- Pending charges
- Non-conviction charges
- Juvenile records

Juvenile records must be included in any WWC Check that is conducted. Juveniles commit violent physical and sexual offences and apply to carry out paid child-related work. In addition, offending may commence at an early age and can assist to demonstrate a pattern of offending or an escalation in behaviours. Certain behaviours that start at an early age can also indicate increased risk to children. Knowledge of early offending is also important to the consideration of whether any identified risk has been successfully mitigated.

Spent convictions are important to include for reasons similar to that relating to juvenile records. This has been nationally recognised and legislation has been implemented in each state in order that spent conviction information can be provided to WWC Screening agencies.

Pending charges must be considered, especially where the offences alleged demonstrate behaviours that are of potential risk to children and exposure to that potential risk is unacceptable while the matter is proceeding through the criminal justice system. Clearly legislation should provide for reconsideration if that is necessary once the criminal trial has concluded.

The rationale for including non-conviction charges was primarily based upon the dynamics of child sexual abuse.

Studies and various statistics show that there is significant under reporting of child sexual abuse.<sup>8</sup> Further prosecution and conviction rates in child sexual abuse cases are low in Australia compared to other offences.<sup>9</sup> Predominantly in child sexual abuse cases, there is a lack of physical evidence, occurs in a veil of secrecy, there may be threats made or incentives given so the child does not to tell anyone, there may be a delay in reporting the alleged offending and therefore there is considerable reliance on the child as a witness in any prosecution.<sup>10</sup> A person may be charged with an offence, but the charge may be withdrawn or discontinued at any stage or the person may be acquitted. The information, transcripts, witness statements and other materials should be analysed and assessed in terms of the risk of harm to children. The materials may identify conduct of an inappropriate nature, while not of a criminal nature, indicates a risk of harm to children.

The case law relating to matters under the WWC Act have clearly identified that information providing evidence as to the behaviours and conduct of a person is relevant to the ultimate task of assessing risk. The decision maker is not adjudicating on whether the person is in fact and at law guilty or not guilty of a non-conviction charge, it is an analysis and evaluation of risk.<sup>11</sup> All information that is relevant to the risk of harm must be considered, not only the information that directly relates to the offences recorded on a person's criminal record or the type of harm that is represented by the offences recorded on a person's criminal record.<sup>12</sup>

To this end, information from prosecuting authorities, courts, corrective services, child protection agencies and other government bodies are crucial.

For example:

- in the matter of *Hardingham v Chief Executive Officer, Department for Child Protection* [2012] WASAT 153, consideration was given to the investigation of the Ministry of Education (as it was then known)
- in *K v Chief Executive Officer, Department for Child Protection* [2011] WASAT 37 and *M v Chief Executive Officer, Department for Child Protection* [2009] WASAT 6 consideration was given to investigations by the Department of Education and Training
- in *Hargrave v Chief Executive Officer, Department for Child Protection* [2009] WASAT 176 consideration was given to Department for Child Protection information (as it was then known)

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<sup>8</sup> This was acknowledged in the Special Inquiry into the Katanning Hostel. See Hon. Peter Blaxell, A Special Inquiry into the response of government agencies and officials to allegations of sexual abuse, *St Andrew's Hostel Katanning: How the system and society failed our children* (2012), 37.

<sup>9</sup> Richards, Kelly, *Child Complainants and the court process in Australia*, Trends and Issues in crime and criminal justice, Australian Institute of Criminology, July 2009, 2 (footnote omitted).

<sup>10</sup> See Richards, Kelly, *Child Complainants and the court process in Australia*, Trends and Issues in crime and criminal justice, Australian Institute of Criminology, July 2009, and Oates, R. K., "Problems and prejudices for the sexually abused child", (2007), 81 ALJ 313.

<sup>11</sup> *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] WASCA 28; (2008) 36 WAR 39, paragraph [84].

<sup>12</sup> *Chief Executive Officer, Department for Child Protection v Hardingham* [2011] WASCA 262, paragraphs [52] – [54]

It is the information relied on by these bodies rather than their conclusions that is vital. That information is to be assessed in the context of the legislative scheme and its child protection purpose.

There is no doubt the above information is vital to the effectiveness of any WWC Check scheme. Relationships and agreements for economical and lawful sharing of vital information for WWC Check purpose have been built during the course of implementing the Act including with the WA DPP and Court system. Low cost access to detailed confidential information collected under different legislation or for different purpose is a complex issue within states.

There is need for inter-jurisdictional agreement about access to court, prosecution and other required information so vital for the protection of children. This needs to be managed carefully so it does not undermine or dilute intra-jurisdictional access to information that is more extensive as is appropriate given that over 80% of WWC applicants who have a criminal record, have charges or convictions only in Western Australia.

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

As decisions are of an administrative nature, the review of final decisions should be undertaken by a specialist administrative tribunal. A specialist tribunal should be bound by the decision making power of the enabling Act and should inform itself as it sees fit, without the restriction of the application of the rules of evidence. The process of review should not be an “adversarial” process as it is currently understood within the courts of the various jurisdictions.

The benefits of an administrative tribunal include accessibility, flexibility, informality and cost effectiveness for those persons aggrieved by a decision that does not permit them to work with children.

The review of a decision should be a merits review, rather than require identification of errors of law which arguably imposes an unnecessary degree of complexity and focuses on perceived error of the decision maker. A merits review enables the Tribunal to re-make the decision, on the latest and most complete information available at that time, with the focus on the protection of children.

It is important that the Tribunal be a specialist forum which has expertise in the issues at hand particularly the dynamics of offending against children. The potential disadvantage of matters remaining in a generalist Tribunal is that focus tends to be around the rights of the applicant to work, with the proof of past events to an acceptable standard before an applicant’s rights will be removed. The applicant’s right to work with children must not overshadow a child’s right to be protected from potential harm. The best interests of children must be the paramount consideration.

The dynamics of offending against children demand that the ability to work with them be treated as a privilege rather than a right. In matters involving offending against children there will often be facts and reasonable suspicions giving rise to a satisfaction that there is an unacceptable risk, but which cannot satisfy proof of an alleged offence or inappropriate conduct (to the standard of the criminal justice system for example). While it would be regrettable should false allegations be acted upon to prevent an applicant from engaging in specific categories of employment, the potential for harm to children cannot be overstated as the more regrettable consequence. Where there is

lingering doubt that the offences and conduct may have occurred based on facts and reasonable suspicions, a specialist Tribunal would be best placed to ensure that caution is exercised in favour of children where appropriate.

In addition there should be room for the Tribunal to refer matters back to the decision maker where an applicant has not previously provided a submission to that first tier decision maker: see for example section 26(3A) and (3B) of the WWC Act. This would ensure that the decision maker is given the opportunity to make the correct and preferable decision on all the relevant information available. The decision maker is also in a better position to collect information to verify any claims by the applicant during the submission process. This will allow the decision making to focus on fairness to applicants and the protection of children in a way that may not be achievable if the collection and verification of information occurs once Tribunal proceedings are instigated given the consequent time constraints and procedures involved. This is also a cost effective management of government resources.

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

Automatic barring is appropriate where it cannot be envisaged that mitigating circumstances could be found to the extent that the person does not pose an unacceptable risk of harm to children through child-related work. In Western Australia this policy underpinning has resulted in the automatic bar being limited to those convictions where an adult has sexually penetrated a child under 13 years of age. These offences are scheduled under the WWC Act as Class One offences.

It has been considered that the risks for other offences may be mitigated in some cases. Accordingly, additional information is sourced and rigorous assessments and decisions made taking all factors properly into account including the extent to which identified risks can be mitigated to an acceptable level.

Some jurisdictions have implemented additional automatic barring offences. Whilst this may simplify and reduce the cost of their WWCC schemes, there are a number of concerns. For example, people who do not pose a risk to children in child-related work may be unfairly excluded, particularly where some employers and organisations require WWC Checks for persons who are not actually working with children. The absence of appeal processes for automatically barred offences prevents any flexibility in considering the potential for risk mitigation in relevant cases.

WWC schemes are relatively new. There is a need to research and develop the evidence base. Most research currently available relates to abuse by family members or about convicted offenders. There is no data available on harm to children by persons who have met them through work situations. It is suggested that barring offences and development of WWC schemes generally should be informed by evidence. A national research agenda to inform legislative development and decision making would also support movement towards nationally consistent WWC schemes based on this research evidence. Presently, there is insufficient evidence on which to develop a best practice screening model, but over time, as the evidence base is built up, such a screening model can be developed.

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

Making a decision about whether or not a person should be eligible for or barred from working with children is necessarily complex and must be determined under legislation and informed by child protection, offender behaviour, social work and psychology expertise and research.

The current COAG MOU that supports the exchange of enhanced criminal record information includes the following two criteria as requirements for screening Units to be authorised to receive the sensitive, enhanced criminal record information.

The participating screening unit has a risk assessment and decision making framework pertaining to child-related employment screening that is: (i) evidence-based, to the extent possible in light of the requirements of the governing legislation; and (ii) documented, and supported by business rules and tools.

The participating screening unit has appropriately skilled staff to make assessments about risks to children's safety suggested by applicants' criminal histories. "Appropriately skilled" includes having appropriate qualifications, experience or standing to make the assessment.

The expertise required to properly consider information received about spent convictions and charges that did not result in conviction often requires analysis of information about patterns of behaviour, mental health, psychological assessment, cognitive development, dynamics of abuse, treatment and cultural issues together with understandings of legal proceedings, probative information and legal tests.

In Western Australia this has been achieved not only through setting out of overarching criteria for considering different records in section 12 of the Act, but also by employing senior officers with tertiary qualifications within a behavioural framework (social work, psychology, criminology) and senior legal officers who have expertise in court processes, legislation, applying legal tests and promoting ongoing development of case law. A panel of expert advisors has also been established to advise the Director, to undertake research and to provide expert witness evidence to the State Administrative Tribunal and higher courts where this is required.

The National Operators Forum has afforded opportunity for the various WWC screening units to share and compare frameworks, research, processes and case law. While there are differences in legislation and processes there is reassuring consistency about the approach to decisions made by the Units. There are however improvements that can be made:

- The consideration of non-conviction charges has emerged as the area where WWC Schemes can contribute substantially to the protection of children. In particular the very nature of sexual offending against children means that where a charge is laid it may not proceed or there may not be a finding of guilt. Some examples include when people disclose as adults and the evidence is not sufficient for a finding of guilt beyond reasonable doubt or where children are confused by prosecution questioning on peripheral matters that result in undermining their credibility.

In these cases there may be evidence of behaviour that in itself is sufficient to establish the level of risk to children that requires prohibition from child-related

work. The Commission is referred to recent important case law established through the Supreme Court of Western Australia (Court of Appeal).<sup>13</sup> The cases highlight emphasis on conduct and ongoing conduct rather than guilt that is important to the protection of children and in this regard: the importance of behavioural, psychological and legal expertise by the primary decision maker (the screening unit) – and also by the tribunals and courts which review decisions.

- The importance of consideration of non-conviction charges by all jurisdictions including Victoria where legislation does not currently mandate this. This consistency is required if there is to be any movement towards recognition of decisions between jurisdictions.
- Previous comments have been made about the importance of improving knowledge and skills through establishing a national research agenda. It is difficult to apply research or tests which have been developed to make decisions about community orders or programs for convicted offenders to decisions about permitting work with children. Dr David Indermaur in his unpublished paper of advice to the WWC Screening Unit states:

*The issue of interest to this paper concerns the risks in regard to a known sex offender being issued a permit to work with children. This is an entirely different matter on a number of counts and it would be wrong to use instruments designed to measure risk in the general community to this very particular situation. First of all the environment the sex offender is being placed in is entirely different. If it is not too gross an analogy if we were concerned about reducing the chances of a fox killing chickens it would be like comparing the results of a fox released in the wild with a fox being released into a hen house.<sup>14</sup>*

- Consistency of risk assessment frameworks and staff skills would also be improved through increased opportunity for inter-jurisdictional practitioners to share skills and train together in this developing area of work.

### **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?**

A WWC Check does not, and should not, **in any way** minimise the need for institutions, or other organisations providing services to children, to establish clear processes for responding to inappropriate behaviour of staff in child-related positions.

For governments and for communities, the overarching goal is to improve child protection and the WWC Check needs to be considered as a vital strategy – just one part of a broad child-safeguarding agenda. If institutions lower their guard because of a perceived WWC Check safety net, then this agenda could be undermined.

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<sup>13</sup> *Chief Executive Officer, Department for Child Protection v Hardingham* [2011] WASCA 262; *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] WASCA 28; (2008) 36 WAR 39. See also the decision of Justice Hall in *Hardingham v Chief Executive Officer, Department for Child Protection* [2012] WASAT 153.

<sup>14</sup> Indermaur, D, “*Tipping the balance: The uses and misuses of risk assessment instruments in the context of screening for child-related work in Australia*”, 23 December 2011, page 13.

As stated in the response to question 1, the WWC Check Schemes operate with three focus areas:

- *Past behaviour* – a risk assessment based on criminal history;
- *Current behaviour*. – a ‘live’, on-going monitoring of existing card holders ; and
- *Future behaviour* - Promotion of child safeguarding and risk management strategies to organisations that provide services to children and to parents. Institutions need to be absolutely clear that a WWC Check is NOT:
  - (a) A ‘fit and proper’ test
  - (b) A character test
  - (c) A skills and experience test
  - (d) A suitability test
  - (e) The total answer to safeguarding children

Good governance is required to implement, enforce and review the child safeguarding agenda across all facets of an institution, including:

- Human Resource management: thorough staff recruitment and selection procedures; such as background checks, referee checks and proper interviewing techniques.
- Risk Management planning including policies, procedures and adequate supervision. Institutions need to plan for the range of adults who have contact with children but are not *working with* them, such as visitors or adults watching their children’s activities.
- Compliance to all relevant legislation and standards such as to the *Occupational Safety and Health Act 1994*; Public Sector Standards Commission and the like.
- Empowering children, as per the United Nations Convention on the Rights of the Child, in how to involve children in the creation of environments where they feel safe, valued and respected.

A WWC Check is not the silver bullet but one part of a broader child safeguarding agenda.

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

The effectiveness of particular WWCC schemes must be judged in the context of the suite of complementary jurisdictional strategies including legislation, screening provided in other ways and local policies and operations to protect children, manage and monitor offenders and regulate relevant occupations. In Western Australia and in other jurisdictions, legislation includes a requirement of evaluation. Under the WWC Act this provision is as follows:

**47. Review of Act**

- (1) The Minister is to carry out a review of the operation and effectiveness of this Act as soon as is practicable after the fifth anniversary of the commencement of this section.

(2) The Minister is to prepare a report based on the review and, as soon as is practicable after the report is prepared, is to cause it to be laid before each House of Parliament.

There would however, be value in using or strengthening existing avenues to monitor and promote improved effectiveness of processes and strategies that are beyond the mandate of individual jurisdictions. This would contribute to the improved effectiveness of all schemes and promote appropriate consistency. These may include:

- Under the proposed COAG Steering Committee for the National Exchange of Criminal History Information for People Working with Children
  - (a) the enhanced criminal record information allowable under the present COAG MOU and proposed IGA is being received and used by jurisdictions
  - (b) other information required for decisions in the best interests of children is shared between jurisdictions (legislative and policy barriers to exchanging this information are addressed). This will include court and prosecution records.
- Strengthen the National Operators Forum to develop skills development strategies and access to expert advice and research required for decision making.
- Establish as part of CrimTrac capacity to provide timely updates of any new offences committed by persons holding WWC Cards or similar authorisation. This is a key action if there is to be progress towards appropriate cross jurisdictional recognition of cards or prohibitions.
- Establish a national research agenda which funds research to develop the evidence base on which WWC decisions are made, effectiveness is determined and legislative reform is undertaken.