



**Government
of South Australia**

**Commissioner for
Victims' Rights**

45 Pirie Street
Adelaide SA 5000

GPO Box 464
Adelaide SA 5001
DX 336

Tel 08 8204 9635
Fax 08 8207 2504

If calling please ask for
Michael O'Connell

Telephone
+61 +8 8207 1969

Email
oconnell.michael@agd.sa.gov.au

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GPO Box 5283
SYDNEY NSW 2001
solicitor@childabuseroyalcommission.gov.au

Dear Commissioners

Re Working with Children Check

Thank you for your invitation to make a submission and comment on the Issues Paper developed as part of the Royal Commission into Institutional Responses to Child Sexual Abuse.

By way of brief introduction, his Excellency the Governor for South Australia appointed me as Commissioner for Victims' Rights. My role is likened to a crime victim ombudsman, although my functions are broader than traditionally associated with an ombudsman. I make this submission as an independent statutory officer who is tasked with monitoring and reviewing the effect of the law on victims and with a keen interest in preventing victimisation.

Over the last thirty to forty years child abuse and neglect have become recognised as significant social issues throughout most of the western world (James, 2000). During the 1960s and 1970s "Australia, like other western countries began to acknowledge the existence and extent of the physical abuse of children" (James, 2000, p.1). In the 1980s the focus of concern extended to children as victims of sexual assault (James, 2000).

This coincided with and was supported by a "renewed recognition" of victims' needs and interests and efforts to reinstate victims as active participants in criminal justice processes (Parsonage, 1979, p.8).

The United Nations *Convention on the Rights of the Child* gave international recognition to the concept that children as individuals have certain distinctive rights. Australia is a signatory to this convention (James, 2000). The United Nations has also promulgated *Guidelines for Action on Children in the Criminal Justice System* (1997) and *Operational Protocol on the sale of children, child prostitution and child pornography* (2000); as well, the Office on Drugs and Crime (UNODC) published *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Commentary* (2009)

In more recent times attention has turned to the abuse of children in institutional settings. Irenyi, Bromfield, Beyer & Higgins (2006) state that the history of child abuse in organisations in Australia is significant. Cashmore & Shackel (2013) highlight the unique nature of institutional abuse stating that in

“Cases of institutional abuse, the betrayal of trust and failure to exercise the inherent duty of care for children goes beyond the deeds of commission by the perpetrator and extends to acts of omission by those in positions of power within the institutions and in the community who fail to protect the child”.

A number of inquiries have been established at the state and national levels to ascertain the extent of the problem, recognise the harm to victims and establish best practice guidelines to prevent victimisation.

We should not, however, assume that the abuse of children within institutional settings is an historical problem. Child abuse and neglect remains a current concern with recent allegations of abuse within schools, churches, child-care facilities and youth groups (Irenyi et al 2006) In South Australia, for instance, the DeBelle Commission (2013) identifies many allegations regarding sexual abuse of students in the South Australia public education system. As Commissioner, I am currently funding legal assistance for two victims of sex offences as ‘test’ cases to advance victims’ rights, especially the right to participate in decisions that affect them and the right to restitution from the offender and compensation from the state.

Many vulnerable adults at risk of abuse and neglect also face similar problems and challenges as children as victims of crime. Furthermore, adult survivors of child sexual abuse often have endured prolonged emotional and psychological effects but also fear of stigmatisation and fear of being labelled dishonest, even a liar. Children, other vulnerable people and adult survivors as witnesses have too often reported that they feel subject of ‘trial by ordeal’ in pursuit of justice.

The incident of child sexual abuse and neglect is a source of ongoing debate and controversy. Statistics do not accurately describe the prevalence of child sexual abuse as they only capture cases that are reported to the authorities. It is widely accepted that the majority of child sexual assault cases fail to reach official attention. This is equally true for vulnerable adults including adults with a disability and the elderly within institutional settings.

Protecting children and vulnerable adults from abuse (including sexual abuse and exploitation), violence, neglect and maltreatment must be seen as imperative for government, public agencies and officials. In seeking to create schools, homes, communities and other places that nurture, protect and care for children and vulnerable adults we, as a society, must commit to the prevention of abuse and neglect and not simply wait to respond to allegations of abuse and neglect

1. Should there be a national WWCC?

I am of the view that there needs to be a multi-dimensional approach to the prevention of child abuse and neglect. A national WWCC is an important element of any prevention strategy. I do not however, believe that such checks should be limited to the protection of children but should also incorporate vulnerable adults (such as adults with intellectual disability or cognitive impairment)

Children and vulnerable adults should expect to be safe in the community, especially when receiving services designed to enhance their wellbeing and/or alleviate any relative disadvantage they may experience.

Governments have a responsibility to ensure child safe environments. Exclusion of people with known and pertinent criminal history is a fundamental part of creating safe working environments for children and other vulnerable people. A nationally consistent

approach – preferably not simply harmonisation of law and practice – is vital to child protection.

Standardisation and particularisation of police data and cross-matching is also essential. For example, an ‘informant’ told me that an adult who at the time was working with children had over his / her life-time several names, which had allowed him / her to evade ‘exposure’ by police checks. Conversely, an elder person convicted once as an older teenager of sexual intercourse with his / her mid-teenage partner approached me while distressed. The person who was employed by a national organisation and was working in one State had been forbidden to work in child related work-places (such as primary schools) in several other States. The conviction was disclosed by a police cross-jurisdictional enquiry. The person was entitled to appeal the decision; however, the person was tasked with providing the necessary information that was so apparently difficult to attain given the passage of about four decades. In order to explain the work-ban, the person had to disclose the offending to family, which humiliated him / her.

I do not dispute that past behaviour provides an indication of possible future behaviour – that is it has presumptive value. Further, examples or patterns of abusive or inappropriate behaviour can be evident in information that should be available for assessment such as an individual’s criminal record or employment history; however, these alone are incomplete. Moreover, most sex offences are not reported so many ‘offenders’ / ‘potential child abusers’ are not identified in criminal record based pre-employment screening.

Notably, “there have been documented cases in which a person with a history of abusive behaviour has gained access to vulnerable people because their previous history was not known to their employer or other vetting agency. In the worst cases, these people have gone on to commit further abuse. Evidence suggests that around half of sex offenders gain access to their victims through children’s organisations” (ACT Government no date) Given such ‘happenings’ and the resultant risk to child safety, it seems to me that background checking and risk assessment should be nationally consistent but also be complemented by other risk reduction activities. For example, when I applied for employment in the 1970s as a police officer, I was obliged to provide school reports, employment reports and personal references, in conjunction with other disclosures on the application forms. After recruitment staff identified me as ‘potentially employable’, a police officer (without my knowledge) door-knocked my neighbours’ homes to ascertain their views on me. The latter arguably runs the risk that the officer collected innuendo and conjecture. My experience suggests that the ‘insight’ contributed to a more wholesome appraisal of me as a suitable applicant but also caused training staff to pay particular attention to my activities during a probationary period at the Police Academy. My desire to be employed outweighed my privacy concern.

There are two challenges associated with a WWCC scheme. First, identifying the best collectivity of means to expose the ‘red flags’ associated with risk to child protection. The deep anxiety for child safety must be addressed. Second, in seeking to achieve the first there is a triangulation of interests: the ‘potential’ child victim (vulnerable person), the ‘potential’ employee and the employer. Regarding the employee, some background checks could reveal information that is irrelevant, taken out of context, or just plain wrong. Furthermore, the employer might use (but should not be permitted to do so) pre-employment screening as improper and illegal discrimination and to justify inappropriate violation of personal privacy.

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

In addition to the pointers above, please note that it seems to me there are two types of screening processes operating in Australia. The Australian Institute of Family Studies has summarised these: employer-driven 'point-in-time' background checks and screening, or certification to engage in child-related work¹. Neither has proved to be full-proof. Pre-employment screening is a crucial ingredient of a child protection strategy but I warn against over-reliance on pre-employment screening to protect children. As well, routine background checks should not be relegated to an employer initiative to avoid employing someone that may be a threat to his / her agency or organisation and minimise risk of, for instance, prosecution. Child protection must be the prime objective.

Core elements of a national scheme should be (but not necessarily limited to): criminal history check (including traffic offences), criminal intelligence check, correctional services check (for example, to confirm rehabilitation or treatment programmes completed), employment verification check (including a proper assessment of references and/or disciplinary proceedings instigated as a result of inappropriate workplace behaviours), and educational background check. Enquiries should gather information on person's good behaviour, contribution to community events,

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

There definitely should be minimum requirements that are harmonised across state and territorial borders. See my answers above and note the core elements of a national scheme that could inform each jurisdiction.

Counteracting offender (or potential offender) mobility is vital. Victims' rights should know no borders – child protection should know no borders.

4. How long should any clearance be granted for?

Jurisdictions vary between point-in-time checks to checks that are valid between 2-5 years. I would advocate for no more that two years. Furthermore, if there is no national scheme (as per question 1) such time should be harmonised in law and practice.

¹ "Some states have employer-driven systems that make it mandatory for employers in relevant fields to carry out background checks on prospective employees or volunteers. These systems provide "point-in-time" background checks and individuals must undergo screening each time they enter into a child-related position. The other type of screen program in operation offers certification to engage in child-related work to individuals. These certifications are valid for a period of time and provide for ongoing monitoring of an individual's suitability for child-related work. This means that if a relevant criminal offence is committed during the validity of the check, or if the individual is subject to relevant work-related disciplinary procedures, the administering authority may inform employers of the offence, and alter or withdraw an individual's entitlement to work with children. Individual's can also carry their certification between positions and do not have to undergo repeated screening while their Working with Children check is valid."

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

In this day and age, an employer has an obligation to maintain a safe working environment for all its employees. An employer should have an obligation to protect children and other vulnerable people. With this in mind, my immediate reply to question 5 is 'a person should not be able to commence work before the check is completed'. I am aware; however, that in the United Kingdom there is an alternative. Where an employer that requires the equivalent of a WWCC is unable to wait for the process to be finalised an interim process exists. The employer can access certain information detailing individuals who are banned or deemed unsuitable to be working with children, which can be applied. An employer may thereafter choose to employ an individual subject to receipt of the completed check.

I hasten to add that contractual arrangements in Australia sometimes do not create an employer-employee relationship. In a case raised with me by child-victims' parents, a suspected child abuser escaped screening because he / she was employed by a private contractor who held a service contract with a government agency. The contractor was screened but not the person the contractor employed. All amendments or changes to improve child protection should apply to all persons in child related work.

6. How should child-related work be defined?

Any organisation that provides medical, health, welfare, child-care, education, sporting or recreational services and transportation wholly or partly for children or vulnerable adults should be included; and, there should be scope by, for instance, regulation to proclaim certain activities as child-related when there might be doubt.

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

As per the recommendation of the Mullighan Commission (2008) in South Australia, child-related sector should include non-government organisations involved in child-related work or work with vulnerable adults (see also the last paragraph in my answer to question 5 as well as answer to question 6).

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?

My simple answer to (a) and (b) is 'yes'.

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

My answer to question 9 is premised on an acceptance that there is no reliable, definitive 'profile' for a child sex offender or abuser of vulnerable people. The prime objective for screening is, as far as an employer is able, to make it as difficult as possible for unsuitable people to attain access to children who come into contact with the respective agency or organisation (including religious or faith-based institution).

Screening is not without its limitations. For example, "[s]uch practices rely on previous offences or a categorical knowledge of perpetrator characteristics. Many child sex abusers are astute at knowing how to circumvent systems designed to prevent them from achieving their goals, and may also have assistance from other offenders at overcoming such barriers. Research has also indicated that, when charged, the

majority of perpetrators detected do not have prior convictions for any form of child maltreatment, and thus would not have been detected by screening processes.” (Irenyi et al 2006)

As stated in reply to question 4, core elements of a national scheme should be (but not necessarily limited to):

- Criminal history check (previous charges for crimes against children, sexual or physical assaults of adults and other relevant charges but also including traffic offences and relevant juvenile offences),
- Anti-violence checks (as family violent / anti-violence orders are not conviction based),
- Criminal intelligence check (for instance, police investigators gather information during investigations that can suggest a person is ‘unsuitable’ for employment in child-related work; as well many perpetrators are not prosecuted or convicted),
- Correctional services check (for example, to confirm rehabilitation or treatment programmes completed),
- Employment verification check (including a proper assessment of references and/or disciplinary proceedings instigated as a result of inappropriate workplace behaviours), and
- Educational background check.

Enquiries might also gather information on person’s good behaviour, and contribution to community events and the like.

10. How should an appeal process operate?

There must be an appeal process that comprises an administrative first step followed by a judicial step. The appeal process must be available and accessible. Cost, for instance, should not be an impediment. The cost of justice is already expensive resulting in individuals not exercising their due process rights.

It should be an offence to publicly communicate any information about a ‘potential’ employee, except as provided by law.

Care needs to be taken not to ‘trash’ the reputation of innocent individuals.

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

See issues raised above.

12. The adequacy of the risk assessment process.

In addition to comment above, identity theft is abundant, so it might be necessary to include safe-guards; perhaps even consider the practicalities of having potential employees in ‘high-risk’ child related work to provide fingerprints for analysis using the national fingerprint data base.

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?

WWCC should not minimise the need for employers (including government agencies, non-government organisations, religious and faith-based institutions) to establish clear processes for responding to inappropriate behaviour of staff in child-related positions. Furthermore it should not minimise the need for institutions to establish clear policies and procedures to limit the opportunities for abuse

The rational choice theory and practice of situational crime prevention provide a useful insight into the occurrence and prevention of child abuse. In accord with rational choice theory, child abuse, such as sexual abuse, is an 'opportunity' based crime. In intra-familial cases perpetrators have access to children in private settings, often without suitable guardianship. Perpetrators of such abuse in an agency or organisational setting often create 'opportunities' to offend by, for instance, arranging access to the child (as an available victim) when there is no suitable guardianship.

Given such opportunities are seen to be present in some settings or circumstances, some perpetrators are said to be attracted to a particular occupation, sporting or service activity, which facilitate access to children. A situational approach requires a "shift in focus from the *child-sex offender* to the *child-sex offense* - to the questions of how, when, where and why these offenses take place" (Wortley & Smallbone 2006)². Further, Irenyi and others (2006) say, "[Situational crime prevention] ... is about creating safe environments rather than creating safe individuals" An objective should be to require agencies and organisations "to create environments that are child-safe and to minimise situations in which children are vulnerable."

To attain this objective requires a multi-faceted approach that attends to three key areas:

- Administrative functions (ensuring adoption of the latest screening and other personnel practices);
- Physical environments (to reduce opportunities for situational maltreatment); and
- Organisational culture (creating a child-focused environment of respect).

Pre-employment screening is an important element in a multi-faceted approach; however, although screening is preventive, child abuse is inevitable, screening by itself is not sufficient to protect children. "Screening needs to be augmented by ongoing attention to policies and procedures and a positive organisational environment and culture in order to manage the risk of child maltreatment", says Irenyi and others (2006). Additional acts should be taken to raise the risk of detection, reduce the attraction to commit the crime and remove the excuses, including tackling the myths shared by perpetrators and some members of the public.

² Wortley as an editor of a collection of essays on child sexual abuse and situational crime prevention refers to "strategies ranging from primary prevention through to relapse prevention with persistent offenders" (Wortley & Smallbone 2006).

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

I respectfully suggest that some lessons can be learnt from the international responses to monitoring the implementation of certain conventions. Each has a peak body (that is committee) but also obliges 'nation-states', independent authorities, civil society to act:

- Convention on the Elimination of Racial Discrimination - Committee on the Elimination of Racial Discrimination: independent experts; state-reports with concerns and recommendations in concluding observations; early-warning procedures; state-complaints; individual or group complaints.
- Convention on the Elimination of All Forms of Discrimination Against Women - Committee on the Elimination of Discrimination against Women: independent experts; general recommendations; state-reports with concerns and recommendations in concluding observations; receiving country-specific information from NGOs through alternative or shadow reports; individual or group complaints; inquiries.
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Committee against Torture: independent experts; general recommendations; state-reports with concerns and recommendations in concluding observations; receiving country-specific information from NGOs through alternative or shadow reports; individual or group complaints; inquiries; Sub-committee on Prevention of Torture
- Convention on the Rights of the Child - Committee on the Rights of the Child: independent experts; general recommendations; state-reports with concerns and recommendations in concluding observations; receiving country-specific information from NGOs through alternative or shadow reports.

On a practical level, funds should be available to pay for a scholarly evaluation that should be made public. An evaluation including stakeholders, including victims and perpetrators should be another core ingredient in a comprehensive set of responses to child protection.

In conclusion, please note that it seems to me that (pre-employment) screening is an essential element of a multi-faceted approach to child protection. It is a necessary intrusion into potential employees' privacy but a balance, as mentioned above is necessary. Screening also sends a message to the public that child abuse will not be tolerated. It is not, however, the panacea that some assert.



Michael O'Connell | Commissioner
Commissioner for Victims' Rights

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