
Working with Children Checks: Issues Paper 1

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

12 August 2013

Table of Contents

Acknowledgements	3
Executive Summary	4
Introduction	5
Background	5
Comments – Working with Children Checks	7
Should there be a National Scheme?	8
Need for a National Scheme	8
Concerns regarding the scope of a National Scheme	12
Commonwealth Provisions – History of Law Council’s Concerns	12
Disclosure and Use of Information about Pardoned and Quashed Convictions	13
Spent Convictions	14
Breadth of “Working with Children” Phrase	16
Review of the Commonwealth Provisions	17
State and Territory Provisions	17
What features and safeguards should a National Scheme incorporate?	19
Other Issues Paper Questions	22
If there is no National Scheme, should there be minimum requirements for each state and territory scheme?	22
How long should any clearance be granted for?	23
Should a person be able to commence work before the check is completed?	23
How should child-related work be defined? How should child-related sectors and roles be defined?	23
Are current exemptions for a Working with Children Check adequate or appropriate?	24
What records should be included in the check? For example, should the check include juvenile records?	24
General Considerations	24
Juveniles	24
How should an appeal process operate?	25
To what degree should the Working with Children Check minimise the need for institutions to establish clear processes for responding to inappropriate behaviour of staff in child-related positions?	26
How should the effectiveness of any existing or proposed Working with Children Checks be evaluated and/or monitored?	26
Conclusion	27
Attachment A: Profile of the Law Council of Australia	28

Acknowledgements

The Law Council acknowledges the assistance of the Law Society of South Australia, the New South Wales Bar, the Queensland Law Society and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council strongly supports measures to minimise the risk of sexual, physical and emotional harm to children, including carefully screening the suitability of those tasked with their care, supervision and instruction. Such measures are consistent with Australia's obligations under the Convention on the Rights of the Child (CROC) to protect children from all forms of sexual exploitation and sexual abuse.
2. It encourages a nationally consistent, clear approach to conducting Working with Children Checks (WWCCs) and considers that a single National WWCC Scheme (a National Scheme) would have several advantages. These include eliminating the current complexity between different jurisdictions' screening requirements; overcoming problems with perpetrators moving from one jurisdiction to another; and reducing the opportunity for perpetrators to exploit gaps in existing schemes.
3. However, there also appears to be a need for evidence to assess whether a National Scheme on its own would be the most effective way of identifying those persons at high risk of harming children, or whether other targeted methods could be developed to identify persons who should not work with children. Evidence should also be used to identify the scope of what information should be included in WWCCs under a National Scheme and how this information should be used by those administering the scheme.
4. The Law Council considers that any National Scheme should be appropriately and carefully targeted, fully resourced and form part of a broader, evidence-based platform of measures to protect children. The allocation of resources to a National Scheme should be in addition to, rather than at the expense of such other measures.
5. In addition, the Law Council notes that it has concerns about certain features of existing WWCC schemes. These concerns arise from the need to strike an appropriate balance between the rights of children to be protected from risks and the rights of individuals subject to WWCCs, including rights to be presumed innocent unless proven guilty and rights to privacy, employment and rehabilitation. While none of these latter rights are absolute, it is important that they are not arbitrarily restricted. That is, any restriction must be necessary in the circumstances and reasonable and proportionate to a legitimate purpose, having regard to alternatives.
6. The Law Council previously considered such a balancing exercise in relation to amendments to the *Crimes Act 1914* (Cth) (the Crimes Act), which allow pardoned, quashed and spent convictions for *any* Commonwealth offences to be included in WWCCs. It is concerned that people who do not present risks to children may experience unfair discrimination as a result of these provisions.
7. The Law Council considers that there are important reasons for ensuring that the parameters of any National Scheme are not overly broad, but are geared towards the disclosure of information which highlights genuine risks to the safety of children.
8. If a National Scheme is pursued, the Law Council has suggested a number of features and procedural safeguards which should be included as part of its development. It also recommends that the development of the National Scheme should occur in conjunction with the consideration of federal anti-discrimination law which protects individuals from unfair discrimination on the basis of their irrelevant criminal record.

Introduction

9. The Law Council is pleased to provide this submission in response to *Issues Paper 1: Working with Children Checks* (the Issues Paper), which was released on 17 June 2013 by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).
10. The Law Council strongly supports the establishment of the Royal Commission, which provides an important opportunity for Australians to better understand:
 - the experiences of people who have been affected by child sexual abuse within institutional contexts;
 - what should be done by institutions and governments to better protect children against such abuse in the future;
 - what should be done to respond appropriately to child sexual abuse in institutional contexts; and
 - what institutions and governments should do to address or alleviate the impact of past and future child sexual abuse in institutional contexts.
11. The Law Council previously made a submission regarding the Australian Government's consultation regarding the Royal Commission's establishment on 28 November 2012.¹ It also made a submission concerning the Royal Commission's Draft Practice Guidelines on 19 April 2013.²
12. The Law Council represents around 60,000 Australian lawyers through its constituent bodies: the State and Territory Law Societies and Bar Associations, as well as the Large Law Firm Group. The Law Council also has a number of specialist sections consisting of individual members of the legal profession with a particular interest in specific areas of law or legal practice. These sections are the Business Law Section, the Family Law Section, the Federal Litigation Section, the International Law Section and the Legal Practice Section. Further details of the Law Council's structure and aims are included at Attachment A.

Background

13. The Issues Paper notes that all states and territories have a system in which adults working with children, on a paid or unpaid basis, are subject to some level of pre-employment screening to determine their suitability to work with children. In the majority of states and territories, individuals need to apply for Working with Children Checks (WWCCs) before they may work in child-related employment. The sources used for screening checks vary across states and territories, but may include a police

¹ Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper: Submission to the Secretariat, Royal Commission into Child Sexual Abuse*, 28 November 2012, available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2664%20-%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20Consultation%20Paper.pdf>

² Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission regarding Draft Practice Guidelines*, 19 April 2013, available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2713%20-%20Draft%20Practice%20Guidelines.pdf>

check; a criminal history check; reports on relevant employment proceedings; and findings from professional disciplinary bodies.

14. The Issues Paper seeks feedback on whether the WWCC should be nationally and consistently applied. In particular, it seeks views on the following issues:

- (a) Should there be a national WWCC scheme (a National Scheme)?
- (b) What features should be included in any National Scheme?
- (c) If there is no National Scheme, should there be minimum requirements for each state and territory scheme?
- (d) How long any clearance should be granted for?
- (e) Should a person be able to commence work before the check is completed?
- (f) How should child-related work be defined?
- (g) How should child-related sectors and roles be defined?
- (h) Are current exemptions for a WWCC adequate or appropriate – in particular, should a WWCC apply to:
 - i. those living in the homes of children in out-of-home care?
 - ii. parent volunteers?
- (i) What records should be included in the check? For example, should the check include juvenile records?
- (j) How should an appeal process operate?
- (k) What issues arise from the current regime of records that result in automatic barring of a person from working with children?
- (l) The adequacy of the risk assessment process.
- (m) 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?
- (n) How should the effectiveness of any existing or proposed WWCC be evaluated and/or monitored?

15. The Law Council's submission responds to several of these questions. It also raises matters which should be considered more broadly in the context of WWCCs.

The Law Council's submission draws upon the views of its constituent bodies. It also draws upon its previous submissions regarding provisions of the Crimes Act, that allow information about pardoned, quashed and spent Commonwealth convictions to be disclosed and taken into account by prescribed Commonwealth, State and Territory screening agencies in determining whether a person is suitable to work with children (the Commonwealth Provisions). The Law Council provided a submission to the Senate Legal and Constitutional Affairs Committee regarding the Commonwealth

Provisions in 2009, before they were passed in 2010.³ Since then, it has provided two submissions to the Attorney-General's Department regarding reviews of the Commonwealth Provisions, in 2011 and 2013.⁴

Comments – Working with Children Checks

16. The Law Council is strongly supportive of measures to minimise the risk of sexual, physical and emotional harm to children by carefully screening the suitability of those tasked with their care, supervision and instruction. It notes that under Article 34 of the CROC, Australia has undertaken to protect children from all forms of sexual exploitation and sexual abuse.⁵
17. The Law Council also notes that the available literature appears to support pre-employment screening as one of a number of mechanisms which help to prevent known perpetrators from infiltrating child-focused organisations.⁶
18. Currently, there is no single National Scheme. Most states and territories have introduced legislation providing for child-related employment pre-screening, or are working towards such legislation. However, each state and territory has its own procedures and it is necessary for an individual to fulfil the requirements in the jurisdiction in which he or she is working.
19. The Law Council notes that according to a 2012 Australian Institute of Family Studies (AIFS) overview, there are important differences across jurisdictions regarding the type of screening programs that are in place.⁷ For example:
 - (a) Some states (such as South Australia and New South Wales) have mandatory “point-in-time” background checks, with individuals undergoing screening each time they enter a child-related position;
 - (b) Others (such as Queensland, Victoria, Western Australia, the Australian Capital Territory and the Northern Territory) provide certification which is valid for a period of time with individuals able to carry their certification between positions. These jurisdictions provide for ongoing monitoring of an individual's suitability for child-related work, which means that if a relevant criminal offence is committed during the period for which the certificate is valid, or if the individual is subject to relevant work-related disciplinary procedures, the

³ Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee regarding the Crimes Amendment (Working with Children – Criminal History) Bill 2009*, 6 October 2009, available at <http://www1.lawcouncil.asn.au/lawcouncil/index.php/members/10-divisions/135-disclosure-of-criminal-record-information>

⁴ Law Council of Australia, Submissions of 12 August 2011 and 12 July 2013 to the Attorney-General's Department regarding the Crimes Act Review – Working with Children Provisions, available at: <http://www1.lawcouncil.asn.au/lawcouncil/index.php/members/10-divisions/135-disclosure-of-criminal-record-information>

⁵ Other relevant CROC obligations include Articles 3.2(Ensuring the child such protection and care as is necessary for his or her well-being), 19 (Protecting the child from all forms of physical or mental violence, injury or abuse, including sexual abuse, while in the care of the parent, guardian or any person who has the care of the child) , 20 (Special protection and assistance to be provided to children deprived of their family environments) and 24.1 (Every child to have, without discrimination, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State).

⁶ Mel Irenyi, Leah Bronfield, Lorraine Beyer and Darryl Higgins, “Child Maltreatment in Organisations: Risk Factors and Strategies for Prevention”, *Child Abuse Prevention Issues No 25 Spring 2006*; Australian Institute of Family Studies, *Pre-Employment Screening: Working with Children Checks and Police Checks*, June 2012

⁷ Australian Institute of Family Studies, *Pre-Employment Screening: Working with Children Checks and Police Checks*, June 2012.

administering authority may inform employers of the offence, and withdraw the person's entitlement to work with children; and

- (c) Tasmania does not yet have legislation or a formal screening program in place, although police checks are usually required.⁸

20. The AIFS overview also notes that there are key differences between jurisdictions regarding the kinds of records that are checked, and who is required to undergo screening.⁹

21. The Law Council notes that under the National Policy Framework for Protecting Australia's Children (the National Framework), states and territories have been working towards a nationally consistent approach to WWCCs, beginning with situations where a paid or volunteer worker is required to cross a state or territory border for child-related work purposes.¹⁰

22. However, the Law Council also understands that it is unlikely under the National Framework that a consistent legislative National Scheme will be pursued. The WWCC Working Group reporting to the Community Disability Services Ministers Conference (the Government Working Group) recommended in its *Position Paper: Towards a Nationally Consistent Approach to Working with Children Checks* in 2011 against such an approach, determining that it was not feasible or desirable.¹¹

Should there be a National Scheme?

Need for a National Scheme

23. The Law Council considers that the law must be both readily known and available, and certain and clear.¹² On this basis, a nationally consistent, clear approach to WWCCs is to be encouraged. A National Scheme would:

- (a) eliminate the current complexity of different jurisdictions' pre-employment screening requirements;
- (b) overcome problems with offenders moving from one jurisdiction to another;
- (c) reduce the opportunity for offenders to exploit gaps in legislation; and
- (d) facilitate nationally consistent interpretation and case law.

24. One of the Law Council's constituent bodies, the Law Society of NSW (NSW LS) considers that there is an urgent need to develop and implement a National Scheme.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Standing Council on Community and Disability Services, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020: Annual Report to the Council of Australian Governments 2011-2012*, page 21, available at:

http://www.fahcsia.gov.au/sites/default/files/documents/05_2013/nfpac_ar_final_v4.pdf

¹¹ Working with Children Checks Working Group, *Position Paper: Towards a Nationally Consistent Approach to Working with Children Checks* (2011), page 3, available at: <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-nationally-consistent-approach-to-working-with-children-checks-2011>

¹² Law Council of Australia, *Policy Statement on the Rule of Law Principles* (March 2011), available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>

Several of its committees¹³ have indicated that they would be able to provide case examples where a WWCC undertaken for a person in one state gave no information on convictions for child abuse, but the WWCC undertaken in another state in relation to the same person revealed convictions for child sexual assault. While these examples arose in the context of parenting orders, the NSW LS considers that a National Scheme could limit children's exposure to risk in both the care and protection context, and in the child-related employment context.

25. Another of the Law Council's constituent bodies, the NSW Bar Association agrees that a National Scheme is necessary; noting that consistency between states and territories will ensure certainty and a thorough application of relevant safeguards. It is concerned that at present, a Working with Children Card is only valid when the card holder is engaged in child-related work in his or her own state or territory, and cannot be used in any other state or territory. It notes that if card holders commit new offences, these can only be monitored in the card holder's home state or territory, which can create difficulties if workers travel between states and territories.

26. These concerns were recognised by the Government Working Group in its paper *A Nationally Consistent Approach to Working with Children Checks* (2011).¹⁴ It stated that:

*"The variation between State and Territory systems makes it difficult to recognise and accept safety checks of volunteers and workers who move across borders. In addition, the lack of cross jurisdictional infrastructure means that any change to the suitability status of the person cannot be effectively actioned and communicated to any relevant employers or organisations accessing that person's services."*¹⁵

27. The Law Council is aware that there is work underway under the National Framework to address cross-jurisdictional information issues with WWCCs:

- (a) As noted above, state and territory Governments have been working to develop a nationally consistent approach to WWCCs, beginning with situations where a paid or volunteer worker is required to cross a state or territory border for child-related work purposes.
- (b) In addition, the Law Council understands that under the National Framework, a 12-month pilot of the National Exchange of Criminal History Information for People Working with Children operated in 2010.¹⁶ However, the outcomes of this pilot do not appear to be publicly available.

28. Another of the Law Council's constituent bodies, the Law Society of South Australia (LSSA) notes that there can be no reasonable objection to national sharing of information about convicted offenders for the purpose of police checks. However, it

¹³ The LS NSW Indigenous Issues Committee, the Family Issues Committee, the Criminal Law Committee and the Juvenile Justice Committee.

¹⁴ Working with Children Checks Working Group, *Position Paper: Towards a Nationally Consistent Approach to Working with Children Checks* (2011), available at: <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-nationally-consistent-approach-to-working-with-children-checks-2011>

¹⁵ *Ibid.*, page 3

¹⁶ Standing Council of Ministers on Community and Disability Services, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020 – Annual Report 2011-12*, available at: <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business/protecting-children-is-everyone-s-business-national-framework-for-protecting-australia-s-children-2009-2020-annual-report-2011-12>

also notes that there must be sufficient evidence for a legislative and regulatory National Scheme and for any other measures to protect children.

- (a) In this context, the LSSA refers to the recent report of the Honourable Bruce DeBelle AO QC concerning the South Australian Royal Commission into the Independent Education Inquiry.¹⁷ Mr DeBelle was appointed to conduct a review into the circumstances surrounding the conviction of an employee of an Out Of School Hours Care Service at an Adelaide school on charges of sexual assault committed against a child.
- (b) Before the South Australian Department of Education employed the accused, it required and obtained a National Police Certificate stating that he had no convictions.
- (c) The LSSA notes that despite reasonable steps being taken to check the applicant's record, he was placed in a position where he was able to commit a most serious crime against a child in his care.
- (d) The LSSA considers that this example highlights the difficulties that organisations face when screening candidates by using police checks. It is concerned that while having a National Scheme may assist in some cases, it is unlikely to have assisted in the Independent Education Inquiry case.

29. On this basis, the LSSA considers that evidence supporting a National Scheme is required, particularly regarding how many people who are later convicted of sexually assault had prior convictions for similar offences. It also considers that data is required concerning: the number of current WWCC applications; the cost of processing these applications; and the total number of identified offenders. The LSSA notes that such statistics would help to identify whether a National Scheme would be the most effective way of identifying those persons at high risk of offending.

30. In addition, the LSSA raises concerns regarding the considerable cost of establishing a National Scheme, given the current patchwork of relevant laws across Australian jurisdictions, and notes that the burden of obtaining checks can be heavy for the vast majority of law-abiding citizens, while people with an incentive to avoid detection will go out of their way to do so. These factors, it states, emphasise the need for evidence which justifies the necessity for a broad National Scheme.

31. Another of the Law Council's Constituent Bodies, the Queensland Law Society (QLS) refers to the recent report of the Queensland Child Protection Commission of Inquiry (the Queensland Inquiry) which notes that, in Queensland:

- (a) In 2011-2012, 280,524 checks were made, over 500,000 "Blue Card" holders were monitored daily and 296 prescribed negative notices were issued at a cost of \$24 million.
- (b) While criminal history checks form a recognised means of reducing risk to children, doubts were expressed by the Queensland Inquiry's advisory group about the cost-benefit of the Queensland scheme.
- (c) The Queensland Commissioner for Children and Young People and Child Guardian is currently reviewing and streamlining its WWCC processes with a

¹⁷ The Honourable Bruce M DeBelle AO QC, *Royal Commission 2012-2013, Report of Independent Education Inquiry*, June 2013, available at: <http://www.decd.sa.gov.au/educationinquiry/files/links/DeBelleInquiry.pdf>

view to a revised system based on a balanced view of risk and downstream effects on community participation.¹⁸

32. As a result of the above views, the Law Council considers that evidence is necessary which supports the adoption of a National Scheme and determines its scope, particularly in relation to other measures which may also be taken to protect children.
33. In this light, the Law Council also notes the concerns of the Government Working Group that “a stand-alone focus on achieving national consistency by legislative harmonisation and alignment of screening processes does not afford sufficient protection to children.”¹⁹ The Government Working Group also noted that:
- (a) such reform forms only one element of a broader response to the protection and safety of children in the organisational environment;
 - (b) legislative harmonisation relies upon enforcement to be effective;
 - (c) legislative reform would require substantial investment of resources;
 - (d) there is insufficient evidence to inform a best practice screening model; and
 - (e) overly broadly targeted schemes can have unintended community consequences including on privacy and volunteering.²⁰
34. While these concerns may not be insurmountable, they reinforce the need for consideration and development of any National Scheme to:
- (a) be evidence-based;
 - (b) be appropriately and carefully targeted;
 - (c) be fully resourced, including at the level of enforcement; and
 - (d) form part of a broader platform of measures aimed at protecting vulnerable children from abuse.
35. The allocation of resources to a National Scheme should be in addition to, rather than at the expense of, other elements of this broader platform of measures to protect children. While there is currently some emphasis on the need to ensure that organisations have effective risk management strategies in place,²¹ state and territory

¹⁸ Queensland Child Protection Commission of Inquiry Final Report, pages 444-445, available at: http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0017/202625/QCPCI-FINAL-REPORT-web-version.pdf

¹⁹ Working with Children Checks Working Group, *Position Paper: Towards a Nationally Consistent Approach to Working with Children Checks* (2011), page 3, available at: <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-nationally-consistent-approach-to-working-with-children-checks-2011>

²⁰ *Ibid.* page 4

²¹ Standing Council of Ministers on Community and Disability Services, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020 – Annual Report 2011-12*, pages 29, 147, available at: <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business/protecting-children-is-everyone-s-business-national-framework-for-protecting-australia-s-children-2009-2020-annual-report-2011-12>; Mel Irenyi, Leah Bronfield, Lorraine Beyer and Darryl Higgins, “Child Maltreatment in Organisations: Risk Factors and Strategies for Prevention”, *Child Abuse Prevention Issues No 25 Spring 2006*

child protection services are reported to be chronically underfunded and this should be addressed as part of a broader platform of measures.²²

36. In a similar vein, the Law Council also notes the recent views of the National Children's Commissioner that "the system of compulsory background checks on the "millions" of people who work with children needs an overhaul because it misleads people into thinking children are safe, misses some targets, wrongly catches others, and may be a "very costly sledgehammer to crack the wrong nut".²³

Concerns regarding the scope of a National Scheme

37. The Law Council has some concerns about the scope of a National Scheme. Its concerns reflect the need to strike an appropriate balance between the rights of children to be protected from the risk of abuse and the rights of individuals subject to WWCCs, including rights to be presumed innocent unless proven guilty and rights to privacy, employment and rehabilitation. These rights are set out in the Universal Declaration of Human Rights (UDHR),²⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR)²⁵, the International Covenant on Civil and Political Rights (ICCPR)²⁶ and the CROC.²⁷
38. While none of these latter rights is absolute, it is important that they are not arbitrarily restricted. That is, any restriction must be necessary in the circumstances and reasonable and proportionate to a legitimate purpose, having regard to the alternative options.
39. The Law Council has previously considered this balancing exercise in relation to the Commonwealth Provisions.

Commonwealth Provisions – History of Law Council's Concerns

40. The Law Council raised its concerns in relation to the Commonwealth Provisions contained in the *Crimes Amendment (Working with Children – Criminal History) Bill 2009* (the Bill), when they were considered by the Australian Parliament in 2009. It reiterated them when the Commonwealth Provisions were reviewed in 2011 and 2013.

²² Anna Patty, *Finger Pointed at Cuts in Funding*, *Sydney Morning Herald*, 3 June 2013; "Toddler's Death Reignites Child Services Funding Debate", ABC The World Today report, 10 August 2012; Natasha Boddy, "Child Protection Funding 'Disgrace'", *The West Australian*, 22 May 2012

²³ Catherine Armitage, "Screening of Child Workers Misleading", *Sydney Morning Herald*, 3 June 2013

²⁴ Article 23.1 of the UDHR proclaims that everyone has the right to work, to free choice of employment to just and favourable conditions of work and to protection against unemployment.

²⁵ Article 6(1) of the ICESCR recognises the right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.

²⁶ Article 17 of the ICCPR specifies a right to privacy, stating that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. In relation to the presumption of innocence, Article 14(2) states that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. In relation to rehabilitation, Article 14(4) promotes the desirability of criminal justice procedures in promoting the rehabilitation of juvenile persons, while Article 10(3) states that the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

²⁷ Article 40(1) of CROC states that every child accused of or convicted of a criminal offence should be treated in a manner which: is consistent with the promotion of the child's sense of dignity and worth; reinforces the child's respect for the human rights and freedoms of others; and takes into account the child's age, sex or gender and needs and the desirability of promoting the child reintegrating and assuming a constructive role in society.

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41. While emphasising its support for measures to minimise risks to children, the Law Council opposed provisions of the Bill that allowed information about *any* pardoned, quashed and spent Commonwealth convictions to be disclosed to and taken into account by prescribed Commonwealth, State and Territory agencies in determining whether a person was suitable to work with children. The Law Council stated that:
- (a) there should be no exception to the principle that if a person has been pardoned or their conviction has been quashed, they are entitled to the full benefit of that decision;
 - (b) it objected to the fact that the amendments applied to convictions for *any* offence and not just convictions relating to children;
 - (c) it opposed the extension of the then existing provisions for the disclosure of spent convictions relating to offences clearly relevant to working with children beyond these offences to *any* spent convictions; and
 - (d) it was concerned about a number of other issues such as the lack of a definition in relation to “working with children”.
42. In the Law Council’s view, these provisions unduly interfered with the presumption of innocence, as well as a person’s right to rehabilitation, privacy and employment, without demonstrated justification.

Disclosure and Use of Information about Pardoned and Quashed Convictions

43. The Crimes Act generally provides that certain protections apply to a person who has been granted a free and absolute pardon for an offence on the basis that he or she was wrongly convicted. These include that:
- (a) The person is not required to disclose that he or she was charged with, or convicted of, the offence;
 - (b) No other person may disclose to a third party or a relevant authority that he or she was charged with, or convicted of, the offence, unless he or she consents to the disclosure; and
 - (c) No other person may take into account that he or she was charged with or convicted of the offence, unless he or she consents.²⁸
44. The same protections are also generally provided to a person whose conviction has been quashed.²⁹
45. The provisions reflect the principle that if a person has been pardoned (on the basis of a wrongful conviction) or their conviction has been quashed or set aside by a higher court on review, they are entitled to the full benefit of that decision. This requires that the person be treated as if the conviction had never occurred. Any different approach would mean that, once convicted, a person’s guilt can never be fully expunged even where the process by which the conviction was secured is found to have been flawed.
46. However, the Bill created an exception which allows for information about pardoned or quashed convictions to be disclosed to, and taken into account by, a prescribed person or body which is required or permitted by law to obtain and deal with

²⁸ Sections 85ZR and 85ZS

²⁹ Sections 85ZT and 85ZQ

information about persons who work, or seek to work, with children.³⁰ Importantly, these amendments relate to offences of all types and are not confined to pardoned or quashed convictions for offences against children.

47. When the Bill was considered, the Law Council raised its concerns that:

- (a) no explanation was provided about why or how the fact that a person was once wrongly convicted of any offence should be taken into account in determining their suitability to engage in child-related work;
- (b) the result of the amendments was that a person's employment opportunities may be curtailed on the basis of a prior criminal charge, even though the person was exonerated; and
- (c) this appeared to be inconsistent with article 14(2) of the ICCPR, which provides that a person should be treated as innocent until proven guilty.

48. The Bill provided that such information could only be disclosed if the Minister was satisfied that certain standards had been met (concerning privacy, human rights, record management, natural justice and risk assessment frameworks). However, the Law Council submitted that these purported safeguards offered little protection given that the amendments, by their very nature, declared that it would sometimes be legitimate to take into account, including to a person's disadvantage, a charge in relation to which that person was ultimately exonerated.

49. In the absence of evidence demonstrating that the amendments would deliver improved child protection outcomes which warranted interference with fundamental rights, the Law Council submitted that the provisions of the Bill which related to pardoned or quashed convictions should not be passed.

Spent Convictions

50. The Law Council also objected to the Bill's provisions which permitted the disclosure and use of information about spent convictions, regardless of type.

51. The Crimes Act generally provides that, where a person has been convicted of an offence but that conviction has become "spent":

- (a) The person is not required to disclose that he or she was charged with or convicted of the offence;
- (b) No other person may disclose to a third party or a relevant authority that he or she was charged with or convicted of the offence, unless he or she consents to the disclosure; and
- (c) No other person may take into account that he or she was charged with or convicted of the offence, unless he or she consents.³¹

52. A conviction is regarded as spent when:

- (a) The person has been granted a pardon for a reason other than that the person was wrongly convicted of the offence; or

³⁰ Sections 85ZZGB, 85ZZGC and 85ZZGD

³¹ Sections 85ZV and 85ZW

-
- (b) The person was not sentenced to imprisonment for the offence, or was not sentenced to imprisonment for the offence for more than 30 months, and the waiting period for the offence has ended.³²

53. The “waiting period” is generally five years from the date of conviction for a person who was convicted as juvenile and ten years in most other circumstances.³³
54. The central objective of the spent conviction regime is to allow offenders convicted of relatively minor offences the opportunity to engage in society without the stigma of a criminal conviction if they have subsequently functioned in the community for the relevant period without committing another offence.
55. Prior to the passage of the Bill, the Crimes Act provided that where a person was being assessed for a position relating to the care, instruction or supervision of minors, the person or body conducting the assessment could have access to and take into account information about a prior conviction for a sex offence or an offence committed against a child³⁴ – even though that offence would otherwise be regarded as “spent”.
56. However, following the passage of the Bill, the Crimes Act now incorporates a significantly broader exception which allows for information about *all* spent convictions to be disclosed to, and taken into account by, a prescribed person or body which is engaged in assessing whether a person is suitable to work with children.³⁵
57. When the Bill was considered, the Law Council acknowledged that the interests of community safety would sometimes require exemptions from the spent convictions regime. However, it submitted that:
- (a) a spent conviction should only be required to be disclosed, or should only be permitted to be taken into account, where it could be demonstrated that the offence was relevant to the exempt situation;
 - (b) no justification had been offered for why those engaged in assessing a person’s suitability to work with children required complete access to information about a person’s spent convictions;
 - (c) no explanation was provided about why or how the fact that a person was once convicted of *any* minor offence, regardless of its nature, should be taken into account in determining their suitability to engage in child-related work.
58. The Law Council was concerned that there was a lack of compelling empirical data to support the breadth of the new exception, a fact also highlighted in the Bill’s Digest.³⁶

³² Section 85ZM(2)

³³ Section 85ZL

³⁴ The previous exception applied in relation to the disclosure of information to, or by, or the taking into account of information by, a person or body who: employed or otherwise engaged other persons in relation to the care, instruction or supervision of minors, for the purpose of finding out whether a person who was being assessed by the person or body for that employment or engagement had been convicted of a designated offence (previous section 85ZZH(e)); or otherwise made available care, instruction or supervision services for minors, for the purpose of finding out whether a person who was being assessed by the person or body for that employment or engagement had been convicted of a designated offence (previous section 85ZZH(f)). A “designated offence” means a sexual offence or an offence against the person committed against a minor (Section 85ZL).

³⁵ Sections 85ZZGB, 85ZZBC and 85ZZGD

³⁶ The Bill’s supporting materials referred to Australian Institute of Criminology (AIC) findings that incarcerated sexual offenders were more likely to have previous convictions for non-sexual offences than for sexual offences (AIC “Child Sexual Abuse: Offender Characteristics and Modus Operandi”, 2001). However, the

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59. The danger, in the Law Council's view, of allowing all spent convictions to be disclosed was that it increased the risk that people would be discriminated against on the basis of an old conviction regardless of its relevance to the inherent requirements of the position they were seeking appointment to.
60. In this context, the Law Council referred to evidence provided by the Australian Human Rights Commission (AHRC), in relation to the draft Model Spent Convictions Bill in 2009,³⁷ of discrimination resulting from employers taking into account irrelevant criminal records. For example, the AHRC provided the following case study:

Employment as a youth worker: The complainant was employed as a locum caseworker for a State Government Department. He applied for a permanent position, and disclosed his criminal convictions under this process. Following this disclosure, he was told that due to his criminal conviction of a drug possession (marijuana) charge 16 years previously, he could not be appointed to the position and could no longer have one-to-one contact with clients. His employment was then terminated.

As with the disclosure of pardoned and quashed convictions, the Law Council noted that the Bill contained safeguards designed to protect individuals with spent convictions from such discrimination, by requiring that prescribed persons or bodies must comply with certain standards regarding privacy, human rights, records management, natural justice and risk assessment frameworks. However, it queried the protection offered by this safeguard, given that the amendments expressly allowed for all spent convictions regardless of type, age or seriousness to be taken into account.

Breadth of "Working with Children" Phrase

61. The Law Council was also concerned that the amendments provided an exemption for disclosure to a prescribed person or body required or permitted by, or under law, to deal with information about persons who "work, or seek to work, with children".
62. This was significantly broader than the previous exemptions to the spent conviction regime, which were drafted so that they only applied to the assessment of people who were engaged in, or seeking to engage in, a job or activity which involved "the care, instruction or supervision" of children.
63. In the amendments, the critical phrase "work with children" was not defined. In the Law Council's view, this phrase was very broad and could encompass large parts of the workforce who worked alongside or in contact with people under the age of 18, but had no direct responsibility for them. For example, this could include workers in fast food restaurants, or in retail outlets. The Law Council submitted that there was no

Bill's Digest noted that the AIC report was published in 2001 based on various studies conducted from 1992 to 2000, of which only one study was Australian. It noted that the Government had not referred to more recent evidence in relation to the Bill, introduced in 2009. The Bill's supporting materials also referred to indications from law enforcement agencies that charges relating to offences against children were often withdrawn as a decision was made to protect the child victim from the stress and trauma of giving evidence, cross-examination and waiting for committal and trial. However, the Bill's Digest noted that neither the Second Reading Speech nor the Explanatory Memorandum provided the details of such indications by law enforcement agencies: Parliament of Australia Department of Parliamentary Services, *Bills Digest: Crimes Amendment (Working with Children – Criminal History) Bill 2009* at page 7

³⁷ AHRC submission to the Standing Committee of Attorney-Generals on the Model Spent Convictions Bill, 5 February 2009

need or child protection imperative for breaching the privacy of this broader class of persons by subjecting them to criminal history checks, particularly where pardoned, quashed and spent convictions might be disclosed and taken into account.

64. For this reason, the Law Council submitted that a definition of “work with children” was required in the Bill, providing that the phrase only encompassed those directly engaged in the care, supervision or instruction of children.

Review of the Commonwealth Provisions

65. When the Bill was under consideration, the Australian Government emphasised the safeguards contained in it and the fact that it would be reviewed in 12 months. The Senate Legal and Constitutional Affairs Committee also recommended that it be subject to a second review (after three years) as well as the initial 12 month review. This recommendation was accepted.
66. The first review (the First Review) occurred in 2011, while the second review is due to be completed by the end of September 2013 (the Second Review).
67. The Law Council was disappointed that the First Review did not provide comprehensive information on whether disclosures had been made regarding pardoned, quashed, or spent convictions, or detail on the nature of the employment for which such disclosures had been made. Nor did it provide any analysis which addressed the concerns which the Law Council raised prior to the passage of the Bill. The operation of the safeguards in the Bill which had been invoked in response to these concerns was also given scant analysis.³⁸ The Law Council has recently made a submission regarding the Second Review. In this submission the Law Council has highlighted the need for such data and analysis.³⁹

State and Territory Provisions

68. The Law Council notes that existing WWCC schemes in different jurisdictions currently draw together a range of information from various sources, and that this can include:
- (a) convictions – whether or not they are considered spent and whether or not an order has been made that a conviction should not be recorded;
 - (b) apprehended violence orders;
 - (c) charges;
 - (d) any relevant allegations or police investigations involving the individual; and
 - (e) any relevant employment proceedings and disciplinary information from professional organisations.⁴⁰

³⁸ Law Council of Australia, Submission of 12 August 2011 to the Attorney-General's Department regarding the Crimes Act Review – Working with Children Provisions, available at: <http://www1.lawcouncil.asn.au/lawcouncil/index.php/members/10-divisions/135-disclosure-of-criminal-record-information>

³⁹ Law Council of Australia, Submission of 12 July 2013 to the Attorney-General's Department regarding the Crimes Act Review – Working with Children Provisions, available at: <http://www1.lawcouncil.asn.au/lawcouncil/index.php/members/10-divisions/135-disclosure-of-criminal-record-information>

⁴⁰ Australian Institute of Family Studies, *Pre-Employment Screening: Working with Children Checks and Police Checks*, June 2012, page 3

69. The recent Victorian Supreme Court case of *ZZ v Secretary, Department of Justice*⁴¹ provides a useful reminder of the need to balance the rights of children to be protected from the risk of abuse and the rights of individuals in the application of the Victorian WWCC scheme. In this case, the Victorian Supreme Court upheld the appeal of a man who was refused an assessment notice and an accreditation that he needed to work as a bus driver. The facts of the case were that:

- (a) ZZ wished to work as a bus driver, which would put him into unsupervised contact with children.
- (b) He had committed criminal offences (which were not sex or child related offences) some ten years ago, including incitement to murder his wife, for which he was sentenced to imprisonment for six years, with a non-parole period of three years and six months. He had been in no further trouble with the police since being released on parole in 2006;
- (c) The Secretary of the Department of Justice refused to give him an assessment notice under the *Working with Children Act 2005 (Vic)* because the Secretary considered that it would put the safety of children at risk and would not be in the public interest.
- (d) The Department of Transport also decided that it was not in the public interest to grant driver accreditation under the *Transport (Compliance and Miscellaneous) Act 1983*.
- (e) The Victorian Civil and Administrative Tribunal (VCAT) upheld the Secretary's decision.

70. On appeal, Justice Bell held that in assessing whether the man was “a risk” to children, rather than an “unjustifiable risk”, VCAT had misapplied the statutory test. He also found that VCAT had failed to consider all the factors pertinent to an assessment of the public interest, including ZZ's human rights as well as the rights of children.

71. His Honour observed that while the arguments had proceeded without consideration of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Victorian Charter), “it was impossible to avoid these issues, especially as the interpretive principle in section 32(1) of the [Victorian] Charter is mandatory”.

72. His Honour further observed that:

- (a) the consideration of children's human rights needed to be balanced against the consideration of ZZ's right to work;
- (b) the right to privacy, as set out in the ICCPR and the Victorian Charter, could also be engaged;
- (c) an appropriate balancing of the right of children to protection from harm and the right of the individual to work is dependent upon a proper assessment of the nature and degree of the risk;
- (d) when applying the unjustifiable risk test, a rational, objective and evidence-based assessment of the nature and degree of the risk was required – that is, the assessment must be rational in the sense of being balanced and not

⁴¹ *ZZ v Secretary, Department of Justice* [2013] VSC 267 (22 May 2013)

arbitrary, and refusing to give a notice must be a proportionate decision in the circumstances.

73. While this decision related to the application of the Victorian WWCC scheme, it highlights the need for the risks to children to be balanced with the rights of the individual applying to work with children in any WWCC scheme. This balancing exercise needs to be undertaken in relation to both the scope of the WWCC scheme and in how it is applied.
74. The Law Council notes that two of its constituent bodies, the NSW LS and the NSW Bar Association have taken the view that the necessary balancing exercise in the scope of the scheme should be resolved in favour of the protection of children from risks rather than the protection of the rights of an individual not to have pardoned, quashed or spent convictions disclosed. Another of its Constituent Bodies, the QLS has taken a preliminary view that the balancing exercise should be resolved in favour of the protection of the rights of the individual not to have pardoned, quashed or spent convictions disclosed. In the time available to respond to the Issues Paper, the Law Council has not undertaken further consultation with its constituent bodies in relation to where the balance should be struck in a National Scheme. However, it notes the importance of this balancing exercise in relation to the scope of a National Scheme.
75. The Law Council considers that there are important reasons, from the perspective of both the community and the individual, for ensuring that the scope of a National Scheme is not overly broad, but is geared towards the disclosure of information which highlights genuine risks to the safety of children.

What features and safeguards should a National Scheme incorporate?

76. The Law Council considers that if a National Scheme is pursued, it should incorporate the following features and safeguards:
- (a) It should explicitly acknowledge that there are competing rights and community interests involved, including the rights of children to be protected from risks and the rights of individuals to be presumed innocent, and rights of individuals to work, privacy and rehabilitation.
 - (b) It should be appropriately targeted, carefully and tightly framed, with its parameters geared towards disclosing information which would demonstrate that an individual presents an “unjustifiable risk” to the safety of children.
 - (c) It should recognise that there will be a list of offences for which a conviction will automatically disqualify an applicant from working with children. For example, this would include sexual assault; crimes of violence against children; grooming and child sex tourism offences.
 - (d) It should also recognise that there will be a borderline area in relation to convictions for certain offences and charges where careful analysis will be required to determine whether an unjustifiable risk exists.
 - (e) It should define the phrase “working with children” to refer only to those directly engaged in the care, supervision or instruction of children.
 - (f) It should be explicitly based on current evidence regarding the abuse of children within Australian institutions. Where such evidence is insufficient, it should be commissioned.

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- (g) It should contain appropriate privacy protections, including that:
- (i) it should clearly set out who may have access to information for WWCCs and for what purposes, as well as the kind of information to be sought;
 - (ii) unlawful disclosure of information should constitute an offence; and
 - (iii) an individual should be informed prior to applying for a position of the need for a WWCC and of the purposes for which, and persons to whom, such information is disclosed.
- (h) It should incorporate safeguards concerning:
- (i) the need to comply with applicable Commonwealth, State and Territory human rights and anti-discrimination laws;
 - (ii) the need to comply with procedural fairness and natural justice principles;
 - (iii) the right of the individual to seek a review of the decision; and
 - (iv) the right of the individual to access legal assistance for any review application, including government funded assistance where he or she does not have the sufficient means to pay for it.
- (i) It should also include mechanisms which ensure that:
- (i) administering staff are trained in the principles which govern the scheme;
 - (ii) policies, operational guidelines and risk assessment frameworks support this training to ensure that staff are appropriately skilled to weigh the risks involved;
 - (iii) there is transparency and accountability in the manner in which it is administered;
 - (iv) there is independent oversight, including regular reviews of its administration, having regard to its overarching principles including appropriately balancing the competing interests set out above; and
 - (v) there is an independent complaints-based mechanism for individuals who are concerned that their privacy has been breached or they have experienced unfair discrimination.
- (j) It should include risk assessment frameworks to ensure that there is careful balancing of the need to protect children, with the need to respect the individual's rights to be presumed innocent, as well as the rights to work, privacy and rehabilitation. These frameworks would have regard to:
- (i) the nature, gravity and circumstances of the offence;
 - (ii) the relevance of the offence;
 - (iii) how long ago the offence was committed;
 - (iv) the age of the person and the victim at the time of the offence;

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- (v) whether the person's circumstances have changed since the offence was committed;
 - (vi) the person's attitude to the offence;
 - (vii) if the person has undergone a program of treatment or intervention for the offence— any assessment of the person following the program;
 - (viii) if the offence was committed outside Australia—whether the offence is also an offence in Australia;
 - (ix) whether the person has committed any other relevant offence; and
 - (x) any submission made by the person to the administering body.
- (k) It should:
- (i) be administered by a national centralised agency, allowing for a streamlined, electronic application process;
 - (ii) provide for ongoing monitoring of individuals checked, and provide alerts to any person, authority, organisation or body which has previously requested a report on a person if updated information becomes available;
 - (iii) provide for cross-jurisdictional coverage, so that information about offences committed in one jurisdiction is available to other jurisdictions; and
 - (iv) clarify how it operates in conjunction with other national schemes and systems to protect children from abuse, including the National Child Offender System and the Child Exploitation Tracking System.⁴²

77. The Law Council also considers that any National Scheme should be developed using a consultation process, with a draft discussion paper and draft legislation both issued for public comment.

78. It further considers that any National Scheme should be part of a more comprehensive suite of measures for protecting children from institutional sexual abuse, noting that there is expert agreement that relying on such a scheme as a standalone measure would be futile.⁴³ This should include measures which better support victims of relevant crimes through the prosecution process so that perpetrators are convicted when these crimes occur.

79. The Law Council also recommends that the development of any National Scheme should occur in conjunction with the consideration of strengthening federal anti-

⁴²The National Child Offender System consists of the Australian National Child Offender Register and the Managed Person System. See CRIMTRAC information about these systems at: http://www.crimtrac.gov.au/our_services/ChildProtectionServices.html

⁴³ Working with Children Checks Working Group, *Position Paper: Towards a Nationally Consistent Approach to Working with Children Checks* (2011), page 3, available at: <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/a-nationally-consistent-approach-to-working-with-children-checks-2011>

discrimination law which protects individuals from unfair discrimination on the basis of their irrelevant criminal record, in line with its previous advocacy on this issue.⁴⁴

80. The AHRC regularly receives complaints of discrimination on the grounds of criminal record in employment. For the period July 2010 to June 2011, of all complaints received by the AHRC under the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act), 23% were on the basis of criminal record discrimination. .
81. However, currently, the mechanisms for the AHRC to address such complaints are limited. Under the AHRC Act, it can investigate and conciliate complaints of discrimination in employment on the ground of a criminal record. However, if conciliation is unsuccessful, the complainant cannot take the matter to court. If the AHRC is satisfied that a breach of the complainant's human rights has occurred, it may report this to the Attorney-General, but cannot enforce its decision.
82. Such protection at a federal level is particularly important, given the absence of comprehensive protection against such discrimination at the state and territory level.⁴⁵
83. The Law Council notes that the National Children's Commissioner has also recently raised her fears that the WWCC system may result in unfair discrimination.⁴⁶

Other Issues Paper Questions

If there is no National Scheme, should there be minimum requirements for each state and territory scheme?

84. The Law Council considers that in the absence of a National Scheme, a minimum requirement should be that there is an effective mechanism for the states and territories to share relevant WWCC information before a risk assessment is undertaken. This would help to address the concerns raised by the LS NSW and NSW Bar Association that the current system means that an individual may be cleared within a state or territory for working with children on the basis of no convictions there, yet have relevant convictions in another state or territory.
85. There should also be a requirement that jurisdictions are alerted when an individual is convicted in another jurisdiction of a relevant offence.
86. As already noted, the Law Council is aware that there is work underway under the National Framework to address cross-jurisdictional information issues with WWCCs, including a recent 12-month pilot of the National Exchange of Criminal History Information for People Working with Children.⁴⁷ However, the outcomes of this pilot do not appear to be publicly available.

⁴⁴ See for example, Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee regarding the Human Rights and Anti-Discrimination Bill 2012*, 24 December 2012, pages 21-22, available at:

<http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2681%20-%20Exposure%20Draft%20-%20Human%20Rights%20and%20Anti-Discrimination%20Bill%202012.pdf>

⁴⁵ Criminal record is not covered in the equal opportunity laws of NSW, Victoria, Queensland or South Australia. Western Australia and the Northern Territory prohibit discrimination only on the basis of spent convictions. Only Tasmanian and the ACT provide unlawful discrimination protection directly based on criminal record. Nor is criminal record covered in the adverse action provisions of the Fair Work Act 2009 (Cth).

⁴⁶ Catherine Armitage, "Screening of Child Workers Misleading", *Sydney Morning Herald*, 3 June 2013

⁴⁷ Standing Council of Ministers on Community and Disability Services, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020 – Annual Report 2011-12*, available at: <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications->

How long should any clearance be granted for?

87. One of the Law Council's constituent bodies, the NSW Bar Association supports a yearly review of any clearance where the worker is required to declare that no additional convictions, misconduct or serious allegations have occurred in the last 12 months.
88. Another constituent body, the NSW LS is of the view that a person wishing to come into contact with children should have to undergo the WWCC process each time they apply for a position involving contact with children.
89. The QLS has referred to the Queensland Inquiry report which notes that a review of its WWCC scheme is under consideration including determining whether a renewal period is necessary and, if so, making it five years or longer.
90. In the time available to respond to the Issues Paper, the Law Council has been unable to conduct further consultation with its constituent bodies on this particular question. However, it suggests that if a National Scheme provides a clearance for a particular period of time, that period should be determined on the basis of evidence relating to the effectiveness of the periods under existing schemes. If such evidence is not currently available it should be obtained.

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

91. Neither the NSW LS, nor the NSW Bar, support individuals being able to commence work before the check is completed.
92. The Law Council understands that work is underway to provide 30 day exemptions for paid and volunteer workers who are required to cross borders in the course of their work with children.⁴⁸ This appears to be a reasonable exception, provided that such workers have already been screened in their own jurisdiction.

How should child-related work be defined? How should child-related sectors and roles be defined?

93. As discussed above, the Law Council supports targeted and carefully framed definitions which are based on current evidence of the kinds of work and sectors where children are most likely to be subject to abuse within Australian institutions.
94. It considers that the critical phrase "working with children" must be defined so as to refer to those people who are directly engaged in the care, supervision or instruction of children.
95. The NSW LS has noted the importance of the definition of child-related work including risks to children presented by direct contact with the relevant individual. This includes physical or face-to-face contact as well as other forms of communication over the internet (such as email and social media) or by telephone (including text messages). It should also include the risk to the child of grooming for sexual contact.

[articles/protecting-children-is-everyones-business/protecting-children-is-everyone-s-business-national-framework-for-protecting-australia-s-children-2009-2020-annual-report-2011-12](#)

⁴⁸ Ibid

Are current exemptions for a Working with Children Check adequate or appropriate?

96. This question focuses particularly on whether people who are living in the homes of children in out-of-home care, or who are parent volunteers should be exempt from WWCCs.
97. The NSW Bar and NSW LS consider that such people should not be exempt from WWCCs and the NSW LS also considers that independent children's lawyers should not be exempt.
98. The QLS has referred to the Queensland Inquiry's report, which includes concerns about the "downstream effects on community participation", with the Queensland system seen to inhibit foster and kinship carer applications, particularly in regard to WWCC requirements for household visitors.⁴⁹
99. The Law Council considers that exemptions from WWCCs should be based on evidence regarding the operation of exemptions under the existing schemes. If such evidence is not available, it should be obtained.

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

General Considerations

100. As discussed, the Law Council considers that appropriate records should be targeted by the National Scheme with its parameters geared towards disclosing information which would demonstrate that an individual presents an "unjustifiable risk" to the safety of children. The National Scheme, and its specific parameters, should be based on current evidence regarding the abuse of children within Australian institutions.
101. The Law Council considers that overly broad categories of records should be avoided. The Law Council considers that the records to be included in a WWCC should be determined according to evidence as to which records are most likely to indicate that an individual presents an unjustifiable risk in working with children. If such evidence is not available, it should be obtained.

Juveniles

102. In relation to juveniles, the Law Council considers that it is particularly important to consider the desirability, as recognised under the CROC, of promoting the reintegration into society of children who are accused of or convicted of criminal offences.⁵⁰ This needs to be weighed against the need to protect other children from the risk of being abused.
103. The NSW LS has noted that the issue of whether juvenile records should be included in a WWCC is a complex policy issue that requires close examination of the above factors. The fundamental goal of ensuring the safety of children should be the paramount consideration. However, the best interests of children who have been accused of or have committed criminal offences also should be considered. While there is a clear need to protect children from the risk of harm, there is also a need to

⁴⁹ Queensland Child Protection Commission of Inquiry Final Report, pages 444-445, available at: http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0017/202625/QCPCI-FINAL-REPORT-web-version.pdf

⁵⁰ Article 40(1), CROC

ensure that the approach taken is nuanced enough that it will not unduly affect young offenders in their later lives if they do not actually pose any risk to children.

104. The NSW LS has raised a number of factors which could be considered regarding the inclusion of juvenile records. It has drawn attention to the position recently taken by its Juvenile Justice Committee (JJC) that children should not be included on the NSW Child Protection Register.⁵¹ The JJC submitted that:

- (a) The Register was set up to track paedophiles, and this purpose is not served by including children particularly where the offence relates to sexual contact where both parties are under 16;
- (b) Children and young people should not be treated as adults, taking into account their lower level of intellectual and emotional maturity;
- (c) The lifelong effects of being on the Register are in conflict with obligations under the CROC.⁵²

105. Nevertheless, juveniles have recently been included on the NSW Child Protection Register. The consequence of this is that in carrying out a WWCC in NSW, a juvenile will be flagged as a "prohibited person".

106. In addition, the NSW LS Criminal Law Committee notes that offences committed by children against children often arise from schoolyard fights or sexual activity between children who are of similar ages. These are very different to situations where an adult abuses a vulnerable child. It emphasises that all information about the circumstances of juvenile convictions should be provided to assist decision-makers.

107. The LS NSW has further noted that complexities exist in relation to whether Apprehended Violence Orders (AVOs) which involve juveniles as parties should be included in WWCCs. These complexities relate to the question of whether AVOs which relate to juveniles indicate that a particular individual poses a threat to children.

108. As noted above, the Law Council submits that the issue of whether juvenile records should be included in WWCCs and if so, which juvenile records, should be determined according to evidence as to which records are most likely to indicate that an individual presents an unjustifiable risk in working with children. If such evidence is not available, it should be obtained.

How should an appeal process operate?

109. As indicated above, prior to any appeal process, the Law Council considers that the process of decision-making itself should be procedurally fair. That is, before an adverse decision is taken, the individual should be informed of this, be provided with the reasons and the relevant information, and given an opportunity to respond.

110. At the point at which borderline cases are considered, the Law Council notes the NSW Bar Association's view that a panel of appropriately qualified persons could be consulted, including psychologists and/or psychiatrists.

⁵¹ NSW LS JJC *Submission to the NSW Attorney-General regarding the Impact of the Child Protection Register and the Working with Children Check on Juvenile Offenders*, 14 May 2012.

⁵² Including under Article 40(4), CROC which emphasises that the wellbeing of the child is prioritised and that any response is proportionate to the young person's circumstances and to the offence

111. Beyond this, the Law Council considers that individuals should have the right to seek review of adverse decisions. This should encompass both administrative and judicial review.

112. In addition, complaints mechanisms should be in place so that individuals may either contact the agency administering the WWCC directly, or take a complaint to an independent body where they believe that their privacy has been breached or they have experienced unfair discrimination.

To what degree should the Working with Children Check minimise the need for institutions to establish clear processes for responding to inappropriate behaviour of staff in child-related positions?

113. As indicated above, the Law Council is concerned that the availability of WWCCs may lead the community and institutions into believing that children are always safe if the WWCC has been carried out. In fact, their effectiveness is limited and they should only be used as part of a platform of broader measures.

114. As also noted, the Law Council understands that commentators in this field are currently placing a strong emphasis on the need to ensure that organisations have effective risk management strategies in place.⁵³ This includes clear processes for responding to inappropriate behaviour of staff in child-related positions, including referrals to police where appropriate. As noted by the NSW Bar Association, inappropriate behaviour may occur following a WWCC, and the WWCC should not minimise in any way the need for institutions to establish such processes. As also noted by the LSSA, the recent Independent Education Inquiry in that jurisdiction showed that a police check in itself was not effective in preventing child sexual abuse in a school setting.

How should the effectiveness of any existing or proposed Working with Children Checks be evaluated and/or monitored?

115. As discussed above, the Law Council considers that there should be independent oversight of the National Scheme, with regular reviews of its operation. Such reviews would have regard to its overarching principles including the need to appropriately balance competing rights. This would provide an opportunity for scrutiny of whether the safeguards included in the National Scheme were operating in practice, and whether appropriate decisions were being taken.

116. To assist this process, the Law Council expects that an independent review would gather (and agencies would be required to collect) de-identified information about:

- (a) the kinds of positions and sectors in which relevant individuals work, or seek to work;
- (b) the nature of the records disclosed – for example, the kind of offence, whether there was a conviction, whether it was a spent offence, the kind of misconduct considered;
- (c) the outcome of the assessments;

⁵³ Mel Irenyi, Leah Bronfield, Lorraine Beyer and Darryl Higgins, "Child Maltreatment in Organisations: Risk Factors and Strategies for Prevention", *Child Abuse Prevention Issues No 25 Spring 2006*

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- (d) whether the assessments were subject to review proceedings, and if so, their outcome;
 - (e) the policies, protocols and risk assessment frameworks that agencies have in place for conducting WWCCs, especially in relation to borderline cases;
 - (f) measures to ensure compliance with privacy, human rights, record management and natural justice/ procedural fairness requirements;
 - (g) the training provided to screening staff on how to conduct such assessments; and
 - (h) any complaints about the disclosure and use of information obtained, including allegations of privacy breaches or unfair discrimination on the basis of criminal record.

117. In addition, the NSW LS has suggested that an advisory body should be established to oversee the operation of the National Scheme. Such an advisory body should be:

- (a) culturally diverse in its appointment of persons and should include representatives from the courts, the legal profession and caseworkers;
- (b) review issues of process, timeliness and efficiency on an ongoing basis;
- (c) have consultative powers and the power to provide advice and recommendations; and
- (d) have the power to engage groups or agencies to assist with the evaluation of the National Scheme's effectiveness.

Conclusion

118. The Law Council strongly supports measures to minimise the risk of sexual, physical and emotional harm to children. It encourages a nationally consistent, clear approach to conducting WWCCs and considers that a National Scheme (a National Scheme) would have several advantages. However, there also appears to be a need for evidence to assess whether a National Scheme on its own would be the most effective way of identifying those persons at high risk of harming children. Evidence should also be used to identify the scope of what information should be included in WWCCs under a National Scheme and how this information should be used by those administering the scheme.

119. The Law Council considers that any National Scheme should be appropriately and carefully targeted, fully resourced and form part of a broader, evidence-based platform of measures to protect children. The allocation of resources to a National Scheme should be in addition to, rather than at the expense of such other measures.

120. Any National Scheme should address the need to strike an appropriate balance between the rights of children to be protected from risks and the rights of individuals subject to WWCCs, including rights to be presumed innocent unless proven guilty and rights to privacy, employment and rehabilitation. While none of these latter rights are absolute, it is important that they are not arbitrarily restricted. That is, any restriction must be necessary in the circumstances and reasonable and proportionate to a legitimate purpose, having regard to alternatives.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.