

# Statutory Review of the Child Protection (Working with Children) Act 2012

Report

August 2017



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# Executive summary

The *Child Protection (Working with Children) Act 2012* (the WWC Act) was enacted in 2012 after a comprehensive review of the former Working with Children Check (WWCC) model under the *Commission for Children and Young People Act 1998* (the CCYP Act) and commenced on 15 June 2013. The review resulted in a radically modernised model for the Working With Children Check (WWCC) that was underpinned by a new legislative framework. This was phased in through staged implementation of the WWC Act between June 2013 and March 2018.

The paramount consideration in the Act is to ensure the safety, welfare and well-being of children, and their protection from child abuse. The aim of the current scheme is to prevent known perpetrators of sexual and violent abuse against children from entering into and undertaking child-related work. Importantly the WWC Act creates the complementary function of encouraging organisations to develop their capacity to be safe for children, which is considered to be an integral adjunct to the WWCC screening scheme.

This 2017 statutory review of the WWC Act was conducted in accordance with s 53, which requires that consideration be given to whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. The Terms of Reference are outlined at page 6.

The Office of the Children's Guardian (the OCG) published a discussion paper in May 2017 as part of the review. It was designed to facilitate thinking about key policy issues to be considered in the context of recent and ongoing tailoring of the legislation that has occurred since it commenced in June 2013, as well as in the context of recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The Discussion Paper is at Appendix 1 and provides historical and contextual background to these changes.

A large number of responses were received to the Discussion Paper (list of submissions attached at Appendix 2) and a number of targeted consultation sessions were also convened by the Children's Guardian. The feedback and written submissions have been given careful consideration and have informed this report, which contains 29 recommendations (see pages 3–4 for a full list, and the relevant areas of the report thereafter).

The review found there is strong and continuing support for the policy objectives of the Act with some fine-tuning required to ensure the terms are appropriate for securing those objectives. The main recommendations in the report relate to two main areas: the scope of the scheme, that is, whether the scheme targets the right people; and strategies to further improve compliance.

A number of recommendations are also made to enhance information gathering processes which are essential to inform the Children's Guardian of the risk in relation to the WWCC process. The recommendations also aim to streamline aspects of the legislation that have become redundant, give rise to uncertainty or require further clarity.

Overall feedback through the consultation sessions on the Discussion Paper indicated that government and non-government partners have developed a strong understanding of the role of the WWCC in responding to the risks that children face in employment settings. It is anticipated that many of the changes recommended in this Report will be incorporated by legislative and operational changes to further improve the NSW WWCC scheme before the WWCC renewals commence in June 2018. The OCG will also continue to invest in building the capacity of organisations to create child-safe spaces and better use the WWCC as a tool in a range of strategies that they adopt.

## List of recommendations

### Recommendation 1

The OCG should give consideration to the appropriateness of further expanding the definition of direct contact, in line with the Royal Commission's recommendation 7a).

### Recommendation 2

Amend the WWC Act to indicate that contact with children must be 'a usual part of and more than incidental to the child-related work'.

### Recommendation 3

Retain the current approach in NSW to defining child-related work, which includes listing child-related roles and sectors and expanding the list to additional roles through regulation.

### Recommendation 4

The OCG should give further consideration to whether cleaners working at overnight camps and in day programs in sports centres should be required to have a WWCC clearance.

### Recommendation 5

Amend the WWC Regulation to require parents volunteering on overnight camps with their child to have a WWCC.

### Recommendation 6

The OCG should give further consideration to how to best respond to out of scope applications.

### Recommendation 7

The OCG should give further consideration to the option of imposing a nominal fee on volunteer applications, consistent with the practice in other jurisdictions.

### Recommendation 8

Amend the WWC Act to permit the Children's Guardian to give special consideration to persons turning 18 while residing with an authorised carer remaining in their care placement despite being refused a WWCC, if the Children's Guardian is satisfied that sufficient supports are in place to mitigate risk.

### Recommendation 9

The OCG should give further consideration to bringing adult household members of carers in voluntary out-of-home care within the scope of the WWCC scheme.

### Recommendation 10

The OCG should give further consideration to clarifying the time frame of 3 weeks referred to in the defence provision at s10(5)(a) of the WWC Act.

### Recommendation 11

Amend the WWC Act to include a definition of criminal history that is consistent with the Royal Commission's recommendation (17).

### Recommendation 12

Amend the WWC Act to remove or replace references to criminal records with the term 'criminal history' for clarity.

### Recommendation 13

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include arson and firearm related offences regardless of whether the victim was a child.

### Recommendation 14

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to specifically capture individuals who have been convicted of, or individuals against whom proceedings have commenced for, offences involving domestic or family violence (whether or not listed in either Schedule to the Act) sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may cause a risk to the safety of children, regardless of children being present.

### Recommendation 15

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include final AVOs initiated by Police in conjunction with an investigation where a child is named on the order as a person in need of protection.

### Recommendation 16

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include the following offences:

- a) Section 37 (choking, suffocation and strangulation)
- b) Section 93G (causing danger with firearm or spear gun)
- c) Section 93GA (firing at dwelling house or buildings)
- d) Section 195 (destroying or damaging property)
- e) Section 198 (destroying or damaging property with intention of endangering life)
- f) Section 200 (possession etc. of explosive or other article with intent to destroy or damage property).

### Recommendation 17

Amend the WWC Act to impose a positive obligation on applicants or holders of the WWCC to notify changes in their personal information to the OCG, with the failure to comply being an offence.

### Recommendation 18

Amend the WWC Act to include a definition of “risk to the safety of children” that reflects the Supreme Court authority of *Commission for Children and Young People v V* [2002] NSWSC 949.

### Recommendation 19

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include convictions for carnal knowledge offences where the victim is over 13 years of age and has not received a sentence of full time custody for the offence.

### Recommendation 20

Amend Schedule 2 to the WWC Act (disqualifying offences) to include convictions for carnal knowledge where the victim is under 13 years of age or, if over 13 years of age, where the applicant has received a sentence of full time custody for the offence.

### Recommendation 21

Retain the current approach in NSW to manslaughter, which distinguishes between manslaughter as the result of a motor vehicle accident and manslaughter other than as the result of a motor vehicle accident.

### Recommendation 22

Amend the WWC Act to include current court orders in factors to be considered in risk assessment by both the OCG and NCAT.



### Recommendation 23

Amend the WWC Act to introduce a new requirement that NCAT may impose an interim stay order subject to conditions only if satisfied that any conditions will be satisfactorily supervised by the relevant agency or employer.

### Recommendation 24

Amend the WWC Act to limit appeal rights where a person is subject to a parole order for any offence for the duration of that order.

### Recommendation 25

Amend the WWC Act to create an offence for the failure of an employer to undertake online verification of workers in child-related work without reasonable excuse and to authorise OCG officers to serve a penalty infringement notice for this offence.

### Recommendation 26

Amend the WWC Act to require prescribed licensing bodies and employment placement agencies to undertake online verification.

### Recommendation 27

Amend the WWC Act to compel non-government organisations to provide the information (and not statements setting out the information) in response to notices under s31 of the WWC Act in the same way as government agencies are compellable.

### Recommendation 28

The OCG should give further consideration to a proportionate and effective response for non-compliance with a notice under s31 of the WWC Act to provide information to the OCG.

### Recommendation 29

Organisations providing services to children should incorporate the NSW Child Safe Principles developed by the OCG in their policies and principles.

# 1. Introduction

## 1.1 Terms of reference

Section 53 of the *Child Protection (Working with Children) Act 2012* (the WWC Act) sets out terms of reference for the conduct of the review of the WWC Act, as follows:

- The Minister is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## 1.2 Policy objectives of the WWC Act

The policy objectives of the WWC Act are, as set out in s3, to protect children:

- a) By not permitting certain persons to engage in child-related work, and
- b) By requiring persons engaged in child-related work to have Working With Children Check (WWCC) clearances

The paramount consideration in the operation of the Act is the safety, welfare and wellbeing of children and, in particular, protecting them from child abuse.<sup>1</sup>

## 1.3 Conduct of the review

Five years since the WWC Act was assented to, the statutory review of the WWC Act has provided the Office of the Children's Guardian (the OCG) with the opportunity to consult widely and consider ways of further improving the WWC scheme guided by the Terms of Reference to this review.

On 3 May 2017, the OCG published a Discussion Paper raising issues for consideration. The Discussion Paper described the process of the review as being made up of 3 stages.

**Stage 1** – The publication of the Discussion Paper was the first of these stages. The Discussion Paper, identified six focus areas, posed as questions as follows:

- 1 Does the WWCC scheme target the right people?
- 2 Does the WWCC scheme collect the most appropriate information?
- 3 Does the WWCC scheme operate effectively?
- 4 Does the WWCC provide sufficient review opportunities?
- 5 Does the WWCC scheme encourage compliance?
- 6 What could strengthen an organisation's understanding of the role of the WWCC in a child-safe organisation?

**Stage 2** – Following the publication of the Discussion Paper, the OCG convened information sessions and targeted consultations with key stakeholders to hear their views first-hand about potential improvements to the WWCC scheme. These sessions were held in May 2017.

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<sup>1</sup> s4 of the WWC Act

**Stage 3** – This report represents the culmination of the statutory review process. It makes recommendations for change based on the outcome of comprehensive consultation. The OCG received over 60 submissions that addressed the issues raised in the Discussion Paper. Some submissions also alerted the OCG to other issues not previously canvassed. The review also attracted responses on Facebook, offering feedback on issues raised in the Discussion Paper. Appendix 2 to this report lists all those who provided submissions (other than those who requested confidentiality) and attended consultation forums.

Some of the recommendations will form the basis of legislative amendment. Others will inform operational processes or be the subject of further consultation.

This report will be tabled in each House of Parliament within 12 months from the date of assent, by 27 June 2018.

## 1.4 Background to the WWCC scheme

New South Wales was the first state in Australia (in July 2000) to introduce employment screening to identify people who may pose a risk to the safety of children and should be prevented from engaging in child-related work areas. This process is called the Working with Children Check (WWCC) and was implemented through the *Commission for Children and Young People Act 1998* (CCYP Act). A comprehensive statutory review of the CCYP Act identified weaknesses in the model adopted and culminated in the development of new model.

While the aim of the former WWCC was to provide employers with information regarding the risk in employing an individual in a specific workplace setting, the aim of the new scheme is to prevent known perpetrators of sexual and violent abuse against children from entering into and undertaking child-related work.

The new model was underpinned by the *Child Protection (Working with Children) Act 2012* (WWC Act) which commenced on 15 June 2013, marking a significant departure from the previous approach to child-related employment screening in NSW.

The WWC Act has been progressively amended since its commencement in response to operational issues identified in each phase-in period, changing community expectations and in response to issues highlighted by the Royal Commission into Institutional Responses to Child Sexual Abuse. This has resulted in a framework that is recognised nationally as the most robust across jurisdictions and largely effective in providing measures to minimise risks to the safety of children in their interactions with people delivering services to children.

## 1.5 Overall findings

- The policy objectives remain valid; and
- The terms of the WWC Act generally remain appropriate for securing the objectives.

The 29 recommendations made in this report aim to provide a balanced set of strategies to further improve the WWC scheme in NSW.

## 1.6 Approach adopted in preparing this report

In considering whether the object of the WWC Act remains valid, this report assumes the ongoing need for pre-employment screening. This need has been recognised by the Royal Commission and internationally as a safeguard for protecting children and young people when incorporated into broader child-safe strategies.<sup>2</sup> The

<sup>2</sup> Royal Commission into Institutional Responses to Child Sexual Abuse 2015, Scoping review: Evaluations of pre-employment screening practices for child-related work that aim to prevent child sexual abuse, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.

WWCC was introduced in NSW to respond to the shortcomings in historical screening and employment practices that did not effectively prevent paedophiles from gaining access to children. Since this introduction, evidence has continued to support the need for pre-employment screening systems. As such, pre-employment screening is acknowledged as a valuable tool for identifying and preventing known offenders from working with children, even though costs to government and the taxpayer are incurred.

Rather than repeat the contextual background already contained in the Discussion Paper, this Report focuses on the way forward. It is intended that the Discussion Paper will be a companion document to this report, providing the requisite background and context. It is attached at Appendix 1.

The recommendations have been developed taking account of the views expressed in submissions and consultations and Royal Commission recommendations endorsing the need for national co-operation and a nationally consistent approach wherever possible.

While some of the recommendations will form the basis of proposals for legislative change to be considered by Government, others will result in operational enhancements that do not require legislative amendment.

## 1.7 Report structure

This report consists of 7 chapters. Chapters 2–7 are based on the focus areas addressed in the Discussion Paper. For ease of reference and to contextualise the discussion, the relevant focus questions that were raised in the Discussion Paper are listed at the beginning of each chapter of this report.

Chapter 2 – “Scope of the Working With Children Check scheme” – this chapter addresses the issue of whether the WWCC scheme targets the right people, and considers definitional issues in relation to child-related work, who else should be covered under the WWCC Act, and how to respond to out of scope applications.

Chapter 3 – “Information considered as part of the Working With Children Check” – this chapter addresses the issue of whether the WWCC scheme collects the most appropriate information, in particular whether and how criminal history information should be defined, and other information that should be considered.

Chapter 4 - Operation of the WWCC scheme – this chapter focuses on operational issues and in particular the risk assessment process, the threshold of risk and the factors to be considered when assessing risk.

Chapter 5 - Review opportunities in the WWCC scheme – this chapter considers the adequacy of, and limitations to, the available opportunities in the WWCC scheme for review of WWCC decisions at NCAT, and whether they are sufficient to address risks to the safety of children

Chapter 6 - Compliance with the WWCC – this chapter looks at the various aspects of compliance with the WWCC scheme that are required of both employers and individuals, whether they are effectively and efficiently met, and possible responses to address non-compliance.

Chapter 7 - The role of WWCC in child-safe organisations – this chapter focuses on the importance of encouraging organisations to develop their capacity to be child safe as a necessary adjunct to the WWCC scheme with particular emphasis on the OCG’s recently developed NSW Principles for child-safe organisations and how they should be implemented.

## 1.8 Recommendations

The recommendations made are listed at the beginning of this report. In addition, they are included at the end of relevant parts of particular chapters for ease of reference in identifying the reasoning which leads to the specific recommendation.

## 2. Scope of the Working With Children Check scheme

**Focus question 1: Does the WWCC scheme target the right people?<sup>3</sup>**

- Does the definition of child-related work need to be changed?
- Would the Act be clearer about who needs a WWCC if it adopted the Royal Commission's recommendations for a limited list of child-related services (found in Rec 12), and removed all references to child-related roles?
- Should parents volunteering on overnight camps be made to have a WWCC?
- How should the scheme respond to applications from individuals who are 'out of scope'?

### 2.1 Introduction

When the WWCC was conceived the intention was to target people whose work is focused on children and who have ongoing role oriented contact with children. It was never intended to be used as an open ended risk mitigation strategy and to be applied wherever children were present. In the debate on the introduction of the Child Protection (Working with Children) Bill 2012 the Hon Victor Dominello categorically stated that not all people in the community who have direct contact with children require a WWCC. He further clarified this by noting that "it has never been intended for people, who as a normal part of their working day, may see a child or be in a place with a child but who do not work with the children". Despite this intention there appears to be an over reliance on the WWCC scheme, with many risk averse employers keen to expand its scope beyond its current parameters.

### 2.2 Targeting the right people

#### 2.2.1 Introduction

Targeting the right people is a balancing act. The aim is to ensure that there is sufficient flexibility to meet the objectives of the Act while avoiding overregulation of the private lives of individuals who may through their daily lives come in contact with children. The WWC Act seeks to provide this flexibility by defining work in s6(1) as being child related if a) the worker is engaged in work in sectors referred to in subsection(2)<sup>4</sup> that involves direct contact by the worker with children, or b) the worker is engaged in work in child-related roles referred to in subsection (3)<sup>5</sup>. The ability to both extend and limit the ambit of the scope is provided through a regulation making power to exempt specified persons or classes of persons from all or any of the requirements of the Act, and also to specify additional roles as being child related.

The majority of opinions expressed through submissions to the review and in the targeted consultations held by the OCG, with the notable exception of the sporting sector (discussed further below), indicate that the scheme generally targets the right people in its current form. However, it was agreed that it could benefit from further clarity

<sup>3</sup> See discussion at Chapter 3 of the Discussion Paper (pp. 10-16), which provides background to the issues addressed in this chapter.

<sup>4</sup> Child-related sectors include child development, child protection, children's health services, clubs or other bodies providing services for children, disability services, early education and child care, education, entertainment for children, justice services, religious services, residential services, transport services and other work or roles prescribed in the Regulation such as youth workers.

<sup>5</sup> Child-related roles include an authorised carer, the principal officer and members of governing bodies of a designated agency, registered agency or accredited adoption service provider and school cleaners.

to minimise confusion about who needs the WWCC. This would also serve to discourage people who were never intended to be captured by the scheme from applying for a WWCC.

It was also noted in a number of the submissions and through consultations that, despite the scope being defined, many organisations do err on the side of caution and require individuals who may not require a Check, or in relation to whom there may be some uncertainty, to apply. This is discussed below in the context of responding to out of scope applications.

### 2.2.2 Definitional issues in relation to child-related work including in response to the recommendations of the Royal Commission

The Royal Commission's recommendations in relation to the definition of child-related work (found in Recommendations 5-13) were considered in many of the submissions, in the context of moving towards a national scheme. This was also discussed in detail during consultations. The recommendations include:

- incorporating a simplified definition of child-related work to provide that contact with children refers to physical contact, face to face contact, oral communication, written communication or electronic communication (Rec 7a),
- incorporating the concept that contact with children 'must be a usual part of and more than incidental to the child-related work' (Rec 8a), and
- only defining the services listed in Rec 12a and the roles in 12b as child-related work, with all other remaining categories of work or roles removed.

### 2.2.3 Expanding the definition of direct contact

Almost across the board, submissions indicated support for expanding the definition of direct contact to include physical, face-to-face, oral, written or electronic communication, to keep abreast of changes in technology and work types. In this context it is noted that the NSW government has already made regulatory amendments following consultation with key government stakeholders, to expand the definition to a targeted group of workers providing ongoing children's services by way of counselling, mentoring, and distance education through any form of communication, including oral, written or electronic communication. This amendment came into effect on 1 July 2017.

Stakeholders identified that to broaden the definition of direct contact further would risk bringing many unintended individuals into the scheme. The review therefore does not recommend expanding the definition to include oral, written or electronic communication beyond the recent expansion to counselling, mentoring and distance education at this stage. However, it is recommended that the OCG should give further consideration to the need to expand this definition, in particular with relevant non-government sectors.

### 2.2.4 Clarifying the scope of child-related work

The overwhelming majority of consultation participants and individuals/organisations who contributed to the review were supportive of efforts to achieve national uniformity or mutual recognition of WWCC outcomes across states and territories. Inserting the words 'contact with children *must be a usual part of and more than incidental to the child-related work*' as recommended by the Royal Commission was favoured as a way of providing further clarity. The review found that this recommendation is consistent with the policy underpinning the exemption in clause 20(1)(a) of the Child Protection (Working with Children) Regulation 2013 (WWCC Regulation) in relation to ancillary staff not being required to have a WWCC clearance. Clarifying the legislation at the front end would achieve the aim of removing ambiguity about who requires a WWCC.

### 2.2.5 Child-related sectors, services and roles

Most submissions did not agree that removing roles and sectors and relying on the agreed list of child services alone, as proposed by the Royal Commission, would reduce ambiguity. In fact, the majority of submissions to the



review favoured retaining the current approach under the WWC Act, which specifies the roles and sectors provides regulation making powers to add further child-related roles, and lists certain exemptions. Most stakeholders thought that removing roles and sectors would unnecessarily restrict the scope of the scheme, fail to take into account emerging work areas and identified high risk roles, and further contribute to ambiguities about who is required to have a WWCC.

During consultation with the sporting sector it was noted that it has taken three to four years to promote understanding of the scope of the current scheme and departing from this approach at this time would add significant uncertainty and confusion within the sector. A number of stakeholders expressed agreement with adopting the Royal Commission's approach if it would further national efforts. This was, however, only on the proviso that the Children's Guardian can continue to prescribe additional roles as being child related. This was seen as an important way of providing flexibility to address emerging risks, and the review considered that this flexibility should be retained to ensure that the scheme targets the right people.

## Recommendations

### Recommendation 1

The OCG should give consideration to the appropriateness of further expanding the definition of direct contact, in line with the Royal Commission's recommendation 7a).

### Recommendation 2

Amend the WWC Act to indicate that contact with children must be 'a usual part of and more than incidental to the child-related work'.

### Recommendation 3

Retain the current approach in NSW to defining child-related work, which includes listing child-related roles and sectors and expanding the list to additional roles through regulation.

## 2.2.6 Scope in relation to the sporting sector

A number of organisations within the sporting sector were of the opinion that the scheme is not currently targeting the right people in sporting clubs and organisations. A number of submissions from the sector sought to expand the scope of the scheme to capture various roles which provide access to children. This includes coaches, referees, managers, match officials, committee members, canteen workers, groundskeepers and volunteer parents who are in constant contact, and are often unsupervised with children at training, sporting events and overnight camps.

However, Recommendation 2 as proposed above should further clarify the scope of the scheme such that any of these individuals in the sporting context who do have contact with children as a usual part of their work will be captured where appropriate. It is therefore considered unnecessary to specify the additional roles in this sector, referred to above, as being child related.

In this context, the Office of Sport identified that the scheme currently does not adequately cover ancillary staff such as catering, administrative and cleaning staff in Office of Sport run sport centres where children are on site often 24 hours a day, 7 days a week for camps, and at other times for day programs.



The review found that relevant ancillary staff other than those providing cleaning services in these centres are currently captured under s6 d) and k) of the WWCC Act and clauses 7 and 9 of the Child Protection (Working with Children) Regulation 2012.<sup>6</sup> It is noted that in the case of catering, administrative and other staff, where their work is usually with children rather than contained in a work area such as the kitchen, canteen or office area, they would be brought within the scope of the WWCC.

The review recognises that some cleaning staff in these sports centres, like school cleaners who are required to have a WWCC, may have regular access to the sports centres while children are at overnight camps and engaged in day programs, though they are not currently required to have a WWCC. They may have the opportunity to form relationships with students at the premises and are often unsupervised. The same rationale for requiring school cleaners to be checked because of their access to and opportunity to form relationships with children, is likely to apply to those cleaners at Office of Sport run sporting centres. However, further consideration and consultation is required in this regard to clarify who should be included and to ensure that individuals who were never intended to be captured by the scheme are not unintentionally brought in.

## Recommendation

### Recommendation 4

The OCG should give further consideration to whether cleaners working at overnight camps and in day programs in sports centres should be required to have a WWCC clearance.

### 2.2.7 Parent volunteers on overnight camps

Overwhelming support was expressed through consultations and in submissions for all parents volunteering on overnight camps to be brought within the scope of the WWCC. Parents volunteering with their own children are currently exempt, with the exception of parents/close relatives who volunteer in a formal mentoring program or with children with disabilities involving intimate contact.

The review noted that the issue of bringing parent volunteers within the scope of the WWCC has been considered by Government on a number of previous occasions with considerable effort taken to balance government intervention in the private lives of citizens against the safety of children. The OCG has worked with organisations to encourage the adoption of multiple responses to manage the potential risks in a range of environments, rather than relying on the WWCC.

However, it was noted by many, particularly in the education and sporting sectors, that the fact of having a child involved in activities does not remove the risk that a parent may present to other children when they are on overnight camps. The OCG heard that in many instances a parent who volunteers at a club or school may not be placed with their own child at the time of the overnight camp or event, so the fact that the parent has a child attending a camp should be immaterial to considerations of risk. Additionally, and importantly, the review recognises that most abuse occurs by individuals who are known to the child and where the environment is not monitored or detection is unlikely, as can happen on overnight camps.

While there has been overwhelming support to bring parent volunteers within the scope of the WWCC, and this is aligned with the Royal Commission's recommendation, the majority of submissions to the review felt there should be no fee imposed on these parent volunteers. The issue of imposing a fee on volunteers is discussed further below.

<sup>6</sup> These provisions refer to clubs and other bodies providing services for children and overnight camps (within residential services).

## Recommendation

### Recommendation 5

Amend the WWC Regulation to require parents volunteering on overnight camps with their child to have a WWCC.

## 2.3 Responding to out-of-scope applications

The WWC Act at s13 requires the Children's Guardian to determine the outcome of all applications made by 'any person' provided they are properly made. The Discussion Paper questioned whether the requirement in s13, as well as the fact that the Act provides no capacity for the Children's Guardian to exclude applications from individuals who are outside the intended scope of the legislation, have impeded the objectives of the Act being met.

A number of serious consequences arising from accepting out scope applications were referred to in the Discussion Paper at page 14.

The most serious of the issues raised are the overreliance on the WWCC by organisations as a sole risk mitigation strategy instead of employing other child-safe strategies, as well as conflicting policy positions in relation to the level of risk that is considered acceptable in different care contexts, and the diversion of resources to deal with out of scope applications. In the early stages of the new scheme the latter issue resulted in adverse impacts on processing times for applications that are within scope, and represented the highest potential risk as out of scope applications require comprehensive risk assessment.

Three approaches to respond to the issues were suggested in the Discussion Paper:

- front end changes that restrict who can apply, or imposing a small fee on volunteer applications;
- penalty options and
- no change/retaining existing requirements.

There were mixed responses about how to respond to out of scope applications, but there was general agreement that a response is required. A number of organisations, both in their submissions and during consultations, expressed the view that the OCG should adopt front end changes to respond to these applications. This would provide the OCG with discretion to determine which applications should be processed and the ability to exclude out of scope applications. A number of stakeholders also submitted comments about the length of time taken to complete the risk assessment process and felt that measures to prevent diversion of resources to out of scope applications should be implemented to reduce the time taken to complete WWCC risk assessments that are received from applicants who are intended to be covered by the scheme.

Some responses also suggested that organisations should be prohibited from requiring out of scope workers from having the WWCC.

Other submissions to the review expressed the view that the OCG should employ alternative strategies to address the out of scope applications. These strategies should include raising awareness, removing ambiguity in the legislation about who requires a Check, and placing prohibitions on agencies from requiring their staff who are clearly not in child-related work to apply for a WWCC clearance.

The review considered these suggestions and the available options at the front end to restrict or prohibit applications, noting the overwhelming opposition to imposing a fee on volunteers as a possible solution to restrict demand. The review also considered the context of the original intent of the legislation as noted in the debate

introducing the 2012 Bill, “the WWCC is reserved for people whose work is focused on children and whose work requires ongoing role-oriented contact with children”.

Given the available options the review considers that providing discretion to the Children’s Guardian to terminate applications that are outside the scope of the legislation presents a number of difficulties that would need to be addressed in order to remain consistent with the current model which has overwhelming support. Under the previous WWCC scheme the clearance was attached to an individual role in an organisation. The new scheme, which gives effect to the recommendations of the previous statutory review, provides a *person*-based rather than a *position*-based WWCC clearance. Restricting individuals from applying for a Check is considered inconsistent with the portability of the WWCC, which allows individuals to move between employers and roles that are child related for the five year life of a clearance. This would also prevent people from obtaining a clearance in contemplation of commencing child-related work and would additionally impede an employer’s ability to take control over how they choose to deploy their workforce, specifically if they choose to move workers between child-related and non-child-related roles.

Importantly, the review recognised that a large number of out of scope applications are initiated by employers who require their workers to obtain a WWCC despite there being no legislative requirement to do so. The OCG recognises this reality and the fact that workers should not be penalised for applying in these circumstances. There was general support for the introduction of a proportionate and escalating range of enforcement options. The OCG should give further consideration to how to best respond to out of scope applications which are initiated by employers.

The review also considered that despite the opposition to imposing a fee on volunteers that was expressed in submissions and through the consultation process, this issue may require further consideration. Imposing a nominal fee for volunteers remains consistent with the policy underpinnings of the scheme. Further, the review notes that when the new WWCC scheme was developed consideration was given to the successful use of a volunteer fee in WA as a way of managing demand from agencies that do not offer child-related roles. It was also considered that if the fee remained nominal, genuine volunteers requiring the WWCC should not be dissuaded from applying. However, it is noted that many non-government agencies were of the opinion that this would have a significant impact on their volunteering bases. Given that four other jurisdictions currently impose a fee on volunteers,<sup>7</sup> it is recommended that further modelling and discussions about imposing a nominal fee on volunteers be considered by the OCG.

## Recommendations

### Recommendation 6

The OCG should give further consideration to how to best respond to out of scope applications.

### Recommendation 7

The OCG should give further consideration to the option of imposing a nominal fee on volunteer applications, consistent with the practice in other jurisdictions.

<sup>7</sup> Tasmania, Northern Territory, WA, and South Australia

## 2.4 Children who turn 18 while in out-of-home care

A number of the submissions to the review raised the need to re-consider the requirement for children who turn 18 years old while in the out-of-home care (OOHC) setting to have a WWCC. The requirement in section 10 of the Act is for all adult household members who reside on the same property as an authorised carer or where a home based education and care service or family day care service operates, to comply with the requirements of the legislation. This captures siblings of the children in care when the siblings turn 18 years old.

Currently, where the individual is not granted a WWCC they are required to leave the home within 48 hours. Alternatively, the authorised carer will cease to be authorised to provide statutory OOHC care to other children if a barred person remains in the home. For a child turning 18 while in OOHC, this may mean leaving a stable placement where they have been residing with carers and siblings and have done so for a number of years. . This has significant adverse impacts not only for the young person who is required to leave the home, but also for the siblings who remain there.

The submissions call for a more nuanced approach that takes into consideration the impact the requirement has on stable OOHC placements and recognises the critical support often provided by the authorised carer and the supervising agency.

The review considered the fact that the requirement for adult household members of authorised carers was only recently introduced in response to identified risks faced by children and young people in OOHC, including by other children and young people. The Royal Commission has drawn attention to the fact that some children and young people in statutory OOHC have problematic sexual or aggressive behaviours because of previous abuse and neglect.

However, statutory OOHC providers are required to carefully assess risks to others when making placement decisions and provide adequate supervision and support to allow sibling groups to reside together. Section 140 of the *Children and Young Persons (Care and Protection) Act 1998* requires that a designated agency that places a child or young person in the OOHC of an authorised carer has a responsibility to supervise the placement.

Additionally, the Government's Safe Home for Life reforms were aimed at providing children in OOHC with a permanent family. The permanent placement principles are articulated in s10A of the *Children and Young persons (Care and Protection) Act 1998* and prioritise placing siblings together wherever possible. Designated agencies often have to manage risks involved in placing siblings or unrelated children together and, where risk is managed appropriately, one child turning 18 should not disrupt a placement that is otherwise appropriate. On this basis, the review recommends that the Children's Guardian should be provided with discretion in relation to these persons who are required to have a Check on turning 18 years of age while in care. The discretion should be such that if they are refused a clearance because of serious offences, they can still remain in the placement if the Children's Guardian is satisfied that appropriate supports are in place to mitigate any risks. The refusal will however preclude the young person from engaging in any child-related work.

A one size fits all exemption for children who turn 18 while in care is not considered to be appropriate as the circumstances of each child in care, the household itself and the support provided to the placement may differ and therefore case by case consideration is required. Further, granting such an exemption would mean that any subsequent concerning behaviour, particular serious offences, will escape the attention of the Children's Guardian.

Additionally, the NSW Carers Register provides a common resource that all designated agencies must use to share information about carers and their household members and prospective carers. By allowing the Children's Guardian to consider each application on a case by case basis rather than exempting this group of individuals, the protections afforded by the Carer's Register will be maintained. Authorised carers would still be required to enter

and record information about themselves and their household members on the NSW Carers Register. The young person, who may have been refused a WWCC but may be permitted to remain in their placement, will still be recorded on the Carers Register. This will allow designated agencies to have a clear understanding about who is living in the authorised carer's household.

## Recommendation

### Recommendation 8

Amend the WWC Act to permit the Children's Guardian to give special consideration to persons turning 18 while residing with an authorised carer remaining in their care placement despite being refused a WWCC, if the Children's Guardian is satisfied that sufficient supports are in place to mitigate risk.

## 2.5 Adult household members

### 2.5.1 Adult household members in voluntary out-of-home (VOOHC) settings

A principal function of the Children's Guardian is to register organisations that provide or arrange voluntary out-of-home care (VOOHC) and to monitor their responsibilities under the WWC Act and regulations. The framework for VOOHC is provided for in the Children and Young Persons (Care and Protection) Regulation.

VOOHC care, unlike statutory OOHC, is arranged directly between a parent and an organisation when there are no child protection concerns. Many children and young people in VOOHC have a disability. The voluntary arrangements can take many forms, including out-of-home respite with a host family or in a care centre, or longer-term residential arrangements.

Unlike adult household members residing at the premises of authorised carers, adult household members where VOOHC is provided are not required to have a WWCC. This is because VOOHC carers are not authorised carers.

However, the review recommends that consideration should be given to bringing adult household members in these settings within the scope of the WWCC in the same way as adult household members in other care arrangements are required to be checked, such as family day care which is analogous to VOOHC in that parents make the choice voluntarily and carers are not authorised under the Care Act. Children should be afforded the same level of protection when they are living away from their birth families. This will provide consistency and further protect children, many of whom are often additionally vulnerable because of disability. However, it is recognised that such a change would have widespread impact and this issue was raised internally by the OCG as part of the review process, but has not been consulted on. For this reason, the review recommends that further consideration and consultation about this issue should occur.

## Recommendation

### Recommendation 9

The OCG should give further consideration to bringing adult household members of carers in voluntary out-of-home care within the scope of the WWCC scheme.

## 2.5.2 Timeframes to establish when an adult household member of a carer requires a WWCC

An additional issue in relation to adult household members of family carers that has come to the attention of the review is that the defence provisions in s10(5) (a) give rise to some uncertainty. Currently the legislation states that “It is a defence to proceedings for an offence under subsection (1) or (2) if the accused person established that (a) the adult person had been residing on the property for less than 3 weeks”. This time frame was specified with the intention of capturing people who have ongoing residence at the carer’s property. It is unclear whether the three weeks referred to in the defence provision of s10 (5) (a) refers to three consecutive weeks in a given time frame, or any three weeks altogether. A clarification that explains the intent of the provision would minimise confusion and ensure that the intent of the provision is clear.

### Recommendation

#### Recommendation 10

The OCG should give further consideration to clarifying the time frame of 3 weeks referred to in the defence provision at s10(5)(a) of the WWC Act.

## 3. Information considered as part of the Working With Children Check

### Focus Question 2: Does the WWCC scheme collect the most appropriate information?<sup>8</sup>

- Would inserting definitions for criminal history and criminal records assist in making sure that the right information is collected and considered?
- Do other records need to be considered?
- Does the scheme need to do anything further to make sure domestic and family violence is captured appropriately?
- Should there be a positive obligation on individuals to notify the OCG of changes in their criminal history?

### 3.1 Introduction

The WWCC scheme is heavily reliant on the information it receives about an applicant in order to assess the risk the applicant would pose to the safety of children if allowed to engage in child-related work. The information that is considered as part of the WWCC screening process includes a comprehensive set of criminal history information, relevant workplace records or disciplinary information and other relevant information obtained from government and non-government agencies and the applicant themselves.

At the initial screening stage when an applicant submits a WWCC application at a Roads and Maritime Services registry or Service NSW Centre, their data is automatically transmitted through to the WWCC system and on to ACIC (formerly CrimTrac) for background checking. Background checking returns an individual's full criminal history which in NSW includes details as in the list below from all states, territories and Commonwealth law enforcement agencies and courts, as well as from outside Australia where available. Criminal history information means:

- convictions, whether or not spent
- findings of guilt that did not result in a conviction being recorded
- charges regardless of status or outcome, including pending charges,
- charges disposed of by a court or otherwise other than by way of conviction, and
- charges that led to acquittals or convictions that were quashed or otherwise overturned on appeal for all offences irrespective of whether or not they concerned the person's history as an adult or a juvenile.

In addition, relevant disciplinary information obtained by the OCG from reporting bodies and Notifications of Concern made by the NSW Ombudsman are also considered.

While the majority of applications are cleared following the receipt of this information because there are no relevant records (approximately 93% of all applications in 2015-16<sup>9</sup>), some require further risk assessment as a result of a

<sup>8</sup> See discussion at Chapter 4 of the Discussion Paper (pp. 16-19) which provides contextual background to the issues addressed in this chapter.

<sup>9</sup> Office of the Children's Guardian, 2015-16 Annual Report [http://www.kidsguardian.nsw.gov.au/ArticleDocuments/493/OCG\\_annualreport2015-16.pdf.aspx?Embed=Y](http://www.kidsguardian.nsw.gov.au/ArticleDocuments/493/OCG_annualreport2015-16.pdf.aspx?Embed=Y)



relevant criminal record being returned (approximately 6.2% in 2015-16). Cleared applications are subject to continuous monitoring of NSW criminal history information and disciplinary proceedings.

Where an application moves to risk assessment, the Children's Guardian collects further and more detailed information in relation to the initial criminal, disciplinary and other information already obtained through direct requests to individual bodies. This includes information in relation to interstate criminal history under the Inter-Governmental Agreement on the National Exchange of Criminal History Information for Working with Children.

## 3.2 Definitions of criminal history and criminal records

### 3.2.1 Criminal history

The criminal history information currently collected and considered as part of the WWCC scheme meets the standards proposed by the Royal Commission in its recommendations 17 and 18. Recommendation 17 however specifies that states and territories should amend their laws to include a standard definition of *criminal history*. While the criminal history information meets the proposed standard, there is no definition currently provided in the WWC Act.

There was almost unanimous support, in submissions and through consultations, for the inclusion of definitions as recommended by the Royal Commission. It was recognised that this would further a uniform national approach and provide increased transparency and clarity about the information that is considered under the scheme.

The Discussion Paper also noted that the differing uses of the terms 'criminal history' and 'criminal record' in the WWC Act giving rise to uncertainty. Section 33 of the WWC Act authorises the Commissioner of Police to provide the Children's Guardian with a person's criminal history, which covers the broad range of information proposed by the Royal Commission. In contrast, s 15(4)(h), provides that the Children's Guardian *may* consider a person's criminal *record* when assessing risk and s30(10)(h) provides that the NSW Civil and Administrative Tribunal (NCAT) *must* consider a person's criminal *record*. A person's criminal record is a subset of a person's criminal history. Both the Children's Guardian (s 15(4)(k)) and NCAT (s 30(1)(k)) are permitted to consider "any other matter the Children's Guardian considers necessary" when assessing a person's risk to children. In considering "other matters" the Children's Guardian usually considers a person's total criminal history as provided by the Commissioner of Police. Given that both the Children's Guardian and NCAT can and do consider a person's criminal history, the reference to "criminal record" appears unnecessary and confusing.

### 3.2.2 Diversion under the Young Offenders Act

Further, the review also heard that the legislation gives rise to uncertainty about whether records of young people who are dealt with by way of diversion under the *Young Offenders Act 2000* (the YOA) are included in the criminal history information looked at by the Children's Guardian. Under several clauses in Schedule 1, risk assessments are triggered by "proceedings commenced against a person" for relevant offences if the person has been "convicted" of those offences. However, where the child or young person is dealt with by way of diversion under the YOA by police, there is technically no charge, criminal proceedings, or conviction. While the WWC Act specifies that the Children's Guardian must risk assess a person if any of the matters specified in Schedule 1 to the Act apply, she is not limited to these matters. Section 15(3) and 15(4)(k) allow the Children's Guardian to consider any other relevant information, which means that even if interventions under the YOA fall outside the Schedule 1 on a literal interpretation of the "proceedings commenced against a person" they are still able to be considered.

The position with court imposed cautions and referrals to youth justice conferences imposed under the YOA also leads to some further disparity regarding whether the records are captured under Schedule 1 to the Act. However, as noted above, the Children's Guardian is not limited in the circumstances which give rise to risk assessment and this should therefore not affect whether a person is risk assessed or not in practice.



To remove any ambiguity and address the differing uses of the terms 'criminal history' and 'records' referred to above, the review considers that a definition of criminal history should be included in the WWC Act which is consistent with the Royal Commission's recommendation and includes all matters disposed of under the YOA. For absolute clarity the review also recommends that existing references to criminal record should be removed or replaced as appropriate.

The related issue of how juvenile offences should be treated (which would include whether juveniles diverted under the YOA should be treated differently) was raised in submissions to the review and this is discussed further below.

Additionally, the Royal Commission recommends at Recommendation 21 that state and territories should amend their laws to specify that *criminal records* should include, but not be limited to a range of offences that the review notes are already captured in Schedules 1 and 2 of the WWC Act. These result in either automatic disqualification or risk assessment. The only exceptions are arson and other fire related offences and drug offences, which, while not a direct indicator of risk to children, should be included if this will progress national consistency given the seriousness of these offences.

### 3.3 Information about juvenile offences

While most submissions noted that the definition of criminal history should be as broad as possible as recommended by the Royal Commission and in keeping with what is already collected in NSW, a number of submissions to the review noted concern in relation to the same breadth of criminal history information being collected for both adults and juveniles. It was argued that there is a different power dynamic between children and young people who offend against each other, in contrast to adults who offend against a child. It was also argued that the link between peer on peer offending cannot easily be translated to risk to children when the offending child or young person grows into adulthood.

The review notes, however, that no records relating to offences committed as a juvenile give rise to automatic disqualification. All applicants who have a relevant record in relation to an offence committed as a child or young person are comprehensively risk assessed by the OCG. Risk assessment is undertaken by officers with expertise in child protection, being drawn from backgrounds of psychology, social work and criminology. The process requires these officers to consider the factors listed in s15 of the WWC Act and determine if there is a risk to children.

The review was satisfied that requiring risk assessment is not of itself an adverse outcome. Through risk assessment the OCG can consider peer on peer offending, which does not translate to a risk to children in adulthood, and is therefore distinguished from circumstances which legitimately do give rise to risk, such as an adult preying on a child. This is consistent with the Royal Commission's discussions in relation to aligning approaches across jurisdictions. In particular, the Royal Commission's report notes at page 86: "we believe applicants' complete unabridged history including offences from when they were under 18 years of age should be available for review by screening agencies so they can identify offences, if any, relevant to WWCC decisions". For this reason, the review is of the opinion that all offences, regardless of how they have been disposed, should be considered in the WWCC process.

## Recommendations

### Recommendation 11

Amend the WWC Act to include a definition of criminal history that is consistent with the Royal Commission's recommendation (17).

### Recommendation 12

Amend the WWC Act to remove or replace references to criminal records with the term 'criminal history' for clarity.

### Recommendation 13

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include arson and firearm related offences regardless of whether the victim was a child.

## 3.4 Domestic and family violence related information

There were mixed responses in relation to whether the scheme adequately addresses domestic and family violence. The Discussion Paper sought comment on whether there is a need to expand the information that is already obtained about domestic and family violence to inform the WWCC process. It was noted in the Discussion Paper that the following records already give rise to the requirement for a risk assessment:

- Offences under s13 of the Crimes (Domestic and Personal Violence) Act 2007
- Offences involving intentional wounding of or causing bodily harm to a child by an adult in circumstances where it is not readily apparent that the domestic family violence has been perpetrated against a child/ren or in the presence of a child/ren
- Where there are convictions or proceedings have been commenced for offences involving violence sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may pose a risk to the safety of children.

In addition, other mechanisms allow relevant information about risk (including risk arising from domestic and family violence) to be collected and considered:

- the Sex Crimes Squad within the NSW police provide AVO data to the OCG upon request under s31 of the WWC Act (as advised by the NSW Police, approximately 2,390 requests had been processed from January 2015 to the time that submissions were received)
- Section 15 (3) of the WWC Act provides that the Children's Guardian is not limited in relation to the circumstances that give rise to a risk assessment
- Ch16A of the *Children and Young Person (Care and Protection) Act 1998* facilitates the exchange of information between prescribed agencies in relation to the safety, welfare and well-being of a particular child
- The NSW Ombudsman may also make a notification of concern if he receives information in the course of exercising his functions that leads him to believe that, on a risk assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to the safety of children.

It is widely recognised that domestic and family violence, even if not committed against a child, can have significant negative impacts on a child's well-being. Research shows that children who live in households where domestic violence occurs are more likely to be the victim of other types of violence.<sup>10</sup> This research suggests a strong co-occurrence and correlation between domestic violence and child maltreatment.

The OCG has found that despite research suggesting this co-relation, applicants and their legal representatives have questioned the connection and view domestic violence as an irrelevant consideration in the risk assessment process, particularly if children were not present at the time. Although the OCG is justified in risk assessing such

<sup>10</sup> Z Winstock 2015. The social mechanism linking inter-parental and parent-to-child physical violence. *Journal of Family Violence* 30:719-728, cited from An Updated review of contemporary research to inform decision making processes under ss17 and 18 of the *NSW Child Protection (Working with Children) Act 2012*, Report prepared for the NSW Office of the Children's Guardian by the Australian Institute of Criminology.

matters, for the removal of any doubt and for symbolic reasons, it would be useful to specifically refer to domestic and family violence as a risk assessment trigger. There was agreement that patterns of behaviour in relation to domestic and family violence, particularly where there is evidence of multiple proceedings that have commenced but resulted in no convictions or have been otherwise disposed of, should trigger an assessment of risk. In view of the research referred to above, this should include domestic and family violence offences that do not involve children directly, that is, where children are present in the home but neither witness to the behaviour or the subject of the abuse.

The review considers that one way of achieving this is to mirror Schedule 1 (6), which currently allows behaviour that indicates a pattern of violence or sexual misconduct to be risk assessed to specifically capture patterns of behaviour in relation to domestic and family violence that would not otherwise fall into schedules 1 or 2, regardless of whether children are present.

### 3.5 Apprehended Violence Orders

By way of contrast there was limited support for routinely accessing all Apprehended Violence Orders (AVOs). Stakeholders who attended the consultations and provided written submissions noted the lack of probative information afforded by considering AVOs, and the fact that many are consented to without admissions.

Of those agencies that work with children and young people in courts and the legal environment, there seemed to be general consensus that AVOs should not be routinely considered. Rather, consideration should only be given to final orders initiated by Police in conjunction with an investigation where a child is named on the order as a person in need of protection. The review considered that the arguments against the inclusion of AVOs more generally because of lack of probative value continue to hold except where the AVO involves a final order, noting that this was the reason they were removed following the statutory review of the legislation that governed the former scheme.

### 3.6 Additional personal violence offences

Additionally, the *Crimes (Domestic and Personal Violence) Act 2007* defines “personal violence offences” in s4. The significance of a “personal violence offence” is that it gives the court the ability to make an Apprehended Domestic Violence Order (ADVO) if a person who had or has a domestic relationship with another person fears that the other person will commit a “personal violence offence” against the first person (s 16). Given this, the review considered that the following sections of the *Crimes Act 1900* may be worth including in Schedule 1 to the Act as giving rise to the need for a risk assessment by the Children’s Guardian, based on the fact that they fall within the definition of a “personal violence offence”, but are not currently expressly referred to in the WWC Act:

- Section 37 (choking, suffocation and strangulation)
- Section 93G (causing danger with firearm or spear gun)
- Section 93GA (firing at dwelling house or buildings)
- Section 195 (destroying or damaging property)
- Section 198 (destroying or damaging property with intention of endangering life)
- Section 200 (possession etc. of explosive or other article with intent to destroy or damage property)

## Recommendations

### Recommendation 14

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to specifically capture individuals who have been convicted of, or individuals against whom proceedings have commenced for, offences

involving domestic or family violence (whether or not listed in either Schedule to the Act) sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may cause a risk to the safety of children, regardless of children being present.

### Recommendation 15

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include final AVOs initiated by Police in conjunction with an investigation where a child is named on the order as a person in need of protection.

### Recommendation 16

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include the following offences:

- a) Section 37 (choking, suffocation and strangulation)
- b) Section 93G (causing danger with firearm or spear gun)
- c) Section 93GA (firing at dwelling house or buildings)
- d) Section 195 (destroying or damaging property)
- e) Section 198 (destroying or damaging property with intention of endangering life)
- f) Section 200 (possession etc. of explosive or other article with intent to destroy or damage property).

## 3.7 Positive obligation on individuals to notify changes in personal information

A key feature of the current WWCC is the continuous monitoring of all relevant NSW records for the life of a clearance. Stakeholders in targeted consultations echoed the importance and value of this feature.

The continuous monitoring feature is however limited to NSW records due to lack of formal mechanisms for obtaining ongoing updated records from other states and jurisdictions. The Discussion Paper noted that other schemes in jurisdictions other than NSW place a requirement on individuals to notify the screening agency or the employer (depending on the model used in the jurisdiction) about a change of circumstances, generally defined as a change in criminal history, along with an offence provision for failure to comply.

There was almost unanimous support from stakeholders that a similar obligation should be placed on individuals under the WWCC scheme in NSW.

The review considered that by creating a positive obligation on individuals to notify the OCG of changes in criminal history and personal information the OCG would be alerted to possible offences in other jurisdictions. This information is not currently available to the OCG as part of the continuous monitoring process. When an individual notifies the OCG it would then be able to request information from the relevant jurisdiction. It is noted that creating an offence of failing to notify would be consistent with the Royal Commission's core categories of offences recommended at pages 82-83 of the WWCC Report. Adopting this requirement and the corresponding breach could further national consistency and add to the overall information available to the Children's Guardian for determining risk. While NSW has the other offence provisions proposed by the Royal Commission in place there is currently no requirement or corresponding offence for failure to notify of change in circumstance.

The review considered a positive obligation should be placed on individuals to notify the OCG of changes in their personal information, and not their criminal history at this stage. This is because the OCG already receives NSW

criminal history information via the continuous monitoring process in relation to all applicants and holders of clearances. Further, the OCG is currently developing the Ministerial Protocol under s36A of the WWC Act which will deal with interstate exchange of information. Accordingly, the review does not make any recommendation about any obligation to notify the OCG of interstate criminal history information at this time.

## Recommendation

### Recommendation 17

Amend the WWC Act to impose a positive obligation on applicants or holders of the WWCC to notify changes in their personal information to the OCG, with the failure to comply being an offence.

## 4. Operation of the WWCC scheme

### Focus question 3: Does the WWCC scheme operate effectively?<sup>11</sup>

- How should historical criminal knowledge records be assessed under the scheme?
- Should the scheme adopt the same approach in all cases of manslaughter of a child regardless of the circumstance, as suggested by the Royal Commission, or is it more suitable to risk assess some cases, such as in the case of motor vehicle accidents?
- Should s15 of the Act, which lists the factors that the Children's Guardian considers in assessing risk, include the fact that an individual is on parole or the subject of a current court order?

### 4.1 Introduction

A WWCC application can result in one of two final outcomes – a clearance or a bar, referred to in the legislation as a clearance or a refusal. One of the key changes from the former WWCC model is that employers are no longer required to determine if an employee can be engaged in a particular role based on their risk rating, the specific requirements of the role and the level of supervision. This important change means that an individual cannot be engaged by one employer and refused employment in a child-related role by another. Once an employee is barred from working with children, they cannot engage in any child-related work in NSW for five years.

WWCC decisions made by the Children's Guardian adhere to the principles of procedural fairness. These principles are upheld, in particular, in Part 3 of the WWC Act by a range of provisions, including: transparent factors listed in the Act that the Children's Guardian uses to assess risk;<sup>12</sup> the opportunity for applicants to provide further information;<sup>13</sup> the right of applicants to know the reasons an adverse decision is being considered and have an opportunity to be able to provide information in response,<sup>14</sup> and the requirement for notice of a decision, and the reasons for the decision to be issued to applicants in relation to WWCC outcomes.<sup>15</sup>

In accordance with the policy and legislative framework of the Act as set out above, there are no conditional clearances and employers are not provided with any additional information about an employee's criminal or other history or risk information about an employee. Instead, employers are responsible for fostering a child-safe environment for all children based on a range of strategies that respond to risks the WWCC was not designed to overcome.

### 4.2 Definition of risk

Assessment of risk to the safety of children is the Children's Guardian's primary function in relation to administering the WWCC. Similarly, in considering review applications and applications for enabling orders, NCAT acts as the decision maker to determine if the person who has been refused a clearance by the Children's Guardian poses a risk to the safety of children.

<sup>11</sup>See discussion at Chapter 5 of the Discussion Paper (pp. 20-25) which provides contextual background to the issues addressed in this chapter.

<sup>12</sup>s15, particularly s15(4) and (4A), of the WWC Act

<sup>13</sup>s16 of the WWC Act

<sup>14</sup>s19 of the WWC Act

<sup>15</sup>s20 of the WWC Act

One of the issues considered in the Discussion Paper was the definition of “risk” under the WWC Act. The Children’s Guardian’s determination as to whether the “applicant or holder poses a *risk* to the safety of children” is guided by the factors for consideration listed in s15 of the WWC Act. Currently the legislation is silent on the meaning of risk, and the threshold that must be achieved. While different jurisdictions have adopted differing standards or thresholds for establishing risk, the case law is well established in NCAT’s jurisdiction. The definition applied by NCAT to the concept of “risk” as explained in *Commission for Children and Young People v V* [2002] NSWSC 949 is “whether in all the circumstances, there is a real and appreciable risk in the sense of a risk that is greater than the risk of any adult preying on a child”. It therefore follows that the word “risk” must be linked with the words that follow, namely “to the safety of children”.

Responses to the Discussion Paper have indicated support for including a definition of “risk”, to make it clear to individuals the threshold that must be reached to establish risk under the WWC Act. The review considers that it would be in the interests of transparency and clarity for the Supreme Court’s definition to be articulated in the legislation.

## Recommendation

### Recommendation 18

Amend the WWC Act to include a definition of “risk to the safety of children” that reflects the Supreme Court authority of *Commission for Children and Young People v V* [2002] NSWSC 949.

## 4.3 Assessment of historical carnal knowledge offences

Currently, under the WWC Act, all adults with carnal knowledge convictions are automatically barred (carnal knowledge being a Schedule 2 offence) where the victim is under 16 years of age.

The current approach stems from amendments progressed on 6 December 2013 by the *Child Protection (Working with Children) Amendment (Miscellaneous) Regulation 2013* whereby all such carnal knowledge convictions were made a Schedule 2 automatic disqualifying offence.

An alternative approach suggested in the Discussion Paper was to adopt a slightly more proportionate approach as is done in Western Australia by automatically barring an applicant where the victim was 13 years and under, and risk assessing where the victim was over 13 years of age. This approach is supported in all of the submissions to the Statutory Review Discussion Paper addressing the carnal knowledge issue.

After considering the responses to the Discussion Paper, it is proposed that the approach put forward in the Discussion Paper be further targeted by automatically barring individuals even where the victim was over 13 years of age if the applicant was sentenced to full time custody for the offence. This would be consistent with s26 of the WWC Act in relation to the limitation on appeal rights where a person convicted of carnal knowledge had received a sentence of full time custody. This further targeted approach has been developed by taking into account the OCG’s experience in dealing with applications to NCAT made by individuals who have been convicted of carnal knowledge.

## Recommendations

### Recommendation 19

Amend Schedule 1 to the WWC Act (giving rise to the need for a risk assessment) to include convictions for carnal knowledge offences where the victim is over 13 years of age and has not received a sentence of full time custody



for the offence.

#### Recommendation 20

Amend Schedule 2 to the WWC Act (disqualifying offences) to include convictions for carnal knowledge where the victim is under 13 years of age or, if over 13 years of age, where the applicant has received a sentence of full time custody for the offence.

## 4.4 Assessment of manslaughter of a child

In NSW manslaughter of a child currently results in an automatic refusal or cancellation of a clearance, unless the offence was as a result of a motor vehicle accident. If the latter applies, an applicant will be risk assessed. The Royal Commission has recommended that manslaughter of a child under any circumstances, including as a result of a motor vehicle accident, should result in automatic refusal of a WWCC clearance.

The review considers that the current position under the WWC Act, when compared to the Royal Commission's recommendation, is a preferable approach to ensuring that the most serious offenders are captured. The current position also recognises that manslaughter in the context of motor vehicle accidents may not reflect premeditated or opportunistic child abuse. The OCG considers these matters on a case by case basis through risk assessment.

The current approach has the advantage of reducing unnecessary costs to applicants and administrative costs to NCAT. Adopting the Royal Commission's recommendation would mean that individuals convicted of the manslaughter of a child, even if as the result of a motor vehicle accident, would have to apply to NCAT for any opportunity for the circumstances of the offence to be taken into account.

All of the responses to the Discussion Paper, as well as the feedback received during consultation sessions, which addressed this issue supported maintaining the current distinction based on whether or not the offence resulted from a motor vehicle accident. The review has considered the Royal Commission's recommendations and their consequences thoroughly in the context of the feedback received to the Discussion Paper. On balance, in light of the advantages of the current approach and the feedback from responders to the Discussion Paper, no change is recommended to the current NSW position.

### Recommendation

#### Recommendation 21

Retain the current approach in NSW to manslaughter, which distinguishes between manslaughter as the result of a motor vehicle accident and manslaughter other than as the result of a motor vehicle accident.

## 4.5 Risk assessment factors

Section 15(4) of the WWC Act currently sets out the factors which the Children's Guardian may consider when risk assessing an applicant. The list of factors does not currently include references to particular types of court orders, such as orders under the *Child Protection (Offenders Registration) Act 2000* (the CPOR Act) and parole orders. As a matter of practice, such orders are considered in risk assessments.



The CPOR Act aims to protect children from serious harm by placing individuals convicted of sexual and other serious offences on the Child Protection Register. The CPOR Act provides for registration and reporting requirements for certain offenders who commit sexual and other serious offences against children. The CPOR Act helps to ensure that children can lead safer lives while engaging fully in the community, by limiting the opportunity for people who would cause harm to them to engage with them.

In 2015, the WWC Act was amended to ensure that any registrable offence, as defined in the CPOR Act and not already captured under the WWCC scheme, was included as an automatically barring offence if it was committed as an adult. The WWC Act was also amended at this time to restrict the appeal rights to NCAT of registrable persons on current prohibition orders under the CPOR Act or persons who had been convicted of specified Class 1 offences, committed as an adult, as defined in the CPOR Act.

This demonstrates a close alignment between the WWC Act and the CPOR Act, which could be further strengthened by articulating orders under the CPOR Act as a factor to be considered in risk assessment.

The fact that an applicant is subject to parole or another order is also typically considered during the risk assessment process. Such an approach is considered appropriate to safeguard the safety and well-being of children, in circumstances where a judicial body has already found that a person poses a risk to the safety of children. It also avoids an unjust and disproportionate impact on individuals who have committed offences as juveniles, in the context of a consensual relationship, or where they have committed an offence considered to be relatively less serious.

The majority of responses to the Discussion Paper which addressed this issue supported including current court orders in the list of factors to be considered by the Children's Guardian when risk assessing applicants. One submission did not support including further court orders, based on a view that sufficient discretion already existed in the WWC Act for orders to be taken into account.

After considering all of the views expressed in response to the Discussion Paper, and in the interests of transparency in decision-making, the review recommends that current court orders be added to ss15 and 30 as matters that the Children's Guardian may consider when risk assessing an applicant, and that NCAT must consider in applications under the WWC Act. Including current court orders would also add weight to the importance of judicial consideration of risk while still only being one of many other factors to be considered in a comprehensive risk assessment.

## Recommendation

### Recommendation 22

Amend the WWC Act to include current court orders in factors to be considered in risk assessment by both the OCG and NCAT.

## 5. Review opportunities in the WWCC scheme

**Focus question 4: Does the scheme provide sufficient review opportunities?**<sup>16</sup>

- Should the Act be amended to specifically prohibit interim orders which are subject to conditions being granted under s27 of the Act?
- Should people who are subject to an order by a court that controls or places restrictions on their movement be allowed to appeal a WWCC decision while that order is in place?

### 5.1 Introduction

External review of an administrative decision by an impartial decision-maker is fundamental to ensuring procedural fairness and promotes a robust and transparent decision-making process. Part 4 of the WWCC Act therefore provides mechanisms for external review of WWCC decisions and appeals against adverse WWCC decisions to NCAT. Further, appeals under s83(1) of the *Civil and Administrative Tribunal Act 2013* (on a question of law only) are available from NCAT to the Supreme Court.

Following a review which occurred as recently as late 2015, the categories of individuals who can appeal WWCC decisions to NCAT have been restricted. These restrictions were introduced after a number of cases were out of step with public expectations about who should be able to seek administrative review of decisions made by the Children's Guardian to prevent them working with children. The review also resulted in the introduction of the reasonable person and public interest tests.<sup>17</sup> Applying these tests means that NCAT, like the Children's Guardian, cannot allow an individual to work with children unless satisfied that a reasonable person would allow their child to have direct, unsupervised contact with the individual, and it would be in the public interest to allow the individual to work with children.

The recent amendments outlined above are generally considered to adequately balance the rights of individuals with public protection and safety. The Discussion Paper identified two key areas of potential further reform — firstly NCAT's ability to grant interim stay orders that are subject to conditions, and secondly the appeal rights of individuals who are subject to court orders that impose any control on their conduct or movement.

### 5.2 Conditional interim stay orders

NCAT can currently make an interim order that a decision of the Children's Guardian to refuse an applicant a clearance be stayed on specific conditions while the application is being reviewed by NCAT.<sup>18</sup> The review considers that such a power is potentially inconsistent with the current policy and legislative framework, which only allows for a clearance or a refusal, and which does not contemplate conditional clearances.

The current policy and legislative framework aims to eliminate the opportunities for high-risk individuals to engage in any child-related work, regardless of conditions, which could have been possible under the former framework.

An order subject to conditions has the effect of allowing individuals to undertake child-related work despite being assessed as a risk to children, as long as certain conditions are met. NCAT has on occasion imposed an interim

<sup>16</sup> See discussion at Chapter 6 of the Discussion Paper (pp. 25-28), which provides background to the issues addressed in this chapter.

<sup>17</sup> s30(1A) of the WWCC Act

<sup>18</sup> Under ss 61 and 62 of the *Administrative Decisions Review Act 1997*

stay order subject to conditions such as continuing to undertake child-related work in a specified environment only. The use of conditions also raises a number of child protection risks as the Children's Guardian does not have the capacity to monitor or enforce any conditions that are imposed. The conditions of a person's clearance would not be immediately known to potential employers until they undertake the online verification process (and many employers do not comply with this requirement).

Relevantly, s28 of the WWC Act specifically prohibits NCAT from making an enabling order that is subject to conditions. Applications for enabling orders under s28 of the WWC Act deal with Schedule 2 (i.e. automatically barring) offences. The inherent risk in employing such individuals in any child-related work is therefore recognised, consistent with the policy underpinnings of the Act.

The majority of submissions to the Discussion Paper supported removing NCAT's ability to order an interim conditional stay of the Children's Guardian's decision. Two submissions were received, however, which supported the continuation of NCAT's ability to order interim conditional stays. These two submissions made the following salient points:

- 1 NCAT, unlike the OCG, could have the benefit of a sworn affidavit from the applicant, and could test evidence
- 2 Conditional stays potentially have considerable practical benefits, in allowing applicants and their families to maintain the status quo, and eliminate or at least significantly reduce adverse impacts on a person's well-being and financial circumstances

The review recognises that NCAT has unique powers which are not available to the OCG. NCAT's powers could allow for the creation of a more comprehensive profile of risk. The review also recognises that decisions not to allow a person to work with children can significantly impact on their livelihood, lifestyle and living arrangements.

The paramount consideration under the WWC Act remains, however, the safety, welfare and well-being of children. The main concern about NCAT's approach is whether risk to the safety of children in the interim period until the decision is made, is being addressed.

After taking into account the arguments set out in the submissions received, and carefully balancing all the benefits and risks of the current approach, the review recommends that interim orders subject to conditions be only imposed subject to a new safeguard: that NCAT be satisfied that its conditional interim stay will be satisfactorily supervised by the relevant agency or employer.

## Recommendation

### Recommendation 23

Amend the WWC Act to introduce a new requirement that NCAT may impose an interim stay order subject to conditions only if satisfied that any conditions will be satisfactorily supervised by the relevant agency or employer.

## 5.3 Ability of individuals subject to specified orders to appeal to NCAT

Section 26 of the WWC Act prevents certain individuals from appealing to NCAT if they have been sentenced to imprisonment for specified offences, or they remain subject to particular types of orders.<sup>19</sup> Currently, s26 of the

<sup>19</sup> A home detention order, intensive correction order, community service order under the *Crimes (Sentencing Procedure) Act 1999*, good behaviour bond under s9 or s12 of the *Crimes (Sentencing Procedure) Act 1999*, conditional release order or recognisance order under s20 of

WWC Act does not refer to parole orders, such that a person subject to parole can still apply to NCAT for a review or appeal of their WWC outcome.

The majority of the submissions which addressed this issue supported restricting appeal rights for people subject to control orders. One submission highlighted the importance of considering the particular nature of the control order. Two submissions did not support restricting appeal rights for people subject to control orders. The reasons provided for not supporting the restriction of appeal rights for people subject to control orders were as follows:

- 1 Due process and natural justice should be afforded to all subject to the WWCC scheme provided resources are not limited in other areas and the risk profile is not heightened
- 2 Review by an impartial body is fundamental to ensuring procedural fairness while also promoting a robust and transparent decision-making process

The Royal Commission, after reviewing all of the arrangements across Australian jurisdictions about appeals in WWCC matters, recommended that individuals subject to an order controlling their movement or employment not be able to appeal. The Royal Commission came to this conclusion after balancing the need not to unfairly restrict rights to work against the paramount consideration of the best interests of children.

A parole order indicates that a court has made a determination that the individual is under supervision and not completely free of risk to the community at large. It would be appropriate to recognise this risk in the narrower child-related work environment by limiting the individual's appeal rights similar to the limitations in s26(2)(b) and (c).

In light of the review's recommendation in relation to including current orders in ss15 and 30, and taking into account the range of views which were expressed in response to this issue, including by the Royal Commission, the review recommends that people subject to parole orders not be able to appeal to NCAT for the duration of the order. This would further strengthen the WWCC regime and reduce the potential for administrative decision making to undermine judicial assessment of an individual's risk.

## Recommendation

### Recommendation 24

Amend the WWC Act to limit appeal rights where a person is subject to a parole order for any offence for the duration of that order.

the *Crimes Act 1914* (Cth) or a prohibition order under the *Child Protection (Offenders Prohibition Orders) Act 2004* or a corresponding prohibition order under s19 of that Act, or any equivalent orders made by a court outside NSW, including jurisdictions outside Australia

## 6. Compliance with the WWCC

### Focus Question 5: Does the WWCC scheme encourage compliance?<sup>20</sup>

- How should we respond to employers who are failing to undertake online verification of their workers?
- How should we respond to organisations that do not provide essential information requested by the Children's Guardian to assist in assessing risk, within the specified time-frame?
- Should non-government organisations be compellable to respond to requests for information from the Children's Guardian in the same way as government agencies are?

### 6.1 Introduction

One of the notable features of the WWCC scheme is the OCG's active role in monitoring and auditing compliance with the WWC Act. The Children's Guardian is also empowered to compel the production of information for monitoring and auditing purposes which provides greater scope for better compliance.

The Discussion Paper outlined the various aspects of compliance with the WWCC scheme required of both employers and individuals aimed at ensuring that the objectives of the Act are met both effectively and efficiently.

There was general agreement that the existing legislative provisions of the scheme were appropriate to encourage compliance with the exception of issues in relation to online verification and information exchange, and these are discussed below.

Many of the submissions suggested operational refinements to make it simpler for employers to comply with the scheme, and a number of agencies identified the need to better engage with Aboriginal and Torres Strait Islander communities to promote understanding and compliance with the scheme's requirements. The Women's Legal Centre suggested in this regard that an Aboriginal Advisory Group should be established to ensure culturally safe practices. This echoed views expressed through consultations on the current level of understanding and concern by some individuals and communities about engaging in the risk assessment process. . These suggestions have been noted and will be considered by the Children's Guardian.

Creating cultural change within organisations rather than relying on the WWCC tool itself was also recognised in consultations as being equally important. In this context, there were a number of submissions, particularly from non-government organisations with high volunteer bases, that recommended additional training and resources to further embed the obligations on employers in the face of high turnover of volunteer staff. These suggestions are of an operational nature as well and under consideration by the Children's Guardian.

### 6.2 Online verification of child-related workers

The key issue in relation to compliance that was highlighted in the Discussion Paper related to the obligation on employers to verify their workers using the online WWCC register. Online employer verification of WWCCs is an important part of the WWCC safety net and is a requirement for all NSW employers in relation to their child- related

<sup>20</sup> See discussion at Chapter 7 of the Discussion Paper (pp. 28-32) which provides contextual background to the issues addressed in this chapter.

workers. This provides the assurance that they hold a WWCC clearance or have a valid WWCC application underway and allows them to be alerted to any change in status to an employee's clearance.

The OCG has found that many employers fail to comply with this key requirement that allows employers to receive up to date information about any change of status in an employee's WWCC clearance.

An individual's status may change as a result of the continuous monitoring of NSW criminal and misconduct records that are undertaken or because of information obtained by the Children's Guardian under information sharing provisions contained in the *Children and Young Person (Care and Protection) Act 1998* or directly from the NSW Ombudsman.

Where an employer fails to undertake the online verification process they are at risk of potentially employing or retaining workers who, after obtaining a WWCC clearance, may subsequently be barred or interim barred on the basis of a new offence or the commencement or finalisation of employment proceedings. This impedes the efficient operation of the scheme in meeting its policy objectives.

The majority of submissions to the review favoured a staged approach to compliance, starting with online resources about verification, and escalating to warnings and to penalties as a last resort. The ability for the OCG to issue infringement notices to employers who fall into this category and the ability to publicly name non-compliant employers was also favoured as an appropriate last response.

The review considered that the OCG already conducts an extensive program of learning and development and provides comprehensive training materials for employers. In 2015 the government amended the legislation in response to low employer verification rates by clarifying the requirement that already existed for employers to undertake online verification, and developed further campaigns to promote compliance.

However, despite these efforts, as was noted in the Discussion Paper, many employers remain non-compliant. While changes to the legislation and ongoing education and compliance activities by the OCG resulted in an increase of 15% in employer verification rates between the periods 2013–14 and 2015–16, there are many employers remaining non-compliant.

In light of efforts already undertaken and the ongoing issues with achieving full compliance, the review considered that it is now appropriate for an offence provision to be included for non-verification and for the issuing of penalty infringement notices (PINs) to form part of a staged approach to compliance.

This would offer a penultimate option when responding to employers who have a pattern of failure to verify or who have remained resistant despite repeated attempts by the OCG to promote compliance in other ways. Where an employer is issued with a number of PINs it would follow that the next response could be referral to NSW Police for prosecution. Prosecution is currently available under the WWC Act where a person engages in child-related work without a valid application or clearance or is interim barred and where an employer engages or continues to engage a person in child-related work without a valid application or clearance or who has been interim barred. However, prosecution is resource intensive and an extreme response to one instance of failure to verify. The review notes that the introduction of this intermediate enforcement option of being able to issue penalty infringement notices would provide a proportionate response and effective deterrent for failing to verify.

## Recommendation

### Recommendation 25

Amend the WWC Act to create an offence for the failure of an employer to undertake online verification of workers in child-related work without reasonable excuse and to authorise OCG officers to serve a penalty infringement notice for this offence.



## 6.3 Verification requirements in relation to licensing authorities and placement agencies

The review found that while the WWC Act requires employers to undertake online verification, there is a gap in relation to who is required to verify workers in some circumstances.

The definition of an ‘employer’ in section 5 includes a person who in the course of business arranges for the *placement* of a person in employment with others. However the requirement in s9A for online verification by employers is in relation to a worker who “carries out, or is to carry out child-related work *for the employer*”. The practical effect of this is that though placement agencies (such as recruitment agencies) that place individuals in child-related work are considered to be employers, verification requirements do not apply to them as the worker carries out work for the person with whom they have been placed rather than for the placement agency. Similarly, licensing authorities (such as the Roads and Maritime Service which license driving instructors under the *Driving Instructors Act*) that have reporting obligations in relation to misconduct of workers are not captured under the online verification requirements of s9A of the WWC Act. The licensing body, in this instance the RMS, is therefore not required to undertake online verification of driving instructors who are self-employed or employed through an agency even though one of the licensing requirements is that a WWCC be undertaken.

The licensing body is therefore required to ensure that licences are properly issued and maintained but is not privy to live information from the OCG about changes in status to an individual’s WWCC throughout the life of the licence. This leads to an absurd result where the body responsible for licensing does not have up-to-date information about requirement essential to licensing — that is, the status of a WWCC clearance. The review considers it therefore appropriate to amend the legislation to ensure that both placement agencies and licensing authorities are required to comply with the requirement for online verification in s9A of the Act. To ensure that only the appropriate agencies are targeted, placement agencies and licensing authorities that must comply with the verification requirement will be prescribed by regulation. It may be appropriate to undertake further consultation about the scope of this section.

### Recommendation

#### Recommendation 26

Amend the WWC Act to require prescribed licensing bodies and employment placement agencies to undertake online verification.

## 6.4 Exchange of information

The OCG is heavily reliant on having accurate, timely and high quality records made available to it in order to make rigorous determinations about the risk that an individual may pose to children in future. Delays in receiving such information directly impact on the ability of the OCG to finalise risk assessments of applicants.

Currently the Children’s Guardian has broad powers to compel the production of information, under s31 of the WWC Act, to assist in her functions. These powers are used in the risk assessment process to comprehensively assess an individual’s criminal and workplace history for indications of risk including the possibility of reoffending.

As noted in the Discussion Paper, this includes in many cases a detailed consideration of the circumstances surrounding matters that have not proceeded to conviction, or in many instances have not been tested in a court.

Documents are obtained for this purpose from courts in NSW and interstate, law enforcement agencies and other government departments involved in the criminal justice system as well as schools, oversight agencies, employers and others associated with identifying and investigating workplace records. Risk assessment officers of the OCG weigh these circumstances against efforts to rehabilitate or other protective factors in the applicant's life that may mitigate any potential risks that are identified. This requires the OCG to contact private and government health providers, counsellors, medical and related staff, as well as a range of other organisations that may be involved in a person's life and be able to contribute information about the factors under consideration.

Section 31 (6) provides that a notice compelling production of information may specify a date on or before which it must be complied with. There are however no penalties for non-compliance within the specified time frame. Additionally, while government agencies are compelled to provide the information, non-government agencies are not. They are authorised to provide statements setting out the requested information, rather than the information requested itself, and are not compellable. Delays in responding to section 31 requests for information directly impact on the ability of the OCG to finalise risk assessment of applications.

The review found general agreement for non-government and government agencies to be equally compellable to ensure that the scheme meets its objectives.

There was however mixed views about how to respond to organisations that do not comply with s31 notices within the specified time frames. While some agencies made submissions about the need for alternative approaches such as engaging with state supervising organisations or heads of agencies, or putting into place practical arrangements such as a Memorandum of Understanding to facilitate timely information exchange, others made submissions about the need for penalties to be introduced.

Given the dependence by the OCG on information from external agencies in order to finalise applications in a timely way, and given that applicants who have had an interim bar imposed on them are able to appeal to the NCAT after six months, the review found that there is a need to further consider the imposition of fines on organisations that fail to comply, and other approaches.

The Discussion Paper noted the approaches taken under the Tasmanian and South Australian legislation as possible options to address this issue. After balancing the implications and views of stakeholders with the available options, the review considers that the approach taken under South Australia's *Child Safety (Prohibited Persons) Act 2006* (assented to on 15/11/16 but not commenced) is most appropriate in this jurisdiction. Under the South Australian legislation the following two pronged approach is taken:

- 1 If a public sector agency refuses or fails to comply with a request for information from the screening unit, the agency must first be consulted. After consultation, the unit is then able to report the refusal/breach to the Minister and include details of the refusal/failure in the unit's annual report (s36 of the proposed SA Act)
- 2 A non-government agency which does not provide information to the screening unit can be fined a maximum of \$50,000 (s37(3) of the proposed SA Act).

The review further considers that the Children's Guardian should have the option of publishing details of breaches in relation to both government and non-government agencies, as there is no persuasive argument to treat these differently.



## Recommendations

### Recommendation 27

Amend the WWC Act to compel non-government organisations to provide the information (and not statements setting out the information) in response to notices under s31 of the WWC Act in the same way as government agencies are compellable.

### Recommendation 28

The OCG should give further consideration to a proportionate and effective response for non-compliance with a notice under s31 of the WWC Act to provide information to the OCG.

## 7. The role of the WWCC in child-safe organisations

**Focus question 6: what could strengthen an organisation's understanding of the role of the WWCC in a child-safe organisation?**<sup>21</sup>

- Would organisations be more encouraged to adopt child-safe systems and policies if there were mandatory standards that they needed to comply with rather than just recommended principles?

### 7.1 Introduction

While the WWCC is a requirement for all those employed or volunteering in child-related work, it is only one of a range of responses to managing risk in the workplace. The WWCC cannot identify people who are yet to offend. Though necessary, it is by no means a panacea for keeping children safe.

The implementation of child-safe practices and strategies is a necessary adjunct to the WWCC scheme in ensuring a child-safe environment. To this end, the Children's Guardian's functions include encouraging organisations to develop their capacity to be safe for children.<sup>22</sup> This role forms part of the Children's Guardian's public awareness and advice functions under s38 of the WWC Act. Encouraging organisations to develop their capacity to be child safe has been an integral part of the response to protect children. Critically, programs to promote child-safe practices recognise the limitations of the WWCC for keeping children safe, and emphasise that organisations need to do more than simply undertaking background screening in order to provide safe environments and services for children.

Research supports the proposition that individuals who harm children in workplaces are mostly opportunistic offenders. Opportunistic offenders will harm children when the following circumstances are present:

- 1 The child is vulnerable,
- 2 The individual's own inhibitions are diminished,
- 3 The environment is not monitored or detection is unlikely to occur, and/or
- 4 The work culture does not value and protect children.

Elements and practices for creating a child-safe organisation have been identified. These elements and practices, as are reflected in the OCG's Child Safe Organisations (CSO) program, are: robust recruitment processes, appropriate training and supervision for staff, processes to investigate complaints and concerns, an organisational culture of openness that values children and young people's participation, and an organisational culture that engenders a sense of extended guardianship in all members of the organisation so that they will assist in creating child-safe environments.

The current CSO program focuses on encouraging and supporting organisations to ensure that they have policies, systems and practices that safeguard children, rather than taking a prescriptive approach. To assist organisations to create a child-safe environment, the OCG provides an extensive program of training and resources free of

<sup>21</sup> See discussion at Chapter 8 of the Discussion Paper (pp. 33-36) which provides contextual background to the issues addressed in this chapter.

<sup>22</sup> Section 181(j) of the *Children and Young Persons (Care and Protection) Act 1998*

charge to a diverse range of government, non-government and private organisations across NSW, both regional and rural.

More recently, the OCG released an awareness-raising eLearning program for adults, based on face to face workshops to assist individuals and organisations in implementing child-safe practices. While this requires strong leadership on the part of organisations, the resources developed by the OCG provide practical guidance to all levels of staff within an organisation on how to protect children who access their services.

## 7.2 Other jurisdictions

Most jurisdictions that operate a pre-employment checking scheme support their checking schemes with education, training and resources to assist child related organisations to develop systems and practices that create safer organisations for children.<sup>23</sup> Such approaches are often referred to as child-safe, child-friendly or risk-minimisation strategies.

More recently, however, the dialogue around child-safe organisations has focused on the issue of standards. Minimum child-safe standards have been adopted in three jurisdictions: Queensland, South Australia and Victoria.

## 7.3 NSW principles for child-safe organisations

Currently in NSW, there are mandatory standards for statutory OOHC and adoption service providers. These providers are required to comply with the NSW Child Safe Standards for Permanent Care in order to maintain accreditation to provide services to children and young people in NSW.

In addition, the OCG has recently developed principles to assist all child-related organisations to embed child-safe principles in their day-to-day work. The principles are informed by the OCG's experiences in delivering child-safe training, consulting with child-related sectors and drawing on the research and findings of the Royal Commission. The principles have been developed to help organisations think about the organisational values that help create safe environments for children. The principles underpin the eLearning and other child-safe training and resources developed by the OCG and form part of a broader child-safe organisations strategy. The principles were produced after consultation with a wide range of child-related organisations and were made available for public comment in April 2017.

As part of the statutory review process, feedback has been sought about whether the principles should be implemented via mandatory child-safe standards, with penalties for failure to comply. In considering regulatory approaches, it is important to "strike a balance between the obligation to protect the community or public interest, while at the same time not imposing unnecessary costs on those they regulate or indirectly the broader community".<sup>24</sup> Responses to the Discussion Paper which addressed the issue of whether to make child-safe principles mandatory recognised that striking such a balance is critical.

Submissions which did not support making child-safe principles mandatory referred to the following pertinent matters:

- 1 Given the wide range of organisations that deliver services to children, developing universally applicable standards could be difficult
- 2 There are challenges associated with measuring compliance with concepts such as organisational leadership directives and with measuring the level of compliance in organisational culture

<sup>23</sup> C. Tilbury. Working with children checks – time to step back? *Australian Journal of Social Issues*, Vol. 49, No. 1, 2014.

<sup>24</sup> Australian National Audit Office Better Practice Guide Administering Regulation: Achieving the Right Balance, June 2014

- 3 Organisations already bear a significant regulatory burden
- 4 Mandatory principles could lead to organisations viewing child safety as a compliance issue, as opposed to a cultural consideration.

The OCG recognises that developing child-safe principles to be adopted by organisations presents a significant challenge, regardless of the size, functions and resources of the organisation. However, given the emerging consensus about the elements needed to create a child-safe organisation, the OCG does not consider that such a challenge is insurmountable.

All organisations providing services to children must be safe for children and operate according to child-safe principles. However, the OCG recognises that mandatory standards could exacerbate the regulatory burden already borne by organisations, and that mandatory principles may lead to organisations viewing child safety as just another “box to tick”, rather than embedding its principles in all aspects of its operations.

Feedback from organisations indicated overwhelming support for child-safe principles, rather than more prescriptive child-safe standards. Organisations indicated that mandatory standards may duplicate existing regulation and could deter small, volunteer-based organisations from providing valuable services to children.

As a result of this feedback the OCG proposes to implement the principles through a capacity building program, rather than a mandatory standards scheme. The principles will be implemented in NSW over a five-year period to coincide with the WWCC renewal cycle. The OCG will undertake an intensive capacity building program with child-related sectors, providing training and resources to assist organisations to put the principles into action. The OCG is currently working with the NSW Data Analytics Centre to make better use of information held across a range of government agencies regarding harm to children and to enable it to direct child-safe training and resources more effectively. Using this data, the OCG can identify organisations where there may be particular risks to children and work with these services to help them improve child safety.

In addition, the OCG is considering a voluntary certification scheme to ensure that the materials and resources prepared by private child-safe organisations training providers meet NSW legislative requirements and are consistent with the child-safe principles. Consultation with these providers and child-related organisations that use their services has indicated support for a certification scheme.

In response to positive feedback on the draft child-Safe principles, the OCG is considering ways it can encourage positive compliance with employer obligations under the WWC Act. One proposal in development is for the OCG to issue a compliance logo to organisations who meet all obligations under the WWCC scheme. If an organisation displays the logo, it will then be subject to ongoing auditing by the OCG to ensure compliance is maintained.

This approach to compliance is viewed as a positive incentive for organisations to meet and maintain their obligations under the WWCC scheme. This would also allow the OCG to focus any enforcement action by way of penalty on or prosecution against organisations that persistently fail to meet their obligations.

## Recommendation

### Recommendation 29

Organisations providing services to children should incorporate the NSW Child Safe Principles developed by the OCG in their policies and principles.

# Appendixes

## Appendix 1 – Discussion paper

# Statutory Review of the Child Protection (Working with Children) Act 2012

Discussion paper

3 May 2017



[www.kidsguardian.nsw.gov.au](http://www.kidsguardian.nsw.gov.au)

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# 1 Introduction

## 1.1 Terms of reference for the Review

The terms of reference of this review are prescribed in s53 of the *Child Protection (Working with Children) Act 2012* (the WWC Act), as follows:

- 1 The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- 2 The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- 3 A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

The Act was given assent on 27 June 2012 and commenced operation on 15 June 2013.

## 1.2 Policy objective of the WWC Act

The policy objective of the WWC Act as set out in s3 *is to protect children*:

- a) By not permitting certain persons to engage in child-related work, and
- b) By requiring persons engaged in child-related work to have Working With Children Check (WWCC) clearances

The paramount consideration in the operation of the Act is the safety, welfare and wellbeing of children and, in particular, protecting them from child abuse<sup>1</sup>.

## 1.3 Purpose of the Review

The enactment of the WWC Act in 2012 was preceded by a comprehensive review of the former WWCC model under the *Commission for Children and Young People Act 1998* (the CCYP Act). This resulted in a significantly new model for the Check that was underpinned by a new legislative framework and phased in through staged implementation of the WWC Act until March 2018.

Since commencement of the WWC Act it has been progressively amended in response to operational issues that were identified in each phase-in period,<sup>2</sup> changing community expectations and in response to issues highlighted by the Royal Commission into Institutional Responses to Child Sexual Abuse. This has resulted in a framework that is recognised nationally as the most robust across jurisdictions and largely effective in providing measures to minimise risks to the safety of children in their interactions with people delivering services to children services. However, this review is an opportunity to enable the Office of the Children's Guardian to improve our ability to contribute to the safety of children in NSW.

Its purpose is to consider and address any remaining policy issues as they relate to the policy objectives of the Act and the appropriateness of the terms of the Act for securing those objectives.

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<sup>1</sup> s4 of the WWC Act

<sup>2</sup>Volunteers and existing paid workers who were already working in sectors not previously subject to the WWCC were phased in to the requirements of the WWC Act over a five-year period, unlike new workers, who were all required to apply for a Check prior to commencing child-related work. The staged phase-in period for each sector are provided for in Schedule 1 to the Child Protection (Working with Children) Regulation 2013

Other legislative issues requiring amendment that do not have broad policy implications are being progressed independently of this review.

## 1.4 Conduct of the Review

This Review is being conducted by the Office of the Children's Guardian (OCG) in three stages, in accordance with the Terms of Reference, reproduced above.

*Stage 1* - This Discussion Paper is the first stage of the review process to facilitate discussion of the key policy challenges that remain, and the benefits and disadvantages of some key issues, under six focus areas that are posed as questions. They are:

- 1 Does the WWCC scheme target the right people?
- 2 Does the WWCC scheme collect the most appropriate information?
- 3 Does the WWCC scheme operate effectively?
- 4 Does the WWCC provide sufficient review opportunities?
- 5 Does the WWCC scheme encourage compliance?
- 6 What could strengthen an organisation's understanding of the role of the WWCC in a child-safe organisation?

A brief background to the issues relevant to each question is provided to facilitate discussion, and further sub-questions are posed at the end of each section. Interested individuals are invited to respond to both the specific and general questions, but are not limited to responding to, or required to respond to, one or the other.

The paper assumes a basic knowledge of the operation of the WWCC (further information can be obtained from the OCG's 12-month activity report on the NSW WWCC, 6 March 2015, which can be found at

[http://www.kidsguardian.nsw.gov.au/ArticleDocuments/316/WWCC\\_activity\\_report.pdf.aspx?Embed=Y](http://www.kidsguardian.nsw.gov.au/ArticleDocuments/316/WWCC_activity_report.pdf.aspx?Embed=Y)

*Stage 2* - An information session and targeted consultations with key stakeholders will follow to consider the issues raised and submissions made.

*Stage 3* - The final report will make recommendations for change based on the outcome of consultations and submissions received by the OCG. The submissions received will be made publicly available as part of the final report on the review, unless marked confidential when submitted to the OCG. The final report on the review will be tabled in Parliament and the recommendations for any proposed legislative changes will be submitted to Government for approval.

## 1.5 Timing

When the WWC Act commenced, a decision was made to phase in, over a five-year period ending in March 2018, volunteers and existing paid workers who were already working in sectors that were not previously subject to the WWCC. The staged implementation of existing workers into the new scheme was done to ensure that by the end of the first five years of the new Check all existing child-related employees and relevant volunteers would be included in the Check.

The last phase-in period concludes on 31 March 2018 and the first set of renewals will become due on 15 June 2018. The OCG needs approximately 6 months after legislative amendments are passed to implement system changes and communicate the changes.

To facilitate the above, while s53(3) of the WWC Act requires that tabling of a report on the review of the WWC Act should occur by June 2018, the OCG is making every effort to complete the review and assist with finalising proposed legislative amendments by the end of 2017.

## 1.6 Assumptions about pre-employment screening that underlie the review

In considering whether the object of the Act remains valid, this paper assumes the ongoing need for pre-employment screening, which has been recognised by the Royal Commission and internationally as a safeguard for protecting children and young people when incorporated into broader child safe strategies<sup>3</sup>. Since the WWCC was introduced in NSW, to respond to the shortcomings in screening and employment practices that gave paedophiles easier access to children, there has been continued evidence brought to light about the need for such screening systems. As such, it is acknowledged as a valuable tool in identifying and preventing known offenders from working with children, despite the costs to government and the taxpayer.

# 2 Policy and historical context

## 2.1 The overarching framework in NSW for protecting children from sexual and violent abuse

Child abuse of any form is abhorrent and it has serious and long-term consequences on victims and their families. However, it is almost impossible to estimate the exact prevalence of child abuse in institutions and the wider community because it goes undetected due to the private nature of the crime, the fact that children experience difficulties in making disclosures and being believed, and there is often a lack of evidence to substantiate the crime.<sup>4</sup> We know this because of the large disparity that exists between accounts of unreported crime that are obtained through crime victimisation surveys and actual reported offences.<sup>5</sup>

What is known is that child abuse impacts individuals physically, psychologically, behaviourally and socially, and this translates to long-term economic and other consequences for communities who are left to meet the costs that arise. This includes costs in relation to hospitalisation, physical and mental health treatment, and welfare as well as the identification, punishment, rehabilitation and ongoing maintenance of offenders in custody or in the community.

The Australian Institute of Family Studies takes a broad understanding of abuse, which includes emotional abuse, neglect, physical abuse, sexual abuse and exposure to family violence when defining abuse.

Although not specifically defined, the WWC Act includes all these five forms of abuse, and they are reflected in Schedules 1 and 2 to the WWC Act, which specify the offences that can lead to a person

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<sup>3</sup> Royal Commission into Institutional Responses to Child Sexual Abuse 2015, Scoping review: Evaluations of pre-employment screening practices for child-related work that aim to prevent child sexual abuse, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.

<sup>4</sup> Child abuse and neglect statistics Resource Sheet, October 2016. Child Family Community Australia.

<sup>5</sup> For example only about one in ten incidents of sexual and indecent assault reported to police results in someone being found guilty in court, with most proceeding no further than the investigation stage. There are acknowledged difficulties in securing a conviction in sexual offence cases and given the private nature of the crimes, victims are often unwilling to report at all. Additionally, the true extent of abuse is very hard to estimate given other reasons such as varying definitions and methodologies to collect data, the delayed reporting by those who do eventually report and statutory limitations which mean that by the time many people are willing to make a report to police they are statute barred.

being barred, with the emphasis being on physical and sexual abuse. A plain English version of the offences listed in Schedules 1 and 2 are attached in **APPENDIX 1**.

The WWCC is targeted at preventing *known* perpetrators of abuse against children from entering into and undertaking child-related work. It is a single tool in a broader framework that consists of a number of legislative platforms for identifying and monitoring known and suspected offenders. This includes the underlying platform for child wellbeing and protection in NSW established under the *Children and Young Persons (Care and Protection) Act 1998*. This creates a mandatory reporting system which places reporting requirements about suspected child abuse or physical harm on a range of professionals. The *Child Protection (Offenders Registration) Act 2000* provides a platform to protect children from serious harm through monitoring by NSW Police of certain offenders who have already committed sexual and other serious offences against children. The Child Protection Register creates reporting requirements for registrable persons to police while they are living in the community. The Police Commissioner can also apply to a NSW Local Court for orders restricting the activities and movements of registrable persons under the *Child Protection (Offenders Registration) Act 2000*.

The WWCC is limited in its capacity to protect children from risk when used on its own and in any event the absence of risk factors does not mean that an individual will not go on to offend in the future. This is exacerbated by the high attrition rates of child abuse cases through the courts and the underreporting of such crimes.

It is for these reasons that the WWCC is underpinned by an obligation on employers to have a multifaceted approach to keeping children safe. In this context the Children's Guardian is empowered with the important complementary functions of encouraging organisations to develop their capacity to be safe for children under s181 of the *Children and Young Persons (Care and Protection) Act 1998* and s38 of the WWCC Act. These obligations are discussed further under *Focus Question 6*.

## 2.2 Background to the former WWCC

In 2000, NSW was the first jurisdiction in Australia to introduce pre-employment screening in response to key recommendations of the Wood Royal Commission,<sup>6</sup> specifically the need to identify people who pose a risk to children and prevent them from working in areas where they had unsupervised contact with children.

The NSW Commission for Children and Young People (the CCYP) had overall responsibility for the administration of the former WWCC, with the checking processes being shared between a number of screening agencies. The aim of the former WWCC, unlike the current framework, was to provide employers with information regarding the risk in employing an individual in a specific workplace role.

Employers collected details on behalf of an individual before they were employed and submitted this information to approved screening agencies. The screening agency used an actuarial risk estimate model to work out how much risk an individual posed to children in a workplace; however, the employer ultimately decided if the individual was suitable to be employed in a particular role, based on their level of assessed risk and the nature of the role itself.

A comprehensive statutory review of the CCYP Act in 2010,<sup>7</sup> conducted by Michael Eyres AM and informed by a prior audit of the Check by the NSW Auditor General,<sup>8</sup> identified a number of weaknesses in the model that gave rise to gaps in child protection.

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<sup>6</sup> The Royal Commission into the New South Wales Police Service (*Wood Royal Commission*) was held in the State of New South Wales, Australia between 1995 and 1997.

<sup>7</sup> Published in April 2010

<sup>8</sup> Published in February 2010

While the Eyres statutory review noted that the policy objectives of the Act remained valid it recommended a new style of *person*-based WWCC (rather than *position*-based) that would apply equally to all workers. Additionally, stakeholders identified the need to align the schemes in other jurisdictions that had developed since the Check had been introduced in NSW, which accredited an individual to work in any child-related role for a specified period of time and extended to all volunteers undertaking child-related work.

The Eyres review and subsequent consultations with government and non-government stakeholders culminated in the development of an entirely new model for the Check underpinned by the WWC Act, modernising the former framework and streamlining operations.

## 2.3 Policy objectives and key elements of the new WWCC

The Hon Victor Dominello, Minister for Citizenship and Communities and Minister for Aboriginal Affairs, noted in his second reading speech introducing the Child Protection (Working with Children) Bill 2012 on 13 June 2012 that the new WWCC protects children by identifying people whose records indicate a possible risk to children, while noting that the processes established in the bill were designed to provide consistent and fair outcomes for all applicants and clarity for employers and workers.

While the policy objective of preventing certain persons from engaging in child-related work, articulated in the repealed CCYP Act was carried over to the WWC Act, a number of significant shifts occurred to achieve the balance referred to in the Hon Victor Dominello's second reading speech on the introduction of the bill.

The new WWCC framework has the following key elements, significantly improving protection for children:

- A portable and renewable clearance that applies to all child-related work for a period of 5 years rather than being attached to an individual role or workplace setting avoiding the risk of long-term employees never being checked if they do not change their employment;
- The same level of protection afforded to children and the same clearance process regardless of whether the workers are in paid employment, volunteers or self-employed (previously different screening processes were adopted in relation to these workers);
- Only two outcomes to an application — a clearance or a bar (this removed discretion from employers in deciding who can work with children as was the case previously providing certainty on who can or cannot work with children);
- Defined convictions set out in the Act that automatically bar a person from working with children;
- Expanded records that give rise to the requirement for an individual assessment of risk (the range of records was considerably expanded by considering spent or unspent convictions, heard, unheard or dismissed charges, juvenile records and the outcome of relevant employment proceedings where they have been conducted through a rigorous investigation process and notifications of concern by the Ombudsman, the most comprehensive range of records considered by any jurisdiction as part of the screening process for WWCCs);
- Continuous monitoring of new NSW criminal charges and disciplinary reports to manage risk that occurs after a person is cleared to ensure ongoing checking;
- A requirement for employers to verify that their employees have a valid and up to date WWCC which means that if an individual's WWCC status changes from a clearance to an interim bar or bar, his or her online status is updated and the employer is able to take action immediately;
- The replacement of actuarial risk assessment by informed judgement based on clear factors that are articulated in the WWC Act;

- A stronger education, compliance and audit program to complement the scheme and programs to assist organisations to be child safe;
- Increased protection for vulnerable children by the inclusion of authorised carers and adult persons residing with them as additional persons who must obtain WWCC clearances.

## 2.4 Key legislative amendments made since the commencement of the WWC Act

Following the commencement of the WWC Act in June 2013, a significant number of legislative amendments have been made to address issues identified by the OCG and stakeholders, and also in direct response to the work of the Royal Commission's case studies and the recommendations in the WWCC Report released on 17 August 2015. Some of the key changes are as follows:

- School cleaners, principal officers and members of governing bodies required to hold or apply for a clearance;
- Murder of any person (not only of a child) a disqualifying offence;
- Reporting bodies not required to notify pre -1995 findings unless otherwise directed by the Children's Guardian or a person holding a key position has knowledge of a finding;
- Introduction of reasonable person and public interest tests that the Children's Guardian and the NSW Civil and Administrative Tribunal (NCAT) must be satisfied about before allowing an individual to work with children;
- Restriction on appeal rights for persons convicted of certain specified offences or where they are subject to a particular kind of order;
- Employers required to verify that workers hold a clearance or have made a current WWCC application of the relevant class applicable to the work performed;
- Consent of the Children's Guardian required for the withdrawal of WWCC applications and surrender of WWCC clearances to ensure that people who are assessed as posing a likely risk are not able to withdraw their application or surrender their clearance;
- Reduction of time for applicants and clearance holders to respond to requests for information from 6 months to 3 months;
- Appointment of Expert Advisory Panel to provide advice to the Children's Guardian as required;
- Creation of a new offence of providing false or misleading information;
- The ability to exchange WWC information between jurisdictions in accordance with Ministerial protocols.

The Royal Commission's recommendations contained in its report of 17 August 2015 are attached at **APPENDIX 2**. There are 36 recommendations aimed at eventually achieving a single national WWCC scheme across all jurisdictions in Australia. This includes a proposed set of minimum standards until a national scheme can be developed. The NSW position in relation to the proposed minimum standards, attached at **APPENDIX 3**, clearly indicates that the current scheme is already largely aligned with the proposed minimum standards. The few remaining standards that require legislative amendment and public input are discussed below in Focus Questions 1-3.



## 3 Focus Question 1 – Does the WWCC scheme target the right people?

### 3.1 People who are currently covered by the WWCC

The Hon Victor Dominello in the debate on the introduction of the Child Protection (Working with Children) Bill 2012 stated categorically that: *“Most people in our community have direct contact with children in their daily lives. They do not all need a WWCC. The WWCC is reserved for people whose work is focussed on children and whose work requires ongoing role-oriented contact with children”*.

He further clarified that the WWCC was never intended for people who, as a normal part of their working day, may see a child or be in a place with a child but who do not work with children. The Act reflects this in s6 (1) by specifying that a worker is engaged in child-related work if: a) the worker is engaged in work in sectors referred to in subsection (2) that involves direct contact by the worker with children, or b) the worker is engaged in work in a child-related role referred to in subsection (3).

Direct contact is currently defined in s6(4) of the Act to mean physical or face-to-face contact. However, in response to the Royal Commission’s recommendation 7 in its WWCC Report, the definition of direct contact is being expanded by regulatory amendment to a targeted group of workers providing ongoing children’s services by way of counselling, mentoring and distance education through any form of communication, including oral, written or electronic communication.

The sectors listed in s6 (2) of the Act are:

- Child development
- Child protection
- Children’s health services
- Clubs or other bodies providing services for children
- Disability services
- Early education and child care
- Education
- Entertainment for children
- Justice services
- Religious services
- Residential services
- Transport services for children, and
- Other services prescribed by the regulations.

The child-related roles listed in s 6(3) and expanded by the WWC Regulation include authorised carers, principal officers of designated agencies, school cleaners, youth workers, members of governing bodies of designated agencies, registered agencies and accredited adoption service providers.

Importantly, in addition to authorised carers, adults residing with an authorised carer are also required to comply with the WWC Act.

Section 7 of the Act allows the Children’s Guardian to deem certain roles that are otherwise not considered to be child-related work as needing a WWCC where they involve access to confidential records or information about children.

Additionally, the Act provides flexibility for responding to existing arrangements within local industry sectors and helps clarify who is not required to have a Check by providing a regulation making power to exempt specified persons or classes of person from all or any requirements of the Act. Existing exemptions are at Part 4 of the Regulations.

The definition of 'child-related work' in the Act is considered sufficiently broad and flexible, when read in conjunction with the specified sectors, exemptions and deeming provisions to target the right people including those in paid work,<sup>9</sup> unpaid work,<sup>10</sup> work as a student on a placement,<sup>11</sup> work as a Minister of religion or spiritual leader of a religious body.

As noted above, most adults come into contact with children in their daily lives, but not all adults need a WWCC. The OCG has received several requests to expand the scope of the Check since the WWC Act commenced in 2013 from risk-adverse employers. Containing the scope of the WWCC has been a continuing challenge that is motivated by the desire to avoid over-regulation of the private lives of individuals and where there is no risk that can effectively be managed by the WWCC.

## 3.2 The Royal Commission's recommendations

As stated above, many of the Royal Commission's recommendations have already been incorporated in the WWC Act by way of recent legislative amendments. However, there are a few that are yet to be considered, and these are discussed below.

### 3.2.1 Remove reference to child-related roles and sectors

The Royal Commission recommends that state and territory governments amend the definition of child-related work to remove any ambiguity about who needs to be checked (see Recommendation 12). The Commission proposes that this be done through an agreed list of service types as listed in Recommendation 12 and including other work or roles that involve contact with children that is a usual part of and more than incidental to the work or roles. It further recommends that all reference to *child-related work or roles* be removed.

The proposed list of services in Recommendation 12 would mean that those individuals listed in s6(3) and expanded by the Regulation, such as individuals in child development, principal officers of designated out-of-home care (OOHC) agencies, youth workers, and school cleaners, will no longer be required to have a WWCC.

Some of these roles, particularly those in the OOHC sector, were recent amendments to the WWC Act in response to the work of the Royal Commission identifying that children are particularly vulnerable in OOHC and need to be better protected while in care. The current legislative approach under the WWC Act which identifies child-related sectors and roles has the advantage of providing flexibility to adapt to emerging work areas and local arrangements, which could be lost under the approach proposed by the Royal Commission.

However, it is acknowledged that there is an argument, in the context of simplifying the definition of child-related work for removing identified work sectors. The sector an individual works in is primarily of importance for compliance activities that were associated with the phase-in arrangements<sup>12</sup> created in relation to existing employees at the time of the commencement of the new Check, rather than for any ongoing definitional purposes. Feedback through the OCG's compliance work has been that work

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<sup>9</sup> as an employee, contractor or self-employed person.

<sup>10</sup> volunteering or unpaid internships.

<sup>11</sup> not including high school placements.

<sup>12</sup> Volunteers and existing paid workers who were already working in sectors not previously subject to the WWCC were phased in to the requirements of the WWC Act over a five-year period, unlike new workers, who were all required to apply for a Check prior to commencing child-related work.

sector definitions can be confusing for some individuals and organisations. The Royal Commission's proposed list of service types also covers the sectors that are currently listed in the WWC Act. It is unlikely that removing work sectors would have any adverse impact on making sure that the right people are checked, as long as child-related roles that were included to directly respond to identified areas of risk are retained.

### 3.2.2 An agreed definition of child-related work

The Royal Commission also recommends (Recommendation 8) that all jurisdictions clarify the definition of child-related work to: "*contact with children must be a usual part of and more than incidental to the child related work*". This recommendation is consistent with the policy underpinnings and current interpretation of the Act and regulations by the OCG in light of s6 and the exemption in clause 20(1)(a) of the WWC Regulation in relation to ancillary staff.

Clarifying the legislation as proposed by the Royal Commission may assist in removing ambiguity and containing the scope to the intended individuals. However, narrowing the ambit of this section also means there is a risk of not being able to adequately capture individuals whose work does not necessarily involve direct contact with children as a usual part of their role, but nonetheless exposes children to risk, for example school cleaners, health staff who are employed with the intention of being able to provide services to both adults and children, or people in management roles in the OOHC sector. The OCG has found that the only suitable resolution to this issue has been the capacity for child-related *roles* to be prescribed by regulation, and for this reason supports retaining a regulation making power to ensure that the right individuals can be captured within the scope of the scheme.

### 3.2.3 Exemptions

The existing list of exemptions at Part 4 of the WWC Regulation is similar to exemptions in other jurisdictions. It avoids the regulatory and cost burden of requiring individuals to undertake the Check where there is no clear risk that can be managed by the Check, and minimises duplication where workers are separately checked through an appropriate probity-checking regime. It also reflects stakeholder consultations about the categories of individuals that should be included in this list.

The Royal Commission recommends (Recommendation 14) a list of exemptions that should be adopted by all jurisdictions which is largely consistent with the existing provisions in NSW, with the main exception of parent volunteers on overnight excursions.

### 3.2.4 Parent volunteers on overnight excursions

Parent volunteers are currently exempt from the requirements of the WWC legislation,<sup>13</sup> but would be brought within the scope of the Check under the Royal Commission's recommendation.

The existing exemption recognises the value and importance of parents taking part in activities with their children and encourages this. The exemption is intended to prevent overregulation where no clear benefit is likely to be obtained or where it would place an unacceptable burden on the community, as may happen if all parents who interact with their children's peers are brought within the scope of the WWCC.

There are three key advantages to removing the exemption for parent volunteers in addition to progressing nationally consistent standards — this would 1) respond to the reality that most abuse occurs by individuals who are known to the child, rather than strangers;<sup>14</sup> 2) recognise that parents

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<sup>13</sup> with the exception of parents/close relatives who volunteer in a formal mentoring program or with children with disabilities involving intimate contact.

<sup>14</sup> It is well documented that most child sex offenders are known to their victims; only 11.1% of surveyed victims in the ABS's 2005 Personal Safety Survey reported having been sexually victimised by a stranger. K. Richards, 2011. Misperceptions about child sex offenders. Trends & Issues in Crime and Criminal Justice no. 429. Canberra: Australian Institute of Criminology.

and close relatives who volunteer on overnight excursions and camps with children often have access to children in unsupervised arrangements; and 3) reflect the current situation where many schools already require that parents volunteering have the Check.

However, bringing parent volunteers within the scope of the Check arguably has a number of distinct disadvantages that outweigh the benefits, including the unnecessary overregulation of the private lives of individual citizens, and the blurring of the distinction of the Check's purpose of regulating the public rather than the private domain. There has never been an intention to exclude parents from taking part in normal activities with their children. There is also the related issue of parents continuing to have primary care of their children despite being refused a WWCC, giving rise to incongruous policy positions.

### 3.3 How the scheme deals with applications from individuals who don't need to be checked

The WWCC was not intended to be used as a risk-mitigation tool for people who do not need a WWCC. Despite this, the OCG has found that a large number of organisations are requiring employees to obtain a Check even where there is no legislative requirement to do so. There are numerous examples of this occurring, such as Aboriginal kinship carers who provide care pursuant to private family arrangements being required to have a WWCC to establish eligibility for carer payments; sporting clubs requiring parents of children taking part in activities to have the Check despite being exempt; the blanket requirement for medical and allied health staff to have a WWCC.

The Act provides no capacity for the Children's Guardian to exclude applications from people who were not intended to be captured by the WWCC. Section 13 of the Act requires the Children's Guardian to determine applications made by any 'person', provided they are properly made. This provision envisages that people may be contemplating volunteering or taking up paid employment in child-related work, or that they may be in between jobs. However, given that in a survey on WWCCs 70% of respondents agreed that "even people who are exempt from the WWCC should still get one, just to be safe",<sup>15</sup> and given anecdotal evidence arising from contact between the OCG and stakeholders, the overwhelming evidence is that 'out of scope' individuals are not limited to those applying for a Check in contemplation of taking up child-related work.

When we refer to applications from individuals who are out of scope in this paper we are referring not only to individuals who are exempted from the requirements under Part 4 of the Regulation, but also to those individuals who are clearly not undertaking child-related work as defined by the Act. This includes but is not limited to the examples noted in the previous paragraph as well as people who apply because they work or volunteer alongside children and young people, people who work in disability services not targeted at children or young people, transport workers who serve the general public, etc.

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<sup>15</sup> Evaluation of the new Working With Children Check, Ernst & Young for the Office of the Children's Guardian, p43

### 3.3.1 Consequences of checking people who do not need a WWCC

There are a number of serious consequences arising from the legislative requirement to consider all applications including out-of-scope applications:

- Organisations become overly reliant on the WWCC as risk-mitigation strategy at the expense of putting in place appropriate probity checking and child safe systems, despite the known limitations on the capacity of the Check to keep children safe.
- Industrial protections are not available to employers who terminate an employee who is not in child-related work.
- Conflicting positions arise in relation to the risk that is considered acceptable in different care contexts, as illustrated by the case of relative and kinship carers, who are exempt under the WWC Act<sup>16</sup> but required to have a WWCC in order to obtain a carer's allowance. Where the carer is refused a WWCC, but chooses to discontinue receipt of the carer's allowance, there is nothing further that can be done under the WWCC framework. This can result in a carer who is refused a WWCC continuing to provide care for a vulnerable child or young person, leading to a direct conflict with the paramount consideration of the WWC Act.
- There are potential privacy breaches if information is exchanged with employers about employees who are out of scope of the legislation.
- Significant resourcing issues would arise, including the fact that individuals are using the volunteer check as an unpaid avenue for finding out if they would be cleared or not before upgrading to a paid Check. This is of particular concern given that volunteers currently make up approximately 40% of the individuals in the WWCC database but are overrepresented in terms of people who have been refused a clearance, making up 60% of all those barred from working with children.
- Additionally, large backlogs have also been experienced in matters requiring comprehensive risk assessment as a result of the unpredicted demand for applications. It is noted that by August 2015 volunteer checks were nearly five times higher than forecast and included applications from people outside the legislature's intention. Applications referred to risk assessment represent those applicants who are potentially the greatest risk to children, and where individuals who are not required to be checked are referred to risk assessment resources are diverted away from those who are actually in child-related work.

### 3.3.2 Options for responding to people who do not need a WWCC

The OCG has undertaken extensive education campaigns with government, non-government and private organisations to raise employer understanding of the purpose and limitations of the WWCC, and the risk of overreliance on the Check. This has had some limited success.

There are three main categories of options for responding to the issue of out of scope applications: front-end changes, penalties, and making no change to current arrangements.

#### 3.3.2.1 Front-end changes option:

- a) Restrict who can apply.
- b) Amend s13 of the Act to give the Children's Guardian discretion over which applications need to be determined. For example, an application may need to be verified by an employer before it needs to be determined. This is arguably inconsistent with the Check's portability and

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<sup>16</sup> Section 135 of the Children and Young Persons (Care and Protection) Act 1998 excludes relatives and kinship carers who are providing care under private family arrangements from the requirements of WWC Act unless  
The Minister has parental responsibility for the child or young person by virtue of an order of the children's Court, or  
The child or young person is in the care of the Secretary, or  
It is provided pursuant to a supported OOHC arrangement as referred to in s153( of that Act)

person-based approach, and can result in an unfair impact on individuals who are trying to enter the workforce or are in between roles.

- c) Remove legislative ambiguity in relation to who needs to be checked (discussed earlier in this paper, and supported by the OCG).
- d) Impose a small cost-recovery fee on volunteer applications, as envisaged when the new Check was developed, in a similar way to WA and SA, and as proposed under the National Disability Insurance Scheme (the NDIS). Given the limited ability of the Children's Guardian to impact drivers of demand for the Check or refuse applications, this may serve to restrict applications from people who are outside the scope of the legislation. The cost-recovery fee may also, through preventing diversion of resources to risk assessments for people who don't need to be checked, assist in forward planning of budgets. This would ensure that sufficient resources are available from year to year to meet demand for the Check. This would also ensure that demand is not inflated by volunteers who need to be checked under the NDIS opting for a free WWCC first.

### 3.3.2.2 Penalties option:

Impose penalties on employers who require their workers to have a WWCC despite not being in child-related work. However, this approach may result in:

- 1) resources being diverted away from protecting children and towards heightened compliance activities. This would require identifying an individual's employer(s) and whether the requirement is an organisational policy before being able to issue a penalty and then ensuring that the employer complies within the specified time frame.
- 2) inconsistency with the notion of a portable person-based clearance. Under the former WWCC scheme a Check was tied to a particular employer and could only be used for a specific role with the relevant employer as it took into consideration known risks posed by an individual. The new scheme radically changed this approach. Anyone who poses a risk to children is prevented from working with children in any capacity. Anyone who is cleared can work in any child-related role for the duration of a five-year clearance. This means that an individual can use the same clearance to work in multiple roles as some workers do, or engage in both paid and volunteer work at the same time. Introducing a penalty on employers for requiring a person who doesn't need one to have a WWCC can arguably restrict employer flexibility in utilising their workforce according to organisational need. This would restrict portability, particularly where an individual is required to work in child-related work at some stage but not always or regularly.

### 3.3.2.3 No change option:

Doing nothing further than to more clearly define who does and does not require a Check may also be a legitimate policy response subject to the availability of sufficient resources to meet demand. This is because an individual who poses a risk to children and has been refused a WWCC, regardless of whether they are currently in child related work, will be prevented from commencing child-related work at any stage in the future. This is ultimately the objective of the legislation and as long as the effectiveness of the Check is not watered down by having to divert limited resources away from people who are required to have the Check, the objective can arguably still be met. This may be through flexibility in resourcing arrangements to ensure that the OCG is appropriately resourced from year to year even if there is a significant difference between projected demand and actual demand for the Check.



- 1 Does the scheme target the right people?
- 2 Does the definition of child-related work need to be changed?
- 3 Would the Act be clearer about who needs a WWCC if it adopted the Royal Commission's recommendations for a limited list of child-related services (found in Rec. 12) and removed all references to child-related roles?
- 4 Should parents volunteering on overnight camps be made to have a WWCC?
- 5 How should the scheme respond to applications from individuals who are 'out of scope'?

## 4 Focus Question 2 – Does the WWCC scheme collect the most appropriate information?

### 4.1 The information that is currently considered under the WWCC scheme

NSW considers, in relation to all other jurisdictions in Australia, the most comprehensive range of records and information as part of the WWCC. This includes convictions, whether or not spent; findings of guilt that did not result in a conviction being recorded; charges regardless of status or outcome, including pending charges, charges disposed of by a court or otherwise other than by way of conviction (e.g. withdrawn, set aside or dismissed), and charges that led to acquittals or convictions that were quashed or otherwise overturned on appeal for all offences, irrespective of whether or not they concern the person's history as an adult or a child, and including offences outside Australia.

Also considered are misconduct findings made by prescribed reporting bodies in relation to sexual misconduct committed against, with or in the presence of, a child, including grooming of a child or any serious physical assault of a child.

The Ombudsman may also make a 'notification of concern' to the Children's Guardian. This occurs if he receives information in the course of exercising his functions that leads him to believe that, on a risk assessment by the Children's Guardian, the Children's Guardian may be satisfied that the person poses a risk to the safety of children.<sup>17</sup>

The Children's Guardian is also, upon request, able to obtain criminal history information from each state and territory under the Inter-Governmental Agreement on the National Exchange of Criminal History Information for Working with Children.

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<sup>17</sup> Schedule 1, Clause 2A, WWC Act



Additionally and importantly, s36A of the WWCC Act was recently inserted by amendment to provide for the exchange of WWCC information between bodies that administer the Check in each jurisdiction, subject to a Ministerial protocol, and the protocol is currently being finalised.

The criminal records and relevant disciplinary information that is checked is largely consistent with the recommendations of the Royal Commission (Recommendations 17 and 21), with only a few areas of difference. Specifically, these relate to the definition of criminal history and whether certain criminal records should trigger a risk assessment or result in automatic refusal/cancellation of a WWCC clearance (this includes the issue of manslaughter of a child and whether it should result in automatic refusal/cancellation, considered under Focus Question 3).

## 4.2 Defining criminal history and criminal records

The Royal Commission has recommended (Recommendation 17) that all jurisdictions should amend their WWCC laws to include a standard definition of criminal history, irrespective of whether or not this relates to the person's history as an adult or a child, which includes: convictions whether or not spent; findings of guilt that did not result in a conviction being recorded; and charges regardless of the status or outcome.

While NSW considers the most comprehensive range of information for the purposes of the WWCC, there is no stated definition of a 'criminal record' or 'criminal history' in s5 of the Act, which provides definitions of the key terms in the Act, or in any other part of the Act. Despite this, the term 'criminal history' is currently interpreted in the same way as proposed by the Royal Commission. That is, the term 'criminal history' is used to refer to convictions whether or not spent, findings of guilt that did not result in a conviction being recorded, and charges regardless of the status or outcome.

It is noted that s30(1) (h) and s15(4) (h) use the term 'criminal record' and s33(3) distinguishes between a 'criminal history' and 'criminal record', with the latter being a subset of criminal history. Given the various uses of the terms in the Act it is acknowledged that defining them would provide clarity.

## 4.3 Other records

### 4.3.1 Domestic and family violence records

Currently domestic violence offences that involve children are captured in Schedule 1 to the Act, requiring the Children's Guardian to conduct a risk assessment.<sup>18</sup>

As noted above, domestic violence offences that do not involve children directly — that is, where children are present in the home but neither witness to the behaviour, or the subject, of the abuse — may be considered in the risk assessment process under s15(3) of the Act if they are considered to be relevant, and the information has been made available to the OCG.

As the body of research develops into domestic and family violence, and its impacts, it is becoming clear that the co-occurrence of domestic violence and child maltreatment is high and that children who live in households where domestic violence occurs are also more likely to be the victim of other types

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<sup>18</sup> Sched. 1 Cl 1(2) (f) — offences under s13 of the *Crimes (Domestic and Personal Violence) Act 2007*, i.e. where proceedings have commenced for stalking or intimidation with intent to cause fear of physical or mental harm *committed against a child* will trigger an assessment requirement

Sched. 1 Cl (2)(a)- offences involving intentional wounding of or causing bodily harm to a child by an adult in circumstances where it is not readily apparent that the DFV has been perpetrated against a child/ren or in the presence of a child/ren

Sched. 1 Cl (6)- convictions or proceedings have commenced for offences involving violence sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may pose a risk to the safety of children

of violence, such as physical and sexual abuse.<sup>19</sup> However, estimating the rates of co-occurrence of child abuse where domestic violence occurs is difficult, and there is no clear evidence that violence in the home translates to the work setting. Given these limitations it is difficult to know whether the WWCC framework needs to undertake additional checking of records in order to adequately respond to perpetrators and alleged perpetrators of domestic and family violence offences under the current framework.

One option is to capture a pattern of behaviour relating to domestic and family violence as giving rise to the need for a risk assessment. Currently Schedule 1 Clause 1(6) captures a person who has been convicted of, or has had proceedings commenced for, offences involving violence or sexual misconduct sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may cause a risk to the safety of children. A similar clause capturing patterns of behaviour in relation to domestic and family violence offences, particularly where there is evidence of multiple proceedings having been commenced with no convictions, may be useful in this context.

### 4.3.2 Records in relation to diversion of juveniles under the *Young Offenders Act 2000*

Currently the legislation gives rise to some uncertainty about whether offences dealt with by way of diversion under the *Young Offenders Act 2000* (the YOA) are consistently giving rise to the requirement for a risk assessment under the WCC Act. This is because of inconsistencies in whether the YOA outcomes trigger risk assessments under Schedule 1. Risk assessments under several clauses in Schedule 1 are triggered by “proceedings commenced against a person” for relevant offences and/or if the person has been “convicted” of relevant offences. However, where the child or young person is dealt with by way of diversion under the YOA by police, there is no charge, criminal proceedings, or conviction.<sup>20</sup> While the Act specifies that the Children’s Guardian must risk assess a person if any of the matters specified in Schedule 1 to the Act apply,<sup>21</sup> she is not limited to these matters. Section 15 (3) does not limit the circumstances in which a risk assessment can be conducted by allowing the Children’s Guardian to conduct a risk assessment even if the person is not ordinarily subject to a risk assessment requirement. Therefore, even if interventions under the YOA fall outside the Schedule 1 on a literal interpretation of the “proceedings commenced against a person” they are still able to be considered.

The position with court-imposed cautions and referrals to youth justice conferences imposed under the YOA also leads to some further disparity in relation to whether the records are captured under Schedule 1 to the Act. Court-imposed YOA orders for relevant offences are captured under Schedule 1 except for a court-imposed caution/youth justice conference (YJC) given after a child admits to a common assault against another child. This is because an assessment is only triggered for that offence if a person is convicted of the offence, and a YOA caution/YJC is not a conviction but rather a diversion. However, as noted above, the Children’s Guardian is not limited in the circumstances that give rise to risk assessment.

A police diversion under YOA is neither a (criminal) proceeding against a person nor a conviction. Accordingly, it does not equate to court proceedings according to the OCG’s current reading of the phrase “proceedings”.

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<sup>19</sup> See Ch 3 in G. Fuller, *An updated review of contemporary research to inform the decision making processes under 17 and 18 of the NSW Child Protection (Working with Children) Act 2012*, A report prepared for the NSW Office of the Children’s Guardian by the Australian Institute of Criminology, 2016, for a comprehensive review of literature on this topic.

<sup>20</sup> Section 4 of the Working with Children Act defines “conviction” to include a finding that a charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction.

<sup>21</sup> s14 of the WWC Act

Given that there is an increasing move towards diverting offenders from the criminal justice system or into rehabilitative programs, the Children's Guardian invites views as to whether any amendment of the legislation is required to ensure that there is no disparity in the way the WWCC Act captures applicants who have been dealt with by way of diversion under the YOA Act . Alternatively, there may be a basis for maintaining the status quo – that is, the discrepancy between police YOA and court YOA outcomes may be argued to reflect the original (and continuing) intention of the YOA to be a diversionary scheme, primarily with police diverting most children and young people out of the court system, with only the most serious matters being referred to court.

## 4.4 Continuous monitoring of WWCC clearance holders

A key feature of the WWCC in NSW is the continuous monitoring of all relevant new NSW records for the life of a clearance. This includes all NSW based offences and findings of disciplinary proceedings. However, there are no formal mechanisms for obtaining updated records from each state and territory on an ongoing basis. The WWCC schemes in jurisdictions other than NSW and SA have offence provisions in relation to an individual failing to notify either the screening agency or the employer (depending on the model used in that jurisdiction) about a change of circumstances, generally defined as a change in criminal history. The definition of criminal history in each of these six jurisdictions has the effect that the applicant must notify of interstate and Commonwealth charges, not just charges brought under the legislation in the state or territory itself. A proposed scheme in SA (to be implemented through the *Child Safety (Prohibited Persons) Act 2016* (SA)) will also include an offence punishable by a penalty of \$50,000.

A similar obligation on individuals to notify the OCG of changes in criminal history with a corresponding offence provision would assist in alerting the OCG to the need to request information from a particular jurisdiction about the individual's criminal record. This would complement the existing provision to exchange information with interjurisdictional screening bodies<sup>22</sup> and is consistent with the simplified list of offences that the Royal Commission has recommended (Recommendation 16) should be adopted by all States and Territories.

- 6 Does the WWCC scheme collect the most appropriate information?
- 7 Would inserting definitions for criminal history and criminal records assist in making sure that the right information is collected and considered?
- 8 Do other records need to be considered?
- 9 Does the scheme need to do anything further to make sure domestic and family violence is captured appropriately?
- 10 Should there be a positive obligation on individuals to notify the OCG of changes in their criminal history?

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<sup>22</sup> At s36A of the WWCC Act

## 5 Focus Question 3 – Does the WWCC scheme operate effectively?

### 5.1 WWCC outcomes

There are only two final outcomes to a WWCC application — a clearance or a bar, legislatively referred to as a refusal of a clearance. As outlined earlier in this discussion paper, one of the key changes from the former WWCC model is that employers are no longer expected to undertake the onerous task of determining if an employee can be engaged in a particular role based on their risk rating, the specific requirements of the role and the level of supervision available. This important change means that an individual cannot be engaged by one employer and refused employment in a child-related role by another. Once an employee is barred from working with children, they cannot engage in any child-related work in NSW.

WWCC decisions made by the Children's Guardian adhere to the principles of procedural fairness which are upheld, in particular, in Part 3 of the WWC Act dealing with WWCC clearances by a range of provisions, including: transparent factors listed in the Act that the Children's Guardian uses to assess risk;<sup>23</sup> the opportunity for applicants to provide further information;<sup>24</sup> the right of applicants to know the reasons an adverse decision is being considered and have an opportunity to be able to provide information in response;<sup>25</sup> the requirement for notice of a decision, and the reasons for the decision to be issued to applicants in relation to WWCC outcomes.<sup>26</sup>

In accordance with the policy and legislative framework of the Act, which provides for an applicant to be granted a clearance or refusal, there are no conditional clearances and employers are not provided with any additional information about an employee's criminal or other history or risk information about an employee. Instead, employers are charged with the responsibility of fostering a child-safe environment for all children based on a range of strategies that respond to risks that the WWCC was not designed to overcome (as discussed in Focus Question 6- What could strengthen an organisation's understanding of the role of the WWCC in a child-safe organisation?).

#### 5.1.1 Automatic bars (or refusals)

The Act provides that the presence of certain serious offences in an individual's criminal history should automatically exclude them from child-related work, and the Children's Guardian is prohibited<sup>27</sup> from granting a WWCC clearance to a person convicted of any of the offences specified in Schedule 2 to the WWC Act (a plain English version of the offences that result in automatic disqualification under Schedule 2 is attached at **APPENDIX 1**). These include convictions for murder (of any person), certain violent offences, offences against children, sexual offences, child pornography and kidnapping.

#### Historical carnal knowledge records

Under the WWC Act, historical carnal knowledge offences result in an automatic refusal of a WWCC clearance unless the conviction was sustained as a juvenile, in which case the applicant is considered through the risk assessment process under Schedule 1.1 (1).

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<sup>23</sup> S15, s15(4) and (4A) of the WWC Act

<sup>24</sup> S16s16(1) of the WWC Act

<sup>25</sup> S19 s19 of the WWC Act

<sup>26</sup> S20 s20 of the WWC Act

<sup>27</sup> s18(1) (a) and (b) of the WWC Act

Carnal knowledge offences were repealed from the *Crimes Act* in 1986 and replaced with sexual assault offences. The old provisions were limited, and lacked the element of consent, which meant that many individuals who engaged in consensual peer-on-peer intercourse were unintentionally captured within these offences. This includes individuals who had early sexual relations with a peer with whom they went on to have a long-term relationship with or, in some cases, to marry.

Under the repealed CCYP Act, a person convicted of a carnal knowledge offence was a "prohibited person", which meant he/she could not work in child-related employment unless the Commission for Children and Young People (CCYP), the Administrative Decisions Tribunal or the Industrial Relations Commission declared that the prohibition was not to apply.

The OCG's records indicate that the inclusion of carnal knowledge offences in Schedule 2 and Schedule 1.1(1) (a) to the Act is achieving mixed results in relation to targeting applicants who should be prevented from working with children, indicating a need to fine-tune the approach to these offences.

Other jurisdictions adopt one of two approaches. In Victoria, the ACT, Tasmania and WA (to the extent that the offence was committed against a child between 13 and 16), carnal knowledge triggers a risk assessment with a presumption that the applicant will be refused a clearance.

In SA, the NT and WA, carnal knowledge is treated as the equivalent of a disqualifying offence (i.e. the applicant must be refused a clearance) where the offence was committed against a child under 13.

The latter approach appears to more effectively respond to this issue. It recognises the seriousness of these offences in many cases while acknowledging that adolescent sexual exploration occurs along with a willingness to engage in sexual activity from an early age. Where the victim is under this age a presumption can be made that the offence occurred without consent, and should therefore still result in an automatic disqualification. As other jurisdictions uniformly adopt 13 years of age as the cut off, it would appear an appropriate age by which to delineate these offences. All carnal knowledge offences where the victim was over 13 years of age would then be moved into Schedule 1 to the Act, giving rise to the need for risk assessment.

This approach ensures that people who have committed serious sexual offences against children without consent are still prevented from working with children, either through automatic disqualification or as a result of a determination made through risk assessment by the Children's Guardian. A right of review would still remain to NCAT; however, it is anticipated that fewer applications would be made as result of a more nuanced approach.

## **Manslaughter of a child**

Under the WWC Act, manslaughter currently results in automatic refusal or cancellation of a clearance, except where it was the result of a motor vehicle accident. In the latter case it gives rise to the need for a risk assessment. The Royal Commission recommends (Rec. 20 (b) (ii)) that manslaughter of a child under any circumstance should result in an automatic refusal of a WWCC clearance.

The current position under the WWC Act is a more nuanced approach to ensuring that the most serious offenders are captured, and recognises that manslaughter in the context of motor vehicle accidents may not reflect premeditated or opportunistic child abuse. Currently these matters are considered by the OCG through risk assessment.

This reduces unnecessary costs to applicants and administrative costs to NCAT arising from applicants seeking review. Changing the current approach would mean that applying to the NCAT for

review would be the only opportunity for an individual to have the circumstances of the offence taken into consideration.

### 5.1.2 Decision bars (or refusals) by the Children's Guardian

Schedule 1 to the WWC Act sets out a list of offences that trigger a requirement for the Children's Guardian to undertake a comprehensive risk assessment before an individual is cleared or barred (a plain English version of the offences under Schedule 1 is attached at **APPENDIX 1**).

These offences trigger the requirement for a comprehensive risk assessment<sup>28</sup> and include all non-conviction charges for automatically disqualifying offences where they were committed as a juvenile rather than an adult. This is in recognition of the fact that juvenile offences, particularly where the victim is also a juvenile, do not provide as clear an indicator of risk of reoffending as adult offending. The second decade of life is characterised by rapid change, particularly in areas of brain functioning associated with response inhibition, calibration of risks and rewards and the regulation of emotions.<sup>29</sup> This is in contrast to the exploitation of the power imbalance that is typically characteristic of child abuse by adults. Determining whether an individual's past behaviour indicates that they are a potential risk to children in cases where they are not automatically barred can be a complex task, and is discussed further below.

### 5.1.3 Cancellations

The Children's Guardian is required to cancel the clearance of a person if she becomes aware that the person is a disqualified person or that they pose a risk to the safety of children at any time after they have been granted a clearance<sup>30</sup>. The Act provides at s13A that individuals who have had a clearance cancelled or an application refused may not reapply for WWCC until 5 years after the date notice of the refusal or cancellation, or there has been a change of circumstances as defined in s13A (2).

The Act also allows individuals who hold a WWCC clearance to surrender<sup>31</sup> their clearance, or who have an application underway to withdraw<sup>32</sup> their application at any time, with the consent of the Children's Guardian. In these cases the Children's Guardian must cancel the individual's clearance or application and give written notice of those to each person that is considered a notifiable person in relation to that individual's clearance.

### 5.1.4 Clearances

The Children's Guardian must grant a clearance to a person who is subject to a risk assessment unless the Children's Guardian is satisfied that the person poses a risk to the safety of children.<sup>33</sup>

The Children's Guardian must also grant a clearance to a person if she is satisfied that the person is not a disqualified person and the person is not subject to a risk assessment under Division 3.<sup>34</sup>

Since amendments to the WWC Act that were made in November 2015 the Children's Guardian must also apply a reasonable person and public interest test, as required under s15 (4A), before granting a clearance.

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<sup>28</sup> s14 of the WWC Act

<sup>29</sup> Steinberg 2005 of *What makes juvenile offenders different from adult offenders*, Trends and Issues in Crime and Criminal Justice, No.409 February 2011

<sup>30</sup> s23 of the WWC Act

<sup>31</sup> s24 of the WWC Act

<sup>32</sup> s13(6) of the WWC Act

<sup>33</sup> s18(2) of the WWC Act

<sup>34</sup> s18(3) of the WWC Act



## 5.2 Interim bars

Section 17 of the WWC Act provides, as a safety measure, the capacity for the Children's Guardian to interim bar an applicant or a clearance holder before a final determination if there is a likely risk to the safety of children. This prevents the individual from working with children until a comprehensive assessment of risk can be undertaken. Interim bars can remain in place for 12 months and can be appealed to NCAT after they have been in place for six months.

## 5.3 Risk assessment

The risk assessment process is complex and requires risk assessment officers (RAOs) who have expertise in child protection to comprehensively assess an individual's criminal and workplace history. This includes in many cases looking at the circumstances surrounding matters that have not proceeded to conviction or have even been tested in court. RAOs must weigh these circumstances against any efforts to rehabilitate or any other protective factors in the applicant's life that may mitigate the potential risks identified.

A risk *to children* must be established, which in some cases can be difficult, particularly where the violence occurred against an adult. Similarly, the likelihood of reoffending requires consideration of a variety of evidence-based factors, including the criminal trajectories of people at different ages and an understanding of the factors that reduce the likelihood that an individual will engage in reoffending behaviour.

### 5.3.1 Factors that are considered in risk assessment

Section 15 (4) of the WWC Act lists the factors that the Children's Guardian may consider when risk assessing an applicant. As a matter of practice, the listed factors are mandatorily considered in every risk assessment as part of making an informed judgement about risk, rather than using an actuarial risk assessment, as occurred under the previous WWCC scheme. The factors that are considered relate to the specific conduct that gave rise to the requirement for risk assessment, factors that relate to the applicant including their conduct since the offence, the seriousness of the person's total criminal records, and factors that relate to the likelihood of reoffending and the impact of the individual's behaviour if they were to reoffend.

Section 15(4) k further provides that the Children's Guardian may consider any other matters that she considers necessary. Importantly, the safety, welfare and wellbeing of children are always given paramount consideration in the risk assessment process, as specified in s4 of the Act.

In November 2015 the Act was amended as noted above to require that, before an applicant is cleared, the Children's Guardian must apply a reasonable person and public interest test as part of her determination.

Overall, the risk assessment process is a resource- and time-intensive activity that often requires additional records to be sourced from schools, courts, law enforcement, child protection authorities, psychologists, medical and allied health professionals or other government and non-government agencies in NSW and interstate. Obtaining this information in a timely manner impacts the time efficiency of the risk assessment process.



### 5.3.2 Consideration of current reporting obligations under the *Child Protection (Offenders Registration) Act 2000* and other court orders

The *Child Protection (Offenders Registration) Act 2000* (the CPOR Act) is intended to protect children from serious harm by placing people who are convicted of sexual and other serious offences on a Child Protection Register. The Act makes provision for registration and reporting requirements for certain offenders who commit sexual and other serious offences against children. The purpose is to ensure that children can lead safer lives while engaging fully in the community, by limiting the opportunity for people who would cause them harm to engage with them.

Registrable persons are required to provide police with certain personal information, travel plans and any changes to this information.

In 2015 the WWC Act was amended to ensure that any registrable offence, as defined in the CPOR Act and not already captured under the WWCC scheme, was included as an automatically barring offence if it was committed as an adult, i.e. committed by a person over 18 years old.

Additionally, s26 of the WWC Act was amended at the same time to restrict the ability of registrable persons on current prohibition orders under the *Child Protection (Offender Prohibition Order) Act 2004* or in relation to specified Class 1 offences, where the offence was committed as an adult, from appealing to NCAT.

Where an applicant is subject to a parole or other order this is considered in the risk assessment process. This approach is considered to appropriately safeguard the safety and wellbeing of children. It recognises the determination of judicial bodies where they have already found that a person poses a risk to the safety of children. It also avoids an unjust and disproportionate impact on individuals who committed offences as juveniles, in the context of a consensual relationship, or where they have committed an offence considered to be at a low level of seriousness.

Articulation of the existence of another current court order, as a factor under s15 of the WWC Act which lists the factors considered in assessing risk, may improve transparency in decision making.

### 5.3.3 The WWCC Expert Advisory Panel

To further inform the OCG in relation to conducting risk assessments, s42A was inserted into the WWC Act and became operational on 2 November 2015, making provision for the Children's Guardian to appoint an Expert Advisory Panel (EAP). The purpose of the panel is to provide advice about matters relating to offenders for the purposes of assisting the Children's Guardian in carrying out risk assessments under the Act.

The types of matters on which expert advice may be sought are those that present particular challenges to risk assessors in determining whether individuals pose a risk to children. However, it is not intended to advise on individual applications that are being risk assessed. There may also be areas on which members of the panel will be able to conduct further research for the OCG.

The EAP became operational on 22 August 2016 and has completed its first piece of work for the Children's Guardian.

The Children's Guardian is considering the further appointment of an expert in domestic and family violence, cybercrime and mental health issues to assist in carrying out the functions of the Children's Guardian under the WWC Act.

### 5.3.4 The threshold of risk that needs to be met

The Children's Guardian task is guided by s15 (1) of the WWCC Act, which is to determine whether "the applicant or holder poses a risk to the safety of children". The legislation is silent as to the meaning of risk, and the threshold that must be achieved. While different jurisdictions have adopted differing standards or thresholds for establishing risk, the case law is well established in NCAT's jurisdiction. The concept of "risk" as explained in *Commission for Children and Young People v V* [2002] NSWSC 949 is "whether in all the circumstances, there is a real and appreciable risk in the sense of a risk that is greater than the risk of any adult preying on a child". One must however link the word "risk" with the words that follow, namely "to the safety of children".

This has been consistently applied and approved of by NCAT and the Supreme Court in relation to both the former and current WWCC legislative schemes. This is therefore the threshold that the Children's Guardian also applies in assessing the risk that an individual may pose to a child in the future if past abuse has been established on the balance of probabilities.

- 11 Does the scheme operate effectively?
- 12 How should historical carnal knowledge records be assessed under the scheme?
- 13 Should the scheme adopt the same approach in all cases of manslaughter of a child regardless of the circumstance, as suggested by the Royal Commission, or is it more suitable to risk assess some cases, such as in the case of motor vehicle accidents?
- 14 Should s15 of the Act, which lists the factors that the Children's Guardian considers in assessing risk, include the fact that an individual is on parole or the subject of a current court order?

## 6 Focus Question 4 – Does the WWCC scheme provide sufficient review opportunities?

### 6.1 Reviews and appeals of WWCC decisions

External review of an administrative decision by an impartial decision maker is fundamental to ensuring procedural fairness and promotes a robust and transparent decision-making process. Part 4 of the Act provides mechanisms for external review of and appeal against adverse WWCC decisions to the NCAT, and under s83 (1) of the *Civil and Administrative Tribunal Act 2013* appeals (on a question of law only) are available from NCAT to the Supreme Court.

## 6.2 Persons who can currently appeal or seek review of a WWCC decision

The categories of persons who can seek review/appeal to NCAT are:

- individuals who have been refused a WWCC clearance by the Children's Guardian,<sup>35</sup>
- WWCC holders who have had their clearance cancelled under s23 of the Act,<sup>36</sup>
- individuals who are subject to an interim bar imposed by the Children's Guardian where the interim bar has been in force for more than 6 months,<sup>37</sup> and
- applications for an enabling order by certain applicants who are considered to be disqualified persons under the WWC Act as a result of an offence on their criminal record specified in Schedule 2 to the Act<sup>38</sup> ( see further discussion of this below).

When the WWC Act commenced every barred applicant had a right of review, with the exception of individuals who had a conviction for murder of a child, or where the person had been refused wholly or partly on the grounds that they had been charged with a pending offence that had not been finally determined, listed in Schedule 2 to the Act.

The review mechanisms were comprehensively reviewed by government as recently as late 2015. This arose following a number of cases that were significantly out of step with public expectations about who should be able to seek administrative review of decisions made by the Children's Guardian to prevent them working with children.

The outcome of those considerations was to expand the list of automatically disqualifying offences (listed in Schedule 2) and to limit review rights for people convicted of serious offences. This was done by way amendment to s26 of the WWC Act. In applications on appeal of automatically disqualifying offences the onus is on the applicant to show that they do not pose a risk to the safety of children.<sup>39</sup> The changes reflected the heinous nature of certain crimes and served to prevent individuals who had committed these crimes from ever being able to work with children. Additionally the Tribunal, like the Children's Guardian, was prevented from enabling a person to work with children unless satisfied that a reasonable person would allow his or her child to have direct contact with the affected person that was not directly supervised by another person, and it would be in the public interest to make the order.<sup>40</sup>

NCAT is required to consider the factors set out in s30 of the WWC Act and determine, on the balance of probabilities, whether a person poses a risk to the safety of children. The factors that NCAT is required to consider under s30 reflect those that the Children's Guardian may consider in s15 of the WWC Act (which in practice are always considered).

Following on from the recent amendments, the review and appeal provisions are considered to adequately balance the protection of the rights of individuals who are subject to administrative decision making with public protection and safety, with two exceptions. One is in relation to NCAT's ability to grant interim stay orders that are subject to conditions (discussed below at 6.3) and the other relates to the appeal rights of individuals subject to a court order that imposes any control on their conduct or movement (discussed at 6.4).

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<sup>35</sup> s27 (1) of the WWC Act

<sup>36</sup> s27(2) of the WWC Act

<sup>37</sup> s27(3) of the WWC Act

<sup>38</sup> s28 of the WWC Act

<sup>39</sup> s28(7) of the WWC Act

<sup>40</sup> s30 (1A) of the WWC Act

## 6.3 Interim stay orders that are subject to conditions

Sections 61 and 62 of the *Administrative Decisions Review Act 1997* provide that the Tribunal may, on the application of any party to the proceedings for administrative review, make interim orders staying or otherwise affecting the operation of the WWCC decision, pending the determination of the application by NCAT and subject to any conditions imposed in the order.

The ability of NCAT to make interim stay orders that are subject to conditions is incompatible with the current policy and legislative framework, which only allows one of two outcomes to a WWCC application – that is, either a clearance or a refusal – and is aimed at eliminating the opportunities for high-risk individuals to be engaged by employers in any child-related work or employed only subject to certain conditions, as occurred under the former framework.

An order subject to conditions has the effect of allowing an individual to undertake child-related work despite being assessed as a risk to children, on the basis that certain conditions are met. This order contravenes the existing legislative framework.

The use of conditions also raises a number of child protection risks as the Children's Guardian has no capacity to monitor or enforce any conditions that are in place. The conditions of a person's clearance would not be immediately known to potential employers until they undertake the online verification process (and many employers do not comply with this requirement).

Of note is the fact that s28 of the WWC Act specifically disallows the Tribunal from making an enabling order that is subject to conditions. Applications for enabling orders under s28 of the Act deal with Schedule 2 (i.e. automatically barring) offences. This recognises the inherent risk in employing these individuals in any child-related work and is consistent with the policy underpinnings of the Act.

It can be argued that, in relation to applications for administrative review of clearance decisions, specifically precluding the ability to grant an order under s27 of the Act which is subject to conditions is essential to upholding the policy underpinnings of the Act and protecting children's safety. Similarly, there is also a strong argument to specifically preclude the ability of NCAT to make interim stay orders under s27 and s28 of the WWC Act which are subject to conditions. This will promote the ability of the framework to effectively prevent known offenders who may reoffend from having access to vulnerable children.

## 6.4 Individuals on current control orders

The Act restricts appeal rights for individuals who have been convicted of any of the serious offences specified in s26 if they received a sentence of full-time custody for the offence, or any of the control orders specified in s26 (2) (b) and (c) are in force. However, where an individual is subject to an order by a court that imposes any control on their conduct or movement, or precludes them from working with children, and this relates to a conviction that is not specified in s26, they may still apply to NCAT for review or appeal of their WWCC outcome.

Given that the existence of such an order indicates that a court has made a determination that the individual is not free of risk to children when living in the community, it would appear appropriate to recognise this under the WWCC framework by restricting appeal rights for the duration of the order. This would further strengthen the regime and reduce the potential for administrative decision making to undermine judicial consideration of an individual's risk.

- 15 Does the scheme provide sufficient review opportunities?
- 16 Should the Act be amended to specifically prohibit interim orders being granted under s27 of the Act which are subject to conditions?
- 17 Should people who are subject to an order by a court which controls or places restrictions on their movement be allowed to appeal a WWCC decision while that order is in place?

## 7 Focus Question 5 – Does the WWCC scheme encourage compliance?

### 7.1 What we mean by compliance with the WWCC scheme

Compliance with the WWCC scheme means that individuals and employers understand and give effect to the obligations placed on them by the provisions of the Act. For employers this means that they not only verify all employees using the online portal, check that employees in child-related work have a WWCC clearance or a valid WWCC application and take appropriate measures to respond to a change in the WWCC status of an employee, but that they also fully engage with exchanging information that the Children's Guardian requires to effectively operate the scheme.

### 7.2 Auditing and monitoring functions to ensure compliance

Over 1,316,467 valid applications have been received since the new Check commenced in June 2013. Section 39 of the Act creates the Children's Guardian's functions of monitoring and auditing compliance with the provisions of the Act and Regulations. Each year, in view of the large volume of applications, the OCG develops a compliance program as part of these functions which adopts a risk-based approach to monitoring and auditing employers and workers. The program directs resources to work sectors that are considered to be of a greater risk of non-compliance with the legislation or where the work sector or geographical area is considered a greater risk of harm to children based on the analysis of data from various sources. The results are published in the OCG's Annual Report.

The main auditing and monitoring functions undertaken include:

- auditing the employers and workers in the defined work sectors
- monitoring workers who are barred from working with children, have terminated their application for any number of reasons, or do not hold a clearance and are working in child-related work
- referring enforcement action to Police where non-compliance with a barred outcome is found
- investigating matters that are referred to the OCG concerning workers or employers who may not be meeting their legislative obligations.

The Act also provides, at s40, powers to compel the production of information in relation to these functions, and makes failure to comply an offence.

## 7.3 Offence provisions

The WWC Act creates the following offences *in relation to individuals*, in order to ensure compliance with the provisions of the Act:

- Engaging in child-related work without holding a WWCC clearance or having applied for a WWCC<sup>41</sup> of the applicable class
- Engaging in child-related work while an interim bar is in force<sup>42</sup>
- Residing as an adult person at the home of an authorised carer, or at a home where an education and care service or family day care service is provided, without having a WWCC<sup>43</sup>
- Disclosing unauthorised information unless an exception applies, or collecting information dishonestly<sup>44</sup>
- Making a false or misleading statement.<sup>45</sup>

The following offences are created *with respect to organisations*:

- Employing or continuing to employ a person if there is reasonable cause to believe that they do not have a WWCC or have not applied for one, or that there is an interim bar in place<sup>46</sup> (also applicable to individuals)
- Failing to ensure that an adult person residing at the home of an authorised carer, or at a home where an education and care service or family day care service is provided, has a WWCC
- (For governing bodies of an organisation) failing to ensure that a person is not appointed on a permanent basis to a key position in the organisation that involves child-related work unless the person is the holder of a WWCC<sup>47</sup>
- (For governing bodies of an organisation) failing to ensure that whenever a person is appointed on a permanent basis to a key position in the organisation involving child-related work a record is held for seven years of how they determined that the person held a WWCC clearance of the applicable class<sup>48</sup>
- Failing to comply with an enforcement notice requiring compliance with the obligations of a reporting body under s35 of the Act<sup>49</sup>
- Failing to comply with a notice for production of information in relation to the monitoring and auditing functions of the Children's Guardian under the WWC Act<sup>50</sup> or knowingly providing false or misleading information.<sup>51</sup>

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<sup>41</sup> s8(1) of the WWC Act

<sup>42</sup> s8(2) of the WWC Act

<sup>43</sup> s10(1) of the WWC Act

<sup>44</sup> s45 of the WWC Act

<sup>45</sup> s45A of the WWC Act

<sup>46</sup> s9 (1) of the WWC Act

<sup>47</sup> s9B (2) of the WWC Act

<sup>48</sup> s9B (4) of the WWC Act

<sup>49</sup> s36(6) of the WWC Act

<sup>50</sup> s40(2)(a)

S52 (4) of the Act further provides a regulation making power to create offences where the penalty does not exceed 20 penalty points.<sup>52</sup>

The offence provisions are consistent with the core categories recommended by the Royal Commission in its Recommendation 16, the notable exception being the absence of penalties in relation to failing to notify authorities of a relevant change in circumstances. The introduction of penalties as proposed by the Royal Commission would further strengthen the framework, and this is discussed under the heading 'Continuous monitoring' in *Focus Question 2- Does the WWCC scheme rely on appropriate information?*

## 7.4 Proposed penalties and other options to improve compliance

The OCG focuses on creating cultural change within organisations to raise awareness of the circumstances that give rise to children and young people being at risk of abuse, and strategies to create child-safe environments (discussed further in *Focus Question 6- What could strengthen an organisation's understanding of the role of the WWCC in a child-safe organisation?*). Education and training about the obligations on employers under the WWC Act are integral to this approach. The OCG considers prosecution as a last resort to promote compliance, and has relied on the offence provisions to commence or consider prosecutions in only a handful of matters where employers have blatantly failed to comply with their obligations in relation to engaging employees in child-related work. There are, however, two areas in which the creation of an offence appears to be a necessary strategy moving forward (discussed below at 7.4.1 and 7.4.2).

### 7.4.1 An offence in relation to employer's failing to undertake online verification

A key part of the OCG's work is in relation to obtaining compliance by employers with s9A of the WWC Act. Section 9A requires that employers must verify through an online process that a worker has a clearance or current WWCC application. This process enables employers to receive up- to-date information about the change in status of an employee's WWCC clearance.

The section was inserted by way of amendment in 2015 to clarify s9 which made it an offence for employers to commence or continue employing a worker without a valid clearance or application. In 2013–14, employers only verified about 61% of all applicants. This meant that for a significant proportion of applications any information that is obtained by the OCG about the applicant's criminal or misconduct related history through the continuous monitoring process is unable to be conveyed to the employer in a timely way to allow them to take steps to remove the employee from child-related work. In some cases one applicant may work at numerous workplaces, representing a potential risk to a large number of children.

In many cases employers continue to register on the system but fail to verify. For example, at the commencement of the OCG's audit of the Clubs sector there were 1700 registered employers who had not made a verification.<sup>53</sup>

While the 2015 amendment inserting s9A has resulted in an increase in verification rates to 73% in 2014–2015 and 76% in 2015–2016, many employers remain non-compliant. Considering that 339,620

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<sup>51</sup> s40(2)(b)

<sup>52</sup> s17 of the *Crimes (Sentencing Procedure) Act* provides that, "Unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying \$110 by that number of penalty units".

<sup>53</sup> 5 OCG officers worked with employers to reduce this to 110 non-verifying registrations.



applications were processed in the last financial year, this represents a large number of applicants for whom no employer has verified their application.

Options to address this issue include the following options which the OCG through its compliance function has found to be essential to ensuring compliance with the online verification requirements:

- The creation of a penalty provision and the ability to issue an infringement notice against employers for not verifying online.
- Providing the Children's Guardian with powers to publicly name non-compliant employers on the organisation's website and in the OCG's Annual Reports.

### 7.4.2 An offence in relation to failing to comply with a notice under s31 seeking information

As discussed earlier in this paper, the risk assessment process is in many cases complex. The OCG relies on accurate, timely and high quality information to be made available in order to make rigorous determinations about risk.

Where an applicant returns relevant criminal records, the OCG often utilises the Children's Guardian's powers to compel production of information under s31 of the Act, which provides broad powers to compel production of information. This is complemented by the provisions of Chapter 16A of the *Children and Young People (Care and Protection) Act 1998*, which facilitates the exchange of child protection information between agencies that are responsible for maintaining the safety, welfare and wellbeing of children.

Section 31 (6) of the Act provides that a notice under s31 may specify a date on or before which the notice is to be complied with. However, there are no penalties for non-compliance with the specified timeframes and no other methods of enforcing the return of information by the specified date.

The second reading speech on the introduction of the Child Protection (Working with Children) Bill 2012 explains that the timeframes in the Act relating to the ability of the Children's Guardian to place interim bars on applicants as a safety measure, pending the finalisation of a risk assessment, were premised on the completion of risk assessments within six months. It was with this timeframe in mind and assuming that few risk assessments would take longer than six months that provision was made in the legislation for an applicant to be able to apply to NCAT for a review of a decision to impose an interim bar after it has been in place for six months.

However, the timeframe for completing risk assessments is dependent on the complexity of an applicant's records (with the records being far broader than were checked under the old system) and subject to the timeframes of agencies external to the OCG for the collection of supporting data from the agencies issued with s31 notices. Delays in receiving responses to s31 notices directly impact on the ability to finalise risk assessments, add to backlogs and compromise the efficient operation of the WWCC system.

Introducing offence provisions for failure to comply with the specified time frames for responding to s31 notices is one option to promote compliance. This approach is taken under the Tasmanian legislation, with entities liable for a fine of up to \$31,400 (200 penalty units)<sup>54</sup> and/or two years' imprisonment. Under South Australia's *Child Safety (Prohibited Persons) Act 2016*, which was recently given assent but has not yet commenced, agencies other than government agencies may be liable for a maximum penalty of \$50,000. The legislation requires that a public sector agency that refuses or fails to comply with a request from the requesting unit must first be consulted. The unit is

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<sup>54</sup> A penalty unit in Tasmania is currently \$157 – as defined by the Penalty Units and Other Penalties Act 1987 (Tas)

then able to report the refusal or breach to the relevant Minister and include details of the refusal or failure in the unit's Annual Report.

Both strategies to promote compliance have their relative strengths and weaknesses. The publication of breaches in Annual Reports responds to the reality that publishing information about another government agency as a sole strategy to promote compliance is likely to have limited success when compared to also involving the Minister who has portfolio responsibility for the relevant department.

### 7.4.3 Compellability of NGOs to comply with notices under s31 seeking information

Section 31 (3) of the WWC Act provides that Government agencies are authorised and required to provide the Children's Guardian with the information sought by a notice under s31 of the Act. However, the same does not apply to non-government agencies that the Act *authorises* to provide the requested information to the Children's Guardian, but does not *compel*.

The fact that not all agencies or organisations are compellable under s31 of the Act limits the effectiveness of the scheme. Ensuring that persons other than government agencies are compellable to respond to notices under this section will ensure a consistent legislative basis for obtaining this information from both government and non-government agencies, thereby increasing the possibility of timely information exchange and ensuring that a comprehensive background history is available to the Children's Guardian to make determinations about risk.

- 18 Does the scheme encourage compliance?
- 19 How should we respond to employers who are failing to undertake online verification of their workers?
- 20 How should we respond to organisations that do not provide essential information requested by the Children's Guardian to assist in assessing risk, within the specified time frame?
- 21 Should non-government organisations be compellable to respond to requests for information from the Children's Guardian in the same way as government agencies are?

## 8 Focus Question 6 – What could strengthen an organisation's understanding of the role of the WWCC in a child-safe organisation?

### 8.1 Building the capacity of organisations to be child safe

Encouraging organisations to develop their capacity to be safe for children is a principal function of the Children's Guardian<sup>55</sup> and part of the Children's Guardian's public awareness and advice functions under s38 of the WWC Act. It has been an integral part of the response to protecting children and a program to promote this was implemented following the introduction of pre-employment screening for child-related employment in 2000. The program recognises the limitations on the Check for keeping children safe, and that organisations need to do more than simply undertake background screening in order to provide safe environments and services for children.

This is supported by research which overwhelmingly indicates that people who harm children in workplaces are mostly opportunistic offenders who harm children when the following circumstances are present:

- The child is vulnerable,
- The individual's own inhibitions are diminished,
- The environment is not monitored or detection is unlikely to occur, and/or
- The work culture does not value and protect children.

There is an emerging consensus on the elements necessary to create a child-safe organisation, which are reflected in the OCG's Child Safe Organisations (CSO) program: robust recruitment processes, appropriate training and supervision for staff, processes to investigate complaints and concerns, an organisational culture of openness that values children and young people's participation, and an organisational culture that engenders a sense of extended guardianship in all members of the organisation so that they will assist in creating child-safe environments.

Rather than being a prescriptive mandatory approach, the current focus of the CSO program is on encouraging and supporting organisations to ensure that they have policies, systems, practices, and cultures that safeguard children. This is done via an extensive program of training and resources and is provided free of charge to a diverse range of government, non-government and private organisations across NSW. There is a strong emphasis on encouraging cultural change within organisations as well as improving practices, since cultures that respect and empower children are critical to reducing the risk of harm.

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<sup>55</sup> found in s181(j) of the *Child and Young Person's (Care and Protection) Act 1998*

## 8.2 Other jurisdictions

Most jurisdictions that operate a pre-employment checking scheme support their checking schemes with education, training and resources to assist child-related organisations to develop systems and practices that create safer organisations for children.<sup>56</sup> These approaches are often referred to as child-safe, child-friendly or risk-minimisation strategies.

More recently, however, the dialogue around child -safe organisations has focused on the issue of standards. Minimum child safe standards have been adopted in three jurisdictions: Queensland, South Australia and Victoria.

## 8.3 Principles for child-safe organisations

Statutory out-of-home care and adoption service providers are required to comply with the *NSW Child Safe Standards for Permanent Care* in order to maintain accreditation to provide services to children and young people in NSW.

In addition, the OCG has recently developed principles to assist all child-related organisations to embed child safe principles in their day-to-day work. The principles are informed by the OCG's experiences in delivering child safe training, consulting with child-related sectors and drawing on the research and findings of the Royal Commission. Child-safe organisation guidelines have been developed to help organisations to think about the organisational values that help create safe environments for children. These guidelines provide practical guidance to organisations wanting to follow child safe principles.

They underpin the eLearning and other child-safe training and resources the OCG has developed and form part of the broader child-safe organisations strategy. The guidelines have been produced after consultation with a wide range of child-related organisations and were made available for public comment in April 2017.

At this stage the principles for child-safe organisations are not mandatory. In the future consideration may be given to whether there is a need to empower the Children's Guardian to make these standards mandatory and/or introduce penalties for failure to comply.

The OCG is aware of a number of private child safe training providers operating in NSW. In consultation with these providers, and child-related organisations that use their services, there is support for a certification scheme to ensure the high quality of training material and resources developed by private providers. The purpose of the scheme is to certify that training and other resources meet legislative requirements and are consistent with the child safe principles. The OCG is currently exploring the feasibility of such a scheme.

In considering future regulatory approaches it is important to "strike a balance between the obligation to protect the community or public interest, while at the same time not imposing unnecessary costs on those they regulate or indirectly the broader community".<sup>57</sup> While there are a number of benefits in adopting mandatory standards, including, primarily, that they provide confidence for the community that organisations have met the prescribed standards and are subject to ongoing monitoring, there are also a number of disadvantages. It is a 'one size fits all' approach to regulation that may be incompatible with the diversity of organisations delivering services to children. Introducing legislative standards would require additional resources from government in relation to compliance and monitoring, as well as an increase in the regulatory burden for many agencies.

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<sup>56</sup> Tilbury, C. Working with children checks – time to step back? *Australian Journal of Social Issues*, Vol. 49, No. 1, 2014.

<sup>57</sup> Australian National Audit Office Better Practice Guide Administering Regulation: Achieving the Right Balance, June 2014.

Any future approaches will require further consultation, in particular to understand the likely impact of the regulatory burden on organisations, which will vary according to their type, size and capacity.

- 22 What could strengthen an organisation's understanding of the role of the WWCC in a child safe organisation?
- 23 Would organisations be more encouraged to adopt child safe systems and policies if there were mandatory standards that they needed to comply with rather than recommended principles?

## 9 Concluding observations

Overall, given the extent of legislative reform since the commencement of the WWC Act in June 2013, the OCG is of the view that the current legislative framework is both robust and effective in meeting the policy objectives of the Act. Since the commencement of the Act to date, of the total number of 1,316,467 valid applications received, the Children's Guardian has barred 2413 applicants from engaging in child-related work. This number includes 976 persons who were automatically barred because they had a conviction or a pending charge for a serious offence under Schedule 2 of the Act and 1581 persons who were barred subsequent upon risk assessment.

In addition to bars imposed as a result of Schedule 1 or Schedule 2 offences or other concerning matters brought to the attention of the OCG, the continuous monitoring of NSW criminal charges and workplace misconduct findings ensures currency of information. Since the commencement of the Check, the Children's Guardian has barred 709 persons who were previously cleared on the basis of new information that came to light as a result of the continuous monitoring process.

The large proportion of OCG decisions upheld by NCAT also provides confidence in the Children's Guardian's decision-making process and adherence to the principles of procedural fairness upheld in the legislation. At the end of the 2015–2016 financial year, of the 395 applicants who sought review or an enabling order, only 100 appeals successfully overturned the Children's Guardian's decision, and 59 of these decisions were in relation to automatic bars where the Children's Guardian has no discretion and does not receive any additional mitigating information from the applicant before making the decision. This suggests that of the 395 bars that were appealed at NCAT, in 65% of completed matters, the Children's Guardian's decision was either upheld by the Tribunal or the cases were dismissed.

That the national standards proposed by the Royal Commission largely align with the NSW legislative framework further supports the view that the current legislative framework is appropriate and effective. However, it is recognised that there are limitations on the Check for keeping children safe and that, rather than place complete reliance on the Check, organisations should develop their capacity to be child safe. The OCG has invested significant resources into this aspect of its work, as reflected in its child safe organisations program.

Despite the Check's proven effectiveness as a tool for keeping children safe when used with other child-safe strategies, it has recognised limitations as a cure-all for child protection issues. It is acknowledged that there is always room for improvement and fine-tuning to deliver even greater protection to the children of NSW. To this end, the OCG welcomes submissions on the issues raised in this Discussion Paper and any other suggestions or comments about the WWC scheme.

**24** Do you have any other suggestions to improve the scheme? If so, what are they?

## 10 Full list of questions

- 1 Does the scheme target the right people?
- 2 Does the definition of child-related work need to be changed?
- 3 Would the Act be clearer about who needs a WWCC if it adopted the Royal Commission's recommendations for a limited list of child-related services (found in Rec. 12) and removed references to child-related roles?
- 4 Should parents volunteering on overnight camps be made to have a WWCC?
- 5 How should the scheme respond to applications from individuals who are 'out of scope'?
- 6 Does the WWCC scheme collect the most appropriate information?
- 7 Would inserting definitions for criminal history and criminal records assist in making sure that the right information is collected and considered?
- 8 Do other records need to be considered?
- 9 Does the scheme need to do anything further to make sure domestic and family violence is captured appropriately?
- 10 Should there be a positive obligation on individuals to notify the OCG of changes in their criminal history?
- 11 Does the scheme operate effectively?
- 12 How should historical carnal knowledge records be assessed under the scheme?
- 13 Should the scheme adopt the same approach in all cases of manslaughter of a child regardless of the circumstance, as suggested by the Royal Commission, or is it more suitable to risk assess some cases, such as in the case of motor vehicle accidents?
- 14 Should s15 of the Act, which lists the factors that the Children's Guardian considers in assessing risk, include the fact that an individual is on parole or the subject of a current court order?
- 15 Does the WWCC scheme provide sufficient review opportunities?
- 16 Should the Act be amended to specifically prohibit interim orders being granted under s27 of the Act which are subject to conditions?
- 17 Should people who are subject to an order by a court which controls or places restrictions on their movement be allowed to appeal a WWCC decision while that order is in place?
- 18 Does the scheme encourage compliance?
- 19 How should we respond to employers who are failing to undertake online verification of their workers?
- 20 How should we respond to organisations that do not provide essential information requested by the Children's Guardian to assist in assessing risk, within the specified time frame?
- 21 Should non-government organisations be compellable to respond to requests for information from the Children's Guardian in the same way as government agencies are?
- 22 What could strengthen an organisation's understanding of the role of the WWCC in a child-safe organisation?
- 23 Would organisations be more encouraged to adopt child-safe systems and policies if there were mandatory standards that they needed to comply with rather than recommended principles?
- 24 Do you have any other suggestions to improve the scheme? If so, what are they?



## Appendices

## Schedule 1 Assessment Requirement Trigger

Act	Description of offence	Finding/outcome
Various	Adult Schedule 2 offences	Non-conviction charges: (Sch 1, cl 1 (1)(b))
Various	Juvenile Schedule 2 offences	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(1)(b))
Various	Patterns of violence or sexual misconduct (whether or not listed in Sch 1 or 2)	Convictions, pending charges: (Sch 1, cl 1(6))
Crimes Act 1900	Description of offence	Finding/ outcome
	An offence involving intentional wounding or causing bodily harm to a child by an adult (other than an offence in Sch 2 (1))	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(a))
	Any sexual offence committed against, with or in the presence of a child (other than an offence in Sch 2 (1))	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(b))
s.38	Using intoxicating substance to commit an indictable offence (victim under 18)	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(c))
s.38A	Spiking food or drink (victim under 18)	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(c))
s.45	Female genital mutilation (victim under 18)	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(d))
s.45A	Removing person from State for female genital mutilation (victim under 18)	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(d))
s.60E	Assaults at school	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(e))
Crimes (Domestic and Personal Violence) Act 2007	Description of offence	Finding/ outcome
s.13	Stalking (victim under 18)	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(f))
Prevention of Cruelty to Animals Act 1979	Description of offence	Finding/ outcome
s.6	Aggravated cruelty to animals	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(g))
Crimes Act 1900	Description of offence	Finding/ outcome
s.43A	Failure of person with parental responsibility to care for child	Proceedings commenced (other than where person found not guilty): (Sch 1, cl 1(3)(a))
s.44	Failure to provide necessities of life (victim under 18)	Proceedings commenced (other than where found not guilty): (Sch 1, cl 1(3)(b))
s. 530	Serious animal cruelty	Proceedings commenced (other than

**Appendix 1- Plain English versions of offences in Schedules 1 and 2 to the *Child Protection (Working with Children) Act 2012***

		where person found not guilty): (Sch 1, cl 1(3)(d))
<b>Children and Young Persons (Care and Protection) Act 1998</b>	<b>Description of offence</b>	<b>Finding/ outcome</b>
s.227	Child and young person abuse	Proceedings commenced (other than where person found not guilty): (Sch 1, cl 1(3)(c))
s.228	Neglect of children and young persons	Proceedings commenced (other than where person found not guilty): (Sch 1, cl 1(3)(c))
s.231	Leaving children and young persons unsupervised in motor vehicles	Proceedings commenced (other than where person found not guilty): (Sch 1, cl 1(3)(c))
<b>Drug Misuse and Trafficking Act 1985</b>	<b>Description of offence</b>	<b>Finding/ outcome</b>
s.23A	Offences with respect to enhanced indoor cultivation of prohibited plants in the presence of children	Proceedings commenced, (other than where person found not guilty): (Sch 1, cl 1(3)(e))
s.24(1A), (2A)	Exposure of children to the manufacture and production of prohibited drugs	Proceedings commenced (other than where person found not guilty): (Sch 1, cl 1(3)(e))
s.25(1A)	Adult who supplies prohibited drugs to a person under 16	Proceedings commenced (other than where person found not guilty): (Sch Sch 1, cl 1(3)(e))
<b>Crimes Act 1900</b>	<b>Description of offence</b>	<b>Finding/ outcome</b>
s. 61	Common assault (victim under 18)	Convictions: (Sch 1, cl 1(4))

Schedule 1 covers an intention to commit any of the above offences, offences under a law other than a law of NSW which are similar to the above offences, attempting, conspiring or inciting to commit any of the above offences: (Sch 1(1)(5)(a), (b) and (c)).

An offence in Schedule 1 as listed above is not specified if the conduct has ceased to be an offence in NSW, even if it was an offence at the time of its commission: (Sch 1(1)(7)).

### **Findings of misconduct**

Findings by a reporting body that the following conduct occurred:

- (a) sexual misconduct committed against, with or in the presence of a child, including grooming a child
- (b) any serious physical assault of a child: (Sch 1(2)).

[A reporting body is defined and listed in s 35(4) of the *Child Protection(Working With Children) Act 2012*; Additional reporting bodies are prescribed in cl 25 of the *Child Protection (Working With Children) Regulation 2013*.]

### **Notifications by the Ombudsman**

Notifications about persons made by the Ombudsman as a result of concerns arising from receipt of information by the Ombudsman in the course of exercising the Ombudsman's functions, that, on a risk assessment, may be found to pose a risk to the safety of children: (Sch 1(2A)).

## Schedule 2 disqualifying offences

(Convictions or proceedings for the following offences whether occurring before, on or after 15 June 2013)

Act	Description of offence
<b>NSW Crimes Act 1900</b>	
s.18	Murder: Sch 2 cl 1(1)(a)
s.18	Manslaughter of child (other than as a result of a motor vehicle accident): Sch 2 cl 1(1)(b)
s.33	Intentional Wounding or causing grievous bodily harm with intent (victim under 18 by adult more than 3 years older): Sch 2 cl 1(1)(c)
s.42	Injuries to child at time of birth: Sch 2 cl 1(1)(o)
s.43	Abandoning or exposing child under 7 years: Sch 2 cl 1(1)(o)
s.61B	Sexual assault category 1 – inflicting grievous bodily harm with intent to have sexual intercourse (repealed): Sch 2 cl 1(1)(d)
s.61C	Sexual assault category 2 – inflicting actual bodily harm etc with intent to have sexual intercourse (repealed): Sch 2 cl 1(1)(d)
s.61D	Sexual assault category 3 – sexual intercourse without consent (repealed): Sch 2 cl 1(1)(d)
s.61E	Sexual assault category 4 – indecent assault and act of indecency (repealed): Sch 2 cl 1(1)(d)
s.61F	Attempt to commit offence under secs. 61B to 61E (repealed): Sch 2 cl 1(1)(d)
s.61I	Sexual assault : Sch 2 cl 1 (1)(e)
s.61J	Aggravated sexual assault : Sch 2 cl 1 (1)(e)
s.61JA	Aggravated sexual assault in company : Sch 2 cl 1 (1)(e)
s.61K	Assault with intent to have sexual intercourse: Sch 2 cl 1 (1)(e)
s.61L	Indecent assault: Sch 2 cl 1 (1)(e)
s.61M	Aggravated indecent assault: Sch 2 cl 1 (1)(e)
s.61N	Act of indecency : Sch 2 cl 1 (1)(e)
s.61O	Aggravated act of indecency : Sch 2 cl 1 (1)(e)
s.61P	Attempt to commit offence under sections 61I–61O: Sch 2 cl 1 (1)(e)
s.65A	Sexual intercourse procured by intimidation, coercion and other non violent threats (repealed): Sch 2 cl 1(1)(g)
s.66	Procuring etc carnal knowledge by fraud (repealed): Sch 2 cl 1 (1)(g)
s.66A	Sexual intercourse child under 10: Sch 2 cl 1(1)(h)
s.66B	Attempting, or assaulting with intent, to have sexual intercourse with child under 10: Sch 2 cl 1(1)(h)
s.66C	Sexual intercourse with child 10 to 16: Sch 2 cl 1 (1)(h)
s.66D	Attempting, or assaulting with intent, to have sexual intercourse with child 10 to 16: Sch 2 cl 1 (1)(h)
s.66EA	Persistent sexual abuse of a child: Sch 2 cl 1 (1)(h)
s.66EB	Procuring or grooming a child under 16 for unlawful sexual activity: Sch 2 cl 1 (1)(h)
s.66F	Sexual intercourse—intellectual disability: Sch 2 cl 1 (1)(h)
s.67	Carnal knowledge of girl under 10 years: Sch 2 cl 1 (1)(i)
s.68	Assault girl under 10 with intent to carnally know: Sch 2 cl 1 (1)(i)
s.71	Carnal knowledge: Sch 2 cl 1 (1)(i)
s.72	Attempted carnal knowledge: Sch 2 cl 1(1)(i)
s.73	Carnal knowledge: Sch 2 cl 1(1)(i)
s.73	Sexual intercourse with child between 16 and 18 under special care: Sch 2 cl 1 (1)(h)
s.74	Attempts (carnal knowledge by teacher etc) (repealed) : Sch 2 cl 1 (1)(i)
s.76	Assault and commit act of indecency on female under 16 (repealed): Sch 2 cl 1 (1)(i)
s.78A	Incest: Sch 2 cl 1 (1)(j)
s.78B	Incest attempts: Sch 2 cl 1 (1)(i)
s.78H	Homosexual intercourse with male under 10 (repealed) : Sch 2 cl 1 (1)(k)
s.78I	Attempt, or assault with intent, to have homosexual intercourse with male under 10 (repealed) : Sch 2 cl 1 (1)(k)
s.78K	Homosexual intercourse with male 10 to 18 (repealed) : Sch 2 cl 1 (1)(k)

**Appendix 1- Plain English versions of offences in Schedules 1 and 2 to the *Child Protection (Working with Children) Act 2012***

Act	Description of offence
s.78L	Attempt, or assault with intent, to have homosexual intercourse with male between 10 and 18 (repealed) : Sch 2 cl 1 (1)(k)
s.78N	Homosexual intercourse by teacher etc (repealed) : Sch 2 cl 1 (1)(k)
s.78O	Attempt, or assault with intent, to have homosexual intercourse with pupil (repealed) : Sch 2 cl 1 (1)(k)
s.78Q	Acts of gross indecency (repealed) : Sch 2 cl 1 (1)(k)
s.79	Bestiality: Sch 2 cl 1 (1)(i)
s.80A	Sexual assault by forced manipulation: Sch 2 cl 1 (1)(l)
s.80D	Causing sexual servitude: Sch 2 cl 1 (1)(l)
s.80E	Conduct of business involving sexual servitude: Sch 2 cl 1 (1)(l)
s.81	(repealed) : Sch 2 cl 1 (1)(k)
s.86	Kidnapping (except where by parent or carer) : Sch 2 cl 1 (1)(m)
s.87	Child abduction: Sch 2 cl 1 (1) (ac)
s.91D	Promoting or engaging in acts of child prostitution (other than offence committed by child prostitute) : Sch 2 cl 1 (1)(n)
s.91E	Obtaining benefit from child prostitution (other than offence committed by child prostitute) : Sch 2 cl 1 (1)(n)
s.91F	Premises not to be used for child prostitution (other than offence committed by child prostitute) : Sch 2 cl 1 (1)(n)
s.91G	Children not to be used for pornographic purposes (other than offence committed by child prostitute) : Sch 2 cl 1 (1)(n)
s.91H	Production, dissemination or possession of child pornography (child under 16) (other than offence committed by child prostitute) : Sch 2 cl 1 (1)(n)
s.91J	Voyeurism: Sch 2 cl 1 (1)(p)
s.91K	Filming a person engaged in private act: Sch 2 cl 1 (1)(p)
s.91L	Filming a person's private parts: Sch 2 (1)(p)
s.91M	Installing a device to facilitate observation or filming (where person intended to observed or filmed was a child) : Sch 2 cl 1 (1)(q)
578B	Possession of child pornography (repealed) : Sch 2 cl 1 (1)(y)
578C (2A)	Publishing Indecent articles: Sch 2 cl 1 (1)(y)
<b>NSW Summary Offences Act 1988</b>	
s.21G	Filming for indecent purposes (where person intended to observed or filmed was a child) (repealed) : Sch 2 cl 1 (1)(q)
<b>Commonwealth Customs Act 1901</b>	
s.233BAB	Importation of items of child pornography or of child abuse material: Sch 2 cl 1 (1)(v)
<b>Commonwealth Criminal Code Act 1995</b>	
s. 270.6	Cause person under 18 to enter/remain in sexual servitude: Sch 2 cl 1 (1)(ac)
s.270.6A	Cause person to enter into/remain in forced labour : Sch 2 cl 1 (1)(u)
s.270.7	Deceptive recruiting for labour or services (victim under 18) : Sch 2 cl 1 (1)(u)
s.271.4	Child trafficking: Sch 2 cl 1 (1)(ac)
s.271.7	Domestic child trafficking: Sch 2 cl 1 (1)(ac)
s.272.8-.11, 272.12-.13, 272.14 -.15	Sexual offences against children outside Australia: Sch 2 cl 1 (1)(r), (s), (ac)
s.272.18-272.20	Offences of benefiting from, encouraging or preparing for sexual offences against children outside Australia: Sch 2 cl 1 (1)(t)
s.273.5	Possessing, controlling, producing, distributing or obtaining child pornography material outside Australia: Sch 2 cl 1 (1)(ac)
s.273.6	Possessing, controlling, producing, distributing or obtaining child abuse material outside Australia: Sch 2 cl 1 (1)(ac)
s.273.7	Offend against ss 273.5 or 273.6 on 3 or more occasions against 2 or more individuals: Sch 2 cl 1 (1)(ac)
s.471.16-.17, 471.19-.20, 471.22	Offences relating to use of postal or similar service for child pornography material or child abuse material: Sch 2 cl 1 (1)(w)
s.471.24-26	Offences relating to use of postal or similar service involving sexual activity with person under 16:

**Appendix 1- Plain English versions of offences in Schedules 1 and 2 to the *Child Protection (Working with Children) Act 2012***

Act	Description of offence
	Sch 2 cl 1 (1)(x)
s.474.19	Using a carriage service for child pornography material: Sch 2 cl 1 (1)(ac)
s.474.20	Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service: Sch 2 cl 1 (1)(ac)
s.474.22	Using a carriage service for child abuse material: Sch 2 cl 1(1)(ac)
s.474.23	Possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service: Sch 2 cl 1 (1)(ac)
s.474.24A	Offend against ss 474.19, 474.20, 474.22 or 474.23 on 3 or more occasions against 2 or more individuals: Sch 2 cl 1 (1)(ac)
s.474.25A	Using a carriage service for sexual activity with person under 16 years of age: Sch 2 cl 1 (1)(ac)
s.474.25B	Offend against s. 474.25A in aggravated circumstances: Sch 2 cl 1 (1)(ac)
s.474.26	Using a carriage service to procure persons under 16 years of age: Sch 2 cl 1 (1)(ac)
s.474.27	Using a carriage service to groom persons under 16 years of age: Sch 2 cl 1 (1)(ac)
s.474.27A	Using a carriage service to transmit indecent communication to person under 16 years of age: Sch 2 cl 1 (1)(ac)

In addition to the above, the common law offences of rape and attempted rape are Schedule 2 disqualifying offences: Sch 2 cl 1(1)(f).

Schedule 2 covers an intention to commit any of the above offences, offences under a law other than a law of NSW (including under a foreign law) which, if committed in NSW would be an offence as listed above, attempting, conspiring or inciting to commit any of the above offences: Sch 2 cl 1 (1) (z), (aa), (ab).

An offence in Schedule 2 as listed above is not specified if the conduct has ceased to be an offence in NSW, even if it was an offence at the time of its commission: Sch 2 cl 1 (2).

# Recommendations

## General

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1. State and territory governments should:
  - a. within 12 months of the publication of this report, amend their WWCC laws to implement the standards identified in this report
  - b. once the standards are implemented, obtain agreement from the Council of Australian Governments (COAG), or a relevant ministerial council, before deviating from or altering the standards in this report, adopting changes across all jurisdictions
  - c. within 18 months from the publication of this report, amend their WWCC laws to enable clearances from other jurisdictions to be recognised and accepted.
2. The South Australian Government should, within 12 months of the publication of this report, replace its criminal history assessments with a WWCC scheme that incorporates the standards set out in this report.
3. The Commonwealth Government should, within 12 months of the publication of this report:
  - a. facilitate a national model for WWCCs by:
    - i. establishing a centralised database, operated by CrimTrac, that is readily accessible to all jurisdictions to record WWCC decisions
    - ii. together with state and territory governments, identifying consistent terminology to capture key WWCC decisions (for example, refusal, cancellation, suspension and grant) for recording into the centralised database
    - iii. enhancing CrimTrac's capacity to continuously monitor WWCC cardholders' national criminal history records
  - b. explore avenues to make international records more accessible for the purposes of WWCCs
  - c. identify and require all Commonwealth Government personnel, including contractors, undertaking child-related work, as defined by the child-related work standards set out in this report, to obtain WWCCs.
4. The Commonwealth, state and territory governments should, within 12 months of the publication of this report:
  - a. agree on a set of standards or guidelines to enhance the accurate and timely recording of information by state and territory police into CrimTrac's system
  - b. review the information they have agreed to exchange under the National Exchange of Criminal History Information for People Working with Children (ECHIPWC), and



establish a set of definitions for the key terms used to describe the different types of criminal history records so they are consistent across the jurisdictions (these key terms include pending charges, non-conviction charges and information about the circumstances of an offence)

- c. take immediate action to record into CrimTrac's system historical criminal records that are in paper form or on microfilm and which are not currently identified by CrimTrac's initial database search
- d. once these historical criminal history records are entered into CrimTrac's system by all jurisdictions, check all WWCC cardholders against them through the expanded continuous monitoring process.

## Standards

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### Child-related work

- 5. State and territory governments should amend their WWCC laws to incorporate a consistent and simplified definition of child-related work, in line with the recommendations below.
- 6. State and territory governments should amend their WWCC laws to provide that work must involve contact between an adult and one or more children to qualify as child-related work.
- 7. State and territory governments should:
  - a. amend their WWCC laws to provide that the phrase 'contact with children' refers to physical contact, face-to-face contact, oral communication, written communication or electronic communication
  - b. through COAG, or a relevant ministerial council, agree on standard definitions for each kind of contact and amend their WWCC laws to incorporate those definitions.
- 8. State and territory governments should:
  - a. amend their WWCC laws to provide that contact with children must be a usual part of, and more than incidental to, the child-related work
  - b. through COAG, or a relevant ministerial council, agree on standard definitions for the phrases 'usual part of work' and 'more than incidental to the work', and amend their WWCC laws to incorporate those definitions.
- 9. State and territory governments should amend their WWCC laws to specify that it is irrelevant whether the contact with children is supervised or unsupervised.

10. State and territory governments should amend their WWCC laws to provide that a person is engaged in child-related work if they are engaged in the work in any capacity and whether or not for reward.
11. State and territory governments should amend their WWCC laws to provide that work that is undertaken under an arrangement for a personal or domestic purpose is not child-related, even if it would otherwise be so considered.
12. State and territory governments should amend their WWCC laws to:
  - a. define the following as child-related work:
    - i. accommodation and residential services for children, including overnight excursions or stays
    - ii. activities or services provided by religious leaders, officers or personnel of religious organisations
    - iii. childcare or minding services
    - iv. child protection services, including out-of-home care (OOHC)
    - v. clubs and associations with a significant membership of, or involvement by, children
    - vi. coaching or tuition services for children
    - vii. commercial services for children, including entertainment or party services, gym or play facilities, photography services, and talent or beauty competitions
    - viii. disability services for children
    - ix. education services for children
    - x. health services for children
    - xi. justice and detention services for children, including immigration detention facilities where children are regularly detained
    - xii. transport services for children, including school crossing services
    - xiii. other work or roles that involve contact with children that is a usual part of, and more than incidental to, the work or roles.
  - b. require WWCCs for adults residing in the homes of authorised carers of children
  - c. remove all other remaining categories of work or roles.
13. State and territory governments, through COAG, or a relevant ministerial council, should agree on standard definitions for each category of child-related work and amend their WWCC laws to incorporate those definitions.

## Exemptions

14. State and territory governments should amend their WWCC laws to:
  - a. exempt:
    - i. children under 18 years of age, regardless of their employment status
    - ii. employers and supervisors of children in a workplace, unless the work is child-related
    - iii. people who engage in child-related work for seven days or fewer in a calendar year, except in respect of overnight excursions or stays
    - iv. people who engage in child-related work in the same capacity as the child
    - v. police officers, including members of the Australian Federal Police
    - vi. parents or guardians who volunteer for services or activities that are usually provided to their children, in respect of that activity, except in respect of:
      - a) overnight excursions or stays
      - b) providing services to children with disabilities, where the services involve close, personal contact with those children
  - b. remove all other exemptions and exclusions
  - c. prohibit people who have been denied a WWCC, and subsequently not granted one, from relying on any exemption.
15. State and territory governments, through COAG, or a relevant ministerial council, should agree on standard definitions for each exemption category and amend their WWCC laws to incorporate those definitions.

## Offences

16. State and territory governments should amend their WWCC laws to incorporate a consistent and simplified list of offences, including:
  - a. engaging in child-related work without holding, or having applied for, a WWCC
  - b. engaging a person in child-related work without them holding, or having applied for, a WWCC
  - c. providing false or misleading information in connection with a WWCC application
  - d. applicants and/or WWCC cardholders failing to notify screening agencies of relevant changes in circumstances
  - e. unauthorised disclosure of information gathered during the course of a WWCC.

## Criminal history information

17. State and territory governments should amend their WWCC laws to include a standard definition of criminal history, for WWCC purposes, comprised of:
  - a. convictions, whether or not spent
  - b. findings of guilt that did not result in a conviction being recorded
  - a. charges, regardless of status or outcome, including:
    - i. pending charges – that is, charges laid but not finalised
    - ii. charges disposed of by a court, or otherwise, other than by way of conviction (for example, withdrawn, set aside or dismissed)
    - iii. charges that led to acquittals or convictions that were quashed or otherwise over-turned on appeal

for all offences, irrespective of whether or not they concern the person's history as an adult or a child and/or relate to offences outside Australia.

18. State and territory governments should amend their WWCC laws to require police services to provide screening agencies with records that meet the definition of criminal history records for WWCC purposes and any other available information relating to the circumstances of such offences.

## Disciplinary or misconduct information

19. State and territory governments should amend their WWCC laws to:
  - a. require that relevant disciplinary and/or misconduct information is checked for all WWCC applicants
  - b. include a standard definition of disciplinary and/or misconduct information that encompasses disciplinary action and/or findings of misconduct where the conduct was against, or involved, a child, irrespective of whether this information arises from reportable conduct schemes or other systems or bodies responsible for disciplinary or misconduct proceedings
  - c. require the bodies responsible for the relevant disciplinary and/or misconduct information to notify their respective screening agencies of relevant disciplinary and/or misconduct information that meets the definition.

## Response to records returned

20. State and territory governments should amend their WWCC laws to respond to records in the same way, specifically that:
  - a. the absence of any relevant criminal history, disciplinary or misconduct information in an applicant's history leads to an automatic grant of a WWCC
  - b. any conviction and/or pending charge in an applicant's criminal history for the following categories of offence leads to an automatic WWCC refusal, provided the applicant was at least 18 years old at the time of the offence:
    - i. murder of a child
    - ii. manslaughter of a child
    - iii. indecent or sexual assault of a child
    - iv. child pornography-related offences
    - v. incest where the victim was a child
    - vi. abduction or kidnapping of a child
    - vii. animal-related sexual offences.
  - c. all other relevant criminal, disciplinary or misconduct information should trigger an assessment of the person's suitability for a WWCC (consistent with the risk assessment factors set out below).
21. State and territory governments should amend their WWCC laws to specify that relevant criminal records for the purposes of recommendation 20(c) include but are not limited to the following:
  - a. juvenile records and/or non-conviction charges for the offence categories specified in recommendation 20(b)
  - b. sexual offences, regardless of whether the victim was a child and including offences not already covered in recommendation 20(b)
  - c. violent offences, including assaults, arson and other fire-related offences, regardless of whether the victim was a child and including offences not already covered in recommendation 20(b)
  - d. child welfare offences
  - e. offences involving cruelty to animals
  - f. drug offences.

22. The Commonwealth Government, through COAG, or a relevant ministerial council, should take a lead role in identifying the specific criminal offences that fall within the categories specified in recommendations 20(b) and 21.

## Assessing risk

23. State and territory governments should amend their WWCC laws to specify that the criteria for assessing risks to children include:
  - a. the nature, gravity and circumstances of the offence and/or misconduct, and how this is relevant to children or child-related work
  - b. the length of time that has passed since the offence and/or misconduct occurred
  - c. the age of the child
  - d. the age difference between the person and the child
  - e. the person's criminal and/or disciplinary history, including whether there is a pattern of concerning conduct
  - f. all other relevant circumstances in respect of their history and the impact on their suitability to be engaged in child-related work.
24. State and territory governments should amend their WWCC laws to expressly provide that, in weighing up the risk assessment criteria, the paramount consideration must always be the best interests of children, having regard to their safety and protection.

## Eligibility to work while an application is assessed

25. State and territory governments should amend their WWCC laws to permit WWCC applicants to begin child-related work before the outcome of their application is determined, provided the safeguards listed below are introduced.

### Applicants

- a. applicants must submit a WWCC application to the appropriate screening agency before beginning child-related work and not withdraw the application while engaging in child-related work
- b. applicants must provide a WWCC application receipt to their employers before beginning child-related work

## Other safeguards

- c. employers must cite application receipts, record application numbers and verify applications with the relevant screening agency
  - d. there must be capacity to impose interim bars on applicants where records are identified that may indicate a risk and require further assessment.
- 26. State and territory governments that do not have an online WWCC processing system should establish one.
- 27. State and territory governments should process WWCC applications within five working days, and no longer than 21 working days for more complex cases.

## Clearance types

- 28. All state and territory governments should amend their WWCC laws to specify that:
  - a. WWCC decisions are based on the circumstances of the individual and are detached from the employer the person is seeking to work for, or the role or organisation the person is seeking to work in
  - b. the outcome of a WWCC is either that a clearance is issued or it is not; there should be no conditional or different types of clearances
  - c. volunteers and employees are issued with the same type of clearance.

## Appeals

- 29. All state and territory governments should ensure that any person the subject of an adverse WWCC decision can appeal to a body independent of the WWCC screening agency, but within the same jurisdiction, for a review of the decision, except persons who have been convicted of one of the following categories of offences:
  - murder of a child
  - indecent or sexual assault of a child
  - child pornography-related offences
  - incest where the victim was a child

and

- a. received a sentence of full time custody for the conviction, such persons being permanently excluded from an appeal



or

- b. by virtue of that conviction, the person is subject to an order that imposes any control on the person's conduct or movement, or excludes the person from working with children, such persons being excluded from an appeal for the duration of that order.

Notwithstanding the above any person may bring an appeal in which they allege that offences have been mistakenly recorded as applying to that person.

## Portability

- 30. Subject to the implementation of the standards set out in this report, all state and territory governments should amend their WWCC laws to enable WWCCs from other jurisdictions to be recognised and accepted.

## Duration and continuous monitoring

- 31. Subject to the commencement of continuous monitoring of national criminal history records, state and territory governments should amend their WWCC laws to specify that:
  - a. WWCCs are valid for five years
  - b. employers and WWCC cardholders engaged in child-related work must inform the screening agency when a person commences or ceases being engaged in specific child-related work
  - c. screening agencies are required to notify a person's employer of any change in the person's WWCC status.

## Monitoring compliance

- 32. All state and territory governments should grant screening agencies, or another suitable regulatory body, the statutory power to monitor compliance with WWCC laws.
- 33. All state and territory governments should ensure their WWCC laws include powers to compel the production of relevant information for the purposes of compliance monitoring.

## Governance

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34. The Commonwealth, state and territory governments should:
  - a. through COAG, or a relevant ministerial council, adopt the standards and set a timeframe within which all jurisdictions must report back to COAG, or a relevant ministerial council, on implementation
  - b. establish a process whereby changes to the standards or to state and territory schemes need to be agreed to by COAG, or a relevant ministerial council, and must be adopted across all jurisdictions.
35. The Commonwealth, state and territory governments should provide an annual report to COAG, or a relevant ministerial council, for three years following the publication of this report, to be tabled in the parliaments of all nine jurisdictions, detailing their progress in implementing the recommendations in this report and achieving a nationally consistent approach to WWCCs.
36. COAG, or a relevant ministerial council, should ensure a review is made after three years of the publication of this report, of the state and territory governments' progress in achieving consistency across the WWCC schemes, with a view to assessing whether they have implemented the Royal Commission's recommendations.

### Appendix 3- Response to the Royal Commission’s recommendations for minimum standards across jurisdictions (Recommendations 5 to 36)

5. State and territory governments should amend their WWCC laws to incorporate a consistent and simplified definition of child-related work, in line with the recommendations below.	This recommendation is supported in principle.
6. State and territory governments should amend their WWCC laws to provide that work must involve contact between an adult and one or more children to qualify as child-related work.	This recommendation is supported. Section 6(1) of the WWC Act currently refers to “children”; however the proposed wording “between an adult and one or more children” is supported and is considered in the Discussion Paper.
7. State and territory governments should: a) amend their WWCC laws to provide that the phrase ‘contact with children’ refers to physical contact, face-to-face contact, oral communication, written communication or electronic communication b) through COAG, or a relevant ministerial council, agree on standard definitions for each kind of contact and amend their WWCC laws to incorporate those definitions.	<p>This recommendation is currently being considered.</p> <p>The WWC Act defines “direct contact” with children in s 6(4) to mean physical contact or face to face contact.</p> <p>NSW is currently considering the viability of expanding the definition of direct contact to give effect to the Royal Commission’s recommendation but in a more targeted manner, i.e. by expanding child related roles (by amending the Regulation) to include roles of those providing ongoing children’s services by way of counselling, mentoring and distance education by any form of communication including oral, written or electronic communication.</p>
8. State and territory governments should: a) amend their WWCC laws to provide that contact with children must be a usual part of, and more than incidental to, the child-related work b) through COAG, or a relevant ministerial council, agree on standard definitions for the phrases ‘usual part of work’ and ‘more than incidental to the work’, and amend their WWCC laws to incorporate those definitions.	<p>This recommendation is supported as it is consistent with the policy underpinnings and current interpretation by the OCG. It is considered in the Discussion Paper.</p> <p>The current framework in NSW is based on the premise that contact with children must be a usual part of, and more than incidental to, the child related work. This is reflected in the exemption at cl 20(1)(a) of the WWC Regulation which specifies that workers who provide ancillary services (other than school cleaners), if the work does not ordinarily involve contact with children for extended periods, are exempt.</p>
9. State and territory governments should amend their WWCC laws to specify that it is irrelevant whether the contact with children is supervised or unsupervised.	This recommendation is supported. No change is required as it is consistent with the existing NSW framework.
10. State and territory governments should amend their WWCC laws to provide that a person is engaged in child-related work if they are engaged in the work in any capacity and whether or not for reward.	This recommendation is supported. No change is required as it is consistent with the existing NSW framework.

### Appendix 3- Response to the Royal Commission's recommendations for minimum standards across jurisdictions (Recommendations 5 to 36)

<p>11. State and territory governments should amend their WWCC laws to provide that work that is undertaken under an arrangement for a personal or domestic purpose is not child-related, even if it would otherwise be so considered.</p>	<p>This recommendation is supported. No change is required as it is consistent with the existing NSW framework.</p>
<p>12. State and territory governments should amend their WWCC laws to:</p> <p>a) define the following as child-related work:</p> <ul style="list-style-type: none"> <li>i) accommodation and residential services for children, including overnight excursions or stays</li> <li>ii) activities or services provided by religious leaders, officers or personnel of religious organisations</li> <li>iii) childcare or minding services</li> <li>iv) child protection services, including out-of-home care (OOHC)</li> <li>v) clubs and associations with a significant membership of, or involvement by, children</li> <li>vi) coaching or tuition services for children</li> <li>vii) commercial services for children, including entertainment or party services, gym or play facilities, photography services, and talent or beauty competitions</li> <li>viii) disability services for children</li> <li>ix) education services for children</li> <li>x) health services for children</li> <li>xi) justice and detention services for children, including immigration detention facilities where children are regularly detained</li> <li>xii) transport services for children, including school crossing services</li> <li>xiii) other work or roles that involve contact with children that is a usual part of, and more than incidental to, the work or roles."</li> </ul> <p>b) require WWCCs for adults residing in the homes of authorised carers of children</p> <p>c) remove all other remaining categories of work or roles</p>	<p>This recommendation is largely supported subject to comments included in the Discussion Paper.</p> <p>In particular it is noted that specific roles listed in s 6(3) of the WWC Act and prescribed in the WWC Regulation, including youth workers, school cleaners (who would otherwise be ruled out as ancillary) (cl 16A), members of governing bodies (cl 16B) and principal officers of registered agencies (cl16C)) would no longer require a Check. Additionally the services proposed by the Royal Commission to define child-related work are largely consistent with NSW legislation except as follows:</p> <p>i) parents on overnight camps are currently exempted under NSW law (cf cl 20(1)(e) and (f) of the WWC Regulation) –this is considered in the Discussion Paper ;</p> <p>v) the current NSW approach is to define child-related work as work for or in connection with clubs, associations, movements, societies or other bodies that provide programs or services for children. The wording of the provision therefore focuses on the provision of services to children rather than the membership or involvement of children. The State considers that this covers clubs that have significant membership of or involvement by children;</p> <p>vii) photography services are not currently captured in NSW but there is no opposition to including these in the relevant sectors. Where a photography service is contracted by a school for example, the service is usually required to be WWCC compliant.</p>
<p>13. State and territory governments, through COAG, or a relevant ministerial council, should agree on standard definitions for each category of child-related work and amend their WWCC laws to incorporate those definitions.</p>	<p>NSW supports reaching agreement on standard definitions as long as the existing NSW framework is not weakened.</p>
<p>14. State and territory governments should amend their WWCC laws to:</p> <p>a) exempt:</p> <p>i. children under 18 years of age, regardless of their employment status</p>	<p>This recommendation is supported with the exception of 14(a) vi) a) which is considered in the Discussion Paper. Parents on overnight excursions or stays are currently exempt in NSW (cll 20(1)(e) and (f) of the WWC Regulation). This</p>

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<p>ii. employers and supervisors of children in a workplace, unless the work is child-related</p> <p>iii. people who engage in child-related work for seven days or fewer in a calendar year, except in respect of overnight excursions or stays</p> <p>iv. people who engage in child-related work in the same capacity as the child</p> <p>v. police officers, including members of the Australian Federal Police</p> <p>vi. parents or guardians who volunteer for services or activities that are usually provided to their children, in respect of that activity, except in respect of:</p> <ul style="list-style-type: none"> <li>a. overnight excursions or stays</li> <li>b. providing services to children with disabilities, where the services involve close, personal contact with those children"</li> </ul> <p>b) remove all other exemptions and exclusions</p> <p>c) prohibit people who have been denied a WWCC, and subsequently not granted one, from relying on any exemption.</p>	<p>issue is considered in the Discussion paper.</p> <p>In relation to 14(b), NSW requires parents/close relatives providing mentoring services as part of formal mentoring program provided by government or non-government agency to have a WWCC. This issue is considered in the Discussion Paper.</p>
<p>15. State and territory governments, through COAG, or a relevant ministerial council, should agree on standard definitions for each exemption category and amend their WWCC laws to incorporate those definitions.</p>	<p>NSW supports reaching agreement on standard definitions for exemption categories as long as the overall framework continues to offer a balanced system and is not weakened.</p>
<p>16. State and territory governments should amend their WWCC laws to incorporate a consistent and simplified list of offences, including:</p> <ul style="list-style-type: none"> <li>a) engaging in child-related work without holding, or having applied for, a WWCC</li> <li>b) engaging a person in child-related work without them holding, or having applied for, a WWCC</li> <li>c) providing false or misleading information in connection with a WWCC application</li> <li>d) applicants and/or WWCC cardholders failing to notify screening agencies of relevant changes in circumstances</li> <li>e) unauthorised disclosure of information gathered during the course of a WWCC.</li> </ul>	<p>This recommendation is supported with all recommendations being consistent with existing NSW legislation except 16(d). This matter is not yet covered in the NSW framework and is considered in the Discussion Paper.</p>
<p>17. State and territory governments should amend their WWCC laws to include a standard definition of criminal history, for WWCC purposes, comprised of:</p> <ul style="list-style-type: none"> <li>a) convictions, whether or not spent</li> <li>b) findings of guilt that did not result in a conviction being recorded</li> <li>c) charges, regardless of status or outcome, including: <ul style="list-style-type: none"> <li>i) pending charges – that is, charges laid but not finalised</li> <li>ii) charges disposed of by a court, or otherwise, other than by way of conviction (for example, withdrawn, set aside or dismissed)</li> <li>iii) charges that led to acquittals or convictions that were quashed or otherwise over-turned on appeal for all offences, irrespective of whether or not they concern</li> </ul> </li> </ul>	<p>This recommendation is supported.</p> <p>NSW law already contains this definition of criminal history for WWCC purposes and supports the need for clarification and standardisation of the definition Australia-wide.</p>

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the person's history as an adult or a child and/or relate to offences outside Australia.	
18. State and territory governments should amend their WWCC laws to require police services to provide screening agencies with records that meet the definition of criminal history records for WWCC purposes and any other available information relating to the circumstances of such offences. 19.	This recommendation is supported and consistent with the existing NSW framework.
20. State and territory governments should amend their WWCC laws to: a) require that relevant disciplinary and/or misconduct information is checked for all WWCC applicants b) include a standard definition of disciplinary and/or misconduct information that encompasses disciplinary action and/or findings of misconduct where the conduct was against, or involved, a child, irrespective of whether this information arises from reportable conduct schemes or other systems or bodies responsible for disciplinary or misconduct proceedings c) require the bodies responsible for the relevant disciplinary and/or misconduct information to notify their respective screening agencies of relevant disciplinary and/ or misconduct information that meets the definition.	This recommendation is supported and consistent with the existing NSW framework.
21. State and territory governments should amend their WWCC laws to respond to records in the same way, specifically that: a) the absence of any relevant criminal history, disciplinary or misconduct information in an applicant's history leads to an automatic grant of a WWCC b) any conviction and/or pending charge in an applicant's criminal history for the following categories of offence leads to an automatic WWCC refusal, provided the applicant was at least 18 years old at the time of the offence: i. murder of a child ii. manslaughter of a child iii. indecent or sexual assault of a child iv. child pornography-related offences v. incest where the victim was a child vi. abduction or kidnapping of a child vii. animal-related sexual offences c) all other relevant criminal, disciplinary or misconduct information should trigger an assessment of the person's suitability for a WWCC (consistent with the risk assessment factors set out below).	This recommendation is supported and consistent with the existing NSW framework.

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<p>22. State and territory governments should amend their WWCC laws to specify that relevant criminal records for the purposes of recommendation 20(c) include but are not limited to the following:</p> <ul style="list-style-type: none"> <li>a) juvenile records and/or non-conviction charges for the offence categories specified in recommendation 20(b)</li> <li>b) sexual offences, regardless of whether the victim was a child and including offences not already covered in recommendation 20(b)</li> <li>c) violent offences, including assaults, arson and other fire-related offences, regardless of whether the victim was a child and including offences not already covered in recommendation 20(b)</li> <li>d) child welfare offences</li> <li>e) offences involving cruelty to animals</li> <li>f) drug offences.</li> </ul>	<p>This recommendation is supported.</p>
<p>23. The Commonwealth Government, through COAG, or a relevant ministerial council, should take a lead role in identifying the specific criminal offences that fall within the categories specified in recommendations 20(b) and 21.</p>	<p>This recommendation is supported.</p>
<p>24. State and territory governments should amend their WWCC laws to specify that the criteria for assessing risk to children include:</p> <ul style="list-style-type: none"> <li>a) the nature, gravity and circumstances of the offence and/or misconduct, and how this is relevant to children or child-related work</li> <li>b) the length of time that has passed since the offence and/or misconduct occurred</li> <li>c) the age of the child</li> <li>d) the age difference between the person and the child</li> <li>e) the person's criminal and/or disciplinary history, including whether there is a pattern of concerning conduct</li> <li>f) all other relevant circumstances in respect of their history and the impact on their suitability to be engaged in child-related work.</li> </ul>	<p>This recommendation is supported and it is noted that the NSW framework is broader than the proposed standard.</p>
<p>25. State and territory governments should amend their WWCC laws to expressly provide that, in weighing up the risk assessment criteria, the paramount consideration must always be the best interests of children, having regard to their safety and protection.</p>	<p>This recommendation is supported and reflects the existing NSW legislation.</p>
<p>26. State and territory governments should amend their WWCC laws to permit WWCC applicants to begin child-related work before the outcome of their application is determined, provided the safeguards listed below are</p>	<p>This recommendation is supported. No change is required as it is consistent with the existing NSW framework.</p>

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<p>introduced.</p> <p><b>Applicants</b></p> <p>a) applicants must submit a WWCC application to the appropriate screening agency before beginning child-related work and not withdraw the application while engaging in child-related work</p> <p>b) applicants must provide a WWCC application receipt to their employers before beginning child-related work</p> <p><b>Other safeguards</b></p> <p>c) employers must cite application receipts, record application numbers and verify applications with the relevant screening agency</p> <p>d) there must be capacity to impose interim bars on applicants where records are identified that may indicate a risk and require further assessment.</p>	
<p>27. State and territory governments that do not have an online WWCC processing system should establish one.</p>	<p>This recommendation is supported. No change is required as NSW already has an online processing system.</p>
<p>28. State and territory governments should process WWCC applications within five working days, and no longer than 21 working days for more complex cases.</p>	<p>NSW supports processing applications within five working days where there are no relevant records that require consideration. Those applications requiring comprehensive risk assessment require significantly longer to complete, on average six months which is currently reflected in the NSW legislation.</p>
<p>29. All state and territory governments should amend their WWCC laws to specify that:</p> <p>a) WWCC decisions are based on the circumstances of the individual and are detached from the employer the person is seeking to work for, or the role or organisation the person is seeking to work in</p> <p>b) the outcome of a WWCC is either that a clearance is issued or it is not; there should be no conditional or different types of clearances</p> <p>c) volunteers and employees are issued with the same type of clearance.</p>	<p>This recommendation is supported. No change is required as it is consistent with the existing NSW framework.</p>
<p>30. All state and territory governments should ensure that any person the subject of an adverse WWCC decision can appeal to a body independent of the WWCC screening agency, but within the same jurisdiction, for a review of the decision, except persons who have been convicted of one of the following categories of offences:</p> <ul style="list-style-type: none"> <li>• murder of a child</li> <li>• indecent or sexual assault of a child</li> <li>• child pornography-related offences</li> </ul>	<p>This recommendation is supported with the exception of the final part which recommends that any person may bring an appeal in which they allege that offences have been mistakenly recorded as applying to that person. Where a person alleges that a charge or conviction has been made in error, this should be addressed separately to the WWCC process.</p> <p>It is noted that NSW has gone further than the Royal Commission's recommendation on limitation of appeal rights by restricting appeal rights for</p>



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<ul style="list-style-type: none"> <li>• incest where the victim was a child</li> </ul> <p>And</p> <ul style="list-style-type: none"> <li>a) received a sentence of full time custody for the conviction, such persons being permanently excluded from an appeal</li> <li>or</li> <li>b) by virtue of that conviction, the person is subject to an order that imposes any control on the person's conduct or movement, or excludes the person from working with children, such persons being excluded from an appeal for the duration of that order.</li> </ul> <p>Notwithstanding the above any person may bring an appeal in which they allege that offences have been mistakenly recorded as applying to that person.</p>	<p>individuals convicted of murder, regardless of the victim's age.</p>
<p>31. Subject to the implementation of the standards set out in this report, all state and territory governments should amend their WWCC laws to enable WWCCs from other jurisdictions to be recognised and accepted.</p>	<p>This recommendation is being considered. NSW supports information sharing but not portability until or unless the schemes in other states and territories are consistent with NSW law.</p>
<p>32. Subject to the commencement of continuous monitoring of national criminal history records, state and territory governments should amend their WWCC laws to specify that:</p> <ul style="list-style-type: none"> <li>a) WWCCs are valid for five years</li> <li>b) employers and WWCC cardholders engaged in child-related work must inform the screening agency when a person commences or ceases being engaged in specific child-related work</li> <li>c) screening agencies are required to notify a person's employer of any change in the person's WWCC status.</li> </ul>	<p>Recommendations 31 a) and c) are supported. No changes are required as they are consistent with the existing NSW framework.</p> <p>Recommendation 31 b) is considered as part of the statutory review of the WWC Act.</p>
<p>33. All state and territory governments should grant screening agencies, or another suitable regulatory body, the statutory power to monitor compliance with WWCC laws</p>	<p>This recommendation is supported. No change is required as it is consistent with the existing NSW framework.</p>
<p>34. All state and territory governments should ensure their WWCC laws include powers to compel the production of relevant information for the purposes of compliance monitoring.</p>	<p>This recommendation is supported. No changes are required as it is consistent with the existing NSW framework.</p>

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<p>35. The Commonwealth, state and territory governments should:</p> <p>a) through COAG, or a relevant ministerial council, adopt the standards and set a timeframe within which all jurisdictions must report back to COAG, or a relevant ministerial council, on implementation</p> <p>b) establish a process whereby changes to the standards or to state and territory schemes need to be agreed to by COAG, or a relevant ministerial council, and must be adopted across all jurisdictions.</p>	<p>This recommendation is being considered in consultation with the Commonwealth through interjurisdictional forums.</p>
<p>36. The Commonwealth, state and territory governments should provide an annual report to COAG, or a relevant ministerial council, for three years following the publication of this report, to be tabled in the parliaments of all nine jurisdictions, detailing their progress in implementing the recommendations in this report and achieving a nationally consistent approach to WWCCs.</p>	<p>This recommendation is being considered in consultation with the Commonwealth through interjurisdictional forums.</p>
<p>37. COAG, or a relevant ministerial council, should ensure a review is made after three years of the publication of this report, of the state and territory governments' progress in achieving consistency across the WWCC schemes, with a view to assessing whether they have implemented the Royal Commission's recommendations.</p>	<p>This recommendation is supported.</p>

## Appendix 2 – List of submissions

	Organisation/name
1.	Aboriginal Child, Family and Community Care State Secretariat (NSW)
2.	Alison James
3.	Anglican Diocese of Sydney
4.	Association of Independent Schools NSW
5.	Australian Education Union (NSW Teachers Federation Branch)
6.	Barnardos Australia
7.	Bible Study Fellowship
8.	Bligh Park Football Club
9.	Catholic Care Diocese of Broken Bay
10.	Catholic Commission for Employment Relations
11.	Catholic Education Commission NSW
12.	Centre for Volunteering
13.	Children's Court of NSW
14.	Confidential
15.	Cricket NSW
16.	Department of Education (Early Childhood Education)
17.	Department of Education (Employment Programs and Screening)
18.	Disabled Surfers Association of Australia
19.	Ed Batten
20.	Eve Clarke
21.	Family and Community Services
22.	Federation of Parents and Citizens Association
23.	Football NSW
24.	Gymnastics NSW
25.	Hamish Neal
26.	Health NSW
27.	Independent Education Union (NSW/ACT Branch)
28.	Information and Privacy Commissioner
29.	Justice NSW
30.	K7 Adventures

31.	Kerry Collins
32.	Kimberley Aguet
33.	Law Society of NSW
34.	Legal Aid NSW
35.	Life Without Barriers
36.	MacKillop Family Services
37.	Momentum Dance Studios
38.	New Street Sydney
39.	Northern NSW Football
40.	NSW Nurses and Midwives Association
41.	NSW Ombudsman
42.	NSW Police Force
43.	NSW Rural Fire Service
44.	Office of Sport
45.	Office of Sport (Hunter Region)
46.	People with Disability Australia Incorporated
47.	Pony Club Association NSW
48.	Rick and Kim Hoswell
49.	Robyn Key
50.	Samaritans Foundation
51.	Scouts Australia
52.	Shane Sherwood
53.	Sharon Osborne
54.	Shellharbour Surf Lifesaving Club
55.	Sport NSW
56.	Sutherland Shire Council
57.	Sutherland Shire Softball Association
58.	Tamil Study Centre Homebush
59.	Women's Legal Service NSW
60.	Various Facebook responses