

Penalty Notice Offences under the Child Protection (Working with Children) Act 2012

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1. Introduction

The Office of the Children's Guardian (OCG) is a statutory agency of the NSW Government. Our principal functions are defined by the *Children's Guardian Act 2019* (CG Act). Our purpose is to regulate and oversee organisations to uphold children and young people's right to be safe. Our functions include administering the Working with Children Check (WWCC) and the legislation under which that scheme operates and providing information and advice and regulating compliance on how organisations can be child safe through implementation of the 10 child safe standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse that have now been legislated as mandatory – free information on being child safe is available on our website www.ocg.nsw.gov.au.

This Consultation Paper is considering a proposal to amend Schedule 2 of the Child Protection (Working with Children) Regulation 2013 (WWC Regulation) to expand the authority of the Children's Guardian to issue penalty infringement notices for a wide range of offences under the Child Protection (Working with Children) Act 2012 (WWC Act).¹

¹The offence provisions under the WWC Act sought to be included in Schedule 2 of the WWC Regulation are listed in Section 3.2 below.

2. The Working with Children Check

The following information provides background to assist you to understand the current proposal.

2.1 Background to the Working with Children Check

In 2000, NSW was the first Australian jurisdiction to implement a WWCC, other States and Territories then followed. The impetus for a WWCC came from the Royal Commission into the NSW Police Service (the Wood Royal Commission) in the 1990s that identified the predatory behaviour of grooming children for sexual purposes.² The Wood Royal Commission recommended a scheme whereby the background of people being employed to work with children could be checked before commencing that work. The *Commission for Children and Young People Act 1998* provided the legal framework for that scheme, known as the WWCC.

2.2 What is a Working with Children Check?

The WWCC involves a National Police Check (criminal history record check) and a review of reportable workplace misconduct.

2.3 What is the purpose of a Working with Children Check?

The WWCC exists to prohibit (bar) persons from working with children where behaviours in their criminal and workplace history indicate a potential risk to the safety of children in workplaces. A

² Royal Commission into the NSW Police Service, Final Report, Vol IV, The Paedophile Inquiry (August 1997): https://media.opengov.nsw.gov.au/pairtree_root/bf/45/ef/d0/9b/3d/4e/7c/a5/eb/96/74/57/17/07/88/obj/RCPS_Report_Volume_4.pdf.

WWCC is not a 'good person' test nor is it a substitute for doing proper probity checking.

2.4 Who requires a Working with Children Check?

A WWCC is a legal requirement for anyone who engages in paid or voluntary child-related work in NSW as stipulated by criteria and definitions in the WWC Act and the WWC Regulation. The legislation also includes exclusions and exemptions from having a WWCC.

2.5 How does the Working with Children Check operate?

The WWCC scheme works to manage risk posed to children by persons in child-related work by providing for them to be removed from child-related work. For it to work effectively, persons seeking to work with children apply online for a WWCC³ and receive an application number. They then have their identity verified at a Service NSW centre, following which a check is run through the Australian Criminal Intelligence Commission (ACIC), which is operated by the Australian Government. The result of a check is either (1) a clearance or (2) an automatic bar or (3) an interim bar (where a risk assessment is conducted on the person, which can result in either a clearance or a bar). The relevant crimes stipulated in the WWC Act determine if the nature of a person's criminal history results in an interim bar or an automatic bar from working with children. The person then provides their application number or clearance number to the organisation employing them.

Employers must make sure that the person they are engaging to work with children or in a child-related role has a valid clearance or application for a WWCC. Employers are required to do this by registering through our website and verifying that the number given to them is valid.

This verification process links the individual to the employer. This is critical as the OCG uses this information to identify and inform employers to remove persons who may subsequently be barred or interim barred from child-related work. Without verification there is no way of identifying where barred workers are engaged in child-related work, and as a consequence, there is no way of advising their employers of the change in their WWCC status.

Changes in verified status come through automated alerts from the NSW Police system. These alerts inform the OCG that a person with a WWCC has been charged with an offence; a risk assessment is then conducted on that offence. In 2020/21 there were more than 5,000 such alerts received. Of those, 516 people were barred from working with children and 552 Interim Bars were imposed.

³ When a person applies for a WWCC they give consent to various disclosures including that their name and details go into the NSW Police system for the five year duration of their check.

3. Compliance with the Working with Children Check Scheme

3.1 Children's Guardian's monitoring and auditing functions

The Children's Guardian actively monitors compliance with the requirements of the WWC Act and WWC Regulation. The OCG ensures employers that engage workers in child-related work:

- register as employers in the WWCC system
- verify all their workers engaged in child-related work who are not subject to an exemption
- keep records of employees who require a Check and when they were verified, and
- do not engage persons in child-related work who are barred or interim barred from working with children.

Ensuring compliance with the WWCC scheme involves the use of a wide range of strategies and monitoring tools to assess levels of compliance and identify potential breaches of the legislation. The strategies and tools used include proactive audits, location visits, and complaint driven investigations.

Enforcement is used as a key tool for addressing conduct which involves directly or indirectly putting children at risk of harm or shows a blatant or persistent disregard for the law.

Enforcement remedies include:

- Administrative actions such as warning letters advising of breaches identified or recommendations to attend education sessions or undertake e-learning.
- Penalty notices (fines) for offences as prescribed by the legislation
- Requiring employers to provide undertakings to conduct themselves in a manner which minimises their risk to children which can be enforced by the Courts
- Prosecution where the matter is referred to Courts for determination and appropriate judgement

3.2 Offence provisions

The WWC Act creates several offences in relation to individuals or organisations to ensure compliance with the provisions of the Act.

The Act creates the following offences *in relation to individuals*:

- Working in a child-related role without a valid WWCC clearance or a current application for a WWCC [Section 8(1)]
- Working in a child-related role while subject to an interim bar [Section 8(2)]
- Residing as an adult person on the same property as an authorised carer, or where a family day care service is provided, without a valid WWCC clearance or a current application for a WWCC [Section 10 (1)]
- Making a statement or furnishing information that the person knows to be false or misleading in an application under the WWC Act or Regulation, or in connection with an inquiry made by the Children's Guardian in relation such an application [Section 45A]

The Act creates the following offences *in relation to organisations*:

- Employing a worker in child-related work if the employer knows or has reasonable cause to believe that the worker does not hold a WWCC or a current application for a WWCC [Section 9 (1)(a)]
- Employing a worker in child-related work if the employer knows or has reasonable cause to believe that the worker is subject to an interim bar [Section 9 (1)(b)]
- Failure to obtain and verify a worker's relevant details with the working with children register, and retaining records, as required, of the worker's relevant details [Section 9A for employers and Section 9AA for licensing authorities]
- (For governing bodies of an organisation) Failure to ensure that a person appointed on a permanent basis to a key position in the organisation that involves child-related work has a valid WWCC clearance [Section 9B (2)]
- (For governing bodies of an organisation) Failure to maintain records, as required, of how the governing body determined that a person appointed on a permanent basis to a key position in the organisation that involves child-related work holds a valid WWCC clearance [Section 9B (4)]
- Failure of a designated agency or approved provider to ensure that an adult person residing on the same property as an authorised carer, or where a family day care service is provided, has a valid WWCC clearance or a current application for a WWCC [Section 10(2)]
- Failure to comply, without reasonable excuse, with the requirement of a notice for production of information issued by the Children's Guardian [Section 40 (2)(a)]
- Providing the Children's Guardian with false or misleading information [Section 40 (2)(b)]

3.3 Penalty Notice Offences under the WWC Act and regulation

The Children's Guardian may issue a penalty infringement notice to a person if it appears to an authorised officer that the person has committed a penalty notice offence. A penalty notice offence is an offence against the WWC Act or Regulation that is prescribed by the regulations as a penalty

notice offence.⁴ Schedule 2 of the WWC Regulation indicates the offences for which a penalty notice may be issued. Currently, the OCG can only issue penalty infringement notices to employers or licensing authorities for failing to obtain and verify a worker's relevant details with the working with children register, and maintain records, as required by the Act, of the worker's relevant details.⁵

⁴See Section 50A of the WWC Act.

⁵Section 9A (6) of the WWC Act for employers and Section 9AA (6) of the WWC Act for licensing authorities.

4. Rationale for regulatory amendments

4.1 Policy objective of the Act

The policy objective of the WWC Act, as set out in Section 3, is to protect children:

- by not permitting certain persons to engage in child-related work, and
- by requiring persons engaged in child-related work to have working with children check clearances.

The safety, welfare, and well-being of children and, in particular, protecting them from child abuse, is the paramount consideration in the operation of this Act.⁶

4.2 Encourage compliance with the provisions of the Act and the Regulation

The OCG conducts an extensive program of learning and development and provides comprehensive materials for individuals and employers regarding their responsibilities under the Act and Regulation.

However, despite these efforts, many employers and individuals remain non-compliant. For the 27 audits finalised between July and December 2021, there were 14 workers found to be working with children without having a WWCC or current application. From the 120 audits conducted during the 2020-21 financial year, 33 workers were identified as working with children without having a WWCC or current application.

Expanding the scope of Schedule 2 to enable the OCG to issue penalty infringement notices as an intermediate enforcement option would provide an effective deterrent, thereby encouraging compliance with the provisions of the WWC Act and Regulation.

⁶Section 4 of the WWC Act.

4.3 Promote consistency in achieving the policy objective of the Act

Currently, there is inconsistency in the authority of the OCG to enforce compliance with the provisions of the Act and Regulation using a staged approach. As set out in Schedule 2 of the WWC Regulation, the OCG can only issue penalty infringement notices to employers or licensing authorities for failing to obtain and verify a worker's relevant details with the working with children register, and maintain records, as required by the Act, of the worker's relevant details.⁷

If a person or organisation commits any other offence under the Act, the Children's Guardian is required to refer the matter to the NSW Police or the Department of Public Prosecutions for prosecution. This is an extreme response in most cases, especially when there have only been one or two instances of a failure to comply with the provisions of the Act. The introduction of an intermediate enforcement option such as a penalty infringement notice would provide a more proportionate response.

Additionally, it is critical to enable the authority of the OCG to adequately address non-compliance with each of the offence provisions listed above. Each provision is equally important to achieve the policy objective of the Act. Therefore, it is important to ensure consistency with respect to the enforcement remedies available to the OCG under the Act and Regulation. For instance, whilst it is important for the OCG to ensure that all employers verify their workers using the WWCC system, it is also critical to enable the OCG to take immediate action if employers continue to engage workers in child-related work once notified that they are barred or interim barred.

4.4 Promote ease of administration in achieving compliance

The limitations of Schedule 2 of the Regulation have a negative impact on the ability of the Children's Guardian to efficiently achieve compliance with the provisions of the WWC Act and Regulation. Prosecution through referral to NSW Police or the Department of Public Prosecutions may be necessary in cases where an individual has demonstrated a pattern of failure to remain compliant despite being subject to other enforcement actions.

However, prosecution is resource intensive, and this may cause delays in addressing non-compliance with the provisions of the WWC Act and Regulation. The introduction of an intermediate enforcement option of being able to issue penalty infringement notices would enable the OCG to take quicker action to achieve full compliance. Additionally, penalty notices may also have the effect of deterring individuals and employers from establishing a pattern of wilful non-compliance, preventing further escalation.

⁷Section 9A (6) of the WWC Act for employers and Section 9AA (6) of the WWC Act for licensing authorities.

5. Comment sought on proposed regulatory amendments

5.1 Should Schedule 2 of the WWC Regulation be amended to expand the authority of the Children's Guardian to issue penalty infringement notices for a wide range of offences under the WWC Act?

Currently, the OCG can only issue penalty infringement notices to employers or licensing authorities for failing to obtain and verify a worker's relevant details with the working with children register, and maintain records, as required by the Act, of the worker's relevant details. The failure of individuals and organisations to comply with the other offence provisions of the Act require direct referral to the NSW Police or the Department of Public Prosecutions for prosecution.

As set out above, this has caused inconsistency in the authority of the OCG to enforce compliance with the provisions of the WWC Act and Regulation using a staged approach. Additionally, the resource intensive nature of prosecution also has the potential to cause delays in addressing non-compliance.

If supported, the proposal would mean that officers authorised by the Children's Guardian may issue penalty infringement notices if individuals and organisations fail to comply with the following provisions of the WWC:

| Legislative Reference (WWC Act) | Offence | Penalties (Schedule 2 WWC Regulation) |
|---------------------------------|----------------------------------------------------------------------------------------------------|---------------------------------------|
| Section 8 (1) | Working in a child-related role without a valid WWCC clearance or a current application for a WWCC | Penalty notice of \$5,500 per offence |
| Section 8 (2) | Working in a child-related role while subject to an interim bar | Penalty notice of \$5,500 per offence |
| Section 9 (1)(a) | Employing a worker in child-related work if the employer knows or has reasonable cause to | Penalty notice of \$5,500 per offence |

believe that the worker does not hold a WWCC or a current application for a WWCC

| | | |
|-------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|
| Section 9 (1)(b) | Employing a worker in child-related work if the employer knows or has reasonable cause to believe that the worker is subject to an interim bar | Penalty notice of \$5,500 per offence |
| Section 9B (2) | Governing body to ensure persons appointed to key positions hold WWCC clearance | Penalty notice of \$1,100 per offence |
| Section 9B (4) | Governing body to ensure that adequate records, as required by the WWC Act, are maintained | Penalty notice of \$1,100 per offence |
| Section 10 (1) | Residing as an adult person on the same property as an authorised carer, or where a family day care service is provided, without a valid WWCC clearance or a current application for a clearance | Penalty notice of \$5,500 per offence |
| Section 10 (2) | Failure of a designated agency or approved provider to ensure that an adult person residing on the same property as an authorised carer, or where a family day care service is provided, has a valid WWCC clearance or a current application for a clearance | Penalty notice of \$5,500 per offence |
| Section 40 (2)(a) | Failure to comply, without reasonable excuse, with the requirement of a notice for production of information issued by the Children's Guardian | Penalty notice of \$5,500 per offence in the case of a corporation and \$1,100 per offence in any other case |
| Section 40 (2)(b) | Providing the Children's Guardian with false or misleading information | Penalty notice of \$5,500 per offence in the case of a corporation and \$1,100 per offence in any other case |
| Section 45A | Making a statement or furnishing information that the person knows to be false or misleading in an Application under the WWC Act or Regulation, or in connection with an inquiry made by the Children's Guardian in relation such an application | Penalty notice of \$275 per offence |

The proposal will:

- Create an effective deterrent, thereby encouraging compliance with the provisions of the Act and Regulation.
- Promote consistency in achieving the policy objective of the Act
- Provide a level-playing field for all organisations providing services to children and young people.
- Promote ease of administration in achieving compliance with the provisions of the Act and Regulation

The OCG seeks your views on whether Schedule 2 of the WWC Regulation should be amended to expand the authority of the Children's Guardian to issue penalty infringement notices for a wide range of offences under the WWC Act as set out above.

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