

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

Discussion paper

3 May 2017



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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 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 WCC 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 (4)A0 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

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

## 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))
<b>Crimes Act 1900</b>	<b>Description of offence</b>	<b>Finding/ outcome</b>
	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))
<b>Crimes (Domestic and Personal Violence) Act 2007</b>	<b>Description of offence</b>	<b>Finding/ outcome</b>
s.13	Stalking (victim under 18)	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(f))
<b>Prevention of Cruelty to Animals Act 1979</b>	<b>Description of offence</b>	<b>Finding/ outcome</b>
s.6	Aggravated cruelty to animals	Whatever the outcome of the proceedings, ie all records: (Sch 1, cl 1(2)(g))
<b>Crimes Act 1900</b>	<b>Description of offence</b>	<b>Finding/ outcome</b>
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)).



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

**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***

<b>Act</b>	<b>Description of offence</b>
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)**

<p>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.</p>	<p>This recommendation is supported in principle.</p>
<p>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.</p>	<p>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.</p>
<p>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>	<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>
<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>	<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>
<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.</p>	<p>This recommendation is supported. No change is required as it is consistent with the existing NSW framework.</p>
<p>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.</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>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> <ul style="list-style-type: none"> <li>i. children under 18 years of age, regardless of their employment status</li> </ul>	<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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<ul style="list-style-type: none"> <li>ii. employers and supervisors of children in a workplace, unless the work is child-related</li> <li>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</li> <li>iv. people who engage in child-related work in the same capacity as the child</li> <li>v. police officers, including members of the Australian Federal Police</li> <li>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:             <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> </li> <li>b) remove all other exemptions and exclusions</li> <li>c) prohibit people who have been denied a WWCC, and subsequently not granted one, from relying on any exemption.</li> </ul>	<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 is 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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<p>the person’s history as an adult or a child and/or relate to offences outside Australia.</p>	
<p>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.</p> <p>19.</p>	<p>This recommendation is supported and consistent with the existing NSW framework.</p>
<p>20. State and territory governments should amend their WWCC laws to:</p> <p>a) require that relevant disciplinary and/or misconduct information is checked for all WWCC applicants</p> <p>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</p> <p>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.</p>	<p>This recommendation is supported and consistent with the existing NSW framework.</p>
<p>21. State and territory governments should amend their WWCC laws to respond to records in the same way, specifically that:</p> <p>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</p> <p>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:</p> <p>i. murder of a child</p> <p>ii. manslaughter of a child</p> <p>iii. indecent or sexual assault of a child</p> <p>iv. child pornography–related offences</p> <p>v. incest where the victim was a child</p> <p>vi. abduction or kidnapping of a child</p> <p>vii. animal-related sexual offences</p> <p>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).</p>	<p>This recommendation is supported and consistent with the existing NSW framework.</p>

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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>