

Mr Michael Evers, AM
c/o Secretariat
Review of the Commission for Children and Young People Act
Communities NSW
GPO Box 7060
SYDNEY NSW 2001

Dear Mr Evers

***Children's Guardian submission to the review of the Commission for
Children and Young People Act 1998 ("the CCYP Act")***

1. About the Children's Guardian

The Children's Guardian is a statutory office, established by s178 of the *Children and Young Persons (Care and Protection) Act 1998* ("the C&YP (C&P) Act").

The Office of the Children's Guardian was for a time merged with the Commission for Children and Young People (CCYP) to form the Office for Children (OFC). The OFC was established to provide shared administrative and financial support to the Children's Guardian and CCYP and its establishment did not affect CCYP and the Children's Guardian in the independent exercise of their statutory functions. The Children's Guardian and CCYP now sit separately within Communities NSW.

The Children's Guardian principal functions under the C&YP (C&P) Act relate to children and young people in out-of-home care (OOHC).

The Children's Guardian accredits designated agencies to provide statutory OOHC (court ordered OOHC) and registers non-designated organisations to provide voluntary OOHC (OOHC arranged by a parent).

The Children's Guardian develops criteria for the accreditation of designated agencies, for the approval of the Minister. Compliance with the NSW OOHC Standards is the principal criterion for accreditation as a designated agency. The OOHC Standards require designated agencies to demonstrate compliance with applicable legislation, including the CCYP Act. In assessing applications for accreditation and reaccreditation, the Children's Guardian assesses whether the agency has systems in place for conducting Working With Children Checks (WWCCs) and for informing CCYP of completed relevant employment proceedings (which feed into the WWCC process).

The Children's Guardian also accredits non-government adoption service providers under the *Adoption Act 2000*. The accreditation criteria for non-government adoption service providers require providers to demonstrate they have systems in place to support WWCCs.

The Children's Guardian also authorises the paid employment of:

- children under the age of 15 in entertainment, exhibition, still photography and door-to-door sales work; and
- children under the age of 16 in modelling work.

There is no overlap of Children's Guardian and CCYP functions or work programs, except for the Children's Guardian's limited compliance monitoring of WWCC requirements at the time organisations seek accreditation as a designated agency or adoption service provider. As outlined at section 15 of this submission, there is potential for the Children's Guardian, acting on behalf of CCYP, to take on a more active role in WWCC compliance monitoring.

2. CCYP's policy, advocacy, research and education functions

The CCYP's advocacy role, underpinned by the participation of children and young people in identifying those issues that are most important for them, is of critical importance. CCYP's policy, research and education functions are necessary to support CCYP effectively advocating for children and young people.

CCYP has produced quality evidence based research, some of which has assisted in the development of the Children's Guardian's regulatory framework. For example, CCYP research on children's employment has informed the development of the Children's Guardian's regulatory framework for the employment of children in the entertainment, exhibition, modelling, still photography and door-to-door sales industries. CCYP research on the participation of children and young people in decisions that affect them has informed the Children's Guardian's approach to monitoring the participation of children and young people in OOHC case planning and review.

When CCYP was established, it was envisaged that it would have a strong focus on the interests and needs of vulnerable children. This is reflected in s12 of the CCYP Act.

Peak organisations such as NCOSS and the Association of Children's Welfare Agencies (ACWA) anticipated that CCYP would focus more attention on vulnerable children in the child protection system, particularly as the 1997 *Royal Commission into the NSW Police Service: Paedophile Inquiry* provided the impetus for CCYP's establishment.

Since CCYP was established, Parliament has given the Ombudsman extensive powers in respect of the child protection system. The Children's

Guardian was also established with a strong mandate to promote the best interests of children and young people in OOHC.

Given the functions and expertise of these independent agencies, it is appropriate that CCYP has not focused its limited resources on vulnerable children within the child protection system, although it has made valuable contributions to the *Special Commission of Inquiry into Child Protection Services in New South Wales* and *Keep Them Safe*. It is important that CCYP does not duplicate the work of the Children's Guardian or Ombudsman, a point which was made by the *Special Commission of Inquiry*.

Whilst it is important that CCYP provides government with policy and research expertise relevant to government priorities, CCYP must also maintain the ability to work with children and young people in identifying, and advocating on, the issues that are important to them.

The CCYP Act supports the ability of the CCYP Commissioner to independently advocate for children and young people in NSW by requiring CCYP to report directly to Parliament (Part 5 of the CCYP Act), be accountable to a Parliamentary Joint Committee (Part 6 of the CCYP Act), and by imposing restrictions on the appointment and termination of the CCYP Commissioner (section 5 of the CCYP Act).

3. CCYP's Working With Children Check role

CCYP is responsible for the regulation of WWCCs, with its responsibility for conducting checks as an Approved Screening Agency (ASA) having recently been devolved to Communities NSW, which is the ASA for checks previously conducted by CCYP and Sport and Recreation.

The Final Report of the *Royal Commission into the NSW Police Service: Paedophile Inquiry* emphasised the importance of the proposed Children's Commission having independence from departments and agencies delivering services, so that it could report fearlessly and objectively on matters within its field.

The CCYP submission to the recent *Special Commission of Inquiry into Child Protection Services in New South Wales* stated that advocacy, regulating and complaints handling are distinct functions which do not appropriately sit in the same agency, noting that regulatory bodies required a balanced view of the system, with consideration being given to the economic realities and the range of stakeholders within that system. An advocate for children is not so constrained.

The WWCC functions of CCYP are regulatory in nature.

When the CCYP Act was first introduced, and then reviewed in 2004, organisations such as NCOSS and ACWA opposed CCYP having the WWCC

function, as they believed it to be inconsistent with, and a distraction from, CCYP's core advocacy, policy, education and research functions.

The tension between CCYP's independent advocacy role and its administering the WWCC regime is apparent on the face of the CCYP Act. Whilst CCYP is an independent statutory body that reports directly to a Parliamentary Committee, s36(2) of the CCYP Act provides that CCYP is subject to written directions of the Minister in the exercise of its background checking functions, with procedures and standards for background checking also ultimately a matter for the Minister (s35 CCYP Act) on the advice of CCYP.

Some of the debate over the years around the scope of WWCCs has focused on cost issues. Consideration should be given as to whether CCYP is able to effectively advocate for a background checking regime that is in the best interest of children, whilst it is required to consider a much broader range of factors and interests in advising on, and administering, the WWCC regime.

The current combination of advocacy and regulatory functions in CCYP increases the risk of CCYP's advocacy role being compromised or CCYP's advocacy role driving its regulatory functions. The review should consider how this tension may be best managed.

4. "Accreditation model" for WWCCs

CCYP has kindly briefed my office on some proposed elements of an "accreditation model" for WWCCs, which I understand will be put forward for consideration in its submission to the review.

I would suggest that, if such a model is adopted, it is not described in terms of accreditation.

Accreditation is commonly understood to involve the independent certification of a person's or organisation's compliance with standards. The proposed model involves a person who wishes to work with children being subject to a relatively simple check, rather than a broader standards-based assessment of their suitability to work with children.

Suggesting individuals are "accredited" to work with children may overstate the benefits of the WWCC and lead some employers to conclude that other probity/suitability assessments for particular positions are not necessary.

The model under consideration appears to be a licensing/certification model, rather than an accreditation model.

NSW and South Australia are the only Australian jurisdictions that conduct point in time WWCCs, with Queensland, Victoria, WA and the Northern Territory all employing a licensing/certification model where individuals are

certified to work for children for a period of time (2 to 5 years) before an application must be made for certification to be reissued.

Such a model would address many of the inefficiencies of the current NSW position-specific model, including the need for rechecking whenever an employee moves to another child-related position. Rechecking is a significant issue for the OOHC sector, where there are relatively high levels of mobility within and between OOHC providers.

The position specific model has also not allowed for the screening of persons when their duties, rather than their position, changes. For example, a respite service that has traditionally catered to adults with a disability may expand its services to provide respite for foster carers. Whilst employees of that organisation have not changed positions or job descriptions, they may now sometimes provide respite services for children. The current system does not support WWCCs in such cases.

The adoption of a licensing/certification model would be consistent with recommendation 10.1 of the recent Productivity Commission Research Report, *Contribution of the Not-for-Profit Sector*, which provides:

“Australian governments should introduce a system of ‘Working with Vulnerable People Checks’ that provides for checks to be portable between organisations for a designated time period.”

It also aligns with the government’s 2009 *Non Government Organisation Red Tape Reduction Report* and the NSW State Plan priority to help build a more effective NGO sector by reducing administrative red tape.

However, it needs to be acknowledged that a move towards a licensing/certification model means the WWCC only assesses the general risk of a person, rather than the risk of that person being employed by a particular organisation in a particular position.

The current AWARE model used in the background checking component of the WWCC assesses the applicant, the employing organisation and the position.

However, in practice only the assessment of the person is extensive and ASAs appear to have limited contact with individual employers and give little consideration to the particular position in risk assessments. The benefits of a licensing/certification model, particularly in terms of portability, timing of checks and consistency in WWCC decision making, probably outweigh the cost of moving away from ASAs conducting checks with reference to specific organisations and positions.

The Children’s Guardian is also of the view that individual employers need to take responsibility for assessing the suitability of persons for particular positions, with the WWCC just one component of a broader assessment.

CCYP has suggested that a WWCC that considers broad criminal history information can replace a probity check based on national criminal record information. The Children's Guardian disagrees with this for the reasons outlined at section 10 of this submission.

5. Centralising WWCC operational responsibilities

The Auditor-General's 2009 Performance Audit, *Working With Children Check: NSW Commission for Children and Young People*, found risk assessments are not always consistent.

Improved consistency in risk assessment will offer greater assurance that risks to children are being appropriately identified and managed.

The current system of multiple ASAs increases the likelihood of inconsistency in decision making. The Ombudsman has recently held probity discussions with Human Services agencies, which identified the need for improved consistency of practice in making assessments as to a person's suitability for employment. The Ombudsman suggested there may be merit in one organisation conducting checks.

A move towards a licensing/certification WWCC which assesses risk generally, rather than with reference to a particular position, should enable a single agency to conduct WWCCs, as occurs in other Australian jurisdictions that operate such systems.

Establishing a single WWCC body is also likely to generate significant savings, as multiple ASA systems would no longer need to be maintained. These savings should be reinvested in improving other aspects of the WWCC regime.

6. WWCC body to determine suitability for employment, subject to judicial review

The Act currently prohibits persons convicted of serious sex offences, the murder of a child or a child-related personal violence offence, as well as persons required to register with police under the *Child Protection (Offenders Registration) Act 2000*, from being employed in child-related employment. CCYP, the Industrial Relations Commission (IRC) and the Administrative Decisions Tribunal (ADT) may exempt such persons from the prohibition if they are satisfied the person does not pose a risk to the safety of children.

However, the WWCC covers a broader range of matters than the prohibited person framework. An employer may employ a non-prohibited person, even if that person is subject to an adverse risk assessment. It is understood that approximately 20% of preferred applicants estimated to present significant risk are employed in child-related employment. This is of particular concern, particularly as employers do not have access to all of the information

considered by ASAs in assessing risk, making it more difficult to manage that risk within the workplace.

Licensing/certification systems in other jurisdictions do not permit employers to employ a person who has not been certified to work with children.

It is recommended that the WWCC body, rather than employers, have responsibility for determining who may work with children.

The decision of the WWCC body should be subject to administrative review. The current factors to be considered in determining an application for review of a person's prohibited person status appear appropriate, although consideration might be given to having only one review body (beyond internal review arrangements). A decision to issue or not issue certification to work with children appears to be an administrative decision appropriately reviewable by the ADT, rather than the IRC.

7. Offences considered in conducting a WWCC

The current check only considers a narrow range of offences that, whilst important, do not capture all offending behaviour that may pose a risk to child safety.

Research into sexual offending behaviour confirms that general criminality is one of the factors with the strongest correlation with sexual offending.

It is of concern that many organisations have dispensed with other probity checks where persons are subject to WWCCs, which means a range of risks to children or other employment risks may not be identified.

For example, drug supply offences are not considered in a WWCC, although the provision of drugs to children is commonly used by child sex offenders in child grooming. The Victorian scheme recognises the possible risk posed by persons who have committed serious drug related offences. Broader violence offences and some fraud offences may also be indicative of risk.

The Children's Guardian supports the CCYP submission that a person's general criminal record (including spent convictions and charges) is considered as part of the WWCC process. The three-tier model proposed by CCYP seems reasonable, subject to there being a strong evidence base for including relevant offences in tier 1 and tier 2 and clear guidelines on how discretion is to be exercised in granting/refusing certification for tier 2 and tier 3 matters.

Whilst general criminal intelligence should not be considered in assessing risk, consideration should be given to the Queensland model which allows some allegations of serious child-related offending to be considered where the child was unwilling or unable to support criminal proceedings against the alleged offender.

8. Apprehended Violence Orders and Relevant Employment Proceedings (REPs)

The Children's Guardian understands there are some equity/relevance concerns about the use of AVO information in WWCCs, but has insufficient knowledge of the AVO system to have a view on how AVOs should be integrated with any licensing/certification system.

Most WWCCs that operate in Australian jurisdictions do not consider disciplinary proceedings arising from allegations of relevant conduct.

In Queensland, disciplinary information from professional organisations associated with teachers, childcare service providers, foster carers, nurses, midwives and certain health practitioners is considered.

One of the strengths of the NSW system is that it considers broader disciplinary information. The Auditor-General found REP records have been found to be a useful tool in identifying people who may pose a risk to children.

However, there appears to be some confusion with the way that disciplinary matters are reported to CCYP under the CCYP Act and to the Ombudsman under Part 3A of the *Ombudsman Act*. This is apparent from a review of one large OOHC provider's systems for responding to allegations of reportable conduct. The review should consider opportunities for greater alignment between these two systems.

Disciplinary investigations may take many months, or even longer, to complete. Investigations may be prolonged where the allegations are particularly serious, where there are multiple allegations, or where there are multiple persons making allegations. Persons subject to such allegations are more likely to be assessed as posing a risk to child safety when the disciplinary process is complete (at which time, relevant completed proceedings are reported to CCYP).

Under current arrangements, a person may not be assessed as a risk whilst the disciplinary investigation is on foot. Consideration should be given to the WWCC body being provided with information on when REPs commence, as well as when they are completed. Having regard to the nature of the allegations, the WWCC body might refuse to certify a person to work with children pending the completion of the proceedings. The WWCC body may need to hold discussions with the NSW Police Force about refusing certification on such ground, so as not to prejudice any possible criminal proceedings.

It appears that some relevant minor matters are being reported to CCYP and CCYP is required to include these on its REP database, with no capacity to remove such matters from consideration in future risk assessments.

The Children's Guardian is aware of some relatively minor matters involving foster carers having been reported to CCYP, which may have long term effects on the ability of those carers to work with children. This was recognised by the *Special Commission of Inquiry into Child Protection Services in New South Wales*, which found:

"The low threshold for reportable conduct and the requirements of the Code of Conduct governing carers catch what may be considered reasonable responses to sometimes challenging behaviour by children and young persons."

CCYP should already be able to filter out many trivial matters under class and kind arrangements permitted under the CCYP Act, but the WWCC body should also have the capacity to remove reported matters from the system where they have been assessed as not indicative of risk (although caution would need to be exercised in doing this as some matters, if repeated, may indicate risk).

The Children's Guardian also notes the recent comments of the *Special Commission of Inquiry* concerning the types of REP findings used in background checking:

"The Inquiry is of the view that these findings [not sustained - insufficient evidence' and 'unable to determine' findings] do not serve any useful purpose, and that the available formal findings should be confined to "sustained", "not sustained" and "not reportable conduct". Decisions formulated in terms of "insufficient evidence" or "unable to determine" are in effect, non decisions, which do not have any legitimate precedent elsewhere. Having regard to the balance of proof, in most, if not all, instances a decision should be capable of being made that will also take into account the best interests of the child principle."

It is understood that CCYP has concerns that a WWCC body is more likely to be exposed to successful administrative review applications for REP matters under a licensing/certification system where the WWCC body determines eligibility to work with children, rather than providing the employer with a risk assessment.

Adoption of Commissioner Wood's criteria for classifying REPs would reduce the likelihood of refused certifications based on REP evidence being brought to the ADT.

WWCC legislation should also require the ADT to conform to the best interests of the child principle in determining review applications relevant to the WWCC, as it does in determining applications for reviews of decisions to revoke the authorisation of a person as an authorised carer. As pointed out by the ADT in *QB v Minister for Community Services* (2005) NSW ADT 89:

“It is almost trite to observe that cases such as this present very difficult evidentiary issues and that applicants in such matters have heavy evidentiary burdens to discharge, even on the balance of probabilities. This is because the principles to be applied require decision-makers – the Director-General in this case – to give ‘paramount consideration’ to the safety, welfare and well-being of children in the care of foster parents. As a simple matter of policy, the Director-General, and this Tribunal when reviewing the Director General’s decisions are required, where there is a conflict, to place the interests of children involved in such proceedings above those of any carer or foster parent.”

The approach taken by the ADT in applying the best interests principle should allow REP information to be appropriately considered in determining whether to certify a person to work with children.

9. Post-certification offences, REPs and AVOs

As noted by the Auditor-General, once a WWCC is conducted there is no guarantee that an employer will be made aware of post-check charges, convictions, REPs or AVOs.

The risk to children associated with such arrangements is significant – for example, in 2007/08 Queensland cancelled 185 blue cards (cards certifying a person may work with children) and further suspended 65 cards after charges of serious child-related sex and pornography offences were laid against card holders.

In jurisdictions with certification systems, Police Forces provide the WWCC body with updates of charges and convictions laid against persons certified to work with children. In NSW, similar arrangements have recently been introduced for self-employed persons issued with certificates by CCYP.

It will be necessary to establish a link between the WWCC register and the NSW COPS system to ensure post-certification charges and convictions are provided to the WWCC body, which may then reassess risk. New REPs/AVOs would need to be similarly considered.

The WWCC body should have the power to cancel certification, requiring termination from a child-related position, or suspend certification, requiring that the person not be employed in child-related employment during the period of the suspension.

10. Integration of WWCC and broader employment checking

The introduction of the WWCC led to some employers dispensing with broader criminal record checks. This is of concern as a broader criminal record check will identify risks associated with a person's employment that will not be identified in a WWCC.

For example, in the OOH system clause 20 of the *Children and Young Persons (Care and Protection) Regulation 2000* makes it clear that designated agencies that authorise carers may conduct national criminal record checks in respect of potential carers, in addition to WWCCs.

Community Services entered into an arrangement with CCYP for CCYP to obtain broader criminal history information from CrimTrac for the purpose of assessing the suitability of potential Community Services authorised carers and employees. CCYP assesses the WWCC information and provides Community Services with a WWCC risk estimate and the broader criminal record information for its own assessment. Spent conviction information may be withheld in accordance with the *Criminal Records Act 1991* and inter-jurisdictional agreements on the use of spent conviction information. There is a cost to CCYP in removing spent conviction and charge material from the information passed onto Community Services.

Other ASAs may also obtain broader criminal record information with a WWCC and paid government employees who work with children are subject to a WWCC and broader national criminal record check.

There are no such arrangements in place for non-government agencies, which must separately seek national criminal record check information at a cost of \$53 per check.

The cost of the WWCC body filtering out spent conviction and other information that cannot be passed onto employers would presumably be much less than the \$53 cost of a separate check. It is recommended, for equity reasons, that the WWCC body provide such services to the non-government sector and negotiate with CrimTrac to support such an arrangement. Its costs could be recovered if there is a move towards employers/employees bearing some of the costs of WWCCs, which seems likely under a licensing/certification model that would allow certification to be granted independent of a person being considered for employment in a specific position by a specific employer.

CCYP has suggested that the consideration of a person's full criminal record as part of a WWCC will eliminate the need for separate probity checking. In many cases this will not be the case, as the WWCC will only assess child-related risks, not all of the risks that might need to be considered in appointing a person to a particular position. For example, a position in a non-government OOH provider may involve duties with children and in administering financial accounts. The weight attached to offences that would be considered in determining a person's suitability to manage finances would

be different to the weight attached to the offences under the WWCC framework.

If a person is granted certification to work with children and this is considered to be sufficient evidence of broader suitability for employment, the employer will not be presented with the details of any offences considered by the WWCC body or be able to consider that information in assessing non-child related risks.

In many cases, an employer will benefit from access to broader national criminal record information and the cost of accessing this information would be reduced if it could be accessed through CCYP, parallel with the WWCC process, rather than through the payment of a fee for a separate national criminal record check.

11. Timing of checks and impact on employment whilst a check is pending

Over 90% of WWCCs are currently completed in 10 working days, but a small proportion of checks may take several weeks or months, delaying the employment of persons who may subsequently be assessed as not posing a risk.

If a person could apply for certification, independent of being the preferred applicant for a particular position, then this would reduce delays in getting some people into employment.

Discussions with CCYP suggest that a person might be able to be employed, pending determination of the application for certification to work with children – ie: they would have to show the employer that they had applied for certification and their employment would be terminated if a decision were subsequently made not to certify them to work with children.

The Children's Guardian would be concerned with a system that supported potentially high risk persons working with vulnerable children in the OOHC whilst background checking was being completed, particularly as a delay in completing a WWCC suggests there are offences or other matters that need to be considered. The broader community may also have concerns about a system that allows persons to work with children before certification takes place.

It is suggested that some of the resources likely to be freed up from moving to a licensing/certification system are invested in speeding up the processing of assessments, with employment in child-related employment not to be offered until certification is obtained.

12. Types of employment where a check is required

This section of the submission is confined to types of employment where the Children's Guardian has a regulatory role.

OOHC – authorised carers and employees

Section 33 of the CCYP Act recognises “employment involving fostering or other child care” as child-related employment for the purposes of the Act.

The “other child care” definition appears sufficiently broad to extend to all statutory, supported and voluntary out-of-home care arrangements under the C&YP(C&P) Act.

Section 33 also defines the performance of the duties of an authorised carer under the C&YP(C&P) Act as “employment” for the purposes of the Act - most authorised carers are not “employed” within the common meaning of the term.

The terms “foster care” and “foster carer” are used in the CCYP Act, although “fostering” has not been legislatively defined under care and protection legislation since the repeal of relevant provisions of the *Children (Care and Protection) Act 1987*.

The terms “foster carer” and “authorised carer” are not interchangeable – foster care refers to a particular type of care arrangement (statutory care provided by a non-relative carer in their own home), whilst an authorised carer is defined with reference to their powers, duties and responsibilities in providing for the day to day care of children and young people in statutory out-of-home care.

Relative/kinship carers, principal officers of designated agencies and some residential care workers may also be “authorised carers” under the C&YP(C&P) Act. There are also persons employed by OOHC agencies who have direct unsupervised access to children and young people who are not authorised carers under the C&YP(C&P) Act.

It is recommended that the language used to describe certain OOHC arrangements under the CCYP Act is modernised to reflect arrangements under the C&YP(C&P) Act. Community Services and the Children's Guardian should be consulted in finalising appropriate modifications in this area.

The Act should apply to persons employed by organisations that arrange or provide OOHC (subject to relevant direct contact and supervision requirements being met). Under the C&YP(C&P) Act, statutory OOHC organisations “arrange” care and voluntary OOHC organisations generally “provide” care (amending legislation that clearly distinguishes between organisations that arrange and provide voluntary OOHC will be introduced in the Spring Session).

Whilst the CCYP Act makes it clear that authorisation of a carer is employment for the purposes of the Act, the Act does not define who the employer is in such arrangements as none of the three limbs of the definition of employer at s33 of the Act apply to carer authorisations (note there is no contract to perform work).

The CCYP Act should make it clear that the designated agency making the authorisation is the employer of the authorised carer for the purposes of the Act.

Clauses 20A and 20B of the C&YP(C&P) Regulation permit Human Services/ a designated agency to authorise employees of another organisation to provide statutory OOHC to children for whom they have supervisory responsibility. However, those clauses prevent the authorisation of a carer attached to another organisation unless that organisation has informed Community Services/the designated agency that it has carried out background checking under the CCYP Act and done anything else it is required to do under the Act in relation to the authorisation (ie: sought prohibited employment declarations).

These provisions were introduced to prevent unnecessary double checking of persons authorised in this way, but there are some concerns that this may result in some carers being authorised without ever having been checked and that the regulations may not be the appropriate vehicle for managing the double checking issue. Crown Solicitor's advice is being sought on these issues and will be provided to the review when available.

Adult persons residing with authorised carers

When a child in OOHC is placed with an authorised carer, there may be other adult persons residing with the authorised carer (eg: a spouse, adult child or lodger).

The failure to subject such persons to WWCCs was a significant weakness in the WWCC framework, which was addressed by the proclamation of s45 of the Act earlier this year.

Section 45 should be retained, except that s45(3)(a) should simply refer to "care", rather than "foster care".

Employees of adoption service providers and prospective adopting parents

Relevant employees of adoption service providers under the *Adoption Act 2000* would appear to be covered under paragraphs (a)(i) or (xi) of the CCYP Act's definition of child-related employment.

However, the CCYP Act does not extend to prospective adoptive parents (unless they were authorised as an authorised carer for a child in OOHC awaiting adoption). Community Services has previously called for prospective adoptive parents to be subject to WWCCs and the Children's Guardian, as a

regulator of non-government adoption service providers, supports the Community Services position.

Principal officers of designated agencies and adoption service providers

Whilst most persons involved in the provision of OOHC must be engaged in employment “that primarily involves direct contact with children where that contact is not directly supervised by a person having the capacity to direct the person in the course of the employment”, certain classes of person do not need to satisfy this test to have their employment classified as “child-related employment”. These classes of person include:

- persons employed as the principal officer of a designated agency within the meaning of the C&YP(C&P) Act; and
- persons employed as the principal officer of an accredited adoption service provider within the meaning of the *Adoption Act 2000*.

The CCYP Act was recently amended to recognise that these persons, who exert considerable influence within the organisation and frequently authorise the employment of agency staff, should be subject to a WWCC. These provisions are strongly supported.

Employment in entertainment venues where the clientele is primarily children

CCYP is understood to have concerns about the scope of employment arrangements captured under this limb of the current definition of child-related employment.

The Children’s Guardian has a regulatory role in authorising the paid employment of children under the age of 15 in the entertainment industry, to ensure that child protection issues are addressed in that employment.

The Children’s Guardian would be concerned at any proposal to remove such employment arrangements from the WWCC regulatory framework as it may allow persons who pose a risk to child safety to be employed with the children whose employment is subject to regulation by the Children’s Guardian.

If there are definitional concerns, these might be addressed by more precisely specifying the types of employment that should be regulated (eg: children’s activity centres, amusement parks, circuses, etc).

Volunteers

Whilst volunteers must submit prohibited employment declarations, the majority of volunteers are not required to undergo a WWCC, even though they may do the same work and pose the same risks to children as paid employees.

Organisations regulated by the Children’s Guardian, such as Centacare, Anglicare and Life Without Barriers, have previously raised concerns about the lack of background checking for volunteers. There is a strong policy

rationale for requiring volunteers who have unsupervised contact with vulnerable children in all forms of OOHC to undergo WWCCs.

It is suggested that government consider meeting/subsidising WWCC costs for relevant volunteers so as not to discourage persons from volunteering.

Students

The Act provides that employment includes undertaking practical training as part of an educational or vocational course, but s37(c)(i) appears to confine mandatory background checking to “child-related employment of a student that involves working in the Department of Human Services”.

Non-government out-of-home care agencies may take on students and, in some circumstances, students may have direct unsupervised contact with children and young people. There are equity, as well as child protection issues, in providing background checks for students working with Human Services, but not for those working with non-government agencies.

Whilst tertiary educational institutions may require some students to undertake a national criminal record check, it would seem appropriate to conduct background checking under the CCYP Act in respect of students who have direct unsupervised contact with children and young people.

13. Who pays for WWCCs?

Government currently fully funds the WWCC and the Children’s Guardian would be concerned if WWCC costs were transferred to non-government OOHC and adoption service providers, requiring them to divert resources from direct service delivery.

If the WWCC continues to be sought at the time a person is being considered for employment (including being considered for authorisation as an authorised carer), then government can continue to meet WWCC costs.

However, if a WWCC may be sought at other times (eg: by a person who wishes to apply for child-related employment in the future), then it is likely that costs will be born by the individual. An employer might subsequently reimburse out-of-pocket costs.

There may be some argument for transferring the cost of a WWCC to persons who are seeking paid child-related employment and these persons may be able to claim a taxation rebate for those costs. However, authorised carers who receive a limited allowance for caring for a child full time, and volunteers, should be reimbursed by government for any out-of-pocket costs they might incur.

14. Promoting compliance – a card or electronic system?

There is the potential for card systems to be circumvented by fraud. Also, a card may be difficult to recall if certification is cancelled.

Consideration should be given to establishing an electronic database of persons authorised to work with children, each of whom would be given a unique identifier. Employers who wish to employ persons in child-related employment could register with the WWCC body and access the database to confirm information that a person is certified to work with children.

The Children's Guardian has recently commissioned the NSW Department of Services, Technology and Administration (DSTA) to develop the Government Licensing System to provide a database of all licensed voluntary out-of-home care providers and children who have received voluntary out-of-home care (each child is effectively treated as a licensee, with their details kept in a limited access register).

It is recommended that the review team consult DSTA to determine if the Government Licensing System might be adapted to provide a database of persons authorised to work with children.

15. Compliance monitoring and education/training about WWCC requirements

Compliance monitoring of, and education/training about, WWCC requirements are currently the responsibility of CCYP. The Auditor-General has noted CCYP does not effectively promote awareness or monitor compliance with the WWCC.

There is the potential for some funding/regulatory bodies, including the Children's Guardian, to promote and monitor compliance on CCYP's behalf. Whilst CCYP does not have a formal program for visiting child-related employers, many government funding bodies/regulators do.

Government funding bodies/regulators can support CCYP's compliance role in a number of ways. For example, WWCC requirements can be integrated with funding agreements (as is the case with Community Services funded agencies), industry Codes of Practice or standards. As noted at section 1 of this submission, the NSW OOHC Standards require designated agencies to demonstrate compliance with applicable legislation, including the CCYP Act and Children's Guardian's accreditation officers look at whether designated agencies have systems in place to support background checking, prohibited employment declarations and the submission of relevant disciplinary information to the Ombudsman and CCYP.

Whilst agencies only apply for accreditation every 3 to 5 years, the Children's Guardian visits designated agencies that provide statutory OOHC (and some voluntary OOHC) to conduct Case File Audits and discuss issues associated with their accreditation.

It would be possible, during annual visits to designated agencies, for the Children's Guardian to conduct a simple audit of WWCC systems if CCYP provided a basic audit tool.

The Children's Guardian will be developing an audit program for voluntary OOHC in 2011, although the audit program will not be as detailed, or visits so frequent, for organisations that only provide VOOHC. Nevertheless, the Children's Guardian and CCYP could discuss how WWCC systems might be audited during such a visit.

Whilst the Children's Guardian would support entering into an arrangement with CCYP to conduct compliance audits of WWCC requirements during its visits, the CCYP Act should continue to make it clear that compliance monitoring remains a CCYP responsibility.

Obligations that have, to date, not been well met by CCYP should not be transferred to other organisations. Rather CCYP should be able to negotiate with other organisations for them to conduct compliance monitoring on its behalf.

CCYP would still need to have a compliance monitoring capacity for employers who could not be monitored by funding/regulatory bodies.

Funding bodies/regulators should not take on the burden of educating/training employers about WWCC requirements. CCYP should retain this role and make use of industry networks/conferences to deliver information sessions on WWCC requirements, as well as providing information on its website and conducting targeted campaigns for particular sectors/employers where understanding of requirements or compliance is a concern.

16. Information sharing constraints

Funding bodies/regulators are only likely to be willing to assist CCYP in compliance monitoring if CCYP shares information it holds about non-compliant organisations that they fund/regulate.

CCYP has wanted to be advised of compliance issues identified by the Children's Guardian but has not been willing to commit to informing the Children's Guardian of any WWCC concerns CCYP may have about organisations regulated by the Children's Guardian.

If the OOHC Standards developed by the Children's Guardian are to require compliance with WWCC requirements, which CCYP supports, then the Children's Guardian believes it is reasonable for CCYP to advise it when it becomes aware of a designated agency breaching those requirements.

In previous discussions, CCYP has expressed concern that the Children's Guardian might take inappropriate enforcement action against a designated

agency if advised of a WWCC breach. Whilst the Children's Guardian can impose conditions on an agency that particular breaches are remedied or, in extreme cases, reduce an accreditation period or suspend or cancel accreditation, the Children's Guardian would never take enforcement action in respect of a WWCC matter that was not supported by CCYP.

There is the potential for CCYP to improve compliance with WWCC requirements by requesting that the Children's Guardian consider particular enforcement action in response to an OOHC provider's breach of those requirements.

Recent CCYP/Children's Guardian discussions about the Children's Guardian assisting in WWCC compliance monitoring and information exchange have been much more positive, although CCYP has expressed concerns that sharing information about WWCC compliance may be constrained by s48B of the CCYP Act.

It is recommended that the review consider whether s48B does constrain the exchange of such information and, if so, propose a solution that would allow CCYP to exchange information about an employer's compliance with WWCC requirements with any relevant government funding/regulatory bodies.

I hope these comments are of assistance. If you have any queries, please do not hesitate to contact David Hunt of the Children's Guardian on 0423 077 277.

Yours sincerely



Kerryn Boland
Children's Guardian

2/6/10