

Issues of concern: Issues related to contacting complainants who have been child victims of sexual assault within the WWCC process. Paper 1.

Executive Summary

Introduction

The Office of the Children’s Guardian (OCG) is responsible for the administration of the NSW Working with Children Check (WWCC). The WWCC involves a national criminal history check and a review of findings of workplace misconduct. A WWCC is either a clearance to work with children in a paid or unpaid capacity for 5 years or is a bar against working with children. The WWCC is an important part of the NSW Government strategy to keep children safe.

The Case in Question

Evidence of relevant past conduct is required to administer the WWCC. The OCG declined a WWCC clearance for a person who had been subject of a past complaint of child sexual assault which resulted in criminal charges and prosecution. Before the prosecution process was completed the complainant withdrew as (for reasons not specified to the authors) she was unable to continue. At a time subsequent to this the alleged offender applied for a WWCC clearance. While initially not granted clearance due to the original complaint, investigation and criminal charges and unfinalised prosecution the person was ultimately granted a clearance following an appeal process. The critical issue in this circumstance was the unavailability of evidence from the complainant beyond the initial complaint which had not been tested in a Court.

In the appeal judgement, the Court identified a number of types of evidence which may have been helpful if made available. This included information regarding reasons for the withdrawal from prosecution process by the complainant as well as other information from the complainant.

The OCG had sought advice from the authors regarding the potential of causing distress and “trauma” by contacting complainants in these and similar circumstances.

The Process

A literature review yielded no evidence of impact - positive or negative – as a result of contacting a complainant after any period of time (shortly after through to historic) following the initial complaint. Anecdotal and practice experience was cited where later contact was – in the main – positive. Consideration of this matter taking in to account research concerning *motivation for disclosure of child sexual assault* and the *ethics of contact versus non-contact* identified the following:

- There is a risk that failing to contact a complainant in these circumstances might be as distressing as contacting without care for their wellbeing,
- It could be distressing for a complainant to discover the person about whose sexual abuse behaviour they complained had been granted a WWCC clearance,
- There could be an amplified negative reaction should they discover this in the context of a reported re-offense by the same offender.

A Considered Approach

Although contact with a complainant in such circumstances could be considered on a case-by-case basis, it is clear that some concerns cannot be ignored. As stated above, no research evidence was found in regards to flow-on effects from contacting complainants or victims (positive or negative). Anecdotal evidence is presented by the authors’ in which they suggest the risk of causing distress could be mediated by a process

which ensures support for the complainant. Without a complainant wellbeing process in place, the contact could be problematic and be detrimental to the complainant.

Record keeping by all NSW Government Agencies may need to improve. In the case example provided, the authors' considered that the absence of record-keeping by the ODPP in relation to the reasons for the complainant's withdrawal from proceedings could impact upon the well-being of a complainant should later contact be considered with said complainant in a WWCC challenge situation.

Any legislative impediment to obtaining relevant records should be addressed; for example, if a complainant had been assessed as eligible for Victims of Crime Compensation. In these circumstances, the use of records may strengthen the case being made for refusal of a WWCC application. Finally, where victim-focused services have in the past had a relationship with the complainant they may assist in the facilitation of a 'safer' process in gaining approval to use past records – or in some circumstances to consider contacting the complainant which may inform the OCG determination.

Recommendations

The authors conclude that, should contact be required to occur, it should be in the context of a considered process, with tailored support provided to minimise the potential of negative impacts. A process which may assist in minimising the potential for negative impact was recommended. Clearly, if the following of this – or another, similarly supportive process is not possible, then contact should not occur.

The authors' have made recommendations with a view to strengthen the system already in place, including better record-keeping, changes to legislation and the use of previously supportive services to 'smooth the waters' should a 'model of contact' ever be considered. Since the OCG would be co-ordinating this process, expertise could be provided to the OCG to support the office throughout this process. The authors' consider that they – or other members of the expert panel for example, would be appropriate to guide such a process.

Brief Synopsis and Context of the Issue

Introduction

The Office of the Children's Guardian (OCG) is charged with ensuring that people who wish to work with children in NSW meet certain screening requirements to ascertain any pre-existing risks they may pose to children they come into contact with. This process requires anyone engaged in child-related work in NSW undertake a Working with Children Check (WWCC).

From time to time, applicants are refused a WWCC clearance. These people may, in certain circumstances, as set out in s.26 of the Working With Children Act, appeal. In regards to this current report, the OCG provided to the authors: *Children's Guardian v BRL [2016] NSWSC 1206 – OCG's concerns regarding consequences*.

Background

BRL was refused a Working With Children Check clearance as a result of a risk assessment by the OCG which took into consideration the complaint against BRL. The subsequent prosecution was terminated when the charges of sexual intercourse with person between 10 and 16 (4 counts) were withdrawn. The offences were allegedly committed in 1998. The applicant was committed for trial at a District Court. The charges were withdrawn after the trial commenced and the complainant indicated that she did not wish to give further evidence. In preparation for the trial, four statements had been obtained from the complainant, her sister and her step-sister.

Copies of these statements were obtained by the OCG and considered during the risk assessment. BRL filed an application for administrative review at NCAT. During the NCAT proceedings, BRL objected to the four statements being admitted as proof of the allegations against him. BRL relied on authority handed down under the predecessor to the current Working With Children legislation to argue that it would be procedurally unfair to admit the statements as proof of the allegations when the makers of the statements were not available for cross-examination.

At an interlocutory hearing, NCAT admitted the statements for the limited purpose only of showing that the allegations were made against the applicant. NCAT ultimately set aside the decision to refuse BRL a clearance, and ordered that he be granted a clearance. The Children's Guardian appealed NCAT's decision to the Supreme Court on the ground that NCAT erred in limiting the purpose for admitting the statements.

Supreme Court decision in dismissing the summons

The Supreme Court made statements including:

- The reason that the statements were admitted for a limited purpose was because BRL would be denied procedural fairness if they were admitted for their truth, in circumstances where the Children's Guardian did not intend to call the makers of the statements for cross examination and their allegations could therefore not be tested.
- While NCAT could have admitted the statements for their truth and discounted weight because they could not be tested, it understandably did not do that in circumstances where the Children's Guardian had not tendered evidence to explain why the makers of the statements were not to be called for cross-examination.

- Natural justice would be denied to BRL if NCAT acted on the statements in proof of the serious allegations against him without the opportunity for him to test the makers of the statements.
- The Children’s Guardian would have been assisted by evidence to explain why the complainant would not testify at trial. This evidence could be obtained from the complainant, her sister and step-sister, the investigating police and/or the Crown prosecutor.

Consequences for the OCG’s conduct of risk assessments and NCAT proceedings

The OCG administers the Child Protection (Working with Children) Act 2012 with the object of protecting children from child abuse, the paramount consideration being the safety, welfare and well-being of children. In implementing the legislation, the OCG requires persons engaged in child related work to have working with children check clearances and does not permit certain persons who pose a risk to the safety of children to engage in child related work.

To determine whether a person poses such a risk, the OCG conducts a risk assessment. The OCG does not have investigatory powers and is not set up to support individuals such as complainants who may experience trauma/ re-traumatisation as a result of being contacted by the OCG.

“Given the above, the OCG does not contact complainants during a risk assessment as a matter of practice to prevent trauma to individuals. It is widely accepted [authors’ underline] that individuals may be traumatised by being contacted about extremely personal and sensitive matters without any prior notice by an organisation with which they did not initiate contact” (Children’s Guardian vs BRL [2016]: p.2).

The OCG’s concern about contacting complainants is particularly heightened when the relevant conduct is alleged to have occurred historically when the complainant is or was a child. The OCG acknowledges that in the interests of fairness to an applicant and sound decision-making, steps should be taken to verify allegations of a serious nature, particularly sexual abuse. Accordingly, the OCG takes steps to verify allegations by seeking information from third parties such as courts, the Police and the DPP. Applicants are also given the opportunity to respond to allegations against them.

The OCG recognises that the Supreme Court decision does not compel the attendance of a complainant for cross-examination, but rather that attempts be made to confirm why they did not proceed with giving evidence. While such information may be available from third parties, where the alleged conduct occurred significantly in the past, documents have often been lost or destroyed.

“The complainant themselves may therefore be the only source of information, particularly about whether or not they still adhere to the allegations against the applicant at the risk assessment stage. In such circumstances, the OCG remains concerned, that the Supreme Court decision compels contact with complainants, with an absence of contact creating a risk that the purpose for which their statements are admitted is limited”. (Children’s Guardian vs BRL [2016]: p.2).

The consequence of the statements being admitted only for a limited purpose is that they would be less persuasive in contributing to an assessment that an applicant poses a risk to the safety of children. A tension therefore exists between protecting the welfare of individual complainants by choosing not to contact them against the paramount consideration of the safety, welfare and well-being of children generally. This could mean that children are placed at risk because an applicant is granted a clearance who otherwise may not have been, if the complainant’s statement were to be admitted for its truth rather than for a limited purpose. A challenging prospect for the OCG charged with the protection of children through the working with children check assessment on behalf of the State.

“Initiating contact with a complainant in the knowledge that it could cause them serious psychological harm [authors’ underline] is a step that the OCG does not consider appropriate. However, holding to this view may lead to the Tribunal ordering that certain applicants be able to work with children even though risk to the safety of children exists”. (Children’s Guardian vs BRL [2016]: p.2).

Initiating contact: Understanding disclosure

A child’s disclosure of sexual abuse is rarely a single event and is recognised in the literature as being a process (Ciarlante, 2007). Disclosure may not be immediate, and in some circumstances may be delayed by an extended period (Alaggia, 2004; Esposito, 2016; Hunter, 2011; Jonzon & Linbald, 2004). The reasons for this are several and are in general related to the child’s relative immaturity, vulnerability and at times dependence on the person who sexually abused them.

There are a number of motivations for disclosure. The main two are: wanting the sexual abuse to stop and to prevent another child being harmed. (Allnock and Miller, 2013)

A detailed review of the process of disclosure is separately provided by the authors, and should be read in conjunction with the current paper.

Initiating contact with a child sexual abuse survivor

No literature was identified regarding the initiating of contact with a child sexual abuse survivor subsequent to initial disclosure and the processes which followed at that time in their lives. Nor was any literature found on contact with child sexual abuse survivors due to disclosure by a third party, when years have passed and the survivor is now an adult. Ethical concerns surround the possible effect of disturbing what may be an otherwise settled adult life and fears that contact may trigger negative memories and symptoms associated with the sexual abuse they suffered as a child. The absence of a literature on this subject also includes an absence of consideration of a positive impact resulting from contact.

Anecdotal practice based examples do however exist of situations where survivors of sexual abuse have been contacted years later for a small number of varying purposes, including the current safety of others (generally children) as well as the re-opening of past criminal investigations. The authors found anecdotal evidence of an adult becoming distressed when approached regarding a proposed prosecution of the person she had disclosed had sexually abused her as a child. In this case the approach was made by police investigating the offender in a similar scenario to the historic abuse. No process was in place at the time for the wellbeing of the person who was approached and who then experienced a high level of distress requiring professional support.

The NSW Pre-trial Diversion of Offenders Program (Cedar Cottage) which operated between 1989 and 2014 periodically faced the issue of approaching survivors. The Cedar Cottage Program was a statutory program for men who had sexually abused their or their partner’s child or children. On a number of occasions offenders (referred as “program participants”) identified that they had previously sexually abused others and that this had either not been previously disclosed or their earlier victims were not believed when they disclosed. Most commonly these were close family members.

Faced with the ethical uncertainty of acting, an absence of a clear procedure to follow, and the potential that failure to report many of these disclosures could be a criminal offence (NSW Crimes Act 1900- s.316 Concealing Serious Indictable Offence), a decision was taken to initiate contact with the then adult victims. The process developed was; a report was made to the police who, following a full briefing on circumstances of the offences approached the victims.

In every instance the adults contacted reported this as positive. In only two instances did the adults wish to make a criminal complaint officially and pursue prosecution. A range of benefits were identified for past undisclosed or unbelieved victims including; relief of being believed, not being or feeling responsible for the sexual abuse, and that the full breadth of the offenders' conduct was being recognised and taken seriously.

To investigate whether similar circumstances and outcomes had been achieved in Victoria, discussion was undertaken with Ms Carolyn Worth, AM, the head of the CASA Forum, the peak body for the affiliated Centres Against Sexual Assault (CASAs). Ms Worth reported that CASAs had supported this type of work for a number of years. She stated that – anecdotally - when survivors were approached by someone they knew and trusted, in a sensitive manner, and with support offered, they overwhelmingly viewed the approach as positive. Similar to the NSW experience reported here, survivors gained relief through being believed, being (finally) taken seriously, and knowing something would be done about their abuse, whether formally through criminal action, or through the inclusion of information in situations where others would be protected. All of these outcome measures led to feelings of relief which they had not previously felt.

Consultation with Dr Danny Sullivan

The authors engaged Dr Danny Sullivan, a well-respected Victorian based Forensic Psychiatrist with qualifications and experience appropriate to provide an opinion about the ethics of approaching victims/survivors of sexual assault/abuse. Dr Sullivan was provided with a synopsis of the case by the authors, and one of the authors also discussed the case and the ethical issues raised.

Dr Sullivan noted that the importance of understanding the original perspective of the complainant. Ethically, in particular where an earlier (potentially historic) decision was made not to proceed, by a police investigator, a prosecutor, a parent or guardian, or even themselves, they should be provided the opportunity to tell their story. Given later opportunity triggered by the WWCC, the survivor may decide to make a statement and have it tested. In other words, Dr Sullivan believed that an informed decision made at one point in time may not have to be then seen as a decision for all time, as has recently been tested over a period of time by the *Royal Commission into Institutional Responses to Child Sexual Abuse*. A different decision to have the complaint heard may be made at another point in time.

A practical example of this occurring could be where a survivor did not originally wish to pursue the matter as long as no one else was at risk. This decision could have been made as a child, or as a somewhat naive young adult, or due to external pressure from family members. Becoming aware that his or her perpetrator is applying for a WWCC may result in re-assessing their original decision making.

Dr Sullivan cautioned that anecdotal practice based evidence does not have the same strength as research based and tested evidence.

To approach or not approach

Whilst the authors' and others' practice experience suggests overwhelmingly positive outcomes where approaches to past victims of historic sexual abuse were made, the situation remains that no research-based evidence exists to confirm this position. In a somewhat 'Catch-22' position, researching this situation to develop a body of evidence would involve approaches to victims and survivors of historic sexual abuse and assault, with the same concerns regarding the potential to 're-traumatise' them in the process. Thus, it must be considered that any individual approach to a victim/survivor of historic abuse has the potential to cause some emotional distress. What is not known, and potentially cannot be known, is which individuals are at

greater, or greatest risk of this occurring, given it is likely that a significant number will not. Whether this emotional distress reaches the level of trauma, or re-traumatisation can be debated and responses by individuals will vary between all cases. In light of this, should there be consideration of the uptake of a policy of approaching victims and survivors of historic abuse in specific situations, then a documented strategy, which includes training and supervision will be required for the person or persons involved in the situations.

A proposed model

In determining what evidence exists of alleged sexual abuse/assault having occurred there are a small number of situations where an approach would be required to be made to a past victim of sexual abuse. These situations are where information suggests that abuse occurred, however the information has never been formally tested in a Court.

The first consideration should be how the report or disclosure was investigated and reviewed. Was a lower threshold than that for criminal responsibility reached when applied for related purposes? For example, a grant of Victim's Compensation, or an Apprehended Violence Order against the offender based on the disclosure. Additional to this, how was the victim affected? Is there medical evidence available? For example, in certain circumstances might this confirm profound psychological and mental health outcomes which have prevented the victim proceeding in the criminal prosecution? An initial step might be that an expert panel could be formed, convened and chaired by the OCG to review and discuss information held in any circumstance where a potential situation as described in this paper exists.

In deciding whether the information held is sufficient to consider an approach to the victim of the abuse, it should be determined whether there is enough particularisation to warrant that a reasonable person could conclude 'something happened' and that the OCG should progress to consider whether an approach to the victim is warranted.

Should the conclusion at this time be that there is evidence of abuse, the panel could recommend a review of the application and any other information being held by statutory authorities. The panel members should possess relevant qualifications to assess the information provided at a sophisticated level.

The panel should contain at least one experienced sexual assault therapist. Then, should a decision be made by the panel that there should be an approach to the past victim, this member could be engaged by the Children's Guardian on an 'as-needed' sessional basis in order to provide input into planning an approach. Additionally, this member could be engaged to provide support and counselling as required to the person being approached.

If a decision is made to proceed, consideration is to be given to whether a known advocate is identifiable such as a past Witness Assistance Officer, (Office of the Director of Public Prosecution), sexual assault counsellor or counsellor provided through Victim's Services, (NSW Department of Justice). In the absence of an existing support being identified, Victim's Services (NSW Department of Justice) is suggested as a NSW Government Agency to partner the OCG in matters of this kind.

In proceeding, the person who holds information should be contacted by registered confidential letter. This correspondence will require sensitivity to ensure that if read by a third party, the past issues would not be apparent.

The contact by letter could request the person contact a particular person directly at the Children's Guardian. This contact would be an important step in the process. Providing a direct contact ensures the survivor does not need to 'tell' their story again to anyone along the way. Direct contact with a significant

person sends the message that this is a sensitive issue which will be handled well. If a past support contact has been identified (see Paragraph e. above), an offer to contact that person or for that person to participate in the victim's response may be included in the letter.

Should the survivor reply by phone, enough information should be provided for them to make an informed decision about further action, including meeting face to face to consider whether they would assist the Children's Guardian decision in the WWCC clearance application in court. Both verbal information and an offer to provide printed material could be provided at this time including details of supports available to them.

Legal consultation should be offered as available during this meeting.

Therapeutic support should also be available at short notice for this consultation.

Limitations and likelihood

A person coming forward to assist must understand the limits to confidentiality, the limits to what support can be provided, and the potential consequences of becoming involved. Additionally, the Children's Guardian will need to come to a position on whether they provide legal representation for the person coming forward, over and above other support discussed in this paper. Clarity regarding these issues may well assist a survivor of childhood sexual assault to make an informed and reasoned decision without undue or overwhelming distress being an unintended outcome of this process. Support, understanding and a thoughtful process may greatly assist the OCG in ensuring that future harms to vulnerable others are avoided.

When considering contacting a past victim, a strong level of support would be required for each individual cases. Without a considered process, with tailored support provided to minimise the potential of negative impacts, then the contacting of complainants is unwise; 'cold' contact with past victims and survivors is not recommended.

There is certainly a case to be made to ensure that record keeping of past cases be improved. In the case example provided, the authors' considered that the absence of record-keeping by the ODPP in relation to the reasons for the complainant's withdrawal from proceedings could impact upon the well-being of a complainant should contact be considered with said complainant in a WWCC challenge situation. A record should be held by ODPP of whether a Witness Assistance Officer had contact with the complainant and details of any counselling service which may have been involved at the time. Additionally, understanding the reasons for withdrawal may assist the OCG in moving forward with a challenge to, or denial of, a WWCC. The quality of record is likely to assist in the anticipated rare circumstance of considering making contact with the original complainant.

Any legislative impediment to obtaining relevant records should be addressed; for example, if a complainant had been assessed as eligible for Victims of Crime Compensation. In these circumstances, the use of records may strengthen the case being made for refusal of a WWCC application. Finally, where victim-focused services have in the past had a relationship with the complainant they may assist in the facilitation of a 'safer' process in gaining approval to use past records.

Conclusion

The Supreme Court has confirmed that an applicant for a WWCC clearance as part of procedural fairness, is entitled to test or request a process of testing the evidence supporting a complaint against them. In

circumstances where a complaint has been made and not tested, including the withdrawal of charges due to a complainant choosing or being unable to participate as a witness in criminal proceedings, additional information is required. This includes information which may be used for limited purposes and extend to a complainant choosing at a later date to provide evidence directly.

In the current review, no literature or expert opinion was identified to support the proposition that to contact complainants breaches ethical principles or that distress or trauma is likely. Failure to contact a complainant, based on the only evidence available which was anecdotal practice based experience in a range of settings, was identified as carrying risk of distress or trauma and some – again, practice-based and anecdotal - evidence was found to support a position where contacting a complainant could lead to some positives for that individual. In relation to a WWCC assessment such positives would also be associated with a better informed or supported decision. The issue appears not to be whether contacting a complainant is harmful but whether a safe and repeatable procedure can be developed to apply in relevant circumstances.

References

- Alaggia, R. (2004). Many ways of telling: Expanding conceptualizations of child sexual abuse disclosure. *Child Abuse & Neglect*, 28(11), 1213-1227.
- Allnock, D. and Miller, P. (2013). No one noticed and no one heard: a study of disclosure of childhood abuse. NSPCC. United Kingdom.
- Children's Guardian v BRL [2016] NSWSC 1206 – OCG's concerns regarding consequences. Document provided by email to the authors', 15/11/16.
- Ciarlante, M. (2007). Disclosing Sexual Victimization. *The Prevention Researcher*, 14(2).
- Esposito, C. (2016). *Child sexual abuse and disclosure: what does the research tell us?* Family and Community Services: NSW Government.
- Hunter, S. V. (2011). Disclosure of child sexual abuse as a life-long process: Implications for health professionals. *Australian and New Zealand Journal of Family Therapy*, 32(2): 159-172.
- Jonzon, E., and Lindblad. F. (2004). Disclosure, reactions, and social support: Findings from a sample of adult victims of child sexual abuse. *Child Maltreatment* 9(2): 190-200.