



THE LAW SOCIETY
OF NEW SOUTH WALES

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30 July 2013

Mr Martyn Hagan
Acting Secretary General
Law Council of Australia
DX 5719 Canberra

By email: rosemary.budavari@lawcouncil.asn.au

Dear Mr Hagan,

**Royal Commission into Institutional Responses to Child Sexual Abuse
Issues Paper 1: Working With Children Check**

I am writing on behalf of the Indigenous Issues Committee (IIC), the Family Issues Committee (FIC), the Criminal Law Committee (CLC) and the Juvenile Justice Committee (JJC) of the Law Society of NSW (together referred to as "Committees"). The Committees respectively represent the Law Society on family law, Indigenous issues, criminal law and juvenile justice issues, as they relate to the legal needs of people in NSW and include experts drawn from the ranks of the Law Society's membership.

The Committees refer to the Law Council's memorandum dated 21 June 2013 inviting comment on the Royal Commission's first Issues Paper on Working With Children Check ("WWCC"). The Committees thank the Law Council for the opportunity to comment and provide their responses below. The Committees' perspective is informed by its focus on the safety of children, particularly children in the NSW care and protection system.

1. Should there be a national WWCC?

The view of the Committees is that there is an urgent need to develop and implement a national WWCC. In stating this, the Committees would be able to provide case examples where a WWCC undertaken for a person in one state gave no information on convictions of child abuse, but the WWCC undertaken in another state in relation to the same person had revealed convictions for child sexual assault. While these examples arose in the context of parenting orders and subpoenas issued by courts in NSW, the existence of a national WWCC scheme could limit children's exposure to risk in both the care and protection context, and in the child-related employment context.

2. What features should be included in any national scheme?

The Committees stress the fundamental goal of ensuring the safety of children, and agree that:

- a) the scheme should be administered by a national centralised agency;
- b) it should allow for simplified electronic applications;

- c) the information provided to the scheme should include a complete history of the person, including pardoned, quashed or spent convictions,¹ and any information relevant to the risk in allowing a person to work with children. A complete history should be provided by the national agency on application, and it would then be up to the decision-maker (that is, the agency) to determine how to weigh each piece of information; and
- d) the national scheme should include a mechanism for providing ongoing monitoring and alerts/flags to any person, authority, organisation or body that has previously requested a report on a person if there is updated information which has become available (for example if a person is later convicted of a child-related offence).

While the Committees acknowledge that the privacy rights of those applying to work with children should be considered, the Committees' view is that the safety of children is the paramount consideration, particularly in the care and protection context. The Committees note also that if a complete history is provided, the decision-maker should be provided with sufficient context to properly weigh the information made available.

The Committees note also that in NSW, s 12 of the *Criminal Records Act 1991* provides that when a person's conviction is spent, the person is not required to disclose to any other person, for any purpose, information concerning the spent conviction. However, s 15 of that Act provides an exception where employment is child-related.

The CLC's view is that the current system recently adopted by NSW is a good model which appears to be the product of careful thought and consultation, and a conscious desire to avoid the flaws of the previous system.

3. If there is no national scheme, should there be minimum requirements for each state and territory scheme?

The Committees' view is that in the absence of a national scheme, the minimum requirements would be for the states/territories to ensure that there is an effective mechanism between states/territories for sharing relevant WWCC information before the risk assessment is provided. However, the Committees emphasise that a minimum requirement should not be seen as a substitute for implementing a national scheme, and rather as a measure of last resort.

4. How long should any clearance be granted for?

The Committees are of the view that the WWCC can only be made retrospective or at a point in time, and should not provide for future clearance. A person wishing to come into contact with children should have to undergo the WWCC process each time they apply for a position involving contact with children.

5. Should a person be able to commence work before the check is completed?
No.

6. How should child-related work be defined?

The Committees note that other bodies may be better placed to provide an appropriate definition, but they submit that the definition of child-related work should capture risk to children presented by direct contact. This includes physical

¹ This position is consistent with Division 6, Pt VIIC of the *Crimes Act 1914* (Cth).

or face-to-face contact as well as risk presented by other forms of communication including communication over the internet (such as email and social media) or by telephone (including text messages). The Committees note that such risk to the child includes the risk of being subjected to grooming. The Committees' view is also that volunteers should not be exempt from the scheme, nor should Independent Children's Lawyers.

7. How should child-related sectors and roles be defined?

The Committees' view is that the definition of child-related sectors and roles should be consistent with the definition of child-related work.

8. Are current exemptions for a WWCC adequate or appropriate – in particular, should a WWCC apply to those:

a. living in the homes of children in out-of-home care?

The Committees are of the strong view that a WWCC should apply in these circumstances, and the check should be undertaken prior to the placement of children in out-of-home care.

b. parent volunteers?

The Committees are of the view that parent volunteers should not be exempt from the WWCC scheme.

9. What records should be included in the check? For example, should the check include juvenile records?

In relation to juvenile records the JJC refers to an earlier submission it made to the NSW Attorney General on 14 May 2012 (submission attached). In that submission the JJC's position was that children should not be included on the Child Protection Register. The JJC submitted that the Register was set up ostensibly to track paedophiles, and this purpose is not served by including children particularly where the offence relates to sexual contact where both parties are under 16. The JJC submitted that children and young people should be treated differently to adults, taking into account their lower level of intellectual and emotional maturity. The life-long effects of being on the Register are in conflict with obligations under the Convention on the Rights of the Child. The JJC maintains this position but notes that under the legislation juveniles are still included in the Child Protection Register. The consequence of this is that in carrying out a WWCC, a juvenile would be flagged as a "prohibited person." The CLC notes additionally that offences committed by children against children often arise from schoolyard fights or sexual activity between children who are of similar ages. These are very different to situations where an adult abuses a vulnerable child. The Committees note that if juvenile records are included, it is important to include all information about the circumstances of juvenile convictions to assist decision-makers in according the appropriate weight to the information available.

The Committees acknowledge that the issue of what records should be included in a WWCC particularly as they relate to juvenile records is a complex policy issue that requires close consideration. The fundamental goal of ensuring the safety of children continues to be the paramount consideration. However, determining where the balance should be struck will require consideration of the fundamental goal of ensuring the protection of children as well as consideration of the best interests of children who have committed criminal offences against other children. On one hand there is a clear need to protect children as far as possible

from risk of harm, but on the other hand, there is a need to ensure that the approach taken is nuanced enough that it will not unduly affect young offenders in their later lives if they do not actually pose any risk to children.²

10. How should an appeal process operate?

The Committees suggest that for the purposes of correcting errors on the record, a person should be able to apply directly to the agency administering the WWCC.

The Committees notes that under the Commonwealth Spent Convictions Scheme, a person who is of the belief that a Commonwealth or state authority has breached provisions of that Scheme can make a complaint to the Office of the Australian Information Commissioner³ ("OAIC").

The Committees note also that if the OAIC decides not to investigate a complaint, or if the individual is of the belief that the determination of the Australian Information Commissioner is incorrect at law, the individual may seek judicial review in the Federal Court of Australia or the Federal Circuit Court of Australia.

The Committees suggest that an appeal process similar to the privacy complaints procedure under the Spent Convictions Scheme could be applied to the national WWCC scheme.

The Committees note that under its proposed scheme, people who wish to appeal the decision made against them can request a judicial review. The Committees' view is that the full disclosure of information and judicial review increases the transparency of the process. This model also places the burden on the person applying to work with children, which is consistent with the focus of eliminating the risk to children.

² The complexity of this issue can usefully be illustrated by the example of whether Apprehended Violence Orders ("AVOs") should be included in the WWCC.

As the FIC and IIC are both of the view that the paramount consideration is the safety of children which should not be compromised, the view of the FIC and IIC is that AVOs, even where both parties are children, should not be excluded from any WWCC.

On the other hand, the views of the CLC and JJC are informed by concerns about how a broad-brush approach to managing risk might affect young offenders who do not actually pose a threat to children. The CLC is of the view that where the parties to the AVO are both children, the AVO should not be included (unless there was a conviction of the child or young person for a relevant offence). The CLC submits that many AVOs are made by consent without admissions or are made on an *ex parte* basis. Under the previous NSW system, many young people were caught by the WWCC in relation to AVOs that were taken out against them on behalf of siblings and school mates, when it was clear that the inclusion of that information in the WWCC did not prevent the sort of risk at which the WWCC is aimed.

To add further to the complexity, the IIC notes that children in the care system are at a much greater risk of having the "usual" children's disputes escalated to the level of AVOs. The IIC notes that in its experience, the Department of Family and Community Services will more readily use the criminal process and AVOs as behavior management options than parents or kin carers. As there are a disproportionate number of Aboriginal children in care, this will affect Aboriginal children more commonly.

³ Division 5, Pt VIIC of the *Crimes Act 1914* (Cth).

11. What issues arise from the current regime of records that result in automatic barring of a person from working with children?

The Committees' view is that other bodies are better placed to respond.

12. The adequacy of the risk assessment process.

The Committees' view is that other bodies are better placed to respond.

13. To what degree should the WWCC minimise the need for institutions to establish clear processes for responding to inappropriate behaviour of staff in child-related positions?

The Committees are of the view that there should be no need for institutions to minimise any processes where an allegation or act/s of inappropriate behaviour by staff in child-related positions exists.

14. How should the effectiveness of any existing or proposed WWCC be evaluated and / or monitored?

The Committees suggest that an advisory body could be established to oversee the operation of the national scheme. Such an advisory body should be culturally diverse in its appointment of persons and should include representatives from the courts, the legal profession and caseworkers.

Issues of process, timeliness and efficiency should be reviewed by the advisory body on an ongoing basis. The body should have consultative powers and the power to provide advice and recommendations. The advisory body should also have the power to engage groups or agencies to assist with the evaluation of the scheme's effectiveness. For example, the Committees understand that the *Review of the operation of Subdivision A of Division 6 of Part VIIC of the Crimes Act 1914* in 2011 found that screening agencies receive a low level of statistical information about a person's criminal history and invariably decisions made are based upon incomplete information. An advisory body should have the power to request the collection and production of all information about a person's criminal history.

Thank you once again for the opportunity to comment.

Yours sincerely,



John Dobson
President



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBG601647

14 May 2012

The Hon. Greg Smith SC MP
Attorney General and Minister for Justice
Level 31
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

The impact of the Child Protection Register and the Working with Children Check on juvenile offenders

The Law Society's Juvenile Justice Committee has asked that I write to you in relation to the Child Protection Register and the Working with Children Check.

The Committee considers that juveniles are significantly disadvantaged in relation to the law's treatment of sex offences for two main reasons. Firstly, because all sexual contact with a child under 16, even consensual contact, is an offence even where both parties are under 16. Secondly, an offence involving two juveniles is automatically 'aggravated' because it is designated as a 'child sex offence' which places the offence in a more serious category, attracting higher penalties. In addition, child sex offences attract the provisions of the Child Protection Register established under the *Child Protection (Offenders Registration) Act 2000*, even where the offender and the victim are both children.

The Child Protection Register was set up ostensibly to track paedophiles. The Register unfairly and inaccurately identifies child offenders as 'paedophiles' even where they are the same or similar age as the victim, because it is based solely on the age of the victim and disregards the age of the offender. Any sexual intercourse with a child, even where both persons are children and there is consent is a 'class 1' offence attracting the most serious provisions of the Register. This includes providing police with many details such as accommodation, car registration, employment, any children they live with or have potentially unsupervised contact with, their telephone service and internet providers, email addresses, DNA profile, and being subject to all of the other restrictions and reporting requirements in place for registered persons.

The Committee submits that children and young people should not be on the Child Protection Register. Children and young people should be treated differently to adults, taking into account their lower level of intellectual and emotional maturity. The life-long effects of being on the Register, described above, are in conflict with obligations under the Convention on the Rights of the Child – in particular that the well-being of children is

prioritised and that any response is proportionate to the young person's circumstances and to the offence (Article 40.4).

In its 2010 report '*Spent convictions for juvenile offenders*' the Legislative Council Standing Committee on Law and Justice concluded that the evidence does not warrant continuing to treat juvenile sexual offences differently from other juvenile offences for the purposes of the spent convictions scheme.

The Committee supports the recommendations to allow convictions to become spent; however this will not stop the automatic inclusion of the juvenile's name on the Child Protection Register as a child sex offender. Even if the conviction were allowed to become spent under a new regime, the person would continue to be 'flagged' as a 'prohibited person' on any 'working with children check' under the *Commission for Children and Young Person Act 1988*. A person in this situation is excluded under this Act from making a review application because the offence was an offence involving sexual intercourse with a child even though the person was a child at the time.

A key proposal in the 2011 '*Report on the Review of the NSW Commission for Children and Young People Act 1998*' is the implementation of a new model for the Working With Children Check including broader appeal rights.

The Committee urges the Government to implement legislative amendments so that children and young people cannot be registered on the Child Protection Register, to allow juvenile sexual offences to become spent under the spent conviction scheme and to expand the appeal rights for a person refused a working with children clearance.

The Committee also supports an amendment to section 38 of the *NSW Commission for Children and Young People Act 1998* to ensure that matters where the court has heard evidence and reached a finding of 'not guilty' are not matters reported by police as part of their records disclosure.

The Committee would be happy to elaborate on any of the issues raised in this letter and looks forward to receiving your response.

Yours sincerely,



Justin Dowd
President