THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Kerryn Boland
Children's Guardian
Office of the Children's Guardian
418A Elizabeth Street
Surry Hills NSW 2010

By email: Sharminie.Niles@kidsguardian.nsw.gov.au

Dear Ms Boland,

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

Thank you for the opportunity to provide a submission to your consultation on the statutory review of the *Child Protection (Working with Children) Act 2012* (the WWC Act). The Law Society's Indigenous Issues and Children's Legal Issues Committees have contributed to this submission.

We provide the following comments on the consultation questions contained in the discussion paper on the operation of the Working With Children Check (WWCC) scheme. We also comment on the Royal Commission's Working with Children Checks Report (the Royal Commission's WWCC Report),[1] particularly where it intersects with issues in the discussion paper.

1. Does the WCCC scheme target the right people?

Should parents volunteering on overnight camps be made to have a WWCC?

We are of the view that parent volunteers should not be exempt from the WWCC.

Children in care who turn 18

Children who have been in care (e.g. in a group home or in the care of an authorised foster carer) may find themselves being subject to a WWCC once they turn 18 in order to continue living in accommodation with other children (e.g. other group home residents, foster siblings or their own siblings).

Research has clearly shown that children in care are overrepresented in the criminal justice system. Hence, they are likely to accumulate criminal records which will either trigger risk assessments and/or lead to adverse assessments. This can lead to children having to leave stable accommodation once they turn 18.

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[1]Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Check Report,* 2015.

The Law Society submits that an exemption should apply for such children to allow them to continue with their accommodation.

Impact on Aboriginal and Torres Strait Islander people

The Law Society is concerned about the operation of the WWCC requirements in relation to Aboriginal and Torres Strait Islander carers. The Law Society has previously provided comment relating to this issue to the Office of the Children's Guardian (OCG).

The Law Society notes the exemption from requiring WWCCs for authorised carers who are close relatives of the child.[2] Despite this exemption, there are some circumstances where Aboriginal and Torres Strait Islander carers (and in particular, Aboriginal and Torres Strait Islander kin in informal care arrangements) are still required to obtain a WWCC when caring for a child. In this regard, the Law Society is concerned about anecdotal reports that potentially suitable Aboriginal and Torres Strait Islander family carers are not being considered by the Department of Family and Community Services (FACS) due to an actual or perceived failure by those potential carers to gain a WWCC. In some cases, this may occur due to historical convictions that do not reflect the current ability of those individuals to care for their family members.

If the WWCC process is acting to exclude from consideration safe and suitable Aboriginal and Torres Strait Islander carers, this may have the unintended consequence of impeding an outcome that would have, in fact, better served the best interests of a particular child.[3]

The Law Society submits that the statutory review further consider the way in which the WWCC requirements apply to Aboriginal and Torres Strait Islander carers, and also carers in the child protection system more broadly. We consider that these efforts are likely to assist with improving outcomes for Indigenous children, by keeping them safe within their own families and preserving their cultural identities. To illustrate the practical concerns with the operation of the legislation with respect to kinship carers, two case studies are set out below.

Case Study 1 – Uncle caring for three children

FACS support the carer arrangements by stating they will go to the Children's Court and ask for the uncle to have parental responsibility (PR) so he can then receive an allowance from FACS. To receive the allowance he must be authorised as a carer and central to this is a WWCC clearance.

It has now been 4 months waiting for the WWCC. FACS has his criminal record, which has events/charges FACS consider would pose no risk to children but which in their experience may bar him. FACS now has to either go to the Family Court to support PR or the uncle will not receive an allowance.

Case Study 2 – Aunty and uncle caring for children in a regional area

PR has been granted with provisional authorisation, so an allowance is being paid. Uncle gets notified by the OCG that he is at risk assessment stage of WWCC verification due to criminal charges FACS has deemed no risk. Carer register notifies FACS that it may result in an "illegal placement".

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[2] *Child Protection (Working with Children) Regulation 2013* cl 20(d).
[3] *C v The Secretary, Family & Community Services* [2016] NSWDC 103 (20 June 2016).

2. Does the WWCC scheme collect the most appropriate information?

Defining criminal history and criminal records

The Law Society supports recommendation 17 of the Royal Commission's WWCC Report that NSW amend its WWCC laws to include a standard definition of criminal history.[4] However, we are concerned with the inclusion of charges, regardless of status or outcome, including charges that were withdrawn, set aside or dismissed, and charges that led to acquittals or convictions that were quashed or otherwise overturned on appeal.

We consider that the definition of criminal history should not include findings of not guilty, diversions, or withdrawn matters.

Criminal records of children

The WWC Act does not define criminal history, however s 5 and Schedules 1 and 2 of the WWC Act provide guidance about what records are checked. We note that only records in relation to certain offences trigger an assessment or disqualification. The WWC Act is silent about whether juvenile records are checked. This fact was also noted by the Royal Commission.[5]

Despite the lack of legislative certainty, we note that, in practice, the OCG currently considers juvenile records.

Rehabilitation is a paramount consideration in the sentencing of child offenders. A criminal record impedes children's prospects of rehabilitation by limiting employment. In recognition of this, several legislative provisions allow a court to deal with a child offender without conviction:

(1) Section 14 of the *Children (Criminal Proceedings) Act 1987* (NSW) (CCPA) provides for no conviction to be recorded against a child under the age of 14 years and the court's discretion to record a conviction;

(2) Section 33(1)(a) of the CCPA is a sentencing option that allows the court to sentence the child offender to a caution or a bond without conviction. It is the children's equivalent of s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW);

(3) The *Young Offenders Act 1997* (NSW) (YOA) also allows for matters to be diverted, and children dealt with, without conviction. The YOA allows for cautions and conferences where children "admit" the offence, without necessarily a finding of guilt. The YOA allows for referrals to cautions and conferences by the police or the court. Section 68 provides for non-disclosure of YOA outcomes.

In addition to the above, the *Criminal Records Act 1991* (NSW) provides for convictions to be spent, with specific provisions relating to children.[6]

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[4] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 2015, 10.

[5] At footnote 142 of the Royal Commission's *Working with Children Checks Report*, the Royal Commission noted that "[w]hile no state or territory WWCC laws exclude juvenile records from being checked, these types of records are not expressly included in all jurisdictions' statutory definitions of criminal history".

[6] See, e.g., *Criminal Records Act 1991* (NSW) s 10.

The Law Society suggests that further consideration should be given to whether and what type of juvenile records should be subject to a WWCC, noting the need to balance the protection of children with the rehabilitation of child offenders/defendants. We maintain 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.

Lack of clarity regarding juvenile record checks

We note that recommendation 17 of the Royal Commission's WWCC Report suggests that records that are checked should include juvenile records, but does not specify whether particular non-conviction outcomes would be subject to the checks.[7] Recommendation 17 recommends that charges be taken into account, but is silent about police referrals under the YOA (i.e. where a child is diverted and not charged). We discuss this matter further below.

We note that recommendation 20(b)[8] of the Royal Commission's WWCC Report lists categories of offences for adult offenders which result in an automatic WWCC refusal. These include child pornography-related offences and indecent or sexual assault of children. Recommendation 20(c)[9] notes that all other relevant criminal information should trigger a WWCC risk assessment. Recommendation 21[10] provides that state and territory governments should amend their WWCC laws to specify that relevant criminal records for the purposes of recommendation 20(c) include juvenile records and/or non-conviction charges for the offences listed in recommendation 20(b).

While recommendation 21 of the Royal Commission's WWCC Report states that relevant criminal records are not limited to those listed within the recommendation, it is not clear whether it is envisaged that relevant criminal records include juvenile records and non-conviction charges beyond the offences specified in recommendation 20(b).

We would suggest that exceptions be made for juvenile offenders who engage in "consensual" sexual offending (e.g. s 66C *Crimes Act 1900* (NSW): or, for example, consensual sexting).

We further note that the category of offences listed in recommendation 29 is similar to the category of offences listed in recommendation 20(b). We note that recommendation 20(b) only relates to adult offenders. Therefore, it is unclear whether recommendation 29 relates to juvenile offenders as well.

The Law Society recommends that the OCG further consider how the Royal Commission's WWCC Report recommendations discussed above may be implemented in the NSW context.

Records in relation to diversion of juveniles under the Young Offenders Act 1997 (YOA)

The discussion paper notes that there are inconsistent approaches to OCG review of YOA records. We observe these inconsistencies to be:

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[7] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report,* 2015, 10.
[8] Ibid, 11.
[9] Ibid.
[10] Ibid.

(1) Police YOA outcomes do not trigger assessments, whereas most court YOA outcomes do[11]; and

(2) Some disparity in court YOA outcomes (e.g. a caution/youth justice conference after an admission to a common assault against a child does not trigger an assessment).

We do not support making all YOA diversions subject to risk assessments. This would significantly increase the workload of the OCG given the vast amount of matters dealt with via police YOA outcomes. It would also not recognise the diversionary nature of police YOA outcomes and the YOA in general.

We submit that the inconsistency would be best resolved if all YOA diversions were not subject to a risk assessment. This would recognise the diversionary nature of YOA, deal with any perceived inconsistency between police YOA and court YOA outcomes, and deal with the complexity of inconsistency within court YOA outcomes. If this proposal is not adopted, then we support maintaining the status quo.

There may be a perception of inconsistency between court YOA outcomes triggering WWCC assessments whilst police diverted YOA outcomes do not. However, there is a significant distinction between police diversions and court diversions. The YOA is designed for the diversion of young people from the court system. This is primarily done through police diversions.

The YOA itself specifically provides for police to directly refer to cautions and conferences.[12] The YOA also provides for referrals by the Director of Public Prosecutions (DPP).[13] The YOA provides for DPP involvement because, at the time when the YOA was enacted, it was envisaged that the DPP might be involved in summary prosecutions.

Only if the police have deemed a matter unsuitable for diversion (e.g. because of a child's prior YOA record or the seriousness of the matter) then the police refer the matter to court. Because the YOA provides for DPP referrals, it envisages the possibility of DPP review of police decisions about whether to deal with a matter under the YOA and for the DPP to refer to a YOA conference before a matter has gone to court.

When the YOA scheme was first established, it was envisaged that the vast majority of matters would be dealt with via police referral and be completely diverted from the court system. The Legal Aid Youth Hotline was established to facilitate this. It was envisaged that only the most serious matters would be referred to court.

However, now, the DPP are rarely (if ever) involved and more matters are being referred to court by the police, even if they are not necessarily serious. Nevertheless, the vast bulk of YOA diversions are still police diversions.

Schedule 1 of the WWC Act is concerned with identifying matters which are significant enough to have gone to court and/or resulted in a conviction. Therefore, the WWCC should be more concerned with court matters rather than police referred YOA outcomes.

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[11] Risk assessments under Schedule 1 are triggered by a combination of "proceedings commenced against a person" and/or "conviction" for the relevant offences. A police diversion under the YOA is neither a (criminal) proceeding against a person nor a conviction. The OCG's current reading of the phrase "proceedings" to equate to court proceedings is correct. "Proceedings" was not meant to capture matters which had been diverted away from the court process.

[12] *Young Offenders Act 1997* (NSW) ss 21, 28.

[13] *Young Offenders Act 1997* (NSW) ss 23, 40(1).

If police diverted YOA outcomes were to trigger an assessment then the OCG might have to assess a large number of matters including common assaults, assaults at schools, and stalking/intimidating offences. This would be resource intensive for the OCG.

Court diverted YOA outcomes

YOA cautions and conferences from courts for offences listed in cl 1(1), (2), (3) and (6) of Schedule 1 would trigger assessments because there have been court proceedings.

However, cl 1(4) of Schedule 1 only triggers an assessment if there has been a conviction for a common assault against a child. Therefore, a court YOA outcome for a common assault against a child would not ordinarily trigger an assessment because there is no "conviction" under the YOA (see above discussion about YOA not constituting a conviction). However, further inconsistency arises because a child may arguably be "convicted" of common assault against child, and then referred under the YOA if:

(1) The child is found guilty after a hearing but the court nevertheless refers the child under the YOA; or

(2) The child pleads guilty rather than admits the offence under the YOA but the court nevertheless refers the matter under the YOA.

These discrepancies concerning common assault against a child may be resolved by adopting the proposal to exempt risk assessments for children convicted of this offence. If that proposal is not adopted then there is an added need to resolve discrepancies for court YOA outcomes for common assaults against a child, for example, by exempting all YOA outcomes from risk assessment.

Again, s 15(3) would still be available for the OCG (see below).

The exercise of s 15(3) WWCC discretion

We note that s 15(3) of the WWC Act gives the OCG a wide discretion to conduct a risk assessment regardless of s 15(1) and (2) and whether there is a risk assessment trigger. Therefore, YOA cautions or conferences (whether police or court diversions) could be able to be used as a reason for the OCG to exercise its discretion under s 15(3) and conduct a risk assessment, even if those YOA records do not trigger an assessment under Schedule 1.

Rather than requiring the OCG to do a risk assessment of YOA matters, we consider it preferable to recognise that YOA outcomes are diversions and should not lead to an assessment unless there is something significant such as to warrant the OCG to exercise its s 15(3) discretion.

Sexual offences by children

The WWC Act provides for the disqualification/risk assessment of adults who commit or are charged with various sexual offences against children. The WWC Act also provides for risk assessments of children who are charged with such sexual offences against children. However, there may be a disproportionate impact of WCCCs upon children who are charged with sexual offences against children because:

(1) Offences are often against peers;

(2) Offences may be part of sexual experimentation rather than paedophilia;

(3) Sex may be consensual; and

(4) An adverse WWCC has a greater impact upon children who are starting their careers.

Children who have underage consensual sex or engage in consensual sexting may be charged with offences.[14] They would then be subject to a mandatory risk assessment for a WWCC, even many years later.

With regards to sexting, police have discretion whether to charge a child offender under NSW or Commonwealth legislation. Under Commonwealth legislation, children (under 18 years of age) who sext can still be liable for child pornography offences even though they are over the age of consent (16 years of age). While the police may claim that they exercise their discretion to not charge for sexting, we are aware of instances where children have been subject to dealings with police (eg charge, YOA and/or AVOs) for sexting offences and/or consensual underage sex.

Other jurisdictions have a similar age defence but NSW does not.[15] The Law Society supports a 3 year age difference for a similar age defence in NSW.

We suggest legislative amendment to allow for a more nuanced approach in dealing with WWCCs for children who are alleged to have committed child sexual offences. Amendments could include providing an exemption for matters involving consensual sexual conduct between children for whom there is no greater than 3 years age difference, including offences under s 66C and child pornography offences. (The OCG would have to look at the facts of the offence and determine if it was "consensual".)

In addition and/or in the alternative, we recommend amending s 15(4) of the WWCC Act to specifically provide that consent can be a factor considered in a risk assessment.

The OCG could retain discretion to conduct a risk assessment if it nevertheless considered one was necessary either:

(1) Due to the operation of Schedule 1, cl 1(6); or

(2) Utilising the OCG's discretion under s 15(3).

Historical carnal knowledge offences

The current position under the WWC Act is that historical carnal knowledge offences result in an automatic refusal of a WCCC clearance, unless the conviction was sustained as a juvenile.

The discussion paper acknowledges that the requirement to disqualify or conduct risk assessments for historical carnal knowledge offences has been problematic and requires fine tuning. In response to the need to fine-tune the approach, the discussion paper suggests that the approach in South Australia, the Northern Territory and Western Australia appears to be a more effective response: i.e. carnal knowledge is treated as the equivalent of a disqualifying offence (i.e. the applicant must be refused a clearance) where the offence was committed against a child under 13. It is suggested that all carnal knowledge offences where the victim was over 13 years of age would then be moved

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[14] *Crimes Act 1900* (NSW) ss 66C, 91G, 91H.
[15] *Crimes Act 1958* (Vic) s 45(4), *Crimes Act 1900* (ACT) s 55(3), *Criminal Code Act 1924* (Tas) s 124(5), *Criminal Law Consolidation Act 1935* (SA) s 49(4).

into Schedule 1 to the WWC Act, giving rise to the need for risk assessment. We agree with this approach, but only in relation to adult offenders/accused.

We do not agree with the approach in other states where carnal knowledge triggers a risk assessment with a presumption that the applicant will be refused a clearance. The current NSW WWC Act has a presumption of clearance whenever the OCG conducts a risk assessment. This presumption should not change for historical carnal knowledge (or the abovementioned child offences).

In relation to children charged with carnal knowledge offences, we refer back to our earlier comments about the need for a more nuanced approach in dealing with children who are alleged to have committed child sexual offences.

Non sexual offences

Under the WWC Act, the following offences trigger a risk assessment:

(1) Charges of assaults at school (regardless of outcome and regardless of whether the assault was against a child);

(2) Charges of animal cruelty;

(3) Charges of stalk/intimidation (s 13 AVO Act); and

(4) Conviction for common assault against a child (s 15(4)).

We submit that children charged/convicted of these offences be exempt from a risk assessment. We query whether children charged with such offences pose the same risk as adults charged with such offences.

We propose an amendment to s 15(4): change "a person convicted of an offence under s 61..." to "an *adult* convicted".

Domestic and family violence records

The discussion paper notes that currently domestic violence offences that involve children are captured in Schedule 1 to the WWC Act, which requires the OCG to conduct a risk assessment.[16]

The discussion paper notes that the OCG is seeking feedback on how to respond to assessments of domestic violence and whether and how to capture behaviour which might not have resulted in domestic violence offences currently within Schedule 1. In particular, the OCG are seeking feedback about whether there should be consideration of, or an assessment of, AVOs relating to domestic violence.

We note that AVOs are not currently seen and considered by the OCG unless the OCG issues a request for information under s 31. Also, AVOs alone do not trigger a risk assessment. There are reasons for this. We note that under the old WWCC scheme only final AVOs for Persons in Need of Protection (PINOPs) under 16 years old were assessed. A review of that scheme found that assessments of these AVOs provided limited probative value.

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[16] See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13, i.e. where proceedings have commenced for stalking or intimidation with intent to cause fear of physical or mental harm committed against a child will trigger an assessment requirement.

Therefore, care should be taken in reconsidering whether AVOs should be assessed, even if such assessments could be limited to a domestic violence context.

We note that there may be practical difficulties in the police and OCG determining which AVOs are related to domestic violence. Furthermore, not all domestic violence related AVOs will suggest a risk to children, especially if there were no children involved in the allegations.

We also note that children may sometimes be included on an AVO only because they are in a domestic relationship with the adult PINOP at the time of the application. The children may not have been involved in the domestic violence at all and may not even have been in a domestic relationship with the PINOP at the time of the alleged violence.

Members of our Indigenous Issues Committee are of the view that the paramount consideration is the safety of children and that AVOs, even where both parties are children, should not be excluded from any WWCC.

However, members of our Children's Legal Issues Committee are of the view that the information provided by AVOs is frequently unreliable for WWCC risk assessments. This is because:

(1) AVOs are not criminal proceedings. They do not need to be established beyond a reasonable doubt but only on the balance of probabilities;

(2) Many AVOs (final and interim) are consented to without admissions; and

(3) Particular difficulties arise where the AVO is against a child (either in relation to a child PINOP or an adult PINOP).

The Law Society's position is that a definition of criminal history should not include matters where there was no finding of guilt. Similarly, members of our Children's Legal Issues Committee are of the view that AVOs should not trigger assessments.

AVOs against children are different to AVOs against adults. In particular, domestic violence AVOs against children may arise due to peer on peer conflict (e.g. fights between siblings) or AVOs by parents/carer against children as a behavioural management/welfare tool. Unlike adult domestic violence AVOs, where the PINOP is an adult taking an AVO against a child, there is a difference in power imbalance. In particular, children in out-of-home care are often subjected to AVOs due to the criminalisation of children in care.

Members of our Children's Legal Issues Committee do not consider that a Joint Investigative Response Team (JIRT) AVO should trigger an assessment, for the reasons outlined above.

In the alternative, if JIRT AVOs are to trigger an assessment then it should be restricted to final AVOs, not interim AVOs, and only where the final AVO is made against a PINOP who is under 16 years of age.

We note that the OCG would still maintain its discretion under s 15(3) or schedule 1 cl 1(6) of the WWC Act to conduct a risk assessment. These discretionary provisions are sufficient to capture domestic violence behaviour which poses a risk to children.

Case Study 3 – AVO against a child

James (name altered) was a child who had never been in trouble with the police. He had a fight with his slightly younger brother over a TV remote. When his brother was injured he called an ambulance to make sure his brother was okay. Even though his brother did not want any police action, James was charged with common assault and subject to an AVO. The charge was ultimately withdrawn and dismissed. However, years later when James sought to do volunteer work on his university Student Representative Council he had to undergo a WWCC risk assessment (presumably because of the AVO). He again had to engage a lawyer for legal advice/representation.

Information collected on Aboriginal and Torres Strait Islander applicants

The Law Society has previously written to the OCG and the Minister for Family and Community Services, seeking information on whether the OCG collects information about applications received for a WWCC. The Law Society's interest is underpinned by its understanding that many potentially suitable Aboriginal and Torres Strait Islander family carers are not being considered by FACS due to an actual or perceived failure to gain a WWCC. We also see WWCC issues arising for Aboriginal and Torres Strait Islander people when seeking job placement and volunteer opportunities in their communities.

Through previous correspondence we were advised by the OCG that, although the OCG collects and records a range of information that is directly relevant to the statutory objective of the WWCC, it does not seek information about applicants' race, ethnicity, nationality or Aboriginality. We also had the opportunity to further raise this issue at our consultation meeting with the OCG as part of this statutory review.

We acknowledge the OCG's view, that this information is unlikely to provide a strategic benefit to improving the operations of the WWCC. However, we continue to hold the view that there may be benefit in looking at information regarding Aboriginal and Torres Strait Islander applications for a WWCC, to determine whether there are structural barriers to attaining a successful WWCC and particularly in the context of care and protection matters. We note that there are many complex and systemic reasons why Aboriginal and Torres Strait Islander people might come into contact disproportionately with the criminal justice system, and may therefore be more likely to be over-represented at the risk assessment stage of the WWCC process.

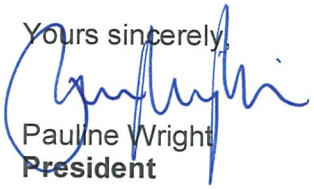
There may be instances where historical convictions that do not reflect a person's current capacity to care safely for a child (such as a grandchild or other relation) may hinder a person's ability to pass the WWCC. If it is in fact the case that the WWCC process is acting to exclude from consideration safe and suitable Aboriginal and Torres Strait Islander carers, this may have the unintended consequence of impeding an outcome that would have, in fact, better served the best interests of a particular child.

We submit that extra information about the Aboriginal or Torres Strait Islander status of WWCC applicants could, in these circumstances, be used by the OCG to improve the operations of the WWCC. For example, this information would assist in undertaking a threshold analysis of whether the anecdotal reports in respect of potential Aboriginal and Torres Strait Islander carers amount to a larger trend of significance. If there is in fact a cause for concern, they might then be addressed through a more nuanced WWCC process.

We consider that these efforts are likely to assist with improving outcomes for Aboriginal and Torres Strait Islander children, by keeping them safe within their own families and preserving their cultural identities.

Thank you for the opportunity to provide comments to this review. I would be grateful if questions can be directed at first instance to Chelly Milliken, Principal Policy Advisor, on (02) 9926 0218 or by email at chelly.milliken@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President