

Issues Paper 1 – Working With Children Check

Submission by Legal Aid NSW

to the

Royal Commission into Institutional Responses to Child Sexual Abuse

August 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women’s Domestic Violence Court Advocacy Services.

Legal Aid NSW represents children across all areas of law, including criminal law, family law and care and protection proceedings.

Legal Aid NSW eligibility policies also make available grants of legal aid for people seeking an exemption for working with children under the *Child Protection (Working with Children) Act 2012* (NSW) where applicants meet the Legal Aid NSW means and merit tests.

Legal Aid NSW welcomes the opportunity to make this submission. If you would like to discuss its content further, please contact Erin Gough, Manager Legal Policy on (02) 9219 5778 or at Erin.Gough@legalaid.nsw.gov.au.

Submission

1. Should there be a national WWCC?

Legal Aid NSW supports the proposal for a national WWCC as this would ensure a more efficient and consistent approach than the current regimes, which vary from state to state.

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

The features that Legal Aid NSW would like to see included in a national scheme are outlined in response to the questions below.

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

If there is no national scheme, there should be effective mechanisms in place for information-sharing between states and territories in relation to working with children checks.

4. How long should any clearance be granted for?

Legal Aid NSW has no comment in relation to this question.

5. Should a person be able to commence work before the check is completed?

Legal Aid NSW has no comment in relation to this question.

6. How should child-related work be defined?

Legal Aid NSW supports the definition in the current NSW legislation, which essentially requires that:

- the work is in a child-related sector, paid or unpaid, and involves direct contact by the worker with children, or
- the work is in a specified child-related role.

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

Again, Legal Aid NSW supports the definitions in the current NSW legislation, which specify the sectors and roles considered to be child-related. Child-related sectors include child development, children's health services, clubs or other bodies providing services for children, disability services and early education and child care. Child-related roles include a provider, supervisor or manager of an education and care service, an authorised carer and the principal officer of an adoption service.

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?

Out-of home care can be defined as overnight care for children and young people under 18 years of age who are unable to live with their parents. This includes foster care, placement with relatives, and residential care which involves placement in a residential building operated by paid staff.

It is important that any national scheme distinguish between these different types of out-of-home care in order to ensure any exemptions are adequate and appropriate.

Paid staff should not be exempt as they are in a clear employment relationship undertaking child-related work. Foster carers and those living in the homes of foster carers should also require a WWCC in the same way that they are required to do so under the NSW legislation. However, it may be the case that placements with certain relatives could be exempt in the same way that parents are broadly exempt under the NSW legislation.

b. parent volunteers?

Legal Aid NSW is of the view that the current exemptions that apply in NSW in relation to parent volunteers are appropriate.

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

The check should not include any juvenile records for the reasons outlined below. However, in the event that the national scheme does include juvenile records in the check it should be confined to serious offences, and all matters involving such records should include a right to appeal, as provided under the current NSW legislation.

It is important that juvenile offences be treated differently from adult offences because:

- Children lack the maturity of adults and the capacity for consequential thinking, such as the impact of their offence on their future employment prospects.
- The categorisation of disqualifying offences against children unfairly impacts on children who offend against their peer group, namely other children. Juvenile offenders are therefore disproportionately affected. For example, children may engage in consensual sex with underage children. Such incidents may then be reported by an adult relative and that child may then be charged with a sexual offence. In NSW even findings of not guilty are taken into account as part of the check.

LEGAL AID NSW CASE STUDY

A Legal Aid NSW client, P, who was aged in his 50s, had consensual sex with a 15 year old girl when he was a 17 year old. The girl's father reported the matter to the police at the time and as a result P had a sex offence on his record. Approximately 40 years later P applied for a position as a Santa Clause in a shop. He was barred under the NSW working with children check scheme from undertaking that employment.

It is also becoming increasingly common for children to use technology to unknowingly commit Commonwealth child pornography offences through sexting and sending naked or sexualised images to other children of themselves or other children on their mobile phones and devices. It was not the intention of the legislators that these offences would impact upon a child's future employment as an adult.

10. How should an appeal process operate?

As noted above, Legal Aid NSW is of the view that an appeal process should be available for all matters relating to a juvenile offence.

There should be transparency in the appeal process so that the charge and all relevant factors are disclosed at the time the decision is made, as well as the source of the information, in order to ensure that the appeal process accords with procedural fairness. This would help to achieve a proper balance between the protection of children and the interests of an individual to make a living.

LEGAL AID NSW CASE STUDY (CONTINUED)

P's solicitor was unable to obtain all relevant information about the decision to bar P under the NSW working with children check scheme. He was initially informed that the sex offence was the reason for the decision, but when the matter was reviewed in the Administrative Decisions Tribunal he was informed that there were additional factors which meant the prohibition would not be lifted.

The appeals process should commence in a low cost federal Tribunal such as one equivalent to the Social Security Appeals Tribunal.

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

Under the current NSW regime of records that result in automatic barring of a person from working with children, issues arise from including juvenile records.

Juvenile offences treated differently from adult offences for the reasons set out in response to Question 9.

Offences that have automatic exclusion should only apply where the offence was committed as an adult.

12. The adequacy of the risk assessment process.

Some inadequacies with the current NSW risk assessment process have been set out above. Legal Aid NSW would also add that it knows of cases where children have been placed in the care of foster carers who have had their own children removed from their care through the care and protection process. The working with children check scheme for potential carers should therefore involve an investigation into whether a person has had a child removed from their care by the State.

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?

Legal Aid NSW has no comment in relation to this question.

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

Any existing or proposed WWCC should be subject to regular statutory review after five years, with a particular focus on how it balances effectiveness with procedural fairness and ensures juvenile offenders are not disproportionately targeted by the scheme.