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Dear Royal Commission

**Working With Children Check (Issues Paper One)**

Victoria Legal Aid welcomes the opportunity to contribute our experience to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) on the issue of processes for assessing the suitability of people to work with children.

Victoria Legal Aid provides advice to clients in relation to the *Working With Children Act 2005* (Vic) (the Act). In particular, we represent clients at the Victorian Civil and Administrative Tribunal in administrative appeals from decisions of the Secretary of the Department of Justice under the Act.

In addition, as the largest provider of legal assistance in Victoria many of our clients have had contact with the criminal justice system. Our experience has been that without finding employment many clients will find it extremely difficult to reintegrate to society after serving a prison sentence.

The spread of working with children checks and the scope for them to be refused on criminal history grounds compounds disadvantage making people more vulnerable to reoffending and re-entering the criminal justice system.

Victoria Legal Aid supports measures to manage risk of harm to children. However, our experience assisting clients who have been refused assessment notices under the *Working With Children Act 2005* (Vic) leads us to the view that the current approach to managing risk through this mechanism could be improved.

A submission outlining these concerns is enclosed.

Should you wish to discuss any of these issues further, please contact Kristen Hilton (Director, Civil Justice, Access & Equity) on 9269 0691.

Yours faithfully



**BEVAN WARNER**  
Managing Director

## **Working with Children Checks**

**Submission to Royal Commission into institutional responses to child abuse**

19 August 2013

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## Introduction

Victoria Legal Aid (VLA) provides advice and assistance to clients in relation to the *Working With Children Act 2005* (Vic) (the Victorian Act). In particular, we represent clients at the Victorian Civil and Administrative Tribunal in administrative appeals from decisions of the Secretary of the Department of Justice under the Victorian Act.

In addition, as the largest provider of legal assistance in Victoria, many of our clients have had contact with the criminal justice system and have a criminal record as a consequence. Our experience has been that many clients find it difficult to rehabilitate or reintegrate after serving a prison sentence and may experience further disadvantage as a result of their criminal history. This may make them more vulnerable to reoffending and re-entering the criminal justice system.

VLA supports measures to manage risk of harm to vulnerable people, including children. However, based on our experience assisting clients who have been refused assessment notices we have some concerns about the operation of the Victorian Act and the current approach to managing risk through this mechanism.

In summary, we support:

- appropriate management of risk of harm to children;
- recognition of the importance of employment for social inclusion and reducing recidivism.
- confining the application of any working with children scheme to employment where there is a direct risk of harm to children;
- a more beneficial approach to support people with criminal histories in employment, including the use of conditional notices;
- more accessible review and appeal processes;
- clarification of the timing, nature and relevance of “public interest” considerations in the assessment process; and
- reform to the management and release of criminal history information, including the development of a spent convictions scheme and better protection from discrimination on the basis of criminal history information.

## Managing direct risk of harm to children

Given the importance of access to employment opportunities for the promotion of social inclusion and reducing recidivism, any pre-employment screening scheme must be appropriately targeted.

As at 30 June 2013, there were 883,600 card holders in Victoria, representing approximately 22% of the Victorian adult population.<sup>1</sup>

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<sup>1</sup>Department of Justice Working With Children Check website, accessed 19 August 2013

<<http://www.workingwithchildren.vic.gov.au/home/about+the+check/statistics/>> and Australian Bureau of Statistics, 2011 Census, Victoria, accessed 19 August:

<[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2011/quickstat/2?opendocument&navpos=220](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/2?opendocument&navpos=220)>.

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In recent years, a broader range of workers have been required to obtain an assessment notice. This occurs even in circumstances where their employment does not fall within the legislative definition of “child-related work”.

“Child-related work” is defined by the Victorian Act to mean work that usually involves, or is likely to involve, regular direct contact with a child where that contact is not directly supervised by another person.<sup>2</sup> “Direct contact” means any contact between a person and a child that involves physical contact, face to face oral communication or physically being within eyeshot.<sup>3</sup>

The Victorian Act provides an example of when employment will not be child-related work:

A is employed as a nurse in the geriatric ward of a public hospital. One day, a nurse who usually works in the paediatric ward is unwell and A works in that nurse’s place for that day. A is not engaged in child-related work as A’s work does not usually involve regular direct contact with children.

The Victorian Act contemplates that even in circumstances where a person has direct contact with children during their employment, this will not be taken to be “child-related work” for the purposes of the scheme if they do not have contact with children on a regular basis.

Despite the original intention of the Victorian Act, we have represented clients whose usual employment cannot be characterised as child-related work in applications for review of decisions under the Victorian Act. One of these clients was required to obtain an assessment notice as a pre-condition of their employment as a labourer on a building site. The requirement to hold an assessment notice was due to his employment on work sites in and around schools.

#### **Case Study - John**

After a troubled youth, John had worked hard with the same construction company for the past eleven years, rising to foreman. The company specialised in laying surfaces of sports fields. In 2009 John’s employer advised that schools were now requiring proof that all employees obtain an assessment notice as a condition of submitting tenders for contracts. The schools adopted this policy as, although the construction company was always fenced off, it was within ‘eye sight’ of the children on the school grounds. John was granted an assessment notice, however in 2012 he was involved in a fight with another adult at his home, resulting in a three-month good behaviour bond. This caused an automatic reassessment of John’s assessment notice, which was revoked, causing John to cease work with that company.

There was evidence at the hearing that John’s employment was a significant factor in assisting him to overcome issues with alcohol addiction. For this reason, losing his employment made John particularly vulnerable.

In our view, the requirement to hold an assessment notice should only arise where a person is engaged in child-related work. This would ensure the scheme remains faithful to its intention of managing direct risk to children. Where there are broader concerns to assess people for suitability for employment, ordinary criminal record checking processes should be adopted.

In our view, employers should be supported to make decisions about whether or not an employee requires an assessment notice with better guidelines or an advisory opinion from a court or tribunal.

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<sup>2</sup> *Working With Children Act 2005* (Vic) s.9.

<sup>3</sup> *Working With Children Act 2005* (Vic), s.3.

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### **Recommendation 1**

That the operation of a working with children scheme be strictly confined to “child-related work” where there is a regular, direct, unsupervised contact with children.

## **Use of conditional notices to manage risk**

Once a person has an assessment notice, this notice is valid for a period of five years. Some of the caution in granting an assessment notice in circumstances where there is only remote contact with children may flow from the transportable nature of the assessment notices.

Given that employers are increasingly requiring their employees to hold assessment notices even in circumstances where they may have limited contact with children, VLA considers that any working with children scheme should also include conditional notices. In our view, this approach would strike a more appropriate balance between risk management and employment participation and would mitigate the concern that an assessment notice suggests that a person is suitable to work directly with children in any employment context.

Under a conditional notice system, an assessment notice is not transferrable. An employee would be required to apply a new check if they changed employer, type of work or had multiple employers. This avoids the characterisation of the assessment notice as an endorsement of the person’s suitability to work with children “at large” and will more appropriately assess their suitability to work in a particular environment. The availability of a conditional notice may assist people like John (refer above) to remain in employment.

### **Recommendation 2**

That any working with children scheme allow for conditional notices to be issued that will require a person to apply for a new check if they change employer or type of work.

## **The importance of accessible review processes**

Based on our experience assisting people with the review of applications under the Victorian legislation, we consider that these review processes should be more accessible.

Since the commencement of the Victorian Act in 2006, approximately 1,840 negative assessment notices have been issued.<sup>4</sup> In Victoria, a person must apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of a decision. There is no option for internal review of the original decision. Moreover, a VCAT application fee is payable unless a person is eligible for a fee waiver. In our view, a person should not have to pay to access the supervisory jurisdiction of VCAT in relation to government administrative decision-making.

Since 2006, approximately 86 working with children checks have been issued by VCAT upon review.<sup>5</sup>

In our view, fees may inhibit access to review of decisions by government and discourage people from seeking review of these decisions. People applying for review of decisions under the Victorian Act can be very vulnerable. Those that end up seeking review are more likely to have a criminal

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<sup>4</sup> Department of Justice Working With Children Check website, accessed 19 August 2013

<http://www.workingwithchildren.vic.gov.au/home/about+the+check/statistics/>.

<sup>5</sup> Ibid.

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record and experience some form of social exclusion and isolation. They may have been unable to work since receiving a negative assessment notice due to the operation of the Victorian Act. They may have little or no income as a result.

**Recommendation 3**

That applicants have access to internal review of any refusal to issue an assessment notice.

**Recommendation 4**

That applications for external review proceed without cost to the applicant, where internal review is not available.

## **Public interest considerations in applications for review**

When VCAT considers reviews of decisions to refuse an assessment notice it makes an assessment of a range of matters, including whether it is in the public interest to order the Secretary to give an assessment notice to an applicant.

In deciding whether or not to make an order giving an assessment notice, VCAT must be satisfied that giving the notice would not pose an unjustifiable risk to the safety of children, having regard to a range of considerations, including the nature and gravity of the offence, the period of time since the offence, the sentence imposed and the likelihood of future threat to a child caused by the applicant.

The legislation demands a complex assessment of risk of reoffending. Unfortunately, in our experience, this assessment process is challenging and is not always grounded in a solid evidence base. Equally, it is very difficult for applicants to produce evidence that will overcome a negative assessment made by the tribunal. The effect of this is that the assessment may draw on assumptions rather than actual risk supported by independent evidence.

**Recommendation 5**

That there be more robust evidence base supporting the assessment of whether a person poses an unjustifiable risk to the safety of children.

VLA also supports consideration of the timing, nature and relevance of public interest considerations in the assessment process. Currently, the Victorian legislation makes public interest considerations a secondary consideration in the assessment process. In the ordinary course of things, there is little opportunity for a person to be issued with a notice on public interest grounds where any level of risk has been identified.

We support attention to the sequencing of the assessment process so that public interest considerations can play a stronger role in the assessment of review applications. This could include, for example, the assessment of employment for social and economic participation and reducing recidivism.

**Recommendation 6**

That public interest considerations be more prominent in the assessment of applications for review.

## **The importance of employment participation**

The importance of social inclusion, employment and community participation for people with criminal histories is well supported by research. A 2007 study by the Australian Institute of Criminology identified a number of factors, which correlate with recidivism. Unemployment, limited or low level

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education, poor residential location, a history of mental health problems, family instability and serious, prolonged drug use were the key factors identified.<sup>6</sup>

Our practice experience supports this research. In particular, we see that a negative assessment notice can operate as a roadblock to rehabilitation and community integration for people with a criminal record. This can operate to increase rather than mitigate the risk of reoffending for this cohort of people.

#### **Recommendation 7**

That any pre-employment screening process balance community safety with recognition of the importance of employment participation for former offenders.

### **Better protections for disclosure and use of criminal history information**

VLA supports further work being undertaken to develop better protections for people in relation the release and use of criminal history information. In our view, the use of criminal-history information for pre-employment screening more broadly should be managed through dedicated processes supported by a spent convictions scheme and better protection from discrimination on the basis of irrelevant criminal history information.

#### **Recommendation 8**

That any development of a national approach to pre-employment screening include the development of better protections for people in relation to the release and use of criminal history information.

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<sup>6</sup> Jason Payne (2007) *Recidivism in Australia*, Australian Institute of Criminology, Research and Public Policy Series (No 80).