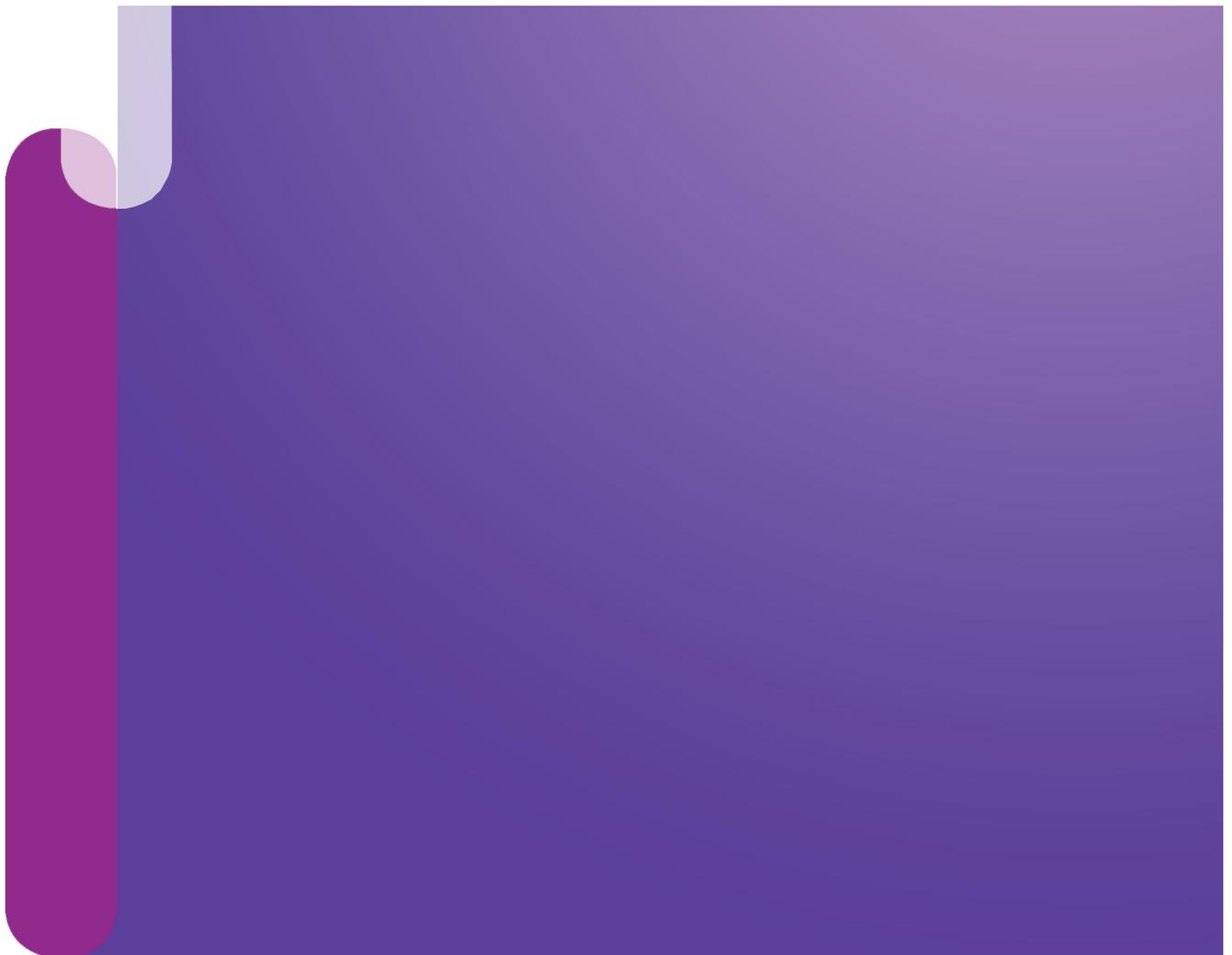


# Royal Commission into Institutional Responses to Child Sexual Abuse

Response to Issues Paper 1 - Working with Children Check



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# 1 Introduction

This submission is made on behalf of the State Government of Victoria to assist the Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission) in addressing the issues outlined in the Commission's first Issues Paper, entitled 'Working with Children Check'.

Victoria welcomes the opportunity to address the matters raised in Issues Paper 1, the responses to which draw on the administrative, operational and legislative experience arising from Victoria's Working with Children (WWC) Check scheme, which has now been in operation for over seven years. This paper provides a comprehensive overview of the Victorian WWC Check scheme and addresses the questions put forward in the Commission's Issues Paper 1.

The Victorian WWC Check (WWC Check hereafter) was established in 2006 with the introduction of the *Working with Children Act 2005* (WWC Act) and is administered by the Victorian Department of Justice's WWC Check Unit.

The WWC Act provides a legislative framework for assessing the criminal history of employees and volunteers to determine their suitability to work with children. The legislative framework consists of the WWC Act and the Working with Children Regulations 2006.

The introduction of the WWC Check significantly expanded the scope of criminal history screening in Victoria, applying to all employees and volunteers involved in child-related work as defined by the WWC Act. Typically, child-related work is work involving regular direct contact with a child or group of children where that contact is not directly supervised.

The WWC Check is part of a wider suite of government activities aimed at reducing harm to children, including the child protection system. The WWC Check enables government to prohibit certain individuals from engaging in child-related work.

The WWC Check includes a national police record check, review of findings made by prescribed bodies, an assessment of suitability to work with children and weekly ongoing monitoring of relevant Victorian offences through Victoria Police. A WWC Check is valid for five years unless otherwise surrendered by the applicant or revoked or suspended by the Secretary.

The WWC Check is promoted as the mandatory minimum screening standard for individuals working with children and is intended to be supported by employers and organisations through the use of other necessary measures that ensure child safe environments.

The Victorian community's commitment to protecting children is demonstrated through the high uptake in applications for the WWC Check. Since commencement of the scheme in 2006, approximately 1.2 million<sup>1</sup> applications have been received. However, custom and practice has evolved over the life of the scheme so that people are obtaining WWC Checks irrespective of legislative requirements.

One measure of the WWC Check's success is its effectiveness in preventing unsuitable people from working with children. As of 30 June 2013, 1,480<sup>2</sup> people have been issued a negative notice, thereby preventing them from engaging in child-related work and reducing the risk these people may have posed to children in our community.

Protections afforded by WWC Check schemes are necessarily constrained by a reliance on the assessment of known and proven criminal offending. The schemes that are currently in place across Australia all rely on this form of known information.

In the particular case of Victoria, an assessment of criminal history information that has been recorded about a person can only offset any future risk to children by this person if they have been subject to a charge, conviction, finding of guilt for a relevant offence or prescribed finding under the WWC Act.

The scope of the WWC Check means that organisations are still required to undertake additional checking (in particular, national police record checks that identify a wider range of offences such as financial related offences, personal referee checks and professional referee checks) to ensure that prospective employees or volunteers are suitable. The nature of the WWC Check also means that

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<sup>1</sup> Working with Children Check Unit Monthly Report, June 2013, page 2.

<sup>2</sup> Ibid.

efforts must continue to ensure its coverage is well understood in the community, particularly in the community and volunteer sectors.

Institutional child abuse of the nature under consideration by the Commission has historically gone undetected and unreported, or has not resulted in successful prosecution. Institutional child abuse cannot be prevented by WWC Check schemes alone and effective prevention remains the subject of prudent and careful recruitment and observation by employers, organisations or guardians.

## 2 Overview of the Victorian WWC Check scheme

The stated purpose of the WWC Act, provided for in section 1(1), is to “assist in the protection of children from physical or sexual harm by ensuring that people who work with, or care for, them have their suitability to do so checked by a government body”. Public confidence in the WWC Check, and trust in the institutions that provide activities and care for children, are key objectives of the scheme. Accordingly, the community expects that the safety of children will be the paramount consideration for decision-makers.

### 2.1.1 WWC Check scheme in context

Many cases of child sexual abuse go undetected and unreported to police, and as a result perpetrators live without a criminal record. While detection and reporting rates have improved in recent decades, there will always be some cases where victims are unwilling to report their case to police and the criminal justice system. As a result prevention of child sexual abuse cannot and does not rely on WWC Check schemes alone. The scheme is supported by a wider range of measures, especially for paid and professional child related work. These include statutory registration of health practitioners, and screening, recruitment, management practices and observation by an employer, organisation or guardian.

Among the most important complementary arrangements that prescribe conduct of persons who work in regular contact with children are:

- ◆ Health professions regulations, through which fourteen health professions are regulated under the *Health Practitioner Regulation National Law Act 2009* (the National Law). The regulatory arrangements are administered by the Australian Health Practitioner Regulation Agency (AHPRA), which supports the statutory functions of fourteen National Boards, one per regulated profession. Under the regulatory regime sanctions can be imposed on registered health practitioners for unprofessional conduct or professional misconduct, whether or not the misconduct leads to a criminal conviction. All National Boards have immediate action powers, where a health practitioner who is the subject of allegations of abuse of a patient may have chaperone conditions placed on their registration. The National Registers of health practitioners publish details of the conditions that apply to a practitioner’s registration.
- ◆ Unregistered health practitioners will also soon be subject to stronger regulation with the introduction of an enforceable National Code of Conduct, mutual recognition of prohibition orders issued by state and territory health complaints commissioners, and a national register of prohibition orders.
- ◆ Out-of-home care services are required to have regard to a person’s criminal records and criminal history before approving them as an out-of-home carer (including any foster parent applicant and usual members of their household). Similarly, when the Department of Human Services statutory child protection services assess a child’s relative or member of a child’s social network to undertake the care of a child away from home (known as ‘kinship care’), the full criminal history of every adult member of the household is reviewed.
- ◆ Quality of care standards in a range of other sectors (including ‘fit and proper’ person tests) and child-safe organisation and management practices.

These higher standards for paid and professional workforces are both appropriate and proportionate to prevent risks. WWC Checks are particularly important to support volunteer and community groups prevent abuse in their organisations.

### 2.1.2 Who needs a WWC Check – legal requirements

Under section 9 of the WWC Act, a person is engaged in child-related work if

- ◆ they work or volunteer in connection with one of the specified child-related occupational fields listed under section 9(3)

- ◆ the work involves or usually involves regular direct contact with children under 18 years of age
- ◆ the contact with children is not directly supervised, and
- ◆ they do not qualify for an exemption under Part 3.

If a person meets the above requirements, they are legally required to obtain a WWC Check.

The specified child-related occupational fields are outlined in table 1, below.

*Table 1: Child-related occupation fields under section 9(3) of the WWC Act*

Occupational fields where child-related work is likely to occur	
Camps	Foster Care
Childcare Services	Gym or Play Facilities
Child Employment Supervisors	Out of Home Care Services
Childminding	Paediatric Wards
Child Protection Services	Photography Services
Children's Services	Refuges
Clubs and Associations	Religious Organisations
Coaching and Tuition	School Crossings
Counselling Services	Talent and Beauty Competitions
Education Institutions	Transport
Entertainment and Party Services	Youth Justice

Through promotion on the WWC Check Unit's website, employers and organisations are encouraged to utilise other measures over and above the WWC Check to ensure the development and promotion of child safe environments. Accordingly, apart from the educational role of the WWC Check Unit in respect of the WWC Act, the WWC Check Unit does not play any direct role in promoting child safety.

### 2.1.3 Who does not need a WWC Check – exemptions

Part 3 of the WWC Act provides for a number of exemptions for different categories of individuals, table 2 below outlines these exemptions.

*Table 2: Exemptions from the WWC Check*

Exemption	Section of the WWC Act
Volunteer whose child is participating or ordinarily participates in the relevant activity	Section 27
Person working with closely related child	Section 28
Children	Section 29
Registered teachers	Section 30
Sworn police officer	Section 31
Federal Police officer	Section 31A
Visiting workers	Section 32
Accredited drivers	Section 32A

The above exemptions are not unique to the Victorian scheme and similar exemptions exist in other jurisdictions. The Victorian exemptions exist for a variety of reasons. On commencement of the

scheme, the parental and familial exemptions were drafted so the WWC Check did not unduly encroach on the family environment, noting that any regulation of these relationships should remain within the ambit of the child protection system.

Registered teachers, sworn police officers and accredited drivers are all subject to criminal history screening, incorporating systems of ongoing monitoring, that is equal to or more thorough than the WWC Check.

The visiting worker exemption was intended to only cover those people who do not usually live or work in Victoria, allowing school groups to visit, junior teams to tour and adults from interstate or overseas to accompany them without being in breach of the WWC Act.

In addition to the legislated exemptions, if a person does not fulfil the requirements in 2.1.2 above, that person does not require a WWC Check.

## 2.1.4 WWC Check applicants

An application for a WWC Check is made when an applicant completes the approved application form and lodges this form, including the approved identifying information, at an Australia Post outlet. In the case of employee applications, these are accompanied by the prescribed fee (currently \$102.70), whereas volunteers are not required to pay. Consistent with the general government principle for fee-setting, the employee WWC Check is set on a full cost-recovery basis. The volunteer WWC Check is fully subsidised by the Victorian Government and is free of charge. Approximately 53 per cent of all applications are for volunteer WWC Checks<sup>3</sup>.

Upon receiving an application for a WWC Check (including a renewal application), the Secretary to the Department of Justice (the Secretary), under section 11(1)(a) of the WWC Act, must arrange for a national police record check to be conducted. Under section 11(1)(b), the Secretary must also consider any findings made by a prescribed body (currently the Victorian Institute of Teaching, out of home care Suitability Panel and certain findings of the Victorian Civil and Administrative Tribunal (VCAT) as they relate to health practitioners). Under section 11(1)(c), the Secretary may also make enquires of any other source, including government agencies such as Corrections Victoria and the Department of Human Services. The Department of Justice maintains memoranda of understanding with these agencies to assist in the exchange of information.

Where it is found that the applicant has not been charged, convicted or found guilty of a relevant offence and there are no other relevant matters under sections 11(1)(b) or 11(b)(c), an assessment notice (the WWC Check card) is issued to the applicant.

Where it is found that an applicant has been charged, convicted or found guilty of a relevant offence, depending on the severity of the offending, the Secretary must classify the applicant as a category 1, 2, 3 or exceptional circumstances application, and must assess the applicant's suitability to engage in child-related work. The categories reflect the descending seriousness of the offending that has triggered the assessment, based on the *Sentencing Act 1991* (Vic) and other Acts. An analysis of the categorisation of offending under the WWC Act is provided at table 3, below.

Table 3: Categorisation of offending

Category	Inclusions	Statutory Tests (see table 4)
1	Finding of guilt for: <ul style="list-style-type: none"> <li>▪ sexual offences against children by adults</li> <li>▪ murder</li> </ul>	The Secretary must refuse to give an assessment notice on a category 1 application
2	Charges for offences that would become category 1 if a finding of guilt Charges or findings of guilt for serious sexual, violent and drug related matters	There is a negative presumption that the Secretary will not issue an assessment notice with consideration given to: <ul style="list-style-type: none"> <li>▪ unjustifiable risk</li> <li>▪ reasonable person</li> <li>▪ any type of child-related work</li> </ul>
3	Charges or findings of guilt for	There is a positive presumption that the Secretary will give an assessment notice,

<sup>3</sup> Ibid, above n1.

Category	Inclusions	Statutory Tests (see table 4)
	<ul style="list-style-type: none"> <li>▪ wilful and obscene exposure</li> <li>▪ recklessly or intentionally causing injury</li> <li>▪ offences against the WWC Act</li> </ul> Professional disciplinary outcomes	unless the following tests are not satisfied: <ul style="list-style-type: none"> <li>▪ appropriate to refuse</li> <li>▪ reasonable person</li> <li>▪ any type of child-related work</li> </ul>
Exceptional Circumstances	Charges or findings of guilt for any offence other than a relevant offence	There is a positive presumption that the Secretary will give an assessment notice but for the following tests: <ul style="list-style-type: none"> <li>▪ significant link</li> <li>▪ exceptional circumstances</li> <li>▪ appropriate to refuse</li> <li>▪ reasonable person</li> <li>▪ any type of child-related work</li> </ul>

Where an applicant is found to have been convicted or found guilty of a category 1 offence (the most serious offences), the Secretary must issue that person a negative notice. The negative notice has the effect of prohibiting a person from engaging in child-related work unless that person has the decision overturned at VCAT or there has been a relevant change in circumstances under section 25(2) of the WWC Act. A person who holds a negative notice is restricted from applying for a WWC Check for a minimum period of five years or unless there has been a relevant change of circumstances.

Even where an applicant has not been charged, convicted or found guilty of a relevant offence, section 17(1A) of the WWC Act allows the Secretary to refuse to issue a WWC Check card if satisfied that exceptional circumstances exist to justify the refusal of a WWC Check.

The statutory tests the Secretary must consider when assessing the suitability of an applicant are summarised at table 4, below.

*Table 4: Statutory tests under the WWC Act*

Test	Description
The 'unjustifiable risk' test	This test requires the decision maker to be satisfied the applicant or cardholder does not pose an unjustifiable risk to the safety of children
The 'appropriate to refuse' test	This test requires the decision maker to grant a WWC Check unless satisfied that it is appropriate to refuse to do so
The 'reasonable person' test	This test requires the decision maker to be satisfied that a reasonable person would allow his or her child to have direct contact with the applicant that was not directly supervised by another person while the applicant was engaged in any type of child-related work
The 'any type of child-related work' test	This test requires the decision maker to be satisfied that the applicant's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children
The 'public interest' test	This test prevents VCAT from ordering the Secretary to issue a WWC Check to an applicant unless it is satisfied that it is in the public interest to do so
The 'exceptional circumstances' power and associated tests	This provision allows the Secretary to refuse a WWC Check on the basis of offences other than those in Categories 1, 2 and 3. The power is only enlivened if three connected, highly technical tests are met

## 2.1.5 WWC Check cardholders

In situations where a WWC Check cardholder is found to have been charged with a relevant offence, section 21(1) of the WWC Act requires the Secretary to undertake a reassessment of their suitability to continue working with children and the Secretary is empowered to suspend or revoke that person's WWC Check.

The ongoing monitoring feature of the WWC Check ensures that it has a significant advantage over screening that relies only on a once-off, point-in-time police record check because the criminal history information of cardholders is monitored weekly by Victoria Police for the five-year duration of the WWC Check.

In this way, cardholders are continually screened for relevant Victorian criminal charges, convictions or findings of guilt. If a person who has already qualified for a WWC Check is subsequently charged with a relevant offence or convicted or found guilty of a relevant offence, their suitability to hold a WWC Check is reassessed.

Since commencement of the scheme, approximately 54 per cent of all negative notices issued have been issued to WWC Check holders, demonstrating the value of ongoing monitoring by Victoria Police.

## 2.1.6 Employers and voluntary organisations engaged in child-related work

The WWC Check Unit maintains a public interface team which plays a role in informing applicants and employers of their obligations under the WWC Act, and provides a range of materials and programs targeted at applicants, cardholders, employers, community organisations and the wider community detailing their obligations under the WWC Act. These include:

- ◆ a community education program, which consists of information sessions, an information line and publications
- ◆ a dedicated website ([www.workingwithchildren.vic.gov.au](http://www.workingwithchildren.vic.gov.au)), and
- ◆ the 'do I need a check' and 'do my workers need a check' online tools.

The WWC Check Unit is also working on further enhancements to online application processes including biometric facial recognition technology and future cohesion with the national Document Verification Service<sup>4</sup>.

Anecdotally, employers and voluntary organisations regard a particular strength of the WWC Check to be the notifications they receive in respect of applicants or cardholders who are engaged by them. Under sections 21A(6), 21A(9), 21B(5), 23(5) and 24(4) of the WWC Act, the Secretary must notify an employer or voluntary organisation if an applicant or cardholder who is engaged by them (and has included this information on their application form) when their WWC Check is suspended, revoked or withdrawn.

## 2.1.7 Over reliance on the WWC Check

Protections afforded by WWC Check schemes that are in place across Australia are necessarily constrained by a reliance on the assessment of known and proven criminal offending. WWC Check schemes all rely on this known information, which cannot be viewed as a predictor of any behaviour that might occur at a later date.

Occurrence of child abuse in the community generates significant concern, however, in some sectors of the community there may be an overestimation of the capacity of WWC Check schemes to reduce child abuse. A scheme such as the WWC Check can:

- ◆ check the known criminal history of an individual
- ◆ where a relevant criminal history is identified, assess whether a WWC Check should be issued, and
- ◆ provide a sense of confidence.

A WWC Check cannot:

- ◆ guarantee that a cardholder, while assessed as low risk, presents no risk to the safety of children,
- ◆ guarantee that a person who receives a WWC Check is more broadly appropriate, suitable or ready to work with children, or
- ◆ protect children from all perpetrators of child abuse.

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<sup>4</sup> The DVS is a secure, electronic online system that can be used to check, in real time, if a person applying for a benefit or service has provided identifying documentation that is accurate and up to date.

A person's overall suitability for specific employment or volunteering roles must be assessed more broadly by the employer or organisation engaging the individual.

Robust recruitment and selection processes, risk management plans and staff training programs that build a culture of child safety are fundamental to preventing harm to children. Likewise, the suitability of individuals should be subject to ongoing scrutiny, based on the person's behaviour at their workplace or volunteer organisation.

Institutional child abuse cannot be prevented by WWC Check schemes alone and any prevention remains the subject of prudent and careful recruitment and observation by employers, organisations and guardians.

## **2.2 Duration**

### **2.2.1 Assessment notices**

From the date a person is assessed as having passed the WWC Check, section 19(1) of the WWC Act provides that the assessment notice remains in force for five years unless revoked or surrendered. A person may lawfully apply for a new assessment notice within six months before or three months after the expiry of their WWC Check.

Approximately 50 per cent of cardholders are renewing their WWC Check after five years. Of this cohort of renewals, approximately 60 per cent are for paid employment.

A cardholder is able to renew their WWC Check after five years by completing a pre-populated application form provided to them by the WWC Check Unit and lodging this application at an Australia Post outlet along with the prescribed fee.

Cardholders who seek to renew their WWC Check after five years are not required to again supply identifying information. Where a person has held their WWC Check for a period of ten years, that is, they have renewed once, a new application must be lodged upon the second renewal at the ten-year point with approved identifying information.

As a check of inter-state offending is only conducted upon application and renewal of the WWC Check, the five-year duration of WWC Checks balances the risk of the Secretary not being notified of interstate offending with that of imposing an excessive regulatory burden on the community.

Since commencement of the WWC Check renewals in April 2011, at which time another national criminal records check is conducted, no relevant interstate offences have been identified. Taking into consideration the very low number of WWC Check cardholders who have been charged, convicted or found guilty of a relevant interstate offence during the life of the Victorian scheme, the five-year period is still considered to be the most cost appropriate position.

### **2.2.2 Negative notices**

If the Secretary to the Department of Justice considers that a person poses a risk to the safety of children and should not pass the WWC Check, a negative notice is issued. The negative notice means a person cannot engage in child-related work, even if the person is directly supervised. A negative notice is effective from the date printed on the notice and prevents the person from applying for a WWC Check for a period of five years unless there has been a relevant change in circumstances under section 25(2) of the WWC Act. If a person reapplies after five years, they are unable to engage in child-related work unless they pass the WWC Check.

## **2.3 Working on a receipt**

There is a presumption in the WWC Act that applicants can engage in child-related work while their application is being assessed and that they are able to use the application receipt as evidence that they have an application being considered. In the vast majority of cases this does not present a risk to the safety of children.

This presumption is given effect through section 33 of the WWC Act, under which it is a defence to the offence of engaging in child-related work without an assessment notice, if the applicant had applied for a WWC Check and the application had not been finally decided by the Secretary.

However, a person is unable to lawfully work on an application receipt under the following circumstances:

- ◆ they have been charged with or found guilty of a serious sexual, violent or drug-related offence under the WWC Act (category 1 or 2)
- ◆ they have previously been given a negative notice
- ◆ they are subject to orders or reporting obligations under the:
  - *Sex Offenders Registration Act 2004* (Vic)
  - *Serious Sex Offenders Monitoring Act 2005* (Vic)
  - *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic)
- ◆ they have applied for a WWC Check to supervise a child in employment under the *Child Employment Act 2003* (Vic), or
- ◆ they have applied for a WWC Check for certain work regulated by the *Children's Services Act 1996* (Vic).

On commencement of the scheme, it was considered appropriate to allow a person who had applied for a WWC Check to commence or continue in their employment or volunteer activity to not unduly restrict their right to work. This policy has evolved somewhat over the life of the WWC Check through other regulatory bodies, such as child employment and children's services, adopting their own requirements in respect of the WWC Check. Further, the WWC Act was amended in 2012 to prevent those individuals assessed as category 1 or 2 applications from engaging in child-related work with a receipt.

The Victorian Government is anecdotally aware that a significant number of employers and volunteer organisations do not recognise the section 33 defence and generally require all people engaged by them to hold a WWC Check prior to their commencement. Under the WWC Act, it is not unlawful for an employer or volunteer organisation to stipulate a valid WWC Check as a condition of employment.

## 2.4 Risk assessment procedures

As noted in 2.1.4 above, the WWC Check examines an applicant's national criminal history for offences that suggest a person may pose a risk to the safety of children. Offences of particular interest to the WWC Check are serious sexual, violent or drug related offences. The WWC Check also reviews disciplinary findings from professional bodies, currently the Victorian Institute of Teaching, the out of home care Suitability Panel and determinations by VCAT under relevant health professions legislation.

During an assessment, the department can seek further information about a person from sources, including—

- ◆ state, territory and federal police forces
- ◆ courts, tribunals and prosecuting authorities
- ◆ authorised screening agencies
- ◆ health treating professionals
- ◆ the Director of Public Prosecutions (Vic)
- ◆ the Department of Human Services (Vic)
- ◆ Corrections Victoria, and
- ◆ employers and organisation.

If there are no relevant offences, disciplinary findings or exceptional circumstances to consider, a person will pass the WWC Check and receive a WWC Check card. However, if during the assessment relevant criminal history information is revealed or disciplinary findings are uncovered, the department assesses the application against the categories listed in the WWC Act and determines whether to refuse a WWC Check or conduct a further assessment of the person's suitability prior to making a final decision.

## 2.5 Automatic barring – category 1 applications

Under the WWC Act, if a person has been convicted or found guilty of—

- ◆ murder

- ◆ a serious sexual offence as an adult against a child (except a carnal knowledge offence which is a category 2 offence)
- ◆ a child pornography offence
- ◆ similar offences committed outside Victoria

or is subject to—

- ◆ reporting obligations under Part 3 of the *Sex Offenders Registration Act 2004* (Vic)
- ◆ an extended or interim extended supervision order under the *Serious Sex Offenders Monitoring Act 2005* (Vic)
- ◆ a supervision or detention order or interim supervision or detention order under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic)

then that person is deemed to pose an unjustifiable risk to the safety of children and is classified a category 1 applicant. The department must refuse to give that person a WWC Check and must issue them with a negative notice.

Noted below at 2.6, when a WWC Check cardholder is issued a negative notice, they can appeal this decision by making an application to VCAT, ensuring the principles of natural justice are upheld and a person maintains their right to procedural fairness and fair hearing.

In Victoria, the automatic barring of a person from engaging in a form of employment or volunteerism without the right of reply would be in breach of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter Act). The Charter Act is unique to Victoria and ensures the protection of an individual's rights under the law.

## 2.6 Appeals process

When an applicant or a WWC Check cardholder is issued a negative notice, section 26(5) of the WWC Act provides that a person can appeal this decision by making an application to VCAT. Under section 26(7), an application to VCAT must be made within 28 days of the decision to issue a negative notice. In the case of a category 1 applicant who has been issued a negative notice because they are a registered sex offender or subject to certain supervision orders, they may only apply to VCAT to review the decision on the grounds of mistaken identity.

## 2.7 Monitoring and evaluation of the WWC Check

In 2008, in light of the recent implementation of the WWC Check, the Victorian Auditor General's Office undertook an audit to examine the scheme's effectiveness, efficiency and economy. The audit found that the department was managing the implementation of the WWC Check well in spite of short time frames and the stronger than anticipated demand.

In 2009, a review of the WWC Act was undertaken by the Department of Justice to ensure that the WWC Check scheme was continuing to meet its aims of providing safer environments for children, whilst not overburdening those required to comply with the scheme.

The 2009 review found that the WWC Check had been well received and was functioning, by and large, as intended. However, a number of practical and technical issues were identified that had arisen during the first three years of the scheme's operation. Consequently, the WWC Act was amended to improve its efficiency and effectiveness. The WWC Act has also been principally amended on another two occasions, in 2007 and again in 2012.

This ongoing refinement and strengthening of the legislation ensures that the WWC Check continues to meet its policy objectives of assisting to protect children from sexual or physical harm.

Another mechanism by which the WWC Check is scrutinised is through the annual review of the administration of the WWC Act, which is undertaken by the Commission for Children and Young People (CCYP)<sup>5</sup>. Under Part 3 of the *Commissioner for Children and Young People Act 2012* (Vic), the CCYP must conduct an annual review of the administration of the WWC Act and report on any recommendations the CCYP considers appropriate. The past three CCYP reviews have found the WWC Check Unit to be fully compliant in its administration of the WWC Act.

<sup>5</sup> Formerly the Child Safety Commissioner. *Commission for Children and Young People Act 2012* commenced on 1 March 2013.

The Department of Human Services requires approximately 450 community sector organisations to comply with the WWC Check and national police record check. Compliance is assessed by independent audit companies as part of accreditation under the Department of Human Services Standards.

### 3 The National Police Record Check and WWC Check

Although Victoria has invested heavily in educating the community about the WWC Check, there is still a level of confusion as to how the WWC Check differs from a National Police Record Check (NPRC). A NPRC is the process undertaken by Victoria Police, upon application by individuals or organisations, that results in the issuing of a National Police Certificate.

The NPRC is a point-in-time check of a person's criminal history and includes findings of guilt and matters currently under investigation or awaiting court hearing except where more than ten years has elapsed since the last finding of guilt. Unlike a WWC Check, not all offences are considered relevant to the WWC Check. As noted in 2.4 above, the WWC Check will consider charges, convictions and findings of guilt in relation to serious sexual, violent and drug offences. While some offences are outside the scope of the WWC Check, such as fraud and financial crime, they are relevant to a NPRC. It is for this reason that some employers and organisations (including some Victorian Government departments and agencies) require individuals to apply for both a WWC Check and a NPRC.

This current system of criminal history checking in Victoria (NPRCs and WWC Checks) is perceived by some members of the community as being unnecessarily complicated, costly and burdensome and it has been suggested by sectors of the community that these two processes be combined.

#### 3.1 Protecting vulnerable children (child protection)

##### 3.1.1 Police checks

Out-of-home care services are required to have regard to a person's criminal records and criminal history before approving them as an out-of-home carer (including any foster parent applicant and usual members of their household). Similarly, when the Department of Human Services statutory child protection services assess a child's relative or member of a child's social network to undertake the care of a child away from home (known as 'kinship care', further discussed at 4.8(a)), the full criminal history of every adult member of the household is reviewed.<sup>6</sup>

In addition to out-of-home-care services, all organisations that are funded by the Department of Human Services or the Department of Health to provide services to specified clients and patient categories are required to comply with the police records check policy.<sup>7</sup> Under this policy, persons who have actual unsupervised contact with the specified client and patient categories, or the potential for such unsupervised contact, are required to have a police check. The specified client and patient categories include: children subject to protection orders or involved with Child Protection, children in residential care services or receiving accommodation support, children to be placed for adoption, and children receiving Specialist Children's Services in the Child and Family Health Program.

The process of utilising both police record checks and WWC Checks is considered an effective way of mitigating against the risk of employing unsuitable employees for child-related roles. The police records check provides immediate coverage pending the finalisation of the WWC Check as well as ensuring that other relevant non-child-related offences are considered in determining the overall suitability of the prospective employee or carer. For example, drink-driving offences may be relevant for assessing the suitability of a person to provide out-of-home care, but these offences will not be captured by the WWC Check. The WWC Check then provides ongoing monitoring of cardholders for child-related offences in Victoria.

##### 3.1.2 Other relevant checks

In addition to WWC Checks and police checks, community service organisations (CSOs) and carers of children and young people in out-of-home care are required to comply with a number of other requirements. Under part 3.4 of the *Children, Youth and Families Act 2005* (Vic) (CYF Act), the

<sup>6</sup> Child Protection Practice Advice 1524 (2013) Criminal History Checks.

<sup>7</sup> <http://www.dhs.vic.gov.au/facs/bdb/fmu/service-agreement/4.departmental-policies-procedures-and-initiatives/4.6-police-record-check-policy-including-working-with-children-check>

Department of Human Services is required to maintain a carer register that records the approval status of carers and the CSO with whom they are associated. The CYF Act requires all approved out-of-home carers to be registered.

During a carer's assessment and approval process, a check of the register must be undertaken to ensure they have not previously been disqualified from caring. People who are not registered or are currently disqualified from caring cannot be engaged as either employed or volunteer carers.

Victoria's out-of-home-care Suitability Panel process determines whether a person should be disqualified and removed from the register of out of home carers.<sup>8</sup> The CYF Act creates offences for an out-of-home care service to employ a person who has been disqualified by the Suitability Panel or without enquiring whether the person is disqualified. It is also an offence for a person to apply for work as an out-of-home carer while disqualified or to conceal the fact that they are under investigation as to their suitability (CYF Act, sections 99-122).

## 3.2 CrimTrac and regulatory burden

CrimTrac is the Australian Government agency charged with providing national information sharing solutions to support the effective operation of police services and law enforcement agencies across state and territory borders. For the purposes of the WWC Check, CrimTrac provides national police record checking services to the WWC Check Unit to assist in the 'pre-employment screening' of individuals seeking to work with children.

The WWC Check Unit maintains an 'accredited agency' status with CrimTrac, enabling it to deal directly with CrimTrac rather than with police services in respect of the national police record check. Accordingly, the WWC Check Unit and CrimTrac maintain a contract for services, which establishes the parties' requirements. The contract with CrimTrac is only designed to fulfil a specific function, and provides that the WWC Check Unit can only request and use criminal history information for the purposes of:

- ◆ the performance and functions under the WWC Act, and
- ◆ deciding whether a person who applies for a WWC Check should be given an assessment notice within the meaning of the WWC Act.

Upon receipt of information from the WWC Check Unit, CrimTrac search a central index containing names of persons of interest to police, refer possible matches to the relevant police services for evaluation against their records, and provide the results to the accredited agency.

As a minimum standard, CrimTrac require that the true identity of an applicant be established through a 100 point check, and that informed consent is gained from the applicant prior to the undertaking of the national police record check.

In addition, all current agreements with CrimTrac for criminal history checking (nationally) allow single purpose checking only.

Currently, in Victoria, a WWC Check and an NPRC must be applied for separately, even where both are required by the same agency or employer at the same time. This scenario is sufficiently common to have led Victoria to consider the possibility of a 'dual-purpose check' that would enable Victorians to apply for both a WWC Check and an NPRC simultaneously.

## 3.3 Dual purpose criminal history checking

One option previously explored by the Department of Justice was for the WWC Check Unit (as an accredited CrimTrac agency) to conduct a single national criminal history check for two purposes, for example, a national criminal history check to assess suitability for a WWC Check and one for general employment. This would have enabled a WWC Check applicant to consent to a check of his or her criminal history for more than one purpose through a single application process. To date, Victoria has been unable to progress this option due to contractual and legislative complexities of criminal history checking at a national level.

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<sup>8</sup> <http://www.suitabilitypanel.vic.gov.au>

## 4 Responses to Royal Commission Issues Paper 1 – Working with Children Check

### 4.1 Should there be a national WWC Check?

In 2009, Victoria and the other states and territories agreed to the National Framework for Protecting Australia's Children 2009-2020 (the National Framework), through which work towards developing a nationally consistent approach to WWC Checks is promoted. State and territory screening units convene regularly to discuss consistent approaches and more effective measures to enhance protections afforded to children. While national consistency is desirable, a move to a national WWC Check would present costly legislative, policy and administrative challenges, including the modification of all contracts, information technology systems and data management systems.

Other challenges associated with a national WWC Check include—

- ◆ Currently, there is no consistent approach to the criminal law across Australia. Some states and territories have codified criminal law whereas others are common law jurisdictions. The Commonwealth, Australian Capital Territory, Northern Territory, Queensland, Tasmania and Western Australia are all 'code jurisdictions', in which statutory codes have been adopted to introduce comprehensive statements of criminal law and are to be interpreted to replace the common law except for cases of ambiguity. On the other hand, Victoria, New South Wales and South Australia remain common law jurisdictions, in which Crimes Acts have been introduced which prescribe common offences and fix their penalties. In these states, only the Parliament can create new offences. Accordingly, without an alignment of criminal codes, prescribing common offences that are relevant to a national WWC Check would be cumbersome.
- ◆ Each jurisdiction that has a WWC Check scheme in place administers their scheme differently. A move toward a national scheme would require extensive community re-education and has the potential to increase the regulatory burden on businesses and organisations. In Victoria, ongoing monitoring is seen as a fundamental component of the WWC Check, and as such results in the broad endorsement of the scheme by employers and organisations. Not all jurisdictions employ ongoing monitoring in their schemes and Victoria would not endorse any lessening of its current practices.
- ◆ Currently, South Australia and Tasmania do not have WWC Check schemes in place, whereas the Australian Capital Territory has introduced a working with vulnerable persons check. As there is a lack of legislated WWC Check schemes in these two states and a unique scheme in the ACT, considerable efforts would be required in working towards a harmonisation of WWC Check legislation.
- ◆ Victoria is currently transitioning its WWC Check application processes to an online system, which will enable applicants and cardholders to apply for and renew their WWC Check through the department's WWC Check website. These measures are designed to not only enable easier access for applicants and cardholders, but will also reduce the cost of the WWC Check scheme to government, therefore enabling this money to be targeted toward other essential services. Some jurisdictions, such as Victoria and New South Wales, are much further progressed than others in respect of the online environment, and considerable time and effort has been expended on developing these systems. A move toward a national scheme would require considerable investment to integrate other jurisdictions in this online environment.
- ◆ As noted above at 3.2, the schemes in place across jurisdictions are driven by individual contracts with CrimTrac, and a move toward a national scheme would require extensive contract renegotiation and arbitration.
- ◆ Under the *Child Employment Act 2003* (Vic), children cannot be employed without a child employment permit. An employer must ensure that any child engaged in employment must be supervised at all times, and is legally required to ensure that a supervisor has applied for and passed the WWC Check. This is also the case for supervisors who may be aged under 18 years. The differing child employment laws across jurisdictions would require unification under any national WWC Check.

### 4.2 What features should be included in any national scheme?

It is crucial to Victoria that any WWC Check legislative framework maintains the integrity and rigour of the current scheme as well as those features of the scheme that are highly valued by employers and voluntary organisations. These features include:

- ◆ weekly ongoing monitoring of offences by WWC Check cardholders during the life of their WWC Check
- ◆ the transferability of the WWC Check to any type of child-related work, and
- ◆ notifications provided to employers and voluntary organisations of changes in the status to the WWC Check of a person engaged by them in child-related work.

Other key features Victoria considers fundamental to an efficient and effective WWC Check include:

- ◆ the duration of a WWC Check balances the cost of the scheme to government and the regulatory burden imposed on the individual with the risk of harm to children
- ◆ assessment of individuals takes into account only relevant criminal history and includes relevant offences committed as a child
- ◆ provision is made for certain persons to be barred from working with children
- ◆ duplicate checking is avoided by exempting people from the WWC Check scheme where these people are already subject to similar employment screening, and
- ◆ decision making applies the principles of natural justice and procedural fairness, values privacy and respects the autonomy of employers and volunteer organisations.

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

Greater unity across jurisdictions is currently being progressed through the National Framework, which promotes developments such as the implementation of minimum standards. The adoption of 'minimum requirements' could apply in all states and territories to ensure the integrity of WWC Check schemes and the consistency in their application. As noted in 4.1, Victoria and the other states and territories are working towards a nationally consistent approach to WWC Checks. Given that each jurisdiction engaged in child-related employment screening has differences in their schemes and some jurisdictions do not have a WWC Check scheme, a single national WWC Check would have some practical challenges in the short to medium term.

### 4.4 How long should any clearance be granted for?

As noted above at 2.2, Victorian WWC Checks are valid for five years, during which time the Victorian criminal and professional records of the cardholder are monitored.

Where the records of an individual are continuously monitored, the original intended duration of the WWC Check is less important than the actions taken in response to any breach. A key issue for consideration may be the degree to which individuals are monitored and minimum standards and timelines for such monitoring.

It is noted that across jurisdictions, the validity of WWC Checks varies considerably, for example, the Northern Territory has a two year WWC Check, Queensland has a three year WWC Check and Victoria has a five year WWC Check. Taking into consideration the very low number of WWC Check holders who have been charged, convicted or found guilty of interstate offences during the life of the Victorian scheme, the five-year WWC Check is still considered to be the cost appropriate position for Victoria.

### 4.5 Should a person be able to commence work before the check is completed?

In Victoria, there is a presumption that an applicant can work on an application receipt while their application is being assessed and that they are able to use the application receipt as evidence that they have an application underway. The Victorian Government is anecdotally aware that a significant number of employers and organisations do not permit potential employees or volunteers to commence work prior to passing the WWC Check. This is also evidenced by certain sectors, such as those regulated by the *Children's Services Act 1996 (Vic)*, and the supervision of child employees under the *Child Employment Act 2003 (Vic)*, legally requiring a valid WWC Check prior to the commencement of employment in particular fields.

Commencing on 1 January 2013, recent amendments to the WWC Act prevent people who have been charged with or found guilty of a serious sexual, violent or drug-related offence (category 1 or 2) from working with children until such time as they pass the WWC Check.

If the screening process is a necessary requirement for engaging in child-related work, it is arguable that the commencement of employment or volunteering should not precede the successful passing of the WWC Check. This would manage the risk of enabling persons who have yet to be assessed by the relevant screening agency from having contact with children. The interests of the child remain paramount in all processes, and it is arguable that these should be prioritised above the early commencement of work. This being said, Victoria has determined that the most serious criminal history information should prevent an applicant from working on a receipt, and that the vast majority of other applicants should not be unduly prevented from engaging in work.

## 4.6 How should child-related work be defined?

Victoria defines child-related work as paid or unpaid work involving regular direct and unsupervised contact with a child when working with or caring for children in any of the occupational categories listed in the WWC Act. In Victoria, child-related sectors are fluid and dynamic. It is not the role of legislation to outline every circumstance in which child-related work may arise. It is appropriately left with the organisation who manages its child-related workers to determine whether the work being undertaken is in fact child-related. However, there is evidence to suggest there is a cohort of people being captured by the scheme who only have incidental contact with children.

Through the examination of WWC Check Unit data and the analysis of VCAT hearings, specific cases in Victoria demonstrate that people such as labourers in schools, whose contact with children is incidental to their usual work, are being required to apply for a WWC Check. It is arguable that these people should not be captured by a WWC Check scheme, as their work clearly falls outside the scope of child-related activities.

Unintended consequences can be significant where a person not doing child-related work is unnecessarily required to obtain a WWC Check by an organisation, particularly if they receive a negative notice (or other mechanism which prohibits their right to certain work). In these cases, if the WWC Check was a condition of employment, they may lose their job and risk detriment to their livelihood.

## 4.7 How should child-related sectors be defined?

Table 1 at 2.1.2 lists the current child-related occupational fields captured by the Victorian scheme. Since inception of the Victorian WWC Check, negative notices have been issued to people under every occupational field, included in the definition of child-related work.

Victoria considers that the occupational fields provided for in the WWC Act are appropriate and adequate.

## 4.8 Are current exemptions for a WWC Check adequate or appropriate – in particular, should a WWC Check apply to those:

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

The WWC Check should continue to apply to workers or contractors supervising children in residential out-of-home-care, and to any adult who is fostering a child through the home-based care program of an out-of-home-care service. The primary carer and other adults exercising a care role in foster care arrangements should be required to obtain a WWC Check as part of the accreditation process prior to any placement. Under section 9(3)(d) of the WWC Act, out-of-home-care services within the meaning of the *Children, Youth and Families Act 2005* (Vic) (CYF Act) is an occupational field. Under sections 9(3)(f) and (k), other residential facilities and fostering children are also occupational fields for the purposes of the Victorian scheme.

The CYF Act does not require WWC Checks for carers where a child is placed in kinship care (that is, care provided by relatives or members of a child's social network). The Department of Human Services' policy requires that kinship care placements are the subject of full national criminal history checks prior to approval of the placement, upon any new adult joining the household during the placement, and every three years for all approved and continuing placements. Checks are undertaken

on the direct carer(s) and all other adult members of the household.<sup>9</sup> The Department of Human Services also conducts a range of other checks to determine the person's suitability as a kinship carer, including checks of the department's Child Protection database.<sup>10</sup> These checks and the broader assessment procedures, undertaken prior to and during kinship care placements, provide for a security screening regime and suitability assessment that is equal to or greater in scope than that provided by the WWC Check.

The Department of Human Services does not require WWC Checks for kinship carers on the basis that:

- ◆ kinship care arrangements are not generally amenable to forward planning and pre-approval as they commonly arise in the context of a family crisis (unlike foster and residential care placements where carers are pre-assessed). In kinship care circumstances it would be impractical to require a WWC Check prior to placement
- ◆ kinship carers are specifically targeted by the Department of Human Services to care for an individual child, consistent with section 10(3)(h) of the CYF Act, which requires that kinship care is considered and investigated before any other placement option. Unlike foster care applicants and residential care employees, kinship carers are not persons seeking an opportunity to care for vulnerable children, and
- ◆ the burden associated with obtaining a WWC Check may create disincentives for kinship carers to provide voluntary care for a child in need of protection. Should a kinship carer not comply with the requirement to obtain a WWC Check, the Department of Human Services would need to consider alternative placements which may be less suitable.

The Department of Human Services also maintains a continuous monitoring role over kinship care placements, through regular home visits and contact with the child for the duration of the placement.

#### **b. Parent volunteers?**

Under section 27 of the WWC Act, a parent is exempt from the WWC Check in situations where they are volunteering in an activity in which their child participates or ordinarily participates. Further to this, a person engaging in child-related work with a child to whom they are closely related is exempt from the WWC Check. As noted in the review of the Western Australian scheme, and as is the case with the Victorian scheme, parents are excluded from WWC Check requirements to limit intrusions on normal family life and to encourage employers to adopt more suitable child safe practices for these volunteer positions.<sup>11</sup>

In Victoria, anecdotal evidence suggests that where organisations do recognise the parental exemption, they do so on a limited basis, with the majority of parents still required to apply for a WWC Check. The exemptions are largely used to enable parents to volunteer for a single, one-off event.

## **4.9 What records should be included in the check? For example, should the check include juvenile records?**

The current information considered by the Victorian WWC Check covers information considered across a person's life, including:

- ◆ formal findings of guilt
- ◆ convictions
- ◆ guilty pleas
- ◆ acquittals because of mental impairment
- ◆ spent convictions or expunged records
- ◆ juvenile convictions and findings of guilt from when a person was under 18 years of age
- ◆ pending charges
- ◆ circumstances around any of these charges or convictions
- ◆ findings by prescribed bodies

<sup>9</sup> Child Protection Practice Manual, Advice No 1524: Criminal history checks.

<sup>10</sup> Child Protection Practice Manual, Advice No 1435: Kinship care and assessment.

<sup>11</sup> Ibid, above n6 and Second Reading Speech, Working with Children Bill 2005 (Vic), Legislative Assembly, 21 July 2005, p1997.

The criminal offences that are of most relevance to the WWC Check are:

- ◆ serious sexual offences
- ◆ serious violent offences
- ◆ serious drug-related offences
- ◆ offences against the WWC Act
- ◆ other offences where there is a significant link between the offence and the safety of children.

Appendix 3 lists the relevant offences under the Victorian WWC Act.

The Victorian WWC Check already includes information relating to juvenile justice records.

#### **4.10 How should an appeal process operate?**

As noted at 2.6 above, under the Victorian scheme, when an applicant or a WWC Check holder is issued a negative notice, that person can appeal this decision by making an application to VCAT.

The WWC Check scheme is strengthened by an applicant's right to review. In keeping with the doctrine of procedural fairness, applicants are entitled to a reasonable opportunity to present information which may assist them in situations where a decision has been made to prevent them from working.

Maintaining the right to appeal a decision under any WWC Check scheme to an Administrative Tribunal, such as is the case with VCAT, ensures an applicant's right to a fair hearing and maintains the integrity of any scheme, demonstrating that it can act flexibly and deal with the wide variety of situations that may arise when WWC Checks are conducted.

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

Under the Victorian scheme, the department must refuse to give a category 1 applicant a WWC Check based on the serious nature of their criminal history. Upon receiving a negative notice, a person cannot apply for a WWC Check for a period of five years unless there has been a relevant change in circumstances as specified under section 25(2) of the WWC Act.

A person may reapply for a WWC Check at the conclusion of the five year period, but there is no guarantee that they will be successful in their application. As previously noted at 4.6 above, there can be unintended consequences associated with automatic barring of a person in situations where that person is not doing child-related work but has unnecessarily been required to obtain a WWC Check. In these cases, if the WWC Check was a condition of employment, this person may lose their job and risk detriment to their livelihood.

#### **4.12 The adequacy of the risk assessment process.**

Noted at 2.4 above, the Victorian WWC Check examines an applicant's national criminal history for offences that suggest a person may pose a risk to the safety of children. Offences of particular interest are serious sexual, violent or drug related offences. The WWC Check also reviews disciplinary findings from professional bodies including the Victorian Institute of Teaching, the out-of-home-care Suitability Panel and determinations by VCAT under relevant health professions legislation.

During the assessment, the department can seek information from a wide variety of sources, ensuring that as much information about an applicant is obtained. The Victorian WWC Check Unit employs qualified individuals from a variety of professional backgrounds, including the child protection, social work and legal sectors. These 'review and assessment officers' examine the information obtained from an applicant's criminal history and assess their suitability to work with children.

WWC Check assessments rely on the assessment of known and proven criminal offending. The schemes that are currently in operation across Australia all rely on this form of known information.

Fundamental to the management of risk by organisations is robust recruitment, including police record checks and referee checks, to ensure that prospective employees or volunteers are suitable to work with children. WWC Checks are, by their nature, minimum standards, and so efforts must continue to

be made to ensure its limitations are well understood in the community, particularly in the community and volunteer sectors.

#### **4.13 To what degree should the WWC Check minimise the need for institutions to establish clear processes for responding to inappropriate behaviour of staff in child-related positions?**

As noted above, a WWC Check is a minimum standard. A person's overall suitability for specific employment or volunteering roles must be assessed more broadly by the organisation engaging the individual. Organisations should have robust recruitment and selection processes, risk management strategies and staff training programs that augment a culture of child safety. The suitability of individuals should be subject to continuous scrutiny, based on the person's behaviour at work. Too much focus on an assessment and barring scheme undertaken by a government body places "emphasis for safeguarding in the wrong place – on the State rather than on employers and individuals".<sup>12</sup>

Predatory behaviour and inappropriate conduct may not in all instances breach the requirements of a WWC Check. The WWC Check should only be one mechanism for screening employees or volunteers and it is important to stress that it does not guarantee that the applicant will never engage in inappropriate behaviour or conduct, nor does it provide a mechanism for responding to misconduct, beyond the revocation of the WWC Check.

Public confidence in the WWC Check, and trust in the institutions that provide activities and care for children, should be key objectives for any WWC Check scheme. Accordingly, the community is likely to expect the safety of children will be the paramount consideration of decision-makers. In the second reading speech for the Working with Children Amendment Bill 2012 (Vic), the Attorney-General stated the law was too "focused on the interests of the individuals who apply for checks." He stressed that the law will "ensure working with children tests give priority to the interests and welfare of children and their families."<sup>13</sup>

#### **4.14 How should the effectiveness of any existing or proposed WWC Check be evaluated and/or monitored?**

Evaluation and monitoring of any WWC Check scheme should be an ongoing business practice by the relevant agency conducting the WWC Checks. In Victoria, the WWC Check Unit maintains a Project Control Group and a Senior Leadership Team, both of which undertake frequent analysis of the operations of the WWC Check Unit. Further to improving business practices, the CCYP undertakes an annual review of the administration of the WWC Act, to identify and analyse any compliance issues that may have arisen over the course of the previous financial year.

The preferred approach to evaluating the effectiveness of an existing or proposed WWC Check would be one of continuous improvement through regular internal audits, supported by external agency reviews, as is the case in Victoria..

## **5 Current developments at the national level**

### **5.1 Nationally Consistent Approach to WWC Checks**

In 2009, as part of the National Framework, Victoria, along with other state and territory governments, agreed to work towards developing a nationally consistent approach to WWC Checks, acknowledging that different approaches were being taken by jurisdictions in relation to pre-employment screening for people working with children.

At the time, the Standing Council on Community, Housing and Disability Services (SCCHDS)<sup>14</sup> did not endorse the harmonisation of state and territory legislation, noting that this would

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<sup>12</sup> Government of the United Kingdom, 2011, *Vetting & Barring Scheme Remodelling Review – Report and Recommendations*, Department for Education, Department of Health and Home Office, p3.

<sup>13</sup> Second Reading Speech, Working with Children Amendment Bill 2012 (Vic), Legislative Assembly, 24 May 2012, p2334.

<sup>14</sup> The Community and Disability Services Minister's Conference was renamed the Standing Council on Community, Housing and Disability Services in 2011.

“...require substantial investment of resources to bring the data and related information management mechanisms into line. Current fiscal constraints make additional financial commitments untenable as part of an agile response. There is insufficient evidence to inform a best practice screening model. Attempting to develop a best practice model in an emerging area of research and practice risks being influenced by high profile cases and worst case scenarios”.

A recent initiative arising out of the National Framework was agreement on ‘cross-border exemptions’ for people working with children. Essentially, the exemption seeks to make it easier for people who are required to engage in child-related work across state and territory borders to comply with the relevant regulatory schemes.

This ‘30 day exemption’ from the WWC Check allows people to work, under certain conditions, for up to 30 days in any 12-month period, thus enabling them to participate in national and cross border activities on a short-term basis.

This undertaking required extensive and complex negotiations between jurisdictions and considerable effort in order for an agreement to be reached by the 2012 deadline. This was particularly the case for Victoria, where unlike other jurisdictions, the WWC Act already made provision for some cross border activity.

It was important that the ‘cross-border exemption’ did not result in a weakening of Victoria’s ‘visiting worker’ exemption under section 32 of WWC Act, which provides that a person who is not a resident of Victoria is able to engage in child-related work without a WWC Check if such work is not their usual occupation.

At the 2013 WWC Check National Operators Forum (NOF)<sup>15</sup> it was acknowledged by jurisdictions that the effort required to give effect to the ‘cross-border exemption’ was much greater than anticipated. The competing interests and constraints of the various jurisdictions combined with the imposition of a 2012 deadline left jurisdictions with little time to implement any changes and to communicate these changes to the community. It was agreed that any future undertakings should include greater clarity regarding governance, co-ordination support and timelines.

## 5.2 Exchange of Criminal History Information for People Working with Children (ECHIPWC)

In 2005, Victoria, along with other state and territory governments agreed that the variations in child-related employment screening across Australian jurisdictions had the potential to compromise the integrity of child-related employment screening. Victoria participated in the Council of Australian Government (COAG) Senior Officials’ working group to address this issue.

The Working Group’s Report formed a framework for a COAG agreement to increase and improve access to a consistent and expanded range of interjurisdictional criminal history and associated information by child-related employment screening schemes, to improve the safety and protection of children from sexual, physical and emotional<sup>16</sup> harm in places of work, learning and play.

In November 2009, COAG agreed to trial an interjurisdictional Exchange of Criminal History Information for People Working with Children (the ECHIPWC). The trial concluded in November 2010, and following feedback from participating jurisdictions, in-principle agreement was reached for the permanent continuation of the ECHIPWC through the development of an Intergovernmental Agreement (IGA).

Under the ECHIPWC, parties can exchange criminal history information and further information held by police services to clarify the circumstances of identified offences or alleged offences. For the purposes of the ECHIPWC, each jurisdiction, with the exception of Victoria, exchanges information relating to “non-conviction charges”. Under the ECHIPWC IGA, a “non-conviction charge” is defined as a charge that—

- ◆ has been withdrawn

<sup>15</sup> A voluntary membership of state and territory screening units who meet annually to discuss issues and share experiences.

<sup>16</sup> Emotional harm is not an element considered under the Victorian WWC Check scheme.

- ◆ has been the subject of a nolle prosequi, a no true bill (where a person is committed by a Magistrate to face trial in a higher court, but the prosecution decides not to present an indictment) or a submission of no evidence to offer
- ◆ that led to a conviction that was quashed on appeal, or
- ◆ upon which a person was acquitted or disposed of by a court otherwise than by way of conviction.

In Victoria, however, a “non-conviction charge” is generally understood to be a charge that has been proven and the sentencing Magistrate or Judge has used their discretion to sentence the offender without recording a conviction. Victoria exchanges information based on this understanding of a “non-conviction charge”, but does not exchange information as provided under the ECHIPWC definition.

Victoria’s position on “non-conviction charges” is based on the following rationale—

- ◆ the WWC Act considers convictions and findings of guilt and only considers charges and pending charges for serious offences and where exceptional circumstances exist
- ◆ there is no quid pro quo, i.e. other states and jurisdictions are able to consider non-conviction information relating to Victorians but Victoria itself has no legislative power to consider this information
- ◆ the consideration of “non-conviction charges” engages a number of rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including s 13(b) ‘a person has the right not to have his or her reputation unlawfully attacked’
- ◆ the presumption of innocence is considered fundamental to a person’s liberty and, in situations where a person does not have a conviction recorded against them, they should not be prevented from engaging in meaningful work because of a “non-conviction charge”

It has been noted by other screening units that confidence in decision-making might be improved by the provision of Victorian “non-conviction charges” as defined in the ECHIPWC IGA and that this could ensure uniformity in the type of information sent and received by each jurisdiction. Victoria has agreed to undertake a review of its position, and will consider, among other things, if greater uniformity in the type of information sent and received by each jurisdiction would improve the protection of children through the availability of this extra information.

## 6 Concluding remarks on a national WWC Check

Through the endorsement of the National Framework, Victoria and the other states and territories have already demonstrated their commitment to working toward a nationally consistent approach to WWC Checks. Through this, a process has been agreed to that addresses issues associated with the different WWC Checks across Australia and promotes the nationally consistent approach.

As noted above, a move to a single national WWC Check would present challenges to state and territory governments.

Victoria would not endorse any move that would result in a weakened WWC Check legislative framework or the removal of certain features of the Victorian scheme that are highly valued by employers and volunteer organisations, including—

- ◆ weekly ongoing monitoring of WWC Check cardholders during the life of their WWC Check
- ◆ the transferability of the WWC Check to any type of child-related work, and
- ◆ notifications provided to employers and volunteer organisations of changes in the status to the WWC Check of a person engaged by them in.

Other key features that are considered fundamental to an efficient and effective WWC Check scheme include—

- ◆ the duration of a WWC Check balances the cost of the scheme to government, the regulatory burden imposed on the individual with the risk of harm to children
- ◆ assessment of individuals takes into account only relevant criminal history, including relevant offences committed as a child
- ◆ provision is made for certain persons to be barred from working with children

- ◆ duplicate checking is avoided by exempting people from the WWC Check scheme where these people are already subject to similar employment screening, and
- ◆ decision making applies the principles of natural justice and procedural fairness, values privacy and respects the autonomy of employers and volunteer organisations.

Victoria has a strong and well functioning WWC Check scheme, which has prevented over 1,480 people from engaging in child-related work. The Victorian WWC Check is continuing to protect children by preventing people with relevant criminal offending from working with children.

## Appendix 1

## Glossary

<b>Assessment Notice</b>	The document (currently the card) issued upon passing the WWC Check
<b>ECHIPWC</b>	Exchange of Criminal History for People Working with Children
<b>CCYP</b>	Commission for Children and Young People
<b>The Charter Act</b>	<i>Charter of Human Rights and Responsibilities Act 2006</i>
<b>COAG</b>	Council of Australian Governments
<b>The Commission</b>	Royal Commission into Institutional Responses to Child Sexual Abuse
<b>CYF Act</b>	<i>Children, Youth and Families Act 2005</i>
<b>The Department</b>	Department of Justice
<b>IGA</b>	Intergovernmental Agreement
<b>MOU</b>	Memorandum of Understanding
<b>National Framework</b>	National Framework for Protecting Australia's Children 2009-2020
<b>Negative Notice</b>	The document issued to a person upon failing the WWC Check
<b>NOF</b>	National Operators Forum
<b>The Secretary</b>	The Secretary to the Department of Justice
<b>VCAT</b>	Victorian Civil and Administrative Tribunal
<b>The WWC Act</b>	<i>Working with Children Act 2005</i>
<b>WWC Check</b>	Working with Children Check
<b>WWC Check Unit</b>	Working with Children Check Unit
<b>SCCHDS</b>	Standing Council on Community, Housing and Disability Services
<b>VAGO</b>	Victorian Auditor General's Office

## Appendix 2 Summary and Key Terms

### Category 1 Application

Category 1 applications are those where an applicant, as an adult, has been found to have committed serious sexual, violence and/or drug related offences against a child. Child pornography offences and those applicants who are subject to reporting obligations under the *Sex Offenders Registration Act 2004*, *Serious Sex Offenders Monitoring Act 2005* and the *Serious Sex Offenders (Detention and Supervision) Act 2009* will also be category 1 applications. Category 1 applications are non-discretionary, the Secretary must refuse an assessment notice and issue a negative notice on a category 1 application.

### Category 2 Application

Category 2 applications are those where an applicant, as an adult, has been found to have committed a serious sexual, violence and/or drug related offence against another adult. Category 2 applications also cover offences such as trafficking in children, certain charges which are pending and certain offences against the *Sex Offenders Registration Act 2004*, *Serious Sex Offenders Monitoring Act 2005* and the *Serious Sex Offenders (Detention and Supervision) Act 2009*. These applications must be refused an assessment notice unless the Secretary is satisfied that there is no unjustifiable risk to the safety of children.

### Category 3 Application

Category 3 applications are those where an applicant has been found to have committed an offence of causing injury recklessly or intentionally; obscene exposure and certain offences against Part 4 (offence connected with child-related work) of the WWC Act. Category 3 applications are also those whereby the applicant is subject to findings of a prescribed kind, made by a prescribed body listed in the Working with Children Regulations 2006. Unlike category 1 and 2 applications, these applications must result in the issuing of an assessment notice unless the department is satisfied that it is appropriate to refuse to do so.

### Exceptional Circumstances Application

Exceptional circumstances is not defined in the legislation. Exceptional circumstances assessments are designed to capture applications which may fall outside the sphere of category 1, 2 and 3 applications, where exceptional circumstances exist which create a significant link between the applicant's criminal history and a risk to the safety of children, where that risk to the safety of children is unjustifiable. The department may exercise discretion to refuse an assessment notice. Since inception, only 37 negative notices have been issued resulting from an Exceptional circumstances application.

### Ongoing Monitoring

Ongoing monitoring, established under s10(3)(a) of the WWC Act, refers to a police record check that is undertaken from time to time on an assessment notice holder. Ongoing monitoring is provided to the WWC Check Unit by Victoria Police and is set out in the Transactional Agreement relating to Information Services for the purposes of the WWC Act between the Secretary to the Department of Justice and the Chief Commissioner of Victoria Police. The ongoing monitoring framework is what sets the WWC Check apart from the other criminal history record checks.

### Child-Related Work

Section 9 of the WWC Act defines child-related work. Briefly, it is work that usually involves, or is likely usually to involve, regular direct contact with a child in connection with a service, body, place or activity, specified in s9(3) of the WWC Act, in circumstances where the contact is not directly supervised by another person.

### Assessment Notice

An assessment notice is issued upon successful completion of the WWC Check. The assessment notice is in the form of a drivers licence style card which has certain features that allow for the identification of the holder. The assessment notice is the legal document that allows the holder to lawfully engage in child-related work.

### Interim Negative Notice

An interim negative notice is issued when there are certain factors, such as offences, charges or particular reporting obligations, which give reason for the withholding of the issuing of an assessment notice. An interim negative notice is essentially an intention by the department to issue a negative notice. Upon receiving an interim negative notice, the applicant can make a submission in writing to the department explaining why they believe they should be entitled to pass the WWC Check. If the department does not receive a submission or is not satisfied that the reasons provided in the submission entitle the applicant to an assessment notice, a negative notice will be issued.

### Negative Notice

A negative notice is the outcome of an application whereby it is deemed that the applicant is unsuitable to engage in child-related work. A negative notice is issued where the person is a category 1 applicant; a category

2 applicant where the department considers the issuing of an assessment notice will pose an unjustifiable risk to the safety of children, and; a category 3 applicant where the department considers it inappropriate to issue an assessment notice. A negative notice may be issued in other cases if exceptional circumstances exist and there is a significant link between the offences by the applicant and a risk to the safety of children.

**Employee Card**

An employee card is the form of assessment notice issued to an applicant who engages in child-related work where that work is for profit or gain. The employee card is charged at full cost recovery.

**Volunteer Card**

A volunteer card is the form of assessment notice issued to an applicant who engages in child-related work for an organisation where that work is on a voluntary, unpaid basis. Under the WWC Act, it is an offence to engage in child-related work for profit or gain on a volunteer card.

## Appendix 3 Relevant offences under the Victorian WWC Act

### Category 1

A person's application is a category 1 application if the person:

- is subject to reporting obligations imposed on him or her by Part 3 of the **Sex Offenders Registration Act 2004 (Vic)**;
- is subject to an extended supervision order or interim extended supervision order under the **Serious Sex Offenders Monitoring Act 2005 (Vic)**;
- is subject to a supervision order (or an interim supervision order) or a detention order (or an interim detention order) within the meaning of the **Serious Sex Offenders (Detention and Supervision) Act 2009**;
- who has at any time been convicted or found guilty of an offence specified in clause 2(a) of Schedule 1 to the **Sentencing Act 1991** (murder);
- as an adult (a person at least 18 years of age), has been convicted or found guilty of any of the following offences against a child (a person under 18 years of age):
  - Rape
  - Compelling sexual penetration
  - Rape with aggravating circumstances
  - Rape with mitigating circumstances
  - Indecent assault
  - Indecent assault with aggravating circumstances
  - Felonious indecent assault
  - Indecent assault on male person
  - Assault with intent to rape
  - Assault with intent to commit rape with aggravating circumstances
  - Attempted rape
  - Attempted rape with aggravating circumstances
  - Incest (but not if both people were aged 18 or older and each consented)
  - Sexual penetration of child under the age of 10
  - Attempted sexual penetration of child under the age of 10
  - Assault with intent to take part in act of sexual penetration with child under the age of 10
  - Unlawfully and carnally knowing and abusing a girl under the age of 10
  - Attempting to unlawfully and carnally know and abuse girl under the age of 10
  - Assault with intent to unlawfully and carnally know and abuse girl under the age of 10
  - Assault with intent to unlawfully and carnally know and abuse girl aged between 10 and 16
  - Attempted sexual penetration of child aged between 10 and 16
  - Assault with intent to take part in act of sexual penetration with child aged between 10 and 16
  - Gross indecency with child under the age of 16
  - Act of gross indecency with a girl under the age of 16
  - Sexual penetration of a child under the age of 16
  - Sexual penetration of child aged between 10 and 16
  - Sexual penetration of a 16 or 17 year old child
  - Indecent act with a child under the age of 16
  - Indecent act with a 16 or 17 year old child
  - Persistent sexual abuse of child under the age of 16
  - Persistent sexual abuse of a 16 or 17 year old child
  - Sexual penetration of a child who is 16 or 17 by a person who is responsible for their care etc
  - Indecent act with a 16 year old child by a person who is responsible for their care etc
  - Facilitating sexual offences against children
  - Sexual offences against people with a cognitive impairment by providers of medical or therapeutic services
  - Sexual offences against persons with a cognitive impairment by providers of special programs
  - Sexual penetration of mentally ill or intellectually defective person
  - Attempted sexual penetration of mentally ill or intellectually defective person
  - Carnal knowledge of female mentally ill or intellectually defective person
  - Attempted carnal knowledge of female mentally ill or intellectually defective person
  - Assault with intent to take part in act of sexual penetration with mentally ill or intellectually defective person (and similar historical offences)
  - Administration of drugs for the purpose of enabling sexual penetration of the drugged person
  - Occupier etc. permitting unlawful sexual penetration of a child under 17
  - Abduction or detention for the purpose of marriage or sexual penetration
  - Abduction of child under the age of 16 for the purpose of sexual penetration
  - Procuring sexual penetration by threats or fraud
  - Procuring sexual penetration of a child
  - Unlawful detention for purposes of sexual penetration
  - Procuring sexual penetration of child under the age of 16

- Procuring defilement of woman by threats or fraud or administering drugs
- Forcible abduction of woman
- Sexual servitude
- Aggravated sexual servitude
- Deceptive recruiting for commercial sexual services
- Aggravated deceptive recruiting for commercial sexual services
- Bestiality
- Soliciting acts of sexual penetration or indecent acts
- Production of child pornography
- Procurement of minor for child pornography
- Possession of child pornography
- Sexual performance involving a minor
- Burglary in circumstances where the offender entered the building or part of the building as a trespasser with intent to commit a sexual or indecent assault
- Aggravated burglary in circumstances where the offender entered the building or part of the building as a trespasser with intent to commit a sexual or indecent assault
- Buggery
- Publication or transmission of child pornography
- Causing or inducing a child to take part in prostitution
- Obtaining payment for sexual services provided by a child
- Agreement for provision of sexual services by a child
- Allowing child to take part in prostitution
- Sexual intercourse with child under 16
- Using a carriage service for child pornography material
- Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service
- Using a carriage service for child abuse material
- Possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service
- Using a carriage service to procure persons under 16 years of age
- Using a carriage service to "groom" persons under 16 years of age
- Offences of conspiracy to commit, incitement to commit or attempting to commit an offence referred to above
- An offence that, at the time it was committed, was an offence to which clause 1 of Schedule 1 of the Sentencing Act 1991 (Vic) applied
- Any other offence, whether committed in Victoria or elsewhere, the necessary elements of which consist of elements that constitute any of the offences referred to above.

## Category 2

A person's application is a category 2 application if the person:

- has been convicted or found guilty of an offence listed in category 1 above, in circumstances where the person against whom the offence is committed is an adult (at least 18 years of age) or both the offender and the victim are children (under 18 years of age);
- has been convicted or found guilty of one of the following offences;
- Manslaughter
- Defensive homicide
- Child homicide
- Causing serious injury intentionally
- Causing serious injury recklessly
- Intentionally causing a very serious disease
- Unlawfully and carnally knowing and abusing girl aged between 10 and 16
- Attempting to unlawfully and carnally know and abuse girl aged between 10 and 16
- Loitering near schools etc.
- Stalking (where the victim is a child)
- Threats to kill
- Threats to inflict serious injury
- Kidnapping
- Intentionally causing grievous bodily harm or shooting, etc. with intention to do grievous bodily harm or to resist or prevent arrest
- Inflicting grievous bodily harm
- Attempting to choke, etc, in order to commit an indictable offence
- Making demand with threat to kill or injure or endanger life
- The common law offence of kidnapping
- An offence of conspiracy to commit, incitement to commit or attempting to commit an offence referred to above
- Any other offence, whether committed in Victoria or elsewhere, the necessary elements of which consist of elements that constitute any of the offences referred to above
- Trafficking in large commercial quantity of a drug or drugs of dependence

- Trafficking in a commercial quantity of a drug or drugs of dependence
- Cultivation of a narcotic plant in a large commercial quantity
- Cultivation of a narcotic plant in a commercial quantity
- Conspiracy, aiding and abetting or preparatory act etc in relation to commission of an offences set out in the above 4 dot points
- Attempted trafficking in a commercial quantity of a drug or drugs of dependence
- Importing or exporting (smuggling) trafficable or commercial quantity of narcotic goods in a range of circumstances
- Trafficking or domestic trafficking in children where the purpose is other than to provide sexual services
- Any other offence, whether committed in Victoria or elsewhere, the necessary elements of which consist of elements that constitute any of the offences referred to above.
- Trafficking in a drug of dependence to a child
- Supply of a drug of dependence to a child
- Importing and exporting commercial quantities of border controlled drugs or border controlled plants
- Importing and exporting marketable quantities of border controlled drugs or border controlled plants
- Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants
- Possessing marketable quantities of unlawfully imported border controlled drugs or controlled plants
- Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported
- Possessing marketable quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported
- Offences against section 46 or 47 or Part 5 (other than section 70) of the Sex Offenders Registration Act 2004
- Offences against the Serious Sex Offenders Monitoring Act 2005 (other than section 42(3))
- Offences against the Serious Sex Offenders (Detention and Supervision) Act 2009 (other than section 182 or 186)
- An offence under a law of a jurisdiction other than Victoria that, if it had been committed in Victoria, would have constituted an offence against section 46 or 47 or Part 5 (other than s70) of the Sex Offenders Registration Act 2004 or against the Serious Sex Offenders Monitoring Act 2005 (other than section 42(3)) or against the Serious Sex Offenders (Detention and Supervision) Act 2009 (other than section 182 or 186)
- has a charge for one of the above offences or one of the offences listed under category 1 pending.

## Category 3

A person's application is a category 3 application if the person:

- has been convicted or found guilty of causing injury intentionally or recklessly; or
- has been convicted or found guilty of malicious wounding / inflicting bodily injury; or
- has been convicted or found guilty of inflicting grievous bodily harm; or
- has been convicted or found guilty of assault occasioning actual bodily harm; or
- has been convicted or found guilty of indecent behaviour in public; or
- has been convicted or found guilty of obscene exposure; or
- has a charge for one of the above offences pending
- has an offence under a law of a jurisdiction other than Victoria that if it had been committed in Victoria would have constituted one of the above offences.
- has been subject to a finding of a prescribed kind made by, or on behalf, of a prescribed body (the Victorian Institute of Teaching and the Suitability Panel (out of home care) are currently the only bodies prescribed for this purpose); or
- has been subject to a determination by VCAT under section 77(4)(g) or (h) or 77(5)(e) or (f) of the Health Professions Registration Act 2005.
- has been convicted or found guilty or has a charge pending in relation to an offence against Part 4 of the Working with Children Act (other than section 37 or 40).

The offences covered by Part 4 of the *Working with Children Act 2005* relate to offences

- connected with child-related work:
- Section 33 Engaging in child-related work without an Assessment Notice;
- Section 34 Holder of a Negative Notice applies for child-related work;
- Section 35 Engaging in child-related work a person who does not have an Assessment Notice;
- Section 36 Agency offers the services of a person who does not have an Assessment Notice;
- Section 38 Using a false or other person's Assessment Notice;
- Section 39 Providing false or misleading information in, or in relation to, an application for a working with children check, or in connection with, a reassessment for a working with children check
- Section 39A Applying for a WWC Check if a person is:
- a registered sex offender within the meaning of section 67 of the *Sex Offenders Registration Act 2004*; or subject to an extended supervision order or interim extended supervision order under the

*Serious Sex Offenders Monitoring Act 2005*; or subject to a supervision order (or an interim supervision order) or an detention order (or an interim detention order) within the meaning of the *Serious Sex Offenders (Detention and Supervision) Act 2009*.