

**Report to
the Hon Carmel Tebbutt MLC
Minister for Youth**

**Review of the
*Commission for Children
and Young People Act 1998*
and the *Child Protection
(Prohibited Employment) Act 1998***

November 2004

Foreword by Helen L'Orange AM

The NSW Minister for Youth, the Hon Carmel Tebbutt MLC, appointed me to review the *Commission for Children and Young People Act 1998* and the *Child Protection (Prohibited Employment) Act 1998*.

I undertook this Review during 2004, drawing on recent research findings and the many well considered oral and written submissions received from a wide range of interested parties. I place on record my appreciation of the constructive contributions made by 384 organisations and individuals including 255 children and young people.

I appreciate the interest and support shown by those who talked with the Review in community meetings, in schools and in the many meetings with organisations and individuals that were held during the consultation period. My thanks go also to the Minister, the Joint Parliamentary Committee, the Expert Advisory Committee, the Young People's Reference Group and the Commission which, throughout the Review, provided me with sound advice and support.

It was pleasing to hear from children, young people and many organisations just how much they value the Commission as a voice in government for children and young people.

My main findings are:

- the policy objectives generally remain valid
- the terms of the Acts generally remain appropriate for securing the objectives.

The Report contains a balanced set of suggested strategies responding to feedback from stakeholders, developments in similar schemes outside NSW, research, recent judgments, Operation Auxin, and other emerging issues.

Some proposals for change are put forward as recommendations (26) for amendment to the legislation. Others are in the form of conclusions (24), proposing strategies that do not require legislative change.

Importantly a significant reduction in level of risk to children and young people will result from proposed changes. As part of its analysis the Review sought to minimise impact on large and small organisations, employees, employers, self-employed persons, volunteers, and applicants for prohibited employment exemptions. The Review was also mindful of the needs of rural and regional communities.

The recommendations and conclusions cover the following key areas:

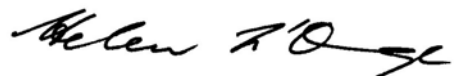
- Maintaining an effective mix of the Commission’s broad advocacy, education and research functions, its workplace-related role of encouraging organisations to be child-safe and child-friendly, and its employment screening functions.
- There is a suggestion that the Commission consider establishing two additional advisory committees, one on working with children and the other on vulnerable children. The Review encourages the Commission to expand its brokering role and in making more use of the analysis of complaints of both children and young people.
- Enhancing the role of the Commission to encourage large and small organisations to be more child-safe and more child-friendly.
- Strengthening the legislation to provide a sounder and more easily understood Working With Children Check scheme. The Review’s proposals include:
 - amalgamating the *Child Protection (Prohibited Employment) Act 1998* with Part 7 of the *Commission for Children and Young People Act 1998* with the Guidelines applying to both
 - adopting a single definition of ‘child-related employment’ with some additional employment types included
 - adding serious assault against a child by an adult to the offences prohibiting people from child-related employment. This should exclude peer violence between juveniles
 - expanding the list of those who must be screened to include volunteers in a limited number of specified high risk positions
 - requiring self-employed persons to display verification that they are not prohibited persons. Community education for parents is also recommended
 - reducing unnecessary duplication by nominating heads of organisations (or their delegate) as ‘agents’ for the purpose of conducting the Working With Children Check
 - introducing several measures to further improve the use of employment proceedings in background checking
 - enhancing compliance measures (especially for prohibited employment) with penalties graduated to match seriousness of breach. Compliance measures remain a last resort and the Commission’s emphasis would continue to be on encouragement and guidance.

Taken as a whole this package of strategies enhances protection and provides a stronger deterrent effect. Some of the package costs will be offset by the savings however a small amount of additional funding will still be required to implement all the Review’s recommendations and conclusions.

The Report endorses the need for national cooperation and a nationally consistent approach wherever possible. As state and territory governments develop employment screening systems, Australia will be in a better position to select a

national approach that protects children and invest in the strategies that have been evaluated as being the most effective.

At this five year point I believe the Commission is well positioned to both enhance its education and advocacy functions and its approach to the Working With Children Check.

A handwritten signature in black ink, appearing to read 'Helen L'Orange'.

Helen L'Orange AM
19 November 2004

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Recommendations

Note: The Report has used a framework in which for each topic, the current situation is described and the respondents' comments summarised. The Review's deliberations are presented, conclusions are drawn and recommendations made. Recommendations are made where legislative amendments are proposed. To read conclusions, readers are referred to the main body of the Report.

RECOMMENDATION 1 Ongoing review of the legislation p22

That the *Commission for Children and Young People Act 1998* and the *Child Protection (Prohibited Employment) Act 1998*, or their equivalent, be reviewed again in five years.

RECOMMENDATION 2 Advocacy, education and research p34

That s11(j) of the *Commission for Children and Young People Act 1998* be amended to require that the Commission develop and administer a voluntary accreditation scheme for programs as well as persons working with those who have committed sexual offences against children.

RECOMMENDATION 3 The employment screening functions – child-safe and child-friendly organisations p40

That s36(e) of the *Commission for Children and Young People Act 1998* be amended to require that the Commission promote public awareness and provide training and advice on appropriate procedures and standards for the development of organisations that are safe and friendly for children and young people.

RECOMMENDATION 4 Integrating the legislation p42

That the *Child Protection (Prohibited Employment) Act 1998* be amalgamated with Part 7 of the *Commission for Children and Young People Act 1998*; that the title of the new part be 'Working With Children'; and that the object of the new part be to protect children by promoting child-safe and child-friendly organisations, by prohibiting certain persons from working in child-related employment and by assisting employers to recruit suitable people by providing background checks.

RECOMMENDATION 5 Definition of child-related employment p45

That the Acts be amended so that one definition of child-related employment applies to prohibited employment and background checking as follows:

That child-related employment be employment of the following kinds which primarily involves direct, unsupervised contact with children:

- i) employment involving the provision of child protection services
- ii) employment in pre-schools, kindergartens and child care centres (including residential children's centres)
- iii) employment in schools or other educational institutions (not being universities)
- iv) employment in detention centres (within the meaning of the *Children (Detention Centres) Act 1987*)
- v) employment in refuges used by children
- vi) employment in wards of public or private hospitals in which children are patients
- vii) employment in clubs, associations or movements (including of a cultural, recreational, religious or sporting nature) having a significant child membership or involvement
- viii) employment in any religious organisation
- ix) employment in entertainment venues where the clientele is primarily children
- x) employment as a babysitter or child minder that is arranged by a commercial agency *or parent with an ABN*
- xi) employment involving fostering, *boarding or regular overnight care*
- xii) employment involving regular provision of taxi services for the transport of children with a disability
- xiii) employment involving the private tuition of children
- xiv) employment involving the direct provision of child health services
- xv) employment involving the provision of counselling or similar professional support services for children
- xvi) employment on school buses
- xvii) employment at overnight camps for children
- xviii) *employment in services mentoring children*
- xix) *employment in research and evaluation involving children*
- xx) *employment involving the provision of personal care services to children, including respite care*
- xxi) *employment involving the provision of home based child care*
- xxii) *employment in theatre, film, performing arts and modelling involving the participation of children*
- xxiii) *employment as road crossing supervisors.*

(italics indicate a new or amended inclusion).

That supervision is defined as immediate overseeing of employees with the capacity to direct them.

RECOMMENDATION 6 Privacy and confidentiality p48

That the forms that are part of the Working with Children Check Guidelines be reviewed to give greater emphasis to the right of people to lodge a complaint with Privacy NSW under s42 if they believe that their right to privacy has been breached.

RECOMMENDATION 7 Guidelines for the Working With Children Check p50

That the Guidelines apply to both background checking and prohibited employment and Guidelines be reviewed following each legislative review period or, if necessary, when legislation is amended.

RECOMMENDATION 8 Prohibition, the offences p54

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to include serious assault against a child by an adult amongst the offences prohibiting people from child-related employment and this amendment should exclude peer violence between juveniles.

RECOMMENDATION 9 Definition of 'prohibited person' p55

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to define a prohibited person as *a person found guilty of* a serious sex offence, serious assault of a child; or a registrable person.

RECOMMENDATION 10 Auditing prohibited employment p57

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to give the Commission the necessary powers to enter premises and the necessary powers exercisable on entry and inspection to carry out its audit function.

RECOMMENDATION 11 Exemptions and other protections p59

That s9(4) of the *Child Protection (Prohibited Employment) Act 1998* be amended to provide that a relevant tribunal is not to make an exemption order under the section unless the person the subject of the proposed order satisfies the tribunal that he or she does not pose a risk to the safety of children.

RECOMMENDATION 12 Making and monitoring conditions on an exemption order p60

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to provide that in the event of an alleged breach of condition the exemption order be reviewed by the relevant tribunal (or the Commission in the case of exemptions made under section 8A) that made the order.

RECOMMENDATION 13 New evidence – duty to make full disclosure p61

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to provide that an applicant to an exemption application under the *Child Protection (Prohibited Employment) Act 1998* should be under a duty to make full disclosure of all relevant matters to the Commissioner or relevant tribunal considering the application.

RECOMMENDATION 14 New evidence – reconsideration of exemption order p62

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to allow the Commission to make application to the relevant tribunal to re-consider an exemption order on the ground of new information, provided the relevant tribunal is satisfied that the new evidence satisfies certain threshold criteria. Those threshold criteria are that the new evidence is relevant, indicates a significant risk to children, that it was not previously disclosed by the applicant, and the Commission could not reasonably have been aware of the evidence at the time of the original application.

RECOMMENDATION 15 Representation p62

That the Government consider asking the Legal Aid Commission to grant legal aid to applicants for exemption where they have been refused an exemption by the Commissioner for Children and Young People and plan to proceed to a relevant tribunal.

RECOMMENDATION 16 Information for making s8A determinations p63

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to give the Commission for Children and Young People the power to direct the provision of original documents when considering applications made under s8A.

RECOMMENDATION 17 Volunteers and students on placement p66

That the *Commission for Children and Young People Act 1998* be amended to make background checking mandatory for unpaid employees (volunteers) in the following high risk categories:

- employment involving fostering, regular boarding, or overnight care
- employment in services mentoring children
- employment at overnight camps for children
- employment involving the provision of personal care services to children, including respite care.

RECOMMENDATION 18 Volunteers and students on placement p66

That the *Commission for Children and Young People Act 1998* be amended to make background checking mandatory for students on placement in any child-related employment and that the employer be the educational institution where the student is enrolled.

RECOMMENDATION 19 Self-employed people and certification p67

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to require self-employed people in child-related employment to display a certificate verifying that they are not a prohibited person and that this amendment be accompanied by a public awareness campaign for parents.

RECOMMENDATION 20 Relevant criminal record checks – release of information to other states p71

That the *Commission for Children and Young People Act 1998* be amended to allow the release of ‘relevant criminal records’ to relevant authorities for interstate child-related employment screening.

RECOMMENDATION 21 Relevant criminal record checks – offences no longer criminal p72

That the *Commission for Children and Young People Act 1998* be amended so that the exclusions established by s5(5) of the *Child Protection (Prohibited Employment) Act 1998* also apply to the *Commission for Children and Young People Act 1998* and that such exclusions not be considered relevant criminal offences.

RECOMMENDATION 22 Relevant employment proceedings – notifying employees p77

That the *Working With Children Check Guidelines* be amended to require employers to notify the employee, in writing, of employer's intention to notify the Commission of a relevant employment proceeding.

RECOMMENDATION 23 Compliance p80

That the *Commission for Children and Young People Act 1998* be amended to give the Commission the necessary powers to enter premises and the necessary powers exercisable on entry and inspection to carry out its audit function.

RECOMMENDATION 24 Compliance p80

That the *Commission for Children and Young People Act 1998* be amended to create an offence of failing to conduct mandatory background checks. Where audit reveals non-compliance by an employer they must first be issued with a notice requiring them to comply, followed ultimately by prosecution if they persist.

RECOMMENDATION 25 Compliance p80

That the *Commission for Children and Young People Act 1998* be amended to create an offence of failing to notify the Commission of relevant employment proceedings. Where audit reveals non-compliance by an employer they must first be issued with a notice requiring them to comply, followed ultimately by prosecution if they persist.

RECOMMENDATION 26 Frequency of checks p82

That the *Commission for Children and Young People Act 1998* be amended to give the Commissioner authority to approve heads of organisations (or their delegate) as 'agents' for the purpose of conducting background checks.

Conduct of the Review

The Minister is required to review both the *Commission for Children and Young People Act 1998* and the *Child Protection (Prohibited Employment) Act 1998* within 12 months of the first five years of their operation. The Minister is to determine whether the policy objectives of the Acts remain valid and whether the terms of the Acts remain appropriate for securing those objectives.

In conducting the Review, the Minister is required to consult with government and non-government agencies that provide or deal with services or issues affecting children; to consult with children and young people using means of consultation developed by the Commission, and to invite and consider public submissions relating to the review of the Acts.¹

The Hon Carmel Tebbutt MLC, Minister for Youth, appointed Ms Helen L'Orange AM to conduct an independent review.

On 7 May 2004 the Review released two consultation papers that identified issues for consideration and comment. One of these papers was written specifically for children and young people. Copies of the papers were widely distributed and both were available on the Commission's website. They sought comments. A template for responding was also available electronically. An advertisement was placed in the *Sydney Morning Herald* on 8 May 2004 inviting submissions.

Consultation meetings were arranged by the Review. The Review held meetings with community organisations and with children and young people in three regions. Ms L'Orange visited Warialda, Moree, Newcastle and Auburn. Invitations were sent to organisations and individuals with an interest in the work of the Commission and care was taken to include broad representation and diverse cultural interests. Consultations were held with students at Warialda Primary School, Merewether High School and Trinity Senior College. Students ranged in age from middle primary to Year 11. A complete list of consultations can be found at Appendix 3.

¹ s53 CCYPA, s16 CP(PE)A

Ms L'Orange also met with organisations and individuals which have a special interest in the work of the Commission and its enabling legislation. In many cases the record of meeting was received as an oral submission. Many oral submissions were later supplemented by written submissions.

In all, the Review received submissions (oral and written) from 384 organisations and individuals, including 255 children and young people. A complete list of submissions received can be found at Appendix 4.

Part One

The Objectives of the Legislation

The Review was asked to report on whether the policy objectives of the legislation remain valid.

1 THE PRINCIPLES

The *Commission for Children and Young People Act 1998* (hereafter referred to as the Commission's Act) contains 'principles' designed to govern the work of the Commission (s10). These principles guide the way the Commission carries out its functions in concert with the overall policy objectives of the Act. The principles state that:

- the safety, welfare and well-being of children are the paramount considerations
- the views of children and young people are to be taken into account and given serious consideration
- a co-operative relationship between children and their families, and between children and their community is important for the safety, welfare and well-being of children.

2 THE OBJECTIVES

2.1 POLICY OBJECTIVES

The general policy objectives of the Commission's Act were set out by the (then) Minister for Community Services, Mrs Faye Lo Po', in her 1998 Second Reading Speech. The general policy objectives are to establish an independent, statutory office that aims to:

- inform and influence the government and the community about the interests and needs of children and young people
- promote the interests of children, particularly in regard to their safety, welfare and well-being
- give the interests and needs of vulnerable children priority attention

- listen to and take seriously the views of children on issues that affect them and promote their participation in matters important to them
- value strong relationships between children, families and their communities
- work co-operatively with government and non-government agencies to advance children's interests.²

There are specific objects clauses in the Commission's Act that relate to employment screening (s31)³ and the Child Death Review Team (s45A).⁴

The objectives of the Working With Children Check, as set out in the Minister's Second Reading Speech regarding Part 7 of the Commission's Act and the *Child Protection (Prohibited Employment) Act 1998* (the Prohibited Employment Act), are to create a scheme for protecting children and young people from abuse by:

- prohibiting people with convictions for serious sexual offences from applying for or working in positions of child-related employment
- establishing a screening process for child-related employment.

These policy objectives received bipartisan political support and significant community support.

2.2 OTHER DIRECTIVES

The Commission's Act also directs that the Commission, in exercising its functions:

- give priority to the interests and needs of vulnerable children (s12)⁵
- develop appropriate ways of consulting with children and use these methods when exercising its functions and before making any significant recommendations (s13).

² NSW Legislative Assembly Hansard 21 October 1998.

³ s31 says the object of Part 7 Employment Screening is to protect children by means of employment screening for child-related employment administered by the Commission and other agencies.

⁴ s45A says the object of Part 7A Child Death Review Team is to prevent and reduce the deaths of children in NSW through the constitution of the Team which is to exercise the functions under Part 7A.

⁵ The Minister's second reading speech in 1998 says that while the Government intended that the Commission have a broad mandate to work for all children and young people in NSW it recognised that some children are more in need of help than others.

The Act also directs the Commission and other government or non-government agencies that provide services or deal with issues affecting children to work co-operatively in exercising their respective functions (s14).⁶

3 VALIDITY OF THE POLICY OBJECTIVES AND DIRECTIVES

Those who made submissions to the Review were unanimous in the view that the principles, policy objectives and other directives expressed in the legislation remain valid.

The principles and objectives are broad and still relevant to the position of children and young people in NSW...The Commission has been active in exploring strategies whereby children and young people can achieve a position in the foreground rather than the background of society (Burnside).

We all think it is a good idea to have a Commission for young people because:

How else would we have a say?

It makes us feel valued.

It keeps us safe.

It gives us a voice within Parliament it informs and educates heaps of people on the effects of things like bullying has on us (student, Year 9).

Three suggestions for improving or strengthening the legislation were made in the submissions. They relate to objectives, children's rights and the needs of vulnerable children.

3.1 INCLUSION OF AN OBJECTS CLAUSE

Regarding objectives, there was some concern that neither the Commission's Act nor the Prohibited Employment Act state the objectives explicitly in an objects clause. The objectives currently derive from the functions expressed in Part 3 and from Minister Lo Po's Second Reading Speech in 1998. Respondents suggested that objects clauses be added to both the Commission's Act and the Prohibited Employment Act to set a context and foundation for future evaluation (NCOSS⁷, Department of Education and Training).

⁶ Relevant Ministers can make arrangements to facilitate this co-operation, including providing information or access to documents.

⁷ NSW Council of Social Services

3.2 CHILDREN'S RIGHTS

Regarding children's rights, several submissions argued strongly for including a reference to the United Nations Convention on the Rights of the Child in an objects clause (NCOSS, YJC⁸). Other submissions suggested amending Section 10(a) to provide that 'the rights, interests and well-being of children are the paramount consideration'; or amending the Principal Functions in Section 11 to include the words 'to promote and monitor compliance with the Convention on the Rights of the Child', or amending Section 12 to provide that the Commission give priority to the rights, interests and needs of vulnerable children (YJC).

3.3 VULNERABLE CHILDREN

Regarding the needs of vulnerable children, the directive that the Commission give priority to the needs of vulnerable children received much comment. Some respondents considered that the emphasis is misplaced, for example:

I would like more information on what defines a 'vulnerable' child. Aren't we all vulnerable, or do you value some kids more than others? (Year 9 student).

Many submissions from children and young people seemed to welcome the inclusiveness of the Commission's mandate and to regard the establishment of the Commission as demonstration that government values young people as a group and supports their inclusion in civic life, for example:

It is a good quality way of getting a message to children that the government is making an effort to make sure that children are being taken seriously, and that the views of children are being taken into account. It is a good idea to show children that they are being heard (Year 9 student).

Kids benefit from it because it addresses the ideas and problems of youth. Not only does it address them but it acts on them. And because it makes other people aware of young people and their needs (Year 9 student).

However, most submissions agreed that priority should be given to vulnerable and disadvantaged children. Some queried whether existing provisions are adequate to ensure that the Commission gives the

⁸ Youth Justice Coalition

needs of vulnerable children sufficient emphasis (ACWA⁹, Ethnic Child Care, NCOSS, Disability Council of NSW, Expert Advisory Committee).

Two approaches were proposed by those wishing to see greater emphasis on the needs of vulnerable children in the legislation. The first was to make the directive to give priority to the needs of vulnerable children a principal function at s11 (Expert Advisory Committee). The second was to identify and name in the legislation those groups of children and young people considered vulnerable, in order to focus the Commission's attention and to strengthen accountability. It was recognised that the list could not be exclusive or exhaustive (Ethnic Child Care, Professor Hayes, Expert Advisory Committee).

Regarding objectives, the Review considers that the inclusion of an objects clause at Part 3 would do little to enhance the current legislation. The principles and functions are comprehensive and provide a strong framework to guide and support the work of the Commission in protecting and promoting children's interests, including their rights.

On the question of giving priority to the needs of vulnerable children, the Review considers that the current legislative expression is appropriate. The approach the Commission takes is to focus on those issues of importance to most children which, if acted upon, will result in greatest benefit to the most vulnerable children. A list of vulnerable children in the legislation could at best be indicative. The Review considers that the needs of vulnerable children are already given priority and that further expression of this could compromise the breadth and inclusiveness of the Commission's current mandate. This broad mandate is strongly supported by children and young people.

Concern about the Commission's role with respect to vulnerable children seems to arise in part from respondents' belief that a mechanism is needed to bring government and non-government agencies working in child protection together, and that the Commission is ideally placed to facilitate this. This idea is expanded upon on p27 and p33. The Review is sympathetic to this view but considers that these goals are achievable within the terms of the current legislation. Effective implementation is considered the key here.

⁹ Association of Children's Welfare Agencies

Conclusion

The principles and objectives of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998 remain valid and they are strongly supported. Matters raised in relation to implementation will be referred for the Commission's consideration.

4 ONGOING REVIEW OF THE LEGISLATION

The Review sought comments on whether the Commission's legislation should be subject to further review. There was general support for regular review and those who commented favoured review at five year intervals.

Recommendation 1

That the *Commission for Children and Young People Act 1998* and the *Child Protection (Prohibited Employment) Act 1998*, or their equivalent, be reviewed again in five years.

Part Two

The Terms of the Legislation

The Review was also asked to report on whether the terms of the legislation remain appropriate to secure the Parliament's policy objectives for the Acts. The 'terms' are the provisions actually written in the legislation that, for example, set out the Commission's functions, powers and responsibilities.

For ease of consideration this Report treats the Commission's 'advocacy, education and research' functions under a separate heading to its 'Working With Children' functions while acknowledging that in practice there is overlap between these areas.

1 INDEPENDENCE, ACCOUNTABILITY AND OBTAINING ADVICE

1.1 INDEPENDENCE

One of the objects of the Commission's Act is that the Commission be independent. The capacity of the Commission to act in the best interests of children and young people without interference is critical.

The Commission's independence is promoted by various provisions:

- The Commission is a statutory body (s4), headed by a Commissioner
- The Commission reports to the Minister for Youth for administrative purposes only
- The Commission's Act empowers the Commission to table a report in Parliament at any time on any particular issue or general matter relating to its functions (s24)
- The Commissioner is appointed by the Governor (s5) for an initial term of up to five years, with the appointment subject to Part 2A of the *Public Sector Management Act 1988*. He or she may be appointed for no more than two successive terms. The Commissioner can only be removed by the Governor for misbehaviour, incapacity or incompetence (s5).

No respondents questioned that independence is vital if the Commission is to act effectively in the interests of children and young people, and most accepted that the current provisions establish

sufficient independence. However, some respondents argued that certain legislative provisions limit the Commission's capacity and are unnecessarily restrictive. The examples raised pertained to the extent of Ministerial control and the Commission's freedom to criticise publicly.

1.1.1 The extent of Ministerial control

Certain respondents felt it is difficult for the Commissioner to be seen to be independent when she is required to report to the Minister whose portfolio includes the Department that is a significant stakeholder in the provision of services to children (ACWA). Others suggested that the requirement at s17 that the Minister approve special inquiries should be amended to authorise the Commissioner to initiate inquiries independently. Still others raised concern that the requirement (at s14) that the Commission 'work cooperatively' with government agencies and the Minister undermines its capacity to take a public and critical stance (NCOSS, YJC). This section of the Act places a duty on government and non-government agencies, as well as the Commission, to work cooperatively, so it is unclear to the Review how the section could be considered to weaken the independence of the Commission in relation to either government or non-government organisations.

1.1.2 Appointing the Commissioner

Some submissions argued that appointment of the Commissioner on the Minister's recommendation alone has the potential to compromise the Commissioner's independence. It was suggested that a recommendation for appointment and reappointment by a committee would strengthen independence and the perception of independence (Professor Oates, Expert Advisory Committee).

The Review does not consider that any of the above mentioned provisions have the practical effect of lessening the independence of the Commission. While the Commissioner is empowered to table a report to the Parliament on any issue or matter related to its functions (s24), there appears to be scope for the Commissioner to act to bring important matters to public attention. Nor is the Review aware of any instance where current legislative provisions have restricted the ability of the Commission to exercise its functions effectively. It takes the view that the current requirement that the Commissioner report to the Minister for Youth for administrative purposes has practical benefit and no apparent disadvantages. Regarding the mode of appointing the Commissioner, the review notes that appointment and reappointment using a committee already occurs under Part 2A of the *Public Sector Employment and Management Act 2002*, and is consistent with other similar appointments.

Conclusion

The Review does not consider that there is a need to amend the terms of the Commission's Act in relation to the independence of the Commission.

1.2 ACCOUNTABILITY

One of the accountability mechanisms for the Commission is through the Committee on Children and Young People (Part 6 and Schedule 1). The Committee is made up of 11 members of NSW Parliament, including Government, Opposition and minor party members from the Legislative Assembly and Legislative Council.

The Commission's Act sets out the functions, membership requirements, powers and procedures of the Committee. Its functions include:

- monitoring and reviewing the Commission's functions
- reporting to Parliament about the Commission's work
- examining each of the Commission's reports, including annual reports, and reporting to Parliament on these
- examining trends and changes in services and issues affecting children and reporting to Parliament on desirable changes to the functions and procedures of the Commission as a result.

Few respondents made substantial comment on accountability mechanisms for the Commission and, overall, responses were consistent with the following position put by the Children's Guardian:

A Parliamentary Committee is the mechanism through which independent statutory agencies retain accountability to Parliament and the NSW community. The provisions mirror those of like agencies. The role of the Parliamentary Committee appears appropriately adapted to the role and functions of the Commission (Children's Guardian).

No government agencies took issue with current legislative provisions regarding accountability and those who raised concerns about the current mechanism considered that the issue was perhaps a matter of practice rather than legislation (NCOSS).

Conclusion

The Review considers that the current terms of the legislation regarding accountability are adequate.

1.3 OBTAINING ADVICE

To help the Commission carry out its functions, the Commission's Act requires the Commissioner to establish an Expert Advisory Committee. The Committee comprises up to eight members, approved by the Minister on the Commission's recommendation, with specific expertise in children's issues across a range of disciplines as set out in the Commission's Act, eg education, health, law and child protection (s8).

The Act also enables the Commission to appoint other advisory committees (s10 (3)).

The Commission has set up a Young People's Reference Group to provide advice on the Commission's work. This is one way the Commission consults with children and young people, as required by the Commission's Act (s10 (b) and s13).

The salient question for the Review here is whether the Commission has adequate powers to obtain appropriate advice to fulfil its functions.

The legislation deals with the question of advice in three ways:

- it prescribes, in the case of the Expert Advisory Committee (s8)
- it directs without prescription, in the case of consultation with children and young people
- it authorises the Commission to appoint other advisory committees as it considers appropriate.

1.3.1 The Expert Advisory Committee

Respondents generally found the Expert Advisory Committee to be a useful and important mechanism for: informing the Commission; monitoring and commenting on its work; acting as a sounding board for the Commissioner; helping to keep its work relevant to current professional concerns and practice; and extending the reach of the Commission through professional networks. Suggestions were received to strengthen the Committee by including members with expertise/experience in three areas: issues affecting Aboriginal children and young people (Aboriginal Education Consultative Group); early childhood (Tonia Godhard); and children and young people with special needs. It was also suggested that a limit be set on membership duration.

The Review notes that the Commission's Act already provides for the types of members respondents suggested (s8) and that membership tenure is already limited by existing guidelines for the operation of the Committee. The Review considers that the current terms of the

legislation enable sufficient flexibility and direction for the Expert Advisory Committee to provide useful advice and respond to the needs of individual Commissioners.

1.3.2 Consulting with young people

As indicated, the Commissioner is also required to consult with children and young people and the Young People's Reference Group (YPRG) has been established as one way of fulfilling this directive. The Review received many comments endorsing the role of the YPRG. However, some respondents queried how the Commission could be sure that the young people selected represent their peers (Hunter Area Health Service). Some objected that it is only articulate, confident young people who are able to participate in such a group (NCOSS). Suggestions were received about the value of alternative consultative mechanisms, such as electronic discussion groups, that have the potential to include greater numbers and widen access. The important issue of consultation with very young children was also raised in this context (Tonia Godhard, Ethnic Child Care).

The Review acknowledges that consultation with young people requires a variety of strategies. Though it is not prescribed in legislation, the YPRG is clearly an effective source of advice to the Commission, suggesting that legislative amendment is unnecessary. Regarding membership, it is not intended to be representative. Rather the young people are appointed as individuals. Members have a range of backgrounds and they are not always confident or articulate. The YPRG is one means, but not the only means, by which children and young people are already consulted by the Commission.

The Review considers that the current legislation provides the Commissioner with sufficient flexibility and authority to use alternative and innovative means of consulting that are appropriate to the issue and the children and young people involved.

1.3.3 New consultative mechanisms

The Review received submissions calling for the establishment of two additional advisory committees on the basis that the work of the Commission should also be informed by those who work with children and young people. One would comprise a standing committee of employers and union members to advise the Commission on issues relevant to the employment screening functions of the Commission. (Independent Education Union, NSW Labor Council, NSW Teachers' Federation, Department of Education and Training). Such a group could regularly update the Commission about the implementation of the Working With Children Check and provide a forum for ongoing discussion about system improvements and the development of other child-safe, child-friendly practices in the workplace. The other would

comprise a standing committee of representatives of government and non-government agencies working with vulnerable children, particularly in the child protection system. Respondents suggested that the Commission would perform a valuable service to those working with vulnerable children in facilitating such a forum and that, in turn, the forum could advise the Commissioner on issues of current concern to those providing services for vulnerable children (ACWA). Calls for such a committee arise in part from missing the forum once provided by the Child Protection Council. ACWA and NCOS both see the Commission as well placed to bring government and non-government agencies together. Respondents felt that a Committee established for this purpose could facilitate cooperative practice and keep the needs of vulnerable children high on the agenda.

The Review considered whether these new committees could be formed under existing legislation and whether legislative prescription is necessary in order that the Commission avail itself of these or other consultative mechanisms.

Conclusion

The Review considers that the current legislative provisions are adequate to enable the establishment of committees or other advisory structures. To prescribe the form and purpose of these structures is unnecessary and could limit the Commission's current flexibility, and thereby capacity, to adapt to emerging needs.

The Review is of the opinion that the establishment of the two suggested standing committees (Working With Children Committee and Vulnerable Children's Committee) deserves consideration by the Commission and that their composition would be enhanced by the inclusion of child advocates and parent advocates.

2 ADVOCACY, EDUCATION AND RESEARCH FUNCTIONS

The Commission's functions, other than its 'Working With Children' functions, can be grouped into 'advocacy', 'education' and 'research' functions (s11).

2.1 ADVOCACY FUNCTIONS

- Promoting and monitoring the overall safety, welfare and well-being of children in the community and monitoring trends in complaints made by or on behalf of children.
- Making recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.
- Promoting the participation of children in the making of decisions that affect their lives and encouraging government and non-government agencies to seek the participation of children appropriate to their age and maturity.
- Conducting special inquiries into issues affecting children (see below).

2.2 EDUCATION FUNCTIONS

- Promoting the provision of information and advice to assist children.
- Conducting, promoting and monitoring training on issues affecting children.
- Conducting, promoting and monitoring public awareness activities on issues affecting children.

2.3 RESEARCH FUNCTIONS

- Conducting, promoting and monitoring research into issues affecting children.
- Supporting and assisting the Child Death Review Team in the exercise of its functions.¹⁰

2.4 SPECIAL INQUIRY FUNCTION

Part 4 of the Commission's Act enables the Commission to conduct a special inquiry. This may be required by the Minister either at his or her initiative or on the Commission's request. If the Minister refuses

¹⁰ This Review does not examine provisions relating to the NSW Child Death Review Team (Part 7A). These provisions were reviewed in 2001/2, as required by legislation.

the Commission's request then his or her reasons for doing so must be noted in the Commission's Annual Report.

The Commission's Act sets out in detail how the inquiry should be run, including matters such as the conduct of hearings, the provision of information, the giving of evidence and reporting requirements (Part 4 of the Commission's Act and Part 2 of the *Commission for Children and Young People Regulation 2000*).

The Commission has not yet conducted a special inquiry. In 2001/2 at the request of the Minister it held a public inquiry on children and young people with no-one to turn to.

2.5 NSW CHILD SEX OFFENDER COUNSELLOR ACCREDITATION SCHEME (CSOCAS)

The Commission also has the separate function of developing and administering a voluntary accreditation scheme for those working with people who have committed sexual offences against children.

2.6 ASSISTANCE TO INDIVIDUAL CHILDREN

The Commission's Act specifically states the Commission does not have the function of dealing directly with the complaints or concerns of individual children (s16). It notes the Commission may, however, provide children and their families, friends and advocates with information about and referral to government and non-government programs and services.

The Review considered whether the Commission's advocacy, education and research functions are still appropriate to secure the objects of the legislation and received some very strong responses to this question. Overwhelmingly, respondents confirmed the importance of these functions to relevant sectors and maintained that these functions describe an essential part of Commission's role and function. A number of issues were raised for consideration.

The importance of including in the legislation an overarching responsibility to promote and monitor the implementation of the Convention on the Rights of the Child was raised in this context (NCOSS, Expert Advisory Committee). For many, the Convention was the foundation of all of the functions of the Commission and they believed that the inclusion of an explicit statement acknowledging the Convention would bring coherence to the principles and functions.

For regional respondents in particular, the training and education functions were considered essential (Newcastle community meeting, Kathy Crouch, Hunter Area Health Service).

While some respondents found the functions of the Child Sex Offender Counsellor Accreditation Scheme to be somewhat anomalous, others welcomed the provision of training in this field of practice and that appeared to override concern about its inclusion among the Commission's functions. The opportunity to participate in Commission seminars was clearly valued, as was the cross-fertilisation of ideas that occurs across sectors in these forums (NSW Police).

Some respondents suggested that the current accreditation of individual practitioners should be extended to include accreditation of programs for sex offenders. They argued that program accreditation will establish consistency and provide a check that congruence between needs and outcomes exists, that children and young people's needs are considered and that programs follow best international practice standards (Cedar Cottage).

The research functions were also valued and many organisations expressed a willingness and desire to work collaboratively with the Commission on research projects (DoCS¹¹, CREATE, Professor Bennett). The collaboration between the NSW Commission, the Queensland Commission and NIFTeY that resulted in the report *A Head Start for Australia: An Early Years Framework*, was cited as an example of successful partnership (Tonia Godhard, Professor Alan Hayes).

Most comment, however, related to the advocacy functions of the Commission. For many respondents, the need for strong advocacy on behalf of children and young people was seen to have increased rather than diminished with time.

For some, the greater urgency arose from structural changes in the field. The merging of the Community Services Commission with the Ombudsman's Office, changes to the Health Care Complaints Commission, the recent shift of the Office for Children and Young People from the Premier's Department to the Department of Community Services were seen by many as amounting to a diminution of the influence of child advocates that has implications for the role and responsibility of the Commission.

For others, the urgency arose from concerns about particular groups of children and young people. Children being sexually exploited, tensions between the concerns of some parents of non-English speaking background and the demands of child protection, children and young people whose parents have a mental illness were among the many issues brought to the Review's attention.

For many respondents, this part of the Commission's work remains the most important. Some believed that in the first term of the

¹¹ NSW Department of Community Services

Commission's work, advocacy had taken second place to the Commission's employment screening functions. They would like to see the Commission's advocacy role strengthened (ACWA, NCOSS).

Three strategies, outreach, monitoring complaints and brokerage were raised in submissions.

2.7 OUTREACH

The development of an advocacy network for children and young people was proposed as a way of extending the Commission's capacity to receive and disseminate information and train advocates (NCOSS). There is no legislative impediment to the Commission pursuing the development of an advocacy network if it sees merit in doing so. It is the Review's understanding that it has been considered by the Commission in the past.¹²

2.8 COMPLAINTS

The Commission's role of monitoring complaints from children and young people received much attention. Complaints can indicate systemic problems and inform advocacy and many saw a need for the Commission to more actively monitor the complaints received by other complaints bodies, both formal (eg Health Care Complaints Commission) and informal (through agencies and services working with children and young people) (ACWA, YJC, NCOSS, Expert Advisory Committee).

In the discussion about complaints it is evident to the Review that people are referring to a number of things when they use the word 'complaints'. For one young person 'a phone hotline would be a great idea for children of Australia to voice their opinions and problems and have someone helpful to turn to for support'. To the Youth Justice Coalition, 'it was part of the vision that people held for the Commission; that it would be a body with sufficient clout to act upon and to see that government acted upon systems failures and problems when they are identified by mechanisms such as complaints'.

It appears to the Review that underlying respondents' concerns is a need for mechanisms by which children's and young peoples' views and experiences are acknowledged, taken into account and acted upon. Complaints mechanisms are a means by which young people can express a view, participate and exert influence. Yet it is known that traditional complaints mechanisms are not widely used by young people.

¹² Commission for Children and Young People, *Report of an Inquiry into the Best Means of Assisting Children and Young People with No-one to Turn To*, 2002.

Before considering whether provisions regarding complaints need to be strengthened or amended, the Review suggests that some exploration of the complaints issue be undertaken, including ways in which information about young people's concerns and experiences can be obtained and used to inform practice and improve systems. Such an exploration should also consider the role that the Commission could play and what it could add to the current network of agencies and services that receive 'complaints' and feedback from young people.

2.9 BROKERAGE

In fulfilling its many functions the Commission allocates priorities and makes choices between competing demands. It also positions itself in relation to government departments and agencies that have a mandate to work with children and young people and to promote their safety, welfare and well-being.

One of the themes that emerged during the consultation is that some would welcome a stronger brokerage role for the Commission and believe that it is the organisation that has the capacity to cut across sector boundaries and to bring organisations (government, non-government, private and children and young peoples' organisations) together. It appears that respondents would like to see this role enhanced, in advocacy, education and research. The Review considers that this is a role that helps the Commission fulfil its charter.

Conclusion

The Review has received many valuable comments about the Commission's functions, its role and the way in which priorities are allocated.

Decisions about how the statutory functions of the Commission are given operational meaning rest with the Commission and the Review anticipates that the Commission will consider the suggestions raised, especially those in relation to complaints, and the way these can inform practice and improve systems, and in relation to a stronger brokerage role.

The Review considers that the proposal to include accreditation of programs for offenders as a function for Child Sex Offender Counsellor Accreditation Scheme has merit and that legislation should be amended to include it. In relation to other matters raised the Review concludes that there is sufficient flexibility in the Act for the Commission to allocate and reallocate priorities as deemed necessary.

Recommendation 2

That s11(j) of the *Commission for Children and Young People Act 1998* be amended to require that the Commission develop and administer a voluntary accreditation scheme for programs as well as persons working with those who have committed sexual offences against children.

3 WORKING WITH CHILDREN

3.1 AN INTEGRATED FRAMEWORK OF PROTECTIVE STRATEGIES

The Wood Royal Commission into the NSW Police Service in 1997 was a major catalyst for the establishment of the NSW Commission for Children and Young People and for the development of a scheme to protect children in community settings and organisations.

The Royal Commission's examination of government and non-government organisations' responses to allegations of paedophilia identified serious, systemic failures that put children and young people at risk of abuse. It found that there was no specific, independent voice in government advocating for children and young people and it recommended the establishment of a children's commission to oversee their safety, welfare and promote their well-being. As a result, the Commission was set up and specifically charged with responsibility for pre-employment screening and probity checking of people involved in the care of children.

The screening and probity checking procedure that resulted is known as the Working With Children Check. It has been, and remains, a core strategy for developing safer organisations in NSW. It is a strategy that is principally about protecting children by preventing potential abusers from using paid or unpaid employment as a means of gaining access to children and young people.

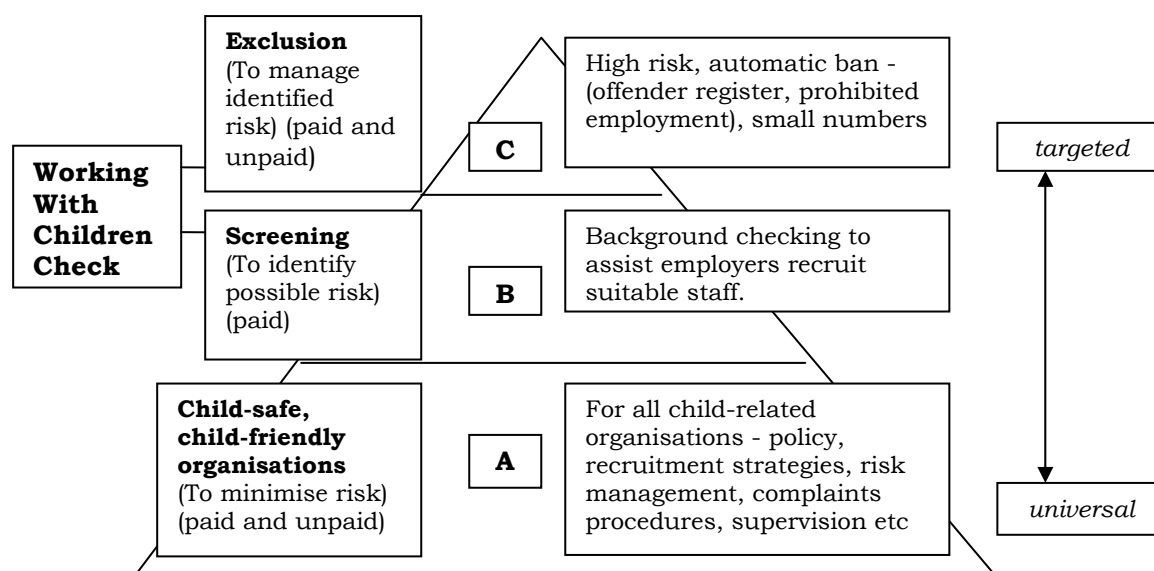
The Working With Children Check now stands as a part of a structure of protective workplace strategies that that has come to include support for workplace and organisational management practices that aim to strengthen organisations in ways that promote child-safety.

The diagram below illustrates the structure that has been developed by the Commission to consider child protection, ie the prevention of child abuse, in the workplace. It illustrates the relationship between three key strategies:

- A Developing child-safe and child-friendly organisations

- B Screening as a tool for employers to help them decide who to employ
- C The exclusion of known offenders.

Working With Children: A Policy Framework



3.1.1 Developing child-safe and child-friendly organisations

The initiatives at the level of strategy A – developing child-safe and child-friendly organisations – are the universal strategies described in the public health prevention paradigm. Together they form the ‘primary’ response that establishes the foundation and infrastructure for more targeted strategies. These child-safe and child-friendly strategies do not target offenders, they are recommended for all organisations that work with children and young people. They are more child-focused and are as likely to be perceived as strategies to enhance young people’s well-being as strategies for protecting them from abuse. They are also strategies that promote organisational well-being. They encourage the development of accountable organisations that have policies, procedures and mechanisms for identifying and managing risks and assuring quality. These include effective recruitment, supervision, training, complaints and disciplinary procedures. They also include the establishment of participative mechanisms that guard against risk by creating a culture and environment that promotes openness and facilitates disclosure. This approach is considered to be protective of children and of staff and it establishes that an organisation is exercising a duty of care to both. In this sense, it is also protective of organisations. Because they are

strategies in common with quality assurance, good practice in these areas will extend the benefits beyond child protection.

3.1.2 Screening

Strategy B – screening as a tool for employers to help them decide who to employ – is a background checking service for employers. In NSW its legislative expression is Part 7 of the *Commission for Children and Young People Act 1998*. The Commission’s function of background checking is to identify people who pose a risk to children, to assess that risk and then provide this information to employers. Employers can then make more informed decisions about recruitment. It is, in prevention terms, a selected strategy that attempts to identify those applicants who pose risk. In NSW, applicants for certain child-related employment are required to consent to a background check. That check looks for relevant criminal records, relevant Apprehended Violence Orders and relevant employment proceedings. If there is a record in any of these databases, an assessment of risk is made by the Commission or approved screening agencies and provided to the employer.

3.1.3 Exclusion of known offenders

At the level of strategy C – exclusion of known offenders – the focus is on specified, identified offenders. In the language of prevention, it is an indicated intervention. It targets a higher risk population ie those people known to have offended. The employment response is an automatic ban or prohibition from working with children. Its legislative expression is the *Child Protection (Prohibited Employment) Act 1998*. This strategy targets those people who have convictions for serious sexual offences, or for kidnapping or murder of a child. Because these are persons with a proven criminal history, interest in this group is shared by law enforcement agencies that have responsibilities to monitor ‘registrable’ people. The severity of the response and restrictions imposed warrant an accessible review mechanism. Breaches of prohibited employment provisions are criminal offences. Strategies B and C together constitute the Working With Children Check.

3.1.4 Working With Children Check principles

The Working With Children Check is underpinned by certain principles set by the Commission:

1. Its paramount consideration will be the welfare of children and their protection from abuse
2. It will follow natural justice principles and promote procedural fairness

3. It will protect sensitive, personal information from unnecessary disclosure
4. It will provide coverage across all industry types that work with children
5. It will apply consistently to all child-related employment
6. It will be evidence based, where scientific evidence exists
7. It will use information that is relevant to employment and capable of being legally challenged
8. It will exclude people convicted of sexual and serious offences against children
9. It will respect and support the responsibility of employers for recruitment and selection
10. It will recognise that background checking is just one part of a broad range of strategies (in the workplace) to help protect children and young people
11. It should not be unduly burdensome in terms of administration and operations
12. It will be efficient and timely.

Taking the structure as a whole, it can be seen that the purpose and mechanism at each level is different but that the strategies are complementary. Each plays an important part in a comprehensive system.

3.1.5 The Review's approach

The Review's approach was to consider the subsequent themes and the issues raised in them in light of:

- the Working With Children Check principles stated above
- the extent to which the legislation provides a sound basis for a rational, internally consistent and easily understood scheme
- similar schemes and proposals for child-related employment screening in jurisdictions outside NSW
- the possible impact of change on small and large organisations, on employers and employees in all parts of NSW
- costs as the Review has sought options which responsibly balance costs against social benefits.

The Review also tried to achieve consistency of language. A note on the Review's use of terms is warranted here. The legislation refers to 'employment screening'. 'Screening' can refer to a number of activities in human resource management. Screening procedures can include referee checks, qualifications checks and, in some areas of work, a medical examination. All are procedures used by employers to verify claims and to distinguish between applicants. While the term 'screening' is frequently used in discussions about working with children, it usually means background checking. Some jurisdictions call this 'vetting'. While the terms are often used interchangeably the

Review has tried to be more precise. In this Review background checking is a subset of 'screening' and the Working With Children Check is a subset of Working With Children.

3.2 EMPLOYMENT SCREENING FUNCTIONS

Under s11 of the Commission's Act, the Commission has broad functions to participate in and monitor screening for child-related employment in accordance with Part 7.

The Commission provides a coordinating role in the ongoing development and conduct of employment screening in child-related employment. The Commission provides community and employer education. It recommends that the Minister approve agencies to act as screening providers and it audits and monitors the system. In doing so, the Commission is obliged to protect the privacy of individuals subject to screening, promote procedural fairness in risk assessments and maintain the integrity of the system.

Section 36 of Part 7 expands on these functions by providing specific activities that the Commission may undertake in employment screening:

- (a) Collecting and maintaining a database of relevant Apprehended Violence Orders against any person and relevant disciplinary proceedings that have been completed against any person.
- (b) Giving access to information on that database for the purposes of employment screening by employers (or employer-related bodies) who have entered into a memorandum of understanding with the Commission on such access and the use of the information obtained.
- (c) Conducting employment screening on behalf of employers for whom the Commission has agreed to conduct any such screening.
- (d) Making recommendations to the Minister on appropriate procedures and standards for employment screening.
- (e) Promoting public awareness and providing training and advice on appropriate procedures and standards for employment screening.
- (f) Monitoring and auditing compliance with the procedures and standards for employment screening.

The Review considered whether these functions are appropriate and whether they are adequate.

Respondents to the Review endorsed the functions currently in the legislation. There remains wide support for the Working With Children Check as one strategy for making organisations safer for children. However, that support is not unqualified. Some respondents

acknowledged that it is a limited tool that can't be relied upon to prevent the most determined people from gaining access to children but saw it nevertheless as a useful deterrent (Queensland Commissioner, Burnside). Some had no problem with the functions, but took issue with the procedures that are or are not in place to implement them. For example, the Independent Education Union, the NSW Labor Council and the NSW Teacher's Federation suggested that for the Commission to advise the Minister on appropriate procedures and standards for employment screening (36(d)) a standing consultative mechanism needs to be established.

Some respondents, though regarding this strategy to protect children as essential, also sounded a cautionary note about the increased level of anxiety amongst those who work with children. In particular, they flagged the greater reluctance of men to work in child-related areas (Professor Hayes, Tonia Godhard). While they did not attribute this solely to employment screening, they would include a more risk-aware work environment on a list of disincentives to working with children.

The current functions in Part 7 give no explicit role to the Commission in developing the capacity of organisations to become more child-safe and child-friendly. The Review considered whether an additional function to promote the development of child-safe and child-friendly organisations should be included in legislation. Respondents strongly endorsed the Commission's work of supporting the development of child-safe and child-friendly organisations. Indeed, most saw it as the foundation for employment screening and as an area of work that is as much a part of the Commission's advocacy role as a part of its employment screening function. Respondents were asked whether they thought a voluntary code of practice for developing safe organisations should be developed and, if so, what the role of the Commission should be with respect to that code. Many thought that a code of practice could be a useful tool for managers and believed it should be voluntary. They saw the Commission's role as supportive ie it should monitor organisational development but it should have no role or mandate to enforce compliance in respect of this aspect.

The functions as outlined in the legislation do not exclude the possibility that the Commission could adopt other complementary strategies to promote child-safe and child-friendly organisations but there was some doubt about whether an additional function is necessary. In his submission to the Review, the NSW Ombudsman acknowledged the importance of the Commission's work in organisational development and had no objection to an additional function, but considered the task to be covered by existing provisions.

The Review is aware of the great diversity of organisations and the great variation in organisational capacity and size across NSW. If what is sought is cultural change, then it is accepted that a range of

measures will be needed, appropriate to different sectors, and to child-related enterprises at many different stages of development and complexity. It also seems likely that other considerations may persuade organisations of the value and importance of developing work practices that are protective. Insurance companies are increasingly aware of risk management as it applies to child protection. Compliance with best practice is likely to become a condition of cover.

The Review considers that most will be achieved by the provision of adaptable resources and training and by reliance on the desire of organisations to follow and be seen to follow best practice, and on the public's insistence that best practice be followed.

Conclusion

The Review concludes that the Commission should add a voluntary code of practice to its resources to guide organisations in the development of child-safe and child-friendly practice.

The Review also considers the organisational development role of the Commission should be made explicit in the legislation. To do so would strengthen the Commission's educative role, give the Commission a clearer mandate and elevate this activity in the minds of employers.

Recommendation 3

That s36(e) of the Commission for Children and Young People Act 1998 be amended to require that the Commission promote public awareness and provide training and advice on appropriate procedures and standards for the development of organisations that are safe and friendly for children and young people.

3.3 INTEGRATING THE LEGISLATION

Preliminary discussions held by the Review suggested that an amalgamation of the two Acts (*Commission for Children and Young People Act 1998* and the *Child Protection (Prohibited Employment) Act 1998*) could bring greater clarity to the process in NSW. This would reflect that the Working With Children Check is an integrated process and that the provisions governing prohibited employment and those that relate to background checking are both part of the employment screening scheme to protect children in workplaces. The Acts currently refer to each other but in some respects they are inconsistent.

The Review received responses that indicated a hope and expectation that amalgamation of the legislation relating to the Working With Children Check would help to address confusion in the minds of employers about how the Working With Children Check functions work, how the two parts of the Working With Children Check interact

and what is required of employers needing to meet obligations under both (ACWA, YJC, Burnside, Law Society of NSW, Catholic Commission for Employment Relations, Central Sydney Area Health Service, Child Protection Service, Hunter Area Health Service, NSW Police, DoCS, Children First).

A desire for simplification appears to underlie the enthusiasm for amalgamation. Respondents were particularly keen to see both parts of the Working With Children Check use the same definitions, especially the definition of child-related employment, and for the Check to be governed by the same principles and mechanisms for external review (NSW Department of Juvenile Justice). For some, amalgamation had a rational appeal, conveying the sense of a coherent and integrated scheme (NSW Ombudsman).

Some submissions did not favour amalgamation for fear it could dilute the force of prohibition (Approved Screening Agency meeting). Others saw too little benefit to warrant the administrative and legislative effort that amalgamation would require. For them, whether the provisions are in one act or two is inconsequential (Kathy Crouch).

Among the respondents who favoured amalgamation, there were different views about how an amalgamation should proceed. Two options were put forward: either amalgamate Prohibited Employment and Part 7 of the Commission's Act within the *Commission for Children and Young People Act 1998*; or amalgamate Prohibited Employment and Part 7 in a separate new act dealing with child-related workplace screening and administered by the Commission.

A separate act was favoured by those who already find the inclusion of employment screening provisions in the Commission's Act a distraction from the important functions of advocacy, education and research (NCOSS, ACWA, Ethnic Child Care). They were concerned that the Commission's responsibility for employment screening could overwhelm these other functions. Presumably, the inclusion of prohibited employment provision would, in the minds of these respondents, further diminish the significance of the other functions.

A separate act was also favoured by those who see screening in child-related employment as a step towards the comprehensive screening of all employees in services and organisations with responsibilities for vulnerable people – in aged care, in disability services etc (NCOSS). Co-location of current provisions appears to these respondents to have the potential to make easier the transfer of screening responsibilities to a single organisation established for this wider purpose.

Conclusion

The Review considers that the amalgamation of the Acts would enable greater coherence and consistency. It favours the inclusion of Prohibited Employment provisions in Part 7 of the Commission's Act. The Working With Children provisions are still relatively new to NSW and the Review considers that the work of achieving greater community awareness of the importance of developing safer organisations for children has just begun. To isolate the Working With Children legislation from the context of the legislation to promote the well-being of children and young people could dilute the purpose of the initiative.

Recommendation 4

That the *Child Protection (Prohibited Employment) Act 1998* provisions be amalgamated with Part 7 of the *Commission for Children and Young People Act 1998*; that the title of the new Part be 'Working With Children'; and that the object of the Part be to protect children by promoting child-safe and child-friendly organisations, by prohibiting certain persons from working in child-related employment and by assisting employers to recruit suitable people by providing background checks.

3.4 DEFINING 'CHILD-RELATED EMPLOYMENT'

The Commission's Act and the Prohibited Employment Act currently use different definitions of child-related employment.

The Commission's Act defines child-related employment as any employment that involves direct contact with children where the contact is not directly supervised (s33 (1)). Employment screening is mandatory for 'primary child-related employment' which is defined in s37 as:

- (a) paid child-related employment to which the *Child Protection (Prohibited Employment) Act 1998* applies
- (b) child-related employment to which that Act applies by a minister of religion or other member of a religious organisation
- (c) child-related employment involving the fostering of children.

The Prohibited Employment Act defines child-related employment in s3 as any employment of the following kind that primarily involves direct contact with children where that contact is not directly supervised:

- (i) employment involving the provision of child protection services
- (ii) employment in pre-schools, kindergartens and child care centres (including residential child care centres)

- (iii) employment in schools or other educational institutions (not being universities)
- (iv) employment in detention centres (within the meaning of the *Children (Detention Centres) Act 1987*)
- (v) employment in refuges used by children
- (vi) employment in wards of public or private hospitals in which children are patients
- (vii) employment in clubs, associations or movements (including of a cultural, recreational or sporting nature) having a significant child membership or involvement
- (viii) employment in any religious organisation
- (ix) employment in entertainment venues where the clientele is primarily children
- (x) employment as a babysitter or child minder that is arranged by a commercial agency
- (xi) employment involving fostering or other child care
- (xii) employment involving regular provision of taxi services for the transport of children with a disability
- (xiii) employment involving the private tuition of children
- (xiv) employment involving the direct provision of child health services
- (xv) employment involving the provision of counselling or other support services for children
- (xvi) employment on school buses
- (xvii) employment at overnight camps for children.

The Review heard that employers find the more general definition used in the Commission's Act difficult to interpret. Most said that they find that the Prohibited Employment Act provides a better definition but many considered that there are gaps in that definition that should be addressed. The Review was told of important exclusions and asked to consider widening the definition.

In this context it seemed that there were two questions that are frequently confused and that the Review needed to consider separately. The first is what is child-related employment? The answer determines to whom the Working With Children Check applies. All people in this category will be required to complete a Prohibited Employment Declaration. The second is to which subset of child-related employment should background checking apply?

The Review considers that there should be one definition of child-related employment. It should follow the model established by the definition in the Prohibited Employment Act. As indicated by the NSW Teachers' Federation, this form of definition provides greater clarity, reduces the need for interpretation and the risk of misinterpretation and has a useful educative function. It is also a definition that is currently in use and therefore familiar to users.

As to the location of the definition, whether it should be in the body of the Act or in regulations, some respondents argued that the changing nature of work, both kinds of jobs and types of employment arrangements, meant that flexibility is needed and therefore the definition should be located in regulation (ACWA). Placing the definition in regulation would make it administratively easier to update.

However, the Review considers that the definition of child-related employment is central to the Working With Children Check. It determines the Act's coverage and therefore who will be required to undertake certain activities and fulfil certain duties. For this reason it believes that the definition should continue to be located in the Act and be decided by Parliament.

It was also put to the Review that the list of industries covered by the definition should be broadened. Respondents tended to propose types of work where the nature of the work enabled the worker to develop a relationship with children. The following were proposed for inclusion:

- people conducting research with children
- in-home care providers providing personal services to children (including respite carers)
- family day care providers
- persons providing boarding/residential care to children ie acting in loco parentis
- road crossing supervisors ('lollipop men')
- people working with children in television, film, performing arts and modelling.

Some respondents argued that any contact with children is sufficient to warrant inclusion (Burnside, Crimtrac, Higgins). Others considered that the degree of involvement should be given primacy and that employers, in determining which of their positions are child-related, should include only those where the relationship is ongoing rather than occasional or incidental. The rationale for this was that in ongoing relationships the opportunity and access to children is high. The decision of Young J (IRC 4337, 2000) regarding the meaning of the term 'primarily' in the *Commission for Children and Young People Act 1998* was frequently cited in considering the definition. Many considered that for inclusion at least one of the essential duties of a position should involve direct, unsupervised contact with children. It was also suggested that supervision needs definition and that it includes the elements of immediate overseeing and the capacity to direct (Healey).

Recommendation 5

That the Acts be amended so that one definition of child-related employment applies to prohibited employment and background checking as follows:

That child-related employment be employment of the following kinds which primarily involves direct, unsupervised contact with children:

- (i) employment involving the provision of child protection services**
- (ii) employment in pre-schools, kindergartens and child care centres (including residential children's centres)**
- (iii) employment in schools or other educational institutions (not being universities)**
- (iv) employment in detention centres (within the meaning of the *Children (Detention Centres) Act 1987*)**
- (v) employment in refuges used by children**
- (vi) employment in wards of public or private hospitals in which children are patients**
- (vii) employment in clubs, associations or movements (including of a cultural, recreational, religious or sporting nature) having a significant child membership or involvement**
- (viii) employment in any religious organisation**
- (ix) employment in entertainment venues where the clientele is primarily children**
- (x) employment as a babysitter or child minder that is arranged by a commercial agency or parent with an ABN**
- (xi) employment involving fostering, boarding or regular overnight care**
- (xii) employment involving regular provision of taxi services for the transport of children with a disability**
- (xiii) employment involving the private tuition of children**
- (xiv) employment involving the direct provision of child health services**
- (xv) employment involving the provision of counselling or similar professional support services for children**
- (xvi) employment on school buses**
- (xvii) employment at overnight camps for children**
- (xviii) employment in services mentoring children**
- (xix) employment in research and evaluation involving children**
- (xx) employment involving the provision of personal care services to children, including respite care**
- (xxi) employment involving the provision of home based child care**
- (xxii) employment in theatre, film, performing arts and modelling involving the participation of children**
- (xxiii) employment as road crossing supervisors.**

NB Italics in the above list indicate a new or amended inclusion.

That supervision is defined as immediate overseeing of the employees with the capacity to direct them.

3.5 PRIVACY AND CONFIDENTIALITY

The Working With Children Check relies on having accurate, reliable information. It also sets out what information can be exchanged. Such information may need to be exchanged between relevant agencies, for example courts, police and Approved Screening Agencies. The Minister's second reading speech in 1998 recognised the potential for misuse of confidential information in the screening process. This information is extremely sensitive and should be well-protected. The principle here is that it should only be accessible to people who need the information and who are authorised to collect it.

As a result, the Commission's Act makes it an offence to:

- disclose any information obtained by the person in connection with employment screening, except as explicitly allowed (eg disclosure made in good faith for the purpose of employment screening – s 42 (1) (a-d))¹³
- dishonestly obtain confidential information relating to employment screening.

No similar provisions apply in the Prohibited Employment Act. The *Working With Children Check Guidelines* provide practical guidance on how to protect sensitive information.

Public sector agencies involved in employment screening, including local government organisations, are subject to Part 2 of the *Privacy and Personal Information Protection Act 1998*. Non-government organisations must collect and hold personal information relating to screening in accordance with the Data Protection Principles endorsed by the NSW Privacy Commissioner.

Many submissions to the Review expressed concerns about the collection, storage and release of information, and access to information about records held (Civil Liberties Inc, Privacy NSW, Independent Education Union, Labor Council of NSW, Tonia Godhard). For example, Privacy NSW emphasised that:

¹³ The Commission does, however, have power to refer information obtained in the course of exercising its functions to the Commissioner of Police, the Ombudsman, DoCS or any other investigative or government agency considering appropriate (eg information relating to a possible criminal offence obtained while performing the Commission's employment screening functions) (s15 and s15A of the Commission's Act).

In order to retain public confidence in child protection, information collected and used to promote the aims of the legislation should be used in a fair, responsible and accountable way.

Privacy NSW expressed concerns related not to the requirement for employment screening but to the way it has been implemented. The employment screening scheme in NSW vests considerable responsibility with employers. It is fundamental to the NSW scheme that decision making about recruitment rests with employers. Respondents queried whether all organisations have the knowledge, capacity and facilities to manage sensitive information well and effectively prevent unauthorised access to information (Civil Liberties Inc).

Privacy NSW were particularly concerned that too few people know of their right to lodge complaints about misuse of information with the Privacy Commissioner for investigation. It commented that although s42 provides penalties for unauthorised disclosure or collection, it is difficult to obtain evidence to the standard required for this to be a useful deterrent. Privacy NSW proposes that a greater effort be made to inform people of this right.

The majority of respondents who commented on information sharing thought that the current restrictions on information sharing hindered effective screening. They argued that these restrictions are as much a matter of policy as legislation (CrimTrac, Department of Education and Training, Criminal Identification Specialist Branch of NSW Police). Police raised the issue of police intelligence being provided to screening agencies. They argued that there are instances where police have information relevant to a person's suitability to work with children but where there are no charges or convictions on record.

There are tensions between the protective principle and the principles of maintaining personal privacy. In this context Privacy NSW alerted the Review to the existence of:

perceptions that agencies use the paramount interest of the child to adopt a risk avoidance approach, or one that is more concerned with representing the interests of the children than according procedural fairness to workers and volunteers.

The Review agrees that information gathered in relation to the Working With Children Check must be used in an accountable way in order to retain public confidence in child protection. However it notes that the requirements of the Working With Children Check are not unique in this respect. While it may be true that organisations vary in their approach to the maintenance of secure information, they are already obliged to maintain secure records for other personnel functions.

In relation to the right to complain about misuse of information, the Review considers that it would be hard to dispute that where a right exists every effort should be made to draw it to people's attention. The Review sees this as being primarily Privacy NSW's responsibility. However, if the Commission, in the course of informing people about the scheme can do more to raise awareness about this right, then the Review considers it should so.

The Review notes that the Bichard Inquiry in the UK has recently reported on child protection procedures, the effectiveness of relevant intelligence based record keeping, vetting practices (screening) and information sharing in Humberside Police and the Cambridge Constabulary in the UK.¹⁴ Lord Bichard has recommended that a proposed central screening body have access to a number of data bases including that of the National Criminal Intelligence Service as well as Police National Computer Records.

As for the perceived tension between procedural fairness to workers and the interests of children the Review maintains that while there may be tension there should not be conflict. The scheme needs to protect children and promote procedural fairness.

(Two other matters that relate to access to information were raised and these are dealt with under 'relevant employment proceedings' at p74 and under 'risk assessment' at p77).

Conclusion

The Review notes that some organisations believe that some policies regarding information sharing are restrictive but does not consider a case can be made for legislative change in this area.

The use of police intelligence in the Working With Children Check is a complex matter that warrants consideration and the Review suggests that the Commission explore this possibility with the relevant agencies.

Recommendation 6

That the forms that are part of the *Working With Children Check Guidelines* be reviewed to give greater emphasis to the right of people to lodge a complaint with Privacy NSW under s42 if they believe that their right to privacy has been breached.

¹⁴ The *Bichard Inquiry Report*, 4.64-4.136

3.6 GUIDELINES FOR THE WORKING WITH CHILDREN CHECK

The Minister is required to publish guidelines for procedures and standards for employment screening under the Act (s35 (1)). The Commission develops and implements these guidelines. The inaugural guidelines have been reviewed recently, as required by the Commission's Act, and new guidelines became effective on 23 April 2004. These are therefore not the subject of this Review.

Section 35 specifies what must be contained in the guidelines. This includes:

- procedures and standards for confidentiality of information obtained for or as a result of employment screening
- procedures and standards for information to be provided to persons subject to employment screening (including procedures enabling those persons to correct any such information)
- procedures and standards for information to be provided to (or withheld from) employers by agencies carrying out employment screening on their behalf
- provisions for notifying applicants for child-related employment of information obtained about them during employment screening that may adversely affect their application and
- provisions for access by employees or prospective employees to information that is or may be used in employment screening.

Many submissions made favourable comments about the recently revised Guidelines. They took the view that the current legislative provisions at s35 of the Commission's Act are adequate. However many made the point that there is no similar provision in the Prohibited Employment Act (Department of Education and Training, Approved Screening Agencies, Catholic Education Commission for Employment Relations).

The Minister is required to publish Guidelines for Part 7 of the Commission's Act but the requirement does not extend to the Prohibited Employment Act. Clearly, to be effective, the Guidelines must deal with both. The Review has proposed the amalgamation of the Prohibited Employment provisions in Part 7 of the Commission's Act. In this model, prohibition is a part of the employment screening system. If this is agreed, the section dealing with the Guidelines would apply to both background checking and prohibition.

On the question of review, most respondents believed that the Guidelines should be formally reviewed at the same time as the review of the legislation, every five years. It was made clear that this should not preclude amendment to the legislation or the Guidelines if the need arose in the meantime (NSW Ombudsman, Children's Guardian).

Because the Guidelines must follow legislation, review of the Guidelines would follow legislative review rather than take place concurrently.

The Review notes that there are areas where respondents have made suggestions that have implications for procedure and therefore potentially, for the guidelines. The inclusion of guidance on the conduct of investigations is an example. These matters are considered in more detail on p75, under 'Natural justice/procedural fairness'.

Recommendation 7

That the Guidelines apply to both the background checking and prohibited employment and they be reviewed following each legislative review period or, if necessary, whenever legislation is amended.

3.7 TOWARDS NATIONAL CONSISTENCY

NSW was the first state to introduce specific legislation to protect children from possible harm from adults in the workplace. Queensland has followed and people seeking work in child-related employment as defined in that state, must apply for a suitability card that verifies background check clearance. Western Australia has just tabled legislation to establish an employment screening scheme and adapts elements of the NSW and the Queensland schemes. In South Australia, a recent report on child protection by Robyn Layton QC recommended the development of a scheme in that state.¹⁵ Ways of enhancing the capacity of organisations to promote child safety are being considered.

The Community Services Ministers' Advisory Council (CSMAC) established a Working Group in 2004 to consider the development of a national framework for persons working or volunteering in child-related areas.¹⁶ In August 2004, the Community and Disability Services Ministers' Council endorsed the establishment of a framework for screening persons working/volunteering in child-related areas and progressive implementation through the adoption of schedules in key areas for action. They also supported the further development of linkages with related national initiatives and collaborative work with other sectors endeavouring to strengthen child-safety in organisations.

The proposed framework will strive for compatibility and consistency, rather than uniformity between systems and jurisdictions. In respecting existing arrangements it acknowledges the variations in

¹⁵ *Our Best Investment: A State Plan to Protect and Advance the Interests of Children*, 2003.

¹⁶ The Council is made up of relevant Commonwealth, State and Territory Ministers.

administration and organisation, even within the community services, in services that work with children.

The Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA) has requested the preparation of model uniform legislation to address the issue of criminal records information being released for the purposes of screening persons seeking to work in the education sector¹⁷ and work on this project is well underway.

There is also national work being coordinated by the Australian Police Ministers Council to develop a National Sex Offender Register.

It is useful to consider these developments in the context of this Review.

In the Review consultations, the proposal that there be a nationally consistent approach to the development of child-safe and child-friendly practices in organisations met with wide support. Most respondents to the Review took the proposal further, supporting a nationally consistent approach to employment screening as well.

Conclusion

The Review considers that there is reason to be optimistic that, despite state variations in legislation and organisation, there is sufficient goodwill and common purpose to pursue an agenda that will result in stronger recruitment practices and safer organisations nationally. As state and territory governments develop employment screening systems, Australia will be in a better position to select a national approach that protects children and invests in those approaches that have been evaluated as being the most effective.

¹⁷ MCEETYA is made up of NZ, Commonwealth, State and Territory Ministers.

4 PROHIBITED EMPLOYMENT

Under the Working With Children Check all people working in, or seeking to work in, child-related employment in NSW must declare whether or not they are a 'prohibited person'.

The Prohibited Employment Act makes it an offence:

- for a prohibited person to apply for, work or remain in child-related employment (s6) and to knowingly make a false disclosure (s7)
- for an employer to fail to ask whether a person is a prohibited person (s7) or knowingly employ one in a child-related position (s8).

A prohibited person is someone:

- convicted of a serious sex offence (s5(3))
- a registrable person as defined in the *Child Protection (Offenders Registration) Act 2000* (s3).

Employers must ask for a Prohibited Employment Declaration from anyone seeking paid or unpaid employment (eg volunteers) in a position that 'primarily involves direct contact with children where that contact is not directly supervised', in areas of work listed in s3.¹⁸ In practice, those subject to the Prohibited Employment Act sign a 'Prohibited Employment Declaration'.

'Primarily' has been defined by the Industrial Relations Commission to mean at least one of the essential duties of the position involves direct, unsupervised contact with children.¹⁹

Minister Lo Po' in her Second Reading Speech in 1998 characterised this prohibited employment initiative as 'an integral part of the employment screening system'. It attempts to stop known offenders from working in child-related employment because of the risk they may pose to children.

A prohibited person can make an application for an exemption from the Prohibited Employment Act to the Commission, the Industrial Relations Commission or the Administrative Decisions Tribunal. If an exemption is granted, that person is no longer prohibited from working with children.

¹⁸ The Act does not apply to child-related employment where all the children with whom a person is required to have contact are related to the person or related to the employer and the employee is related to the employer (s4).

¹⁹ IRC Matter 4337 of 2000.

The Review sought comment on whether the types of offences that result in a person being prohibited from working in child-related employment are the right ones.

4.1 THE OFFENCES

The opinion of respondents varied about whether the current offences used to define prohibited persons best indicate risk to children. For some the net is cast too wide and they sought to limit the offences considered. Civil Liberties Inc submitted that the definition of serious sex offence is so broad as to result in the prohibition of people convicted of relatively minor offences. To work in child-related employment they are also required to apply for an exemption; a process that is disruptive and takes time. Civil Liberties cite the offence of carnal knowledge as an offence that can sometimes be minor. Many of these convictions are old convictions for an incident involving young people of similar age. Although the age differential between 'victim' and perpetrator is considered by the Commission or tribunal hearing an application, it is argued that it would be sensible to exclude those offences where the age difference between perpetrator and young person is small. Civil Liberties argue that applying for an exemption can be traumatic.

The Review is aware that many of these relatively minor offences would be dealt with on application to the Commission under s8A of the Prohibited Employment Act, without the need for a tribunal hearing. This provision was introduced into the Act in 2002 to avoid the very disruption that Civil Liberties Inc allude to. It is important to note that there will be some carnal knowledge offences that are highly relevant.

Some organisations sought to expand the range of offences, to include serious assault and some drug offences, particularly trafficking offences. They argued that any serious assault, against a victim of any age, warrants the exclusion of the perpetrator from child-related employment (CrimTrac, Criminal Identification Branch of NSW Police). Others argued that the inclusion of serious assault should be limited to those where the victim was a child (DoCS, Department of Education and Training). However, many of those who commented on this question stressed the importance of evidence in making any determination about inclusion. Additional offences, they said, should be included where there is evidence of a clear link between the offence and risk to children.

The Review takes the view that to prohibit a person from engaging in child-related employment is a restriction that should be justified by evidence of relevant risk. While some of the offences nominated for inclusion may suggest poor character, they are not sufficient grounds for prohibition. There is little evidence that serious assault of an adult

indicates risk to children. However, where a person's criminal history includes serious assault of a child, there is stronger reason for concern. The Review considers that where a person has been found guilty of serious assault of a child there should be a presumption of risk and that person should be prohibited on that basis. The exception would be physical assault of a child by another child. It is not intended that peer physical violence between juveniles be captured and a formulation for excluding them would need to be developed. Serious assault means severe or significant violence and does not include common assaults.

Recommendation 8

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to include serious assault against a child by an adult amongst the offences prohibiting people from child related employment and this amendment should exclude peer violence between juveniles.

4.2 DEFINITION OF 'PROHIBITED PERSON'

The policy behind prohibition is to exclude persons with convictions from working with children. Exclusion is the most intrusive strategy within the scheme, to be used where it has been established beyond reasonable doubt that the offence has been committed. The Act also says that 'conviction includes a finding that the charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to conviction' (s3).

The Act also:

- makes it a defence if a prohibited person can establish that they did not know the employment was child-related when they applied for, undertook or remained in child-related employment (s6 (2))
- states that an employer is not prevented from moving a prohibited person from child-related employment to a different kind of employment (s10).

Some respondents were concerned that in completing the Prohibited Employment Declaration, some people have made the declaration in good faith, unaware that it also covers people found guilty of an offence even though the court does not record a conviction. In these cases, where it has later become apparent that they are in fact prohibited, they face possible prosecution for making false declaration (Higgins).

The Review considers that the Act should be amended to clarify the definition of a prohibited person.

Recommendation 9

That the *Child Protection (Prohibited Employment) Act 1998* or its equivalent be amended to define a prohibited person as ‘*a person found guilty of a serious sex offence serious assault of a child; or a registrable person*’.

4.3 PROHIBITED EMPLOYMENT DECLARATION AND BACKGROUND CHECKS

At present all people who are subject to a Working With Children Check must also provide their employer or potential employer with a Prohibited Employment Declaration. This declaration is separate to the consent form that they sign to enable a background check to be made. Whenever a background check identifies someone as a prohibited person, the matter is referred to the NSW Police for investigation.

Some respondents thought that the administration of the system could be simplified by removing the requirement for those subject to background checking to also make a Prohibited Employment Declaration. They argued that that by maintaining simplicity and minimising administrative burden, people are likely to be more accepting of the system and more compliant (Children’s Guardian, Professor Hayes, unions, Hunter Area Health Service).

However, more respondents saw merit in the current two stage process (all Approved Screening Agencies, employers). Rather than being wasteful they argued that the duplication is useful in strengthening the deterrent effect of the Working With Children Check. A person is put on notice that the position is child-related and therefore subject to Working With Children Check legislation. They are asked to make a declaration early and then, if their application is preferred, they will be asked to consent to a check. A check can take some time and in these instances, having a declaration in advance of receiving the background checking results can be useful for employers. It also provides a means of deterring prohibited persons from pursuing employment working with children. The Prohibited Employment Declaration and the consent to check are therefore seen as complementary procedures.

The Review believes that there is merit in maintaining this view.

Conclusion

That employers should continue the practice of asking all people applying for child related employment to make a Prohibited Employment Declaration.

4.4 AUDITING

While obligations exist in the Prohibited Employment Act on employers and those applying for child-related employment, the Commission has no clear powers to check that employers are asking for declarations or that employees are answering them truthfully.

Respondents to the Review felt that there should be a mechanism to check that employers are asking for declarations. Most favoured random audit of employers to see that Prohibited Employment Declarations are being sought for positions that are not subject to mandatory background check.

S36(f) of the Commission's Act gives the Commission authority to monitor and audit compliance with the procedures and standards for employment screening. In an amalgamated Act this would include monitoring and audit of prohibited employment procedures.

However neither the Commission's Act or the regulations include any specific provisions to authorise entry without warrant into premises that are places of employment. Nor do they articulate powers exercisable on entry and inspection. For the Commission to fully exercise its responsibility to monitor and audit, both are necessary.

The Review considers that the sections of *Children and Young People (Care and Protection) Act 1998* that deal with entry without warrant into premises – places of employment (s236) and powers exercisable on entry and inspection (s241) – provide a useful model and inclusion in the Commission's Act would provide the necessary authority to conduct random checks of employers.

Where employers are found not to be fulfilling this requirement the Review considers that a first notice should be given to the employers that they are in breach. If subsequent audit finds that employers remain non-compliant they should be prosecuted for non-compliance and penalised. The Review notes that this can be achieved through administrative processes in relation to the exercise of the decision to prosecute or to refer the matter to the police under s7(1).

The Review was also told that in some areas there is a problem with 'over compliance', ie employers asking all employees, whether they are in child-related positions or not, to complete Prohibited Employment Declarations. Strengthening auditing by the Commission will identify these situations.

Recommendation 10

That the *Child Protection (Prohibited Employment) Act 1998* or its equivalent be amended to give the Commission powers to enter premises and the necessary powers exercisable on entry and inspection to carry out its audit function.

4.5 EXEMPTIONS AND OTHER PROTECTIONS

Prohibited persons can apply to the Commission for Children and Young People (s8A), or the Industrial Relations Commission (IRC) or Administrative Decisions Tribunal (ADT) – relevant tribunals – for an exemption under the Prohibited Employment Act (s9).

4.5.1 When an exemption can be granted

The Commission, the IRC and ADT can only make an order if they consider the person does not pose a risk to the safety of children (s8A (3)) and s9 (4)). The Act sets out relevant factors that are to be taken into account.

The Commission is party to any proceedings in the IRC and ADT and can make submissions supporting or opposing the orders.

The Tribunals and the NSW Supreme Court have made judgements interpreting what is meant by ‘risk to children’ and how the discretion to make an order should properly be exercised.²⁰

4.5.2 Risk

Where a prohibited person makes an application for exemption, the tribunal considering the application can make an exemption order if it considers that the person poses no risk to the safety of the child. Case law has interpreted risk and the structure for making a decision about exemption, wholly or conditionally.²¹

The Review sought opinion on whether risk and the level of risk considered relevant can be defined.

Young CJ characterised the proper approach to determining whether a person should be exempted (completely or conditionally) from the operation of the Prohibited Employment Act as requiring a ‘balancing

²⁰ Significantly *R v Commission for Children and Young People* [2002] NSWIR Commission 101 and *Commission for Children and Young People v V* [2002] NSWSC 949 (23 October 2002)

²¹ *R v Commission for Children and Young People* [2002] NSWIR Commission 101 and *Commission for Children and Young People v V* [2002] NSWSC 949 (23 October 2002)

of protecting employees, protecting children from abuse and protecting reasonable civil liberties'.²²

In every application for exemption there is a tension between competing interests and the Review considers that some clarification here would be useful. In making a determination about exemption there should be no doubt that the protection of children must be the primary consideration.

It is a principle of the Commission's Act that the safety, welfare and well-being of children are the paramount consideration (s10(a)). The Review has recommended the amalgamation of the Prohibited Employment Act with the Commission's Act and that the Object of Part 7 be to protect children by promoting child-safe and child-friendly organisations, by prohibiting certain persons from working in child-related employment and by assisting employers to recruit suitable people by providing background checks. Together, the principle and amended Object should put beyond doubt that the protection of children is the paramount consideration in making determinations.

The Review also considers that clarity around the concept of risk would be helpful. The Prohibited Employment Act is based on the assumption that a person who has been found guilty of a serious sex offence poses a risk to children. It is up to the applicant to show to the satisfaction of a tribunal that on all the relevant material the applicant does not pose a danger to the safety of children. Under present legislation, a tribunal is not to make an exemption order unless it considers that the person the subject of the proposed order does not pose a risk to the safety of children. The Review considers that this could be made clearer by amending s9(4) to say that the tribunal should not make an order unless the applicant satisfies the tribunal that he or she does not pose a risk to children.

S9(5) says that in deciding whether or not to make an order in relation to a person, a relevant tribunal is to take into account:

- the seriousness of the offences
- the period of time since the offences were committed
- the age of the person at the time those offences were committed
- the age of each victim of the offences at the time that they were committed
- the difference in age between the prohibited person and each such victim
- the prohibited person's present age
- the seriousness of the prohibited person's total criminal record
- such other matters as the tribunal considers relevant.

²² CCYP v V[2002] NSWSC 949

The Review sought opinions on whether these considerations are comprehensive and whether they remain relevant. There have been cases where other factors have been relevant eg that the person has a mental illness. However, respondents have told the Review that s9(5)(f) which allows ‘other matters as the Tribunal considers relevant’ has provided the opportunity to raise these considerations. Section 9(5)(f) also allows research findings in relation to assessment of risk to be taken into account.

The Review considers that legislation in this area is adequate and the list of considerations helpful.

Recommendation 11

That s9(4) of the *Child Protection (Prohibited Employment) Act 1998* be amended to provide that a relevant tribunal is not to make an order under the section unless the person the subject of the proposed order satisfies the tribunal that he or she does not pose a risk to the safety of children.

4.5.3 Making and monitoring conditions on an exemption order

The Commission, IRC and ADT may make an exemption order that has conditions attached. These conditions may govern, for example, how a person must be supervised. They may prohibit someone from working with children of a particular age and/or gender or require that the person complete counselling.

The NSW Ombudsman stated in his submission to the Review that:

we see the ability to impose conditions upon an exemption as enabling the protection of children without necessitating severe effects upon a person’s employment or civil liberty (NSW Ombudsman).

The Review considers that the capacity to impose conditions on orders is a pragmatic approach to managing the tensions between protection and the right to work with children and young people. However, there are some practical considerations that should be taken into account.

The legislation gives no guidance about what kind of conditions may be acceptable to adequately reduce an offender’s risk to children or would be capable of being effectively monitored.

Some respondents have argued that when the tribunal is considering conditions, the prospective employer should be given the opportunity to make submissions because the employer is in the unique position of being able to advise the tribunal whether a proposed condition is

practical and capable of implementation in the setting (Employee Performance and Conduct, Department of Education and Training).

The Review notes that the employment circumstances in which applications for exemption are made are varied. Where a potential employer is known, they are usually able to put their position regarding conditions through the Commission. There is scope within the current tribunal processes for the views of the employer to be taken into account.

Where conditions are imposed it is essential that they apply to the applicant, not the employer, and that they are capable of being implemented, monitored and enforced. The legislation provides that the NSW Commissioner of Police must be notified of exemption orders made, which includes conditions attached to those orders. However, the legislation makes no provision for how compliance with these conditions should be enforced or what happens if they are breached.

The Commission has a monitoring function in relation to prohibited employment. The Review notes that this function enables the Commission to monitor compliance with conditions attached to an exemption order. Where the Commission finds that a condition has been breached, the Review considers that the appropriate course should be for the exempted person to be brought before the tribunal that granted the conditional exemption and the matter re-considered.

Recommendation 12

That the *Child Protection (Prohibited Employment) Act 1998* or its equivalent be amended to provide that in the event of an alleged breach of condition the exemption order be reviewed by the relevant tribunal (or the Commission in the case of exemptions made under section 8A) that made the order.

4.5.4 New evidence

There is currently no provision to allow the Commission to bring a matter back to the relevant tribunal if it has new evidence that should have been before the tribunal at the time it considered the exemption application.

There was support for the Commission bringing new evidence to the tribunal where that new evidence relates to a previously heard matter and the information would have been relevant to the making of the exemption order. While this is supported by the Review in principle, it is important that the status of an exempt person not be continually at risk of being overturned provided the exempt person has been frank with the tribunal in disclosing matters that are relevant to the exemption application.

The Review supports the Commission being empowered to make application to the IRC or ADT for re-consideration of an exemption and/or the conditions of an exemption, subject to certain threshold criteria being satisfied.

In relation to new evidence that would have been relevant to the tribunal's decision at the time it dealt with the exemption application, had it been known, that threshold should take into account the following factors:

- the applicant to an exemption application should be under a duty to make full disclosure of all relevant matters to the tribunal
- notwithstanding that duty, full disclosure of a relevant matter was not made by the applicant
- the Commission was unaware of the relevant matter at the time of the original application to the tribunal and could not reasonably have been aware of it
- the new evidence of the relevant matter indicates a significant risk to children so as to justify a re-consideration of the application for exemption to protect the paramount considerations of the safety, welfare and well-being of children.

These threshold factors provide a balance between the policy objectives of the safety, welfare and well-being of children and that of finality of the exemption application proceedings.

If the Commission has satisfied the threshold, the IRC/ADT could consider the substance of the application and determine whether the exemption and/or conditions result in a risk being posed to children. If the tribunal is satisfied that a risk exists, it could amend or revoke the exemption.

The exempt person should have a right of appeal to the Supreme Court on a question of law if the tribunal accepted the Commission's position.

Recommendation 13

That the *Child Protection (Prohibited Employment) Act 1998* or its equivalent be amended to provide that an applicant to an exemption application under the *Child Protection (Prohibited Employment) Act 1998* should be under a duty to make full disclosure of all relevant matters to the tribunal considering the application.

Recommendation 14

That the *Child Protection (Prohibited Employment) Act 1998* or its equivalent be amended to allow the Commission to make application to the relevant tribunal to re-consider an exemption order on the ground of new information provided the relevant tribunal is satisfied that the new evidence satisfies certain threshold criteria. Those threshold criteria are that the new evidence is relevant, indicates a significant risk to children, that it was not previously disclosed by the applicant and the Commission could not reasonably have been aware of the evidence at the time of the original application.

4.5.5 Representation

The other issue raised by respondents' concerns representation. Civil Liberties Inc has argued that as it is up to the applicant to persuade the tribunal that he/she does not pose a risk to children, he/she should be entitled to representation and access to expert opinion. The Review considers that applicants to the tribunals should be entitled to representation whereas applicants to the Commission, where decisions are made on the documents and without a hearing, should not be entitled to representation.

Recommendation 15

That the Government consider asking the Legal Aid Commission to grant legal aid to applicants for exemption where they have been refused an exemption by the Commissioner for Children and Young People and plan to proceed to a relevant tribunal.

4.5.6 Information for making s8A determinations

For the purpose of determining whether the Commission should grant an exemption to a prohibited person the Commission has the power to request a 'statement' from a government agency, or any other person, that sets out information relevant to this determination (s14A (3) Commission's Act). A summary statement does not have the same veracity as original documents as it risks missing important matters. The Review asked whether the Commission should be given power to obtain original documents instead. The Commission has this power when matters are before the IRC and the ADT.

Further, the Commission can only 'request' this information when making its determination to grant an exemption (s14A (3)). In contrast, where the Commission is preparing submissions to the IRC or ADT it can 'direct' that the information be provided (s14A (1)).

Many respondents considered that the Commission should have the power to obtain original documents. It was argued that access to original documents would reduce subjectivity (unions) and result in greater consistency. It was also argued that better quality information would benefit both the applicant and the cause of protection (NSW Ombudsman).

The Review considers that it is important for the Commission to have the best possible information on which to base its decision to grant a prohibited person an exemption.

Recommendation 16

That the *Child Protection (Prohibited Employment) Act 1998* or its equivalent is amended to give the Commission for Children and Young People the power to direct the provision of original documents when considering applications made under s8A.

5 BACKGROUND CHECKING

5.1 WHO SHOULD BE CHECKED?

Certain people in paid, child-related employment must consent to a background check. Background checking is currently mandatory for:

- preferred applicants for paid child-related employment to which the *Child Protection (Prohibited Employment) Act 1998* applies
- child-related employment to which that Act applies by a Minister of religion or other members of a religious organisation
- child-related employment involving fostering of children.

Preliminary discussions indicated that gaps are perceived in the present scheme and this was confirmed by respondents to the Review. They drew attention to particular categories of workers that they thought should to be included. The Review has proposed the inclusion of some additional categories of employees in the list of child-related employment on p45 and it maintains that background checking should remain mandatory for people in paid, child-related employment.

Conclusion

That the Working With Children Check should remain mandatory for paid child-related employment.

5.1.1 Volunteers and students on placement

Volunteers were the group most commonly recommended for inclusion. For many organisations, volunteers are their main exposure and checking their background is seen as an important part of risk management (NCOSS, Burnside, ACWA, Newcastle Diocese of the Anglican Church). But it was also suggested that the inclusion of all volunteers would present a massive increase in the volume of checks needing to be processed, without commensurate benefit to children (Department of Education and Training). Over the course of the Review the Commission was piloting a program of background checking of volunteers and students on placement and the Review has also been informed by the results of that program.²³

The Review considers that the current blanket exclusion of unpaid employees is unacceptable, yet it does not believe that the inclusion of all volunteers in child-related employment is warranted. The Review takes the position that the decision to include a position on the list of mandatory checks should be based upon the nature of the

²³ CCYP Report, *Working With Children: Volunteers and Students on Placement*, October 2004

relationship between adult and child, the characteristics of the child (eg emotional vulnerability) and characteristics of the position (eg involving personal care). The positions included are most likely to be paid positions because:

- paid employees generally have greater authority than volunteers in the organisation
- paid employees are more difficult to dismiss and therefore greater care needs to be taken in selection
- paid employment is likely to be ongoing, increasing exposure to children.

However, some positions will be voluntary and for these positions, the Review believes that checks should be mandatory. These are positions that involve overnight care, personal body contact, where the children concerned are particularly vulnerable, or where a combination of these characteristics apply.

The Review acknowledges that some employers may determine that other positions in their organisation also carry risk and that a background check should be made. There needs to be a mechanism for employers to obtain some background information about prospective employees. The National Police Certificate that the Review anticipates will become available through NSW Police, may provide the solution.

Conclusion

For those volunteers in specified high risk positions, background checking should be mandatory. For other volunteers the employing organisation may have the option of requesting a National Criminal Record History Check from police, provided the applicant has provided consent. Employers will need to be aware that the police check will not include a check of the employment proceedings data base held by the Commission and that they need to be careful to explore work history in these cases.

Recommendation 17

That the *Commission for Children and Young People Act 1998* be amended to make background checking mandatory for unpaid employees (volunteers) in the following high risk categories:

- **employment involving fostering, regular boarding or overnight care**
- **employment in services mentoring children**
- **employment at overnight camps for children**
- **employment involving the provision of personal care services to children, including respite care.**

Recommendation 18

That the *Commission for Children and Young People Act 1998* be amended to make background checking mandatory for students on placement in any child-related employment and that the employer be the educational institution where the student is enrolled.

5.1.2 Self-employed people and certification

Another group that respondents thought should be included were self-employed people. Self-employed people in child-related employment are required to comply with the Prohibited Employment Act but they are not currently subject to background checks as there is no employer to make a recruitment decision. The Review sought suggestions on ways of verifying that self-employed people in child-related employment are not prohibited persons.

Many respondents considered that self-employed people should be subject to the same kind of scrutiny as employees (unions, ACWA, Hunter Area Health Service). They argued that as ways of working become more diverse, it is becoming more common for people to work with children as small business operators. Many took the position that some kind of certification should be provided as evidence that self-employed people are considered safe to work with children and that in addition certain conditions apply to such certification, including that:

- there be adequate provision for verification of identity
- there be a time limit on validity
- there be protections against forgery and possibly an electronic data base of certification numbers to which people could refer for confirmation of authenticity (ACWA, Burnside, Children's Guardian)
- it be centralised, and use the common base for checks and risk assessment (Expert Advisory Committee)

- any certification system be accompanied by public education making parents in particular, aware that they are entitled to ask to see certification.

There were also concerns expressed about privacy. In the UK, the certificate issued for this purpose lists the full results of the search including charges, convictions, police intelligence and records from other sources.

Conclusion

Self-employed persons working in child-related businesses should not be subject to background checking as there is no employer to make a recruitment decision.

For NSW purposes verification of the prohibited status of self-employed persons could be provided by the proposed National Police Certificate. Alternatively, a form of certification from the Commission for Children and Young People could be explored. If the Commission was to issue a certificate, consultation about the information on the certificate would need to occur.

Whichever is favoured, it would need to be accompanied by public education about what the community can expect of self-employed people providing services to children and young people.

The Review considers that if the Commission developed a certificate for self-employed persons that the applicant should be charged a fee.

Recommendation 19

That the *Child Protection (Prohibited Employment) Act 1998*, or its equivalent, be amended to require self-employed people in child-related employment to display a certificate verifying that they are not a prohibited person and that this amendment be accompanied by a public awareness campaign for parents.

5.2 WHAT SHOULD BE CHECKED?

Employment screening is described in s34 of the Commission's Act as all or any of the following procedures with respect to a person who has applied to be employed in child-related employment:

- (a) a check for any relevant criminal record, Apprehended Violence Order or relevant employment proceeding against the person
- (b) other relevant probity check relating to previous employment or other activities
- (c) an assessment of risk to children involved in that child-related employment
- (d) the disclosure of the results of the check or risk assessment to the employer.

Of the employment screening schemes being provided or considered around Australia, NSW provides the most extensive check. All other schemes only consider criminal records.

Extensive submissions were received on whether the offences selected support the objective of employment screening to protect children and whether the offences nominated most reliably indicate risk to children. Many of them raised issues related to procedure rather than legislation, but given the very strong link between the two, the Review has considered both.

5.2.1 Relevant criminal record checks

5.2.1.1 Which criminal records are relevant?

Relevant criminal records are charges or convictions for:

- any sexual offence (including but not limited to, sexual assault, acts of indecency, child pornography, child prostitution and carnal knowledge)
- any assault, ill-treatment or neglect of, or psychological harm to a child
- any registrable offence

that was committed in NSW and was punishable by penal servitude or imprisonment for 12 months or more; or that was committed elsewhere and would have been an offence punishable by 12 months or more had it been committed in NSW. Included are all matters, irrespective of whether they are otherwise considered spent (in NSW) or committed as a juvenile; charges which may not have been heard or finalised by a court; charges which are proven but have not led to a conviction; or have been dismissed, withdrawn or discharged by a court.

The definition of ‘relevant criminal record’ in the Commission’s Act focuses on sex offences and acts of indecency, whether committed against children or adults, and child abuse offences.

Respondents supported the current focus on sexual offences and offences involving harm to children but many believed that children would be better protected if the following offences were included because such offences also indicate risk to children:

- aggravated assault of adults, including domestic violence
- indecent exposure (s5 *Summary Offences Act 1988*)
- serious drug offences, particularly trafficking offences involving minors.

In its submission to the Review, the Criminal Identification Branch of NSW Police highlighted aspects of legislation (Commission’s Act and *Criminal Records Act 1991*) and the Working With Children Check procedures that restrict the amount of criminal record information that may be released for child-related employment screening. It would like to see the definition of ‘relevant criminal record’ amended to include all acts of violence, no matter the age of victim, including all assaults and murder.

Respondents also pointed out that some of the offences which fall within the current definition of relevant criminal offences are age specific offences. Since child abuse offences are limited to offences made upon persons under the age of 18, ‘relevant criminal records’ do not include serious assaults (or murder) upon adults. To determine if a non-age specific offence involving violence is a ‘relevant criminal record’, Criminal Records staff must attempt to determine the victim’s age at the time of the offence. Where the victim’s date of birth cannot be confirmed, the offence cannot be classified as ‘relevant criminal record’ and the information is not released.

The submissions recognised that the inclusion of these additional offences would have the effect of identifying many more persons through the screening process, with a consequent increase in the number of assessments required, however, proponents of the inclusion of these offences thought this was justified by the protective principle (CrimTrac, Criminal Identification Specialist Branch of NSW Police).

Criminal Identification Specialist Branch identified two other problems concerning information release for the Review to consider. Firstly, there is a limitation on the release of information to other states. The Criminal Records Section may release information for employment screening only in NSW. The Review considers that this is contrary to the development of a nationally consistent approach and therefore

supports their proposition that 'relevant criminal records' in NSW be available for interstate child-related employment screening.

Secondly there is a limitation on release of information about spent convictions: the Criminal Records Section can release information about spent convictions for all offences only for occupations listed in 15(1) *Criminal Records Act 1991*. Although spent conviction legislation does not apply to child-related employment in NSW, Police have advised that s15(1A) was not drafted to allow the release of all spent convictions for child-related employment in NSW. Unless an occupation is specifically exempted by s15(1), the *Criminal Record Regulations 1998* and other NSW legislation, the Criminal Records Section will only release spent 'relevant' criminal records. Consequently spent conviction information for all offences will be released for 'police officers, prison officers, teachers, teacher's aides, the provider of child care services as defined under part 3 of the *NSW Children (Care and Protection) Act 1998*'. For other child-related employment, only spent 'relevant criminal records' will be released. The Criminal Records Section considered this was unduly restrictive and that it contributed to different levels of information being provided.

Conclusion

Exclusion from child-related employment is the strongest consequence under the scheme (Prohibited Employment Act). The severity of this consequence therefore requires that the information considered in these cases should be the most comprehensive available. This cannot be argued in the case of background checks. The Review does not consider that the entire criminal record should be made available for a background check.

Neither does the Review favour broadening the definition of 'relevant criminal record' to include all serious assault (ie against adults and children). There is insufficient evidence of a link between physical assault of adults and risk to children to justify inclusion of assault other than assault of a child as a relevant criminal record.

The Review considers that relevant criminal records in NSW should be made available to child-related employment screening units interstate.

On the matter of different levels of information being provided, the Review accepts that there are some organisations that are screening prospective employees for matters that go beyond risk to children. They maintain an interest in other records pertinent to their organisation and role.

By including all child-related employment, as defined, in s15(1) of the Criminal Records Act (that lists exempted occupations), there would be greater consistency in release of information, yet this is not in itself a

strong argument for increasing the amount of information made available. The Working With Children Check is a check of suitability for work with children and the information sought should be relevant. The Review maintains that consistency and administrative ease are not sufficient reason to amend the current legislation to establish uniformity in screening.

Recommendation 20

That the Commission for Children and Young People Act 1998 be amended to allow the release of ‘relevant criminal records’ to relevant authorities for interstate child-related employment screening.

5.2.1.2 Should convictions and charges be relevant?

There were submissions made in favour of excluding all but convictions from consideration. Consideration of spent convictions, charges not heard or finalised by a court and charges proven but not leading to conviction and charges dismissed, withdrawn or discharged should, according to this view, should be excluded from consideration (Independent Education Unit, Civil Liberties Inc).

However the Review notes that difficulties in obtaining convictions in child abuse matters are well documented and that lack of a conviction cannot be taken to mean no risk. The Review sees no reason to resile from the current practice of checking criminal records for both charges and convictions. Their inclusion in the check does not mean automatic exclusion from working with children. It means that both charges and convictions will be considered in the assessment process; that both will inform the risk assessment.

Conclusion

That charges and convictions will continue to be included in background checking.

5.2.1.3 Offences no longer criminal

Attention was drawn to an inconsistency between the Acts regarding offences no longer considered criminal. It was argued that s5(4) and s5(5) in the Prohibited Employment Act should be reflected in the Commission’s Act (Employee Performance and Conduct Unit, Department of Education and Training). The Commission’s Act states at s5(4) that an offence that was a serious sex offence at the time of its commission is not a serious sex offence for the purposes of the Act if the conduct constituting the offence has ceased to be an offence in NSW. It states at s5(5) that an offence involving sexual activity or an act of indecency is not a serious sex offence for the purposes of this

Act if the conduct constituting the offence occurred in a public place, and would not have constituted an offence in NSW if the place were not a public place.

The Review accepts that there should be consistency.

Recommendation 21

That the *Commission for Children and Young People Act 1998* be amended so that the exclusions established by s5(5) of the *Child Protection (Prohibited Employment) Act 1998* also apply to the *Commission for Children and Young People Act 1998* and that they not be considered relevant criminal offences.

5.2.2 Relevant Apprehended Violence Orders

Relevant Apprehended Violence Orders are those made under Part 15A of the *Crimes Act 1900*, or interstate restraint orders that would fit this definition if they were taken out in NSW and that are registered in NSW and that are:

- made since 3 July 1995 on application of a police officer or other public official
- for the protection of a child (or a child and others).

A number of submissions alerted the Review to widespread concern about the use of Apprehended Violence Orders in employment screening (Legal Aid, YJC, Anna Russell, Juvenile Justice Advisory Council of NSW, Law Society of NSW). The concerns related to the circumstances of the Orders rarely being available to assessors and where Orders are taken out against young people.

5.2.2.1 Circumstances

The Act states that the risk assessment has regard to ‘all the circumstances of the case’. Some respondents submitted that this is rarely possible when considering Apprehended Violence Orders, partly because the circumstances are not recorded on file; partly because Apprehended Violence Orders may contain unsubstantiated allegations, hearsay or omit important allegations (Anna Russell).

Preliminary analysis of data on the use of Apprehended Violence Orders in background checks suggests that there is sufficient information for risk assessors to take the Apprehended Violence Order into account in a quarter of the cases. In these cases it makes a useful contribution to the assessment. Where information is not available, the Apprehended Violence Order is excluded from consideration.

5.2.2.2 Apprehended Violence Orders taken out against young people

Apprehended Violence Orders taken out against children were of particular concern to respondents. The Youth Justice Coalition for example, argued that *there are unintended consequences in relation to the policy objectives which are detrimental to some children without the consequent benefits to others.*

They are sometimes made against a child, 17 years or less to protect another child and are increasingly relied upon by DoCS to help resolve conflict within families, conflict between parents and children and conflict between young people, for example at school. In such contexts they are chosen as the least intrusive option. Some respondents argued that while there are some matters resulting in an order that are serious enough to warrant consideration in a background check, these will be included for consideration as a criminal charge (YJC, Law Society of NSW, Juvenile Justice Advisory Council of NSW).

It was also argued that criminal offences committed by juveniles and Apprehended Violence Orders taken out against juveniles both warrant special consideration on the basis that they indicate the transitory problems of adolescence rather than ongoing risk to children. Respondents holding this view felt that to jeopardise a person's employment prospects on the basis of these juvenile offences is inconsistent with sentencing principles within the Children's Court. They argued that it is an approach not supported by evidence on recidivism (YJC, Juvenile Justice Advisory Council of NSW).

It is apparent that the circumstances leading to the making of an Apprehended Violence Order in the Children's Court are diverse and that not all will be relevant in background checking. But some will be highly relevant. Screening and risk assessment is one way of distinguishing.

Conclusion

Judgements about relevance and seriousness should relate to the nature of the event and the circumstances of the event, regardless of the offenders' personal characteristics, including age. The Review therefore maintains that the same approach be adopted to Apprehended Violence Orders taken out in adult and children's courts, ie that where information about the circumstances in which a relevant Apprehended Violence Order was taken out is available, that it be considered during a risk assessment.

5.2.3 Relevant employment proceedings

5.2.3.1 The effect of recent amendments

Recent amendments to the Commission's Act have introduced the term 'relevant employment proceedings'. These are defined as disciplinary proceedings in which an employer (or professional body) has found that reportable conduct or an act of violence has been committed by an employee. A summary of the amendments can be found at Appendix 1 and the definition of 'relevant employment proceedings' at Appendix 2. The Commission maintains a data base of completed relevant employment proceedings that is checked during the employment screening process.

Many respondents commented that while recent amendments to the legislation have resolved some difficulties there remains a strong view that the inclusions are too broad and insufficiently sensitive to degrees of risk, for example:

The Working With Children Check continues to consider allegations and behaviours that do not necessarily indicate a risk to children or young people or fall within what reasonable people would consider to be child abuse. This is especially true of relevant employment proceedings where findings are inconclusive (NSW Labor Council).

While there was no submission proposing that employment proceedings not be considered, many thought that it is important to be able to distinguish those employment proceedings that indicate risk to children from those that do not. For these respondents, the recent amendments to the Commission's Act do not go far enough in excluding some matters from consideration (Independent Education Union, NSW Teachers Federation). It was also suggested that the definition of 'reportable conduct' introduced with these amendments needs revision (Independent Education Union).

Conclusion

It is too early to judge whether the provisions of the Child Protection Legislation Amendment Act 2003 have achieved their purpose of eliminating irrelevant matters. The definition of employment proceedings that underpins the amendments was introduced at the same time. The Commission is committed to an evaluation of the category system at the end of its first year of operation, in 2005, and the Review considers that the evaluation will provide the opportunity to review the efficacy of the amendments.

5.2.3.2 Some workers more susceptible to notification

Some workers consider that their job requirements put them at a higher risk of being the subject of allegations and therefore at greater risk of being notified to the Commission. The Department of Juvenile Justice raised the issue with respect to staff whose job requires the responsible use of force. They believe they are more exposed to allegations of assault which are less likely to be perceived as necessary or trivial.

Conclusion

The Review accepts that certain staff may be more susceptible to notification but also believes that young people in their care are more vulnerable. If that is accepted, then vigilant adherence to procedure should mean that notifications are made only when it is clearly established that a matter is reportable.

5.2.3.3 Meaning of 'disciplinary proceedings'

What constitutes a 'disciplinary proceeding' varies between the government and non-government sectors. The NSW Labor Council submitted that the definition relied upon in this legislation is not one used in industrial law. A clear definition of what constitutes a disciplinary procedure and what constitutes a completed disciplinary process was sought.

Conclusion

The Review considers that the Guidelines could clarify the elements of a disciplinary procedure that might form the basis for an employer determining that an employment proceeding is relevant to background checking.

5.2.3.4 Natural justice/procedural fairness

The Review heard from individuals, the NSW Labor Council, the Independent Education Union and the NSW Teachers' Federation, as well as some employers, that current procedures are insufficient to afford natural justice to people subject to allegations. Unions in particular sought an opportunity for people who are the subject of notification to the Commission to access the information that has informed the investigation and the decision to notify.

Regarding information, Section 43 of the Commission's Act confers rights on employees and former employees in child-related employment to exercise their right under the *Freedom of Information Act 1989* to access and seek correction of 'documents of an agency' relating to child employment screening. It is an unusual provision in

that it applies to both government and non-government agencies. As Privacy NSW pointed out, this is an important provision and one that safeguards against possible unfairness arising from retention and use of inaccurate information as a result of reporting obligations. It appears that this provision is little known and not utilised and no requests are reported by the NSW Ombudsman in Freedom of Information reports. There is a need to make this provision better known and Privacy NSW suggested that the provision of customised application forms could be required.

Conclusion

While there appears to be no need for legislative change here, there are implications for procedure. The Review considers that information about the s43 provision that allows employees to access documents related to background checking needs to be more prominent. This is a matter for consideration by the Commission and perhaps for emphasis in the Working With Children Check Guidelines.

Regarding the investigation of allegations that may result in a notification to the Commission of a relevant employment procedure, respondents, particularly unions, raised concerns about their quality and fairness. Responsibility for the investigation of allegations rests with the employer. For designated agencies, the NSW Ombudsman has responsibility for oversight of these investigations. Additionally, all employees have recourse to the Industrial Relations Commission regarding investigations of disciplinary matters. For volunteers the ultimate recourse is to the Supreme Court at any stage of the investigation.

While the Commission has no role in the investigation process, the Review was made aware of instances of notifications being made, based on investigations that have been poor and where natural justice has not been provided to the person the subject of allegations (eg *Carter v NSW Netball Association* (2004) NSWSC 737). The consequences for people unfairly dealt with can be deeply distressing and have the capacity to undermine the credibility of the screening system.

The problems identified in submissions include:

- difficulties some employers have in identifying reportable conduct
- employers failing to notify the employee that the investigation of an allegation is underway or has resulted in a finding that the employer considers to be reportable at a stage that would allow the employee to consider and challenge the decision

- the lack of well developed procedures for managing disciplinary matters and notifications, particularly in many smaller, sometimes voluntary organisations.

The question for the Review was whether the Commission's Act can or should provide guidance or procedural safeguards that would make for a fairer process. Clearly it is inappropriate for the Commission to assume a role in overseeing or intervening in investigations. However their work regarding child-safe and child-friendly organisations may assist small organisations with their procedures. Similarly the introduction of a two tier reporting system under the recently reviewed Guidelines should assist employers with their decision regarding notifications.

Conclusion

Investigations

The Ombudsman's experience of investigations makes it the appropriate agency to provide advice and guidance on the conduct of investigations. The Commission should continue to refer employers to the Ombudsman in the Working With Children Check Guidelines and its website.

Notice to employee of intention to notify Commission

Employers should be required to notify the employee, in writing, of the intention to notify the Commission of a relevant employment proceeding.

Information

Section 43 that deals with obtaining and correcting information on relevant disciplinary proceedings should be brought to employees' attention at the time the notice is issued so that they can obtain all relevant information.

Recommendation 22

That the *Working With Children Check Guidelines* be amended to make it a requirement that employers notify the employee, in writing, of the employer's intention to notify the Commission of a relevant employment proceeding.

5.3 RISK ASSESSMENT

If a relevant record is found during the checking process ie a relevant criminal record, Apprehended Violence Order or employment proceeding, a risk assessment is conducted by the Approved Screening Agency and a report is provided to the employer requesting the check.

The process of assessing risk is complex and the Review is aware that the Commission is currently evaluating its risk assessment model. While the Review is not in a position to comment upon the technical aspects of assessing risk, it is able to consider the risk assessment

procedure as part of the screening system established by this legislation and to consider it from the point of view of procedural fairness.

Ms Anna Russell submitted that:

To maintain credibility the Commission must be able to demonstrate that the process of background checking is fair, transparent and objective. This applies not only to the results but to the process. The Review accepts this point.

The following issues were raised by respondents regarding the assessment process:

- there is a lack of information available about the means by which the assessment decision is made
- there is no process for appealing an assessment outcome
- there is no clear procedure for challenging material and correcting errors in material during the assessment process
- the process for confirming information is unacceptably intrusive, specifically telephone discussions of any matter involved in risk assessment.

The Independent Education Union proposed that the system would be fairer if there was an opportunity provided for a person to challenge the proposed outcome of screening by appeal to the ADT/IRC. They also proposed that right of access to information through Freedom of Information should be available at this stage as well as at the investigation stage and that full disclosure of the information being considered should be provided unless there are reasons not to do so (as set out in *Freedom of Information Act*, Schedule 1). Privacy NSW submitted that there should be a more effective and independent form of review of determinations, to avoid the risk of systemic bias or unfairness.

Regarding the proposal to allow screening challenges via appeal to the ADT/IRC, the Review notes this introduces an industrial relationship between an applicant and an employer where none has previously existed and does not support this approach. However it concerns the Review that so little is known by organisations about the risk assessment process. The risk assessment model used by the Commission and the Approved Screening Agencies is publicly available. It is possible to contest the assessment outcome and for the person being assessed to challenge errors in material being considered. People also have a right of access to information through Freedom of Information.

Conclusion

That the Commission consider making information about the risk assessment process and the means by which people can challenge the risk assessment report available in the Working With Children Check Guidelines.

5.4 COMPLIANCE

Part 7 of the Commission's Act requires employers to check the background of preferred applicants in those cases identified as mandatory (s37(2)). Employers have a duty to notify the Commission when an applicant has been rejected primarily because of a risk assessment outcome (s40(1)).

Employers are also required at s39 to notify the Commission of the name of any employee against whom relevant employment proceedings have been completed since July 1995. The Act gives the Commission authority to monitor and audit compliance with s36(f) of the Act. It is premised on a cooperative approach to compliance and it currently provides no penalties for failure to meet obligations.

Many respondents submitted that this approach is inadequate and that the legislation should provide a penalty for non-compliance (CrimTrac, Butcher and Webster). But the Review also heard that there are many employers who may be in breach because they remain unaware of their obligations under this legislation or because they misunderstand their obligations.

There can be little doubt that compliance is ideally achieved through encouragement and persuasion. The Review believes that these mechanisms should remain the principal mechanism for achieving compliance. However, by themselves they are insufficient and need to be backed up with penalties. Indeed their existence supports persuasive approaches. They also secure adherence to the Act when employers knowingly refuse to comply.

The Children's Guardian submitted that non-compliant employers should be named in the Commissioner's annual report to the Parliament. The Review agrees that this is a powerful deterrent however it is a process that gives those named no right of reply. While naming might be an ultimate step, the Review favours the establishment of a process that provides employers with a right of reply.

Of the obligations on employers, two are particularly important; the requirement to seek background checks and the requirement to notify the Commission of relevant employment proceedings. Without these

two actions the Working With Children Check cannot operate to protect children as applicants are not subject to screening nor is possibly important information available to assist with that screening, a problem identified by the Wood Royal Commission.

The Review therefore considers that the Commission should continue to promote employers obligations through persuasion and encouragement targeting those least familiar with their obligations. The Review also favours establishing statutory offences for failure to conduct checks and failure to notify, together with a mechanism that includes a first warning notice, followed by prosecution should subsequent audit reveal persistent non-compliance. The penalties should be used as a last resort, when persuasion has failed.

Recommendation 23

That the *Commission for Children and Young People Act 1998* be amended to give the Commission powers to enter premises and the necessary powers exercisable on entry and inspection to carry out its audit function.

Recommendation 24

That the *Commission for Children and Young People Act 1998* be amended to create an offence of failing to conduct mandatory background checks. Where an audit reveals non-compliance by an employer they must first be issued with a notice requiring them to comply followed ultimately by prosecution if they persist.

Recommendation 25

That the *Commission for Children and Young People Act 1998* be amended to create an offence of failing to notify the Commission of relevant employment proceedings. Where audit reveals non-compliance by an employer they must first be issued with a notice requiring them to comply, followed ultimately by prosecution if they persist.

5.5 FREQUENCY OF CHECKS

In NSW it is the responsibility of employers to screen preferred applicants for child-related employment. Where a person has more than one position, or where they often change employment, they will be screened on each occasion by the new employer. For example, when employees are recruited seasonally or for casual work, they are required to complete Prohibited Employment Declarations and consent to background checks with each new employer. In some situations this is perceived to be cumbersome and inefficient.

One option proposed for minimising frequency was to give the Commission power to approve certain employer-related bodies as an 'agent' for the purpose of screening (for example, organisations like the Catholic Commission for Employment Relations, recruitment or placement agencies or local councils). Once screened by the approved 'agent', the employee would be cleared to work in any setting formally associated with that body.

Respondents expressed some caution about transfer of a screening report across types of employment. Screening reports are currently specific to the job applied for and assessments consider age of child, vulnerability and degree of supervision among other things, in relation to the particular position. They are therefore relevant to the position being applied for or one that is similar in most dimensions (Department of Education and Training). This is seen as a strength of the system in NSW and highly valued.

The proposal to identify a screening 'agent' received some support. Some endorsed the proposal unconditionally (Independent Education Union). Others supported the proposal when the field of work is narrow enough for the result of screening to be relevant to all of the positions likely to be held. This would maintain consistency with the principle of specificity. Still others thought that a wider range of options should be considered. This included:

- the introduction of a portable, renewable clearance card
- the development of a virtual card, an electronic system for checking suitability
- authorising professional associations to take responsibility for screening members/applicants for membership so that professional accreditation would include a background checking to at least the standard of the Working With Children Check.

Among these options, the most frequently suggested was to explore the feasibility of a portable card system (NCOSS, ACWA, Burnside).

The renewable clearance card holds some appeal because:

- it is convenient for the holder, it can be provided to the employer and the public as evidence of a person's suitability
- the employer is relieved of the responsibility to make the determination about whether to employ or not.

The policy in NSW is that a check specific to the actual position is the stronger check and that a system that leaves the decision to employ in the hands of employers is the better one. The Review received no submission that the current policy should be changed; just that there be procedural variations available.

Conclusion

The Review considers that the authorisation of ‘agents’ would be useful and that it would reduce costs by reducing multiple checks. In applying for agent status, an organisation should establish that the people they are screening work in positions that are similar in kind. The Review has also suggested that a process of certification be explored by the Commission. It may be that a time limited certificate transferable across positions that are similar in kind, would also be useful.

Recommendation 26

That the Commission for Children and Young People Act 1998 be amended to give the Commissioner authority to approve heads of organisations (or their delegate) as ‘agents’ for the purpose of conducting background checks.

5.6 CHARGING FOR THE WORKING WITH CHILDREN CHECK

There are currently no charges for people seeking a Working With Children Check in NSW. However, it appears that states now considering the introduction of employment screening systems are likely to charge for their checks. In Queensland, where a suitability card is required for paid and unpaid workers in child-related work, there is a \$40 charge for paid workers and no charge to volunteers. The charge to paid workers cross-subsidises volunteer checks.

Respondents’ opinions on cost recovery varied widely. It seems that while most would prefer background checks to be free to all those who seek them, there is an acceptance that some cost redistribution may be necessary, particularly if screening is made available to some volunteers. Unions were clear in their view that workers should not bear the cost of screening but many organisations considered that paid employees, in particular, might accept a screening charge as simply another employment cost, analogous to the cost of providing an academic transcript, driver’s licence etc. For non-government service providers, particularly small employers and children’s service providers, the notion that they might bear the cost of screening was unacceptable. There was a strong view amongst respondents that no volunteer should be charged for background checking.

Conclusion

The Review considers that mandatory background checks should be provided free of charge. A charge would be a disincentive to compliance and potentially compromise child safety. Should the current system be adapted to provide certification for the self-employed, the Review considers it reasonable to charge a fee to the person requesting the certificate.

APPENDIX 1 BACKGROUND

For more information

For detailed information about the Commission and its work go to www.kids.nsw.gov.au.

1 HISTORY BEHIND THE LEGISLATION

Key relevant inquiries

- Inquiry into Children’s Advocacy – The NSW Parliament Legislative Council Standing Committee on Social Issues held an inquiry into children’s advocacy, reporting in 1996.²⁴ The report made a number of recommendations in the key areas of child protection, legal services, health services and education.
- *Who Cares? Protecting People in Residential Care* – In 1996 the NSW Community Service Commission inquired into the policies, procedures and practices in recruitment, screening and appointments of the Departments of Community Services, Juvenile Justice and Aging and Disability and non-government agencies funded or approved by those Departments. It recommended an employment screening system for NSW that focused on those caring for children and adults with disabilities in residential care.²⁵

The Wood Royal Commission

The findings of the Royal Commission into the NSW Police Service, in its investigations into paedophilia, were a major catalyst for the establishment of the Commission. The Royal Commission examined the way Government and non-government organisations responded to allegations of paedophilia. The Commission’s report in August 1997 identified serious, systemic failures that put children and young people at risk of abuse. It found that there was no specific, independent voice in government speaking out for children and young people. It recommended the establishment of a children’s commission to oversee their safety and welfare and promote their well-being, which would also be responsible for pre-employment screening and probity checking of people involved in the care of children.

²⁴ Inquiry into Children’s Advocacy, September 1996.

²⁵ *Who Cares? Protecting People in Residential Care*, September 1996.

Consultation on the Commission model

Before the Commission was established there was a consultation process designed to see that the Commission reflected the needs and interests of the community, especially children and young people. The Government also released a Green Paper²⁶ and then an Exposure Bill²⁷, with approximately 200 interested organisations, agencies and individuals putting forward their views in submissions. The Government also consulted with more than 150 children and young people from across NSW to listen to their views. There was considerable support for setting up a child- and youth-friendly Commission with a broad focus, a somewhat different model to that proposed by the Wood Royal Commission.

Introduction of legislation

The *Commission for Children and Young People Act 1998*, the *Child Protection (Prohibited Employment) Act 1998* and the *Ombudsman Amendment (Child Protection and Community Services) Act 1998* were introduced into Parliament together as a package of legislation.²⁸ The Acts were passed with bipartisan support.

2 RECENT LEGISLATIVE DEVELOPMENTS

There have been a number of key legislative developments since the Commission's Act and Prohibited Employment Act were first passed.

The *Child Protection (Offenders Registration) Act 2000*

This established a register managed by NSW Police that contains personal information about people convicted of certain serious offences against children. A person on this register is automatically considered a 'prohibited person' under the Prohibited Employment Act and cannot therefore apply for or work in child-related employment.

²⁶ The Children's Commission Green Paper 1997.

²⁷ The Commission for Children and Young People Bill was tabled in July 1998.

²⁸ The Ombudsman Amendment Act responded to concerns by the Wood Royal Commission about agencies investigating child abuse allegations made against their own staff. Part 3A of the Ombudsman's Act gives the Ombudsman responsibility for overseeing and monitoring the handling of allegations of 'reportable conduct' and convictions against employees of certain 'designated' government and non-government agencies. It also establishes the Ombudsman's role in scrutinising the systems for child protection in these agencies.

The *Child Protection Legislation Amendment Act 2002*

This amended the Prohibited Employment Act, the Commission's Act, the *Offenders Registration Act 2000* and the *Summary Offences Act 1988* in various ways to strengthen child protection provisions and address anomalies for example, to include Apprehended Violence Orders in background checking and to empower the Commission to consider applications for exemption as a prohibited person.

The *Commission for Children and Young People Amendment (Child Death Review Team) Act 2003*

Provisions governing the NSW Child Death Review Team were originally placed in the *Children (Care and Protection) Act 1987*. These were reviewed in 2001/2, as required by legislation, with community consultation. The *Report of the Review of Legislation Governing the NSW Child Death Review Team* was tabled in Parliament in May 2002. Other developments saw The *Community Services (Complaints, Appeals and Monitoring) Amendment Regulation 2002* transfer responsibility for the review of deaths resulting from child abuse and neglect or occurring in circumstances suspicious of child abuse to the NSW Ombudsman on 1 January 2003. The *Commission for Children and Young People Amendment (Child Death Review Team) Act 2003* moved the legislative provisions for the Team to the Commission's Act in 2003. Part 7A of the Commission's Act governs the Team. The Team now has a broader and more flexible research focus to allow it to look at deaths from all causes.

The *Child Protection Legislation Amendment Act 2003*

A NSW Cabinet Office review of the impact of Part 3A of the *Ombudsman Act 1974* and the Commission's employment screening legislation on teachers resulted in the *Child Protection Legislation Amendment Act 2003*. This amended the Commission's Act and the Ombudsman's Act. The *Child Protection Legislation Amendment Act 2003* replaces the term 'child abuse' with the concept of 'reportable conduct' and in doing so establishes a more precise definition of conduct that warrants reporting. The Act defines reportable conduct as including relevant sexual offences, assault, ill-treatment or neglect of children. The Act also clarifies and expands the range of behaviours that do not need to be reported but which still need to be the subject of local investigation and resolution. Conduct is not reportable if it is reasonable for the purposes of the discipline, management or care of children or if it is of the kind exempted by the Guidelines. For certain organisations covered by Part 3A of the *Ombudsman Act 1974*, physical force which is considered trivial or negligible also need not be reported if it is investigated and the results recorded under workplace employment procedures.

APPENDIX 2 DEFINITIONS

Definition of a 'prohibited person'

A person convicted of a serious sex offence, or a 'Registrable Person', other than where there is an order in force declaring that the *Child Protection (Prohibited Employment) Act 1998* does not apply to the person in respect of the offence (s5(1)(2) *Child Protection (Prohibited Employment) Act 1998*).

Definition of 'relevant employment proceedings'

Disciplinary proceedings completed in NSW or elsewhere, where an employer (or professional or other body that supervises the professional conduct of the employee) has found:

- reportable conduct, or
- an act of violence committed by an employee in the presence of a child has occurred, or there is some evidence it occurred, however the finding is inconclusive.

For employers oversighted by Part 3A of the Ombudsman Act, the term 'some evidence it occurred however the finding is inconclusive' includes matters found under the Ombudsman's scheme to be 'not sustained because of insufficient evidence'.

Completed employment proceedings also include processes which have been completed through the actions of the employee, ie where an employee voluntarily terminates their employment before an employer finalises the disciplinary process.

Relevant employment proceedings do not include those where a finding is made that reportable conduct or an act of violence did not occur, or where the allegations have been found to be false, vexatious or misconceived.

APPENDIX 3 CONSULTATIONS

REGIONAL MEETINGS

Warialda:

Ms Kate Lockhart, Ms Debbie Taber, Ms Suzanne Fuelling, Mr Wayne Squires, Mr Peter Cuskelly, Mr Martin Bower.

Students from Warialda Primary School.

Western Sydney:

Ms Olive O'Halloran, Ms Amera Salah, Ms Faith Debreczeny, Ms Julie Hillier, Mr Nahed Hakim, Abeda, Kolitha Wickramage, Ms Aisha Akkawi, Ms Fatema Rashid Hasan, Ms Zeljika Josipovic, Ms Hashim Elhassan, Ms Toni Laoolach, Mr Gerry Smee, Ms Linda Wickham, Mr Tihomir Ljlibisic, Mr Gary Cachia.

Year 11 Legal Studies students at Trinity Senior College, Auburn.

Newcastle:

Right Reverend Roger Herft, Mr Bruce Hockman, Ms Kathy Crouch, Ms Patsy Browne, Mr James Barry, Ms Jenny Wade, Ms Jacqui Dehn, Ms Julia Woods, Ms Kathie Mackay, Mr Ken Callan.

Year 9 students at Merewether High School.

CONSULTATIONS WERE HELD WITH THE FOLLOWING ORGANISATIONS AND INDIVIDUALS

Association of Children's Welfare Agencies Board

Baker, Mr Ian, Director, Policy and Programs, Catholic Education Commission

Bargen, Ms Jenny, Law Society of NSW

Bennett, Professor David, Head, Centre for the Advancement of Adolescent Health, The Children's Hospital at Westmead

Carr, Mr Michael, Director, Industrial Relations, Association of Independent Schools

Chiang, Ms Far, Coordinator, Centre for the Advancement of Adolescent Health, The Children's Hospital at Westmead

CCYP Expert Advisory Committee

CCYP Young People's Reference Group – past members

CCYP Young People's Reference Group

Commission for Children and Young People – staff

Davidson, Mr Charles, President, Aboriginal Consultative Group

Dudley, Dr Michael, Chairman, Suicide Prevention Australia

Foy, Ms Liz, General Manager, Research and Service Development, the Spastic Centre

Fozzard, Mr Robert, NSW Parents Council

Gailey, Ms Lynn, Federal Policy Officer, Media Entertainment and Arts Alliance

Godhard, Ms Tonia AM, Consultant

Griffiths, Ms Julie, Women's Officer/Child Care Organiser, United Services Union - Local Government

Hayes, Professor Alan Dean and Head of Division, Australian Centre for Educational Studies, Macquarie University

Healey, Ms Anne, Barrister, Frederick Jordan Chambers

Higgins, Mr Mark, Barrister, Frederick Jordan Chambers

Kennelly, Ms Anne, Industrial Officer, Public Service Association

Koutsounadis-Germanos, Ms Vivi, Executive Director, Ethnic Child Care Development Unit, Marrickville

Lemaire, Ms Joan, Industrial Officer, NSW Teachers Federation

Lloyd, Ms Deborah, Country Vice President, Federation of Parents and Citizens Associations of NSW

Loughman, Ms Janet, Convenor, Youth Justice Coalition

Ludowici, Ms Sarah, Consulting Facilitator, CREATE Foundation

Mc Innes, Mr Duncan, Executive Officer, NSW Parents Council

Mc Manus, Ms Sally, Executive president, Australian Services Union

Mason, Dr C, Consultant

Moir, Mr Brian, Manager, Criminal Identification Specialist Branch, Criminal Records Section

Murphy, Mr Cameron, President, NSW Council for Civil Liberties

Murray, Mr Glenn, Risk assessment/Policy officer, Employment Screening and Review Branch, NSW Health Department

NCOSS Board

Newcombe, Mr A, Association of Independent Schools

NSW Student Representative Council

Oates, Professor K. Chief Executive Officer, The Children's Hospital, Westmead

Patterson, Mr Andrew, Acting General Director Business Operations,
CrimTrac

Peters, Ms Alison, Deputy assistant Secretary, Labor Council of NSW
Premier's Youth Advisory Council

Rees, Mr David, Manager, Ethics, Child Protection and Employment
Screening, NSW Department of Sport, Tourism and Recreation

Salmon, Mr Barry, Acting Commissioner for Children and Young
People, Queensland

Shapiro, Mr Jon, Industrial Officer, Independent Education Union

Shield, Ms Wendy, Law Society of NSW

Thorpe, Ms Jane, Director, Employee Performance and Conduct Unit,
Department of Education and Training

Udy, Ms Ginie, Chief Executive Officer, SDN Children's Services

Walton, Mr Michael, NSW Council for Civil Liberties

Warren, Ms Stacey, Employee Relations Adviser, Employers First

Willmott, Ms Veronica, Manager of Employment Screening,
Employment Screening Unit, NSW Department of Education and
Training

APPENDIX 4 SUBMISSIONS

Oral submissions – O

Written submissions – W

- Akkawi, Ms A, Social Work Student, Granville Multi-Cultural Community Centre – O
- Antrum, Mr M, Expert Advisory Committee, CCYP – O
- Baker, Mr I, Director of Policy, Catholic Education Commission – O and W
- Barbour, Mr B, NSW Ombudsman – W
- Bargen, Ms J, Law Society of NSW – O
- Bargwana, Mr G, Chief Executive Officer, Scouts NSW – W
- Barry, Mr J, Regional Director, Department of Tourism, Sport and Recreation – O
- Bennett, Professor D, Head, NSW Centre for the Advancement of Adolescent Health, The Children’s Hospital at Westmead – O
- Bower, Mr M, Careers Adviser, Warialda High School – O
- Brown, Ms P, Manager, Clarenen House, Newcastle – O
- Brooker, Ms L, A/Manager Review and Reform, Legal Aid, NSW – W
- Buchanan, Mr A, Chair, Disability Council of NSW – W
- Butcher, Assoc Professor J, Head, School of Education (NSW), Australian Catholic University – W
- Cachin, Mr G, STARTTS – O
- Callan, Mr K, Student Services, Department of Education and Training – O
- Cappie-Wood, Mr A, Director-General of Education, Department of Education and Training – W
- Carr, Mr M, Director of Industrial Relations, Association of Independent Schools – O
- Chiang, Ms F, Coordinator, NSW Centre for Adolescent Health, The Children’s Hospital at Westmead – O
- Connors, Dr L, Expert Advisory Committee – O
- Crouch, Ms K, Psychologist, Hunter Area Health Service – O and W
- Cunneen, Assoc Professor C, Chair, Juvenile Justice Advisory Council of NSW – W
- Cuskelly, Mr P, Principal, Warialda High School – O

Davidson, Mr C, President, Aboriginal Education Consultative Group – O

Debreczeny, Ms F, Child Protection Officer, NSW Department of Community Services – O

Dehn, Ms J, Organisational Development Manager, Hunter/Central Coast, NSW Department of Education and Training – O

Dickie, Mr J, Acting Privacy Commissioner, Privacy NSW – W

Dudley, Dr M, Director, Adolescent Services, Department of Adolescent and Child Psychiatry, Children's Hospital – O

Elhazan, Mr H, Community Development Worker, Granville Multicultural Community Centre – O

Epstein-Frisch, Ms B, Family Advocacy – W

Fanning, Mr D, Commissioner for Children, Tasmania – W

Foy, Ms L, General Manager, Research and Service Development, The Spastic Centre – O

Fuelling, Ms S, Youth Worker, Bingara Youth Services – O

Gailey, Ms L, Federal Policy Officer, Media, Entertainment and Arts Alliance – O and W

Godhard, Ms T, AM, Consultant – O

Griffiths, Ms J, Women's Officer, United Services Union, Local Government – O

Hadfield, Mr D, Area Director Human Resources, Hunter Health – W

Hakim, Mr N, CSSS, Canterbury-Bankstown/Auburn Migrant Resource Centre – O

Hatherly, Ms J, Community Education Officer, Botanic Gardens Trust – W

Hayes, Professor A, Chair, Australian Council for Children and Parenting, Dean and Head of Division, Australian Centre for Educational Studies, Macquarie University and Chair, Interim Committee for a NSE Institute of Teachers – W

Healey, Ms A, Barrister-at-law, Frederick Jordan Chambers – O

Healey, Mr B, Director-General, NSW Department of Sport, Tourism and Recreation – W

Healey, Dr J, Lecturer in Special Education, University of Western Sydney – W

Herft, Right Reverend R, Bishop, Anglican Diocese of Newcastle – O and W

Higgins, Mr M, Barrister-at-law, Frederick Jordan Chambers – O

Hillier, Ms J, Coordinator, Auburn Youth Centre – O

Hockman, Mr B, Manager, Anglican Diocese of Newcastle – O

Jenkins, Ms S, Community Planner, Lake Macquarie City Council – W

Johnson, Mr B, General Secretary, NSW Teachers Federation – W

Josipovic, Ms Z, Families First, Auburn Migrant Resource Centre – O

Kennedy, Dr P, Director of Health Services, Central Sydney Area Health Services – W

Kennelly, Ms A, Industrial Officer, Public Service Association – O

Koutsounadis-Germanos, Ms V, Executive Director, Ethnic Child Care, family and Community Services – O and W

Kruk, Ms R, Director-General, NSW Health – W

Lemaire, Ms J, Industrial Officer, NSW Teachers Federation – O and W

Lennon, Mr M, Assistant Secretary, Labor Council of NSW – W

Lavolach, Ms T, Family Support Worker, Granville Multi-Cultural Community Centre – O

Ljlibisic, Mr T, Community Development Worker, Serbian Orthodox Welfare Association – O

Llewellyn, Professor G, Expert Advisory Committee, CCYP – O

Lloyd, Ms D, Country Vice President, Federation of Parents and Citizens Associations of NSW – O

Lockhardt, Ms C, Early Childhood Services, Warialda – O

Ludowici, Ms S, Consulting Facilitator, CREATE – O and W

Loughman, Ms J, Convenor, Youth Justice Coalition – O and W

McCallum, Professor R, Expert Advisory Committee, CCYP – O

McManus, Ms S, Executive President, Australian Services Union - O

McDonald, Mr M, Executive Director, Catholic Commission for Employment Relations – W

Mackay, Ms K, Organisational Development Facilitator, TAFE, NSW Hunter Institute, Department of Education and Training – O

Mc Innes, Mr D, Executive Officer, NSW Parents Council – O

McKenzie, Ms K, Company Director, Childcare First – W

Mallett, Ms L, Children's Guardian, Office of the Children's Guardian, NSW – W

Maple-Brown, Ms S, Deputy State, Girl Guides Association NSW – W

Mason, Dr C, Consultant – O and W

Moir, Mr B, Manager, Criminal Identification Specialist Branch,
Criminal Records Section, NSW Police – O

Moore, Mr G, Director, NCOSS – W

Moroney, Mr K, Commissioner, NSW Police – W

Murphy, Mr C, President, NSW Council for Civil Liberties Inc. – O

Murray, Mr G, Risk Assessment/ Policy Officer, Employment
Screening and Review Branch, NSW Health – O

Oates, Professor K, Chief Executive Officer, The Children’s Hospital at
Westmead – O

O’Halloran, Ms O, Area Coordinator, Aunties and Uncles – O and W

O’Reilly, B, Director-General, Department of Ageing, Disability and
Home Care – W

Parker, Dr R, Expert Advisory Committee, CCYP – O

Paterson, Mr A, A/G Director, Business Operations, CrimTrac – O

Peters, Ms A, Deputy Assistant Secretary, Labor Council of NSW

Peters, Mr P

Power, Ms B, Chief Executive Officer, Aunties and Uncles, COOP
Family Project Ltd – W

Pride, Mr G. – O and W

Rashid Hasan, Ms F, Families First, Immigrant Women’s Speakout
Association of NSW – O

Rees, Mr D, Manager, Ethics and Employment Screening, NSW
Department of Sport, Tourism and Recreation – O and W

Reynato, Mr R, Member, NSW Youth Advisory Council – W

Russell, Ms A, Barrister-at-law, Orana Chambers – W

Salah, Ms A, Centre Coordinator, Auburn Migrant Resource Centre –
O

Salmon, Mr B, Acting Queensland Commissioner of Children and Yong
People – O

Schmidmaier, Mr D, State Librarian, State Library of NSW – W

Shapiro, Mr J, Industrial Officer, Independent Education Union – O
and W

Shepherd, Dr N, Director-General, NSW Department of Community
Services – W

Sherlock, Mr D, Director General, NSW Department of Juvenile Justice
– W

Shields, Ms W, Law Society of NSW – O

Sidoti, Mr P, Executive Director, Sydney Olympic Park Authority – W

Simms, Ms D, Senior Sport Consultant, Sport Ethics, Australian Sports Commission – W

Smith, Ms L, Director of Operations, Northern Sydney Health – W

Squires, Mr W, Warialda High School – O

Smee, Mr G, Deputy Principal, Auburn West Public School – O

Smith, Ms L, Director Operations, Northern Sydney Health – W

Spence, Mr N, Chief Executive Officer, Association of Children's Welfare Agencies – O and W

Stanley, Professor G, President, Board of Studies NSW – W

Taber, Ms D, Family Worker, Gwydir Council – O

Taylor, Ms G, Deputy General Secretary, NSW/ACT Independent Education Union – O and W

Thorpe, Ms J, Director Employee Performance and Conduct, Department of Education and Training – O

Udy, Ms G, Chief Executive Officer, SDN Children's Services – O

Usher, Father J, Expert Advisory Committee, CCYP – O

Wade, Ms J, Child Development Officer, Lake Macquarie City Council – O

Wagstaff, Ms P.

Warren, Ms S, Employee Relations Adviser, Employers First – O

Webster, Mr G, Lecturer, School of Education (NSW), Australian Catholic University – W

Wellesley, Ms B, National Director, Good Beginnings Australia – W

Wickham, Ms L, Deputy Principal, Auburn Public School – O

Wickramage, Mr K, Refugee Youth Worker, Auburn Migrant Resource Centre – O

Willmott, Ms V, Manager of Employment Screening, NSW Department of Education and Training – O

Woodham, Mr R, Commissioner, Department of Corrective Services – W

Woodruff, Ms J, Chief Executive Officer, Uniting Care Burnside – W

Woods, Ms J, Youth Development Worker, Community Youth Development Project, Newcastle – O

York, Superintendent C, Commander, Criminal Identification Specialist Branch, NSW Police – W

Yu, Dr J, Chair, Expert Advisory Committee, CCYP – O

(Total : 129 individuals and organisations)

Submissions from children and young people

Warialda Public School - one submission, 30 students

Merewether High School - one submission, 28 students

Trinity Senior College - one submission, 54 students

NSW SRC - one submission, 20 students

YPRG - one submission, 12 members

Ex-YPRG - one submission, eight members

Premier's Youth Advisory Committee - one submission, 12 members

Barker College - 88 students and 88 submissions

Casula High SRC - one submission

Amanda Kerslake, Tumby Umbi

Sriram Srikuma, Sydney Boys High School

(Total: 255 children and young people)