



Our ref: ADM/7268
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Secretariat
Review of the Commission for Children and Young People Act
Communities NSW
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Sydney NSW 2001

Dear Mr Eyers

Statutory Review of the *Commission for Children and Young People Act 1998*

Thank you for the opportunity to make a submission to the Statutory Review of the *Commission for Children and Young People Act 1998*.

In regard to Part 1 of the Statutory Review, I have a range of responsibilities in relation to the oversight of community services in NSW. My role includes monitoring, reviewing and inquiring into services related to child protection and out-of-home-care; community support services, including services for homeless people; disability services for children and adults; and children's services.

In the context of the Statutory Review, we believe that section 12 of the Act relating to the prioritisation of vulnerable children and young people should be carefully considered.

In regard to Part 2 of the Statutory Review, Part 3A of the *Ombudsman Act 1974* requires my office to oversee the investigation by government and other designated agencies of 'reportable allegations' made against their employees. My office performs this function to ensure that agency investigations are conducted properly and result in appropriate actions being taken. This includes employers reporting relevant employment proceedings to the Commission for Children and Young People (CCYP) for the purpose of the child-related employment screening program administered by the Commission.

In our view, the current scheme for child-related employment screening in NSW has particular strengths. However, we also have concerns about aspects of the scheme. In this regard, we believe the Statutory Review should consider whether the overall legislative framework for the reporting of relevant employment proceedings and for conducting child-related employment screening, delivers a genuinely integrated and efficient system for protecting:

- the safety of children in child related employment; and
- the rights of relevant employees and employing agencies.

Our submission refrains from proposing different options for fundamentally overhauling the current scheme. We have taken this approach because we are of the view that, as the other major regulatory stakeholder in the scheme, it would be better for us to first consult with you around potential options for change against the background of submissions made to this Review by key stakeholders. However, in light of the significant concerns that we have outlined in our submission, we believe that there is a compelling case for major structural change to the scheme.

In our submission you will note that we also have a particular interest in part 7A of the *Commission for Children and Young People Act*, which relates to the NSW Child Death Review Team. The *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* includes changes to Part 7A which will result in this function being transferred to my office. The pending change has presented some legislative issues, which we suggest can be largely resolved by transferring part 7A from the *Commission for Children and Young People Act* to the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

The attached document outlines certain issues warranting consideration in relation to Parts 1 and 2 of the Review, and Part 7A of the *Commission for Children and Young People Act*. However, we should stress that many of the recommendations we have made about both the reporting of relevant employment proceedings and employment screening, may be superfluous should a decision ultimately be made to fundamentally alter the scheme.

Please contact Steve Kinmond, Deputy Ombudsman, on 9286 0989 should you wish to discuss any aspect of this submission further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'B. A. Barbour', written in a cursive style.

Bruce Barbour
Ombudsman

1. Responsibilities of the NSW Ombudsman relevant to the Statutory Review

The responsibilities of the Ombudsman in relation to services for children and young people, and screening for child related employment, are prescribed by the *Community Services (Complaints, Reviews and Monitoring) Act 1993* and the *Ombudsman Act 1974*.

1.1 The Community Services (Complaints, Reviews and Monitoring) Act 1993

In 2002, the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS CRAMA) was amended, and the Community Services Commission was merged into the office of the NSW Ombudsman. Amendments to CS CRAMA provided the Ombudsman with a range of responsibilities in the oversight of community services, including child protection and out-of-home-care; community support services, including services for homeless people; disability services for children and adults; and children's services. Relevant to issues being considered in this review, and beyond our traditional complaint-handling role, these responsibilities include:

- Section 11(1)(b) to educate service providers, clients, carers and the community generally about [*standards for the delivery of community services*];
- Section 11 (1) (c) to monitor and review the delivery of community services and related programs, both generally and in particular cases;
- Section 11 (1) (d) to make recommendations for improvements in the delivery of community services and related programs, both generally and in particular cases;
- Section 11 (1) (e) to inquire, on his or her own initiative, into matters affecting service providers and visitable services and persons receiving, or eligible to receive, community services or services provided by visitable services;

The Ombudsman also has broad functions in community education and promotion of access to advocacy support for consumers (s.11 (1) (a), (b), (j)), and a specific function to review the systems of service providers for handling complaints (s14). This is primarily focused on educating and supporting services in the development of good complaint handling systems.

1.2 The Ombudsman Act (Part 3A)

In response to the findings and recommendations of The Royal Commission into the NSW Police Service, NSW Parliament gave responsibility to the Ombudsman for the oversight of investigations into allegations against employees of certain agencies.

The *Ombudsman Amendment (Child Protection and Community Services) Act* commenced on May 7, 1999, and inserted Part 3A into the Ombudsman Act. Part 3A of the Act was amended in 2003. Among other minor changes, including the exemption of trivial matters, the term 'child abuse' was replaced with 'reportable conduct'. Reportable conduct includes sexual offence or sexual misconduct, physical assault, ill-treatment, neglect, and conduct causing psychological harm.

Under Part 3A of the Act, the Ombudsman:

- scrutinises the systems put in place by designated agencies and other public authorities for preventing reportable conduct by employees, and for handling and responding to allegations of reportable conduct or convictions by those agencies and authorities (s 25B);
- receives and assesses notifications concerning reportable allegations or convictions against an employee (s. 25C);
- monitors investigations of reportable allegations and convictions against employees (s 25E);

- conducts investigations concerning reportable allegations or convictions, or concerning any inappropriate handling of, or response to, a reportable notification or conviction (s. 25G); and
- conducts audits and education and training activities to improve understanding of, and responses to, reportable allegations (s 25B).

All public authorities are subject to the requirements of Part 3A where the reportable conduct arises in the course of a person's employment. Some public authorities are designated agencies and also need to notify reportable allegations where they arise from conduct that takes place outside of employment.¹ Some non-government agencies are also subject to Part 3A requirements and must notify reportable allegations arising both within and outside of employment.²

2. Statutory Review Part One: Issues associated with the commission's policy, advocacy, research and education functions

In considering issues associated with the Commission's broader functions relating to policy, advocacy, research and education, and as noted in the Statutory Review *Information Sheet*, it is important to acknowledge changed emphases in policy and service provision in NSW. Additionally, consideration needs to be given to the oversight responsibilities of my office in relation to community services in NSW, including services to children and young people.

2.1 The Office for Children: Commission for Children and Young People

Section 11 of the *Commission for Children and Young People Act 1998* identifies the principal functions of the Commission for Children and Young People (CCYP). Of particular relevance to discussion of policy, advocacy, research and education functions, the role of the Commission includes:

- a) to promote the participation of children in the making of decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children appropriate to their age and maturity;
- b) to promote and monitor the overall safety, welfare and well-being of children in the community and to monitor the trends in complaints made by or on behalf of children;
- c) to conduct special inquiries under Part 4 into issues affecting children;
- d) to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children;
- e) to promote the provision of information and advice to assist children;
- f) to conduct, promote and monitor training on issues affecting children;
- g) to conduct, promote and monitor public awareness activities on issues affecting children;
- h) to conduct, promote and monitor research into issues affecting children.

Section 12 prescribes that in exercising its functions, the Commission is to give priority to the interests and needs of vulnerable children.

We note that the Commission has not conducted any special inquiries under 11 (c).

¹ Designated government agencies include DoCS, Departments of Education and Training, Juvenile Justice, Ageing, Disability and Home Care, Corrective Services, Sport and Recreation, NSW Health, Area Health Services, statutory health corporations, TAFE and the Ambulance Service of NSW.

² Designated non-government agencies include all non-government schools, all residential care agencies, all licensed children's services, family day care services and affiliated health organisations.

We also note the very broad range of functions which the Commission is required to perform. In our view, it is timely for the Review to consider whether the very broad nature of these functions gives sufficient direction in relation to how the Commission should focus its resources in the public interest. In considering this issue, there would be merit in the Review taking into account the extent to which the Commission's existing functions overlap with other agencies in promoting and/or addressing the needs of children and young people, particularly those most vulnerable.

2.2 Role of the Commission in relation to the Ombudsman

While the Ombudsman has a broad jurisdiction under CS CRAMA that incorporates services such as child care and neighbourhood and youth centres, our work is clearly focused on children who are or may be at risk, are in statutory or voluntary care, or who have disabilities and require assistance from State agencies, or from those agencies licensed, funded or authorised by State agencies.

Due to the scope of the CCYP's jurisdiction and the focus taken by the Commission, there has been little duplication between the CCYP and the Ombudsman's office in regard to this office's monitoring, inquiry and review roles under CS CRAMA and the Commission's policy and research work.

2.3 Objectives and priorities

NSW Government policy and priorities

Over the past decade, NSW Government policy has moved toward an emphasis on multi-agency responsibility for providing services and supports to children and young people. Policy in this regard has also focused on the broader role of communities in supporting children and families, and embedding the concept of early intervention across all government services.

The NSW State Plan promotes stronger communities and a social inclusion agenda to build the capacity and resilience of communities, including Aboriginal communities, and *'the independence, safety and wellbeing of individuals and families'*. In direct relation to children and young people, the State Plan also has a significant focus on strategies to improve access to school, university and jobs. The overall health of the community in NSW; improving child wellbeing, health and safety; and reducing crime and anti-social behaviour are also key State goals of significant relevance to children and young people.

Keep them Safe, while resulting from a review of the child protection system, sets out a significant community-wide goal that *'all children in NSW are healthy, happy and safe, and grow up belonging in families and communities where they have opportunities to reach their full potential'*. *Keep them Safe* promotes a *'revitalised partnership among all agencies with responsibility for children'*.³

Other specific policies also prioritise coordination across government and fairness and opportunity. For example, the NSW Government's direction for people with disabilities, *Better Together*, recognises that one in five people in NSW lives with a disability. *Better Together* promotes integrated planning and cross-agency coordination as key strategies to ensure that people with disabilities – including children and young people – participate fully in education, employment and community life.

CCYP statutory objectives and priorities

The Commission's statutory objectives can be broadly interpreted, and as such, are adaptable and able to accommodate shifts in overarching government policy and service delivery practices. In this sense, the objectives would appear to remain valid, although subject to internal Commission decisions and priorities.

³ NSW Government 2009 *Keep them Safe – a shared approach to child wellbeing*, pII

In this context, section 12 of the Act is significant. Section 12 requires the Commission to give priority to the interests and needs of vulnerable children. The Commission has stated the view – informed by consultations in the establishment of the Commission – that the Commission is concerned with the wellbeing and interests of *all* children and young people in NSW (our emphasis). This has been a consistent theme.

The Office for Children Annual Report 2006/07 notes that:

*Children, young people and others who were consulted about establishing the Commission felt that it should broaden its focus to encompass the broad range of issues that affect all children and young people in NSW and should focus on their well-being.*⁴

The Commission's submission to the Special Commission into Child Protection Services in NSW notes:

*'Children and young people interviewed for the Inquiry into the best means of assisting children and young people with no-one to turn to said that the Commission should concentrate on ways to prevent them becoming vulnerable, not just on ways of helping once they were vulnerable. This advice came from vulnerable children themselves as well as from their more resilient peers.'*⁵

It is unclear how this approach meets the specific requirement of section 12. The principal functions of the Commission outlined in section 11 are universal in nature and apply to all children. However, Section 12 is a provision that directs the Commission to promote the wellbeing of those most vulnerable within the broader universal system, and to reflect the policy priorities of government. Children and young people who would be the subject of this section would include those from poor, marginalised or otherwise disadvantaged communities; those with disabilities or characteristics which potentially limit access to opportunity or community life; Aboriginal children and young people and those from culturally and linguistically diverse backgrounds.

Therefore, given the current terms of section 12 of the Act against the background of the Commission's stated focus, it is timely for the Statutory Review to consider whether section 12 should be removed or amended. Should section 12 remain in its current form, then it may be appropriate to require the Commission to publicly report in its Annual Report each year on its plans and activities directed towards compliance with that section. More broadly, this issue of the Commission's statutory role in relation to vulnerable children under section 12 – as distinct from the policy position that the former Commissioner took – well illustrates the need for the Review to consider whether there should be a more clearly articulated statement as to the Commissioner's role in the Act.

2.4 Advocacy

The CCYP has strongly defined itself as an advocate for children and young people.⁶ It will be a matter for the Review to consider whether such a broad advocacy brief is appropriate and effective. Obviously, such an assessment will need to be undertaken against the background of the work that the Commission has performed to date and in the context of other advocacy bodies in the child and family field.

Furthermore, as the CCYP has explained, the Commission does not have a complaint investigation role as it avoids the *'conflict of the Commission being both an advocate and an umpire'*. However, and related to Part 2 of the Statutory Review below, there is a potential tension in the CCYP's stated role as advocate, and as a regulator through the exercise of its relevant employment proceedings and child-related employment screening functions. In this context, the CCYP has also noted that the inclusion of the screening for child related employment was one of the *'most contentious of the functions included in the Act'*.⁷

Against this background, we believe that the Review should consider whether the Commission's relevant employment proceedings and employment screening responsibilities sit well with its advocacy function.

⁴ Office for Children *Annual Report 2006/07*, page 47

⁵ Commission for Children and Young People 2008, Submission to the Special Commission of Inquiry into Child Protection Services in NSW.

⁶ For example, CCYP (2009), *Captured by kids: the first ten years of the NSW Commission for Children and Young People*.

⁷ CCYP (2009), *Captured by kids: the first ten years of the NSW Commission for Children and Young People*, page 6

3. Statutory Review Part Two: Issues associated with the Commission for Children and Young People's child-related employment screening

3.1 Regulator and operator

In section 2.4 we discussed the advocacy/regulator issue. A related additional area which warrants consideration is the 'fit' of the Commission's **regulatory** and **operational** roles insofar as the handling of relevant employment proceedings and the conducting of employment screening are concerned. We note that in its review of the WWCC, the Audit Office expressed some concern about the '*multiple and sometimes conflicting roles*' of the Commission in being a regulator and operator of the WWCC, and that '*The Government may consider that the community may be better served if these roles were separated*'.⁸

We support the Auditor General's observations in this regard. We also believe that the Review should consider removing both the relevant employment proceedings and WWCC **operational** responsibilities from the CCYP on the basis that there is no compelling reason to retain operational responsibility for the handling of completed relevant employment proceedings if the CCYP no longer has operational responsibility for the WWCC.

In making these observations, we believe that this Review provides an ideal opportunity to examine the overall statutory arrangements relating to the respective responsibilities of the CCYP and my office in relation to reportable conduct, including the completed employment proceedings aspect of these arrangements. In particular, we believe that the Review should consider whether or not, from a holistic perspective, the evidence shows that the way in which our respective responsibilities operate result in an efficient and integrated system.

3.2 Relevant employment proceedings

After 11 years of experience in reviewing child employment-related investigations, we are confident that there is strong evidence supporting the need for relevant employment proceedings to be part of any future scheme. Should the Review require further evidence from this office to support this contention then we would be happy to provide it. However, in general terms what we can say is that there is a very significant number of matters dealt with each year through the relevant employment proceedings process, in which the conduct identified highlights risk factors for children of which employers need to be aware and manage. However, we do have a number of concerns about the effectiveness of the current scheme – these are discussed below.

3.2.1 Common definitions

In relation to reportable conduct, the CCYP and the Ombudsman operate under the same legislative definition. However, both agencies issue guidelines, and from time to time, there have been differences in our interpretations of specific types of reportable conduct. Clearly, it is unacceptable for employers to be receiving different advice on common issues from the two key statutory oversight agencies and this adversely impacts on the coherence (and standing) of the scheme.

It is essential that the CCYP and Ombudsman guidelines be consistent in relation to matters such as:

- The interpretation of the meaning of particular types of reportable conduct;
- The types of findings and the basis on which such findings should be made;

⁸ NSW Audit Office (2010) *Working with Children Check: NSW Commission for Children and Young People*, Performance Audit, p.15

- Where a finding concerning reportable conduct requires notification to the CCYP, the relevant category of the finding;
- The advice provided to agencies regarding the appropriate use of chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* in relation to matters falling within the reportable allegations scheme.

As the CCYP develops guidelines through the Minister, it would not be appropriate for the CCYP and Ombudsman to develop joint guidelines, as the Ombudsman must remain independent.

Therefore, if following this Review the scheme which is ultimately adopted by Parliament necessitates the need for consistent CCYP and Ombudsman guidelines on ‘common issues’, we suggest that our respective Acts should be amended to require both agencies to consult in relation to the development of our guidelines.

3.2.2 Assessing relevant employment proceedings

In our view, a more fundamental issue that needs to be considered by the Review involves whether the system relating to the handling of completed relevant employment proceedings needs a major overhaul.

Under the current system, completed matters are classified by the CCYP as either ‘category 1’ or ‘category 2’. It is important to note that all category 1 matters will result in the involved employee being the subject of a risk assessment should the employee seek further child-related employment, regardless of whether the allegations that have been sustained against the employee are of a particularly serious nature. We also note that the category 1 and 2 determinations are generally made without the supporting evidence being provided to, or reviewed by, the CCYP. Furthermore, the CCYP does not hold the relevant evidence on its database about these matters.

In our opinion, the current crude category system is neither fair to employees nor an adequate indicator of risk to children. Instead, we believe that there needs to be a comprehensive review of all the available evidence before any decision is taken as to whether an employee’s conduct may warrant a formal risk assessment.

3.2.3 Notification to the CCYP of minor conduct

On a related note, we are concerned that certain finalised minor reportable conduct matters are still required to be notified to the CCYP. It is our view this is also neither efficient nor fair to the affected employees (and is inconsistent with Justice Wood’s original vision of a system which has safeguards focussed on identifying those who are in, or seeking, child-related employment who may pose an unacceptable risk to children).

However, in making this observation we note that, under the current scheme, there is at least the scope for excluding minor reportable conduct matters from notification to the CCYP – the problem is that this option has not been fully utilised. The net effect of failing to utilise this option is that individuals who have had findings made against them in relation to minor child-related employment matters will unnecessarily be the subject of risk assessments should they seek employment in this field.

We would also add that our office has increasingly been utilising ‘class or kind determinations’ to exclude certain types of reportable allegations from needing to be notified to us. Over the past few years, this had led to a dramatic reduction in the number of matters which are required to be reported to us. While our determinations deal with different issues, and as such should not be expected to mirror the CCYP’s class or kind determinations, we believe that, subject to any change to the scheme making the following unnecessary, there should be legislative obligations placed on both our agencies to consult with each other prior to making, or amending, any class or kind determination.

3.2.4 Incomplete Relevant Employment Proceedings

Apart from exempted matters, employers are required to notify the CCYP of completed relevant employment proceedings.

Under the current system, a person who is subject to an investigation of a reportable allegation may apply for new child-related employment, and undergo a WWCC for the new position, prior to 'completion' of the investigation. In these circumstances, the matter would neither be notified to the CCYP nor considered in the WWCC. This presents a gap in the system that poses a potential risk to children. In fact, because of this gap in the system, over the last six months there have been several matters where individuals the subject of very serious allegations have moved from one area of child-related employment to another without their new employer even being aware of the outstanding allegations and related unresolved employment proceedings.

In order to promote currency in the scheme, we suggest that the Review should seek to ensure that, whatever system is ultimately adopted, this gap in the current system is closed, particularly in relation to matters involving serious reportable conduct.

Furthermore, we note that any arrangement designed to address this current weakness in the system, would also need to have certain safeguards. For example, in all circumstances where the involved individual is unaware of a criminal investigation, the release of any advice or information to a prospective employer would need to be consented to by the Police Commissioner, or their delegate. In addition, procedural fairness would need to be provided to the involved individual and the nature of the advice provided to the prospective employer should be of a very limited nature unless both police (where relevant) and the involved individual, consents to specific details being provided: (for example, the nature of the advice provided may simply involve informing the prospective employer that there is an outstanding employment proceeding).

3.2.3 The 'fictitious' child

A common investigative strategy for identifying and obtaining evidence against paedophiles is to create an on-line profile of a **fictitious child**. However, the legislation currently defines reportable conduct in terms of certain inappropriate conduct involving a **child**. The effect of limiting conduct to situations involving an **actual child** means that actions in relation to a fictitious child do not currently fall within the reportable conduct jurisdiction; and therefore even proven relevant employee misconduct in relation to a fictitious child, would not technically be 'reportable' following the completion of relevant employment proceedings. It is critical that sexual misconduct in relation to such matters is captured by any amendments that may be made to the reportable conduct scheme, even where there is insufficient evidence of a criminal offence.

3.2.5 Auditing agency compliance

In late 2009, the CCYP advised us that it does '*not have authority to audit employer practices in notifying Relevant Employment Procedures.*' It also advised that the CCYP relies on the Ombudsman's power under s 25B of the *Ombudsman Act* '*to ensure employers are appropriately notifying Relevant Employment Proceedings*'.

In our view, there are a number of problems in relation to the CCYP's reliance on our section 25B powers.

Section 25B of the Ombudsman Act requires:

- (1) The Ombudsman to keep under scrutiny the systems:
 - (a) for preventing reportable conduct by employees of designated government or non-government agencies or of other public authorities, and
 - (b) for handling and responding to reportable allegations, or reportable convictions, involving those employees.
- (2) For that purpose, the Ombudsman may require the head of any such agency to provide information about those systems and their operation.

We also note that a principal function of the CCYP, as set out in section 11(i) of the CCYP Act, is ‘to participate in and monitor background checking for child-related employment in accordance with Division 3 of Part 7.’

We acknowledge that there is currently a link between our ‘keep under scrutiny function’ and us **seeking** to ensure that employers are complying with their notification requirements to the CCYP. However, from a practical perspective, we are not at all well placed to guarantee that employers meet their obligations to the CCYP. While we have, and will continue to, ensure appropriate practice in this area, it is neither reasonable nor realistic to expect us to provide ‘the lead’ on ensuring ‘adequate agency compliance’ with not only the broad legal framework for reporting to the CCYP, but also for ensuring adequate compliance with the CCYP’s own guidelines in this area.

To illustrate the practical problem for our office, we note that since 2007 the CCYP ceased providing us with a monthly summary of all relevant employment proceedings that have been notified to, or withdrawn from, the CCYP. From 2003 to 2007, this information assisted us in checking the reliability of advice given by agencies about their notifications to the CCYP following their completion of relevant employment proceedings. Therefore, given that the CCYP is fully aware that they no longer provide us with this critical information, it is difficult to understand how they could propose that we could effectively and efficiently ensure compliance in this area.

In addition, we also note that the range of agencies that have reporting obligations to the CCYP is much broader than the agencies under our jurisdiction. As a result, we have no authority under section 25B of our Act to audit whether employers outside our jurisdiction are appropriately notifying relevant employment proceedings to the CCYP.

On the other hand, we believe that section 36(1)(f) of the CCYP Act provides the necessary statutory power for the CCYP to carry out all monitoring and auditing in respect of ‘*compliance with the procedures and standards for background checking.*’

More broadly, we make the observation that this issue highlights the need for the Review to consider as to whether separating the oversight of reportable conduct investigations from the reporting of the outcomes of these investigations, is efficient, effective and in the public interest.

3.3 Screening

3.3.1 General observations

Notwithstanding the concerns that we have expressed about current practice relating to completed relevant employment proceedings, for the reasons previously outlined, we are of the view that any future screening scheme needs to include the consideration of Relevant Employment Proceedings (REPs). For example, it is essential that consideration can be given to actions or behaviours of employees that do not meet the threshold for police investigation or criminal charges, but do nevertheless provide critical information relating to potential risks to children.

Notably, REPs were identified in the NSW Auditor-General’s Performance Audit report on the Working with Children Check as being a useful tool in identifying people who may pose a risk to children.⁹

The NSW system also allows for consideration of the duties of a particular position and/or the record of risk management by a particular employer during background checking. This enables an approach to risk assessment that reflects the specific requirements of a position. A risk assessment of this type is not generally possible under an accreditation or ‘blue card’ system such as that operating in Queensland.

The following highlights a number of key limitations to the current system which would need to be considered in the development of any future system.

⁹ We note that in the Queensland screening system, REPs are not included.

3.3.2 Scope of records considered

There are three types of records considered under the current WWCC scheme: relevant criminal records, relevant apprehended violence orders (AVOs) and relevant employment proceedings, as defined by section 33 of the *Commission for Children and Young People Act*. ‘Relevant criminal records’ and ‘relevant apprehended violence orders’ do not include records relating to a range of acts that may indicate significant risk to children. This includes for example, drug supply and offences involving violence towards adults. We understand that the Queensland card system includes in its relevant serious offence list, certain crimes committed against adults and property, as well as certain drug offences.

In order to ensure that the scope of records considered in screening is sufficient to identify all behaviour that may constitute a risk to children, we propose that the Review consider the breadth of records currently considered when conducting employment screening. In particular, the Review should consider whether a broader range of offences should be considered such as those referred to above. Alternatively, the Review should consider the inclusion of a full criminal record check as part of standard employment screening.

3.3.3 Lack of review and updating of information

An employee is required to undergo a WWCC only at the outset of employment with an agency. This results in a situation where a person in child-related employment may commit a relevant offence or be subject to a relevant AVO following their appointment to a child-related employment position without this information being made available to their employer.

A significant benefit of the ‘blue card’ system in Queensland is that firstly, certification is for a limited period (three years) and must be renewed. Secondly, we understand that the Queensland Police and the Commission for Children and Young People and Child Guardian (CCYPCG) systems are linked. This enables blue card holders to be flagged on the police system, with police having a statutory requirement to advise the CCYPCG of relevant changes to information held about blue card holders. The CCYPCG can subsequently notify employers of any suspension of a blue card and further action, such as additional risk assessment. We are of the view that an accreditation system of this kind would not work effectively if such a ‘flagging’ process was not in place.

We strongly support the Review considering as part of the overall screening and/or certification process for people seeking child related-employment, a system which includes a periodic re-certification of a person’s suitability for working with children. In this regard, we also note that if a certification process is adopted, consideration should be given to the model which is in place in Queensland which distinguishes between disqualifying offences, serious offences and other offences impacting on eligibility.

3.3.4 Employment of persons of significant risk

In NSW, employers may not employ a prohibited person. However, it is ultimately up to employers to determine whether to appoint a person who has been assessed by the CCYP or screening agencies as being of significant risk.

Although employers are required under section 40 of the *Commission for Children and Young People Act* to notify the CCYP if they refuse an applicant child related employment because of the outcome of the estimate of risk, there is no requirement that employers notify the Commission if they decide to employ a person who poses a potentially high risk to children. According to the Audit Office, of more than 50 significant risk applicants assessed each year, on average seven are employed in child-related employment. In 2008 – 09, 14 such people were employed in NSW.¹⁰

¹⁰ NSW Audit Office (2010) *Working with Children Check: NSW Commission for Children and Young People*, Performance Audit, p.20

Notification of these situations by employers to the CCYP (or to another agency with primary operational employment screening responsibilities) may at least enable the Commission (or another agency) to take relevant action; such as assisting the employer to develop strategies to mitigate any potential risks. In this regard, we note that the Audit Office recommended that the CCYP ‘ensure employers of significant risk employees implement Child Safe Child Friendly strategies by June 2010’.¹¹

We also note that the accreditation system currently in place in Queensland requires regulated organisations to implement risk management strategies to reduce risks to children, and that these strategies are monitored by the relevant Commission. Against this background, we recommend that the Review supports the need for employers of ‘high risk’ individuals to be appropriately supported in, and held accountable for, developing and implementing strategies to mitigate risks to children under their care.

3.3.5 Child-related employment screening for police

Our office has had ongoing discussions with the CCYP in relation to the application of the child-related employment screening system to general duties sworn police officers. We are concerned that general duties police officers are not currently subject to a WWCC, as the CCYP does not consider that general duties police officers are engaged in child related employment, as defined by section 33 of the Act.

Given that policing activities incorporate significant contact with children and young people, we believe it is in the public interest that general duties policing be included as child-related employment. By virtue of their position, general duties police officers are in a position of significant power relative to children, and in performing their duties have unsupervised contact with children and young people.

Police officers have statutory responsibilities for the protection of children under the *Children and Young Persons (Care and Protection Act) 1998*, including making mandatory reports concerning children and young people at risk of significant harm, making applications for apprehended violence orders on behalf of children, and removing children and young people who are at immediate risk of serious harm.

While there is an argument that police officers already fall within section 33(1)(a)(i) of the Act, in that they provide ‘child protection services’, for avoidance of doubt, we suggest that the Review recommend that policing be prescribed as child-related employment under the regulations (section 33(1)(b)).

3.3.6 Screening of adults in family day care settings

WWCCs have recently been extended to adults who live with foster carers and family day carers. The CCYP has advised us that this screening will only apply to new carers. We are concerned that a significant number of people are already living with foster carers or family day carers who have not been subject to any form of screening, and there is no legislative provision for this to occur. For this reason, we suggest that the Review consider recommending an amendment to the Act to ensure that all adults living with existing foster carers and family day carers be subject to employment screening.

3.4 Information sharing arrangement between the Ombudsman and the Commission for Children and Young People

The need for consultation in relation to our respective guidelines which was referred to earlier in this submission, raises the broader issue of information exchange between the Ombudsman and the CCYP.

In 2003, it was agreed that the CCYP would provide our office with a monthly summary of all relevant employment proceedings that have been notified to, or withdrawn from, the Commission. This enabled our office to check the reliability of advice given by agencies following their completion of relevant employment proceedings. These reports ceased in 2007, as the CCYP formed the view that it had no lawful excuse under section 48B of the *Act* to provide our office with these reports.

¹¹ Ibid.

We have been attempting to negotiate a suitable arrangement with the CCYP since that time. The CCYP's recent advice is that it does not have the power to provide this information to our office. This limits our capacity to oversee employers' notifications of relevant employment proceedings to the CCYP. Recent correspondence from the Acting Commissioner indicates that she would be pleased to share information with my office if the Commission has the legal means to do so.

Against this background, we suggest that it is timely for the Review to consider this issue of the capacity of the CCYP to exchange information both in connection with its Part 7 functions and other functions as well. In this regard, we suggest that the Review makes recommendations designed to ensure that the CCYP has the power to share relevant information with our office and other key stakeholders in relation to the exercise of all of its functions, when it is in the public interest for it to do so.

4. Review (Child Death Review Team)

The Child Death Review Team (CDRT) is currently convened by the Commissioner for Children and Young People. The team is supported by a secretariat within the CCYP. Part 7A of the *Commission for Children and Young People Act* prescribes the functions of the CDRT and the role of the CCYP in this regard.

The *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* includes changes to Part 7A of the *Commission for Children and Young People Act 1998*, which will result in:

- The Ombudsman becoming Convenor of the Child Death Review Team. The Commissioner for Children and Young People will be a member of the Team.
- Members of staff of the Ombudsman's office will support and assist the Team in the exercise of its functions.

This change is pending proclamation. The changes will result in a number of anomalies within the *Commission for Children and Young People Act*, and between this Act and CS CRAMA, that will affect the efficiency and effectiveness of child death reviews in NSW. These anomalies could be addressed through the current Statutory Review.

The issues we have identified, and have notified to the Department of Premier and Cabinet, relate to the possibility of legislative provisions for the Child Death Review team remaining within the *Commission for Children and Young People Act*, rather than being transferred to CS CRAMA:

- Section 25 of the *Commission for Children and Young People Act* – as applied by 45S (1) of the Act – requires draft reports of the CCYP, including those relating to child death reviews, to be provided to the Minister for comment prior to tabling in Parliament. A number of other sections, for example, 45N(1)(d), 45N (2) (a) and (b), 45O (2), require Ministerial approval. Given the importance of the independence of my office, it is not appropriate that I be party to any requirement to seek Ministerial approval.
- Should Part 7A remain in the *Commission for Children and Young People Act*, oversight of the Ombudsman's work in the exercise of CDRT functions would continue to sit with the Parliamentary Committee on Children and Young People. This would result in two Parliamentary committees overlooking the work of my office. I would be unable to report fully to either committee on issues such as child protection and child deaths, and therefore neither committee would achieve a holistic understanding and full scrutiny of the work and achievements of this office in these areas.
- Linked to the above, and pursuant to s. 12 (2) CS CRAMA, the Ombudsman's functions under that Act are carried out by the Community and Disability Services Commissioner. Staff supporting the CDRT would be situated within the Community Services Division, which is established under s. 12(1) CS CRAMA. In this context, it is essential that the Commissioner, who is also a Deputy Ombudsman, be a statutory member of the Team, in the same way the Wood Act has included the Commissioner for Children and Young People as a member.

We believe that these problems can be resolved through transfer of Part 7A to CS CRAMA.

The CCYP will no longer have a role in the Child Death Review Team, beyond the Commissioner being a member of the Team. As the Ombudsman will become Convenor of the Team and as the office of the Ombudsman will provide support to the team, legislation for the Team should link directly to this office. CS CRAMA would be the appropriate legislation to contain provisions relating to the Team. CS CRAMA currently provides for reviewable child deaths and given the similarities in the intent of both functions, the CDRT provisions could be incorporated as part 6A in this Act.

We therefore propose that the Review consider recommending the transfer of Part 7A of the *Commission for Children and Young People Act* to the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.



.....
Bruce Barbour
Ombudsman

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Steve Kinmond
**Deputy Ombudsman and Community and Disability
Services Commissioner**