

Review of the Working with Children (Criminal Record Checking) Act 2004

July 2012

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1. Introduction

1.1 Executive Summary

The *Working with Children (Criminal Record Checking) Act 2004* (the Act), has been in operation for six and a half years. The Act aims to contribute to the protection of children by requiring persons undertaking, or proposing to undertake, child-related work to pass a stringent criminal record checking process. The Working with Children Check (WWC Check) is more intrusive than the standard pre-employment criminal record checks, which can only access conviction records, and is a static 'point-in-time' check. In comparison the WWC Check takes into account adult and juvenile conviction charges, pending charges and non-conviction charges along with any other information considered relevant, and is 'live' meaning the criminal records of card holders are continuously monitored whilst their card remains valid. Parliament determined that the expansive WWC Check was warranted, to prevent from working with children those people whose criminal record histories indicate they might harm them.

In November 2011, a review of the operation and effectiveness of the Act was commenced by Ms Leanne Guest, a Western Australian public service officer. The Review was undertaken in order to assist the Minister for Child Protection to fulfil her obligations under section 47 of the Act. The findings and recommendations from the Review are detailed in this Report.

The Reviewer found that there is strong community support for the intent of the legislation and the Act is administered effectively. A number of legislative amendments and administrative improvements have been recommended as part of the Review, but are considered to be enhancements to the existing operation of the legislation, as opposed to major structural change.

1.2 List of recommendations

Recommendation 1

In consultation with relevant stakeholders, amendments are drafted to reduce the ambiguity of the definition of 'child-related work' under section 6 of the Act and related provisions. The consideration of suitable amendments should ensure that:

- (a) consistent with Parliament's original intent, scope remains limited to targeting the WWC Check to those persons whose work with children affords the opportunity for the development of relationships of trust and authority; and
- (b) the suitability of developing a category of 'children's organisations' and amending categories to reflect changes in work practices and other legislation is considered.

Recommendation 2

(a) Consideration is given to prohibiting Negative Notice holders from accessing the parent-volunteer exemption only if adequate mechanisms to monitor compliance and strengthen the promotion of broad child safeguarding strategies can be identified.

(b) Consideration is given to whether persons with reporting obligations under the *Community Protection (Offender Reporting) Act 2004* should be precluded from accessing the parent volunteer exemption under the Act.

Recommendation 3

Consideration is given to repealing section 5 of the Act, having regard to its overall benefit given the comprehensive definition of child-related work in section 6, and the possible expansion of persons considered to be 'managerial officers' as a result of amendments to the *Child Care Services Act 2007*.

Recommendation 4

Procedures for the consideration of WWC Check applications are documented.

Recommendation 5

The development and implementation of the Smart Form is progressed.

Recommendation 6

The development and implementation of the new information management system is progressed.

Recommendation 7

Amend the Act to allow the CEO to request and receive any information needed for functions under the Act and to provide protection from liability for persons providing such information in good faith.

Recommendation 8

Amend the Act to allow the CEO to terminate applications prior to the CEO issuing a notice, when reasonable attempts to contact the applicant have failed.

Recommendation 9

The structure and resourcing of the WWC Screening Unit is evaluated to determine if officer caseload for complex cases can be reduced. This evaluation should also ensure that any extra resources required to implement Review outcomes do not reduce service delivery capacity.

Recommendation 10

Consideration is given to whether card validity should be extended to five years, in the context of Recommendations 9 and 11.

Recommendation 11

The Act be amended to allow relevant disciplinary findings from prescribed employers and professional associations to be a trigger for consideration under section 12 of the Act. Relevant disciplinary findings are those relating to sexual behaviour towards children or serious physical harm of a child.

Recommendation 12

Consideration is given to amending the Act to allow certain police intelligence information, consistent with the limits and protections provided in the Queensland *Commission for Children and Young People and Child Guardian Act 2000*, to be a trigger for consideration under section 12 of the Act.

Recommendation 13

Consideration is given to redrafting section 12(8)(e) to express its intent in a clearer manner.

Recommendation 14

As part of the evaluation under Recommendation 9, the adequacy of the WWC Screening Unit's compliance staffing and processes is reviewed with a view to increasing compliance capacity. This should include clarifying the role of WA Police in supporting and possibly undertaking certain compliance activities.

Recommendation 15

Amend the Act to remove barriers to the provision of information to WA Police where this is necessary to perform functions under the Act or to support WA Police (and where appropriate other law enforcement agencies) to investigate possible offences against children.

Recommendation 16

Include a provision explicitly enabling the WWC Screening Unit to provide information to law enforcement agencies about an applicant or compliance activity where this is in the public interest, including the investigation of possible offences against a child.

Recommendation 17

Amend section 38 of the Act to enable relevant regulatory boards/bodies as well as public authorities to be specified in regulations.

Recommendation 18

Amend the Act to add the capacity to advise employers about the WWC status of an ex-employee where this is in the public interest or needed for compliance and other legal proceedings.

Recommendation 19

Amend the Act to ensure that officers who are investigating compliance with the Act have clear authorisation to do so and can enter relevant premises and obtain relevant information and records.

Recommendation 20

As part of the organisational evaluation in Recommendation 9, the resourcing and appropriate classification levels of the Call Centre is examined.

Recommendation 21

Consideration is given to the establishment of a funding program to support services working with children to put in place child safeguarding strategies that include the WWC Check.

Recommendation 22

Repeal Clause 3 of Schedule 1 of the *Commissioner for Children and Young People Act 2006*.

Recommendation 23

Formalise governance arrangements for the WWC Screening Unit within the Department for Child Protection to minimise possible, perceived, or actual conflicts of interest. These governance arrangements should include channels for provision of advice such as, compliance issues, should they occur.

1.3 Terms of reference

1. Review the operation and effectiveness of the Act.
2. Report on the extent to which the purpose of the legislation is being achieved, specifically, but not limited to:
 - a) assessments undertaken and notices issued meet the requirements of the Act;
 - b) processes are in place to ensure that persons issued with notices and their employers/education providers comply with the requirements of the Act; and
 - c) the Working with Children Check is promoted to ensure that persons are aware of their obligations under the Act.
3. Make recommendations for improvement, including legislative amendment, that supports the intent of the Act, namely to:
 - a) deter people from applying to work with children where they have criminal records that indicate they may harm children;
 - b) prevent those with such criminal records who do apply, from gaining positions of trust in certain paid and unpaid employment, and volunteer work;
 - c) establish consistent standards for criminal record screening for working with children and the ethical use of such information; and

- d) contribute to awareness that keeping children safe is a whole of community responsibility.

1.4 Reviewer and Review Reference Group

Ms Leanne Guest was made available by her employer, the Public Sector Commissioner, to conduct the Review. A Review Reference Group was established to assist the Reviewer in considering data, feedback, options and recommendations. Reference Group membership consisted of:

Mr Peter Byrne	Executive Director Corporate Services, Department for Child Protection
Ms Jenni Collard	Director of Aboriginal Health, Department of Health
Ms Tara Gupta	General Counsel, Department for Child Protection
Dt Sr Sgt Simon Hubbard	Police Child Protection Squad, WA Police
Mr Rob Thompson	CEO, Western Australian Sports Federation
Mr Eamon Ryan	Director Professional Standards and Conduct, Department of Education
Ms Sandie van Soelen	Director, Working With Children Screening, Department for Child Protection

1.5 Methodology

The Reviewer informed herself in a variety of ways about matters to be examined under the terms of reference. A public submission process took place between 30 November 2011 and 29 February 2012. Notices advertising the Review and inviting submissions were placed in *The West Australian*, community and regional newspapers. The Review was also promoted on the Working with Children Check website (www.checkwwc.wa.gov.au).

The Reviewer wrote to government and non-government organisations and to relevant interest groups inviting submissions to the Review. The Reviewer received 38 submissions, listed in Appendix 1.

In addition to considering the written submissions, the Reviewer held meetings with persons considered to have an interest or involvement in the Act. Considerable time was spent meeting with staff in the Working with Children (WWC) Screening Unit and observing work processes and community education activities. Statistical data was provided by the WWC Screening Unit, Department for Child Protection. The Reviewer also read a number of WWC Card applications and the consideration(s) applied under the Act in cases where the applicants had some form of criminal record.

2. Overview of the Act

The Act was passed by Parliament on 26 November 2004 and was assented to on 8 December 2004. During 2005, the WWC Screening Unit was established within the then Department for Community Development, now Department for Child Protection. The Act was proclaimed on 1 January 2006 from which time the WWC Screening Unit began to receive applications for the WWC Check.

2.1 Impetus for a WWC criminal record checking scheme

In 1996 the *New South Wales Royal Commission into the New South Wales Police Service* triggered concerns about persons who were in positions of trust and authority and where they used their positions and status to access and abuse children. New South Wales and Queensland introduced centralised checking schemes in 2000 and 2001, respectively.

Internationally, the Home Office in the United Kingdom established the Criminal Records Bureau in 1999 to undertake criminal record checks for those working with children in response to what appeared to be an increasing number of incidents. The infamous Soham Murders of two ten year old girls in August 2002 by Ian Huntley (a caretaker at a local high school) led to an inquiry chaired by Sir Michael Bichard. The Bichard Inquiry began in January 2004 and included a major focus on the effectiveness of vetting practices.

In Western Australia community support for a vetting scheme was building and came to prominence in 2002 through the Archbishop of the Anglican Church, (and later also the National Council of Churches) requesting that the Government consider the proposal. On 24 June 2003, the then Department for Community Development hosted a stakeholder forum on the Government's proposal for mandatory criminal record screening for people working with children. The elements of a proposed scheme included many features of the Queensland scheme which was considered the most rigorous and effective criminal record checking model for people in child-related work at that time.

Input from the stakeholder forum, further research and consultation shaped the proposed WA Act. This included input from the United Kingdom Criminal Records Bureau following the report of the Bichard Inquiry in May 2004.

2.2 Features of the Act

The aim of the Act as expressed in the 2004 second reading speech was to contribute to the protection of children by requiring that persons working with them in a contract of employment (paid or unpaid employee, volunteer over 18 years, self-employed person or a Minister of Religion) undertake an extensive check of criminal records¹. Persons with certain convictions or charges assessed as putting children at risk of sexual or physical harm would be barred from starting or continuing in child-related work.

¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 October 2004, p.6946.

In practice, contact between adults and children occurs throughout society and it was not the intent of the legislation to intrude on normal social or family life². Considerable care was invested in crafting the definition of 'child-related work', to focus on work where the services to, and activities with, children occurred over time, and where relationships of trust and authority were likely to develop.

The criminal history considered by the Act includes adult and juvenile convictions, spent convictions, pending charges and charges that did not result in conviction (non-conviction charges). This is broader than the standard National Police Certificate that the general public would be familiar with as part of a normal employment application process.

Including non-conviction charges in the consideration of a WWC application was consistent with advice received from New South Wales, Queensland and also the United Kingdom. This decision reflected international and national literature about the difficulty of finding guilt 'beyond reasonable doubt' for sexual offences against children, but where there was substantial information supporting a risk of harm to children in child-related work.

Successful applications for a WWC Check result in an Assessment Notice commonly known as the Working with Children Card (WWC Card), which is valid for three years across all types of child-related work, unless relevant new offences are notified. Persons whose criminal record and other relevant information is assessed as indicating an unacceptable risk of harm are issued with Negative Notices and are barred from undertaking child-related work. At the time that the legislation was drafted, the danger of the card being considered to stand alone as a sign of good character was recognised and it was intended that information about the other child safeguarding strategies would be promoted.

The schedules of the Act and decision making criteria are constructed to allow for discretionary decisions to be made with regard to the issue of a Negative Notice or Assessment Notice. Decisions must consider convictions, pending and non-conviction charges, depending on the exceptional or particular circumstances of the case, but with regard to the best interests of children as the paramount consideration. Only a small number of Class 1 convictions where an adult has sexually penetrated a child under the age of 13 years old are exclusionary. It was considered that in these circumstances there could never be an exceptional circumstance sufficient to mitigate risk if the person were to be approved as eligible to undertake child-related work.

The legislation provides for internal and external natural justice provisions, with persons able to appeal Negative Notice decisions to the State Administrative Tribunal.

The Act was phased-in progressively over five years, with those areas considered highest risk phased in first. Areas deemed high risk included volunteers working with the youngest children, self-employed persons and certain new employees.

Fees for the WWC Check are established in a schedule in the *Working with Children (Criminal Record Checking) Regulations 2005* (the Regulations). Government determined that full cost

² Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 October 2004, p.6947.

recovery would not be sought³. It was unknown at the time when the legislation was introduced what the check would cost, but the fee for applicants in paid child-related work was originally set at \$50 which at that time was only \$5 more than the standard National Police Certificate through WA Police, which did not involve assessment or on-going monitoring. A notional fee of \$10 was originally set for volunteers, the same at that time as the volunteer check undertaken by the Department for Communities in conjunction with WA Police. This small fee was viewed as important to assist in targeting the WWC Check to only those in child-related work, discouraging volunteers who were not in child-related work from applying.

Amendments to the Act were proclaimed on 6 October 2010 following consideration of how the Act had been operating since its introduction and at the direction of the Minister for Child Protection. These amendments strengthened certain provisions so that persons who posed a risk to children would more likely be refused a WWC Card or have their card removed. A full review of the Act was not undertaken at this time, as this was deferred to the current statutory review. A summary of the 2010 amendments is contained in Appendix 2.

2.3 Administration of the Act

When the Act was passed it had been the intention of Parliament for the responsibility of the Act to reside temporarily with the then Department for Community Development with a view to transfer responsibility to the Commissioner for Children and Young People when that position had been properly established⁴. Legislative provisions for this to occur were included in the *Commissioner for Children and Young People Act 2006* Schedule 1 which has not been enacted. This is discussed further in Chapter 7 of this report.

The legislation rests all decision making authority with the Chief Executive Officer of the Department responsible for the administration of the Act. This is currently the Director General of the Department for Child Protection. Since its inception, the Director General has delegated all powers related to the Act to the Director of the WWC Screening Unit. While being a division of the Department for Child Protection, the WWC Screening Unit in practice operates largely autonomously, and is located in separate premises from the other offices of the Department.

Currently, the WWC Screening Unit operates with 43 permanent FTE and up to five additional temporary staff in the following business units:

- **Screening**
Receives and assesses applications for the WWC Check.
- **Community Engagement and Policy**
In the context of child safe and friendly practices, this team promotes awareness and compliance of the WWC Check to persons undertaking child-related work and their employers, parents and community organisations. This team is also responsible for in-house training, evaluation and policy.

³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 October 2004, p.6948.

⁴ *Ibid.*

- **Compliance and Monitoring**
Includes ascertaining whether existing card holders are charged or convicted with new offences requiring reassessment; persons holding Negative Notices are complying with those notices; persons undertaking child-related work and their employers are complying with the Act.
- **Legal**
Provides advice on the application of the Act, specifically in regard to consideration of applications, the monitoring and prosecution of non-compliance, ongoing legislative development and interpretation, responding to reviews of Negative Notice decisions before the State Administrative Tribunal and related court work.
- **Business and Systems Support**
Administrative support to the WWC Screening Unit, including contract and information system management.

The current organisational chart of the WWC Screening Unit is provided at Appendix 3.

2.4 The cost of operating the WWC Screening Unit

The WWC Screening Unit is resourced through a combination of fees revenue, contributions from the Departments of Education and Health and consolidated fund revenue to the Department for Child Protection. Resources available therefore vary and are not known at the start of a financial year.

In total \$9,680,503 was used in the 2010/11 financial year by the WWC Screening Unit to support the administration of the Act. Of this approximately \$5 million was spent on external contracted services (such as WWC Card processing and criminal record checking) and \$3.3 million was allocated to salary costs.

Income received from fees

In 2010/11, \$3,616,340 was received from fees paid for WWC applications. This represents approximately 74% (\$4.9m) of the external contract costs incurred that financial year. For each application the external contract costs are approximately \$53.60 for a paid worker and \$38.15 for an unpaid/volunteer applicant. These external contract costs are paid by the WWC Screening Unit to Australia Post for managing the initial application process, CrimTrac for the criminal record check, and Placard for manufacturing the card (further detailed in Chapter 4). The income varies widely in line with numbers of applications as may be seen from the Graph at figure 2.1, below.

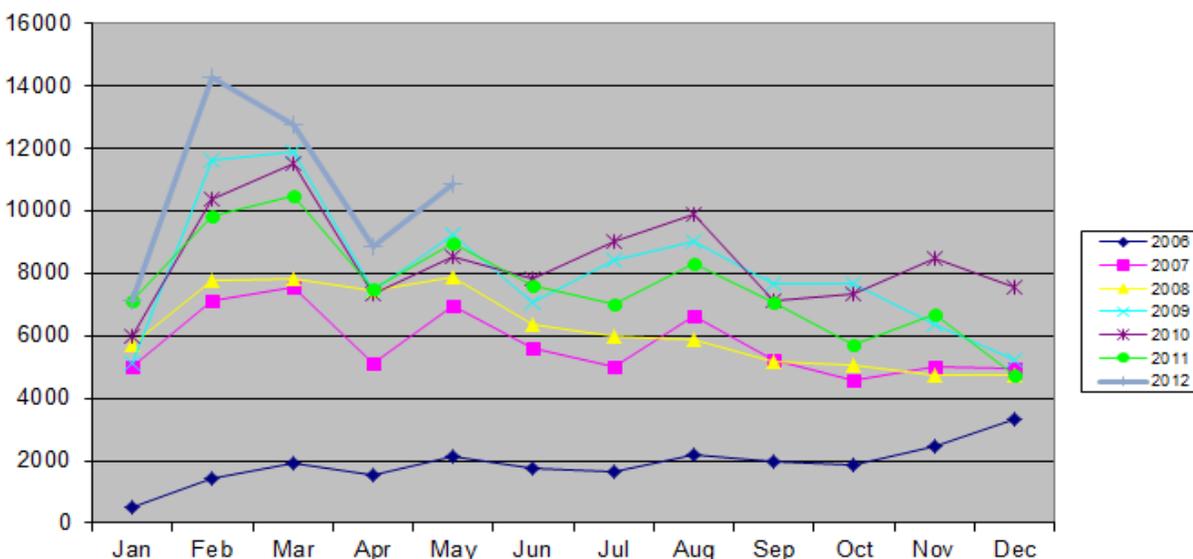
When the WWC Screening Unit internal costs are taken into account (including internal assessment, compliance, legal, community education and administrative functions), the true average cost per card to Government is \$95⁵. As discussed further in section 4.7, below, the fees for paid workers and volunteers are heavily subsidised by Government. The more applications received, the bigger the gap between income received and cost of the checks.

⁵ Department for Child Protection, Annual Report 2010/2011, p.51.

Statistics

Since the WWC Scheme was introduced on 1 January 2006, over 500,000 applications had been received for a WWC Check, and as at 31 May 2012 in excess of 488,000 cards had been issued⁶.

Figure 2.1: Over the counter applications for WWC Checks (by month)



The above chart shows the number of WWC Check applications which were lodged at an Australia Post outlet by month and year. The 2012 data is correct up until 31 May 2012.

The trend which is reflected in the above chart illustrates the number of applications which have been lodged at Australia Post over the six years of the WWC Screening Unit's operation. Of further note is the pattern of peaks and troughs in the number of applications lodged each month over the year. This fluctuation is a challenge for the WWC Screening Unit to manage.

More specifically the number of applications by calendar year is as follows:

2006	2007	2008	2009	2010	2011	2012
22,374	68,536	74,708	96,728	100,637	91,384	53,510 ⁷

At the end of May 2012 there were over 283,000 'current' WWC Cards in place. Western Australia currently has 1.57 million people aged between 15-64 years considered to be of working age⁸. This equates to around one in five working age persons holding a WWC Card, however, taking into account persons over the age of 64 volunteering and/or remaining in the workforce, the true ratio is likely to be closer to one in six or seven persons over working age. What is not known, however, is the number of people who are in child-related work and have

⁶ Includes WWC Card renewals.

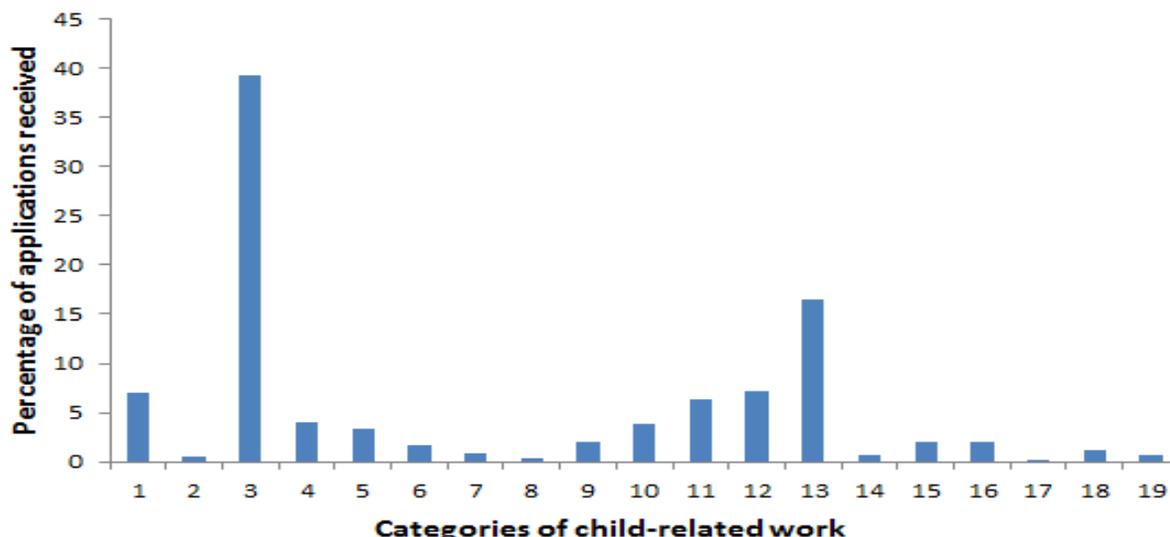
⁷ 2012 Figures are to 31 May (5 months of data).

⁸ Australian Bureau of Statistics, cat. no.3235.0 *Population by Age and Sex, Regions of Australia, 2010*.

never applied for a WWC Check or how many have applied and are in fact outside the scope of the Act.

As at May 2012 there were 285 Negative Notices in place, prohibiting those people from engaging in child-related work. There were also eight Interim Negative Notices in place. Persons who are considered to pose an immediate risk to children whilst they are in child-related work are issued with an Interim Negative Notice prohibiting such employment while the assessment is underway⁹. A further 17 cards have been cancelled where there has been a new charge or conviction of concern. This occurs primarily as a result of notifications from WA Police. These numbers do not reflect the number of WWC Cards that have been withdrawn when card holders' criminal record histories have been challenged. However, the WWC Screening Unit's information system is not currently able to accurately identify the specific number of people who undertake this action.

Figure 2.2: Applications for a WWC Check by Work Category



Data source: WWC Screening Unit Data from 2008 to 2012. This data is likely to include some applications which were submitted under the incorrect category. For an explanation of categories, see Appendix 4.

Of the 19 categories of child-related work, the bulk of applications for WWC Checks are received in relation to the following categories:

- Category 3: an educational institution for children which comprises the public and private education sector and is inclusive of teachers and others employed at schools and other training facilities (39.35%);
- Category 13: a ward of a public or private hospital in which children are ordinarily patients which includes Princess Margaret Hospital for Children, Bentley Child and

⁹ Section 13 of the Act.

Adolescent Mental Health Unit, all emergency departments, staff in public and private hospitals who are assigned to designated children's wards, and all regional hospitals which do not have specific wards designated for children but 'ordinarily' accommodate children (16.54%); and

- Category 12: a club association or movement (including of a cultural, recreational or sporting nature and whether incorporated or not) with a significant membership or involvement of children, but not including an informal arrangement entered into for private or domestic purposes. Category 12 is broad and is comprised of a diversity of community groups which include a significant number of volunteers (7.09%).

3.Scope – who is in child-related work

3.1 Legislative intent

The difficulty of defining which types of work should be considered ‘child-related’ was recognised from the outset. Parliamentary consideration acknowledged that community consensus on the types of occupational groups and settings which should be included would never be achieved, and that the aim was to “achieve a considered balance”¹⁰.

The areas of work that were identified as requiring the WWC Check were considered to be those “that offer opportunities for sustained contact with children in which the usual duties of the work involve, or are likely to involve, contact with a child in connection with a range of services and workplaces”¹¹. Work where contact with children was incidental was not included in the scope as it was known that such legislation could not prevent opportunistic behaviour from taking place in any public setting. Parliament recognised that the Act needed to be carefully constructed to prevent it being applied beyond its intent.

Exclusions and exemptions were put in place to try and ensure that those not intended to come within the scope of the Act were precluded from applying. Children working along-side adults in workplaces that were not ‘child-related’, and employers of children, for example workplaces such as fast food restaurants, were considered appropriately out of scope as this environment is covered by other industrial or equal opportunity law¹².

Further areas where Parliament determined the legislation would not operate were that of parents undertaking child-related work on a voluntary basis in environments where their children were present, and persons interacting with children in a normal social environment. In this context, it was not considered appropriate “to make it impossible for people to do the things they have been doing for years”¹³, such as a nephew or next-door neighbour babysitting a child, or a parent volunteering at a school canteen. It was recognised that children have contact with the parents of their friends and other children through a range of normal social interactions. Requiring parents who volunteer at places where their child is enrolled or in activities with their child to have the WWC Check would be an undesirable intrusion on normal family life. Other more suitable child safe practices that responsible employers should put in place could be used for these particular volunteer positions.

¹⁰ Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 October 2004, p.6946

¹¹ *Ibid.*

¹² Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 October 2004, p.7286

¹³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 October 2004, p.7284

3.2 Definition of child-related work

Under section 6 of the Act, a person is undertaking 'child-related work' and is required to apply for a WWC Check when the work is carried out:

- under an agreement with another person (written or unwritten) to do the paid or volunteer work;
- as a self-employed person carrying on a child-related business;
- as a Minister of Religion or in any other capacity for the religious purposes of a religious organisation; or
- by a student with another person that may or must be undertaken as part of the student's course of study.

Section 6 of the Act determines that work is only child-related when the person's usual duties involve, or are likely to involve, contact with a child in connection with one of the 19 categories of child-related work which are outlined in the legislation. Persons exercising functions under the Act are also required to undertake a WWC Check¹⁴.

For each category, a range of exemptions may also apply. Section 6 directs that all voluntary child-related work carried out by a child is exempt, and also provides an exemption for employers of children and people who work alongside children, with further exemptions as prescribed by the Regulations. The Act and Regulations currently provide 29 exemptions, of which 14 relate to the parent volunteer exemption (discussed below)¹⁵. A summary of the categories of child-related work and relevant exemptions is provided in Appendix 4.

The Act places responsibility for determining if an individual is in scope on both the applicant and his or her employer (if relevant). An employee or self-employed person who is within scope but does not apply for a WWC Check commits an offence under the Act and risks penalties of up to \$60,000 and five years imprisonment¹⁶. An employer that knowingly engages a person in child-related work, without that person obtaining or applying for a WWC Check is liable for a fine of \$12,000 and imprisonment for 12 months¹⁷.

3.3 Issues and recommendations

a) Ambiguity and expansion of scope

The complexity of interpreting and applying the definition of child-related work was raised in a number of submissions. The Western Australian Sports Federation advised that the ambiguity of the legislation requires sporting organisations to devote significant time and resources to interpreting the legislation, time that could be better spent focusing on "broader child safe strategies"¹⁸. Terms in section 6 that submissions highlighted as being ambiguous included:

¹⁴ Section 6(1)(b) of the Act.

¹⁵ Regulations Sch. 1.

¹⁶ Section 24 of the Act.

¹⁷ Section 22 of the Act.

¹⁸ Western Australian Sports Federation, Submission to WWC Act review, 29 February 2012.

- The 'usual duties' of the work;
- 'in connection with';
- 'likely to involve' contact with children;
- 'significant';
- a 'club, association or movement' ('movement' was identified as being particularly problematic); and
- 'ordinarily' patients.

Given that sporting and community organisations are largely volunteer based, the burden of determining who in the organisation is required to apply for a WWC Check is acknowledged as presenting a potential disincentive for persons to take on such administrative roles.

The administrative burden placed on private and government employers is also acknowledged, particularly in organisations with numerous, dispersed employees. There is a danger that the administrative difficulty of determining scope for some organisations leads to 'blanket' requirements for staff to apply for WWC Checks, resulting in applications for work where child contact is marginal and incidental. This is contrary to the intent of the legislation.

'Blanket' policy whereby employers instruct all staff to have WWC Checks is problematic because the legislation clearly does not give the WWC Screening Unit a mandate to carry out the required intrusive criminal record check on persons who are not in child-related work. This creates not only resource inefficiency but conflict between employers and the WWC Screening Unit. There have been instances where employees' jobs are in jeopardy because the employer insists on a WWC Check but the WWC Screening Unit rejects the application on the grounds that the applicant is not in child-related work. This issue is discussed further under 3.3(d) below.

The WWC Screening Unit has developed a range of materials to educate employers and employees about the scope of child-related work. The Reviewer considered these materials to be clear and user-friendly, notwithstanding the complexity of legislation. WWC Check information sessions for employers (discussed further in Chapter 6) are a valuable free resource for employers, including those from volunteer and/or community organisations, to gain a practical understanding of how to determine which persons will be in scope. However, for those persons at the 'grey' edge of the definition, where it is not easily apparent if a WWC Check will be required, the WWC Screening Unit is precluded from providing organisations with a definitive answer. The legislation is premised on the applicant/employer having the knowledge of what that person does –the *usual duties* of the work. The usual duties of a job can also change over time and work that is not initially child-related work can become so.

It is therefore important that the definition of child-related work is as simple to understand and apply as possible. Any attempt to define a concept such as child-related work will inevitably result in ambiguity at the margins. Significant restructuring of the existing definition may only result in greater community confusion. While there is capacity for the simplification of section 6, refinement not wholesale change is possible, having regard to comparative definitions in the other Australian jurisdictions, which are not markedly different to that in Western Australia.

Any refinement to the definition of child-related work should also examine if the existing language requires contemporisation. The Department of Health submitted that reference in section 6(1)(a)(xiii) to “ward of a public or private hospital” is:

*“limiting from a WA Health perspective as it reflects an old-fashioned traditional approach towards health service delivery... (and) does not align to the current world-wide shift towards a more community based approach”.*¹⁹

One suggestion to reducing the complexity in determining child-related work was to broaden the coverage or scope of the WWC Check²⁰. Other submissions sought to broaden scope by allowing the employer or applicant to determine if they required a check, on the basis that these people are best placed to understand if the nature of the role potentially places children at risk²¹. Consultations undertaken by the Reviewer revealed a consistent level of frustration when applications are rejected by the WWC Screening Unit because they are not assessed as being within the scope of child-related work.

At first glance, broadening the scope is an attractive proposition. This would be done through either determining certain workplaces, for example hospitals, to be within scope regardless of occupation, or through applicants self-selecting. However, closer examination reveals problems with this position. Firstly, criminal record information accessed as part of the WWC Check goes beyond that of a standard criminal record check and should only be accessed by a government agency with good reason. In the case of the Act, the expansive check is justified on the basis that the protection of children is deemed more important than the privacy of the individual, but only in very limited circumstances where the work clearly involves sustained contact with children in a child-specific context.

Secondly, the WWC Check comes at a cost to the individual and the taxpayer. Expansion of scope would require an additional resourcing commitment from Government.

The most significant counter-argument against broadening the scope is that it risks weakening that which the Act is designed to promote – the safety of children. If persons apply for WWC Checks when they have little meaningful contact with children, the value of the check is diminished and the risk of it being merely one more administrative requirement is exacerbated. Furthermore, WWC Checks being commonplace is likely to contribute to community complacency for ensuring child safe environments.

The Reviewer is of the view that scope should not be expanded unless the administrative burden on organisations can be demonstrated to be of significant magnitude, and that the majority of employees would be within scope.

¹⁹ Department of Health, Submission to WWC Act Review, 24 February 2012.

²⁰ Western Australian Local Government Association, Submission to WWC Act Review, 28 February 2012.

²¹ Department for Communities, Submission to WWC Act Review, 28 February 2012; Surf Lifesaving Australia, Submission to WWC Act Review, 29 February 2012.

In this context, consideration should be given to creating a category of ‘children’s organisations’ within the Act, and all persons employed by the organisation would be considered within scope. This category would provide for children’s hospitals, schools, child care centres, youth detention centres and children’s residential facilities. The WWC Screening Unit advises that through administering the Act for six years, it is apparent that the overwhelming majority of staff working within these workplaces would be expected to have contact with children in connection with their work. Relevant existing components of section 6 would be collapsed into this new category, allowing for streamlining of the child-related work definition. Given that such organisations are established solely for the care, service, or protection of children, placing a blanket WWC Check requirement is not considered to be inconsistent with the intent of the Act. Administrative savings would be made for both the WWC Screening Unit and employing entity through not having to scrutinise the usual duties of positions such as cooks, gardeners and handymen employed by these services to see if they fit within the current definition of child-related work. The existing legislative exemptions would apply such as exemptions for volunteers under 18 years of age.

Other possible strategies for reducing the ambiguity of ‘child-related’ while targeting the WWC Check as intended by Parliament may include the following:

- making it clear that in the context of the terms ‘usual duties’, ‘contact’ and ‘in connection with’ section 6(1)(a) of the Act, that child-related work is about the provision of a service *to children or the conduct of activities with children*, not incidental interaction with children.
- defining the term ‘proposed to be’ (section 9(1), section 9A(2)(a) and section 10(1)) so that it clearly applies to those who are to commence child-related work because they have been offered a position or a placement, or because they are opening a business. Currently this term can be interpreted too widely to apply to those who may be undertaking such work in the future or who would like to be.
- defining the term ‘ward’ as used in section 6(1)(a)(xiii) so that for the purposes of the Act it applies to hospital services that accommodate children overnight as was originally intended. Currently this category is applied to work where there are one-off medical procedures where it is unlikely that there would be time for relationships to develop. It is also noted that medical and allied health practitioners also have extensive checking through registration requirements²² and there is little child protection benefit to capturing those who are at the ‘edges’ of child-related work.
- remove, amend or add categories to better reflect the current areas where child-related work is undertaken and to take into consideration changes to other legislation.

²² *Health Practitioner Regulation National Law Act 2010* currently applies to chiropractic, dental, medical, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry and psychology with more national boards coming under the scheme in July 2012.

RECOMMENDATION 1.

In consultation with relevant stakeholders, amendments are drafted to reduce the ambiguity of ‘child-related work’ under section 6 of the Act and related provisions. The consideration of suitable amendments should ensure that:

(a) consistent with Parliament’s original intent, scope remains limited to targeting the WWC Check to those persons whose work with children affords the opportunity for the development of relationships of trust and authority; and

(b) the suitability of developing a category of ‘children’s organisations’ and amending categories to reflect changes in work practices and other legislation is considered.

b) Parent volunteer exemption

Six submissions argued for the removal or modification of the ‘parent volunteer exemption’. This exemption operates in a number of areas, for example where a parent is volunteering at a school that his or her child is enrolled in. Where the parent volunteer exemption is applied to a category of child-related work, the parent is not required to hold or apply for a WWC Check. Submissions that argued for the removal of the parent-volunteer exemption did so on the basis that parents are just as likely to harm children as non-parents, and removing the exemption would be an effective risk reduction strategy.

The Act was not intended, nor is it able, to guarantee safety for children. Instead, it supplements the community’s broad responsibility for this area. The community expects parents to have an active interest and involvement in their child’s development and this will often involve volunteering in activities that their child is involved in. Requiring WWC Checks for ‘normal life’ was not the intent of the Act (see section 3.1 of this Report). Removing the parent volunteer exemption is not supported by the Reviewer, as it would be an unnecessary impingement on parents’ opportunities to interact with, and support the development of, their children.

The Reviewer also considered whether the existing parent volunteer exemption should be modified to so that it could not be accessed by parents who hold a Negative Notice. Submissions received on this matter were strongly of the view that where a person has been issued a Negative Notice, it is appropriate that this person’s access to normal social life should be curtailed to the extent of removing them from this exemption, to the overall benefit of the safety of children. Removing Negative Notice holders’ access to the parent volunteer exemption at first appears a sound policy response to strengthen the protections provided by the Act. Closer consideration however, raises serious implementation issues and possible unintended consequences that the Reviewer’s deliberations have not been able to resolve.

The first concern is that if Negative Notice holders are not able to access the parent volunteer exemption, ensuring compliance is problematic. The identities of Negative Notice holders are appropriately kept confidential and it would not be possible for an organisation to know if their parent volunteers held Negative Notices. The onus would be on the Negative Notice holder to

refrain from undertaking child-related work which would include not availing themselves of the parent volunteer exemption. However, if that person was actively seeking out opportunities to deal inappropriately with children, the prohibition alone is unlikely to be effective.

Given this, the Reviewer then considered whether imposing significant penalties for Negative Notice holders undertaking parent-volunteering child-related work would be a suitable deterrent. This is an option, but to have a real impact, the threat of discovery for non-compliance must be high. Monitoring the activities of 285 Negative Notice holders²³, while possible, would be extremely resource intensive. It should be noted that Chapter 6 discusses the current compliance activities undertaken and raises concerns about existing compliance capacity. Given this, new compliance requirements should be considered with caution.

The introduction of a prohibition will be ineffectual if compliance cannot reasonably be monitored. Accordingly, the Reviewer's second concern was that the overall effect would be a more unsafe environment for children. Such a situation would occur if organisations, through a false sense of security which was based on the assumption that parent volunteers were not Negative Notice holders, then reduced their overall child safety strategies. The success of the legislation is based on organisations adopting a suite of complementary strategies which prevent children from being harmed, as opposed to the sole dependency on the WWC Check. It must be remembered that Negative Notice holders are only those persons that have applied for a WWC Card who have existing criminal records. Many persons who seek to harm children, whom also include parents, will not have a criminal record, or have not needed to apply for a WWC Card.

The Reviewer's third concern was the possible amendment's unintended consequences on normal societal and family life. As discussed under issue 3.3(a) above, the definition of child-related work is ambiguous, and this ambiguity is heightened in the parent volunteering realm. A parent Negative Notice holder who is committed to complying with the legislation may feel unequipped to distinguish between volunteer child-related work under the Act, and normal parental involvement. Accordingly, these parents may remove themselves from any public involvement in their child's life.

The Reviewer acknowledged that it does not appear appropriate that someone deemed not safe to work with children in the paid context, can currently do so under the Act if they are a parent volunteer. However, unless the issue of compliance can be addressed, and the community is willing to accept possible negative social impacts, the Reviewer reached the view that any proposal to remove Negative Notice holder access to the parent volunteer exemption should be treated with caution. If amending the Act to address the perceived anomaly is Government's preferred strategy, increasing the Unit's compliance capacity and making improvements to promote child safeguarding strategies, as discussed in Chapter 6, is essential to address the risk of increased complacency and overreliance on the WWC Card.

At the heart of this issue is that the community is most concerned about paedophiles, who may exploit the opportunities for access to children that child-related work provides. It is important to

²³ As at May 2012.

remember that not all Negative Notice holders are in this category. Convicted paedophiles are subject to the *Community Protection (Offender Reporting) Act 2004* (CPOR Act). Under this legislation, persons convicted of prescribed offences, mainly relating to sexual behaviour towards children, are listed on a register and may be subject to court imposed prohibition orders.

An option possibly better targeted to address community concerns regarding child safety may be to ensure that the parent volunteer exemption is not available to convicted sex offenders subject to reporting provisions under the CPOR Act. Given the grave nature of the prescribed offences, and that a conviction must be recorded, the Reviewer considered that this may be a more acceptable bar at which to constrain parental involvement in their child's development. It would also cover persons convicted of child sex offences who do not undertake child-related work in a paid capacity. It is noted that the Act and CPOR Act were introduced back-to-back in 2004 with the intention that they work together and this proposal may be an appropriate development of that intent.

RECOMMENDATION 2.

(a) Consideration is given to prohibiting Negative Notice holders from accessing the parent volunteer exemption only if adequate mechanisms to monitor compliance and strengthen the promotion of broad child safeguarding strategies can be identified.

(b) Consideration is given to whether persons with reporting obligations under the *Community Protection (Offender Reporting) Act 2004* should be precluded from accessing the parent volunteer exemption under the Act.

c) Managerial officers

Section 5 of the Act deems that 'managerial officers' of licensed child care centres are taken to carry out a child-related business and as such must apply for a WWC Check (managerial officers are as defined in the *Child Care Services Act 2007* section 3).

This deeming provision was intended to capture persons who may access child care centre premises because of their position on the management board, but do not have regular contact with children. Undertaking this role alone, these individuals would not be included within the scope of section 6 of the Act. Currently under this provision, managerial officers of national child care companies need to apply for a Western Australian WWC Check, even if they do not visit Western Australia. The Reviewer questioned the overall benefit of section 5, on account of the administrative compliance burden on child care organisations, and given that section 6 adequately captures all persons working *within* a child care centre.

The introduction of national child care industry regulatory harmonisation intends to amend the definition of managerial officer under the *Child Care Services Act 2007*. As these amendments are yet to be fully implemented, it is not clear as to whether the impact will be to expand or contract the scope of persons considered to be 'managerial officers'. It is possible that the

effect would be to further widen the scope of persons that have a financial or administrative role in the overall operations of a child care centre, but do not work at the child care premises, and may not even be in Western Australia.

RECOMMENDATION 3.

Consideration is given to repealing section 5 of the Act, having regard to its overall benefit given the comprehensive definition of child-related work in section 6, and the possible expansion of persons considered to be ‘managerial officers’ as a result of amendments to the *Child Care Services Act 2007*.

d) Conditional notices

In his submission to the Review, the Hon Justice Chaney, President of the State Administrative Tribunal (SAT), endorsed comments made in the 2009-2010 SAT Annual Report, suggesting that consideration could be given to amending the Act to allow for ‘conditional notices’. Conditional notices allow for an assessment to be made of the risk to children in relation to the type of work to be undertaken by the applicant. For example, a risk assessment of a health nurse treating sick children who have been admitted to hospital, who has regular and on-going contact with children during the time they are on the ward, would be more rigorous than that for a health technician who takes blood, or performs other functions on all patients, some of which include children, and whose contact with children is limited.

Under a conditional notice system, an Assessment Notice is not transferrable. An employee would have to apply for a new check if they changed employer, type of work or had multiple employers (for example, because they were employed in child-related work and also did voluntary work in their spare time). The current system provides for a transportable card, where the same level of rigour is applied to the consideration of all applications.

Justice Chaney’s preference for conditional notices is based on the following:

*“The Tribunal’s experience is that an increasing number of employers are requiring their employees to hold Assessment Notices under the WWC Act, notwithstanding that particular employees may have very limited contact with children... ”.*²⁴

The concerns expressed by Justice Chaney reflect the trend observed by the Reviewer for employers to want to take a risk-averse approach and insist that their employees apply if they have any contact, or even the possibility of contact, with children, regardless of whether their work would be considered child-related for the purposes of the Act. In consultations the Reviewer was also advised of employers requiring potential job applicants to be WWC Check card holders, even though the legislation precludes persons from applying for a card until they are employed, or proposed to be employed, in child-related work.²⁵

²⁴ State Administrative Tribunal, *Annual Report*, 2009-2010.

²⁵ Section 9(1) of the Act.

This tendency is understandable, given that scope as defined in the Act is complex and often ambiguous (see discussion in issue 3.3(a) above), so it may be administratively more efficient for the employer to apply a blanket policy, rather than consider the work undertaken by each staff member in the organisation. Employers will also be aware that they commit an offence under the Act if they employ a person in child-related work who does not hold, or has not applied for a WWC Card²⁶, and this may sway their judgement for positions where it may not be immediately apparent if the work falls within the scope definition. A further factor contributing to this tendency is that employers may feel that they are providing a safer workplace and contributing to the overall protection of children in the community if they require all employees to hold a WWC Card.

Conditional notices was an option considered when the legislation was originally developed, however a transportable card was the preferred option, as it was considered to be the most administratively efficient and cost-effective option overall. The transportable system was also consistent with the intent that the scope of child-related work be strictly limited. A conditional notice system would require persons to reapply for WWC Cards or seek amendment to the condition when changing employment. Employers would also be required to understand the risk profiles of roles within their organisation and ensure that employees hold the correct type of Assessment Notice for the job they are performing. The Reviewer considers a conditional notice system to be more administratively burdensome and potentially more complex than the current system.

The Reviewer agreed with Justice Chaney that currently too many people with limited contact with children are applying for WWC Checks. Following consideration of submissions and consultations, the Reviewer reached the view that this occurs due to some employers and employees not adequately understanding the definition of child-related work and the policy rationale behind scope being so strictly targeted.

The legislation is still relatively new and as it becomes more established it is anticipated that the community will reach a more sophisticated level of understanding about the definition of child-related work and how it is correctly applied in the workplace. Significant promotional effort is undertaken by the WWC Screening Unit to explain that scope is deliberately limited. Whilst inroads have been made, the sheer size of the population that is impacted by the legislation means that achieving critical mass for this knowledge will take some time.

The Reviewer considered that the best strategy to address the concerns expressed by Justice Chaney is to tackle the community's misunderstanding of what is child-related work. The adoption of Recommendation 1 (above) would reduce the ambiguity of section 6. In addition, the current community education function must be continued and extended to ensure that persons are aware of their rights and responsibilities under the Act, including the definition of child-related work, and most importantly, its policy rationale. The community education function is discussed in Chapter 6.

²⁶ Section 22 of the Act.

4. Processing WWC Check applications

4.1 Overview of the legislative requirements

Part 2 of the Act outlines the process through which applicants apply for an Assessment Notice, and how that application is to be considered by the CEO in determining whether an Assessment Notice or Negative Notice will be issued. Mandatory information to be contained in the application is detailed in sections 9 and 10 of the Act and provision is also made here for the setting of an application fee, as prescribed in the Regulations. Section 11 enables the applicant to withdraw their application at any time before an Assessment Notice is issued, provided an Interim Negative Notice has not been issued, or if the application has been required by the CEO under section 17. Section 17 is where a notification has been provided by WA Police to the WWC Screening Unit, advising of a change in a WWC Card holder's criminal record status.

On receipt of an application and the checking of the applicant's criminal record, section 12 of the Act provides a strict framework for how the person's criminal records, if present, must be assessed. The legislation provides the CEO with no discretion in instances of:

- Adult Class 1 convictions (where a Negative Notice must be issued)²⁷;
- Class 3 records that have resulted in a non-conviction (Assessment Notice must be issued)²⁸; or
- Absence of a criminal record (Assessment Notice must be issued)²⁹.

In the remainder of circumstances, section 12 directs a default determination of either an Assessment Notice, unless 'particular' circumstances are considered to apply, or a Negative Notice, unless 'exceptional' circumstances are considered to apply. In determining if exceptional or particular circumstances are relevant, the CEO must have regard to the criteria established in section 12(8) of the Act, which are as follows:

- (a) the best interests of children;
- (b) when the offence was committed or is alleged to have been committed;
- (c) the age of the applicant when the offence was committed or is alleged to have been committed;
- (d) the nature of the offence and any relevance it has to child-related work;
- (e) the effect of future conduct by the applicant in relation to a child if that future conduct were the same or similar to conduct the subject of —
 - (i) any offence committed by the applicant; or
 - (ii) any charge against the applicant;
- (f) any information given by the applicant in, or in relation to, the application;
- (g) anything else that the CEO reasonably considers relevant to the decision.

²⁷ Section 12(7) of the Act.

²⁸ Section 12(4) of the Act (Provided the application has not been required by the CEO under section 16 or 17 of the Act).

²⁹ Section 12(4) of the Act.

Section 13 of the Act provides that in instances where a Negative Notice is proposed, the applicant is to be provided with the opportunity to make a submission, prior to the CEO making his or her final decision. The CEO has the opportunity in this instance to issue an 'Interim Negative Notice' which takes immediate effect until a final decision is made. This notice is issued when a criminal record indicates that a person poses serious and immediate risk in child-related work to the extent that prohibition is necessary, pending determination of the application.

An Assessment Notice is in effect for three years unless sooner cancelled under the Act³⁰, and the application for renewal of an Assessment Notice may be made up to three months prior to expiry³¹.

Notifications are received from employers³² or WA Police³³ where it is reasonably believed a person has been charged with or convicted of an offence that makes them unsuitable to work with children or hold a WWC Card. If the person already has a card the WWC Screening Unit can immediately assess the new criminal record notified by police and decide under section 12 whether or not the person should continue to be eligible to work with children. For all other notifications the person is required to make a new application and if this does not occur, a Negative Notice can be issued³⁴.

Negative Notices continue to have effect until cancelled under the Act³⁵. A Negative Notice holder may apply to have his or her Notice cancelled under section 19 after three years from date of issue or sooner under certain specified circumstances, e.g. if the Negative Notice was issued on the basis of a pending charge and the person is later acquitted of the charge by a court of law³⁶.

The Director General, Department for Child Protection (CEO for the purposes of the Act) has delegated all of his powers under the Act to the Director of the WWC Screening Unit. All references to the Director WWC Screening Unit in the following description of process should be read as the CEO for the purposes of the Act.

4.2 Lodgement of applications

The WWC Check application form may only be lodged at an Australia Post outlet. This is not a legislative requirement, but a contractual arrangement put in place by the WWC Screening Unit to best ensure that the rigour of information and processes required can be achieved. This includes ensuring that the identification validation requirements, as mandated by CrimTrac, the federal criminal records checking agency, can be met so that the check is conducted on the

³⁰ Section 14 of the Act.

³¹ Section 15 of the Act.

³² Section 16 of the Act.

³³ Section 17 of the Act.

³⁴ Section 18 of the Act.

³⁵ Section 14 of the Act.

³⁶ Section 19(3) of the Act.

correct person. The contract with Australia Post is valued at about \$3.2m³⁷ per year, and requires Australia Post to:

- develop and print the application form;
- ensure Australia Post staff verify the applicant's identification (100 point identity check);
- take the photo;
- process the fees;
- at the central office level, verify that the local postal outlet sent through complete forms;
- electronically scan the application form (through subsidiary Decipha), and send Optical character Recognition (OCR) data to the WWC information management system; and
- provide electronic transaction reports to the WWC Screening Unit.

After the lodgement with Australia Post, 98% of applications are received by the WWC Screening Unit within five working days, 82% within two working days.³⁸

The application form directs applicants who cannot meet the identification requirements, or travel to a nearby postal outlet, to contact the WWC Screening Unit. In cases where a person genuinely cannot travel to a postal outlet or does not have the required identification, the WWC Screening Unit puts alternate measures in place to confirm the person's identity and may lodge the application form through Australia Post on the applicant's behalf.

The data is transferred electronically to the WWC Screening Unit information management system. However, the OCR technology may not always accurately read the handwritten forms and this may not have been picked up by Australia Post; also some fields such as the child-related work category may need to be queried. Staff at the WWC Screening Unit therefore validate the data received for each application against the original paper form. An error-free application takes 1-2 minutes to verify. Some electronic validation processes have recently been put in place. However, in cases where the information is incomplete, processing delays can occur as the application must either be returned to Australia Post or queried with the applicant and/or employer.

4.3 Consideration of applications

Once the information on the application has been validated, the applicant's identifying information is electronically forwarded to CrimTrac for the enhanced national criminal record check. Application processing is undertaken by the Screening Team in the WWC Screening Unit. Appropriate seniority of staff considers and approves cards for lower thresholds of criminal records under delegation from the CEO. Senior screening staff, and legal officers where necessary, consider more serious records with varying degrees of delegation. These considerations and recommendations are referred for final determination to the Director.

³⁷ \$3.2m was the value of the approximate contract for the 2010/2011 financial year. The total cost per year is dependent on the number of applications processed.

³⁸ Working With Children Screening Unit, Input to 2011 Review, March 2012.

For applicants where a criminal record exists, the Reviewer observed that clear organisational structures and processes exist within the WWC Screening Unit to ensure that it is allocated to an appropriate officer. For example, the consideration of criminal records featuring only Class 3 convictions of a non-sexual or violent nature is undertaken by an Assistant Screening Officer, a relatively junior position, who submits their recommendation to a Screening Officer for decision. More serious or complex Class 3 records, for example those that involve patterns of violence or drugs, are assessed by Screening Officers and above as appropriate to the case. Appropriateness is determined by the Screening Manager or Team Leader, who hold tertiary qualifications in fields such as social work or psychology.

In the case of Class 3 criminal conviction records, WWC Screening Unit officers other than the Director have been delegated the authority to issue Assessment Notices but these are referred to the Director if an adverse decision is proposed. In the case of Class 1 or Class 2 records, or where a Negative Notice is proposed, approval rests with the Director in most situations where the Act requires discretion to be exercised. In reviewing the WWC Screening Unit's processes, it was apparent to the Reviewer that quality assurance processes, involving at least the next senior tier, are in place to enable applications to be considered in accordance with the requirements of the Act.

4.4 Access to criminal records required to make a decision under the Act

In order to make decisions that meet the requirements of the Act, the WWC Screening Unit is reliant on receiving information about the applicant's full criminal record so that any patterns of concern to the safety of children can be considered. This requires not only the name of the charge or conviction, but also the details about what occurred - the context and circumstances of the offence or alleged offence.

Section 34 of the Act provides for this information to be requested and received from CrimTrac, from police in all jurisdictions and also from the Director of Public Prosecutions (DPP); and information subject to the *Sentencing Act 1995*.

Regulations are in place to enable court transcripts to be obtained and Memoranda of Understanding (MOUs) are in place with the DPP, WA Police, the Department of the Attorney General and the Department of Corrective Services to facilitate the provision of information to allow consideration to take place under section 12 of the Act.

As described above, the Act provides for consideration of all convictions (including spent and juvenile convictions) as well as pending charges and non-conviction charges. When the Act was first proclaimed, the national criminal record check through CrimTrac did not reveal this range of criminal records. A strategy to ensure that the full range of criminal history was received started following the national forum held in WA in 2004 where the UK Bichard Inquiry was presented. The risks associated with not having the full history and potentially missing important patterns of offending was clearly identified. Attempts to address this through the community services and police ministerial councils did not succeed until the matter was referred to the Council of Australian Governments (COAG) in 2006.

The WWC Screening Unit together with WA Police undertook negotiations resulting in an agreed national framework for the Inter-jurisdictional Exchange of Criminal History Information for People Working with Children (ECHIPWC) (November 2006). A project to implement the framework resulted in the signing of a MOU (November 2009) between jurisdictions whereby police agreed to provide the expanded criminal history to jurisdictions with screening agencies authorised by Government as meeting the strict terms and conditions. These terms and conditions included the expanded records only being used to make decisions relevant to the safety of children with people employed to work with them; that operations must occur under legislation and that there were natural justice and confidentiality provisions in place. Jurisdictions agreed to address any legislative or policy barriers and in Western Australia, the *Spent Convictions Act 1988* was amended so that spent convictions could be provided by police to authorised screening units in other jurisdictions.

The result is that since early 2010, the expanded criminal records have been received for the purpose of assessment under the Act. The exception is that Victoria did not agree to provide records of non-conviction charges. A formal evaluation of the operation of the MOU undertaken in late 2010 confirmed substantial improvements to the access to information needed to make quality decisions relevant to the safety of children with people who could harm them through child-related work. It was noted that the gap in access to Victorian records of non-conviction charges means that the WWC Screening Unit cannot consider the 'full picture' of an applicant's criminal history at the national level.

Issues concerning access to criminal history information which must still be resolved at the national level include:

- The expanded criminal record information is currently available only at the time the initial WWC Check is undertaken through CrimTrac. There is not continuous checking as occurs within this State through linkages between the WWC Screening Unit and WA Police.
- It can be difficult to obtain court transcripts and associated information outside of Western Australia which can impact the quality of decisions. At times this information is expensive, particularly given the usefulness of the information will not be apparent to the WWC Screening Unit until it is ordered and obtained.

4.5 Access to non-criminal record information

Section 12(8)(g) of the Act provides for the consideration process as to whether an Assessment Notice or Negative Notice should be issued, to have regard to 'anything else reasonably considered relevant to the decision'. Section 13(1)(c) requires that if a Negative Notice is to be proposed, applicants are invited to make a submission as to their suitability to be issued with a card to carry out child-related work.

In meeting the requirements of these provisions, information is required to make a decision that is in the best interests of children and also does not unnecessarily prohibit people from child-related work. The information required to make protective but balanced decisions can include aspects of the applicants' lifestyle, health or behaviour. Information may also be required to

corroborate claims in applicants' submissions that notwithstanding past behaviour, he or she is now 'suitable' to work with children.

Where there is a charge or conviction triggering concern, examples of information which the Reviewer noted from her reading of cases included:

- records about contact with the Department for Child Protection;
- records about disciplinary action taken by employers;
- reports about programs undertaken from the Department of Corrective Services;
- reports from medical, psychiatry and psychological practitioners;
- reports commissioned for the WWC Screening Unit from the 'Expert Panel of Advisors'³⁹.

4.6 Issues and recommendations - overall operation and effectiveness

The processing and consideration of applications is technologically and analytically complex, occurring in the context of close to 100 000 applications per year. In order for the Act to effectively contribute to the protection of children in child-related workplaces, applications must be processed in a timely manner, and in instances where criminal records are present, these must be rigorously considered in accordance with the legislative requirements.

To assess the operation and effectiveness of how applications are processed and considered, the Reviewer considered statistical information generated by the WWC Screening Unit information management system and was provided access to all operational documentation maintained by the WWC Screening Unit. This documentation included service agreements with Australia Post and CrimTrac; organisational budget, structure and job description forms; and documentation relating to procedures. The Reviewer also reviewed a sample of applications where the presence of a criminal record required consideration under section 12(5) or (6) of the Act. Interviews and observation of staff enabled the Reviewer to ascertain how the legislative requirements were applied in practice.

The Reviewer found that application lodgement, processing and section 12 consideration practices were sufficient to meet the requirements of the Act. At the consideration level, delegations were appropriately targeted, and all delegated decision making had quality assurance procedures in place. Staff employed to undertake screening were of an appropriate seniority and professional background such as psychology, social work or law. While the Reviewer did observe that in practice consideration of applications took place in a thorough manner, with appropriate quality assurance in place, a complete and up to date procedures manual was not available. The expertise and long-standing tenure of senior staff currently supports consistency of screening practice, but the reliance on these individuals in place of documented procedures represents considerable risk. The WWC Screening Unit advised the Reviewer that work had commenced on a current procedures manual, but this was presently on-hold due to operational priorities. The appropriate structure and resourcing required to

³⁹ A panel of experts in their respective fields who are commissioned to provide advice to the Director, WWC Screening Unit which includes assisting with the consideration of high complexity applications.

administer the legislation is discussed further in this Chapter⁴⁰. Notwithstanding the current capacity of the WWC Screening Unit, the Reviewer considers that full documentation of consideration procedures should be developed as a priority.

RECOMMENDATION 4.

Procedures for the consideration of WWC Check applications are documented.

The timeliness of decisions made under the Act are a significant contributor to the overall operation and effectiveness of the legislation. Consideration of serious criminal records requires a level of analysis that cannot always be undertaken within a short period. The WWC Screening Unit advises that Senior Assessing Officers regularly have in excess of 30 cases to assess at one time.

The majority of applicants do not have a criminal record and receive their WWC Card within three weeks or sooner of actual application lodgement. This can take longer where there are common name matches through CrimTrac or there are inaccuracies in the way the form has been filled out and the person has to be contacted by the Australia Post outlet or the WWC Screening Unit. The time taken will also be longer at peak times. In February/March 2012 the WWC Screening Unit received a record of approximately 28 000 applications and a record for May of over 11,000. As at 31 May 2012 approximately 9 300 applications were yet to be processed and sent to CrimTrac for checking, due to the WWC Screening Unit being unable to clear the backlog of applications from February and March, and further high numbers of applications in April and May. This backlog represents a risk to the effective operation of the Act, as applicants are able to work with a receipt following the lodgement of applications⁴¹.

Of the approximately 17% of applicants that do have some form of criminal record:

- 10% are finalised in 14 days or less;
- 50% are finalised in 30 days or less;
- 83% are finalised in 60 days or less;
- 92% are finalised in 90 days or less; and
- About 2% take longer than six months and a few were noted to have taken a year or more⁴².

It is acknowledged that the majority of applications are received by the WWC Screening Unit and processed in less than three working weeks. However there are cases where applications take significantly longer, causing stress and uncertainty for both the applicant and employer.

⁴⁰ See discussion for Recommendation 9.

⁴¹ Section 25 of the Act.

⁴² WWC Screening Unit information management system, May 2012.

Factors that increase the time taken to finalise certain applications include:

- The process of managing according to perceived risk. This can result in applications that include Class 2 offences being queued where there is not an immediate risk to children, for example offences that have not targeted or involved children or which occurred a long time ago.
- Complex cases, such as consideration of Class 1 and 2 offences that have not resulted in conviction, requiring information to be sourced from a range of agencies and professionals, including some which are located interstate. This information may take many months to obtain. If a Negative Notice is then proposed the applicant must, under the legislation, be given at least 28 working days to respond and this response may require further follow-up.

The WWC Screening Unit manages volume by prioritising risk through a triaging process. Where there is a record of extreme concern, such as where charges or convictions relate to the sexual assault of a child, this is immediately allocated. This includes those card holders who commit new offences of concern and prompt action must be taken to cancel the WWC Card. If it is identified that the criminal record is one where the applicant poses a serious and immediate risk in child-related work, that person is issued with an Interim Negative Notice prohibiting that work while the assessment is underway. The employer is advised of this notice ⁴³.

WWC Screening Unit staff are under pressure to finalise assessments quickly, particularly those that take six months or more. The demand is difficult to manage with priorities needing to be changed as more urgent cases are identified. This is also an area where even well qualified staff take at least three months to develop a familiarity with the Act, case law and procedures and as such, engaging temporary or casual staff for short periods is not a viable option. The absence of one or more of the four Senior Assessing Officers or Legal Officers for reasons such as for leave or illness has a major impact on output.

Recommendations for improving the timeliness of considering and issuing notices featured in several submissions to the Review. The Department of Health recommended that a maximum review period of three months be prescribed⁴⁴, whereas the Western Australian Local Government Association considered that the introduction of a priority processing fee could be introduced as a mechanism to improve processing times⁴⁵.

A discussion on the various components impacting on timeliness of Notice finalisation and recommendations for improvement are outlined in the following sections.

a) Electronic forms

Requesting the availability of online application forms was a common theme in the submissions received. The inconvenience of applicants requiring two visits to a postal outlet, firstly to collect

⁴³ Section 13 of the Act.

⁴⁴ Department of Health, Submission to WWC Act Review, 24 February 2012.

⁴⁵ Western Australian Local Government Association, Submission to WWC Act Review, 28 February 2012.

the form, and then return the completed version and present suitable identification was raised. Some organisations advised that if they chose to keep bulk forms in stock, these became out of date, and the lack of cost-effective facilities for forms to have standard organisational information completed were cited as reasons to introduce on-line applications.

In 2010, the WWC Screening Unit commenced working with Australia Post to develop a Smart-Form that would enable the applicant to fill in their information electronically, before printing the form and taking it to an Australia Post outlet. It is noted that online lodgement of the form is not viable as it would not enable identification requirements to be verified to the satisfaction of CrimTrac and police jurisdictions. A trial of the Smart-Form was conducted over three months in 2010 and 2011, with the trial concluding that further refinements to the form were required. Development of the form continues, and if it is successful it is anticipated to be available within the next six months.

While Smart-Forms will become the default lodgement process, the WWC Screening Unit proposes that paper application forms be provided by exception to those people who cannot gain access to computers and the internet. Delivery of the Smart-Form is expected to provide the following benefits:

- Reduce the requirement for the applicant to attend a postal outlet to one occasion;
- Reduced verification of information contained in applications due to illegible handwriting; and
- A reduction in the number of applications made that are out of scope through the use of electronic prompts.

RECOMMENDATION 5.

The development and implementation of the Smart Form is progressed.

b) Initial processing of applications

During high volume periods, particularly around February – March, the validation of applications can be delayed. While validation is typically a two minute process, during peak periods the sheer number of applications, as described previously, makes daily clearance not possible. As discussed above, implementation of the Smart Form is planned to reduce the effort required for this initial validation.

Some other manual processes are also expected to be streamlined when the WWC Screening Unit information management system is replaced. For example the new system will better track allocated cases and tasks, and also eliminate some cumbersome steps that are currently required. This new system is expected to be built over about 12 months with the new tender recently awarded and the process about to begin.

RECOMMENDATION 6.

The development and implementation of the new information management system is progressed.

c) Access to criminal records and other relevant information required to make a decision under the Act

The Reviewer was struck by the complexity of the cases that require decisions to be made about whether or not to issue an Assessment Notice under the Act. A simple list of charges and offences is not sufficient information to make these decisions. There are criminal records that contain mixed and varied histories of violence, substance abuse, and sexual and other criminal behaviour. The staff undertaking assessments must therefore have a range of child protection, offender behaviour and legal expertise, to ensure they have the appropriate skills and experience to properly determine the eligibility of people to work with children. This must occur in a context where the legislation is fairly new, and where expertise nationally and internationally is growing. The case law is also developing as judgments are made by the Court of Appeal and Supreme Court.

The Reviewer observed that substantial effort is made by WWC Screening Unit staff to make informed, balanced decisions where the safety of children is paramount. These decisions also recognise that some people do mature and change and only those people considered to pose an unacceptable risk of harm to children are prohibited from working with them.

The importance of receiving information sufficient to make quality decisions cannot be underestimated. While the WWC Screening Unit's current computer system cannot provide data about what information is requested and how long it takes to be received. It was noted that in some cases this information takes many months to be received if at all, resulting in delays in finalising decisions.

The Reviewer found that appropriate arrangements are in place with WA Police, CrimTrac, and other jurisdictions to allow for the secure transmittal of criminal record information. As discussed at section 4.4 above, historical criminal record information from other States can take time and be expensive. Even then, the relevance of the information may become apparent only on delivery.

The Reviewer notes that screening units which are authorised under the COAG MOU continue to push for continuous checking at a national level which would mean that notice of new offences committed by card holders would not be limited to those committed in this State. In the main productive relationships are in place, which allow obtaining other relevant information to assist with the consideration of applications. However the WWC Screening Unit has encountered difficulties in obtaining this information in a timely manner from some Western Australian Government agencies. The comparative newness of the legislation, and the lack of general understanding of the importance of receiving comprehensive information, is seen to result at times in reports not being provided, or the records that are provided having been edited

to the extent that the information is not helpful. For example, rather than receive information about the outcome of a programme or counselling, the WWC Screening Unit may receive little more than confirmation of the person's attendance and possibly some overall comment which may be of little value. This can occur even where the applicant provides written consent for the information to be released.

The Act does not compel Government or other bodies to provide information in relation to the CEO's capacity to gather any other relevant information under section 12(8)(g). Compulsory power is not considered appropriate by the Reviewer given that 'relevant information' is not limited or defined under the Act. The WWC Screening Unit currently relies on Public Sector Commissioner's Circular 2009/29 '*Policy Framework and Standards for Information Sharing between Government Agencies*' to provide leverage in their requests for access but this has not always been successful. Some agencies' understandable reluctance to provide information could be resolved if an enabling provision was placed into the Act. One such example is sections 23 and 123 of the *Children and Community Services Act 2004*, which provides for the Department to request and receive information necessary to protect a child, and protection from liability for any persons providing relevant information in good faith. Given the importance of comprehensive information to facilitate the decision making process, the Reviewer was of the view that similar provisions should be considered for inclusion in the Act.

RECOMMENDATION 7.

Amend the Act to allow the CEO to request and receive any information needed for functions under the Act and to provide protection from liability for persons providing such information in good faith.

d) Obtaining additional information from the applicant

Another reason for delay occurs when information needs to be obtained from the applicant. This may occur for reasons such as, seeking the applicant's permission to access certain information and provides the applicant with the required opportunity to make a submission prior to the proposed issuing of a Negative Notice⁴⁶. In some instances, all reasonable attempts to contact the applicant fail. While section 11 of the Act was amended in 2010 to enable applications to be deemed withdrawn where the applicant's identity or child-related work cannot be determined, there have been several cases where neither notice of a deemed withdrawal nor a proposal for a Negative Notice could be delivered because the person's whereabouts could not be ascertained.

This is an uncommon occurrence but the risk is that the person may continue to work with a pending application because the notice of deemed withdrawal or proposal for a Negative Notice is never received. This is considered to be both an unnecessary impost on the WWC Screening Unit and a risk to the community. Accordingly it is appropriate that the WWC Screening Unit has the capacity to terminate applications when all reasonable attempts to contact the applicant

⁴⁶ Section 13(1)(a)(iii) of the Act.

fail. If this provision were available, employers/prospective employers checking the status of the person's application through contacting the WWC Screening Unit would be advised that the individual does not hold a WWC Card.

RECOMMENDATION 8.

Amend the Act to allow the CEO to terminate applications prior to the CEO issuing a notice when reasonable attempts to contact the applicant have failed.

e) Resourcing of the consideration of applications

The improvements recommended above will assist in the timely provision of information being provided to the WWC Screening Unit to enable the consideration of applications where criminal records are present. The second area that must be considered is whether the WWC Screening Unit is appropriately structured and resourced to consider and determine these applications in a timely manner. The Reviewer observed the following regarding the existing capacity of the screening function in the WWC Screening Unit:

- Where there are criminal records for consideration, 16 staff from the Screening Team are involved. This includes six staff who process those with very minor offences and these staff have other functions in processing of application forms, administrative tasks and responding to customers via the Call Centre. Five staff undertake mid-range assessments, triage applications and source information needed by the Team. Four staff are dedicated to complex assessment. A Team Leader and Manager quality assure and manage these processes amongst their other duties. In addition four Legal Officers undertake various tasks related to the complex assessments and may undertake some assessment amongst their other duties.
- Consideration of some applications involves a very complex assessment about whether a person's criminal and other relevant history poses an unacceptable risk of harm to children. The need for a thorough consideration of all available information, seeking external expert advice where relevant, and testing preliminary conclusions with colleagues, is resource intensive and appropriately so. Given the grave consequences of a Notice determination for the applicant and children, the community expects that this consideration would not be unduly rushed.
- Senior Assessing Officers within the WWC Screening Unit may have up to 30 cases allocated them at one time. Depending on the complexity, and assuming all relevant information is at hand (which as discussed above, can of itself be delayed), the time taken for consideration varies between hours and many weeks.
- The number of unallocated 'complex cases' queued for consideration is 40 as at May 2012, with more expected following the clearance of the backlog of applications that are yet to be sent for national criminal record checking. All of these applicants have a criminal record that requires consideration under section 12(5) or 12(6) of the Act. For these pending applications, the Act provides for applicants to work with a receipt until a determination is

made⁴⁷. This presents some risk to the community and was raised as an issue of concern by employers in submissions and consultations conducted as part of the Review.

- The COAG MOU which resulted in details of spent convictions and charges being available on a national basis (see section 4.4, above), has improved protection of children because there is more complete information available. This has however increased workload with more information needing to be sourced and considered. Also, where persons renew their applications, information is now received that was not available at the time the card was first issued, requiring another layer of assessment upon renewal.
- Consideration of applications is challenging work, requiring high levels of analysis, concentration and attention to detail, as well as officers being exposed on a daily basis to disturbing criminal records and related information that needs to be examined as part of the consideration process. This, combined with the caseload backlog and unrelenting high demand, leaves officers vulnerable to burnout. While the Reviewer noted that the level of staff commitment to their work was high, and overall there is a supportive work culture, staff sickness and turnover is of concern. Absence of staff and turnover has a very disruptive impact on operational capacity and corporate knowledge.

In short, the Reviewer observed that the WWC Screening Unit was operating at close to capacity and efforts made to keep pace with the workload do not appear sustainable in the long term, as evidenced by the pending caseload and the inability of the WWC Screening Unit to find spare human resources to complete the current procedures manual (as discussed at section 4.6, above). Any amendments to the Act resulting from this Review will have further resource implications for the WWC Screening Unit and will need careful consideration.

The observations made by the Reviewer should be tested by a formal evaluation of the structure and resourcing of the WWC Screening Unit, taking into account the impact of any changes to the Act resulting from this Review. The evaluation should look at the most appropriate organisational structure and associated resourcing to allow for the timelier processing of complex applications while ensuring that other functions, such as documenting of procedures, can be sustained.

⁴⁷ Section 25 of the Act. It should be noted that these cases are distinct from those applicants whose criminal record is sufficiently serious to be issued with an Interim Negative Notice, and are prevented from working with children until a determination is made (section 13 of the Act).

RECOMMENDATION 9.

The structure and resourcing of the WWC Screening Unit is evaluated to determine if officer caseload for complex cases can be reduced. This evaluation should also ensure that any extra resources required to implement Review outcomes do not reduce service delivery capacity.

f) Renewal period

Currently Assessment Notices issued under the Act are valid for a three year period, unless otherwise cancelled⁴⁸. This is consistent with the Queensland system, but Victorian cards are valid for five years and New South Wales has recently announced that they will be moving to a five year validity period⁴⁹.

The Reviewer considered whether or not the renewal period could be increased to five years without increased risk to children.

Possible resource savings

The benefit of extending the renewal period from three to five years is that it represents a time and expense saving for child-related work employers and employees. It would also provide resource savings to Government in that the WWC Check is heavily subsidised, and would ease the increasing resourcing pressure that is currently on the WWC Screening Unit to process a high volume of cards (as discussed at 4.6, above).

Support was expressed in submissions to the Review for extending the renewal period. This would be particularly beneficial for community organisations with limited resources for the administration necessary to comply with the Act.

What is the increased risk to children?

The possible resource savings must be considered against the possible increased risk to children. Until continuous record checking is available at the national level, the extension of the renewal period would mean that there are two additional years where a card holder committing a relevant criminal offence in a State outside of Western Australia may not be brought to the attention of the WWC Screening Unit.

Information was not available for the Reviewer to quantify the risk in extending the renewal period by two years. Discussions with the WWC Screening Unit indicate that this risk is likely to be relatively small, given that the overwhelming majority of applicants hold no criminal record, and that although updates are not received through CrimTrac, information can be received through other mechanisms including advice from persons who believe a card holder has an offence of concern, and significant serious offences also usually appear in national media.

⁴⁸ Section 14 of the Act.

⁴⁹ <http://kids.nsw.gov.au/kids/resources/news.cfm?itemID=2D666893F5917D5E6DD0EF997E4B9C20>.

Extension of the application period would ease the resource pressures on the WWC Screening Unit, which as discussed above at section 4.6(e) of this Report is considered by the Reviewer to be operating at close to capacity. Section 4.7(b) of this Report, below, contains recommendations on non-criminal information that could be used as a 'trigger' for consideration of applications. Introduction of this information would provide another intelligence stream for the WWC Screening Unit, possibly mitigating against the risk of some criminal offences in other jurisdictions not being identified for an additional two years if the renewal period is extended.

In the absence of continuous national criminal record checking, the Reviewer was not inclined to make a stand-alone recommendation that the renewal period be increased. Instead, the overall risks and benefits of moving to a five year period of card validity should be considered as part of the structure and resourcing evaluation contained in recommendation 9 and any decisions by Government to allow non-criminal record triggers for application consideration as contained in recommendation 11.

RECOMMENDATION 10.

Consideration is given to whether card validity should be extended to five years, in the context of Recommendations 9 and 11.

4.7 Issues and recommendations - Other

a) Fees

Section 9(2)(c) of the Act allows for application fees to be set by regulations, currently \$51.50 for paid employees and \$10 for volunteers⁵⁰. As outlined in section 2.4, above, cost is heavily subsidised by Government, with the true cost being approximately \$95 per application.

Only two submissions raised the issue of fees. Scouts WA were of the view that fees should be waived for all applicants and advised that:

'even at \$10 (for volunteers) it is a significant cost and administrative expense that has to be reimbursed from our funds'⁵¹.

The Department for Communities submitted that the subsidy program for volunteer applicants be maintained⁵².

The terms of reference for this Review did not request an examination of the appropriateness of the current fee structure, and given that only two submissions were received on this matter, detailed consideration has not been undertaken. It is of note that the existing fee structure is heavily subsidised by taxpayers and the token fee paid by volunteers is in place to protect against unnecessary applications.

⁵⁰ As of 1 July 2012, the fees will increase to \$53 for paid employees and \$10.30 for volunteers.

⁵¹ Scouts WA, Submission to the WWC Act Review, 27 February 2012.

⁵² Department for Communities, Submission to the WWC Act Review, 28 February 2012.

b) Introduction of non-criminal ‘triggers’ for consideration of applications

Currently, only a criminal record (conviction, charge, or spent conviction), can trigger section 12 consideration of a person’s eligibility to be issued with a WWC Card. Non-criminal record information can be taken into account when deciding to issue a Notice based on the particular or exceptional circumstances of the case (section 12(8)(g)). However, a relevant criminal charge or conviction must first be present to ‘trigger’ the consideration.

The Act second reading speech in 2004 stated:

*At this stage it is not intended to consider records others than criminal convictions and charges. Consideration can be given to other types of records **when the basic building blocks are in place**. The minimum requirement is for consistent, reliable access to national convictions and charges (emphasis added).*

As stated above, since late 2010, convictions (including spent convictions), pending and non-convictions charges and the ‘circumstances’ of these offences have been available under the COAG MOU from all Australian States and Territories (excluding Victoria, where non-conviction information is not disclosed). Over its six years of operation, the WWC Screening Unit has developed and refined processes to receive and consider this criminal history information in a consistent and reliable manner.

Given this, the ‘basic building blocks’ contemplated by Parliament are largely in place and examination is now warranted as to whether non-criminal record information should be made available as a consideration trigger.

Employment disciplinary findings

The standard of proof in employment based disciplinary findings is ‘the balance of probabilities’, as opposed to the criminal standard of ‘beyond reasonable doubt’. Due to this, there are instances where adverse disciplinary findings do not result in criminal charges being laid. In the context of child-related work, relevant disciplinary matters include inappropriate sexual or physical behaviour towards children. At present, an employment disciplinary finding that did not result in a criminal charge cannot act as a trigger for consideration under the Act.

Employment disciplinary findings do not have the same standing as criminal proceedings and the rigour of the investigation can vary between employers. There is a very real risk that the inclusion of all employment disciplinary findings as a trigger for consideration under the Act, without regard to both the relevance of and the procedure behind the findings, would lead to poor quality or biased information.

In Queensland, this risk is mitigated by stipulating the workplaces that disciplinary findings can be received from, which includes substantiated abuse by foster carers. To be included, the employer or body must have a statutory basis, have an established disciplinary procedure that reflects the principles of natural justice, and have external avenues for appeal.

The second consideration is the type of disciplinary matters that can trigger consideration under the Act. In child-related workplaces, disciplinary matters will often have no impact upon the

safety of children, for example, findings concerning co-worker conflict or misuse of company resources. Only disciplinary findings that relate to sexual behaviour towards children or serious physical harm of a child would be relevant to the decision on whether a person is eligible for an Assessment or Negative Notice.

Information from Queensland and New South Wales is that such behaviour occurring in a work place is highly relevant in determining whether or not a person should be authorised to work with children, and in some cases the information may be more relevant than criminal records.

The resource implications of the inclusion of employment disciplinary findings should be explored. An increase in 'trigger' information will result in increased caseload or case complexity for the WWC Screening Unit. As discussed in section 4.6(e) of the Report, staff responsible for consideration of applications already have high caseloads. Any move towards increasing the complexity and/ or number of cases, should be made only after it can be determined that the increase can be finalised within a reasonable time. The second resource implication is on those employers and professional bodies that would be required to provide the relevant disciplinary findings for consideration under the Act. While the Queensland experience is that this is not an excessive burden, it is noted that it would impose an additional compliance requirement on these bodies. The WWC Screening Unit also advises that some bodies have wanted to provide information about persons considered to pose a risk to children but that this information could not be considered if no charges had resulted.

Notwithstanding the above, child safety in the workplace would be better protected if relevant disciplinary findings could be used as a trigger for consideration under the Act.

RECOMMENDATION 11.

The Act be amended to allow relevant disciplinary findings from prescribed employers and professional associations to be a trigger for consideration under section 12 of the Act. Relevant disciplinary findings are those relating to sexual behaviour towards children or serious physical harm of a child.

Protection and care orders

Protection and care orders may be issued by the Children's Court under the *Children and Community Services Act 2004*. Under section 28 of that Act, a child may be considered to require care or protection from their parents if they are subject to harm or neglect, which is defined broadly. While in some circumstances the harm may be directly relevant to the information considered under the Act (i.e. sexual behaviour or serious physical abuse), in other instances the order is related to a parent's capacity to cope within the home, however there is little prospect of harm to children occurring in the work place setting. Specific findings are more likely to relate to harm and parental capacity to protect rather than a particular person's culpability.

Given the broad range of circumstances that can result in a care or protection order being issued, this is not considered to be a suitable trigger for consideration under the Act. The

information should, however, continue to be considered under the Act section 12(8)(g) where there is a criminal (or disciplinary) record of concern and it is clear that Department for Child Protection has been involved. This information is often important to establish the context and behaviour of the applicant and to assist in determining whether there are exceptional or particular circumstances.

Police intelligence

In Queensland, police intelligence, where no charge or conviction resulted, is able to be considered in limited situations relating to alleged child sex offences⁵³. To meet the required threshold for consideration, the Police Commissioner must be satisfied of sufficient evidence of a scheduled offence, and that the investigated person was formally notified of the investigation or given an opportunity to answer the allegations. Also, that a charge had not been laid because the complainant had died, was unwilling to proceed, or it was not in the best interests of a child victim.

WA Police stated the following in their submission:

WA Police is concerned that relevant police intelligence suggesting that a person poses a risk to children cannot be considered by the CEO, unless a formal charge has been preferred. There have been instances where police intelligence holdings suggest that a person poses an extreme risk to children, but the evidence is insufficient to substantiate a relevant criminal charge”.

Addressing WA Police’s concerns through legislative amendment would extend beyond that provided by the Queensland provision. While the concerns of Police are acknowledged, information that is not strong enough to support laying a criminal charge would be of limited use as a ‘trigger’ to the CEO undertaking thorough and robust consideration as to whether an assessment or Negative Notice should be issued. Where there are other trigger offences, information about police investigations should continue to be considered under section 12(8)(g).

The Queensland provision may be suitable for consideration in the Western Australian context. However further consideration is warranted on issues such as an applicant’s ability to access the intelligence, the applicant’s right to challenge or test the veracity and/or reliability of the intelligence prior to receiving a Negative Notice, and the seniority within the WA Police Force at which such a discretion could be exercised.

⁵³ Section 305 *Commission for Children and Young People and Child Guardian Act 2000* (Qld).

RECOMMENDATION 12.

Consideration is given to amending the Act to allow certain police intelligence information, consistent with the limits and protections provided in the *Queensland Commission for Children and Young People and Child Guardian Act 2000*, to be a trigger for consideration under section 12 of the Act.

c) Deciding applications for Assessment Notices – ambiguity in section 12(8)(e) of the Act

In his submission to the Review, Hon Justice Chaney, President of the State Administration Tribunal expressed concern that section 12(8)(e) of the WWC Act as it is currently drafted is ambiguous. Section 12 of the Act directs how the CEO is to decide applications for Assessment Notices. In cases where an applicant has a criminal record history that allows CEO discretion in determining whether an Assessment or Negative Notice will be issued (sections 12(5) and 12(6) of the Act), section 12(8) directs that the CEOs consideration will have regard to a number of factors, including:

12(8)(e): the effect of future conduct by the applicant in relation to a child if that future conduct were the same or similar to conduct the subject of –

- (i) any offence committed by the applicant; or*
- (ii) any charge against the applicant*

Section 12(8)(e) was introduced as part of the 2010 amendments to the Act. The basis for this amendment, as stated in the second reading speech is as follows:

“It is the government’s intention that, even when an offence against a young person took place many years ago, the passage of time without further charges or convictions will not be sufficient to issue an assessment notice if a repetition of that type of behaviour would result in significant harm to a child. This government views the risk that these people pose to children to be unacceptable. Time without offending is a major component of psychological actuarial tools, which provide statistical profiles developed for decisions including sentencing and parole of sexual offenders. However, statistical profiles are not sufficient as the basis for decisions that allow specific offenders to work with children. There are severe consequences should a known offender who may fit a “low-risk profile” go on to harm a child. This risk is unacceptable.”⁵⁴

Justice Chaney expressed the view that this provision is difficult to comprehend and apply, as that in ‘almost every case... the effect of future conduct of the same character would clearly be unacceptable’⁵⁵.

The Reviewer agrees that the provision as currently drafted could be perceived as ambiguous. As the body responsible for hearing reviews on Negative Notice decisions, it is

⁵⁴Parliamentary Debates Legislative Council 18 November 2009, p.9193.

⁵⁵ Hon Justice Chaney, Submission to the WWC Act Review, 19 March 2012.

imperative that the State Administrative Tribunal can satisfactorily interpret and apply the Act. Accordingly, it is appropriate that the drafting of section 12(8)(e) be reconsidered to determine if the intent of this provision can be expressed in a clearer manner.

RECOMMENDATION 13.

Consideration is given to redrafting section 12(8)(e) to express its intent in a clearer manner.

5. Compliance

5.1 Compliance requirements under the Act

The Act seeks to contribute to the protection of children by putting in place a regulatory regime that vets the criminal record background of persons undertaking child-related work. Penalties are provided for non-compliance with the Act, for example, a person holding a Negative Notice who undertakes child-related work risks penalties of up to \$60 000 and imprisonment for five years⁵⁶. Employers engaging persons in child-related work without the employee holding or applying for an Assessment Notice risk a fine of up to \$12 000 and 12 months imprisonment⁵⁷.

The only provision in the legislation that explicitly provides compliance monitoring powers is section 42, which enables the CEO to require relevant employers, business owners and education providers, to provide 'specified information or documents that the CEO reasonably need to establish a person's compliance' with the Act.

The Parliamentary debates relating to the passage of the Act contain little information on how Parliament intended compliance to be monitored and enforced. In practice, this can be conducted in numerous ways, ranging from resource intensive monitoring, observation and prosecution actions, to holding the individual responsible for ensuring their own compliance.

Upon commencement of the legislation in 2006, government's resources were directed to establishing the application process and promoting the legislation to the community. Compliance was understandably a comparatively low priority in the start-up phase. When the Act was being developed there were assumptions that investigations of compliance breaches would occur in partnership with police as occurs in other jurisdictions. However following passage of the legislation it was determined that police would not have a formal role.

Following the recommendations of an operational review commissioned by the then Department for Community Development, a position of Senior Compliance Officer was established in 2007. This has been expanded over time to allow for a Compliance Manager, supported by two Senior Compliance Officers and a Compliance Officer.

⁵⁶ Section 23 of the Act.

⁵⁷ Section 22 of the Act.

The range of compliance activities undertaken by the WWC Screening Unit is demonstrated in the following table:

Figure 5.1: Spectrum of Compliance Activities Undertaken by the WWC Screening Unit

Soft compliance / support		Hard compliance / statutory	
<p>COMMUNITY ENGAGEMENT</p> <p>Provide information so people know about their obligations under the Act and how to comply</p>	<p>AUDIT</p> <p>Checking or ‘auditing’ employers for compliance. This includes following up employers where Negative Notices have been issued to employees or volunteers to ensure their obligations are understood</p>	<p>NOTIFICATIONS</p> <p>Receiving information from police and employers and the public about possible breaches of the Act, also new offences committed by person with WWC Cards</p>	<p>INVESTIGATIONS</p> <p>Identifying risks of non-compliance including persons working in breach of Negative Notices. Investigating these including ‘covert’ observation to identify if child-related-work has occurred. Also taking of evidence from witnesses and developing prosecution briefs for the State Solicitor’s Office.</p>

A challenge for the WWC Screening Unit is determining the areas of highest risk and allocating resources accordingly. There are currently over 283,000 Assessment Notice card holders, approximately 20,000 employers and 300 persons that hold a Negative Notice, Interim Negative Notice or have had their cards cancelled. The number of persons or employers that are working outside of the Act is unknown. Compounding this difficulty is the size of Western Australia, with often the highest non-compliance risk occurring in remote or regional areas.

To date, the WWC Screening Unit’s approach has been to exploit opportunities for ‘soft compliance’ through community promotion, either conducted by the WWC Screening Unit itself, or in partnership with WA Police, sporting and community organisations. This is further detailed in Chapter 6, below. While this is an effective strategy to ensure compliance in relation to persons in the community that are receptive to being engaged, it does not provide compliance assurance for those who are unwilling to participate in the regulatory scheme.

In this regard, the WWC Screening Unit does follow-up persons who have recently received a Negative Notice, or employers who are known to have previous compliance issues with the legislation. The WWC Screening Unit also receives intelligence from WA Police and the public concerning persons thought to be working in child-related work without having applied for an Assessment Notice or working with a Negative Notice.

5.2 Issues and recommendations

a) Resourcing of the compliance function

Compliance responses have improved over time with increased knowledge and improved capacity, but the Reviewer noted considerable gaps. The issues are explored under each compliance category outlined in the above table.

Community engagement

Employers and other clients who do not properly understand their obligations are referred to community education workshops conducted by the WWC Screening Unit. Observation of a workshop in November 2011, submissions, and discussions with stakeholders informed the Reviewer's conclusion that the community engagement activities are of a high quality. Within the metropolitan and regional areas there is unmet demand for workshops and one-on-one engagement. The WWC Screening Unit operates in partnership with other organisations to reduce resource costs. However, given that community engagement is primarily undertaken by 1.5 FTE there are very limited resources to meet the large community demand. This is covered further in Chapter 6.

Audit

The WWC Screening Unit has procedures in place to ensure all persons (and their employers, if relevant) who receive a Negative Notice or Interim Negative Notice are contacted to ensure the prohibition is understood.

There has, however, been minimal auditing of employers. Where this has occurred, it has taken place on an ad hoc basis, usually in response to an identified problem. Effort has recently been made to develop a framework and guidelines for voluntary and mandatory audits and a trial is currently underway. The proposed information management system is expected to assist in the targeting and development of audits. However this will not address the issue that the WWC Screening Unit does not currently have sufficient resource allocation for a dedicated auditing function.

Notifications

Section 17 of the Act enables the Commissioner of Police to provide identifying details to the CEO of persons charged or convicted of criminal offences that the Commissioner believes make it inappropriate for that person to carry out child-related work. This, combined with the arrangements to ensure continuous checking of Western Australian criminal records, provides a strong system of updated Western Australian criminal record histories for card holders during the three year life of the WWC Check.

Considerable work has been undertaken to develop strong working relationships with police including to receive information about new charges under section 17. While valuable information is provided, the scrutiny of the recent activity reports received through information management system links with WA Police is a major undertaking. Of the approximately 60 reports received per week, each requires individual checking to ascertain if any of the changes in criminal records require further consideration under section 12 of the Act. This is an

increasing resource demand and the time involved in data checking reduces the resources available to undertake investigations and audits.

Investigations

There are substantial penalties for breaches of the Act. The WWC Screening Unit receives 'intelligence' from a variety of sources about persons allegedly working with Negative Notices or persons who have not applied for checks, including those with offences of concern.

There are also persons whose past behaviour and breaches of other sanctions indicate they are at high risk of working in breach of their Negative Notice. Receiving and following up 'intelligence' and undertaking investigations must be the priority for compliance staff. Senior compliance staff within the WWC Screening Unit often have policing backgrounds, and their investigative skills are considered extremely beneficial.

There is however a small investigative capacity within the WWC Screening Unit when considering the size of the State and the coverage of the WWC scheme.

Overall comment

Government's priority in the first two years of the Act's operation was to establish the necessary structures to determine applications and ensure the community had a broad understanding of the legislation and its requirements. The Act has now been in place for sufficient time to require a focus on compliance. Without an increase in compliance activities the community is at risk of the Act being weakened in its ability to deter or prevent inappropriate persons from working in child-related workplaces.

While it is accepted that complete risk mitigation is not possible, a lack of compliance capacity may be perceived by the community as placing children in danger. The reputation of the WWC scheme would accordingly be at risk.

It is important therefore that the evaluation of the structure and staffing of the WWC Screening Unit, as per Recommendation 9, also consider the resources needed to adequately undertake compliance functions. It is suggested that such consideration include whether the existing close working relationship with WA Police can be built upon, particularly with regards to investigations that need to occur in regional and remote areas of WA. It is unlikely that the compliance capacity within the WWC Screening Unit could be built to the extent needed to undertake such investigations which require local knowledge and relationships.

RECOMMENDATION 14.

As part of the evaluation under Recommendation 9, the adequacy of the WWC Screening Unit's compliance staffing and processes is reviewed with a view to increasing compliance capacity. This should include clarifying and the role of WA Police in supporting and possibly undertaking certain compliance activities.

b) Information exchange between the WWC Screening Unit and the WA Police

The positive and collaborative working relationship with WA Police is a major factor in the implementation of effective compliance activities and working together to protect children. The amendments to the Act in 2010 improved the WWC Screening Unit's capacity to share information about the status of applicants and the outcomes of decisions and certain identifying information with police, as well as with employers and bodies regulated under section 38 of the Act. However both the police and WWC Screening Unit identify that there are still barriers to proper sharing of information necessary for the protection of children and these barriers need to be removed. The issues are as follows:

- Currently, section 17 of the Act gives the Commissioner of Police (or delegate) the authority to release specific information to the CEO. It is often the case, however, that the WWC Screening Unit requires additional information to make a more informed decision on the best course of action to take in the case of suspected breaches. The police are currently under no legal obligation to provide this additional information but they do so in the interests of assisting the WWC Screening Unit in making a more informed and accurate decision in the interests of the protection of children.
- Currently, section 17 of the Act only applies to WA Police. The WWC Screening Unit is increasingly receiving information about new offences from other law enforcement agencies, for example the Australian Federal Police. It should be noted that Class 2 offences include Commonwealth offences.

It is also anticipated that in future, updates of new offences will be able to be received from other jurisdictions through the information management system links with CrimTrac. Notifications from other law enforcement agencies should be able to be received under section 17 so that action can be taken promptly to reconsider that person's eligibility to continue holding a WWC Card.

- Section 34(2) of the Act mandates the Commissioner of Police to provide information only with respect to a person —
 - (a) who has a current Assessment Notice; or
 - (b) who has applied to the CEO for an Assessment Notice; or
 - (c) who has applied to the CEO for a Negative Notice to be cancelled; or
 - (d) if the CEO is given a notice that is to be treated under section 32(1) as an application by the person for an Assessment Notice.

It has been necessary to request police to provide information about persons who may have committed a breach under the Act by never applying for WWC Check. This is not explicitly provided for in section 34.

- Section 39(b) provides for disclosure of information for the purposes of investigating a suspected offence under the Act but does not allow similar disclosure to those undertaking

investigation of possible offences against a child or possible breaches of the *Community Protection (Offender Reporting) Act 2004*.

- Section 38 provides the CEO with authority to disclose information to a Public Authority about the WWC status of applicant if it is *in the public interest* to do so. The WWC Screening Unit receives requests from Western Australian and interstate police for information about applicants with a WA WWC Card whom they are investigating. The WWC Screening Unit increasingly holds information that would assist in preventing offences against children. People of concern do move across borders and information necessary to protect children in Australia should be provided to law enforcement bodies.

RECOMMENDATION 15.

Amend the Act to remove barriers to the provision of information to WA Police where this is necessary to perform functions under the Act or to support WA Police (and where appropriate other law enforcement agencies) to investigate possible offences against children.

RECOMMENDATION 16.

Include a provision explicitly enabling the WWC Screening Unit to provide information to law enforcement agencies about an applicant or compliance activity where this is in the public interest, including the investigation of possible offences against a child.

c) Information to other authorities

Section 38 provides for public authorities, prescribed by regulations, to be advised, when it is in the public interest to do so, about an applicant's WWC status (for example issue of a card, Negative Notice or withdrawal). Currently, bodies such as the WA College of Teaching⁵⁸ can be advised that a Negative Notice has been issued to a teacher, or the Department of Transport can be notified that a driving instructor has withdrawn after a proposal for a Negative Notice has been issued. This is an important part of the compliance mechanism as such bodies can register, license, or place conditions on persons.

There are other bodies, for example the Australian Health Practitioner Registration Agency, which also undertake these functions. It is considered important for the protection of children and to boost compliance with the Act, to be able to notify relevant regulatory boards/bodies when it is the public interest to advise them of a person's WWC status. There have also been instances where it has been in the public interest to provide an employer with information about the status of an ex-employee for the purposes of ensuring compliance and other legal proceedings.

⁵⁸ To become the Teachers' Registration Board as proposed by the *Teachers' Registration Bill 2011*.

RECOMMENDATION 17.

Amend section 38 of the Act to enable relevant regulatory boards/bodies as well as public authorities to be specified in regulations.

RECOMMENDATION 18.

Amend the Act to add the capacity to advise employers about the WWC status of an ex-employee where this is in the public interest or needed for compliance and other legal proceedings.

d) Investigative provisions

When gathering evidence during compliance investigations, compliance officers have not always been able to obtain the relevant documents from agencies necessary to determine the level of compliance. Consideration is required as to whether investigative provisions in other statutes are suitable for amendment to the Act.

The *Criminal Investigations Act 2006* provides police officers with the legislative power to issue 'A Notice to Produce'.⁵⁹ The Notice to Produce is used by the police to obtain business records and is similar in construct to that of a Search Warrant i.e. both documents require Justice of the Peace endorsement and both documents cease to be valid once served. It is important to note that a Notice to Produce does not authorise the use of force to gain entry.

Compliance Officers must also go to the homes or workplaces of persons under investigation, and have no specific authority under the Act to enter premises.

Other statutes routinely include provisions that allow government officers to access information and enter premises in order to carry out their duties. Under the *Public Sector Management Act 1994*, the Public Sector Commissioner is provided with a number of powers in respect of public sector bodies and employees when undertaking reviews under that Act⁶⁰: These powers include power of entry, obtaining documents, and directing an employee to answer questions.

The *Children and Community Services Act 2004*, allows 'authorised officers' to enter premises where children are employed for the purposes of inspection, and may require persons to answer questions⁶¹. This status would provide officers investigating compliance under the Act with the appropriate authority to gather information.

⁵⁹ Section 31 of *Criminal Investigations Act 2006*.

⁶⁰ Section 24D of *Public Sector Management Act 1994*.

⁶¹ Section 195 of the *Children and Community Services Act 2004*.

RECOMMENDATION 19.

Amend the Act to ensure that officers who are investigating compliance with the Act, have clear authorisation to do so and can enter relevant premises and obtain relevant information and records.

6.Promotion of the Act

6.1 Overview of promotional activities undertaken

The scope of persons and organisations required to understand and comply with the Act is considerable and includes:

- those undertaking child-related work (employees, volunteers, students on placement and self-employed persons);
- employers, volunteer organisations and education providers who have employees, volunteers and students on placement in child-related work; and
- parents and others in the community.

Within the above groups, the needs of rural and remote communities, Aboriginal and culturally and linguistically diverse groups must also be taken into account.

The WWC Screening Unit is responsible for communicating the requirements of the Act, and the legislation's place in child safety strategies generally. Within the WWC Screening Unit a Community Engagement and Policy team, consisting of 4 FTE, of which approximately 1.5 FTE is designated to the design and delivery of communication strategies directly to the public. The key information that is required to be communicated is:

- The purpose of the Act;
- Who is in scope of the Act and who is not eligible to apply;
- What the checking includes, how decisions are made, and how the WWC Check differs from other criminal record checks;
- What is required to comply with the Act; and
- What other child safeguarding strategies should be put in place alongside the WWC Check.

The focus and content of communication strategies has changed over time, given that Act was phased in over a five year period, and community awareness of the legislation has improved. As part of the phasing in period, funding was provided for a television and radio campaign. The current approach does not rely on mass-media, and uses a targeted approach underpinned by the principles of community development. This approach includes the following strategies and actions:

- WWC Check website – this website provides comprehensive information on the purposes and application of the WWC Check. Information is categorized according to audience – i.e. parent, employer, volunteer and students on placement. Complex information is presented in a series of Fact Sheets.
- Providing targeted written information and workshops to specific employer, cultural, religious and industry groups to improve understanding and compliance.
- Conducting regular workshops in the metropolitan area.

- Visits to regional areas, generally undertaken in partnership with other organisations, such as WA Police, Department of Sport and Recreation, WA Sports Federation, Constable Care and local governments.
- Engaging with Aboriginal organisations and communities, including partnership approaches with the WA Sports Federation, Noongar Sports Association, Constable Care Foundation, and Aboriginal Engagement and Coordination from the Department for Child Protection. Contact with Indigenous Coordination Centres in non-metropolitan WA is a precursor to any outreach visit to rural and remote communities.
- Paid advertising is currently limited to promotion of WWC Check workshops and regional visits through *The West Australian* and local newspapers. Articles and promotional material are submitted to publications such as the Child Care Association of WA, Catholic Education, Association of Independent Schools of Western Australia, and similar organisations.
- Attendance at conferences, forums, seminars where there is a high traffic of people in child-related work.

In addition to the Community Engagement team, a call centre is staffed by 3.5 FTE augmented by other officers on a roster. The Call Centre is often the first contact the public has with the WWC Screening Unit and the nature of the enquiries and their complexity ranges considerably, from assistance with understanding and application of the Act to resolving lodgement issues. The public can access Call Centre staff via telephone or through Checkquery (web messages sent from the WWC Screening Unit's website).

6.2 Issues and recommendations

a) Quality of information services provided by the WWC Screening Unit

The Reviewer was impressed by the quality of the information produced by the WWC Screening Unit. The website was considered to be easy to navigate and explained the legislation in an accessible style and form. In November 2011 the Reviewer observed an information session undertaken by the WWC Screening Unit, *Safeguard Children – Safeguard Your Organisation* and again was impressed by the accessible way in which complex information was conveyed. The partnership focus undertaken by the WWC Screening Unit enables for efficient deployment of resources, but also allows for what could be perceived as a negative compliance requirement, to be packaged more positively through broader sporting or community participation messages.

In consultation meetings undertaken as part of the Review, stakeholders were consistently positive about the professionalism of the WWC Screening Unit. One area where concern was expressed by stakeholders was the consistency of advice provided through the Call Centre. While staff were considered to be professional and helpful, complex questions, particularly concerning the scope of legislation, were not perceived to have been always answered satisfactorily. The complexity of who is in scope under the Act was discussed in Chapter 3. No two jobs will be the same, and the legislation does not provide the capacity, nor should it, to

provide definitive advice, or rulings on scope. There is, however, expectation from some callers that this advice should be provided and this has led to some callers being dissatisfied with the response from the Call Centre.

The scope issue is one example of the increasing complexity of enquiries received from the Call Centre. When the legislation was established, the bulk of enquiries were for basic information such as what the WWC Check was for and how to apply. Six years later the nature of the front line response has changed considerably. The Call Centre is staffed by relatively junior officers, who despite best efforts may not be attuned to the complexities of questions and as previously stated there may not be definitive answers to some questions. Monitoring responses for evaluation and improvement is currently not possible and the current information system does not allow data on calls to be collected.

The Call Centre phone system is currently being upgraded. These upgrades will enable greater capacity to match type/complexity of calls to the level of experience and competency of staff and also make it possible for data regarding the volume and types of calls received to be collected. This will contribute to more efficient management of Call Centre workloads and inform training requirements, including monitoring of calls.

Queries received from the public through the website are currently time consuming and cumbersome to manage. The proposed improvement to the WWC Screening Unit's information system is designed to improve this.

Currently, the WWC Screening Unit has limited capacity for training of staff, including Call Centre staff. The focus has been on induction and on the job mentoring, so that staff understand the relevant legislation and application lodgement issues. Whilst this will always be required, there has been little capacity to develop more advanced targeted training such as the advanced skills required to manage the WWC Screening Unit's front line services. The training required is often specific to the WWC Screening Unit and to the Act, and is not available elsewhere

RECOMMENDATION 20.

As part of the organisational evaluation in Recommendation 9 the resourcing and appropriate classification levels of the Call Centre is examined.

b) Communicating the message that ‘keeping children safe is a whole of community responsibility’

The various activities undertaken to promote the Act described above are developed in such a way to reinforce that the WWC Check is only one component of child safety in the workplace and community. In developing the WWC legislation, the policy framers were acutely aware that the biggest risk of the check was if it fostered a false sense of security.

Throughout the phasing-in period (2006 – 2010) the community outreach focus was primarily on who should apply for a WWC Check. There has been a shift in recent times to embracing the broader agenda of compliance to the legislation and child safety generally.

Promoting the WWC Check as one component in a suite of child-safety strategies is now reflected in all aspects of the WWC Screening Unit’s information to the community. There is expressed community demand for more information about child-safe, child-friendly practices, particularly the development of policies and procedures, staff/volunteer recruitment and risk management strategies in various employment and recreational settings.

Positioning WWC Checks as part of holistic child safeguarding strategies cannot be effectively provided through written materials and one off forums but requires a developmental approach with organisations. These community engagement and education functions are therefore labour intensive as well as requiring supporting printed and electronic resources. The Reviewer noted that despite creative efforts, partnerships and collaborative practice, the WWC Screening Unit is not able to meet the current demand.

Throughout this report the Reviewer has identified the need for increased focus on other child safeguarding strategies to properly balance over-reliance on the check and improve the safety of children as was intended by Government in setting up the legislation. It is suggested that a funding program be established to address this service need. This would be supported by the WWC Screening Unit which has expertise in the area and would need to provide training about the Act and to quality assure the program. The specifications for tendering out this program may include that it needs to be provided to both metropolitan and non-metropolitan services with priority to support smaller services, including those working with Indigenous and culturally and linguistically diverse populations.

RECOMMENDATION 21.

Consideration is given to the establishment of a funding program to support services working with children to put in place child safeguarding strategies that include the WWC Check.

7. Other

7.1 Indigenous research

The Review received a submission from the Aboriginal Health Council (AHC) which recommended that government commissioned research be undertaken into the WWC legislation and its potential impact on the Indigenous community across a number of social domains, with a view to informing government policy.

As relatively new legislation, the impact of the Working with Children Act on the Indigenous and other populations is as yet unknown. The Reviewer agrees that if such research could be undertaken it would be valuable in understanding the impact of child-related pre-employment screening programs on the indigenous and other vulnerable populations. However, according to the legislation, any decision making about whether or not to issue a WWC Check must place paramount consideration on the safety of children. Therefore, whilst the value of the suggested research is not in question, it is however unclear how this information might interact with the WWC legislation given its premise.

The prioritisation of resources is another important consideration in this conversation. The WWC Screening Unit is currently operating well, albeit with finite resources. However the demand for expanded resources in relation to areas such as information technology, compliance, and extending the WWC Screening Unit's community education provisions, which will ultimately contribute to child-safety on a practical level, must be prioritised over potential commitment to research endeavours.

7.2 Functional responsibility for the administration of the Act

At the time that the Act was introduced into Parliament, legislation establishing the Commissioner for Children and Young People was yet to be introduced, but the Government intended for "serious consideration" to be given to the WWC screening function being carried out by this Commissioner⁶².

The *Commissioner for Children and Young People Act 2006* established the Commissioner for Children and Young People (Children's Commissioner) and was proclaimed in December 2007⁶³. Clause 3 of Schedule 1 of that Act provides for the Children's Commissioner to replace the CEO as the decision making authority under the Act. This clause has never been proclaimed and the department principally assisting the Minister continues to be the Department for Child Protection (formerly the Department for Community Development).

The March 2012 report of the Joint Standing Committee on the Commissioner for Children and Young People, '*Report on the functions of the Commissioner for Children and Young People: Working with children checks*' (Joint Standing Committee Report) examined the issue of the appropriate authority to be responsible for screening under the Act.

⁶² Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 October 2004, p.6948.

⁶³ Government Gazette (WA), No 246, 23 November 2007, p.5861.

Finding three of the Joint Standing Committee Report was as follows:

“The administration of the Working with Children (Criminal Record Checking) Act 2004 is not an appropriate function for the Commissioner for Children and Young People”⁶⁴ .

The Joint Standing Committee reached this finding having regard to the former Select Committee on Advocacy for Children (Appointment of a Commissioner for Children) not being unanimously of the view that the WWC screening function was an appropriate role for the proposed children’s commissioner⁶⁵, and that evidence of the Children’s Commissioner to the Committee has “consistently maintained the view that having the WWC Check function would serve as a distraction from her core functions and may negatively impact on her advocacy role”. The Children’s Commissioner reiterated this view in her submission to this Review⁶⁶ .

The Reviewer concurs with the views of the Joint Standing Committee and the Children’s Commissioner.

RECOMMENDATION 22.

Repeal Clause 3 of Schedule 1 of the *Commissioner for Children and Young People Act 2006*.

7.3 Administration of the Act – mitigating against potential conflicts of interest

While the Joint Standing Committee Report endorsed the Department for Child Protection as being the most appropriate agency for administering the WWC Checks⁶⁷ the Committee held concerns about the potential for a conflict of interest, specifically in that the administering agency would be responsible for conducting checks on its own staff. The Joint Standing Committee recommended that the Act be amended “to enable periodic auditing of the working with children checks and renewals the administering body (currently the Department for Child Protection) performs on its own staff”.

The Reviewer concurs that there is a potential for a perceived conflict of interest to arise, but notes that the Department for Child Protection has structured its administration of the Act to mitigate against this risk. This includes the placement of the WWC Screening Unit within the Corporate Services Directorate, removing line management responsibility from the operational areas of the organisation, and locating the WWC Screening Unit in physically separate, secure premises. The Director of the WWC Screening Unit reports administratively to the Executive

⁶⁴ Western Australia, Joint Standing Committee on the Commissioner for Children and Young People *Report of the Functions of the Commissioner for Children and Young People: Working With Children Checks* 1 March 2012, p.v

⁶⁵ Western Australia, Joint Standing Committee on the Commissioner for Children and Young People *Report of the Functions of the Commissioner for Children and Young People: Working With Children Checks* 1 March 2012, p.4

⁶⁶ Commissioner for Children and Young People submission, dated 22 February 2012

⁶⁷ Western Australia, Joint Standing Committee on the Commissioner for Children and Young People *Report of the Functions of the Commissioner for Children and Young People: Working With Children Checks* 1 March 2012, Finding 6, page 17

Director Corporate and Business Services and to the Director General for all functions under the Act. As discussed in section 4.1 above, the Director General has delegated all of his powers as CEO under the Act to the Director, although it is acknowledged that the Director General is not excluded from exercising these powers should he choose to do so.

The Reviewer mapped the decision making processes used by the WWC Screening Unit, and examined a sample of notices issued under the Act. Through this the Reviewer formed the view that the Department, both in structure and practice, has taken reasonable steps to mitigate against a perceived conflict of interest arising in relation to decisions being made with respect to Departmental staff and foster carers, who are considered under the Act to be 'employed' by the Department. This is not to say, however, that a formal audit of some description would not be of benefit in assuring the Parliament and the public of this.

The Reviewer observed that a possibly higher risk potential or perceived conflict of interest relates to the compliance function. If concerns were present regarding the Department for Child Protection's compliance with the Act in relation to its role as an employer of persons in child-related work, investigation of any allegations and determination as to any prosecution would rest with the Director of the WWC Screening Unit. Given that any compliance failures would create embarrassment for the Department of Child Protection, it is imperative that clear and unambiguous protocols exist for the reporting and addressing of WWC Card compliance between the Screening Unit and the Department.

This potential for conflicts of interest would be resolved if administration of the WWC screening function was the responsibility of a stand-alone agency. However, the Reviewer is of the view that the conflict risk is not sufficiently high to warrant this. Creation of a stand-alone agency would come at a greater cost to Government, particularly with regard to the provision of corporate services; and the synergies that exist with the WWC Screening Unit sitting within the government agency primarily responsible for child protection would be lost.

The Reviewer concurs with the view of the Joint Standing Committee that the WWC screening function is most appropriately located within the Department for Child Protection. There is scope, however, for governance structures to be reviewed and strengthened to protect against a perceived or actual conflict of interest occurring. Provision for an audit function warrants consideration, but the Reviewer supports this being facilitated through the existing audit functions available to the Auditor General under the *Auditor General Act 2006*, rather than a legislative requirement under the WWC Act.

RECOMMENDATION 23.

Formalise governance arrangements for the WWC Screening Unit within the Department for Child Protection to minimise possible, perceived, or actual conflicts of interest. These governance arrangements should include channels for provision of advice such as, compliance issues, should they occur.

8. Appendices

Appendix 1.

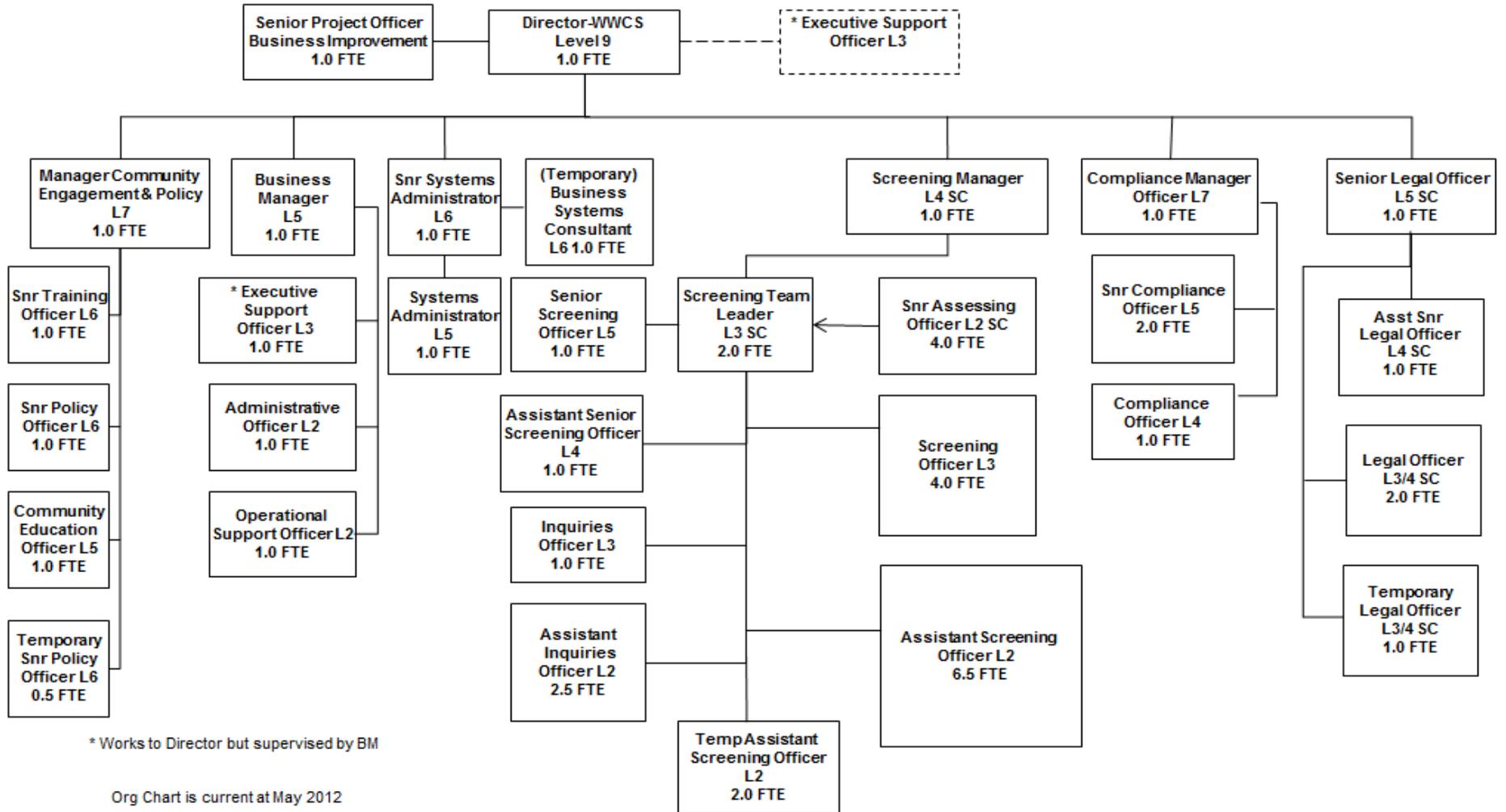
Submissions to the Review of the *Working with Children (Criminal Record Checking) Act 2004*

1. Aboriginal Health Council of Western Australia
2. Australian Medical Association Western Australia
3. Mr Brett Busby
4. Mr Charlie Chodorowski
5. Child Wise
6. Commissioner for Children and Young People
7. Curtin University
8. Ms Cynthia Pickering
9. Department of Education
10. Department for Communities
11. Department of Health
12. Department of Sport and Recreation
13. Department of Training and Workforce Development
14. Dr K Morrissey
15. Edith Cowan University
16. Mr Francis Smith
17. Independent Education Union of Western Australia
18. Joint Standing Committee for the Commissioner for Children and Young People
19. Joondalup Health Campus
20. Musica Viva
21. Office of Multicultural Interests
22. Office of the Public Advocate
23. Mr Paul Grundy
24. Pony Club Association of Western Australia
25. Scouts WA
26. Small Business Development Corporation
27. State Administrative Tribunal of Western Australia
28. Surf Life Saving Western Australia
29. Mr Tim Tucak
30. Mr Tony York
31. The University of Western Australia
32. Ice Hockey WA
33. Western Australia Police
34. WA Sports Federation
35. Western Australia Local Government Association
36. Western Australia Secondary School Executives Association Inc
37. Willetton Basketball Association Inc.
38. Working with Children Screening Unit

Appendix 2: Summary of Amendments to the Act which occurred in 2010.

Strengthening Assessment Provisions	Barriers to taking timely steps to protect children	Operational anomalies
New Class 1 and Class 2 offences	Removing the requirement to request a new application when police notify under section 17 that card holders have new offences reasonably believed to make it unsuitable for them to continue to hold a card so that assessment by the WWC Screening Unit could occur immediately.	Introducing provisions which enabled education providers such as universities and TAFE colleges to endorse the WWC application form for their students undertaking placements in child-related work and to have similar obligations to the 'employers' providing placements.
Clarifying the hierarchy of decision making provisions in section 12 and adding provisions to require a Negative Notice unless there were exceptional circumstances where a Class 3 offence involved an indecent Act and also providing capacity to issue adverse decisions where there were relevant pending Class 3 offences notified to the WWC Screening Unit by police or employers.	Rationalising card holder notification of relevant changes to their criminal records.	Introducing a provision to enable some applications in limbo to be terminated by deeming as 'withdrawn' applications from persons who do not respond to repeated attempts for information that would establish their eligibility to have the WWC Check.
An additional factor was added explicitly requiring the impact of harm on a child if behaviour involved in a charge or conviction were to be repeated, even when the offence occurred some time ago.	Requiring cards to be cancelled and returned where police notification is received that a person no longer in child-related work has committed an offence of concern.	
	Removing provisions for people to withdraw their applications and avoid being issued with a Negative Notice if they had been issued with an Interim Negative Notice.	
	Removing from certain people already assessed as a possible risk to children, access to the 'defence' allowing them to undertake child-related work for up to five days in 12 month period without lodging an application - such as when a previous card was cancelled or where an application was withdrawn after a Negative Notice had been proposed.	
	Broadening advice able to be provided in the public interest to authorised agencies under section 38, from information only about the issue of Interim Negative Notices and Negative Notices to whether a person had applied for or been issued with a WWC Card or had withdrawn their application. WA Police could also be given more details about the applicant.	

Working with Children Screening Unit Organisational Chart



Appendix 4. The categories of child-related work and the exemptions which may apply:

Category	Parent volunteer exemption	Other exemptions
1. A child care service (has the meaning given to that term under section 4 of the <i>Child Care Services Act 2007</i>)	<ul style="list-style-type: none"> Work carried out on a voluntary basis by a parent of a child to whom the service is being provided; or who is enrolled for, or otherwise ordinarily is provided with, the service. 	<ul style="list-style-type: none"> Police officers performing functions as a member of WA Police.
2. A community kindergarten registered under Part 5 of the <i>School Education Act 1999</i>	<ul style="list-style-type: none"> Work carried out on a voluntary basis by a parent of a child who is enrolled at the kindergarten. 	<ul style="list-style-type: none"> No other exemptions apply.
3. An educational institution for children	<ul style="list-style-type: none"> Work carried out on a voluntary basis by a parent of a child who is enrolled at the educational institution. 	<ul style="list-style-type: none"> Police officers performing functions as a member of WA Police. Universities established under a written law are excluded from the definition of educational institution for children.
4. A coaching or private tuition service of any kind	<ul style="list-style-type: none"> Work carried out on a voluntary basis by a parent of a child to whom the service is being provided in connection with an activity in which the child is participating, or ordinarily participates. When the coaching or private tuition is also in connection with a category 12) club, association or movement, the following broader exemption applies. Parent volunteers are exempt whose child is involved or ordinarily involved in at least some of the 'club' activities. 	<ul style="list-style-type: none"> An informal arrangement entered into for private or domestic purposes. Police officers performing functions as a member of WA Police. Coaching or private tuition provided to a class of two or more students, that is not provided primarily for children.
5. An arrangement for the accommodation or care of children, whether in a residential facility or private residence	<ul style="list-style-type: none"> Work carried out on a voluntary basis by a parent of a child in connection with an activity in which the child is participating, or ordinarily participates. 	<ul style="list-style-type: none"> An informal arrangement made by a parent of the child concerned. Police officers performing functions as a member of WA Police. Accommodation or care provided by a relative of the child. Arrangements for accommodation or care of children in a residential facility connected to, or used predominantly by students of, a university or other institution of tertiary accommodation.
6. A placement arrangement under the <i>Children and Community Services Act 2004</i>	<ul style="list-style-type: none"> No parent volunteer exemption. 	<ul style="list-style-type: none"> No other exemptions apply.
7. The performance by an officer, as defined in the <i>Children and Community Services Act 2004</i> , of a function given to the officer under that Act	<ul style="list-style-type: none"> No parent volunteer exemption. 	<ul style="list-style-type: none"> No other exemptions apply.
8. A detention centre, as defined in the <i>Young Offenders Act 1994</i> section 3	<ul style="list-style-type: none"> No parent volunteer exemption. 	<ul style="list-style-type: none"> Police officers performing functions as a member of WA Police.
9. A community child health service	<ul style="list-style-type: none"> Work carried out on a voluntary basis by a parent of a child to whom the service is being provided in connection with an activity in which the child is participating, or ordinarily participates. 	<ul style="list-style-type: none"> No other exemptions apply.

Category	Parent Volunteer Exemption	Other Exemptions
10. A counselling or other support service	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child to whom the service is being provided in connection with an activity in which the child is participating, or ordinarily participates. 	<ul style="list-style-type: none"> ▪ Police officers performing functions as a member of WA Police.
11. Religious organisation	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child in connection with an activity in which the child is participating, or ordinarily participates. 	<ul style="list-style-type: none"> ▪ No other exemptions apply.
12. A club, association or movement (including of a cultural, recreational or sporting nature and whether incorporated or not) with a significant membership or involvement of children	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child who is involved, or is ordinarily involved in some, or all, of the activities of the club, association or movement. 	<ul style="list-style-type: none"> ▪ An informal arrangement entered into for private or domestic purposes. ▪ Police officers performing functions as a member of WA Police.
13. A ward of a public or private hospital in which children are ordinarily patients	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child in connection with an activity in which the child is participating, or ordinarily participates. 	<ul style="list-style-type: none"> ▪ No other exemptions apply.
14. A baby sitting or child minding service	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child in connection with an activity in which the child is participating, or ordinarily participates. 	<ul style="list-style-type: none"> ▪ An informal arrangement entered into for private or domestic purposes.
15. An overnight camp, regardless of the type of accommodation or how many children are involved	<ul style="list-style-type: none"> ▪ No parent volunteer exemption. 	<ul style="list-style-type: none"> ▪ Police officers performing functions as a member of WA Police.
16. A transport service specifically for children	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child who is a passenger on the transport service, or is ordinarily a passenger on the transport service. 	<ul style="list-style-type: none"> ▪ No other exemptions apply.
17. A school crossing service, being a service provided to assist children to cross roads on their way to or from school	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child who is enrolled at the school. 	<ul style="list-style-type: none"> ▪ Police officers performing functions as a member of WA Police.
18. A children's entertainment or party service	<ul style="list-style-type: none"> ▪ Work carried out on a voluntary basis by a parent of a child in connection with an activity in which the child is participating or ordinarily participates. 	<ul style="list-style-type: none"> ▪ Performances open to the general public, not involving physical contact with children, whether on payment of a fee or otherwise. ▪ Where the service only involves the provision of equipment, food or a venue, and no other children's entertainment or party service. ▪ Police officers performing functions as a member of WA Police.

