1. THE NSW COMMISSION FOR CHILDREN AND YOUNG PEOPLE

1.1 The NSW Commission for Children and Young People was established in 1998 by the Commission for Children and Young People Act 1998 (‘the Commission’s Act’) to promote the safety, welfare and well-being of children in NSW.

1.2 Section 10 of the Commission’s Act lays down three statutory principles which govern the work of the Commission:
(a) the safety, welfare and well-being of children are the paramount considerations;
(b) the views of children are to be given serious consideration and taken into account; and
(c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children.

1.3 Section 12 of the Commission’s Act requires the Commission to give priority to the interests and needs of vulnerable children. Children are defined in the Commission’s Act as all people under the age of 18 years.

1.5 Section 11(d) of the Commission’s Act provides that one of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children.

2. GENERAL COMMENT

2.1 The Commission is pleased to make a submission to the research being undertaken by the Human Rights and Equal Opportunity Commission (‘HREOC’) concerning discrimination in employment on the basis of criminal record.

2.2 The Commission’s submission describes the operation of the legislation applying to child-related employment in New South Wales (‘the Commission’s legislation’). That legislation can be viewed as
promoting human rights, albeit giving priority to the best interests of children over the right to work with children, rather than facilitating discrimination on the basis of criminal record.

2.3 The Commission’s approach is consistent with article 3 of the United Nations Convention on the Rights of the Child which provides that in all action concerning children, the best interests of the child shall be a paramount consideration. The Commission notes that the Convention has been declared to be an international instrument relating to human rights and freedoms for the purposes of the Human Rights and Equal Opportunity Commission Act 1986 (‘HREOCA’).

2.4 Moreover, insofar as the Commission’s legislation restricts the right to work in child-related employment on the ground of criminal record, those restrictions can be understood as consistent with the principle of non-discrimination. The legislation provides for the risk to children to be assessed on a case-by-case basis in light of the inherent or essential requirements of the position in question and an individual’s relevant criminal record.

2.5 It should be noted that the Commission’s scheme prohibits certain people from working with children and does not preclude them from working generally. Few professional qualifications are limited to children only.

2.6 The Commission’s view is that safeguarding the best interests of children while supporting the principle of non-discrimination on the basis of criminal record, is best achieved by legislation that articulates the principles and criteria for child-related employment decision-making as well as establishing a process for the application of those principles and criteria in individual cases.

2.7 That process should also ensure that the privacy rights of individuals are respected as well as being accessible, expeditious and as clear as possible. The fact that there are different laws applying to criminal records and employment in each state and territory as well as federally in Australia means that there will be an inevitable level of complexity overall.

2.8 The Commission welcomes discussion of methods for reducing the level of complexity and promoting consistency between state, territory and federal legislation provided that the best interests of children remain the paramount consideration in child-related employment and NSW’s legislation is not weakened.

3 THE COMMISSION’S LEGISLATION

3.1 In New South Wales, the law dealing with the relevance of criminal records to child-related employment is set out in two Acts, the

Definition of child-related employment

3.2 The Acts refer to the same definition of child-related employment in the context of determining eligibility for employment. Child-related employment means employment in one of a number of specified services or industries where the employment primarily involves direct contact with children where that contact is not directly supervised.¹

3.3 This definition was considered by the New South Wales Industrial Relations Commission in HREA v Commission for Children and Young People². In that decision Peterson J stated that ‘one needs to construe the words in context as having an intention not to describe the major and substantial time or, indeed, … the major and substantial function, of the employee, but rather to view the phrase as it was intended, namely, to describe the primary or essential requirements of the job’. Peterson J noted that this interpretation accords with the child protection intention of the Act.

3.4 While Peterson J did not refer to the decisions referred to at point 5.1 of the HREOC Discussion Paper on the meaning of ‘inherent requirements’ in anti-discrimination law, those decisions can be used to clarify the meaning of primary or essential requirements of the job. In particular, it is important to consider the social, legal and economic context of the position as well as the job description (where it exists) itself.³ This will provide a means of objectively ascertaining the essential requirements of the position rather than relying upon the way in which the job description was written, whether or not it accurately reflects the job in practice. Just as the ability to perform a job without endangering the safety of other employees is an inherent requirement of any employment,⁴ the ability to perform a job without posing a risk to children can be regarded as an inherent requirement of child-related employment.

3.5 However, in making reference to the manner in which the term inherent requirements has been interpreted in anti-discrimination law, it is important to distinguish the different purpose of child protection law. Whereas anti-discrimination legislation is intended to promote equality of opportunity in employment, the purpose of legislation such as the Prohibited Employment Act and the Commission’s Act is to protect children from the risk of abuse. Accordingly, in the context of child protection legislation, an interpretation that promotes the safety

¹ Section 3, Prohibited Employment Act.
² [2001] NSWIRComm 93
of children should be preferred over one that promotes equality of opportunity.

The operation of the Prohibited Employment Act

3.6 The Prohibited Employment Act prohibits people who have been convicted of serious sex offences or who are registrable persons within the meaning of the Child Protection (Offenders Registration) Act 2000 from applying for or remaining in child-related employment. For the purposes of that Act, a conviction includes a finding that the charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction.

3.7 The definition of serious sex offences exempts offences that have ceased to be a serious sex offence in New South Wales and offences involving sexual activity or an act of indecency that would not have been an offence if the conduct had not occurred in a public place. However, the Act applies even where a conviction is otherwise spent under the provisions of section 579 of the Crimes Act 1900 (NSW).5

3.8 The rationale behind the Act is that in the case of serious sex offenders, there should be a presumption of risk to children that justifies the offender being prohibited from child-related employment without further inquiry into the circumstances of the offence and the person’s criminal record or the risk to children posed by that individual within the context of a particular job.

3.9 However, the Act also provides for exemptions from the application of the Act to be granted by the Commission, the Administrative Decisions Tribunal or the Industrial Relations Commission where that individual is able to show that he or she does not pose a risk to the safety of children. The factors that must be considered are:

(a) the seriousness of the offences with respect to which the person is a prohibited person,
(a1) the period of time since those offences were committed,
(b) the age of the person at the time those offences were committed,
(c) the age of each victim of the offences at the time they were committed,
(d) the difference in age between the prohibited person and each such victim,
(d1) the prohibited person's present age,
(e) the seriousness of the prohibited person's total criminal record,
(f) such other matters as the tribunal considers relevant.6

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5 The Commission for Children & Young People v 'AG' [2002] NSWSC 582
An order exempting a person from the operation of the Act can be made subject to conditions so that it can be made specific to certain types of employment.

3.10 The exemption process provides the opportunity for the essential or inherent requirements of the particular job to be matched against the individual’s criminal record and relevant background to assess whether that individual poses a risk to children. Viewed this way it is consistent with the principle of non-discrimination on the basis of criminal record, except where it is based on the inherent requirements of the job. The critical difference is that in the child protection context certain criminal records give rise to a presumption of risk which can be displaced by evidence to the contrary. However, until a prohibited person is granted an exemption the Act functions as a statutory bar to employment with children.

The Commission’s Act

3.11 In addition to the prohibitions on child-related employment applying to serious sex crime offenders, employers are required to undertake or arrange for mandatory background checks for prospective employees for child-related employment.

3.12 These checks are undertaken by Approved Screening Agencies (‘ASAs’). There are five ASAs including the Commission in New South Wales, each with responsibility for certain areas of employment.

3.13 The checking process involves a check for any relevant criminal record, for any relevant apprehended violence orders made against the person, for any relevant employment proceedings completed against the person and any other relevant probity check. In light of those checks, the ASA determines the level of possible risk of employing that person in child-related employment and provides that risk rating to the employer. It is up to the employer to decide whether to employ the person and the terms of that employment. The employer does not receive any information about the person’s criminal record, relevant apprehended violence orders or relevant employment proceedings.

3.14 The Commission’s Act\(^7\) authorises the New South Wales Commissioner for Police to disclose information to an ASA relating to any relevant criminal record or any relevant apprehended violence orders for the purpose of background screening.

3.15 Relevant criminal record means the criminal record of a person regarding an offence involving reportable conduct or any sexual offence, or an offence an element of which is an intention to commit

\(^7\) Section 38 Commission’s Act.
such an offence, or an offence of attempting, or of conspiracy or incitement, to commit any of the preceding offences:

(a) that was committed in New South Wales and that was punishable by penal servitude or imprisonment for 12 months or more, or
(b) that was committed elsewhere and that would have been an offence punishable by penal servitude or imprisonment for 12 months or more if it had been committed in New South Wales, and includes the criminal record of a registrable person within the meaning of the Child Protection (Offenders Registration) Act 2000, but only in relation to registrable offences within the meaning of that Act.

3.16 Reportable conduct means any sexual offence or misconduct committed in the presence of a child, any assault, ill-treatment or neglect of a child or any behaviour causing psychological harm to a child.\(^8\)

3.17 Information that may be disclosed is widely defined to include:

(a) information relating to spent convictions, despite anything to the contrary in the Criminal Records Act 1991, and
(b) information relating to criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged, and
(c) information relating to offences, despite anything to the contrary in section 579 of the Crimes Act 1900.

3.18 As provided in the Act, even charges that have been withdrawn or dismissed may be taken into consideration for the purpose of background checking. However, if any information is received through the background check about a relevant criminal record, relevant apprehended violence order or relevant employment proceeding, the ASA will advise the person about it and offer that person the opportunity to make comments about it and to provide further information. The ASA makes a determination of the possible risk of employing that person in a child-related position based on the position applied for, the circumstances of any information received through the background check and any other further information available to it. The risk rating process is undertaken according to an established framework developed by the Commission. In this way, the person’s criminal record is matched against the actual position to assess whether that record is relevant to the position applied for.

3.19 The risk rating is provided to the employer who decides whether or not to employ the person in light of the risk rating and other information such as job application and referee checks available to the employer. If the risk rating process has raised a concern, the employer and the

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\(^8\) Section 33, Commission’s Act.
job applicant have the opportunity to discuss that concern, and how it might be addressed. At that stage, the job applicant may wish to disclose to the employer the information that gave rise to the concern so it can further discussed. If the employer decides not to employ the applicant primarily because of the risk rating given to that applicant, then the employer must notify the Commission. The information the Commission receives about rejected job applicants cannot be used for any other purpose than its compliance functions.\textsuperscript{9}

3.20 As the Act does not prevent an employer from employing a person with a relevant criminal record, a job applicant who believes that he or she has been wrongly refused employment on the basis of criminal record could still make a complaint of discrimination on the basis of criminal record. Presumably if such a complaint were made to HREOC, the relevance of the criminal record would be taken into account in determining whether discrimination had occurred.

3.21 While the background checking process can be regarded as casting a wide net in terms of the criminal record information that can be taken into account, that approach is justified in terms of the paramount consideration of protecting the interests of children. Furthermore, the manner in which that record is assessed by ASAs restricts the use made of it to information that is directly relevant to the job in question. The risk rating process provides a means of matching the essential characteristics of the job with details of an applicant’s criminal records, while protecting the applicant from disclosure of those details to the prospective employer. The applicant is additionally protected from discrimination on the basis of criminal record by the right to make a complaint to HREOC in situation where the HREOCA applies.

4 EMERGING ISSUES

4.1 Over the last five years a range of statutory schemes designed to protect children in the employment context have been established across Australia. While those schemes largely focus on criminal records, research within Australia and overseas is also examining other ways in which potential risk to children can be identified. These trends raise a number of issues relevant to HREOC’s research. The Commission’s welcomes informed debate about these issues.

Employment performed in more than one state

4.2 New South Wales was the first state in Australia to establish a comprehensive statutory-based system of background checking job applicants to protect children from abuse. Since then almost all other states have established their own system or are presently considering doing so.

\textsuperscript{9} Section 40, Commission’s Act.
4.3 Where the child-related employment offered by a particular employer is to be performed in more than one state, an employer may need to comply with varying background checking requirements, defining the meaning of relevant criminal record and conviction differently. This position is further complicated by the way in which the law on spent convictions varies from state to state, as indicated by the table of spent conviction legislation appended to the HREOC Discussion Paper. This is where the NSW scheme is useful as it removes the need for employers to do this running around.

4.4 The range of schemes and the fact that their definition of criminal records varies can make it difficult for employers to determine when it is appropriate to take a criminal record into account. Criminal record checking across different jurisdictions may also be time-consuming. Where police are responsible for providing the criminal record check, their task is made more complex by having to determine what legislation applies and what information can be provided under the legislation in question. In some cases, particularly in relation to offences committed some time ago, the records may be incomplete or require the exercise of discretion in relation to the information that may be disclosed.

4.5 In the face of these complexities and possible delays, employers may find it simpler to ask job applicants and employees wide ranging questions about their criminal record and to refuse employment where any criminal record is revealed. This blanket approach carries with it the potential for discrimination on the ground of criminal record.

Other disclosure requirements

4.6 In addition to the legislation applying to criminal records in the context of child-related employment, a criminal record may also be relevant to professional qualifications or suitability. The Discussion Paper (at page 23) also refers to the relevance of criminal records to security concerns. Again, the differing ways in which certain criminal records may be relevant can make it difficult for an employer to determine the circumstances in which distinguishing on the basis of criminal record is justified.

The status of other relevant information

4.7 In addition to criminal charges, findings of guilt and convictions, there may be circumstances in which other information such as police intelligence is a reliable predictor of risk to children. In the United Kingdom, the Bishard Inquiry has recommended consideration of police intelligence where there have been multiple reports about a person posing child protection concerns, even though the person has not been charged. There may be pressure in the future for this kind of information to be able to be disclosed to employers in circumstances of potential risk.
4.8 Where a child-related employer has received information about a job applicant or employee that suggests a risk to children, but the person does not have a relevant criminal record, this can place the employer in a dilemma as to the use that can or should be made of the information. In that context, the employer may have to make difficult decisions about prioritising child protection concerns with potential discrimination and defamation issues.

Volunteers and criminal records

4.9 Employment is widely defined in the Commission’s legislation to include performance of work as a volunteer as well as paid work. The Prohibited Employment Act applies to volunteers but the background checking requirement under the Commission’s Act currently does not. However, the 2004 review of the Commission’s legislation has considered the extension of background checking to volunteers in certain potentially high risk situations. The definition of employment in the legislation of other states and in HREOCA may raise further complexities.

Documentation and Privacy

4.10 Resulting documentation being generated from the range of legislative provisions that can apply in one case may mean that record-keeping process becomes increasingly challenging. The sensitive nature of the information makes it imperative that individuals’ privacy be safeguarded appropriately.

5 RECOMMENDATIONS FOR CHANGE

5.1 As the Discussion Paper notes, there is a lack of clarity as to the relevance of criminal records in employment that may give rise to misunderstandings by both employers and employees as to what amounts to discrimination on the basis of criminal record.

5.2 The discussion above of the Commission’s legislation and emerging issues indicates the legislative situation relating to the relevance of criminal records in the child protection context is already complex and likely to become increasingly so. Given Australia’s federal system and growing awareness of child protection issues it is likely that each state will have its own legislative system for background checking.

5.3 The Commission strongly supports state and federal cooperation in developing nationally consistent legislation and policies in this area. In that respect the Commission notes the work of the Community Services Ministerial Working Group (‘CSMAC’), the current consideration of spent convictions legislation by the Standing Committee of Attorneys-General (‘SCAG’) and the discussion of relevant criminal records in the education context by the Ministerial
Council on Education, Employment, Training and Youth Affairs (‘MCEETYA’).

5.4 While the Commission agrees with HREOC that employers should have clear, transparent processes for making employment decisions on the basis of criminal records, the Commission believes that in the face of such complex legislative requirements, guidance should be provided to employers and employees about their responsibilities in this area. That guidance can take the form of legislation, policies or guidelines that clearly state the principles behind background checking and allow for prohibitions and checks to be adapted to individual situations. It should also stress the need for compliance with privacy rights and procedural fairness.

6 CONCLUSION

6.1 Protecting children from the risk of abuse in child-related employment is compatible with non-discrimination in employment as it is an inherent requirement of child-related employment that the work be performed in a way that does not put children at risk.

6.2 As described above, the Commission’s legislation allows for child protection concerns to be adapted to individual situations provided that the best interests of children remain the primary consideration.

6.3 The increasing challenge in this area is to have the legislative requirements and the underlying policy requirements appropriately reflect contemporary knowledge about child protection issues, the best interests of children and the right to work with children. These should be as consistent as possible, accessible and comprehensible to employers and employees, and procedurally fair. The Commission welcomes discussion of the complex issues involved and supports national cooperation towards consistency in legislation and policies.

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