SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Responses to Questions on Notice

Attorney-General's Department

Hearing 10 November 2009

RESPONSES TO QUESTIONS ON NOTICE

1. What are the provisions in each State and Territory that deal with how a screening unit decides what is information is relevant and should be taken into account?

In order to receive, take into account and further disclose Commonwealth criminal history information under the Crimes Amendment (Working With Children – Criminal History) Bill 2009, the Minister for Home Affairs must be satisfied that screening units:

- are permitted or required under a Commonwealth, State or Territory law to obtain and deal with information about persons who work, or seek to work, with children
- comply with applicable laws relating to privacy, human rights and records management
- comply with the principles of natural justice, and
- have risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

Under the terms of the COAG agreement, information provided to screening units is to be used solely for the purpose of child-related employment screening, and is not to be disclosed beyond the screening unit, or to persons not performing functions relevant to criminal record employment screening for child-related work, except in exceptional circumstances for a legislated child-protection function.

Currently, not all jurisdictions have established screening units. Existing screening units have the following procedures in place in relation to background checking. Where these procedures are inconsistent with the terms of the COAG agreement, amendments will be required. The Department is unable to comment on the form these amendments may take.

In **New South Wales**, under section 35 of the *Commission for Children and Young People Act 1998*, the Minister for Youth is required to publish guidelines relating to the procedures and standards for background checking. This includes procedures and standards in relation to the information to be provided to (or withheld from) employers by agencies carrying out background checking on their behalf.

The guidelines published on the Commission for Children and Young People website <http://kids.nsw.gov.au> indicate that the three types of information considered in a Working With Children background check are relevant criminal records, relevant apprehended violence orders (AVOs) and relevant employment proceedings.

The guidelines specify relevant criminal records as including charges or convictions for:

- any sexual offence (including sexual assaults, acts of indecency, child pornography, child prostitution and carnal knowledge)

- any assault to, ill-treatment of, neglect of, or psychological harm to, a child
- any registrable offence (including, where committed against a child, murder, sexual offences, indecency offences punishable by imprisonment of 12 months or more, kidnapping, offences connected with child prostitution, or possession or publication of child pornography)
- offences of attempting, or of conspiracy or incitement, to commit any of the above offences

where the offence was:

- committed in NSW and was punishable by penal servitude or imprisonment for 12 months or more, or
- committed elsewhere and would have been an offence punishable by penal servitude or imprisonment for 12 months or more if it had been committed in NSW.

The guidelines specify relevant AVOs as including AVOs, other than interim orders:

- made by a court under Part 15A of the *Crimes Act 1900*, or
- external protection orders (within the meaning of Part 15A of the Crimes Act 1900), registered in NSW, and
- made on the application of a police officer or other public official for the protection of a child (or a child and others).

The guidelines specify relevant employment proceedings as including findings by an employer that the following conduct occurred or may have occurred:

- reportable conduct - any sexual offence or sexual misconduct, committed against, with or in the presence of a child, including a child pornography offence
- any child-related personal violence offence
- any assault, ill treatment or neglect of a child
- any behaviour that causes psychological harm to a child, or
- an act of violence committed by an employee in the course of employment and in the presence of a child.

Further, under section 38 of the same Act, the Commissioner of Police may disclose criminal history information to the Commission or any employer approved by the Minister. This includes information about spent convictions, criminal charges whether or not heard, proven, dismissed, withdrawn or discharged and information relating to offences.

In **Victoria**, under sections 2.6.9 and 2.6.14 of the *Education and Training Reform Act 2006*, the Victorian Institute of Teaching is able to refuse to grant registration as a teacher or permission to teach to an applicant on many grounds. The following grounds are relevant to this question:

- Conviction or a finding of guilt for a sexual offence or an indictable offence in Victoria, or an equivalent offence in another jurisdiction.
- Conviction or a finding of guilt for an offence where the ability of the applicant to teach in a school is likely to be affected because of the conviction or finding of guilt or where it is not in the public interest to allow the applicant to teach in a school because of the conviction or finding of guilt.

Also in **Victoria**, under section 10 of the *Working With Children Act 2005*, a person may apply to the Secretary to the Department of Justice for a working with children check to be carried out on him or her and an assessment notice to be provided upon completion of the check.

Under section 12 of the same Act, the Secretary must refuse to give an assessment notice if the application is in respect of a person:

- who is subject to reporting obligations under Part 3 of the *Sex Offenders Registration Act 2004*
- who is subject to an extended supervision order under the *Serious Sex Offenders Monitoring Act 2005*
- who, as an adult, has at any time been convicted or found guilty of an offence (other than a child pornography offence) specified in clause 1 of Schedule 1 to the *Sentencing Act 1991* (sexual offences), in circumstances where the person against whom the offence is committed is a child, or
- who, as an adult, has at any time been convicted or found guilty of a child pornography offence.

Under section 13 of the Act, the Secretary must refuse to give an assessment notice if the application is in respect of a person:

- who has at any time been convicted or found guilty of an offence specified in clause 1 (sexual offences), other than in certain circumstances, clause 2 (violent offences) or clause 4 (drug offences) of Schedule 1 to the *Sentencing Act 1991*
- who has at any time been convicted or found guilty of an offence against section 71AB (trafficking in a drug of dependence to a child) or 71B (supply of a drug of dependence to a child) of the *Drugs, Poisons and Controlled Substances Act 1981*
- who has at any time been convicted or found guilty of an offence against section 46 or 47 of the *Sex Offenders Registration Act 2004* or against Part 5 of that Act (other than section 70) or against the *Serious Sex Offenders Monitoring Act 2005* (other than section 42(3))

- who has at any time been convicted or found guilty of an offence against section 271.4 (trafficking in children) or section 271.7 (domestic trafficking in children) of the Criminal Code of the Commonwealth other than in certain circumstances, or
- against whom a charge of an offence specified in clause 1 of Schedule 1 to the *Sentencing Act 1991* or an offence covered by the preceding points above is pending,

unless doing so would not pose an unjustifiable risk to the safety of children, having regard to:

- the nature and gravity of the offence and its relevance to child-related work
- the period of time since the offence was committed or allegedly committed
- whether a finding of guilt or a conviction was recorded or a charge is still pending
- the sentence imposed for the offence
- the ages of the applicant and the victim at the time of the offence
- whether or not the conduct that constituted the offence has been decriminalized since the offence was committed
- the applicant's behaviour since the offence was committed
- the likelihood of future threat to a child caused by the applicant
- any information given to the applicant in relation to the application, and
- any other matter the Secretary considers relevant.

Under section 14 of the Act, the Secretary must give an assessment notice if the application is in respect of a person:

- who has at any time been subject to a finding of a prescribed kind made by or on behalf of a prescribed body
- who has at any time been convicted or found guilty of an offence against Part 4 of the Act (other than section 37 or 40), or
- against whom a charge of an offence covered by the point above is pending,

unless satisfied in the particular circumstances that it is appropriate to refuse to do so, having regard to the points above in relation to section 13.

In **Queensland**, under section 100 of the *Commission for Children and Young People and Child Guardian Act 2000*, an employer may apply to the Commissioner for a prescribed notice about an employee in relation to regulated employment (child-related work). Under section 101 of the Act, a person may apply to the Commissioner for a prescribed notice about the person in relation to a regulated business (child-related business).

Upon receiving an application, under section 102 of the Act the Commissioner must decide the application by issuing one of the following, unless the application is withdrawn:

- a positive notice, where the application is approved, or
- a negative notice, where the application is refused.

Unless satisfied that the case is an exceptional one in which it would not be in the best interests of children to issue a positive notice, the Commissioner must issue a positive notice if the Commissioner:

- is not aware of any police information or disciplinary information about the relevant person
- is not aware of a conviction of the relevant person for any offence but is aware that there is one or more of the following about the relevant person:
    - investigative information
    - disciplinary information
    - a charge for an offence other than a disqualifying offence
    - a charge for a disqualifying offence that has been dealt with other than by a conviction
- is aware of a conviction of the relevant person for an offence other than a serious offence
- has cancelled a negative notice issued to the relevant person under the Act, or
- has issued an eligibility declaration to the relevant person and the declaration has not expired.

‘Serious offences’ include:

- offences involving the possession, sale, production or demonstration of an objectionable computer game, film, publication or photograph or the procurement of a child for such a film, publication or photograph
- offences involving the production, distribution or possession of child exploitation material
- offences involving prostitution
- rape, sexual assault, unlawful sodomy, indecent treatment of a child, bestiality child abuse, carnal knowledge with a child, abuse of a person with an impaired mind, procuring sexual acts by coercion, incest
- unlawful homicide, kidnapping, torture
- offences involving sexual servitude or child pornography
- offences involving trafficking, supply or production of dangerous drugs

‘Disqualifying offences’ include most of the above offences, but with the qualification that the offences were committed in different circumstances - generally involving a child victim.

The commissioner must issue a negative notice if the Commissioner is aware the relevant person:

- is a relevant disqualified person, other than only because the person is subject to a temporary offender prohibition order
- is a person, other than above, who has been at any time a relevant disqualified person, or
- has been convicted of a serious offence.

Other than in exceptional circumstances, the Commissioner must also issue a negative notice where the Commissioner has cancelled a negative notice issued to the relevant person under the Act, or has issued an eligibility declaration that has not expired, if the Commissioner is aware of any further police information or disciplinary information about the relevant person.

In deciding whether a case is an exceptional one, the Commissioner must have regard to the following:

- in relation to the commission, or alleged commission, or an offence:
    - whether it is a conviction or a charge
    - whether the offence is a serious offence and, if it is, whether it is a disqualifying offence
    - when the offence was committed or is alleged to have been committed
    - the nature of the offence and its relevance to employment, or carrying on a business, that involves or may involve children
    - in the case of a conviction, the penalty imposed by the court and if it decided not to impose an imprisonment order for the offence, or decided not to make a disqualification order, the court’s reasons for it decision, and
- anything else relating to the commission, or alleged commission, of the offence that the Commission reasonably considers to be relevant to the assessment of the person.

If the Commissioner is aware of investigative information about a person, the Commissioner must have regard to the following:

- when the acts or omissions were committed, and
- anything else relating to the commission of the acts or omissions that the Commissioner reasonably considers relevant to the assessment of the person.

If the Commissioner is aware of disciplinary information about a person, the Commissioner must have regard to the following:

- the decision or order of the decision maker relating to the disciplinary information and the reasons for the decision or order
- the relevance of the disciplinary information to employment, or carrying on a business, that involves or may involve children, and
- anything else relating to the disciplinary information that the Commissioner reasonably considers to be relevant to the assessment of the person.

Also in **Queensland**, under section 11 of the *Education (Queensland College of Teachers) Act 2005*, in deciding whether to register a person as a teacher or give the person permission to teach, the College must have regard to the person's criminal history. The College must find that a person is unsuitable to teach if the person's criminal history includes a conviction for a serious offence, as defined in the *Commission for Children and Young People and Child Guardian Act 2000* above, unless satisfied that the case is an exceptional one in which it would not harm the best interests of children for the person to teach.

In having regard to a person's criminal history, the College must consider the following matters relating to information about the commission, or alleged commission, of an offence by the person:

- when the offence was committed, or is alleged to have been committed
- the nature of the offence and its relevance to the duties of a teacher
- anything else the college considers relevant to deciding whether the person is suitable to teach.

In deciding whether a person is suitable to teach, the College must also have regard to information held by the College or reasonably available to the College about each of the following matters:

- any conviction of the person of an offence against a corresponding law or another law of a foreign country
- if the person has been refused registration as a teacher interstate or overseas – the reason for the refusal
- if the person has been employed by an employing authority for a school and the person's employment was ended for a reason relating to the person's competency or suitability to teach – the reason for ending the employment
- if the person has been registered under the Act or a corresponding law and the registration was affected by the imposition of a condition, suspension or cancellation of the registration or in another way – the reasons behind these decisions
- whether the person is suitable to work in a child-related field, and

- any other matter the College considers relevant.

In **Western Australia**, under section 12 of the *Working with Children (Criminal Record Checking) Act 2004*, the CEO of the Department of the Public Service is to decide applications for a child-related work assessment notice.

The CEO is not to decide an application unless a criminal record check in respect of the applicant has been conducted.

The CEO is to issue an assessment notice if he or she is not aware of any offence of which the applicant has been convicted or any offence (other than an offence that is neither a Class 1 or Class 2 offence) with which the applicant has been charged.

Class 1 offences generally refer to sex offences involving a child victim under 13 years of age.

Class 2 offences include sex offences involving child victims over 13 years of age, as well as offences such as carnal knowledge of animal, murder, grievous bodily harm, indecent assault, sexual penetration without consent, child pornography, objectionable material offences and prostitution offences involving children.

Where an applicant has a non-conviction charge in respect of a Class 1 or Class 2 offence, or a conviction for an offence other than a Class 1 or Class 2 offence, the CEO is to issue an assessment notice unless satisfied that in the particular circumstances a negative notice should be issued.

In this case, 'circumstances' includes:

- the best interests of children
- when the offence was committed
- the age of the applicant when the offence was committed
- the nature of the offence and any relevance it has to child-related work
- any information given to the applicant in relation to the application, and
- anything else that the CEO reasonably considers relevant.

The CEO is to issue a negative notice to an applicant unless exceptional circumstances (as above) suggest otherwise if the CEO is aware of a conviction for a Class 1 offence (committed by the applicant as a child), a conviction for a Class 2 offence or a pending charge in respect of a Class 1 or Class 2 offence.

If a Class 1 offence is committed other than when the applicant was a child, a negative notice should be issued.

In the **Northern Territory**, under section 187 of the *Care and Protection of Children Act 2007*, a clearance notice is required for anyone engaged or proposing to engage, in child-related employment.

Under section 189 of the same Act, the Screening Authority must not issue a clearance notice to an applicant if the candidate has been convicted of an offence, or has a criminal history, that is prescribed by regulations.

This Screening Authority exists in law but is not yet in operation. The regulations have not been finalised. Northern Territory officers have indicated that the Screening Authority is expected to be in operation by early 2010.

Northern Territory officers have also indicated the following in relation to how the screening process will be conducted:

- Applicants for a clearance notice will be invited to self-disclose any criminal history on the application form, and at that stage will be encouraged to add any information for consideration by the Screening Authority relating to the offences/charges disclosed.
- If the Screening Authority discovers items of concern in an applicant's criminal history, then under the gazetted administrative guidelines the Authority is required to contact the applicant in writing, notifying of the charges/offences of concern and inviting submissions prior to the finalisation of the decision.
- Under the Act, the Screening Authority is able to consider any information offered by the applicant. This may include current references from employers or community leaders, proof of completion of sentence/rehabilitative programs, circumstances information from prosecuting authorities or sentencing statements from the courts. The Screening Authority has the ability to meet with the applicant, either at the instigation of the vetting panel or the applicant who seeks to provide further information.

Where an applicant does not have any prior convictions or criminal history prescribed by regulations, the Authority must also have regard to administrative guidelines in deciding whether the person poses an unacceptable risk of harm or exploitation to children and, subsequently, whether to issue a clearance notice.

Under section 191 of the Act, the administrative guidelines are made by the CEO of the Agency administering the Act and may provide for matters the Authority must take into account in making the decision and how those matters may be taken into account. This includes the following:

- the whole of the person's criminal history
- in relation to any offence the person has committed:
    - the nature and gravity of the offence
    - the relevance of the offence to child-related employment
    - the age of the victim when the offence was committed
    - the time that has elapsed since the commission of the offence

- in relation to any alleged commission of an offence, the risk of harm or exploitation to children posed by the person, and
- any other matter the Authority may reasonably take into account in the circumstances.

Under section 197 of the Act, the regulations may make further provision for the procedure for the making of a decision by the Authority.

2. What are the ramifications in each State and Territory if an employer is told that someone is not suitable to work with children and they choose to employ them anyway?

In **New South Wales**, under section 33E of the *Commission for Children and Young People Act 1998*, an employer must not commence employing, or continue to employ, in child-related employment a person that the employer knows is a prohibited person. This offence carries a penalty of 100 penalty units for a corporation, and 50 penalty units in any other case.

The guidelines published on the Commission for Children and Young People website (<http://kids.nsw.gov.au>) also specify that it is an offence to employ a prohibited person.

In **Victoria**, under section 2.6.56 of the *Education and Training Reform Act 2006*, a person or body must not employ a person to teach in a school unless the persons is registered as a teacher, or has permission to teach, under the Act. The penalty for this offence is 120 penalty units.

Also in **Victoria**, under section 35 of the *Working with Children Act 2005*, a person is guilty of an offence if the person engages, or continues to engage, another person in child-related work and the other person does not have a current assessment notice and the employer is aware that the other person does not have a current assessment notice or is reckless as to this fact. The penalty for this offence is 2 years imprisonment or 240 penalty units, or both and, in the case of body corporate, 1200 penalty units.

In **Queensland**, under section 107 of the *Commission for Children and Young People and Child Guardian Act 2000*, an employer must not employ, or continue to employ another person in regulated employment if the employer is aware that a negative notice has been issued to the employee and is current. The penalty for this offence is 200 penalty units or 2 years imprisonment.

Also in **Queensland**, under section 82 of the *Education (Queensland College of Teacher) Act 2005*, the employing authority for a prescribed school must not employ a person as a teacher unless the person is an approved teacher, or allow an approved teacher to teach if the person's registration or permission to teach is suspended. The penalty for both offences is 200 penalty units.

In **Western Australia**, under section 22 of the *Working with Children (Criminal Record Checking) Act 2004*, an employer must not:

- Employ a person in child-related work if the employer is aware of a Class 1 or Class 2 offence of which the person has been convicted or has a pending charge for, and the person does not have a current assessment notice and does not have a pending application for an assessment notice. The penalty for this offence is a fine of $60,000 and imprisonment for 5 years.

- Employ a person in child-related employment if the employer is aware that a negative notice or an interim negative notice has been issued to the person and is current. The penalty for this offence is $60,000 and imprisonment for 5 years.

- Employ a person in child-relate employment in connection with a child care service if the person does not have a current assessment notice and does not have a pending application for an assessment notice. The penalty for this offence is a fine of $12,000 and imprisonment for 12 months.

In the **Northern Territory**, under section 187 of the *Care and Protection of Children Act 2007*, a person must not engage an individual in child-related employment unless the individual holds a clearance notice that is in force. The penalty for this offence is 500 penalty units.

3. Which jurisdictions are setting up new screening units because of the COAG agreement?

No jurisdiction has indicated that it will be establishing a new screening unit because of the COAG agreement.

With the exception of South Australia, Tasmania and the Australian Capital Territory, all jurisdictions currently have screening units in operation. However, if these jurisdictions wish to receive the expanded criminal history under the COAG agreement, new screening units would need to be established.

4. Where in the Second Reading Speech or Explanatory Memorandum does the Minister state that the aim of the Bill is simply to provide information about certain Commonwealth offences to States and Territories for them to take into account in doing what they already do to assess a person's suitability for working with children?

The Explanatory Memorandum, at page 1, states the following:

> The purpose of the Bill is to implement the [COAG agreement] for facilitate the inter-jurisdictional exchange of criminal history information for people working with children (ECHIPWC), including information about spent, pardoned and quashed convictions.
>
> As part of the agreement, each jurisdiction is required to remove legislative impediments to the exchange of criminal history information for people working with children. This Bill removes the legislative barriers at Commonwealth level to ensure that the Commonwealth can provide information in accordance with the COAG agreement.

The Second Reading Speech, at page 4, states the following:

> The current provisions in the Crimes Act prevent the disclosure of a person's full criminal history. This Bill carves out an exception to these provisions, allowing for the inter-jurisdictional exchange of criminal history information, including information on pardoned, quashed and spent convictions, for the specific purpose of child-related employment screening.