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Submission on the Working With Vulnerable People Background Checking System

We are writing to you in response to the Community Services Directorate's (CSD) invitation to the community to have their say on the proposed *Working with Vulnerable People (Background Checking) Bill 2010* (WWVPCS), including the Risk Assessment Guidelines and Application Form, the Risk Management Assessment Tool, the Government Amendments to the Bill and the Regulations.

Thank you for meeting with the Alcohol Tobacco and Other Drug Association ACT (ATODA) and the Mental Health Community Coalition ACT (MHCC ACT) on Friday 26 August 2011 to make a verbal submission. As discussed with you, this written submission is a follow up to our discussions.

We have been working closely with the Health Directorate to identify outstanding issues and suggest options for the resolution of these issues identified within the proposed system.

We acknowledge the considerable work undertaken by the CSD and Office of Regulatory Services (ORS) to develop the proposed system. As discussed, we are happy to work with you and the ORS to provide further feedback on subsequent revisions of the documents related to the system.

1. Review of the Act, implementation schedule and supporting documentation

CSD's proposed changes to the *Working with Vulnerable People (Background Checking) Bill 2010* (the Bill) to include *Clause 63 Review of the ACT* and an *Implementation Schedule* that allows for findings from the review to be considered prior to the commencement of checking for those in the *mental health* and the *services for addictions* areas are welcomed.

However, we seek to have checking for those in *justice facilities* commence no earlier than checking in the *services for addictions* area. The implementation schedule should be amended to move *justice facilities* from September 2014 to February 2015 (page 14) to September 2017 to February 2018 (page 17).

Unless this change is made, given all ACT drug treatment services for adults outreach into the adult justice facility (the Alexander Maconochie Centre), the schedule for implementation in the *services for addictions* area by default is brought forward to September 2014 to February 2015. This would mean findings from the review will not be considered prior to checking commencing in the *services for addictions* area which would be a significant problem. This would also then not align with our discussions with Minister Burch regarding our sectors being introduced following the review.

All references in the supporting documentation relating to the mental health, alcohol and other drug and the justice areas need to be removed at this time on the basis that:

- The review will be completed and findings from the review considered prior to the commencement of checking for those in the *mental health* and the *services for addictions* areas;
- To include reference to these areas at this stage in the supporting documentation would unnecessarily confuse prospective applicants and employers as to current requirements; and
- We anticipate the supporting documentation will require amendments to address shortfalls identified as part of the review. This will provide an opportunity for the inclusion at that time of references relating to the mental health, alcohol and other drug and justice areas.

2. References to Alcohol Anonymous and Narcotics Anonymous to be removed from the Bill

Currently the Bill inappropriately cites Alcoholics Anonymous as an example of a regulated activity (page 63). These peer support programs need to be explicitly excluded from the definitions in the Bill of *services for addictions*.

By their very nature, in the area of illicit and injecting drug use, many of the peers involved in these programs currently use or in the past have used drugs which they have obtained illegally. The whole premise of the peer support programs is those who are likely to benefit from the programs see themselves as having or having had similar problems to those supporting them.

To illustrate this further, according to the Narcotics Anonymous Australia website:

Narcotics Anonymous is active in over 60 countries... NA's primary approach to recovery is the belief in the therapeutic value of one addict helping another... The basic premise of anonymity allows addicts to attend meetings without fear of legal or social repercussions. This is an important consideration for an addict thinking about going to a meeting for the first time. Anonymity also supports an atmosphere of equality in meetings. It helps ensure that no individual's personality or circumstance will be considered more important than the message of recovery shared in NA... Members take part in NA

meetings by talking about their experiences and recovery from drug addiction...

NA meetings and other services are funded entirely from donations by addict members and the sale of recovery literature. Financial contributions from non-members are not accepted. NA meetings are informally structured, held in space rented by the group, and are led by members who take turns opening and closing the meeting. Those who feel they may have a problem with drugs, legal or illegal, including alcohol, are welcome in NA. Recovery in NA focuses on the problem of addiction, not on any particular drug.

Unless these peer support programs are explicitly excluded from the definitions in the Bill of *services for addictions*, programs operating across the world (such as NA) are unlikely to be viable in the ACT. These programs are a critical component of support available in the ACT for those wishing to reduce the harm caused by their drug use.

3. Telephone contact

CSD's proposed change to the Bill to provide an exemption for those receiving and transmitting information by telephone, such as volunteers or employees on telephone help-lines is welcomed.

However, the change serves to highlight the need to also provide an exemption for those *dealing with a record relating to a vulnerable person* and those *making a decision that affects the vulnerable person* where there is no physical contact with the vulnerable person. The level of risk in these cases is significantly less than that of the exempted volunteer or employee on a telephone help-line. Without this further amendment, the legislation would create a further anomaly and a barrier for the highly valued contribution of many consumer representatives on committees and boards of many organisations.

4. Acknowledge recovery and rehabilitation in full registration

The wording in the Commissioner's Risk Assessment Guidelines currently suggests that the only option for people who may have posed an unacceptable risk in the past is role-based registration. This is problematic because it rules out the possibility that someone who may have posed an unacceptable risk in the past may now be considered eligible for full registration because the degree of risk they pose now is the same as others being considered eligible for full registration.

Solution:

Suggest paragraph 2 on page 3, in the Commissioner's Risk Assessment Guidelines is re-worded to say:

The system is designed to ensure that people entering into activities that are regulated under the Act do not pose an unacceptable risk to the vulnerable people they may work with. The system has been designed in a way that recognises some people can make significant changes in their lives. People can, for example, recover from some types of health problems (e.g those associated with mental health or alcohol use) which means that they no longer

pose an unacceptable risk to the vulnerable people they may work with. In some cases these people will be eligible for full registration and in other cases it may result in these people being eligible for a role based registration with the support of their employer.

5. Risk identification

Paragraph 1 on page 4 of the Commissioner's Risk Assessment Guidelines states 'There may be occasions where a person presents with no convictions, but there is substantial other information supplied to the Commissioner from other sources.'

The issue being raised is not that other information may be provided to the Commissioner but rather that the other information which may be provided may result in the individuals being assessed as posing a higher risk.

Solution:

Suggest paragraph 1 on page 4 in the Commissioner's Risk Assessment Guidelines is re-worded to say:

There may be occasions where a person presents with no convictions, but there is other information presented to the Commissioner which may result in the individual being considered to pose a higher risk.

6. Risk Analysis

Sentence 2 or paragraph 2 on page 5 of the Commissioner's Risk Assessment Guidelines currently indicates the Commissioner will consider a spent conviction a lower risk to the vulnerable person than an unspent one. This is only likely to be true if the conviction is deemed relevant to the potential risk posed to the vulnerable person.

It would also be highly preferable that whether or not a conviction is spent is used only as a guide rather than it being interpreted in a prescriptive way. For example spent or unspent convictions should not automatically constrain the length of time within which someone may be considered eligible for a general registration, a conditional or role based registration, or a negative notice.

7. Expand membership of the Registration and Licensing Committee

We are concerned that the make up of the proposed Registration and Licensing Committee is limited to Office of Regulatory Services officials given its role in reviewing complex cases and making recommendations to the Commissioner.

Solution:

The Registration and Licensing Committee is expanded beyond an internal ORD committee, to include at least one independent person with relevant expertise. Alternatively a working group of the ORD committee could be established with at least one independent person with relevant expertise on it.

We understand a similar model operates within Legal Aid ACT, through the Legal Aid

Review Committee, where a panel of lawyers, community representatives and other appropriate people from an identified list is convened to examine individual cases and makes assessments. The list would need to include health professionals, social workers and others skilled in the areas related to the nature of the complex case.

Following our verbal submission we acknowledge and understand that this Committee is currently under review and request that these issues be considered as part of the review process.

8. Advisory Panel

Paragraph 7 on page 5 of the Commissioner's Risk Assessment Guidelines suggests the panel will only form as necessary and its membership will consist of individuals with specific capacity relating to each specific case.

It would be preferable that the panel only meet as necessary, rather than only form as necessary. It would also make more sense to establish a panel with a level of expertise that would be likely to enable most cases to be dealt with but to have capacity to co-opt members with specific expertise as required.

Solution:

Suggest paragraph 7 on page 5 in the Commissioner's Risk Assessment Guidelines is re-worded to say:

The panel will meet as necessary and its membership will include health professionals with a capacity to agree or otherwise with an applicant's claim that they may have recovered from past health problems to the extent that they now pose a level of risk that would allow them to work with vulnerable people consistent with other individuals. The panel will also have the capacity to co-opt members with specific expertise as required.

9. Restricted interpretation in risk assessment due to breadth of offences under a category of offence

We are concerned that the categories of offences used in the tables on pages 6-14 of the Commissioner's Risk Assessment Guidelines are too broad and could be used to restrict the level of interpretation and analysis that the assessor could undertake.

As an example, the tables make reference to the broad category of sexual offences. A brief look at the Crimes Act 1900 (ACT) indicates that there are a wide range of offences that could come under this category, with vastly different perceived seriousness and maximum penalties that can be applied. For example:

- Offences involving sex with a person under 10 years carry a maximum sentence of 17 years imprisonment;
- A person who engages in sexual intercourse and is reckless as to whether there is consent could be sentenced to a maximum 12 years imprisonment;
- Possessing child pornography carries a maximum of 7 years imprisonment;

- Indecent Exposure is a summary offence, and while not specifically listed as a sexual offence is generally categorized as such, and has a maximum penalty of 1 year imprisonment; and
- Urinating in Public comes with a strict liability fine.

Clearly the intention of the system would not be to automatically refer someone with a far less serious sexual offence (such as urinating in public) directly to the Referral Advisory Panel as is indicated within the table related to clubs, associations and movements (see page 14).

The system needs to have built into it flexibility for professional judgement. The system should allow the Background Screening Unit to differentiate scale of offences within an offence category. For example, under the offence category of fraud and dishonesty a range of offences are captured in the ACT Criminal Code including but not limited to:

Giving false or misleading information to Territory	Passing valueless cheque	Makes off without payment worth more than \$2000	Making false statement in oath or stat declaration	Obtaining financial advantage by deception
Max. penalty 1 year imprisonment	Max. penalty 1 year	Max. penalty 2 years	Max. penalty 5 years	Max penalty 10 years

Clearly if the system was functioning as intended, it would be able to differentiate between a single mother with a mental health issue who defrauded Centrelink by not declaring changes to her circumstance five years earlier to a person who engaged in blackmail and was imprisoned for the offence.

Solution:

We recommend that a single table is developed, which acknowledges the spectrum of offences within an offence category to highlight both the maximum penalty for an offence and the range of offences within the category, and that this table be used only used to guide, not prescribe, a risk assessment.

In addition to this table it is recommended that, as in NSW in relation to those who work with children, anyone with a conviction for a serious sex offence, or serious violence against a child is prohibited from working with children in the ACT.

10. No general transportable registration within the proposed system

We understand that one of the key purposes of the proposed system is to provide individuals, where applicable, with general registration that is transportable across regulated activities so as to create a streamlined, consistent, cost-effective and efficient system. However, the way the offences are currently categorised this is not the case.

The information in the table below is collated from the 16 tables in the Draft Risk Assessment Guidelines of which categories of offence equate to a general registration. What is clearly demonstrated in this table is that different types of offences could equate to different types of general registration for different regulated activities. The consequence of this could be, for example that an individual with an offence relating to property spent can be granted a general registration to work within a homeless service; however, six months later when they change jobs to work in a community service then they would need to reapply for another 'general' registration because this is classed as a category of offence requiring assessment of associated issues.

This implies that all general registrations would need to, on some level, be contingent on the nature of the work an individual is engaged in and attract conditions which would need to be explicitly stated on the general registration (e.g. general registration for homeless services only).

Regulated activity	No criminal history	Driving offence spent	Offence not relevant spent	Offence not relevant unspent	Offence relating to property spent	Driving offence unspent
Children's services	✓	✓	✓		✓	✓
Migrants, refugees and asylum seekers	✓	✓	✓	✓	✓	
Homeless services	✓	✓	✓	✓	✓	
Housing and accommodation	✓	✓	✓	✓	✓	
Prevention of crime	✓	✓	✓	✓	✓	
Victims of crime	✓	✓	✓	✓	✓	
Community services	✓	✓	✓	✓		
Disability services	✓	✓	✓	✓		
Transport services	✓		✓	✓	✓	
Coaching and tuition services	✓	✓	✓	✓		
Vocational and educational training	✓	✓	✓	✓		
Religious organisations	✓	✓	✓	✓		
Clubs, associations and movements	✓	✓	✓	✓		

There is further confusion related to the above where it would require individuals, on the application form, to indicate which regulated service they planned to work in for

general registration purposes. Again, it is understood that this information need not be stated at this stage in the process and would undermine the transportability of any general registration.

It requires an unrealistic shared understanding by community members and ORS staff of how the service or work they might be engaged in (or plan to be engaged in) might be classified within the regulated activities structure. For example, many adult services may cross-over the broad regulated activity categories:

For example: A service may fit within migrant, refugees and asylum seekers; homeless service; victim of crime; community services and religious organisation. Under the current proposal, both the applicant and the Background Checking Unit are likely to make inadvertent mistakes in classification – which could then inadvertently place the individual and their employer in breach of the Act.

11. 'Stability of lifestyle'

On page 17 of the Commissioner's Risk Assessment Guidelines it needs to be clear that when assessing stability of lifestyle (housing and personal relationships) individual circumstances need to be taken into account. Many people may pose no risk to vulnerable people they could work with yet they may not be fortunate enough themselves to reside in stable accommodation.

Reference should also be removed to the requirement to provide information about their diagnoses of mental illness, treatment plans and health professional reports. This should be only required if it is deemed to be directly relevant to the application.

12. Role of the Commissioner

Paragraph 4 on page 17 of the Commissioner's Risk Assessment Guidelines makes reference to the major treatment functions of the Commissioner being conditional and role based registrations. The rationale for this is unclear. The Commissioner could decide someone should receive full registration even though the person has been recommended for consideration for conditional and role based registrations.

13. Risk treatment

On page 17, of the Commissioner's Risk Assessment Guidelines reference is made to role-based registrations being considered when risk cannot be easily mitigated without a formal arrangement in place. A conditional registration is a formal arrangement so this doesn't make sense.

14. Conditional registration (page 1, 2) – application form

Suggestion:

Before issuing a conditional registration the applicant will have an opportunity to provide any relevant information to the Commissioner that supports their claim for general registration. They will also have an opportunity to provide

any relevant information to the Commissioner that supports their claim that the specific restrictions proposed are not relevant.

15. Role-based registration

The definition of role based registration needs to be clearer.

Suggestion:

A role based registration recognises that the risks of a person working with vulnerable people have been successfully mitigated against through restricting the person to working only in a particular role.

16. Cost

Given it currently costs \$45 for a police check it unclear what the justification is for charging applicants more than this (i.e. \$71) to lodge an application.

Further, we highlight the Human Rights Commissioner's recommendations regarding fees:

"The proposed \$71 fee for applications will be a burden on many community employers, especially those with modest funding and a large number of casual and part-time employees, such as women's refugees or emergency crisis centres. Many organisations will not have made provisions in their budgets for these costs.

The cost will be prohibitive for applicants who are unemployed and seeking a check to make them job ready.

I recommend that a concession be available for eligible card holders and that provisions are put in place to allow discounted and/or staggered payments or waivers for community not-for-profit organisations seeking such assistance. The draft Application form states "need to include hardship." I note that volunteers are already exempt from the fee."

<http://www.hrc.act.gov.au/res/file/HRC%20submission%20on%20draft%20Regs%20and%20Application.pdf>

17. Reviewing re-drafted system as a whole

As demonstrated throughout our submission the system still requires significant development.

Following our discussions with Minister Burch, we understand that all elements and documents related to the system will be presented as a whole prior to the system moving forward. Could you please let us know the timing and process for next steps in the system's development?

19. Conclusion

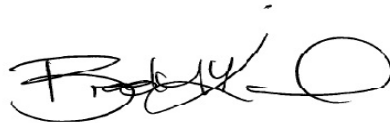
We draw your attention to the Human Rights Commission's conclusions, after reviewing recent drafts of the documentation, that the system has the potential to infringe human rights including the right to privacy and reputation, equality before the law, and right to participate in public life, as well as requiring the assessor to have specialised training and expertise.

Thank you for the opportunity to provide comment on this important area of public policy. We look forward to further working with you on subsequent document revisions and on the development and implementation of the system.

Sincerely,



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9 September 2011

The Alcohol Tobacco and Other Drug Association ACT (ATODA) is the peak body for the non-government and government alcohol, tobacco and other drug (ATOD) sector in the ACT.
www.atoda.org.au

The Mental Health Community Coalition of the ACT (MHCC) is the peak body for the community mental health sector in the ACT.
www.mhccact.org.au