
PART VI

SYSTEM-WIDE CHANGES TO IMPROVE SAFETY

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SCREENING FOR RISK

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OVERVIEW

Screening a person to assess the level of risk they may pose to children in a professional or volunteering environment is one of a range of strategies that organisations should employ to keep children safe. Risk is assessed through sourcing and reviewing certain records relating to a person. However, it is a limited tool and only one part of a broad range of strategies which must be used to create and maintain a child-safe organisation. In South Australia the assessment of the risk is commonly referred to as child-related employment screening.

To understand the effectiveness of the screening scheme in South Australia, and identify deficits and areas for potential improvement, the Commission took a holistic approach, considering both the scheme's ability to screen out unsuitable persons from working or volunteering with children in care, as well as its operation in the broader South Australian community and across jurisdictional borders.

The development and implementation of screening schemes varies across Australian jurisdictions. The federal Royal Commission into Institutional Responses to Child Sexual Abuse (the federal Royal Commission) has recently made a number of recommendations principally concerned with the establishment of consistent national screening standards in its *Working With Children Checks report*.¹ It has therefore been necessary for this Commission to recognise the broader national context when conducting inquiries and framing findings as to screening in South Australia.

In examining the screening system in South Australia, the Commission undertook a review of 150 screening assessment briefings from the 2013/14 financial year in which negative information about an applicant had emerged (see Appendix C). The findings of that review have informed discussion and conclusions mentioned throughout this chapter.

This chapter principally relates to the Commission's Terms of Reference 5(e), in the context of Terms of Reference 1 to 4.

THE PURPOSE AND VALUE OF SCREENING

The aim of child-related employment screening is to help organisations ensure that only appropriate people are permitted to work or volunteer with children. Screening not only eliminates inappropriate individuals but also acts as a deterrent to those who might otherwise try to obtain child-related employment.

The screening is performed by scrutinising records, identifying any risk of harm the person could pose to children, and assessing the extent of that risk.² Screening checks are limited in nature and rely to a significant extent on an applicant's previous history to assess future risk. Generally, an applicant's criminal history will be the most obvious and tangible historical record on which to base this assessment.

Screening is clearly intrusive; it scrutinises in detail personal historical records. A balance needs to be struck between protecting children from risk and not imposing an unfair or unnecessary burden on ordinary parental and community activities or on the workforce.

The screening of people wishing to work or volunteer with children is not intended to constitute a fail-safe measure in its own right. Gaining clearance does not mean that a person has been deemed safe or suitable to work with children—it simply means there is no available history to suggest they pose a threat.

Screening checks will detect only those people who have come to the attention of the authorities in the past, not those with unblemished records. Checks should be implemented in conjunction with other strategies focused on minimising risk to children on an ongoing basis.³ These include 'appropriate leadership, governance and culture; quality recruitment, selection and screening; training; effective child protection policies and procedures; and child-friendly practices'.⁴ The combination of these strategies, together with screening for risk, affords the best protection to children.

WHAT RESEARCH TELLS US

There is very little research evaluating the processes that screen employees and volunteers for risk.⁵ Of what research does exist, some highlights the fallibility, from a risk management perspective, of placing too much reliance on these processes.⁶ An overreliance on screening can come at the expense of other strategies to reduce the dangers of child abuse.⁷

Research conducted in the United Kingdom suggests that highly prescriptive workforce vetting can have the opposite effect to that intended by compromising 'the very bonds which make communities welcoming, safe places for children'.⁸ Due to the threat posed by fines for non-compliance with screening requirements in the UK:

many agencies ... focus solely on carrying out checks at the expense of other measures, such as training and awareness raising, which could be more effective in protecting children from abuse.

It is important not to divert badly needed resources from other services in a child protection system towards a highly prescriptive screening regimen.⁹ Witnesses in evidence raised concerns about the costs associated with screening in South Australia, absorbing resources that could more usefully be applied to early intervention programs and other child welfare services.¹⁰

There is a dearth of empirical research against which the current South Australian screening processes can be scrutinised. However, some research has highlighted the advantages of structured risk assessments over unstructured judgements. The benefits include the following¹¹:

- By basing decisions on standardised points of reference, subjective decision making is minimised.
- The use of structured risk assessment approaches is more reliable and valid than the use of professional judgement alone.
- The assumptions on which the risk assessment models are based can be clearly set out, and may be tested.
- Information can be dealt with transparently, and the person affected can put forward information as well as correct it.
- Public awareness of the use of structured risk assessment models may deter possible offenders.

The question of the sustainability of risk assessment systems which are applied to a broad population in an effort to exclude a small minority of people also cannot be ignored.

Simply implementing more detailed and prescriptive legislation and policies to net more people, and demanding more resource-intensive assessments, is unlikely to be sustainable. This Commission is aware that over time the costs attached to operating and monitoring a reformed screening scheme, as proposed in this chapter, may deter effective implementation of some aspects of the system or that there will be pragmatic ‘slippage’ as cost-saving measures are pursued.¹² It will be important for the government and policy makers to track the contribution that a reformed and evolving screening scheme makes to the child protection system.

SCREENING ACROSS AUSTRALIA

Since first implemented in New South Wales in 2000, screening schemes have been gradually adopted nationwide, Tasmania being the last to do so in 2014.

The National Framework for Protecting Australia’s Children 2009–2020 called for the development of a nationally consistent approach to screening and the implementation of a national framework for the exchange of criminal histories across jurisdictions for

people working with children.¹³ In response, an inter-governmental agreement—Exchange of Criminal History Information for People Working with Children (ECHIPWC)—was developed.¹⁴ This agreement allows government agencies responsible for conducting screening assessments to access more comprehensive interstate criminal history information about a person, such as pending, dismissed or withdrawn charges, convictions, spent convictions and acquittals.¹⁵

A nationally consistent approach to screening has not been achieved. Each state and territory holds individual responsibility for establishing and administering its own screening scheme and there are significant differences across the jurisdictions. These differences relate to who must be screened; who initiates the screening process; what information is assessed; the process to determine if a clearance should be refused; the types of clearances offered; and the duration, portability and ongoing monitoring of clearances.¹⁶

There are three types of screening schemes currently used within Australia. The first—operating in South Australia—is an employer-driven system. This requires employers in relevant fields to review the history of a prospective employee or volunteer. Individuals seeking employment in a child-related role are the subject of a ‘point-in-time’ screening before being appointed to a position and generally every three years thereafter.¹⁷

The second scheme is a Working with Children Check (WWCC). This operates in Queensland, New South Wales, Victoria, Western Australia and the Northern Territory. Under this scheme individuals have their criminal history and, in most cases, disciplinary information (such as professional disciplinary proceedings) checked to determine their suitability to engage in child-related work for a designated period of time. The individual’s continued suitability is assessed on an ongoing basis during the relevant period.¹⁸

The third scheme is a Working with Vulnerable People (WWVP) check, which is used in the ACT and Tasmania and requires individuals to be registered to engage in certain activities or services. Registration involves the assessment of an individual’s suitability to work with vulnerable people such as children and disadvantaged adults. It is a hybrid of both the first and second schemes, and three types of screening clearances are offered¹⁹:

- a general registration, which incorporates an initial clearance for a period of three years with ongoing monitoring;
- a role-based registration, which restricts an individual to work with a specific employer; or
- a conditional clearance, which imposes specific conditions on an individual’s registration.

The differences between the schemes lead to²⁰:

- varying levels of protection afforded to children across jurisdictions;
- generally, the inability to use screening clearances outside the jurisdiction within which they were issued;
- the need to navigate multiple and/or complex screening laws;
- perpetrators exploiting vulnerabilities and ‘forum shopping’ between jurisdictions; and
- limitations to the effectiveness of information sharing between jurisdictions.

SOUTH AUSTRALIA’S SCREENING SCHEME

In 2003 the Layton Review proposed the development in South Australia of a ‘statutory scheme for screening and monitoring of persons who are working with children, whether as employees or volunteers in education institutions, sports or recreation bodies or religious organisations’.²¹ It was suggested that ‘specific legislation is the first important step in developing a coordinated and consistent approach to screening and monitoring throughout South Australia’.²² The following ingredients were said to be essential for the creation of a coordinated system²³:

- legislation to establish the basic principles, objectives and framework;
- establishment and maintenance of appropriate register(s);
- mechanisms for screening and monitoring;
- processes and responsibilities for notification; and
- appeal processes.

The Layton Review proposed that the function of child-related employment screening would best lie with South Australia Police (SAPOL), given that the police, for their own purposes, maintain records of convicted persons or those under surveillance.²⁴ However, the records currently screened go beyond those held by the police and this should continue to be the case.

When first established in 2011, the Screening Unit was part of the Department for Families and Communities alongside Families SA (the Agency). In 2012, when Families SA merged with the Department for Education and Child Development (the Department), the Screening Unit became part of the new Department for Communities and Social Inclusion (DCSI).

The Screening Unit remains within DCSI and, in addition to child-related employment screening, conducts assessments of persons who work with other vulnerable groups, including disability services and aged care.²⁵

However, the vast majority of all assessments are child-related employment screenings, with about 90,000 applications of this type received in 2015.²⁶

Many government agencies within South Australia rely on the services of the Screening Unit. In addition to DCSI, the key government stakeholders, in terms of information sharing and the functioning of the Screening Unit, are the Department and SAPOL.

South Australia did not develop specific legislation. Instead, the obligation for child-related employment screening was incorporated into the *Children’s Protection Act 1993* (SA). Many of the essential ingredients suggested by the Layton Review have either not been achieved or have been developed in a way that has led to an inadequate or inconsistent screening scheme.

THE LEGISLATIVE INSTRUMENTS

In South Australia, child-related employment screening is governed by the *Children’s Protection Act 1993* (SA) (the Act) and the *Children’s Protection Regulations 2010* (SA) (the Regulations). The provisions setting out the screening scheme are within the division of the Act, entitled ‘Child Safe Environments’.²⁷ The Act and the Regulations are augmented by standards issued by the Chief Executive of the Department.²⁸

In July 2014 the Chief Executive issued Standards for Use of Child Protection Information in the Assessment of an Applicant’s Relevant History in accordance with the Act (the CP Standards). In February 2015 the Chief Executive issued Child Safe Environments: Standards for Dealing with Information about a Person’s Criminal History as part of a Relevant History Assessment (the Criminal Standards). These standards replaced and updated those previously issued in 2012.

Navigating across the Act, the Regulations and standards issued by the Chief Executive is unwieldy, confusing and at times frustrating.

South Australia and the Northern Territory are the only jurisdictions in Australia that do not have stand-alone legislation dedicated to setting the parameters for their screening regimes (see Table 20.1).

In view of the substantial reforms to be made to the screening system in this state in response to the recommendations of this Commission and the federal Royal Commission, it would be appropriate for the South Australian Government to legislate for a new, stand-alone legislative instrument incorporating all relevant reforms.

Table 20.1: Screening legislation by jurisdiction

JURISDICTION	LEGISLATION
Australian Capital Territory	<i>Working with Vulnerable People (Background Checking) Act 2011</i>
New South Wales	<i>Child Protection (Working with Children) Act 2012</i>
Northern Territory	<i>Care and Protection of Children Act 2007</i>
Queensland	<i>Working with Children (Risk Management and Screening) Act 2000</i>
South Australia	<i>Children's Protection Act 1993</i>
Tasmania	<i>Registration to Work with Vulnerable People Act 2013</i>
Victoria	<i>Working with Children Act 2005</i>
Western Australia	<i>Working with Children (Criminal Record Checking) Act 2004</i>

INITIATING A SCREENING ASSESSMENT

In South Australia organisations are responsible for ensuring an assessment is conducted of a person's relevant history before engaging them in a child-related role.²⁹ In all other states and territories (except Queensland), it is the responsibility of the individual to apply for a screening clearance prior to engaging in child-related employment. On receiving such a clearance, that person is able to engage in any child-related employment with any employer without the need for multiple screening checks (unless in the ACT or Tasmania the clearance held is role-based or conditional). In Queensland an employer or volunteer coordinator will apply for a screening clearance on behalf of the individual in question.³⁰

To ascertain which prospective employees must be screened, South Australian organisations have to determine whether they are captured by the Child Safe Environments division of the Act. The division applies to both government and non-government organisations that provide health, welfare, education, sporting or recreational, religious or spiritual, childcare or residential services wholly or partly for children, as well as non-government organisations of a class prescribed by regulation.³¹ Currently, non-government organisations that provide disability services wholly or partly for children and defined passenger transport services are prescribed under the Regulations.³²

If an organisation considers it fits into one of these broad categories, a prospective employee, volunteer, agent, contractor or subcontractor who is to act in a 'prescribed position' or undertake 'prescribed functions' must have their relevant history assessed.³³

The Act defines a 'prescribed position' as³⁴:

- a position that requires or involves the performance of one or more prescribed functions; or
- a position, or a position of a class, in a government organisation designated (by notice in the Gazette) by the organisation's responsible authority³⁵ as a prescribed position for the purposes of this section.

To date, no positions have been prescribed by notice in the Gazette.

'Prescribed functions' are defined as³⁶:

- regular contact with children or working in close proximity to children on a regular basis, unless the contact or work is directly supervised at all times; or
- supervision or management of persons in positions requiring or involving regular contact with children or working in close proximity to children on a regular basis; or
- access to records of a kind prescribed by regulation relating to children;³⁷ or
- functions of a type prescribed by regulation, for example the provision of overnight care which is defined as 'care provided to a child overnight and involving sleeping arrangements (whether such care is provided on a short-term or ongoing basis)'.³⁸

The organisation is obliged to interpret the various legislative provisions and determine which positions and/or functions within its operations are 'prescribed' under the terms of the Act. The answer may not always be clear. For example, the Act does not define 'regular contact' or 'close proximity'. The Criminal Standards state that the terms are to be given their 'ordinary everyday common sense meanings'.³⁹ 'Regular contact' is said to generally imply a pattern that 'recurs at short uniform intervals'. No guidance is provided as to what 'contact' means.⁴⁰ 'Close proximity' is said to imply that the child is 'within sight of the person performing a prescribed function and/or the person has the capacity to engage in dialogue with the child'.⁴¹

Under the Regulations, certain categories of persons are exempt from the requirement that their relevant history is assessed. This includes teachers and police officers, who are subject to distinct screening practices as part of their registration and/or employment arrangements.⁴²

The types of roles that are defined as ‘child-related’ vary across all Australian jurisdictions. While there is consistency with respect to roles that are obviously child-related, where the nature or frequency of contact with children is less clear, there is greater divergence between the jurisdictions.

SCREENING PATHWAYS IN SOUTH AUSTRALIA

The Regulations set out two pathways by which an organisation may fulfil its screening responsibilities for a prospective employee or volunteer. An organisation may choose to⁴³:

- obtain a criminal history report (such as a National Police Certificate) or other prescribed evidence⁴⁴ of the person’s relevant history and undertake its own assessment of that report or evidence, also taking into account any information the person might provide; or
- have an authorised screening unit assess the relevant history of the person.

The first pathway involves an organisation conducting its own assessment of a person’s relevant history. The second involves an organisation arranging for the assessment to be conducted through the South Australian Government’s Screening Unit in DCSI (the Screening Unit). This is the only authorised screening unit in South Australia.

These provisions reflect the unique nature of the South Australian screening scheme.

Disparities and inadequacies in screening pathways constitute weaknesses that unsuitable applicants may be able to exploit.

As a result of the dual pathways, and the apparent lack of clarity with respect to the intrastate portability of clearances (discussed later in this chapter), individuals may be required to undergo multiple assessments or obtain multiple clearances if they wish to engage in more than one child-related role. This leads to frustration and confusion for employers and employees, double handling and unnecessary costs.⁴⁵ One witness told the Commission she was:

required to have several concurrent checks—one for being a foster parent, one for her current employment, one for volunteering with the CFS, and one for working in the tennis club canteen.⁴⁶

Permitting two pathways by which a clearance can be obtained produces a system of variable levels of scrutiny. The particular pathway selected will affect what information is assessed, how it is assessed and by whom, and how robustly the risk posed by a person is assessed.

Organisations conducting their own assessments will not have access to the same breadth of information as the Screening Unit. Two organisations engaging the same person could have access to quite different information.

Conducting a screening assessment is a highly complex task and requires significant expertise. Drawing together indicative threads in a person’s history to predict future risk is an unenviable responsibility

Conducting a screening assessment is a highly complex task and requires significant expertise. Drawing together indicative threads in a person’s history to predict future risk is an unenviable responsibility. The scheme provides no clear guidance as to the level of expertise required by those persons conducting risk assessments within an organisation, allowing untrained individuals to make an assessment on potentially inadequate information. There is also limited guidance as to how an applicant’s history is translated into a predictor of risk for children.

There is no clear mechanism for scrutinising assessments conducted by organisations, leaving deficient assessment standards to go unchecked.

By allowing organisations to conduct their own assessments of employees and volunteers, South Australia has created an inconsistent, and flawed, screening scheme. Disparities and inadequacies in screening pathways constitute weaknesses that unsuitable applicants may be able to exploit.

Legislative reform should therefore provide for a single screening pathway in this state, namely the South Australian Government Screening Unit, which should be an employee-driven system.

Table 20.2: Categories of information available to be assessed by the Screening Unit compared to other organisations

CATEGORY OF INFORMATION	SCREENING UNIT	OTHER ORGANISATIONS
1 Findings of guilt for offences committed by the person in South Australia or elsewhere	Yes	Yes
2 Offences alleged to have been committed by the person in South Australia or elsewhere and with which the person has been charged but which have not yet been finally determined	Yes	Yes
3 Information relating to findings of guilt and charges referred to in Categories 1 and 2	Yes	No
4 Information relating to charges for offences alleged to have been committed by the person in South Australia or elsewhere, regardless of the outcome	Yes	No
5 Relevant information lawfully obtained or held for any purpose by the Department, the Department for Communities and Social Inclusion ^a , the Courts Administration Authority and an authorised screening unit	Yes	No
6 Information provided by the person for the purposes of an assessment of their relevant history	Yes	Yes

^a As the administrative unit responsible for the administration of the *Carers Recognition Act 2005 (SA)* and the *Disability Services Act 1993 (SA)*.

Source: *Children's Protection Act 1993*, s 8B(8).

SCOPE OF INFORMATION ASSESSED

The information assessed depends on the pathway chosen by an organisation to fulfil its screening obligations.

Table 20.2 sets out the much broader suite of information the Screening Unit should consider when conducting a screening, compared to the information on which an organisation should base its assessment. The disparity in the range of information highlights the dual standards between the two pathways.

If an organisation conducts its own assessment, it must do so in accordance with the Criminal Standards. These provide guidance on accessing and assessing a person's criminal history, the circumstances in which evidence other than a fresh criminal history record may be accepted, and affording procedural fairness to an applicant in the decision-making process.⁴⁷

As shown by Table 20.2, if an organisation chooses to have the Screening Unit conduct the assessment, in addition to findings of guilt and pending charges (Categories 1 and 2), any information relating to those matters should also be considered. This may include, for example, the circumstances of the criminal act that led to a finding of guilt or the reasons why a particular penalty was imposed by a court. It is not expected that an organisation conducting its own assessment would have access to this additional information. The Screening Unit should also take into account information relating

to charged offences, regardless of their outcome (Table 20.2, Category 4). In other words, the Screening Unit may consider criminal charges that were withdrawn before a finding was made and offences of which a person has been acquitted. An organisation conducting its own assessment will in most cases not have access to this additional information.

The Screening Unit should also consider information held by some government bodies that is relevant to whether a person is suitable for engagement in child-related employment (Table 20.2, Category 5). The most obvious examples of this are a person's child protection history held by Families SA or their care concern history held by the Care Concern Investigations Unit. An organisation will not have access to these potentially valuable sources of information, which may capture occasions, falling short of criminal conduct, when a person has behaved inappropriately towards a child or shown themselves to be a risk to children.

While all states and territories consider the criminal history of applicants and any pending charges, there is significant variation between the jurisdictions as to what information beyond this is assessed. All jurisdictions consider disciplinary or misconduct information of some type. This may include information from professional registration bodies, such as those regulating health practitioners and teachers; information from correctional services; or information on whether the person is subject to a sexual offender prohibition order or a child protection prohibition order.⁴⁸

The circumstances in which jurisdictions consider disciplinary and/or misconduct information also vary. New South Wales and Victoria consider this information as a matter of course, but Western Australia only considers such information if the initial criminal history assessment is adverse.⁴⁹

In view of the lack of general consensus regarding what constitutes best practice in relation to screening, the inconsistency across jurisdictions as to what information is considered is not surprising. It is a likely by-product of the absence of evidence to demonstrate which records are the most reliable indicators of potential risk to children.⁵⁰

OUTCOMES OF A SCREENING ASSESSMENT

If an organisation conducts its own screening of a prospective employee, there is no requirement to provide any type of outcome. The organisation simply conducts an assessment of the relevant history and then makes a decision about employment. However, organisations are expected to keep written evidence of their consideration of an individual's relevant history.⁵¹

Since April 2015, the South Australian legislative scheme has provided for one of two outcomes of an assessment conducted by the Screening Unit: a screening clearance is either granted or the application is refused. When a clearance is granted, a certificate is sent to the individual and the organisation is informed of the outcome via email. When an application is refused, the individual is sent a certificate stating that they pose a risk to the safety of children.⁵² Prior to April 2015, the organisation was informed of a refusal, but no advice was given to the individual.⁵³

The Screening Unit has in the past offered a third outcome—namely, a specific clearance that permitted an applicant to be engaged in a specific role, as opposed to general child-related employment. This appears to be similar to the situation in the ACT and Tasmania.⁵⁴ In all other jurisdictions screening clearances are either granted or refused.

In every jurisdiction except South Australia and New South Wales, persons receiving a clearance are issued with a card authorising them to engage in child-related work for a designated period of time.⁵⁵ In New South Wales the person is issued with an electronic clearance number rather than a card. In December 2015, the Commission was informed that the Screening Unit was working towards issuing individuals with a unique identification number that could be used to check the status and validity of a clearance.⁵⁶

DURATION OF CLEARANCES

Neither the Act nor the Regulations stipulate the duration of screening clearances in South Australia. Instead, the Criminal Standards require the screening of an individual to be undertaken at least once every three years.⁵⁷ Nevertheless, some employers, such as those whose staff work with children in care, require screenings to be conducted every 12 months.⁵⁸ It is likely that this practice has arisen to compensate for the absence of continuous monitoring in South Australia. Some organisations may consider that allowing three years to pass without a fresh assessment of a person's criminal or child protection history is a risk they are not willing to take.

In New South Wales and Victoria, clearances are granted for a period of five years. Clearances in the ACT, Queensland, Tasmania and Western Australia are valid for a period of three years. Clearances granted in the Northern Territory are of the shortest duration, requiring renewal every two years.⁵⁹

OFFENCE PROVISIONS

The South Australian legislation requires organisations, and in some instances natural persons (such as sole traders or volunteers not engaged through an organisation), to undertake an assessment of a person's relevant history in accordance with the legislative scheme. The maximum penalty for failing to do so is \$10,000.⁶⁰ Although the legislation creates an obligation to undertake the process, it is not an offence if a person is engaged in a child-related role despite an adverse screening outcome.⁶¹

In all states and territories except South Australia, it is an offence to engage an individual in a child-related role if they do not hold a valid screening clearance. The ACT includes a strict liability offence; that is, an offence has been committed even if the employer was unaware the individual did not hold a valid clearance.⁶²

It is also an offence in other jurisdictions for an individual to engage in child-related work without a valid screening clearance. In New South Wales, Queensland, Tasmania, Victoria and Western Australia, persons who are refused a clearance are issued a negative notice which excludes them from working in child-related employment for a period of time, and they commit an offence if they do so.⁶³

OPERATIONS OF THE SCREENING UNIT

Generally, the operations of the Screening Unit are structured around two teams: an administration team and an assessment team.

The administration team conducts an initial assessment of applications and can issue a clearance in limited circumstances. Applications that cannot be cleared by the administration team are referred to the assessment team. The assessment team is divided into two screening teams: the child-related employment screening team and the disability, vulnerable persons, aged and general probity screening team. In this chapter, any reference to the assessment team is intended only to encompass the child-related employment screening team.

The assessment team consists of assessment officers employed in the administrative services officer (ASO) stream, across levels five (ASO5) to eight (ASO8)⁶⁴, with duties divided according to the level of complexity associated with each screening application. While assessment officers are not required to hold a qualification, some have tertiary level qualifications in areas including social work, law and psychology. They hail from a variety of professional backgrounds, including law enforcement, the Office of the Director of Public Prosecutions, the Courts Administration Authority, Families SA and Correctional Services.

In January 2015, the size of the assessment team was increased threefold, from 12 assessment officers to 36.⁶⁵

APPLICATIONS

Organisations that choose to use the Screening Unit must make an application through their requesting officer—a person responsible for coordinating screening checks within the organisation. While the application is primarily completed by the potential employee, the requesting officer is required to describe the applicant's proposed role and responsibilities within the organisation.

In July 2015 the Screening Unit began accepting online applications. Previously, applications could only be submitted in hard copy. As at December 2015, approximately 2000 applications had been received through the Screening Unit's online portal.⁶⁶

THE ASSESSMENT PROCESS

Initially a screening assessment involves obtaining the applicant's criminal history from CrimTrac and searching for records relating to the applicant across the Department's C3MS, CIS and Objective databases. (Objective is used by the Care Concern Investigations Unit and discussed in Chapter 15).

CrimTrac is a Commonwealth government agency that provides an information sharing service for Australia's law enforcement agencies. (On 1 July 2016 CrimTrac merged with the Australian Crime Commission to form the Australian Criminal Intelligence Commission.) Through CrimTrac, the Screening Unit obtains comprehensive criminal history information about an individual from across all Australian jurisdictions.⁶⁷

If 'no disclosable court outcomes' are reported by CrimTrac (that is, no criminal history) and there are no database records matching the applicant's name, the administration team can issue a clearance.⁶⁸ If a database reveals a match to the applicant's name or CrimTrac reports a criminal history, the application is referred to the assessment team.

An assessment officer reviews the initial results to ascertain what (if any) further information is needed. The Act allows for information relating to an individual's relevant history to be disclosed to the Screening Unit for the purpose of undertaking an assessment.⁶⁹ In practice, the Screening Unit will request additional information from a variety of sources, including SAPOL, the courts (commonly for sentencing remarks), Families SA (particularly when necessary to view hard-copy historical files), and other agencies, such as hospitals.⁷⁰

The *Spent Convictions Act 2009* (SA) allows for the Screening Unit to also access and assess spent convictions when conducting child-related employment screening.⁷¹

The Screening Unit tries to ascertain whether a person's previous history, when understood in context, indicates that the applicant may pose a risk to the safety of children in an employment or volunteering capacity. An assessment officer relies on a number of policies to guide their assessment, including the standards issued by the Chief Executive of the Department and internal procedures and policies of the Screening Unit.⁷²

Where adverse findings may be drawn or clarification is necessary, the Screening Unit will contact the applicant, usually by letter, requesting information and advising they can respond in writing, over the telephone, or face to face.⁷³

CHILD PROTECTION INFORMATION

If the applicant has a child protection history recorded on the Department's databases, this will be considered as part of the assessment. Assessing a person's child protection history, especially if the allegations have not been substantiated, can be particularly complex. The use of child protection information when conducting assessments was a focus of the Commission's review of screening assessments, and is discussed later in this chapter.

CRIMINAL HISTORY

The assessment officer considers the applicant's criminal history with the aid of an assessment matrix contained within the Screening Unit's procedural documentation. This tells assessment officers how to assess criminal history results and obtain information from the applicant, courts and police if required.⁷⁴

The assessment matrix attributes a level of risk (low, medium or high) to categories of offences. For example, homicide and sexual and indecency offences committed against an adult or a child, and acts intended to cause injury to a child, are categorised as high risk regardless of when they occurred. Other offence categories are allocated differing levels of risk in accordance with how long ago the offence was committed.⁷⁵

In the event that a criminal history reveals a charge that has not been proved, and there is no child protection history revealed through a search of the Department's databases, a clearance is provided without further assessment. However, there are some important exceptions. These include allegations of homicide, or sexual or indecent acts, alleged to have been committed against an adult or a child, and any allegations involving a child.⁷⁶

MEDIUM- AND HIGH-RISK OFFENDING

Assessment officers are authorised to approve clearances for any low- and medium-risk offending. This authority also extends to instances in which an applicant is the subject of unsubstantiated child protection allegations.⁷⁷

Although assessment officers have the authority to approve a clearance for medium-risk offending, they must undertake a more comprehensive assessment of the risk posed by the applicant, considering 'all relevant information obtained during the assessment process, with particular regard to patterns of allegations, courses of conduct and the inherent requirements of the applicant's role'.⁷⁸

In relation to previous offending, the contextual factors an assessment officer should consider include⁷⁹:

- the seriousness of the particular offending, and the seriousness of the applicant's criminal history in its entirety;
- the length of time that has passed since the offending;
- the age and vulnerability of the victim;
- the nature of the relationship, and age difference, between the applicant and the victim;
- the applicant's conduct since the offending;
- the applicant's current age and age at the time of the offending;

- the likelihood of the offending being repeated; and
- the effect on children if the offending were to be repeated.

A similar comprehensive assessment is conducted for offending categorised as high risk. However, regardless of the light the assessment might shine on the past offending, assessment officers do not have authority to approve a clearance when it is determined by the assessment matrix to be high risk.⁸⁰

To conclude the process, an assessment officer prepares a briefing which recommends whether or not the applicant should be cleared to work or volunteer with children. If the officer does not have authority to grant a clearance, they refer the application to a more senior staff member. Depending on the seriousness of the applicant's history, the authority to grant a clearance sits with an assessment supervisor, a senior assessment officer, an assessment manager (previously the principal assessment officer), the manager or the director of the Screening Unit. If the applicant's history includes allegations of a sexual nature, the application must be referred to the Complex Assessment Panel (CAP).⁸¹

The manager and the director of the Screening Unit, as well as CAP, have the authority to refuse a screening clearance.

COMPLEX ASSESSMENT PANEL

CAP (previously the Sexual Assessment Panel) comprises the Chief Executive of DCSI, the Executive Director responsible for the Screening Unit, and the director and manager of the Screening Unit.⁸²

In addition to assessments involving a sexual component, highly complex assessments may also be escalated to CAP. By the time an assessment briefing reaches CAP, it will generally have been reviewed by at least three levels of authority.

As shown by Table 20.3, in the 2013/14 financial year, 739 applications were assessed by senior level staff of the Screening Unit and CAP. The latter assessed 80 applications, and in the vast majority of cases either granted a general clearance or offered the organisation a specific clearance. Of the complex matters escalated to CAP, only about nine per cent of individuals were refused an application. The senior level staff in the Screening Unit refused a similarly low number of applications.

In determining the most complex screening assessments in the state, CAP obviously has a very difficult and unenviable task. CAP may be well served by having a greater mix of expertise and experience, in particular panel members who have forensic expertise in child protection or behavioural indicators of risk.

Table 20.3: Applications assessed by senior levels of the Screening Unit and the Complex Assessment Panel, 2013/14

	SENIOR LEVELS OF THE SCREENING UNIT ^a (PERCENTAGE OF TOTAL)	COMPLEX ASSESSMENT PANEL (PERCENTAGE OF TOTAL)
Total number of applications considered	659	80
General clearances granted	502 (76.2%)	51 (63.8%)
Specific clearances offered	102 (15.5%)	22 (27.5%)
Applications refused	55 (8.3%)	7 (8.8%)

^a Includes Principal Assessment Officer, Manager and Director
Source: Assessment briefings provided by the Screening Unit.

SPECIFIC CLEARANCES

At times, the Screening Unit has offered organisations the option of engaging a person subject to a specific clearance, permitting an applicant to undertake a particular role as opposed to general child-related employment.

Specific clearances have been offered when the Screening Unit considered there was an unacceptable level of risk such that the applicant did not meet the criteria for a general clearance but, having regard to the role to be undertaken, formed the view there was a possibility the organisation would be able to mitigate the risk.⁸³ That is, the level of risk was not sufficiently great to warrant a complete refusal of the application. In those cases, it became a matter for the organisation to decide whether or not to engage the person.

To facilitate the organisation undertaking its own risk assessment, the Screening Unit would provide the organisation's requesting officer with a summarised assessment briefing, generally outlining the applicant's criminal history and other relevant information gathered by the Screening Unit. However, aspects of the applicant's child protection history that had not previously been brought to their attention would not be shared.⁸⁴ The organisation would then conduct its own risk assessment and decide whether it was prepared to carry the level of risk, and if so, engage the person on a clearance specific to the particular role.

Consigning what are likely to be some of the toughest screening decisions to untrained and less skilled persons who may have a commercial or personal interest in engaging the person is potentially detrimental to the safety of children.

An organisation may not appreciate the difference between a 'specific clearance' and a 'general clearance'. This is particularly concerning if the organisation does not itself practise robust child-safe strategies.

Information revealed by the Screening Unit to the requesting officer might not be adequately relayed to staff members working closely with the person and who, in practice, were shouldering the day-to-day responsibility of mitigating the risk posed by that person.

Specific clearances rely on a person remaining in the particular position, and the nature of their role and their level of contact with children not changing throughout the duration of the clearance (generally three years). Without careful monitoring on the part of the organisation, such situational factors could place children at an unacceptable level of risk.

The Commission's review observed that of 55 refusals, 40 resulted from specific clearances being refused by the requesting organisation, but only 15 by the Screening Unit. This suggests that the thresholds applied by the Screening Unit for entry into child-related employment may generally be too low. For example, in one case, the applicant had an extensive criminal history which indicated a clear pattern of violence although it had not resulted in any findings of guilt. The Screening Unit found that a risk of harm had been established but nevertheless provided a specific clearance, leaving it to the employer (another government agency) to make the ultimate decision about his appointment in a role working with Aboriginal youth and their families.

Specific clearances also introduce barriers to portability, both intrastate and between Australian jurisdictions.⁸⁵

The Screening Unit's practice of issuing specific clearances was based on neither legislation nor policy.⁸⁶ However, since April 2015, the Regulations have specifically prescribed this practice:

[a] certificate must not indicate that the person to whom the certificate relates is only suitable or authorised to perform specified prescribed functions (however, a failure to comply with this subregulation will not invalidate a certificate).⁸⁷

Despite the legislative change, the Screening Unit continued to offer specific clearances, issuing 71 between May and November 2015. No specific clearances were offered in December 2015. The Screening Unit proceeded on the basis that, if a person submitted an application prior to the April 2015 legislative change, it was still entitled to determine the application by offering a specific clearance.⁸⁸ It is unfortunate that the legislation was interpreted in this way. The Regulations make it clear that when the Screening Unit completes an assessment the only response available to it is to issue a certificate, and that certificate must not relate only to a specified function. Specific clearances are not and should not be permitted.

THE NUMBER OF SCREENING APPLICATIONS

Table 20.4 shows that the number of child-related employment screening applications made to the Screening Unit has increased significantly from approximately 51,000 in 2011 to more than 90,000 in 2015. Between 2011 and 2013 the annual rate of increase was steady at about 17 per cent a year. However, this trend changed in 2014 with a sharper 24 per cent increase in the number of applications. The timing of the increase coincides with the arrest of Shannon McCoole, which may have prompted organisations to use the more robust assessment pathway through the Screening Unit, rather than undertake their own assessments. Organisations may have also been motivated to seek an up-to-date clearance for current employees or volunteers, or interpreted the legislation more broadly as to who needed to be screened. A legislative change in July 2014 that prescribed an additional class of organisation as being captured by the screening scheme may have also contributed to the increase.

Whatever the reasons, it is clear the workload of the Screening Unit is substantial. Although the rate of increase was only slight between 2014 and 2015

(two per cent), if the number of applications continues to rise, it is questionable how readily the Screening Unit will be able to meet demand for its services. This comes into sharp focus when the implications of the Commission's recommendations to abolish the second screening pathway (organisations screening prospective employees or volunteers themselves) and reform the child-related roles captured by the legislation are considered.

THE PROPORTION OF REFUSALS

Table 20.4 shows that only a small fraction (on average 0.118 per cent) of all screenings undertaken in the last five years resulted in a clearance refusal. To some extent, this may reflect the system working effectively; that is, those people who are aware they are unlikely to obtain a clearance simply do not apply. This is consistent with one purpose of the scheme—deterrence. The exclusion of such a small proportion of applicants from working or volunteering with children also reinforces the basic premise that screening is but one risk management strategy, and limited in its scope.

It raises, however, broader questions as to the effectiveness of the screening process and whether the Screening Unit standards are calibrated and applied correctly. The Commission's review suggested that the Screening Unit's threshold as to what circumstances indicated a risk to children was high. The rate of refusals (percentage of applications not cleared) supports this view. There is no baseline with which to compare the rate of refusals but in light of the negative profiles in most of the reviewed assessments, it seems low.

The rate of refusals has been constant over the past five years. As the number of applications submitted to the Screening Unit has increased, so has the number of refusals. Accordingly, whether or not the standards utilised by the Screening Unit are appropriate, they appear to be consistently applied.

Table 20.4: Applications submitted to the Screening Unit, 2011–15

	2011	2012	2013	2014	2015
Applications submitted	51,281	60,401	70,731	87,883	90,059
Applications not cleared (percentage not cleared)	56 (0.109%)	81 (0.134%)	79 (0.112%)	76 (0.086%)	133 (0.148%)
Applications withdrawn (percentage withdrawn)	159 (0.310%)	261 (0.432%)	324 (0.458%)	121 (0.138%)	886 (0.984%)

Source: Data from the Screening Unit.

WITHDRAWN APPLICATIONS

As shown by Table 20.4, the proportion of withdrawn applications increased between 2011 and 2015. The Screening Unit advised the Commission that a backlog of screening applications—eventually processed in 2015—contributed to the spike in withdrawn applications that year. In other words, delays led to many applications being withdrawn as the clearances were no longer needed by the time the application was processed. However, the peak in withdrawn applications in 2015 is evened out by the comparatively low number in 2014, and the average proportion of withdrawn applications across those two years (0.56 per cent), demonstrates an overall trend upwards.

The reasons for withdrawing an application are no doubt many and varied. However, the possibility that a person may seek to withdraw their application to avoid a refusal based on their history should be enough to prohibit the withdrawal of applications.

Once an application is submitted, it should be assessed and a screening outcome determined. All refusals should be systematically recorded. Efforts should be made to develop information sharing practices with interstate screening units so that assessments in this state can benefit from knowing about refusals in other jurisdictions.

CHALLENGES FACED BY THE SCREENING UNIT

In addition to a heavy workload, the Screening Unit faces challenges on several other fronts. These challenges, discussed below, range from applying the appropriate standard of proof, affording applicants procedural fairness and dealing with unsubstantiated allegations, to records management.

THE TIME IT TAKES

The time taken by the Screening Unit to finalise clearances was the focus of many concerns raised with the Commission about the Screening Unit's practices and has been the subject of extensive media attention. However, Figure 20.1 shows that in the 2013/14 financial year, approximately 92 per cent of all applications handled by the administration team were completed within 20 days and less than one per cent of applications took them more than 40 days to complete. Given the limited scope of the administration team's role (basically deciding whether or not the applicant has a criminal history and whether or not they are recorded on the Department's databases) it is expected that the vast majority of this work should be completed within 20 days.

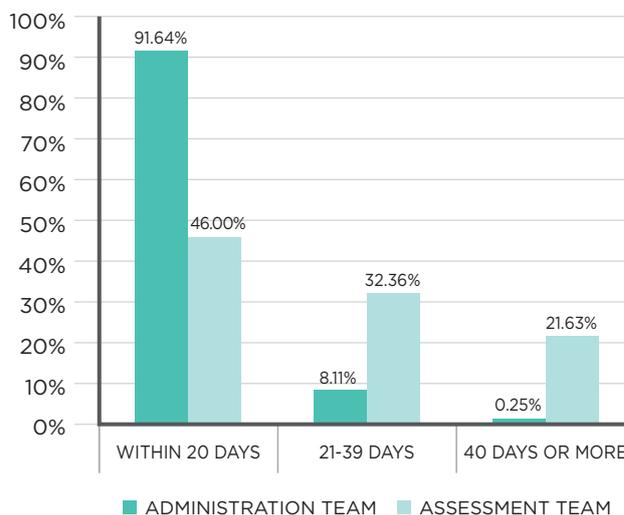


Figure 20.1: Proportion of applications finalised by team and days in 2013/14

Source: Data from the Screening Unit.

Figure 20.1 shows the variation in time taken by the assessment team to finalise applications. This reflects the fact that no two assessments are the same and will involve gathering and reviewing a range of information. However, such variations should not be used to mask avoidable or disproportionate delays.

In the 2013/14 financial year, while the assessment team assessed almost half (46 per cent) of the applications which could not be cleared by the administration team within 20 days, about one-third (32 per cent) of applications still took between 21 and 39 days to process, and about one-fifth took 40 days or more (from the time the application was submitted to the Screening Unit). Such delays inevitably cause frustration for employers, employees and volunteers, and potentially affect the ability of organisations to function efficiently. Those seeking employment are likely to suffer financial strain when obliged to wait for extended periods before being able to commence work. Volunteers whose services might be desperately needed by an organisation may lose interest if the wait for a clearance is too lengthy. Delays also influence the community's perception of the service, as shown by recent media articles reporting, for example, 'dozens of school and preschool support staff' being unable to return to work, and a not-for-profit organisation having about a quarter of its workforce unable to volunteer, due to screening delays.⁸⁹

In February 2015, a Families SA office manager told the Commission the delays were so extensive it was hard for the Department and not-for-profit organisations to respond to fluctuating and unpredictable employment demands. The delays resulted in added stress for existing staff, poor outcomes for clients, and increased risk for the Department and organisations.⁹⁰

Screening delays can hinder the process of registering urgently needed foster parents and kinship carers, causing them to lose patience with the registration process.⁹¹ This is particularly concerning given the clear need for growth in the number of home-based carers in the community (see Chapter 11). The delays also contribute to the challenges associated with finding respite carers at short notice, placing added strain on already overburdened placements.⁹²

The work of the Screening Unit has the potential to influence the operations of most, if not all, aspects of the child protection system. Its service must facilitate and complement the work of organisations, not frustrate it.

IMPROVED PROCESSING TIMES

The influx of staff in January 2015 improved the Screening Unit's processing times. As shown in Table 20.5, the delays have abated significantly in recent times. In the 2014/15 financial year, the Screening Unit took an average of about 24 days to complete an assessment. This decreased to an average of about eight days for the period 1 July 2015 to 31 December 2015. In that period, the administration team was completing applications on average within just four days and the assessment team had achieved a dramatic reduction in its average processing time to 11 days. However, there will remain some occasions when applications take an excessively long time to process. For applications received and finalised in 2015, the longest processing time was 328 days (46 weeks)—the application was received on 9 January 2015 and not finalised until 7 December 2015.⁹³

Table 20.5: Average days taken to complete screening applications, 1 July 2014 to 31 December 2015

	2014/15 (DAYS)	1 JULY 2015-31 DECEMBER 2015 (DAYS)
Administration team	7.18	3.9
Assessment team	41.65	11.1
Screening Unit average	24.29	7.8

Source: Data from the Screening Unit.

Table 20.6 shows that in 2014 the Screening Unit was completing less than one-quarter of all applications within five days. This improved in 2015 and by March 2016 the Screening Unit had achieved a completion rate of almost 60 per cent of applications within five days and almost 90 per cent of applications within 10 days. In 2014 about 20 per cent of applications took more than 31 days to complete; by early 2016, this figure was less than 1 per cent.

Table 20.6: Proportion of applications finalised by days, 2014 to 2016

	2014	2015	2016 ^a
0-5 days	22.13%	35.57%	59.47%
6-10 days	33.25%	25.17%	28.14%
11-15 days	13.43%	14.87%	3.13%
16-20 days	5.74%	8.87%	3.01%
21-25 days	3.13%	4.48%	4.25%
26-30 days	2.24%	3.05%	1.73%
31+ days	20.08%	7.98%	0.28%

^a As at 23 March 2016

Source: Data from the Screening Unit.

This suggests that a properly resourced Screening Unit can assess screening applications in a timely manner, facilitating the efficient operation of those organisations in the child protection system that rely on them to assist in their risk management strategies. The significant reduction in processing times resulting from increased staffing levels also suggests that difficulty obtaining information from other agencies is not a primary contributor to delay. While on occasion particularly complex screening decisions will take longer, this should only occur in exceptional circumstances.

PROCESSING BENCHMARKS

On the basis of the Commission's recommendation to provide a single screening pathway, it will be necessary to review the adequacy of resources to ensure that the Screening Unit is able to continue to meet acceptable benchmarks in light of what is likely to be an increased demand for its service.

In all but the most exceptional circumstances, the administration team should process applications within seven days and the assessment team should process applications within 28 days. However, the public should be made aware that some applications will, of necessity, take longer. For example, the screening agency in Western Australia publicly acknowledges some assessments may take longer than 12 weeks and the NSW screening agency advises the public some risk assessments may take more than six months.⁹⁴

In March 2016, the South Australian Ombudsman published findings following an investigation into the delays in the Screening Unit’s practices and the provision of information to applicants during the screening process. The Ombudsman considered ‘there should be some mechanism in place to inform an applicant or requesting organisation where an application is in the assessment process’.⁹⁵ It is the Commission’s view that if the screening is not able to be completed within 28 days, the Screening Unit should advise the person concerned of the status of their application, but it is not possible to prescribe the extent of the information that the Screening Unit should provide.

APPLYING THE STANDARD OF PROOF

When determining a screening outcome, it is expected that assessment officers will apply the civil standard of proof, that is, they only need to be satisfied *on the balance of probabilities* of future risk. They do not have to be satisfied to the much higher criminal standard of *proof beyond reasonable doubt*.

The Commission’s review found very few occasions on which the Screening Unit cited and relied on the lower standard of proof.

The Criminal Standards acknowledge a national view that where an applicant’s criminal history suggests a prima facie risk of harm to children, it may be appropriate to place the onus on the applicant to prove they do not pose such a risk.⁹⁶ However, this approach was not strongly evidenced in the reviewed assessments revealing a relevant criminal history.

Assessing conduct beyond proven criminal matters may be challenging and at times contentious. However, conduct below the threshold for criminal sanction may, on the balance of probabilities, still indicate potential risk to children.

DEALING WITH UNSUBSTANTIATED ALLEGATIONS

There are three broad categories of unsubstantiated allegations that may be of relevance to a screening assessment:

- criminal charges which do not proceed;

- findings of not guilty of criminal charges; and
- child protection notifications or care concerns not investigated or not substantiated

Criminal charges, particularly those involving allegations of child abuse, may be discontinued for a range of reasons, most of which do not preclude their consideration in a screening assessment. A prosecution may not proceed because the child does not feel able to give evidence in court about highly sensitive experiences involving someone very close to them. In some cases, strict evidentiary rules, together with the criminal standard of proof, will mean there is no longer a reasonable prospect of conviction. Importantly, the discontinuation of criminal charges does not necessarily equate with a complainant recanting their allegations or a determination that the allegations were of no substance.

Further, a verdict of not guilty is a finding that the specific offence alleged has not been *proved beyond reasonable doubt*: it is not a declaration of innocence. In the vast majority of cases it will never be known whether the trier of fact was satisfied on *the balance of probabilities*—that is, more likely than not that the accused person committed the offence. To interpret a not guilty finding as meaning the accused did not partake in the alleged conduct, and therefore does not pose a risk to children, may lead to important indicators or patterns in that person’s behaviour being dangerously ignored.

References to charges having been tested in a court of law were rife in the assessment briefings reviewed. This may indicate a misinterpretation of the outcome of a court process, or confusion of the criminal standard of proof with the lower standard applicable to screening assessments. The Screening Unit does not have to operate within the boundaries of criminal law, and allegations not proven to a criminal standard may be relevant to the assessment of risk when making a determination on the balance of probabilities.

As discussed later in this chapter, the large number of child protection notifications that do not get a response or are not investigated also present a significant challenge for the Screening Unit in terms of assessing unsubstantiated allegations. Disregarding such allegations may represent a lost opportunity to identify potentially concerning conduct or patterns of behaviour, particularly for those individuals who have come to the attention of child protection authorities on multiple occasions.

There will therefore be occasions when the Screening Unit should rely on them when undertaking assessments. This is appropriate provided that decisions have a solid evidentiary base, are well reasoned and are in line with the policies and procedures of the Screening Unit.

The Commission identified some isolated screening assessments where, in deciding to refuse a clearance, the Screening Unit had appropriately cited and applied the lower standard of proof with respect to unsubstantiated criminal allegations. In one matter, an applicant who had been the subject of an indecent assault charge which had been dismissed for want of prosecution was refused a clearance. The Screening Unit's assessment included consideration of a child protection notification and information provided by a sporting association with which the applicant was affiliated. This enabled a pattern of predatory and inappropriate behaviour around children to be identified.

Assessing unsubstantiated allegations is clearly a difficult process. On the evidence before the Commission, assessment officers are given only limited guidance on the application of the standard of proof, how this intersects with the outcome of criminal matters and how unsubstantiated allegations might be weighted in a risk assessment. Improved guidance and training in this regard, and the elevation of complex decisions to an appropriate level of seniority, should encourage decision making that demonstrates that the safety of children is paramount. This should also have the added benefit of promoting consistency across decision makers.

PROCEDURAL FAIRNESS AND CHILD PROTECTION NOTIFICATIONS

The Screening Unit has regard to a person's complete child protection history as recorded on C3MS, CIS and Objective, and if necessary, in hard-copy files. Examining a person's child protection history can give an assessment officer significant insight into the risk a person may pose to children. Assessing information to this extent is relatively rare compared to other jurisdictions.⁹⁷ However, assessing a greater level of information brings with it greater challenges.

The Commission's review identified a number of screening outcomes that were concerning. For example, an applicant with a significant child protection history, including notifications involving sexual abuse and a resultant arrest, was granted a clearance on the basis there were no charges laid and no confirmation of abuse. In another case an applicant was granted a clearance allowing her to work with a care agency contracted by Families SA despite her 113 pages of child protection history over a five-year period.

To explore the challenges faced by the Screening Unit when reviewing child protection information, it is necessary to understand that applicants must be afforded procedural fairness throughout the assessment process. A decision of the Screening Unit has the potential to exclude a person from employment, volunteering and roles such as being a foster parent or kinship carer. The outcome of an assessment, if negative, affects a person's substantive rights. 'Procedural fairness demands that there is a rationale for excluding persons from child-related employment. This rationale must be transparent, relevant, evident and objective.'⁹⁸

The importance of affording procedural fairness to applicants should not be understated. However, the Commission's review revealed that at times the Screening Unit appeared preoccupied with maintaining procedural fairness to the applicant to the extent that it compromised child-focused decision making.

This sensitivity to the rights of applicants was particularly evident with respect to cases in which the relevant history revealed unresolved child protection notifications—that is, notifications that had either not been investigated or, if investigated, had not resulted in a formal outcome being recorded. Deficiencies in Families SA assessments and case management processes appeared to influence and compromise child-safe screening outcomes.

The Commission's review suggested that procedural fairness took precedence in circumstances in which the absence of a child protection investigation outcome was due to anomalies or inadequacies in Families SA's intake and investigation processes. Screening assessments commonly reasoned that unresolved child protection notifications did not prevent an applicant from being issued with a clearance. The following statement was ubiquitous throughout the reviewed assessments and was concerning to the Commission:

The standards set out in the Children's Protection Act do not preclude an individual [from a screening clearance] on the basis of unsubstantiated child protection history which resulted in no further investigations by Families SA at the time.

This is troubling—firstly because it suggests a mistaken understanding of the assessment officer's task and secondly because it overlooks the potential significance of a child protection notification to which Families SA has not responded.

While the Children's Protection Act does not preclude the granting of a clearance where an individual has an unsubstantiated child protection history, there are actually no precluding circumstances (either general or specific) in the Act. Even a convicted murderer is not by legislative provision precluded from a screening clearance. Registered child sex offenders are prohibited from engaging in child-related work pursuant to the *Child Sex Offenders Registration Act 2006 (SA)*.⁹⁹ The task of the assessment officer is to assess the applicant's relevant history and determine if they pose a future risk to children; it is not to reason that a clearance can be granted, despite a relevant history, because the Act does not specifically prevent that decision being made.

The Commission is well aware that Families SA's responses to child protection notifications are beyond the control of the Screening Unit. The challenges the Screening Unit faces in this regard illustrate the far-reaching consequences of Families SA attributing incorrect response priorities to notifications and its failure to respond adequately, or at all, to screened-in notifications (see discussion in Chapter 7 and Chapter 9). It is no doubt difficult for the Screening Unit to adopt a muscular approach to an applicant's child protection history when the database on which it relies reflects an inadequate approach to assessment and intervention.

The Screening Unit is not an investigative agency. In having regard to an applicant's child protection history, its purpose is not to investigate or re-investigate the notification or previous outcomes.¹⁰⁰ The Screening Unit will on occasion be left grappling with child protection concerns that indicate, on face value, that the applicant poses a risk to children yet Families SA has not made a determination as to whether or not the concerns are substantiated.

Increasing the Agency's ability to better respond to child protection notifications should gradually improve the robustness of the state's screening processes. The Screening Unit will be able to assess more confidently the appropriate weight to be given to a properly investigated child protection notification for which a clear outcome has been recorded.

Families SA's practices have led to a situation where there will always be historical unresolved child protection notifications on the databases that might be relevant to a screening assessment. Improving the Agency's ability and capacity to respond to notifications will therefore not completely overcome the issue of how to take into account an unresolved notification during a screening assessment. The prevalence of unresolved notifications should however decrease over time.

In attempting to gather contextual information about a child protection notification, the Screening Unit is constrained by section 13(2) of the Act, in that it must not disclose the identity of the notifier to the applicant (or indeed any other person). Affording the applicant procedural fairness by allowing them to comment on such allegations could potentially disclose a notifier's identity.

The Commission's review found there was much less engagement with applicants about relevant child protection notifications which had not been investigated than there was about other types of non-criminal investigations such as care concern investigations. Assessment officers generally assumed that applicants would be unaware of notifications, but made some efforts to enquire obliquely of the applicant with respect to child protection matters that had not been acted on by Families SA. It was evident that some extremely complex child protection histories, which had not resulted in criminal offences, were not elaborated on by the applicant, and assessment decisions were made purely on C3MS and CIS records.

The information that is reported to the Families SA Call Centre (commonly referred to as the Child Abuse Report Line) or otherwise recorded on C3MS is invaluable in understanding a child's experiences and recognising those adults in our community who jeopardise the safety and wellbeing of children. It would be short-sighted for the Screening Unit not to have regard to this valuable information.

STANDARDS FOR THE USE OF CHILD PROTECTION INFORMATION

As it stands, it is questionable whether assessment officers are given sufficient guidance in their use of this information. While the CP Standards require engagement with the applicant in all cases to give them sufficient opportunity to respond to any child protection information, this position appears to be qualified:

*In all cases, the applicant **must** be given an opportunity to provide a submission addressing factors of concern for consideration during the risk assessment ...*

***As appropriate**, in cases where the child protection information has a material bearing on the assessment of risk, the assessor should contact the applicant directly to provide procedural fairness ... The applicant **must** be given sufficient opportunity to respond to any child protection information relevant to the assessment process ...*

*Where child protection information is considered relevant to the assessment process, **and where appropriate**, the applicant must be given notice and information in [sic] (either in writing or verbally) that factors of concern exist and may influence the decision making process ...*

*During the risk assessment, **where practicable** the applicant may be given a reasonable opportunity to submit information relating to their child protection history and for this information to be considered.* [Emphasis added]¹⁰¹

There is no clarity in the CP Standards as to what is an ‘appropriate’ or ‘practicable’ circumstance such that an assessment officer can deviate from the overall position of giving an applicant the opportunity to provide a submission focusing on factors of concern.

Only Standard 4 acknowledges the possibility of inconsistent or unreliable information being uncovered when child protection information is being reviewed. It directs the assessment officer to other sources of information, such as the applicant or SAPOL. However, SAPOL is not commonly involved in child protection notifications, and the applicant often does not have knowledge of them. Assessment officers therefore face an information impasse.

The CP Standards emphasise that child protection information is gathered and recorded for the purpose of assessing risk of harm to children in their *family environment*, and a determination therefore has to be made whether, and to what extent, this indicates the applicant may pose a risk to children in *other settings*.¹⁰² The Commission is not aware of assessment officers being trained in understanding adult behaviour and how their interactions with children might differ depending on the environment. It suggests assessment officers should attempt to understand the nuances of the circumstances leading up to an applicant’s past conduct. This would be the task of a comprehensive psychological assessment, and not one for risk assessments conducted at an administrative level. It also invites assessment officers to have regard to the specific setting in which an applicant will be engaged but this tends against the portability of screening clearances across roles.

When no contextual information can be gathered and the applicant cannot be specifically engaged, it must be extremely challenging for an assessment officer to determine the risk posed to children, particularly if Families SA has not responded to a notification or recorded the outcome of an investigation. The CP Standards recognise that assessments must be made by persons with appropriate backgrounds and skill sets, for example backgrounds in law and law enforcement, child protection, psychology, criminology and/or child development.¹⁰³ The question of the experience and training of assessment officers is discussed later in this chapter. At this point, it is sufficient to recognise that without adequate standards to guide them, even the most qualified or experienced assessment officer may struggle when assessing child protection information.

The CP Standards do not appear to give sufficient clarity to ensure assessment officers are appropriately guided towards child-focused decision making. If child protection information were reviewed by appropriately trained and experienced assessment officers with practical guiding standards, risks posed by an applicant should be identified. Any guiding standards should make clear the circumstances in which an assessment may deviate from a strict adherence to procedural fairness for the applicant. The Commission’s review suggests there will be some child protection histories that are so serious or alarming that to be overly influenced by the inaction of Families SA, and adopt an inflexible ‘innocent until proven otherwise’ stance, risks the safety of children.

There will be some child protection histories that are so serious or alarming that to be overly influenced by the inaction of Families SA, and adopt an inflexible ‘innocent until proven otherwise’ stance, risks the safety of children

INTERACTION WITH APPLICANTS

The Commission’s review revealed concerning themes with respect to the nature of the Screening Unit’s engagement with applicants in relation to their criminal histories (as well as their child protection histories).

In some circumstances the Screening Unit engaged with applicants by proxy during the screening process, but the grounds on which this was permitted or might be appropriate were not clear to the Commission. For example, in the case of Aboriginal applicants from remote areas, a local community representative commonly translated or spoke on behalf of the applicant. On occasion, a relative communicated with the Screening Unit on behalf of the applicant.

It was difficult for the Commission to draw a conclusion as to how an applicant's responses were weighted in the assessment process and the extent to which issues such as mental health were taken into account. In some instances assessment officers would appropriately weigh an applicant's comments if supported by other evidence, such as judicial sentencing remarks or employer references. At other times, however, the Screening Unit appeared to show extreme sensitivity to the rights of the applicant and an inclination to accept an applicant's uncorroborated responses. There did not appear to be a method for weighting dishonest or inappropriate behaviour by applicants during the screening process. Some applicant behaviours clearly raised questions about professional and personal integrity, yet assessment officers appeared challenged as to how this might affect their decision making.

These themes are highlighted by the following examples:

- An applicant failed to declare a criminal conviction to the Screening Unit for assaulting his own child. Nevertheless he was granted a specific clearance to work in a school.
- An applicant received a clearance despite an allegation that he had sexually assaulted a child in his care, and a failure to disclose his termination from his associated employment with a care agency for misconduct. (The allegation was not investigated by Families SA and did not result in criminal charges.)
- An applicant failed to declare to the Screening Unit a finding of not guilty of robbery with violence because of mental incompetence, yet was granted a clearance for continued employment as a youth worker. The applicant had failed to disclose the matter during a previous assessment which resulted in a specific clearance.

There will be occasions where the decision maker falls into error because they have overlooked a relevant circumstance, or given too much weight to a matter, or taken into account an irrelevant factor. There will also be occasions, as with any discretionary decision-making process, when the circumstances are borderline and others may have reached a different conclusion. This does not necessarily mean the decision was incorrect. However, the Commission is concerned that borderline matters are tending to fall in favour of the applicant, rather than keeping a firm focus on child safety.

The Screening Unit needs to achieve greater consistency with respect to an applicant's responses which inform the assessment process. There needs to be a better understanding across all levels of decision makers in the Screening Unit as to how information from an applicant should be weighted and used in the assessment process. This may be achieved through clearer documented guidance and better training.

The Screening Unit should also be concerned with maintaining the integrity of its processes. It should be made clear to an applicant when lodging an application that a failure to declare a relevant matter to the Screening Unit, or misleading the Screening Unit, may result in a fine, in addition to potentially adversely affecting the outcome of the assessment.

RECORDS MANAGEMENT

The validity of screening assessments depends on the soundness of the databases which underpin them. As discussed, those databases in turn reflect the quality of the assessments and decisions of the relevant authority. The Screening Unit is clearly challenged by the search limitations and poor quality of information on the CIS and C3MS databases. To some extent this is not surprising given these systems were never intended to be used for the Screening Unit's purposes.¹⁰⁴

It was evident from the Commission's review that the Screening Unit often experienced difficulty extracting factual information from child protection databases. The Commission saw examples of the Screening Unit being unable to:

- satisfactorily establish the identity of an applicant in regard to child protection matters;
- determine from the child protection databases whether or not one of the applicant's children was in the care of the state;
- determine from C3MS if a report had been made to SAPOL about the applicant's treatment of foster children; and
- determine from the databases, or Families SA directly, the status of Families SA's earlier directive that the applicant not work with its clients again, or whether this directive had ever been enforced. The applicant had been the subject of a care concern investigation when previously employed by an agency contracted to Families SA. Nevertheless, the applicant was cleared to work for another agency contracted to Families SA.

Gathering information from C3MS and CIS is a resource-intensive process. Assessment officers often spend a large amount of time confirming the identity of individuals, ensuring information has been recorded against the correct person, determining relationships between the applicant and other persons listed on the database, linking children to the applicant and reviewing the histories of those children.¹⁰⁵

A case of mistaken identity?

In an assessment briefing reviewed by the Commission, the Screening Unit was faced with a question as to the applicant's identity. The applicant intended to undertake a volunteer role in a children's dancing program. Records held on child protection databases indicated a possible match to a male with the same date of birth, first name and surname, but a different middle name. A previous address given by the applicant also matched that of the recorded male. The records referred to the male, a number of years earlier, having been imprisoned in New South Wales for 23 years.

More recent records revealed a series of nine child protection notifications in relation to a male with the same first name and surname as the applicant. It was alleged the male had befriended intellectually disabled sisters, aged 15 and 17 years, through the dancing program, whom he then groomed, had inappropriate contact with and sexually abused.

The Screening Unit was unable to obtain information from CrimTrac about the male with the different middle name, as the applicant had not used this name in his application. The Screening Unit therefore had no permission to obtain criminal history information in relation to the different middle name.

The Screening Unit engaged the applicant. He advised he did not have, or use, any other middle names and he had never lived in New South Wales or been to prison there. The assessment officer recommended a general clearance, concluding:

- it is concerning that there is a reference to a male with a different middle name being the subject of a considerable custodial sentence, but this cannot be confirmed and was denied by the applicant;
- it is concerning the applicant appears to be in a relationship with a 17-year-old girl; however, this in itself is not unlawful;
- the other allegations around his inappropriate relationship with the girl's family have been investigated by Families SA and none have been substantiated; and

- the individual is not precluded from a clearance on the basis of unsubstantiated child protection notifications especially considering there is no supporting evidence available to the Screening Unit.

It is worth noting that of the nine child protection notifications, the assessment briefing only referred to Families SA responding to one of them. After the third notification it assessed the children as 'safe and risk assessment moderate'. Its investigation revealed no child protection concerns and it concluded it appeared the situation was motivated by family conflict. After the fourth notification Families SA referred back to its recent investigation and to the fact no disclosures had been made by either child, but noted that the older sister might have been coached in some answers.

Further, although in general terms a sexual relationship with a 17-year-old might not be unlawful, the question of intellectual disability in this case was relevant but it is not clear from the assessment briefing whether that was taken into account.

The matter went through the layers of authority in the Screening Unit and was eventually referred to CAP. At the panel's request the Screening Unit again contacted the applicant. He was asked to detail his address history. Perhaps unsurprisingly there was a period of 23 to 24 years where the detail given by the applicant could at best be described as vague. It is tempting to conclude this imprecision flowed from his incarceration for a significant period of time which he did not want to disclose to the Screening Unit. During this engagement the applicant provided information about his apparently platonic relationship with the sisters.

Following receipt of this information, CAP decided to offer a specific clearance. The panel determined the applicant was not the male with the different middle name who had been incarcerated for 23 years. The only evidence in support of this determination was the applicant's denial. This was accepted despite the matching address and date of birth.

The frustrations experienced by the Screening Unit when accessing the databases of Families SA are not unique. They echo the frustrations of many users of C3MS (see discussion in Chapter 5). The Commission has recommended improvements to the way information is handled on these systems. Such improvements should assist the Screening Unit in its practices and over time lead to less fallible screening outcomes.

KNOWLEDGE AND SKILL OF ASSESSORS

No screening methodology will be perfect or 100 per cent accurate and screening will not pick up those few people with clean records who later commit terrible crimes when working with children.¹⁰⁶ There is no question that the Screening Unit has an extremely difficult task. In a constrained environment, pressured by numbers of applications and complaints about processing times, and in the absence of well-founded formulae for predicting risk, it must attempt to construct an assessment decision from disparate bits of information of variable quality while attending to the rights of the applicant.

The assessment of information beyond proven criminal offending often calls for a highly complex and demanding decision-making process.

The Commission’s review demonstrated that, on paper at least, the Screening Unit was operating a procedurally driven and methodical system.

The Creating Safe Environments for Children—Organisations, Employees and Volunteers, National Framework sets out what is required for competent risk assessment and decision making:

*A mix of knowledge, skills and abilities is needed in any environment where risk assessment takes place. Analytical and investigative skills, a capacity for structured questioning and decision making, and understanding of the settings in which child-related employment/volunteering takes place, are all important. Where possible, there is merit in assessments being based upon multidisciplinary knowledge from corrective services, child protection, psychology and the law. Persons responsible for risk assessment may possess this expertise, or it may be gained through consultative arrangements.*¹⁰⁷

In addition to maintaining a team of assessment officers with relevant and diverse qualifications and/or experience, there should be an appropriate suite of tools to encourage consistent decision making in the best interests of the children. Conducting risk assessments will never be an exact science but it is clear that predicting child abuse through a formal risk assessment model is more accurate than leaving it to chance.¹⁰⁸ While the expertise and judgement of assessment officers is

relevant, they cannot be relied on alone. Whatever their qualifications or professional backgrounds, assessment officers need strong case formulation capacities which allow them to integrate multiple threads of factual information with knowledge about relevant predictive data in decision making.

The Commission was told that, in collaboration with DCSI’s Registered Training Organisation, the Screening Unit is working towards developing a specific qualification relevant to the role of assessment officers.¹⁰⁹ This development should be pursued with a view to addressing challenges identified throughout this chapter.

OTHER CHALLENGES

EMPLOYER RESPONSIBILITIES IN THE HUMAN SERVICES FIELD

The Commission’s review revealed that the screening process on occasion cleared people with troubling personal backgrounds. Of course, an unfortunate personal history does not necessarily result in poor quality work. However, the combination of such matters as low pay, relatively low qualification requirements, low employer expectations, access to vulnerable clients, and work which intersects with personal experience, make the human services particularly attractive for those with personal agendas to pursue or who have few other employment options. It is through a susceptible human services field that some persons with undesirable characteristics will gain access, often unsupervised, to vulnerable and damaged children who require a reliable and expert service.

The Commission reiterates that a screening process is only one part of a whole system to ensure that suitable workers work with vulnerable children and poor or high risk workers do not.¹¹⁰ Screening can never be a substitute ‘for proper vigilance by individuals and society’.¹¹¹

Screening can never be a substitute ‘for proper vigilance by individuals and society’

Beyond the role of the screening agency, information about applicants disclosed in some reviewed assessments highlighted the need for more rigorous scrutiny in the employee selection process, and any subsequent supervision. The number of persons with negative histories who were already in employment raises concerns about some human service employee selection processes. Post-screening recruitment processes, staff training, staff management and, most importantly of all, staff supervision and monitoring are critical. The Commission is concerned that inappropriate

workers are able to move freely from one job to another in the human services field and vulnerable children suffer the consequences.

PORTABILITY OF SCREENING CLEARANCES

INTRASTATE

In an overview of the South Australian scheme in its *Working With Children Checks report*, the federal Royal Commission commented that 'clearances are not portable; a new criminal history assessment must be undertaken each time a person begins new child-related work'.¹¹² In other words, a person who has a valid clearance may not use it to work or volunteer for different organisations.

However, this Commission was informed by the director of the Screening Unit that clearances are portable within South Australia.¹¹³ Clearance certificates expressly state they 'can be accepted by a number of organisations'. The Criminal Standards also provide that an organisation conducting a relevant history assessment can rely on a certificate issued within the preceding three years by an authorised screening unit.¹¹⁴

However, if an organisation chooses to conduct its own assessment of a potential employee, the employee cannot rely on that assessment with any other organisation.

The intrastate portability of clearances is clearer in other jurisdictions, in part because no other jurisdiction allows organisations to conduct their own assessments and engage a person without a clearance from a screening unit. In New South Wales, Western Australia and the Northern Territory, a Working With Children Check (WWCC) is portable across roles and organisations. Similar arrangements exist in the ACT and Tasmania, with the exception of clearances that are role-based or subject to certain conditions and therefore not transferable. In Queensland and Victoria, WWCCs are portable across roles and employers, but a volunteer's WWCC is not transferable to paid child-related work.

INTERSTATE

The Criminal Standards permit an organisation conducting its own assessment of a person's relevant history to accept a current screening clearance from another Australian jurisdiction.¹¹⁵ Presumably, this is because every jurisdiction at a minimum assesses a person's criminal history and pending charges, and that is all that is required of an organisation.

In all other circumstances, there is no interstate portability of screening clearances. If an individual moves across borders and wants to work or volunteer with children, they will require a new screening clearance.¹¹⁶

THE PROPOSED NATIONAL STANDARDS

A nationally consistent approach to creating child-safe environments has been on the agenda since 2005 when the Community and Disability Services Ministers' Conference established the Creating Safe Environments for Children National Framework. The framework sets out best practice across areas such as risk assessment and decision making when undertaking background checking, excluding people from child-related employment, and cross-jurisdictional information sharing. This was followed in 2009 by the National Framework for Protecting Australia's Children 2009–2020, again encouraging a nationally consistent approach to screening and information sharing of criminal histories.¹¹⁷

Against the background of some progress over the last 10 years, the federal Royal Commission's examination of WWCCs has brought to the fore the inconsistencies and deficiencies of the screening regimes across Australia and has proposed a national model.

The focus of screening must be on the safeguarding of children. Clearly, reform is necessary in South Australia to streamline and strengthen the current scheme. However, the efficacy and necessity of the expected outcomes of a national scheme, such as portability of WWCCs across jurisdictions and assisting organisations and people working across borders to comply with screening requirements, must be considered with the primary focus in mind—will these outcomes improve the safety that can be offered to children?

The federal Royal Commission recommended a national model for WWCCs, highlighting:

*The combined effect of the varied and complex schemes, the lack of portability of WWCCs, the capacity for people to forum shop for a less rigorous scheme, and the lack of infrastructure to support the effective sharing of information across borders weakens the protection that could otherwise be afforded to children by an effective, national WWCC.*¹¹⁸

However, support for a national WWCC scheme does not appear to be unanimous. Although the federal report indicates a general consensus across Australian jurisdictions for a nationally consistent approach to WWCCs, views differed as to the form it should take. There was a large degree of support for establishing a single national scheme from non-government organisations, but state and territory governments were less supportive of this concept. They preferred to implement consistent standards across jurisdictions rather than shift to a single national scheme.¹¹⁹

In response to weaknesses identified in screening schemes across Australia, the federal Royal Commission made a swathe of recommendations aimed at improving the protection afforded to children. For the national model to be achieved, generally state and territory governments need to amend their schemes to include consistent standards across key aspects of the schemes, support information sharing across borders and permit the portability of WWCCs.¹²⁰

While this Commission does not question the fundamental proposition that WWCCs 'deliver unquestionable benefits to the safeguarding of children'¹²¹, it is necessary to consider the value of South Australia supporting and moving towards the national approach proposed by the federal Royal Commission.

As discussed earlier in this chapter, South Australia's scheme is in need of reform and it would be assisted by adopting some of the standards set out in the federal Royal Commission's report.¹²² The following section of this chapter examines the recommendations and standards proposed by the federal scheme by reference to this Commission's inquiry into the South Australian screening system.

WHO SHOULD REQUIRE A CLEARANCE?

The current legislative scheme in South Australia captures a broader range of persons than many other Australian jurisdictions. It includes people who do not have direct contact with children, such as those who access records about children through their work or who manage persons who have contact with children.¹²³ Evidence before this Commission highlighted the prescriptive nature of the scheme in South Australia, particularly with respect to the current requirement that people have to be subjected to screening checks even if contact with children is only incidental to their employment.¹²⁴

In considering legislative reform there should be a simplified definition of who must obtain a clearance to undertake a child-related role, in order to limit subjective interpretation.

Balance should be struck between protecting children through intrusive screening processes and not imposing unnecessarily or unfairly on the workforce, nor on ordinary community or parental activities. Given the Screening Unit operates a fee-for-service model, it is also important that screening is not so far-reaching as to disadvantage potential applicants from low socio-economic areas and deter them from participating in their communities or the workforce.

Employers and caregivers cannot rely on screening to absolve them of responsibility for safeguarding children. There will be some contacts with children that are so incidental to a person's role that strategies other than screening should be employed to ensure the environment is safe. There will also be some instances when children are only put at risk because of irresponsible actions on the part of their caregiving adult. The legislative scheme cannot be so broad as to cover all eventualities of contact, particularly those where it is expected a responsible caregiver would safeguard the child.

Founded on the view that WWCCs should not apply to people who have only incidental contact with children and who do not work with children, the standards proposed by the federal Royal Commission would narrow the scope of persons currently required to be screened in South Australia. For example certain occupations, such as taxi-drivers, school cleaners and people handling children's records, would no longer be subject to a WWCC.¹²⁵ Nevertheless, there is some merit in the proposed standards as to who should require a screening clearance.

DEFINING CHILD-RELATED WORK

The federal Royal Commission has recommended that state and territory governments should amend their WWCC laws to incorporate a consistent and simplified definition of child-related work in line with recommendations contained in its report. This Commission supports that recommendation.

The federal Royal Commission sets out the following categories which can be regarded as child-related work:

- i. *accommodation and residential services for children, including overnight excursions or stays;*
- ii. *activities or services provided by religious leaders, officers or personnel of religious organisations;*
- iii. *childcare or minding services;*
- iv. *child protection services, including out-of-home care;*
- v. *clubs and associations with a significant membership of, or involvement by, children;*
- vi. *coaching or tuition services for children;*
- vii. *commercial services for children, including entertainment or party services, gym or play facilities, photography services, and talent or beauty competitions;*
- viii. *disability services for children;*
- ix. *educational services for children;*
- x. *health services for children;*

- xi. justice and detention services for children including immigration detention facilities where children are regularly detained;*
- xii. transport services for children including school crossing services; and*
- xiii. other work or roles that involve contact with children that is a usual part of, and more than incidental to, the work or roles.¹²⁶*

However, this definition needs to be read in conjunction with the overarching requirements set out by the federal Royal Commission¹²⁷:

- work must involve contact between an adult and one or more children to qualify as child-related work;
- the phrase ‘contact with children’ refers to physical contact, face-to-face contact, oral communication, written communication or electronic communication;
- contact with children must be a usual part of, and more than incidental to, the child-related work;
- it is irrelevant whether the contact with children is supervised or unsupervised;
- a person is engaged in child-related work if they are engaged in the work in any capacity and whether or not for reward; and
- work that is undertaken under an arrangement for a personal or domestic purpose is not child-related even if it would otherwise be so considered.

The key issue with respect to these definitions is the interpretation of when contact transcends the incidental to become usual. To lessen the opportunity for subjectivity leading to misinterpretation, it would be helpful for these terms to be further defined and guidance provided as to how often and how regular the contact must be to constitute ‘usual’. The purpose of a role and the subject of the service may also be relevant in determining ‘incidental’ contact. For example, if a person is engaged solely to coach an adult sporting team but in the course of that role has some contact with a children’s sporting team at the same club, that contact may or may not be regarded as incidental.

The Commission understands that the application of the above definition of ‘child-related work’ would mean that some persons in South Australia who currently perform a ‘prescribed function’ would no longer be screened. Nevertheless, some organisations may still opt for their prospective employees to be screened as a result of some particular feature of their role. For example, a person whose role involves working regularly, with minimal supervision, accessing sensitive health records about children might be the subject of such an optional screening.

It is also useful to refer to section 64(1) of the Child Sex Offenders Registration Act which contains a definition of ‘child-related work’. It is in similar terms to the categories set out by the federal Royal Commission. However, the South Australian Act specifically includes work in connection with taxi services and hire car services (whether or not the work involves contact with a child). That is not necessarily captured by the federal Royal Commission definition of transport services for children, unless it is a car service contracted to transport children on a regular basis.

ADULTS RESIDING IN THE HOME OF AN AUTHORISED CARER

The federal Royal Commission proposes a requirement that all adults residing in the home of authorised carers of children should hold a WWCC. While authorised carers should be screened, extending this to other adults residing in the house may not be appropriate. It would, for example, capture the natural son of foster parents who had just turned 18 and who remained living at home. It is not the job of a mandatory screening check to provide a safeguarding measure in ordinary familial circumstances: that responsibility should sit with the authorised carer and the child’s caseworker. It may be that a caseworker will seek a screening clearance for another adult residing in the house, but that is a matter to be determined through consideration of the particular circumstances of the residential arrangements.

SCREENING EXEMPTIONS

The federal Commission proposes that defined groups of persons who are engaged in child-related work be exempt from needing a WWCC. Acknowledging that a screening regime is not designed to encompass every person with whom a child comes into contact, generally speaking, the proposed categories are appropriate. If adopted, the most obvious divergence from the current legislative position in South Australia is that registered teachers would no longer be exempt from holding a screening clearance.¹²⁸

TEACHERS

In South Australia, registered teachers are exempt from the application of the screening scheme but are subject to a fit and proper person assessment under the *Teachers Registration and Standards Act 2004* (SA).¹²⁹ In part this involves a criminal history check, obtained by the Teachers Registration Board through CrimTrac.

The exemption of teachers from requiring a screening clearance has been in place since 2010. At that time, the Screening Unit relied on an assessment of an applicant’s criminal history similar to the practices of the Board. However, the Screening Unit’s assessments have evolved to encompass a much broader suite of information, including child protection records and cross-jurisdictional, expanded criminal history information (ECHIPWC).¹³⁰

From March 2014 the Board has been obtaining access to records held by the Department, most notably child protection information.¹³¹ The Board relies on Families SA personnel to action its requests for information, as opposed to the Screening Unit which has read-only access to the child protection databases.

Teachers have significant relationships and frequent unsupervised interactions with large groups of children.¹³² That relationship may be of even greater import for a vulnerable child who is in care with inconsistent caregivers or who is challenged by their experiences in their home environment.

As at 30 June 2015, there were approximately 36,000 registered teachers in South Australia.¹³³ This Commission acknowledges that the removal of their exemption will result in a substantial increase in the number of assessments which are required to be made by the Screening Unit. However, there is no reason why teachers should be exempt from the most rigorous of screening assessments, which reviews the greatest range of records available. This is consistent with the Commission's recommendation that the Screening Unit should be the only screening pathway for child-related roles in South Australia.

It would appear that the government has already given some consideration to this issue. In June 2013 in the *Report of Independent Education Inquiry*, Commissioner Debelle referred to an announcement by the Minister for Education of an intention to require teachers and student teachers to undergo a child protection history assessment in addition to a criminal history check. Commissioner Debelle noted that the screening process would only be effective if the Screening Unit was suitably resourced. He recommended that:

*the complement of staff of the Screening Unit at the Department for Communities and Social Inclusion be appropriately increased to manage the extra volume of work required for the purpose of screening teachers and students intending to be teachers.*¹³⁴

The staffing of the Screening Unit was increased in the 2013/14 financial year. However, teachers remain exempt and have not added to the Screening Unit's volume of work.

This Commission considers that the exemption of teachers from the Regulations should be removed and that teachers be required to be subject to the screening regime which is applicable in this state. The implementation of this recommendation could be staggered with a requirement that teachers obtain a screening clearance at the time of the next review of their three-year registration.

OVERNIGHT CARE

The federal Royal Commission proposes that a person who engages in child-related work for seven days or fewer in a calendar year be exempt, except in respect of overnight excursions or stays.¹³⁵ This reflects a provision in the South Australian Regulations which ties the exemption to a period of not more than 10 consecutive days or not more than one day in any month. However, this exemption does not apply to organisations or persons who provide residential or overnight care for children.¹³⁶

It is not entirely clear whether the federal Royal Commission's reference to 'overnight excursions or stays' is intended to capture emergency care workers who may only work a few shifts with children in care.¹³⁷ However, this Commission considers that, regardless of the number of shifts, no person should be permitted to work in a commercial or residential care environment with children who are in the care of the state without first being screened. Any reformed legislation should leave no room for uncertainty in this regard.

PARENTS OR GUARDIANS WHO VOLUNTEER

Under the South Australian Regulations, a person who volunteers 'to provide a service in his or her capacity as a parent or guardian of a child who is ordinarily provided with the service', is exempt from requiring a screening assessment unless the service involves overnight care or is provided only to children with disabilities.¹³⁸

Similarly, the federal Royal Commission recommended that 'parents or guardians who volunteer for services or activities that are usually provided to their children' should be exempt in respect of that activity, unless it involves¹³⁹:

- overnight excursions or stays; or
- providing services to children with disabilities that involve close, personal contact with those children.

In late January 2016, the Minister for Education and Child Development announced the Department had updated its screening policy, consistent with the federal Royal Commission's recommendations, to make it easier for parents to volunteer their time.¹⁴⁰

The Department's updated screening policy provides that volunteers participating in Departmental services¹⁴¹:

- do not require a screening if they are a parent (or guardian) of the child in direct receipt of the services they are providing;
- do not require a screening if they are a parent (or guardian) coaching a sporting team and their child is in the team. If their child is not in the team a screening is required;

- do require a screening if they are involved in overnight camps, school sleepovers, billets and homestays; and
- do require a screening if they are volunteering with children with disabilities and the services involve close personal contact.

It is not clear what is intended by ‘direct receipt’ of services. Even if a service involves the parent’s own child, for example school outdoor activities or providing transportation for an excursion, other children involved in those activities may find themselves being provided a service directly by the parent volunteer.¹⁴²

The Department’s narrowing of the screening requirement to services that involve ‘close personal contact’ with children with disabilities, while in line with the federal Royal Commission’s recommendations, is inconsistent with the provisions of the South Australian Regulations. Under the Regulations ‘close personal contact’ with children with disabilities is not said to be relevant to whether or not a person is exempt.

Putting to one side the Department’s policy, organisations in the community who engage volunteer parents are left to interpret, and operate within the bounds of, the Regulations.

This Commission is concerned that the position with respect to exemptions for parents who volunteer may be confusing. As a starting point, it is necessary to recognise that ‘by and large, then, extra-familial and mixed-type offenders seek victims close to home—among the children of friends or other children with whom they already have some social relationship’.¹⁴³ The reality is that offenders can also be parents, and many offenders access victims through their own children. However, a balance must be struck between safeguarding children and not intruding disproportionately into ordinary parental activities.

The federal Royal Commission’s recommendation provides some guidance when determining the categories of volunteer parents who should be exempt. However, the state government should consider whether screening of parents or guardians who participate in services that involve close personal contact, such as assistance with toileting or dressing, with any children, not just those with disabilities, is appropriate. Volunteer parents involved in providing overnight services (other than personal or domestic arrangements) should be subject to screening.

A PROHIBITION TO RELYING ON AN EXEMPTION

The federal Commission proposes that persons who have been denied a WWCC should not be able to rely on an exemption to participate in child-related work.¹⁴⁴ This Commission supports this proposal.

WHAT RECORDS SHOULD BE ASSESSED?

This Commission agrees with the proposal by the federal Royal Commission that an applicant’s criminal history should include:

- convictions, whether or not spent;
- findings of guilt that did not result in the recording of a conviction; and
- any charges, regardless of status or outcome.

The proposal requires police services to provide screening agencies with ‘any other available information relating to the circumstances of such offences’.¹⁴⁵ The provision of ‘any other available information’ should be limited to offences in an applicant’s criminal history that the Screening Unit considers warrants further assessment.

In general terms, the proposal of the federal Royal Commission as to the types of criminal matters to be assessed is consistent with the current position in South Australia and the information available through ECHIPWC (the exchange of criminal history agreement). However, the Screening Unit gathers valuable information from a broader range of sources than police services, such as the courts, and there would appear to be no reason to limit this process.

SPENT CONVICTIONS

This Commission agrees with the recommendation of the federal Royal Commission that spent convictions should come within the definition of criminal history and therefore be assessed. However, reform of the screening legislation in South Australia should occur in line with the safeguards in the Spent Convictions Act.

Under the Spent Convictions Act, the Screening Unit may consider spent convictions in its screening process, but only if good reason exists, giving strong weight to the fact that the conviction is spent or relates to circumstances that did not lead to an actual conviction. The Screening Unit must provide reasons if it decides to have regard to spent convictions.¹⁴⁶

INFORMATION BEYOND AN APPLICANT'S CRIMINAL HISTORY

The federal Royal Commission proposes that an applicant's disciplinary and/or misconduct information should be assessed where the conduct was against, or involved, a child, but does not set out the types of records that should be checked. Other jurisdictions include information provided by professional or regulatory organisations associated with teachers, childcare providers, foster carers and health practitioners.¹⁴⁷ The Screening Unit does not routinely undertake checks for professional misconduct. However, it does obtain information from some regulatory bodies, such as the Australian Health Practitioner Regulation Agency and prohibition orders issued by the South Australian Health and Community Services Complaints Commissioner, if there is something in the application or assessment process to trigger that inquiry. As a general rule, the Screening Unit regards searches of publicly accessible sources, such as the Australian Association of Social Workers list of persons ineligible for employment, to be the prospective employer's responsibility.¹⁴⁸

Some disciplinary or misconduct information will not be publicly available, such as that relating to the deregistration of foster carers or formal proceedings of the Teachers Registration Board. Consistent with the proposal of the federal Royal Commission, legislative amendments in South Australia should include a requirement that the Screening Unit assess disciplinary and/or misconduct information, particularly where the information is not publicly available. The legislation should address the way in which this information is brought to the attention of the Screening Unit. There is merit in the federal Royal Commission's proposal to require the bodies responsible for the disciplinary or misconduct information to notify the Screening Unit of relevant information.¹⁴⁹

THE USE OF CHILD PROTECTION RECORDS

The federal Royal Commission does not exclude child protection records from use in WWCCs, but they are not included in the recommended standard on information to be assessed.¹⁵⁰ For the reasons set out in this chapter, this Commission considers that child protection records should always be assessed by the Screening Unit during every child-related employment screening.

Information afforded by child protection notifications and care concerns, which might not be available by simply assessing criminal histories, can be highly informative to screening assessments. The Commission's review found a number of assessments in which a potential risk to children was only revealed through information beyond that associated with the applicant's criminal history, in particular by reference to child protection histories.

In view of the challenges faced by the Screening Unit in assessing child protection records, it is tempting to adopt the federal standards and the practices of many other jurisdictions. This would be the simplest way to overcome issues such as:

- data integrity within the child protection databases accessed by the Screening Unit;
- resource inefficiencies associated with assessment officers wading through cumbersome child protection histories;
- having regard to unresolved child protection notifications in a procedurally fair assessment; and
- deficiencies associated with the investigation of care concerns (see Chapter 15).

These complications are further exacerbated by the fact the CP Standards are silent on data quality or investigation inadequacies and do not provide matrix guidance on risk assessment against the type and number of child protection reports or events.

While there is support for a completely streamlined and integrated national screening system, the Commission does not recommend that the state government adopt a standardised definition of disciplinary and/or misconduct information that would exclude, or narrow, the assessment of child protection information. This would lead to a less rigorous screening scheme and potentially allow children to come into contact with adults who would place their safety and wellbeing at risk. Reviewing child protection information should result in more accurate screening assessments. Research highlights the statistical relevance of prior allegations of child abuse as an indicator of the likelihood of future abuse.¹⁵¹

AUTOMATIC REFUSALS

The federal Royal Commission proposes that the absence of any relevant criminal history and disciplinary or misconduct information should lead to an automatic grant of a WWCC.¹⁵² However, this Commission considers there should not be an automatic grant unless the absence of disciplinary or misconduct information includes an absence of child protection history.

The federal Royal Commission also recommends that any conviction or pending charge for the following categories of offences should lead to an automatic refusal provided the applicant was at least 18 years at the time of the offence:

- murder of a child;
- manslaughter of a child;
- indecent or sexual assault of a child;
- child pornography-related offences;

- incest where the victim was a child;
- abduction or kidnapping of a child; or
- animal-related sexual offences.

The proposal for automatic refusals for these offences is understandable. However, even for the crime of manslaughter, judges often comment on the difficulty of fashioning an appropriate sentence in view of the wide range of circumstances in which that crime can be committed. The same can be said for some sexual offences. For example, an applicant when aged 19 may have had a sexual relationship with a young woman aged 16 who was a willing participant and whose parents were aware of the relationship. Nevertheless, he would still be guilty of a sexual offence. However, 10 years later, with no other criminal or relevant history and married to the young woman concerned, he seeks a screening clearance to volunteer as the coach of a junior boys' basketball team. Under the automatic refusal categories proposed by the federal Royal Commission, the Screening Unit would have no choice but to refuse the clearance.

Although the appeal provisions proposed by the federal Royal Commission would appear to give such an applicant a right of review, it may nevertheless be more appropriate to limit the automatic refusal category to the crime of murder of a child and provide that all other categories mentioned trigger a risk assessment. That would enable the Screening Unit to examine the circumstances of the relevant offence in its historical context.

The federal Royal Commission also proposes categories of offences that should trigger a risk assessment. For some, depending on the time passed since the offending, the Screening Unit currently issues a clearance without further assessment. As part of legislative reform, it would be appropriate to review the offences that trigger an assessment in this state (currently set out in the Screening Unit's assessment procedures and the matrix guiding assessment officers).

It is important to note that a person who is a registered offender according to the Child Sex Offenders Registration Act is prohibited from applying for, or engaging in, child-related work. A person remains a registered offender for life, regardless of whether the period of their reporting obligations has expired. This leaves the Screening Unit with no discretion in respect of registered offenders, even if a significant period of time has passed since their offending, there has been no further offending and they are no longer subject to reporting obligations. Clearly there is a close practical relationship between the screening scheme and this Act. When considering legislative reform, and in particular whether to make any categories of offences the subject of automatic refusals, it will be necessary to ensure there is consistency between the screening scheme and the Child Sex Offenders Registration Act.

CRITERIA FOR RISK ASSESSMENT

The federal Royal Commission proposes that standard criteria for assessing risk be legislated.¹⁵³ These criteria are appropriate and largely consistent with those outlined in the standards currently guiding assessment officers in South Australia.¹⁵⁴ There is merit in the proposal that the legislative scheme expressly provide that, in assessing risk, 'the paramount consideration must always be the best interests of children, having regard to their safety and protection'.¹⁵⁵

CONDITIONAL CLEARANCES

As discussed in this chapter, this Commission considers that screening clearances should never be granted on a conditional basis and should be detached from the organisation or the role the person is intending to undertake. This is consistent with the recommendations of the federal Royal Commission.¹⁵⁶

COMMENCING WORK PENDING A CLEARANCE

The federal Royal Commission proposes that persons should be allowed to commence child-related work while their WWCC application is pending, provided appropriate safeguards are put in place such as a receipt for the pending application being provided to an employer and the employer verifying this with the screening agency. A processing benchmark of five days is proposed, with no longer than 21 days for more complex cases.¹⁵⁷

In South Australia organisations are not permitted to engage a person in child-related work until an assessment of their relevant history has been undertaken. The Commission considers this should remain the position (provided that assessment results in a clearance being granted). In view of recent improvements in processing times the Screening Unit should be able to maintain earlier mentioned benchmarks of seven and 28 days. The Commission believes these times are not unreasonable for a person to wait before engaging in child-related work.

Under the proposed reforms of the legislative scheme, with clearances transferable across roles and valid over a period of potentially five years, it is an unnecessary risk to allow individuals to commence employment before a check is completed. Further, in the proposed system, which is driven by employees rather than employers, individuals who anticipate working in a child-related field could take the initiative and obtain a clearance at any time before being prompted to do so by a particular employment opportunity.

Nevertheless, there will still be a small number of applications that will take longer than 28 days to process. These are likely to be applications that require detailed information gathering or complex decision making. They will relate to those persons who potentially pose a real risk to children, and time is required to make that assessment. To allow such a person to work with children for an extended period of time pending the grant of a valid clearance is not acceptable. This Commission acknowledges this may seem unreasonable for that small proportion of applicants who are not cleared within about one month of their application but the safety of children must always be the paramount consideration.

MONITORING DURING THE LIFE OF A SCREENING CLEARANCE

In addition to determining how often the risk a person poses to children is assessed, the validity period of a WWCC has implications for administrative matters such as application fees and the operational costs of screening schemes. It also determines the currency of information held by screening agencies.¹⁵⁸

The average duration of a WWCC in Australia is three years.¹⁵⁹ Evidence before the federal Royal Commission suggested the principal reason for limiting the duration of a WWCC to within that timeframe was the lack of a national system alerting screening agencies to relevant changes in an individual's criminal history.¹⁶⁰ That is, the validity period is 'linked inextricably to screening agencies' capacity to identify and monitor new relevant records, as they arise'.¹⁶¹

The federal Royal Commission proposes that WWCCs be valid for a period of five years.¹⁶²

Currently, South Australia's screening scheme is a point-in-time assessment of risk that does not involve systematic monitoring during the lifetime of a clearance. Organisations that conduct their own assessment of a person's relevant history cannot effectively facilitate ongoing monitoring.

After granting a clearance, the Screening Unit relies on information coming to light in an opportunistic manner which identifies new risk factors and triggers the need for a reassessment. Such information may come from a variety of different sources, for example chance reports from SAPOL or requesting organisations. The provision of fresh information from the Care Concern Investigations Unit is more structured, with the Screening Unit being routinely advised of serious matters regarding a person who holds a valid clearance.¹⁶³

If additional adverse information is received, the Screening Unit has no legislative mandate to revoke or retrieve a clearance certificate. The Screening Unit has sought to retrieve a certificate following the receipt of additional information on only a few occasions. While the Screening Unit has always notified the requesting organisation, it has not always been successful in retrieving the certificate from the individual.¹⁶⁴

The absence of the ongoing monitoring of screening clearances in South Australia constitutes a significant deficit in pre-employment screening practices. Every other state or territory monitors an individual's criminal history on an ongoing basis. This does not entail reviewing a person's *national* criminal history as is undertaken when a clearance is first issued—it is restricted to the individual's criminal history in the particular jurisdiction.¹⁶⁵ As proposed by the federal Royal Commission, South Australia should work with other jurisdictions towards the continuous monitoring of criminal histories through a national database operated by CrimTrac.

The Screening Unit has announced that in mid-2017 it will move to a real-time monitoring system. Regular updates will be provided to the Screening Unit through linking with SAPOL and other databases. New information that may affect a person's clearance status will be available to the Screening Unit for assessment. A person's clearance status can then be withdrawn if appropriate.¹⁶⁶

If this proves to be a robust system whereby changes that affect a person's complete risk profile are promptly identified and assessed, and organisations are alerted to any consequent changes in a person's clearance status, it would be appropriate to consider extending the duration of all clearances to five years.¹⁶⁷

The implementation of an ongoing monitoring system has the potential to moderate the number of applications submitted to the Screening Unit. Those organisations that currently require annual screenings would be able to rely on continuous monitoring to identify indicators of risk, rather than having to make regular applications to the Screening Unit.

ESTABLISHING A REGISTER

As part of the ongoing monitoring system, a public register should be established and maintained by the Screening Unit of all clearances issued, and their expiration dates. Organisations and individuals should be required to register the use of a clearance with the Screening Unit, to ensure that they are notified if a clearance is cancelled.

Refused clearances should also be registered, but this register should not be available for public viewing.

PORTABILITY ACROSS JURISDICTIONS

At present, individuals seeking to engage in child-related work must hold a WWCC in each jurisdiction in which they wish to be employed. A consistent theme in the federal Royal Commission's report was the need for screening checks to be portable across jurisdictions. This was said to be particularly relevant given the transient nature of the Australian workforce. Although the federal Royal Commission reported that 'more than 300,000 people move across jurisdictional borders each year, and this figure does not include temporary movements to other states or territories'¹⁶⁸, it is unknown what proportion of this group are engaged in child-related positions.

Nevertheless, the federal Royal Commission considers that a national approach and consistent WWCC standards are necessary to support mobility and reduce administrative burdens on organisations providing services across jurisdictions. It proposes that all state and territories should enable WWCCs from other jurisdictions to be recognised and accepted in their jurisdiction.¹⁶⁹

This Commission considers that this state should be cautious in simply accepting a WWCC from another jurisdiction. New jurisdictions should be mindful of the possibility that the applicant may have first applied for a clearance in another jurisdiction safe in the knowledge they did not have any relevant disciplinary or misconduct information in that jurisdiction. Even if the proposed national standards were adopted, there remains the potential for some schemes to be more robust than others. The extent of disciplinary and misconduct information assessed is likely to vary across jurisdictions.

Before a screening clearance from another jurisdiction is accepted, an assessment of all the available information against the legislation and standards that apply in this state should be conducted.

APPEAL PROCESSES

The legislative scheme in South Australia does not provide an appeal mechanism for persons who are refused a clearance.

An applicant wishing to dispute the Screening Unit's decision to refuse a clearance can apply to have it reviewed internally. The applicant must demonstrate a substantive reason exists for the Screening Unit to accept an application for review, such as the availability of new or additional information that might affect the outcome or that irrelevant information was considered as part of the initial assessment.¹⁷⁰

If an application for review is accepted, the matter will be re-assessed by an assessment officer who had no association with the initial screening decision. The same information reviewed in the initial assessment will be assessed afresh, along with any new or additional information provided by the applicant.¹⁷¹

If the applicant is still dissatisfied following an internal review, external avenues of review may be available through government agencies such as the South Australian Ombudsman or the Human Rights Commission. The applicant may also seek a judicial review in the Supreme Court.¹⁷² In all other states and territories a person who is refused a clearance may appeal either to an administrative tribunal or local court.¹⁷³

The federal Royal Commission proposes that any person who is the subject of an adverse WWCC decision should be able to apply by way of appeal to a body independent of the WWCC screening agency, but within the same jurisdiction, for a review of that decision. However they exclude from any such appeal those persons who have been convicted of^{f174}:

- murder of a child;
- indecent or sexual assault of a child;
- child pornography-related offences; or
- incest where the victim is a child.

The person must have also received full-time custodial sentence for the conviction, or by virtue of the conviction be subject to a control order.

The federal Royal Commission had difficulty in identifying all the offences that should exclude a right of appeal due to the differences between states and territories as to the description of relevant offences.¹⁷⁵ However, curiously the proposed categories are less extensive than those for automatic refusals mentioned earlier. Manslaughter, abduction/kidnapping and animal-related offences are not included, but the concept of penalty (that is, imprisonment or a control order) is introduced. A narrow group of offences would therefore be left for which the Screening Unit would be obliged to refuse a clearance, but a right of appeal would be available to the applicant against that automatic refusal.

The Commission agrees with the proposal for an independent review by way of appeal from an adverse screening decision of the Screening Unit. A person convicted of the murder of a child obviously should be excluded from any such appeal. Other than this, a right of appeal should only be excluded from those categories of offences that the South Australian legislature considers appropriately the subject of an automatic refusal.

The ACT, New South Wales, Queensland, Victoria and Western Australia all provide for a right of appeal within their screening legislation to their respective administrative tribunal. On 30 March 2015, the South Australian Civil and Administrative Tribunal (SACAT) commenced. SACAT currently deals with matters such as residential tenancy agreement disputes, the appointment of guardians for persons with a mental incapacity, treatment orders for persons with a mental illness, and the review of some government decisions such as assessment decisions made by Housing SA. SACAT has a broad mandate and a membership with an appropriate range of expertise. Consideration should be given to including a right of appeal to SACAT or some other independent body. It will be important, particularly for the resourcing needs of the Screening Unit, to establish a streamlined appeal pathway that places minimal burden on the Screening Unit. This is possibly best achieved through the review jurisdiction of SACAT that provides for the examination of a decision by way of re-hearing.¹⁷⁶

ENFORCING COMPLIANCE

Amendments to the legislation with respect to the screening scheme in South Australia should include specific offences to encourage compliance with the legislation. Such offences can be guided by those proposed by the federal Royal Commission and also incorporate specific features of the reformed South Australian scheme. For example¹⁷⁷:

- engaging in child-related work without holding a WWCC;
- engaging a person in child-related work without them holding a WWCC;
- providing false or misleading information in connection with a WWCC application;
- as a holder of a WWCC, failing to notify a screening agency of a relevant change in circumstances; and
- unauthorised disclosure of information gathered during the course of a WWCC.

There may be merit in requiring an organisation not only to notify the Screening Unit when they engage (or no longer engage) an individual, but also to report other relevant disciplinary or misconduct information that comes to its attention. This obligation would in some ways be comparable to New South Wales' 'reportable conduct scheme'.¹⁷⁸

Placing an obligation on organisations to report relevant conduct to the screening authority will strengthen the message that a screening clearance does not absolve them of their ongoing responsibility to assess and monitor employees or volunteers. It would be consistent with the requirement that organisations implement a broader suite of strategies aimed at ensuring their organisation is child safe.

The implementation of offence provisions would require a process to monitor and investigate compliance and prosecute non-compliance. The evidence before this Commission does not allow for a conclusion to be drawn as to who would be best placed to perform such functions. The structure would to some extent be dictated by resources. As it stands there is no agency or body in South Australia specifically tasked with monitoring compliance with the screening scheme.¹⁷⁹ It may be that a monitoring and compliance team could be established within the Screening Unit, with statutory powers to monitor compliance with the screening legislation and compel production of information to facilitate this.

TECHNOLOGICAL REQUIREMENTS

Underpinning the utility of a national scheme is the establishment of a centralised database, operated by CrimTrac and accessible by all jurisdictions to record WWCC decisions.¹⁸⁰ While this Commission maintains its position that screening in this state should continue to be of a broader scope than that proposed by the federal Royal Commission, it supports the establishment of a national database. Knowing that an applicant has been previously refused a clearance in one or more other jurisdictions, or is currently the subject of a suspended clearance, would be a significant starting point for an assessment.

RECOMMENDATIONS

The Commission recommends that the South Australian Government:

238 Enact a stand-alone legislative instrument to regulate the screening of individuals engaged in child-related work which:

- a declares that the paramount consideration in screening assessment must be the best interests of children, having regard to their safety and protection;
- b invests powers in only one authorised government screening unit which is charged with maintaining a public register of all clearances and their expiration dates;
- c empowers the screening authority to take into account in its assessments criminal offence and child protection history, professional misconduct or disciplinary proceedings, and deregistration as a foster parent or other type of carer under the *Family and Community Services Act 1972*;
- d provides a clear definition of child-related work, including the meaning of incidental or usual contact;
- e declares that the outcome of a screening assessment will be limited to either a clearance or a refusal and that all applications, even if withdrawn, will be assessed;
- f requires individuals to seek and maintain a personal clearance, valid for a period of up to five years, through a card or unique electronic identifier system, which has portability across roles and organisations in the state; and to notify the screening authority of relevant changes in their offence, conduct or child protection circumstances;
- g requires employers to ensure that all relevant personnel in their organisations, at all times, hold current clearances;
- h precludes exemptions from screening requirements for—
 - i registered teachers
 - ii applicants waiting on screening outcome decisions

iii those working or volunteering with children who are in care

iv those who have been refused a WWCC;

- i details offences for individuals and organisations who fail to comply with the provisions of the legislation, including engagement in or for child-related work without a clearance, and dishonesty in the application process; and
- j permits appeals from decisions of the screening authority to the South Australian Civil and Administrative Tribunal or other independent body.

239 Establish a real-time monitoring system which ensures that changes in screened individuals' circumstances are communicated to the screening authority, that clearances are reviewed, and that changes are reflected in the register, and communicated to employers.

240 Charge the screening authority with:

- a ensuring that it has access to forensic expertise in child protection and behavioural indicators of risk;
- b developing a consolidated set of standards, matrices, and weighting guidelines for use in screening assessments, that include substantiated and unsubstantiated criminal, child protection and disciplinary matters, and ensuring that assessors are appropriately trained in their application;
- c developing guidelines for ensuring that applicants are afforded appropriate procedural fairness, including circumstances in which information may be withheld from applicants;
- d developing and promulgating timeline benchmarks for screening outcomes, and procedures for informing applicants whose clearances may fall outside benchmarked times;
- e developing information sharing protocols with interstate screening units.

241 Develop an independent mechanism and evaluation process for reviewing the performance of the screening authority.

NOTES

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- 21 RA Layton (Chair), *Our best investment: A state plan to protect and advance the interests of children*, Report of the Review of Child Protection in South Australia, Department of Human Services, Government of South Australia, Adelaide, 2003, p. 1.9; see also Recommendation 130.
- 22 *ibid.*, pp. 1.9, 17.7.
- 23 *ibid.*, p. 17.7
- 24 *ibid.*, p. 5.12.
- 25 Witness statement: K Tattersall.
- 26 Data from the Screening Unit.
- 27 *Children's Protection Act 1993* (SA), Part 2 Division 3.
- 28 *ibid.*, s. 8A(j).
- 29 *ibid.*, s. 8B(1).
- 30 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working With Children Checks report*, pp. 32–36.
- 31 *Children's Protection Act*, s. 8B(6).
- 32 *Children's Protection Regulations 2010*, r. 3, 8.
- 33 *Children's Protection Act*, s. 8B(2).
- 34 *ibid.*, s. 8B(8).
- 35 With respect to government organisations, 'responsible authority' is defined to mean the chief executive officer of a government department or the managing authority of a government agency or instrumentality: *Children's Protection Act*, s. 8B(8).
- 36 *Children's Protection Act*, s. 8B(8)
- 37 Such as records of an educational or childcare service, a health service, a disability service, records relating or legal proceedings: *Children's Protection Regulations 2010*, r. 10.
- 38 *Children's Protection Regulations 2010*, r. 10A(2).
- 39 DECD, *Child safe environments*, p. 12.
- 40 *ibid.*
- 41 *ibid.*
- 42 *Children's Protection Regulations 2010*, r. 14.
- 43 *Children's Protection Regulations 2010*, r. 6(1).
- 44 Either a letter or certificate relating to the outcome of a relevant history assessment conducted by the Screening Unit within the preceding three years or a criminal history report prepared by the South Australia Police or a CrimTrac accredited agency within the preceding three years: DECD, *Child safe environments*, p. 11.
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Some oral evidence, witness statements and submissions were received on a confidential basis. The source is known to the Commission, and is identified by a number in the endnotes.

- 61 In accordance with s. 8C of the Children's Protection Act, an organisation commits an offence if it does not have in place appropriate policies or procedures to ensure the maintenance of a child safe environment. Depending on the circumstances, engaging a person without a valid clearance could evidence a lack of appropriate policies or procedures.
- 62 *Working With Vulnerable People (Background Checking) Act 2011* (ACT), s. 14; *Child Protection (Working With Children) Act 2012* (NSW), s. 9(1); *Care and Protection of Children Act 2007* (NT), s. 187; *Working With Children (Risk Management and Screening) Act 2000* (QLD), s. 194(2); *Registration to Work with Vulnerable People Act 2013* (Tas), s. 17; *Working With Children Act 2005* (Vic), s. 35; *Working With Children (Criminal Record Checking) Act 2004* (WA), s. 22.
- 63 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working With Children Checks report*, pp. 32–41, 130–133.
- 64 K Tattersall, response to questions from the Child Protection Systems Royal Commission, 11 December 2015; Department for Communities and Social Inclusion (DCSI), Organisational chart - Screening Unit, internal unpublished document, Government of South Australia, 21 November 2014.
- 65 Witness statement: K Tattersall.
- 66 K Tattersall, response to questions from the Child Protection Systems Royal Commission, 11 December 2015.
- 67 Witness statement: K Tattersall.
- 68 *ibid.*
- 69 Children's Protection Act, s. 8B(10).
- 70 Witness statement: K Tattersall.
- 71 *Spent Convictions Act 2009* (SA), s. 9A.
- 72 Witness statement: K Tattersall.
- 73 *ibid.*
- 74 Witness statement: K Tattersall. DCSI, 'Assessment procedure for dealing with criminal history information: Child related employment', internal unpublished document, 2014; DCSI, 'Matrix for assessing criminal history information: Child related employment—organisational settings', internal unpublished document, 2014.
- 75 DCSI, 'Matrix for assessing criminal history'.
- 76 DCSI, 'Assessment procedure for dealing with criminal history', p. 1.
- 77 Witness statement: K Tattersall.
- 78 DCSI, 'Matrix for assessing criminal history'.
- 79 DCSI, 'Assessment procedure for dealing with criminal history', p. 3.
- 80 *ibid.*, p. 1.
- 81 Witness statement: K Tattersall. DCSI, 'Approvals authorisation: Child-related assessment', internal unpublished document, 2014; DCSI, 'Approval authority matrix', internal unpublished document, 2014; DCSI, 'Approval authority matrix', internal unpublished document, 2015.
- 82 Witness statement: K Tattersall.
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- 84 *ibid.*
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- 87 Children's Protection Regulations 2010 (SA), r 8A(3).
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- 91 Submission: Name withheld (S79).
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- 99 *Child Sex Offenders Registration Act 2006* (SA), s. 64.
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- 111 DSS, *A nationally consistent approach*, p. 3.

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- 115 *ibid.*, p.28.
- 116 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working With Children Checks report*, p. 48.
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- 118 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working With Children Checks report*, pp. 51–52.
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- 121 *ibid.*, p. 5.
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STRUCTURES TO PROMOTE COLLABORATION

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OVERVIEW

It is evident from this report that significant obstacles remain to effective collaboration and information sharing between the many government and non-government agencies that form South Australia's child protection system. This chapter summarises measures discussed elsewhere in this report to improve collaboration and information sharing. It also includes some additional recommendations for recasting the duty to share information within the child protection system and bringing together the leadership of key government and non-government agencies to promote ongoing strategic cooperation.

This chapter principally relates to the Commission's Terms of Reference 1 to 4.

BENEFITS AND CHALLENGES OF INTER-AGENCY COLLABORATION

As discussed in Chapter 8, the potential benefits of coordinating services include¹:

- being able to address complex, interrelated issues simultaneously;
- reducing financial costs by identifying needs and targeting support earlier, and reducing multiple visits to separate support services and duplication of services;
- improving access to services;
- improving information sharing and cooperation between service providers;
- improving service quality, outcomes and satisfaction with service delivery among service users and providers.

At the same time, it is easy to become cynical about initiatives that purport to promote collaboration. Buckley and Nolan have commented on recommendations following reviews and enquiries:

*You can seal [the report] in a brown envelope before you start and know that inter-agency cooperation will come up, probably something to do with adherence to policy and procedure and all these predictable things ... you can bet your bottom dollar that they will come out.*²

In recent years, the Layton Review and the Children in State Care Inquiry emphasised the importance of inter-agency collaboration and recommended measures for improvement in this state. Elsewhere in Australia, the Victorian Vulnerable Children Inquiry³, Carmody Inquiry⁴, Wood Inquiry⁵ and Bath Inquiry⁶ also recommended measures to improve collaboration.

The continuing challenge of inter-agency collaboration was a consistent theme in evidence before the Commission. Services are often fragmented and poorly coordinated, leaving areas of duplication and service gaps (see Chapters 8 and 10). People find it difficult to navigate the system to access the services they need. Information sharing between agencies is often poor and there is a siloed approach to service delivery, as opposed to a coordinated, multi-agency response, which may often be required.

It is easy to criticise agencies for poor collaboration. However, collaboration is difficult. Significant obstacles hinder coordination of the work of the various agencies—including government, for-profit and not-for-profit—that form the wider child protection system. Agencies often have different interests and face competitive pressures that discourage collaboration. Their practitioners come from diverse backgrounds, with differences in training, experience, service approach and ideological views. These barriers need to be overcome by a process that promotes collaborative practice.

MEASURES TO PROMOTE COLLABORATION

The Commission is endorsing and recommending a series of measures to promote service collaboration in South Australia's child protection system. For example, recommendations in Chapter 8 include establishing a cross-departmental Early Intervention Research Directorate to prepare a prevention and early intervention strategy. It would guide the funding of services across the South Australian Government and form the basis of negotiations with federal and local governments. A further recommendation is to establish child and family assessment and referral networks throughout South Australia with a lead not-for-profit agency managing a local entry point for services provided by partner agencies in each region. The network would promote collaborative practice and coordinated, multi-service responses.

The draft Interagency Code of Practice: Investigation of Suspected Child Abuse or Neglect (a revision was due to be released in July 2016) (ICP) is the guiding document for inter-agency collaboration in investigating suspected child abuse or neglect in South Australia (see Chapter 9). The revised ICP better addresses all forms of abuse and neglect, not just sexual abuse. It applies to government and non-government agencies that provide relevant services.

Under the ICP, strategy discussions by Families SA (the Agency), South Australia Police (SAPOL) and Child Protection Services are central to coordinating responses to individual Tier 1 and 2 child protection notifications. While the revised ICP encourages Families SA to act as lead agency and to coordinate service provision

throughout the assessment process, this does not always happen. Chapter 9 emphasises the need for the Agency to convene strategy discussions more promptly (and without delay when children present with physical injury), to include all relevant government and non-government participants, and to reconvene discussions throughout the assessment process as required.

Chapter 10 discusses the importance of the Rapid Response policy, which gives priority access to state government services for children in care. It recommends establishing an inter-departmental committee to oversee Rapid Response and review its operation at least biannually.

INFORMATION SHARING

The Information Sharing Guidelines (ISGs) are a 'statewide policy framework for appropriate information-sharing practice'.⁷ They apply to most state government agencies and to non-government organisations contracted by the state government to provide services. The ISGs require agencies to share information where 'a person is at risk of harm (from others or as a result of their own actions) and adverse outcomes can be expected unless appropriate services are provided'.⁸ They guide practitioners step by step in the responsibilities and decisions for information sharing.

A consistent theme in evidence before the Commission was that, in spite of the ISGs, many agencies fail to share information. The Commission was told of a persistent culture that privileges privacy and confidentiality over the need to share information relevant to the health, safety and wellbeing of children.

It may be that the ISGs, as a policy framework, do nothing to ease legislative restrictions on information sharing. The first step for decision making under the ISGs is to follow specific legislative requirements and the guidance of the practitioner's agency.⁹

Most relevantly, section 58(1) of the *Children's Protection Act 1993* (SA) makes it an offence for a person engaged in the administration of the Act to divulge personal information obtained in the course of that administration, relating to a child, a child's guardians or other family members or any person alleged to have abused, neglected or threatened a child. The phrase a 'person engaged in the administration of the Act' is broad enough to include not only the Agency, but also a range of government and non-government agencies that respond to vulnerable and at-risk children and support their families. The personal information caught by section 58(1) is also wide in the context of child protection practice.

Section 58(3) creates exceptions so as not to prevent a person:

- from divulging information if authorised or required to do so by law;
- from divulging statistical or other data that could not reasonably be expected to lead to the identification of any person to whom it relates; or
- engaged in the administration of the Act, from divulging information if authorised or required to do so by his or her employer.

The first two exceptions would not usually help practitioners working with children and families, except when notifying the Agency of suspected child abuse or neglect. The third exception permits very wide divulging of information if authorised by a practitioner's employer, but gives no guidance as to the basis on which such authorisation should be given.

The Department's chief executive has given a general authorisation to Families SA staff to divulge information under section 58(3) when either:

- the information is divulged to a person (government or non-government personnel including carers) with a duty of care for a child or young person; or
- it is necessary to divulge that information to that person in order to protect that child or young person from risk of serious harm.

In each case, staff must proceed to follow the ISG principles and, in the event that personal information is shared without the consent of the person it relates to, first seek approval from a supervisor or another senior officer.¹⁰

This permission offers no assistance to other agencies that must individually decide what information employees are permitted to share. The process is cumbersome and liable to produce inconsistency.

Section 58 effectively assumes personal information is confidential unless an employer provides otherwise. However, legislation in New South Wales strikes a different balance. Section 245A of the *Children and Young Person's (Care and Protection) Act 1998* (NSW) includes the following three principles¹¹:

- agencies with responsibilities for the safety, welfare or wellbeing of children should be able to provide and receive information that promotes the safety, welfare or wellbeing of children;
- those agencies should work collaboratively in a way that respects each other's functions and expertise, and should be able to communicate with each other to facilitate service provision to children and their families; and

- because the safety, welfare and wellbeing of children are paramount, the need to provide services relating to the care and protection of children, and the needs and interests of children and their families in receiving those services, take precedence over the protection of confidentiality or of an individual's privacy.

The NSW legislation expressly permits 'prescribed bodies' to provide information to each other relating to the safety, welfare or wellbeing of a child (or class of children) to help the recipient make a decision, assessment or plan, or initiate or conduct an investigation, or provide a service, relating to the safety, welfare or wellbeing of the child or class of children; or manage risk to the child.¹² Prescribed bodies may also ask each other for information relating to the safety, welfare or wellbeing of a child for the same purposes; generally speaking, they must comply with such requests.¹³ Importantly, the prescribed body must not use or disclose the information for any purpose that is not associated with the safety, welfare or wellbeing of the child (or class of children) to whom the information relates.¹⁴ These provisions take precedence over other laws that might otherwise prohibit or restrict the disclosure of information.¹⁵ Prescribed bodies include NSW Police, a public service agency or public authority, a government or registered non-government school, a TAFE establishment, a public health organisation, a private health facility or any other body prescribed by regulations.¹⁶

These provisions significantly recast the balance in favour of information sharing to promote the best interests of children. The South Australian Children's Protection Act should be amended to permit and, in appropriate cases, require the sharing of information between prescribed government and non-government agencies with responsibilities for the health, safety or wellbeing of children, where it would promote those responsibilities. Amendments should identify the agencies with a common obligation to share information, as providing agencies, receiving agencies, or both. The Agency would need powers to both give and receive information. Such a scheme would require a cultural shift for those agencies accustomed to holding client information closely. The overriding consideration for these proposed arrangements should be the three principles cited above from the NSW Act.

It is important to recognise that even with the proposed amendments, the exceptions provided in section 58(3) will still need to be utilised in some circumstances and must therefore be maintained. For example, information may need to be disclosed to an individual, as opposed to an agency, if their conduct relating to the abuse of a child is being investigated by a person engaged in the administration of the Act.

Multi-Agency Protection Service

The Multi-Agency Protection Service (MAPS) is an initiative led by SAPOL. It brings together in one location staff from SAPOL, Housing SA, Correctional Services, Families SA, Education and Health to share information about incidents of family and domestic violence. It draws upon the United Kingdom example of Multi-Agency Safeguarding Hubs.

After each shift, police officers complete a risk assessment form on any domestic violence incidents. Every morning, MAPS reviews these forms and selects high-risk cases and those otherwise of interest for 'mapping'. In the mapping process, information gatherers from each agency search their respective databases for information relevant to the case. They enter this information into a summary document.

Once all agencies have entered their information, the summary document is forwarded to a tactical team who review the information together and identify actions for each agency. These actions are recorded and the completed document returned to the agencies. Examples of actions include directing the relevant Family Violence Investigation Section of SAPOL to convene a family safety framework meeting, notifying a school so that it is aware of the risk factors or directing a barring order in cases where there is a problem with alcohol. The process helps agencies to make more complete assessments and earlier, better informed responses at the local service level.¹

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LEADERSHIP TO SUPPORT COLLABORATION

Overcoming the obstacles to inter-agency collaboration requires concerted effort and leadership. To demonstrate this commitment, leaders from agencies with responsibilities for the health, safety and wellbeing of children should meet regularly to identify strategic measures to promote inter-agency collaboration and information sharing. This is a forum at which promising models for collaboration, like the Multi-Agency Protection Service (MAPS), can be pursued.

Attendees should be senior leaders, generally at chief executive or deputy chief executive level or their equivalent, with authority to speak for, and make commitments on behalf of, their respective agencies. They should represent health, education, police, youth justice, disability, housing, mental health, family violence, drug and alcohol services, community services, multicultural services, correctional services and the Screening Unit. The forum should also include representatives from the Child and Family Welfare Association of SA, Aboriginal Family Support Services and other non-government service providers. They should meet at least four times a year.

The NSW legislation expressly requires prescribed bodies to take reasonable steps to coordinate decision making and the delivery of services for children.¹⁷ A similar duty should be included in the South Australian legislation.

As recommended by the Wood Inquiry, chief executives from government agencies that have responsibilities for the health, safety and wellbeing of children should have, as part of their performance agreements, a requirement to ensure inter-agency collaboration in child protection matters and a metric for measuring that performance.¹⁸

RECOMMENDATIONS

The Commission recommends that the South Australian Government:

- 242 Amend the *Children's Protection Act 1993*:**
- a to permit and, in appropriate cases, require the sharing of information between prescribed government and non-government agencies that have responsibilities for the health, safety or wellbeing of children where it would promote those issues; and**
 - b to require prescribed government and non-government agencies to take reasonable steps to coordinate decision making and the delivery of services for children.**
- 243 Require senior leaders from government and non-government agencies that have responsibilities for the health, safety and wellbeing of children to meet at least quarterly to identify strategic measures to promote inter-agency collaboration and information sharing.**
- 244 Review procedures and employment arrangements so that chief executives of government agencies with responsibilities for the health, safety and wellbeing of children have a provision included in their performance agreements that obliges them to ensure inter-agency collaboration in child protection matters, and measure that performance.**

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- 12 *ibid.*, s. 245C.
- 13 *ibid.*, s. 245D.
- 14 *ibid.*, s. 245F.
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PROMOTING SYSTEM TRANSPARENCY

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OVERVIEW

The child protection system is frequently at the forefront of public debate and attracts a high level of media interest. When events occur and decisions are made that adversely affect personal relationships and family lives, people can feel aggrieved, excluded and silenced. They can feel powerless to influence decisions which have a substantial impact on them.

Children whose lives are shaped by the way the system operates can be at particular risk of marginalisation if understanding them and taking their point of view into account is not emphasised. Children living in out-of-home care in particular can be constrained in their ability to influence the system and effect changes at a high level.

Both system and individual issues can be independently examined by oversight and review mechanisms, improving transparency and quality of decision making and service provision.

In this chapter, the term 'oversight' is used to describe organisations that are tasked with examining matters that come to their attention at a system level. This function might also involve advocacy for particular individuals in the system, but their focus is not on reviewing or investigating individual matters. 'Review agencies' are those established to consider individual grievances, and are empowered to report back to agencies on individual matters.

In South Australia, system oversight comes from a group of bodies created and defined in the *Children's Protection Act 1993* (SA): The Guardian for Children and Young People (GCYP), the Child Death and Serious Injury Review Committee (CDSIRC), and the Council for the Care of Children (the Council). These bodies contribute (among other functions) to the examination and monitoring of children's wellbeing. The Ombudsman SA and the Health Care and Community Services Complaints Commissioner (HCSCC) provide review functions.

With the exception of the Ombudsman, all current oversight and review bodies were established following the Layton Review of Child Protection in South Australia in 2003, and modified as a result of recommendations from the Children in State Care (CISC) Commission of Inquiry in 2008. Their structure and functions reflect aspects of recommendations from both reports.

The Layton Review also recommended the creation of a Children's Commissioner, a recommendation not implemented. Instead, the Council for the Care of Children was created. However, agitation has continued for the appointment of the Layton recommended Children's Commissioner.

At present bipartisan support is strong for the appointment of a Children's Commissioner but there is some dispute as to the powers and functions of that office. This chapter recommends the appointment of a Children's Commissioner, and considers the functions that should be included within their remit.

This chapter also considers current structures and proposes a system to create a more complete, cohesive and accessible network for review and oversight.

The chapter principally relates to the Commission's Terms of Reference 5(a) to 5(h), in the context of Terms of Reference 1 and 2.

CURRENT OVERSIGHT AND REVIEW ARRANGEMENTS

The Layton Review made several recommendations for establishing a framework of services to oversee and promote the interests of children. They were based on comparing services operating in the state against interstate and overseas models for the protection of children's interests and services. The review recognised an increasing acknowledgement in the community that parents or caregivers might not always be the best advocates for the interests of children, and it was appropriate to empower a specialist body or bodies to represent children's interests.

The review identified four, then unfulfilled, functions in South Australia: promotion and advocacy for children; an independent complaints and grievance service; screening for child related employment; and a separate representative for children who are in the care of the state.¹

The Layton Review proposed a framework for fulfilling those functions:

- A Children's Commissioner would promote and advocate for children, and develop screening processes for child-related employment. The model anticipated the appointment of a Deputy Commissioner filled by an Aboriginal² person. The Review did not recommend including a complaints jurisdiction within the role of the Children's Commissioner, recognising the potential for conflict between complaint and advocacy roles.
- A Children's Guardian would be an independent statutory body in the Office of the Children's Commissioner, with functions including a focus on monitoring children in care, and ensuring that the care provided was in accordance with guidelines set out in a charter of rights.
- A complaints and grievance process relating to decisions on administrative actions would include independent review by the Ombudsman. This recommendation would have enhanced the functions

of the Ombudsman, but exclude jurisdiction for those complaints or grievances that fell within the jurisdiction of a proposed Health and Community Services Ombudsman.

- A special unit in the proposed office of the Health and Community Services Ombudsman would investigate complaints and grievances about services concerning children.
- A Child Death and Serious Injury Review Committee would monitor epidemiological factors and develop strategic approaches to protect children from death and serious injury.
- Administrative measures across government were aimed at improving coordination and relationships across all sectors of government, and included as a first step creation of a South Australian Child Protection Board.

The functions of existing oversight and review organisations are outlined below.

GUARDIAN FOR CHILDREN AND YOUNG PEOPLE

GCYP's powers relate solely to children under guardianship or in the custody of the Minister, with a particular focus on children in foster care, kinship care and residential care. The functions of GCYP, set out in sections 52C and 52EB of the Children's Protection Act, include:

- promoting children's best interests;
- individually advocating for children;
- monitoring children's circumstances more broadly;
- advising the Minister about quality of care and whether children's needs are being met;
- investigating and reporting to the Minister on matters referred by the Minister³; and
- developing and monitoring a Charter of Rights for Children and Young People in Care.⁴

GCYP's operations are driven by two imperatives: achieving transparency about the circumstances of children in care, and strengthening the voice of those children.⁵ Former guardian Pam Simmons explained that her focus had been determined by:

*looking at what we are finding from our monitoring, and then whatever the most critical issues are from our monitoring activity, then we make a decision about what we will enquire into, and ... our advocacy flows from that.*⁶

GCYP almost always assists a child who raises a complaint. However, if an adult approaches GCYP with a grievance, GCYP is guided by its capacity and the seriousness of the matter in deciding whether the help can be provided, or if the matter should be referred to a more appropriate source for resolution. The former

guardian considered there was value in exercising both individual advocacy and systemic monitoring functions. In helping with individual complaints, GCYP monitors repetition and identifies ongoing issues for children in care.⁷

For GCYP to conduct a systems inquiry, an identified topic must affect a significant number of children, cause significant disadvantage to them, not be the subject of another inquiry and have some associated urgency. GCYP determines at a quarterly meeting which matters are to be the subject of major inquiry, depending on capacity.⁸

In Chapter 12, the Commission recommends the development of a community visitors scheme for children in emergency care and residential care facilities. This would add to GCYP's oversight responsibilities, especially in relation to monitoring the wellbeing of children in rotational care.

The guardian is independent of the Minister and is empowered to request, and receive, information from government or non-government organisations which provide services to children.⁹ The guardian is obliged to consider children's views and is supported by a youth advisory committee.¹⁰ GCYP reports to the Minister, and its reports must be tabled in Parliament.¹¹

GCYP's office comprises the guardian, assisted by 5.8 full-time employees (FTE)—3 FTE as advocates, 0.8 in communications, 1.0 as office manager and 0.6 as policy officer. Actual spending of GCYP for 2014/15 was approximately \$874,518.¹² The Commission observes that GCYP's legislative remit is currently being satisfied very economically.

COUNCIL FOR THE CARE OF CHILDREN

The functions of the Council for the Care of Children are set out in section 52J of the Children's Protection Act. The Council focuses on advising the government about the rights and interests of children, reporting about the wellbeing of children and considering child-specific legislation. It investigates and reports on matters referred to it by the Minister.¹³ The Council is subject to the direction of the Minister, but has independent authority to make findings or recommendations.¹⁴

In 2014/15, the Council's annual spend was \$268,787.¹⁵ The Council has a staff complement of 1.8 FTE, and its members are offered sitting fees, although some members do not apply for them, preferring that the small budget be preserved for other important work. The modest funding has prevented the Council from fulfilling every aspect of its broad legislative mandate, and it has been unsuccessful in obtaining additional resources to permit it to do so.¹⁶

In 2009, the Council developed a monitoring framework as part of its responsibility to report to government on the wellbeing of children in the state. Guided by a concept of 'child wellbeing', the framework monitors children's outcomes in five domains which measure children's development and participation in life, with the aim of tracking progress over time and identifying areas which require greater focus.¹⁷

The initial report in 2009 set a baseline against which future outcomes could be measured. Two further reports have been published since then, in 2013 and 2015, reviewing and reporting against those key indicators.¹⁸ The development and monitoring of the framework was accomplished through the goodwill of the Council's membership and did not attract any additional funding to support it.

CHILD DEATH AND SERIOUS INJURY REVIEW COMMITTEE

CDSIRC reviews the circumstances surrounding the death or serious injury of children. Its purposes include identifying trends and patterns in cases of child death or serious injury, and reviewing policy, practice and procedures designed to prevent such deaths and injuries. It maintains a database of child deaths and serious injuries, and their circumstances and causes, for performing its roles.¹⁹

CDSIRC reports periodically to the Minister on the performance of its functions and its annual reports are tabled in Parliament. It is subject to the Minister's direction but cannot be directed about its findings or recommendations.²⁰

The committee is restricted from disclosing information about the circumstances of individual cases to relevant agencies or more broadly. Confidentiality provisions apply, except for information on potential criminal offences, information which suggests a child may be at risk of abuse or neglect, or information relevant to a coronial inquiry.²¹

CDSIRC membership comprises experts from across the private and government sector. In the 2014/15 year its 16 members brought together expertise from disciplines including law, social work, psychology and medicine. Private members receive a retention allowance of approximately \$5,600 per year and are paid sitting fees. They are not paid for preparation time for meetings or reviews outside meetings. Government employees are not paid additional allowances as membership is part of their substantive employment. Committee members contribute a great deal of their time for no remuneration.²² The total spend for CDSIRC in the 2014/15 annual year was \$313,870, including salaries for a small secretariat.²³

HEALTH AND COMMUNITY SERVICES COMPLAINTS COMMISSIONER

HCSCC was created as an independent body with functions relating to health and community services complaints. It fulfils the functions anticipated in the Layton Review for the Health and Community Services Ombudsman. Its overarching purposes are to:

*provide for the making and resolution of complaints against health or community service providers; to make provision in respect of the rights and responsibilities of health and community service users and providers.*²⁴

HCSCC is the primary body tasked with reviewing individual grievances relating to child protection. Its functions include²⁵:

- resolving individual complaints about services, including by conciliation;
- inquiring into and reporting on matters relating to services;
- identifying and reviewing issues arising from complaints, making recommendations about improving services, and advising and reporting to the Minister;
- providing information, advice and reports to registration authorities; and
- developing a Charter of Health and Community Services Rights.

Complaints may be made on grounds that relate to service provision. The most relevant grounds for child protection service complaints are that a service provider²⁶:

- acted unreasonably by not providing a health or community service, or by discontinuing (or proposing to discontinue) a health or community service;
- gave an unnecessary or inappropriate service;
- acted unreasonably in the manner of providing the service;
- failed to exercise due skill;
- failed to treat the user in an appropriate professional manner or failed to respect their privacy or dignity;
- unreasonably disclosed information about the user to a third party; and
- failed to conform with generally accepted standards of service delivery.

HCSCC is not required to act in the interests of children generally or to advocate for them individually or as a group. It is bound by its legislation to encourage and assist complainants to attempt to resolve complaints directly with service providers. It may not act on a

complaint if it forms the view that the complainant has failed to take reasonable steps to resolve the matter with the service provider without good reason.²⁷ However, this is usually inappropriate when a child is the user of the service to which the complaint relates.

THE NATURE AND NUMBER OF COMPLAINTS

A relatively small volume of complaints are received by HCSCC relating to child protection issues. In 2014/15 only 4.6 per cent (102 of a total of 2200) of complaints received related to its child protection jurisdiction. Of these, the vast majority (67.5 per cent) related to service delivery, with the second highest proportion relating to communication or information (24.1 per cent).²⁸ These numbers are consistent with the two preceding financial years.²⁹

The number of complaints received by HCSCC appears out of keeping with the level of dissatisfaction with the child protection system that the Commission has encountered in the course of its inquiry. It is also inconsistent with rates of complaint observed in some other jurisdictions. For example, the rate of complaints was over twice as high in New South Wales, with the Ombudsman's child protection jurisdiction receiving 0.14 complaints per thousand people in the population compared to the 0.06 per thousand people received by HCSCC.³⁰

Three factors may have a bearing on this comparatively low rate: HCSCC does not have a high profile in the community, and service users (particularly children) in contact with the child protection system may be unaware of its service; legislative restrictions on complainants' standing might affect the number of complaints received; and the emphasis is on helping complainants resolve matters directly with the service provider, rather than formally determining complaints.

Following the recommendation of the CISC Inquiry, amendments to the *Health and Community Services Complaints Act 2004* (SA) enabled children who are service users to complain to HCSCC. The CISC Inquiry envisaged that HCSCC would continue the work begun by the CISC Inquiry in hearing complaints about the functioning of the child protection system.³¹ However, the Commission understands that HCSCC has received only two complaints directly from children in the past 10 years.³² The current provisions of the *Health and Community Services Complaints Act* undermine easy access by people with legitimate grievances relating to the child protection system, and reforms are needed.

STANDING TO COMPLAIN

The *Health and Community Services Complaints Act* limits who has standing to make complaints. Primarily, the 'health or community service user' can make a complaint, although the Act provides for options where the service user is a child, or where other circumstances

cause a complaint to be made by someone else.³³ The following options are most relevant to receipt of complaints relating to the child protection system³⁴:

- a person appointed by a child if the child is over 16;
- a parent or guardian of the child if the child is under 16;
- a person approved by the Commissioner to make that complaint on the user's behalf, if the Commissioner is satisfied that it is unreasonable to expect the service user to make a complaint personally; and
- any other person, or anybody who, in the opinion of the Commissioner, should be able to make a complaint in the public interest.

If a child wishes to make a complaint about the actions of the statutory agency, and they are under 16, then their capacity to have an adult act on their behalf may be limited to an adult approved by HCSCC, or an adult who makes a complaint in the public interest. They have the right to have a parent or guardian act on their behalf. However, a birth parent of a child in care is unlikely to be their best advocate in dealings with the complaints body, and as their guardian is likely to be the service they are complaining about, that power is also unlikely to help.

This difficulty is a consequence of the focus of the Act on the quality and efficacy of a service being delivered to a user, and the impact of the delivery (or non-delivery) of that service. The Act does not, on a strict reading, allow a third party who is aggrieved by the service delivery to make a complaint on their own behalf. This can be distinguished from the provisions of the *Ombudsman Act 1972* (SA), which provide that the Ombudsman may entertain a complaint made by any person or body of persons 'directly affected' by an administrative act.³⁵

Many groups may wish to make complaints about services being delivered (or not delivered) to children: relatives, carers and other people aware of a child's circumstances. On a strict interpretation of the legislation they may not make a complaint on a child's behalf. Nor may they make a complaint which focuses on how the nature of the service being delivered to the child impacts on them.

The significance of this issue comes into sharp focus when considering the position of foster parents or other carers aggrieved by a decision made to remove a child under a guardianship order from their care (see Chapter 11). In such a situation, a child may complain about the service delivery by Families SA (the Agency), in removing them from that placement. However, it is unlikely that a child would do so unassisted.

The complexity of the circumstances of a child's removal is likely to make the carer an inappropriate conduit through which a complaint can be made by the child. The focus on the service user excludes the carer from making a complaint about the quality of service delivered to them, because they are not the user of the Agency's service. A carer may be a user of a service being provided by a registered foster care agency supporting the placement of the child, but it is not the actions of that service about which the carer is aggrieved.

Carers may receive some services from Families SA, but they are not the recipient of the care and protection service to which the HCSCC's jurisdiction relates. The service they receive is not aimed at helping them with any disadvantage, rather it is helping them perform such a service for another. The situation of a foster parent or other carer is better aligned to that of a 'service provider', that is, providing a service to the child on behalf of the Agency. Their role is contemplated in the Health and Community Services Complaints Act as that of a volunteer, providing services on behalf of the organisation.³⁶

In another setting, a relative may observe that a young child in the care of their parents is being continuously abused or neglected, notwithstanding the ongoing involvement of the Agency that repeatedly decides not to remove the child from the family's care. Neither the child who is the victim of that abuse and neglect nor the parents who are responsible for it are likely to access the HCSCC to make a complaint. The relative must rely on the Commissioner exercising discretionary powers to receive a complaint on behalf of the child about services being delivered.

The Commission is concerned that the strict interpretation of the Act does not permit many people with legitimate concerns to raise them with the decision-making body that should hear their complaints.

However, the Commission was advised that HCSCC does take an inclusive approach towards the receipt of complaints. Provided a person has a legitimate issue, HCSCC accepts the complaint, even where the complainant does not necessarily fit within the criteria strictly applied. Its basis for receiving the complaint is that it is in the public interest to allow it, or it begins an own-motion inquiry.³⁷ HCSCC receives complaints from birth grandparents, family members, foster parents and other carers, and concerned members of the community.³⁸

HCSCC also considers that foster parents, kinship carers and children are in receipt of community services from Families SA and thus have standing on their own behalf to make complaints to HCSCC.³⁹

The Commission considers that the inclusive position taken by HCSCC, which relies heavily on discretionary powers and a wide interpretation of the jurisdictional provisions, does not reflect the limitations revealed by a strict interpretation of the Health and Community Services Complaints Act. It is only the inclusive attitude taken by the current HCSCC that permits many complaints about child protection to be received and actioned. This flexible approach has allowed the system to function to date, but cannot be considered a long-term solution.

DEFINING A COMMUNITY SERVICE

Child protection services come within the HCSCC's jurisdiction insofar as they are described within the definition of 'community service' in the Health and Community Services Complaints Act. A community service includes both 'a service for the relief of poverty, social disadvantage, social distress or hardship' (section 4(1)(a))⁴⁰ and under section 4(1)(c):

*A service for the care or protection of any child who has been abused or neglected, or allegedly abused or neglected, and includes any service that relates to the notification of any case of child abuse or neglect (or alleged child abuse or neglect), or the investigation of a case where a child may be in need of care or protection, or any subsequent action taken by a service provider arising from any such investigation.*⁴¹

HCSCC receives complaints about child protection services almost exclusively under the definition in section 4(1)(c). If the complaint relates to the Agency, HCSCC assumes that the child concerned is receiving a care or protection service because of abuse or neglect, and accepts that that condition is satisfied.⁴²

The CISC Inquiry recognised that the section 4(1)(c) definition permitted the investigation of complaints regarding many services associated with caring for children who are the subject of abuse, including hospitals, medical services and counsellors.⁴³

However, the Commission observes that the definition, on a strict reading, does not include all children who come into contact with the child protection system. The term 'abuse and neglect' is not defined in the Health and Community Services Complaints Act but is defined in the Children's Protection Act.⁴⁴ Abuse and neglect are not the only bases on which a child may come into the care of the state, or into contact with the system. For example, the relevant test for most intake decisions relates to assessing whether a child is 'at risk'.⁴⁵ This term reflects the potential of abuse or neglect, without any having necessarily occurred, and includes abuse and neglect as one of a number of bases for a finding that a child is at risk.⁴⁶

It is arguable that child protection services might come within the scope of section 4(1)(a). However, the purpose of including section 4(1)(c) then becomes unclear. Yet if section 4(1)(c) is to be interpreted as covering the field of child protection services, it excludes many children who are in contact with child protection systems. The provision should be amended to reflect the broader definition of children at risk in the Children's Protection Act.

POWERS

After receiving a complaint, HCSCC may conduct preliminary inquiries, initiate informal mediation to try and resolve the matter between the service provider and user,⁴⁷ and/or refer the complaint for conciliation, where agreements reached between a complainant and service provider may be made binding.⁴⁸

HCSCC may conduct investigations. It has the power to engage experts, demand information or documents, or require a person to answer questions. It may seek a warrant from a magistrate to enter and search premises for relevant documents.⁴⁹ It must prepare reports following investigation, and may serve a notice of recommended action to a service provider, who may be required to outline what, if any, action has or will be taken about matters in the notice. Copies of notices must be provided to relevant registration bodies, and HCSCC may publish its reports.

HCSCC must produce annual reports to the Minister which are tabled in Parliament. Its reports are then taken to be published as a report of the Parliament.⁵⁰

Following an investigation, HCSCC may refer matters to registration bodies for registered professional groups, or take action where a breach of the code of conduct for unregistered practitioners is identified.⁵¹ With the exception of medical professionals, and some registered allied health professionals including psychologists, these powers would not apply to most practitioners working in child protection services. Social workers, who make up a significant proportion of the professional workforce in child protection, are not registered, so cannot be referred to a registration body. Neither would they come within the definition of a health practitioner for the purposes of the unregistered health practitioners' code of conduct, and consequences that flow from a breach thereof.⁵²

OMBUDSMAN

The Ombudsman's overarching purpose is to 'investigate the exercise of the administrative powers of certain agencies'⁵³, including those of the Department for Education and Child Development (the Department).

The Ombudsman has the capacity to act of its own initiative, on receipt of a complaint or a referral from parliament.⁵⁴ The Ombudsman has the power to conduct

a review of the administrative practices and procedures of an agency where to do so would be in the public interest.⁵⁵

The Ombudsman has flexibility in the categories of persons from whom complaints can be received. Where the administrative act that is the subject of the complaint is 'directly relevant' to the person or body making the complaint, the Ombudsman may receive it. Complaints may also be made on behalf of a person by a member of Parliament or another suitable representative if the person is unable to make a complaint personally, or is deceased.⁵⁶ Complaints made by an employee about an employer's employment-related conduct are specifically excluded.⁵⁷

JURISDICTION

The Ombudsman's jurisdiction is activated by the identification of an administrative act⁵⁸, including those performed by the Agency and by other non-government organisations under a contract with the Agency. It would include the provision of care by for-profit and not-for-profit agencies contracted for that purpose to the Agency.⁵⁹

The Ombudsman's jurisdiction to investigate is set out in section 13 of the Ombudsman Act:

- (1) *Subject to this Act, the Ombudsman may investigate any administrative act.*
- (2) *The Ombudsman may make such an investigation either on receipt of a complaint or on the Ombudsman's own initiative and, where a complaint is made, the Ombudsman may investigate an administrative act notwithstanding that, on the face of it, the complaint may not appear to relate to that administrative act.*
- (3) *The Ombudsman must not investigate any administrative act where—*
 - (a) *the complainant is provided in relation to that administrative act with a right of appeal, reference or review to a court, tribunal, person or body under any enactment or by virtue of Her Majesty's prerogative; or*
 - (b) *the complainant had a remedy by way of legal proceedings, unless the Ombudsman is of the opinion that it is not reasonable, in the circumstances of the case, to expect that the complainant should resort or should have resorted to that appeal, reference, review or remedy.*
- (3a) *The ability to lay a complaint for disciplinary action against a person is to be disregarded for the purposes of subsection (3).*

- (4) *The Ombudsman may investigate any administrative act, notwithstanding any enactment that provides that that administrative act is final or not to be appealed against, challenged, reviewed, quashed or called into question.*

The Ombudsman is the avenue of last resort for complaints resolution and investigation relating to administrative decision making. Where there are rights of appeal or review to any other body, the Ombudsman's jurisdiction is excluded in most circumstances until other avenues are investigated and exhausted.

Because HCSCC holds a specific jurisdictional mandate to consider complaints about community services (including for the care and protection of children), when such complaints are made to the Ombudsman they are referred to HCSCC. The exceptions are complaints unrelated to the HCSCC's jurisdiction, including decisions about registration or de-registration of foster parents and child-related screening decisions. Thus the Ombudsman does not, by and large, conduct investigations into child protection complaints.

POWERS

The Ombudsman's powers of investigation are similar to those of HCSCC. The Ombudsman may conduct investigations arising from complaints or of its own motion, and is subject to a direction to investigate from parliament. The Ombudsman holds an additional power to review administrative practices and procedures of an agency if it is in the public interest to do so.⁶⁰

For the purposes of its investigations, the Ombudsman holds the same powers as a Royal Commission.⁶¹ It can require production of documents under summons, compel a person to attend and give evidence, and inspect, but not search, premises. It may seek a warrant from a court to compel a person to appear and answer questions or produce documentary information.⁶²

The Ombudsman may also issue a notice to an agency to refrain from performing an administrative act for a specified period. Unjustified non-compliance may be reported to the Premier. Further, documents or information obtained, or furnished, by people engaged in service of the Crown or agencies, apart from Cabinet proceedings, may be inspected by the Ombudsman.⁶³

The Ombudsman is empowered to report to the agency investigated if it identifies an error of a defined kind and if it believes that action should be taken⁶⁴, and to make recommendations as it sees fit.⁶⁵ It may subsequently request information about action on those recommendations.

The Ombudsman must provide copies of such reports to the relevant Minister. It may report to the Premier if appropriate steps are not taken to address recommendations, and also report to the Speaker of

the House of Assembly and President of the Legislative Council, requesting that the report to the Premier be placed before each house of parliament. Ultimately the Ombudsman holds the authority to publish information as it sees fit, subject to restrictions in the Ombudsman Act.⁶⁶

OVERLAP OF JURISDICTION

A complaint about a child protection matter may fall into the jurisdiction of both the Ombudsman and HCSCC. A complaint may raise issues relating both to the delivery of a service and an administrative act. If the jurisdiction is shared, section 13(3) of the Ombudsman Act excludes the Ombudsman's jurisdiction. A complaint might also be related to the HCSCC's health services jurisdiction.⁶⁷

The Commission considers that the current jurisdictional arrangements are confusing and unwieldy. At present they are only workable because of the liberal view taken by HCSCC about jurisdiction, and the merits of accessibility. Such an important part of the system should not continue to operate on this basis, and reform is required.

REFORMING COMPLAINTS PROCESSES

THE PROBLEM OF ACCESSIBILITY

The present system of complaints resolution developed in response to the recommendations of previous inquiries, yet the purpose behind the recommendations has arguably not been achieved. The Ombudsman has jurisdiction over administrative acts, but the present application of section 13 prevents the Ombudsman from receiving the majority of child protection complaints. The Ombudsman's office has not developed into a body which effectively and efficiently reviews administrative decisions relating to child protection matters, as was envisaged in the Layton Review.⁶⁸

Similarly, amendments to the Health and Community Services Complaints Act to provide that a child who is a community services user may make complaints have not made HCSCC directly accessible to children with complaints.

Despite the intent of the CISC Inquiry, HCSCC has not developed to continue the work of the CISC Inquiry, investigating complaints of child protection matters and monitoring the effectiveness of child protection reforms.⁶⁹

At present, people with child protection complaints meet barriers to accessing services with the power to investigate their individual case. Legislative provisions surrounding jurisdiction and standing for complaints to HCSCC and the Ombudsman restrict access by people with legitimate complaints.

The Commission has considered whether amendments to the Health and Community Services Complaints Act to broaden standing and jurisdiction would address the problem. The Commission believes it is critical that one agency provide a service that is clearly oriented towards investigating the types of complaints that are agitated, and that the Ombudsman is best placed to provide that service.

THE OMBUDSMAN AS THE PRIMARY AGENCY

HCSCC is strongly oriented towards health services, and focuses on the quality and appropriateness of services provided rather than on administrative acts or decision making. The mandate to inquire into administrative acts, held by the Ombudsman, is more appropriate to the investigation of most complaints relating to child protection services.

Most individual child-protection complaints focus on administrative acts of the Agency. Many complaints do include aspects of service provision, but that is not the main focus.

The most common disputes that have come to the Commission's attention concern:

- decisions to act, or not to act, on a Child Abuse Report Line notification or notifications and in particular failure to intervene after multiple notifications;
- declining to register, or deregistering, a foster, kinship or specific child only carer;
- declining to provide services sought for a child in a foster, kinship or Other Person Guardianship placement;
- delays in basic decision making surrounding children in care, including during the process of considering requests to provide services to children in care;
- decisions to remove a child from a placement;
- delays in the process of investigating care concerns and provision of insufficient information surrounding care concerns; and
- deregistering a foster parent.

Having regard to the nature of the matters described above, the Commission considers that all complaints regarding the child protection system should find principal jurisdiction with the Ombudsman. The Commission recommends that the expertise and resources in the Ombudsman's office be developed to permit it to assume the principal role in the jurisdiction.

The Commission has considered whether a preferable course is to create a fresh body to handle child protection complaints generally. The structure and expertise of the Ombudsman's office, and its profile within the community, are already well established. In these circumstances it is appropriate that the child protection jurisdiction be placed into that service.

Nevertheless, care must be taken to ensure that service-focused complaints which are more appropriately addressed through the HCSCC jurisdiction and focus, or which relate to the provision of health services, still have access to that jurisdiction. The Commission is concerned about continuing to require people with legitimate complaints about child protection to negotiate the overlapping jurisdictions of two agencies.

The Commission recommends that the Ombudsman's Act be amended to empower the Ombudsman also to exercise the jurisdiction of HCSCC in appropriate cases. The Ombudsman and HCSCC should enter into an administrative arrangement to guide which categories of matters remain with the Ombudsman exercising the HCSCC's jurisdiction. The administrative arrangement should identify (at a minimum) exercising dual jurisdictions in child protection complaints, but the Commission does not exclude expansion of this arrangement to other areas in which review processes might be streamlined.

The Health and Community Services Complaints Act should also be amended to remove the ambiguity surrounding the definition of community services as they relate to child protection systems complaints. Specifically, section 4(1)(c) should be amended to more closely reflect the criteria of 'at risk' set out in the Children's Protection Act.

A RIGHT OF APPEAL

A number of contributors argued for reforms which would create an appeal jurisdiction in the South Australian Civil and Administrative Tribunal (SACAT) for some decisions made by the Agency. Foster parents in particular supported the creation of such a mechanism.⁷⁰

An appeal process, it was argued, would expose decision making to greater scrutiny, and potentially shift the entrenched power imbalance between the Agency and the adults and children who are affected by their actions. While this concept has some attraction, and the development of SACAT provides a logical point of review, the Commission is concerned that creating a right of appeal has the potential to divert focus from critical questions of the best interests of the child. Appeals heard in the review jurisdiction of SACAT are conducted according to the *South Australian Civil and Administrative Tribunal Act 2013* (SA). Section 34 of that Act provides for a review to be conducted as a re-hearing, and the Tribunal must 'reach the correct or preferable decision but in doing so must have regard to, and give appropriate weight to, the decision of the original decision maker'.⁷¹ The availability of such a review of selected decisions would, in most cases, exclude the jurisdiction of the Ombudsman, because of the prohibition on the Ombudsman investigating when a remedy is otherwise available through legal processes (unless it is unreasonable to expect those processes to be pursued).⁷²

22 PROMOTING SYSTEM TRANSPARENCY

Table 22.1: Current oversight and review agencies

RELEVANT LEGISLATION	CHILDREN'S PROTECTION ACT			HCSC ACT	OMBUDSMAN ACT
STATUTORY BODY	GUARDIAN FOR CHILDREN AND YOUNG PEOPLE	COUNCIL FOR THE CARE OF CHILDREN	CDSIRC	HCSCC	OMBUDSMAN
PROMOTION OF CHILDREN'S INTERESTS	Promotes best interests of children in care	Promotes safe care of children			
ADVOCACY	Children in care only				
MONITORING	Children in care only		Monitors its own recommendations		
REPORTING	On matters referred by the Minister for investigation Periodic and annual reporting to the Minister on statutory functions. Periodic reports are published by Parliament Children in care only	To government on specific topics Periodic and annual reporting to the Minister on statutory functions	Periodic and annual reporting to the Minister on statutory functions	May publish reports Provides notices of recommended action to service providers after investigation and to a registration authority Provides reports to registration authorities about complaint procedures Periodic and annual reporting to the Minister on statutory functions	May publish reports to: <ul style="list-style-type: none"> complainants after investigations heads of agencies and responsible Minister on its opinions, when error is found the Premier if agencies do not take appropriate steps to follow a recommendation Annual reporting to government
ADVICE	To the Minister Children in Care only	To government on rights and interests of children To the Minister on specific topics and on matters referred for inquiry by the Minister	Recommendations for the avoidance of preventable child death or serious injury	Recommendations relating to service improvement, rights of service users and dealing with/ reducing complaints Helping service providers resolve complaints To the Minister about relevant services To registration authorities	Recommendations may be made to the head of agencies where error is found
REVIEW		Of the Family and Community Services Act	Cases where children die or are seriously injured. To identify legislative or administrative means to prevent future death/injury	Review and identify causes of complaints, detect trends	May review administrative procedures of an agency if in the public interest
RESEARCH					
INQUIRY	Systemic reform to improve care Children in care only	As referred by the Minister		At own motion or on request of Minister	Administrative audits of practices and procedures of agencies
INDIVIDUAL INVESTIGATION	As referred by the Minister Children in care only			Of individual complaints or issues arising from complaints: <ul style="list-style-type: none"> if issues of public interest, safety or importance if a significant question as to the practice of a service provider arises, or as directed by Minister 	Administrative acts after other avenues exhausted Administrative audits in some circumstances
INDIVIDUAL RESOLUTION				Service complaints Limits on standing to complain Use of mediation May refer to conciliators	Administrative acts Acts only when other avenues of complaint exhausted May use conciliation

The Ombudsman's jurisdiction is one that is accessible, flexible, affordable and informal. It has greater powers to drive its own investigation using coercive powers, and greater capacity to ensure that the child concerned is heard in its deliberations.

In prosecuting a review to SACAT, an adult acting on behalf of a child, or on their own behalf, is unlikely to possess the skills or the knowledge to obtain the amount of information available to the Ombudsman. There is a greater risk of an adversarial process resulting in delay and a deterioration in the relationship between the Agency and the other parties. Appeals of this kind could also see children excluded from proceedings which relate to them. Where a carer appeals a decision about the placement of a child, the relevant parties to that appeal are the carer and the Agency. The child would need to apply to be joined, and obtain representation to ensure their point of view is considered.

SACAT has the power to award costs in certain circumstances, although in the ordinary course each party is expected to bear their own costs.⁷³ The Ombudsman's service is free of charge to the complainant.

The Ombudsman cannot impose an alternative decision upon a government agency. At its highest, a report and recommendation can be made, and escalated to the Premier if not acted upon.⁷⁴ By contrast, a decision on review by SACAT is substituted for the original decision.⁷⁵ However, the Commission considers that a report and recommendation by the Ombudsman will be sufficiently persuasive to achieve a change of approach, despite the absence of power to impose a substituted decision.

For these reasons, the Commission does not believe that the interests of children in the child protection system would be better served overall by allowing parties affected by selected administrative decisions to appeal to SACAT.

SUPPORTING CHILDREN TO COMPLAIN

The Commission recommends that GCYP be explicitly given standing to make complaints to the Ombudsman and HCSCC on behalf of children involved in the child protection system. The Ombudsman and HCSCC presently receive complaints from GCYP, but this is not a right nor without preconditions. For example, the Ombudsman may receive a complaint from GCYP as a person who is a suitable representative of a child, but only if the child is unable to make the complaint.⁷⁶

Complaint pathways should be highly visible and accessible to people who may have grievances with aspects of the child protection system. The low number of complaints received by HCSCC suggests that greater effort should be made to improve the profile of the services.

Information about review bodies should be given to children and carers throughout their involvement with the child protection system. Efforts to raise the profile of services is the responsibility of all child protection service providers, including the Agency. The Ombudsman, HCSCC and the proposed Children's Commissioner should work together on a strategy to increase the knowledge of children about their rights. They should also develop a package of material, including child friendly complaint forms.

REFORMING OVERSIGHT

A significant number of the recommendations made by the Layton Review and CISC Inquiry regarding oversight of child protection have been implemented; however, it cannot yet be said that children's voices are truly heard nor their rights comprehensively protected in South Australia.

The Commission has identified the need for statutory reform to achieve four main aims:

- 1 Raise the profile of recommendations made by the current range of oversight bodies.
- 2 Coordinate the pursuit of common interest of the oversight bodies, and facilitate the sharing of data and research.
- 3 Raise the profile of children's experiences and perspectives in public life.
- 4 Fill gaps in the current oversight regime (shown in Table 22.1).

Clear gaps exist in the following areas:

- There is no body which provides advocacy for children other than those in the care of the state.
- There is no body which monitors children's issues or the condition of children other than those in care.
- Only CDSIRC has capacity to monitor the implementation of recommendations, and then only its own. CDSIRC has limited capacity to perform this function and has no capacity to inquire into the accuracy of information it receives about compliance.
- None of the bodies holds a statutory mandate to conduct research.

A CHILDREN'S COMMISSIONER

The United Nations Convention on the Rights of the Child places obligations on the state to protect the rights of children. Within South Australia there is no unifying body entrusted by the state with this function. A greater focus is needed on promoting children's interests across all aspects of government and public life.

The Commission recommends the appointment of a Children's Commissioner as a visible, high profile figure who acts and speaks on behalf of the state's children about issues that are important for them. A Children's Commissioner must be placed in a position to represent the interests of all children.

People assume that a commissioner is going to fix the child protection system and will prevent tragedies. They won't. They can't.

The Commission heard evidence in support of a broad range of functions for a Children's Commissioner: from an independent complaints resolution service for children in conflict with decision makers, to a body who works with government to draw attention to the practical effects of planning, policies and legislation on children.⁷⁷

The expectations for a Children's Commissioner are high. Former GCYP, Pam Simmons, told the Commission:

*People assume that a commissioner is going to fix the child protection system and will prevent tragedies. They won't. They can't. That's the sad part about it. The best we can do, including myself, is to point to where there are weaknesses and help to address that.*⁷⁸

The GCYP, Amanda Shaw, in a recent publication referring to a Children's Commissioner, observed:

*There is a very real danger in trying to subsume formal child protection functions into the role of a Children's Commissioner. A Children's Commissioner with a very broad brief would find it difficult to sustain the critical expertise and focus on the lives of individual children that is essential to be effective in child protection. And if they could, the high engagement and urgency required in child protection would draw them away from their responsibility to hear from and act for all young South Australians.*⁷⁹

The Commission is mindful that there are limits on what a Children's Commissioner can achieve and its role must be designated with some specificity. It is not a cure-all for the problems that beset the child protection system. Its functions must not be diverted by tasking it with a range of functions that are inconsistent with each other and have the potential to overwhelm it. The Commission has identified important functions which the Children's Commissioner should fulfil in the areas of advocacy, research and inquiry into systems issues.

The Children's Commissioner's activities should be heavily guided by consultations with children. The Commissioner should use the profile of the position to advance children's issues in the wider community, with both industry and government.

The Commission considers some of the current oversight bodies should be aligned to the functions of the Children's Commissioner, providing a mechanism for them to advance issues that reach their attention, but which they are currently unable to advance in the way they see as appropriate. The Children's Commissioner should have the authority to hold government to account when areas of need have been identified, but action has not been taken.

The Commission does not consider it appropriate that a Children's Commissioner be a complaints body, resolving or adjudicating individual disputes. This position is supported by the Council for the Care of Children⁸⁰ and is consistent with the previous recommendations of the Layton Review and CISC Inquiry. A clear separation must be maintained between complaint resolution and advocacy bodies, to avoid potential for conflicts of interest.⁸¹ The Commission considers that the reforms suggested earlier to review agencies provide an adequate check on the actions of staff and organisations involved in child protection matters.

However, the Commission considers it essential that the Children's Commissioner have extensive powers to conduct investigations into systemic issues, including thorough examination of individual circumstances where such an investigation has the capacity to highlight systemic issues. The Commission's own evidence gathering processes have highlighted the worth of conducting individual case studies as a way of reflecting and analysing broader system issues. The identification of appropriate matters must lie entirely within the discretion of the Children's Commissioner.

The restriction of investigative functions to systems issues, and the recommendation against the Children's Commissioner holding a complaints resolution function, reflects an assessment of which functions can bring the most good to children in general. There is greater potential to benefit children as a group if the Commissioner's powers are restricted in this way:

*Population-level improvements in the development, wellbeing and safety of South Australian children and young people are more likely to result from developing systemic understandings of the factors affecting children and young people rather than through investigations and scrutiny of individual cases.*⁸²

Population-level improvements in the development, wellbeing and safety of South Australian children and young people are more likely to result from developing systemic understandings of the factors affecting children and young people rather than through investigations and scrutiny of individual cases

INTERSTATE AND OVERSEAS MODELS

South Australia lags substantially behind other Australian jurisdictions which have enacted legislation creating Children's Commissioners, or substantively similar statutory bodies (see Table 22.2).⁸³

Queensland established the first Children's Commissioner in 1996 with the creation of the Queensland Commission for Children and Young People, a body which has since been dissolved and its functions redistributed. The National Children's Commissioner, Megan Mitchell, was appointed in 2013. In 2015 the Children's e-Safety Commissioner was appointed at a national level, with responsibility for the promotion of online safety.⁸⁴

The role and functions of the bodies differ between jurisdictions. Most provide services to all children and young people; the Northern Territory restricts services to 'vulnerable' children.⁸⁵

There are significant differences in the role of Children's Commissioners as they relate to complaints resolution and investigatory functions. The greater proportion are not individual complaint bodies and have no capacity to investigate individual issues. Their focus is rather on advocacy and promotion of children's rights. Only in the Australian Capital Territory and the Northern Territory do the Children's Commissioners hold the capacity to hear and resolve individual complaints.

In the Northern Territory the Children's Commissioner has no specific advocacy role, although advocacy occurs incidentally through provision of advice to the executive government and its educative function. The NT Children's Commissioner investigates individual complaints regarding the provision of services to vulnerable children. It is also empowered to conduct own-initiative investigations. In the ACT the Children's Commissioner can investigate and determine individual complaints relating to services. The Tasmanian Commissioner for Children investigates circumstances relative to an individual child, but only on request of the Minister.⁸⁶

Table 22.2: Children's representative bodies across Australia

JURISDICTION	STATUTORY BODY	ENABLING ACT
National	The National Children's Commissioner The Office of the Children's e-Safety Commissioner	<i>Australian Human Rights Commission Act 1986</i> <i>Enhancing Online Safety for Children Act 2015</i>
Australian Capital Territory	The Children and Young People Commissioner	<i>Human Rights Commission Act 2005</i>
New South Wales	The Advocate for Children and Young People The Children's Guardian	<i>Advocate for Children and Young People Act 2014</i> <i>Children and Young Persons (Care and Protection) Act 1998</i>
Northern Territory	The Children's Commissioner	<i>Care and Protection of Children Act 2007</i> <i>Children's Commissioner Act 2013</i>
Queensland	The Family and Child Commission, overseen by two Commissioners	<i>Family and Child Commission Act 2014</i>
Tasmania	The Commissioner for Children	<i>Children, Young Persons and Their Families Act 1997</i> <i>Youth Justice Act 1997</i>
Victoria	The Commissioner for Children and Young People	<i>Commission for Children and Young People Act 2012</i>
Western Australia	The Commissioner for Children and Young People	<i>Commissioner for Children and Young People Act 2006</i>

Source: Australian Institute of Family Studies, *Children's commissioners and guardians*, Child Family Community Australia resource sheet, Australian Government, May 2015.

By contrast, the Western Australian Commissioner for Children and Young People may investigate matters affecting the general wellbeing of children if they arise from a matter relating to an individual.⁸⁷

In the United Kingdom, the Welsh model was commended to the Commission in the course of its evidence gathering. The Welsh Children's Commissioner, established since 2001, is an example of a robust Children's Commissioner with broad capacity and functions including:

- providing advice and information regarding children's rights and welfare to children and adults;
- offering advice and support to children and young people;
- assisting children, including financial assistance and representation in legal proceedings, where their rights have not been respected; and
- reviewing effects of policies and the delivery of services to children.

The Welsh Children's Commissioner has the power to conduct examinations into the circumstances of individual children where a question of more general application to the rights and welfare of children arises.⁸⁸

The Welsh Children's Commissioner works with children aged up to 18 who are living in Wales and may act on behalf of people up to age 25 if they have been 'looked after' by (were in the care of) a local authority. It may consider and make representations to the National Assembly about any matter affecting the rights or welfare of children in Wales and was involved in reporting to the United Nations Committee on the Rights of the Child. It has obligations to report at the conclusion of examinations, which must ultimately be published; provides reports on particular subjects; and provides annual reports about its actions, including a version suitable for children.⁸⁹

The differences between mandated functions held by Children's Commissioners in Australia and Wales demonstrate that Children's Commissioners hold different functions dependent upon on the needs of the particular jurisdiction, and the regulatory environment in which the Commissioner sits.

CURRENT PROPOSALS

There is bipartisan political support and broad ranging community support within South Australia for the creation of a Children's Commissioner. The Council for the Care of Children⁹⁰, CDSIRC⁹¹, associations such as the Child and Family Welfare Association⁹² and Uniting Communities⁹³, experts in child protection⁹⁴ and those who work in the field have expressed their support.⁹⁵

Despite this general support, legislation has not yet been passed creating the position. Divergent views about the precise nature of the role appear to be the principal cause of delay, although the Commission acknowledges that more recently progress was halted pending the report of this Inquiry.

The Government's Child Development and Wellbeing Bill 2014 (SA) (the Government Bill) and Opposition's Commissioner for Children and Young People Bill 2014 (SA) (the Opposition Bill) are both before Parliament.

The Government Bill abolishes the Council for the Care of Children⁹⁶ and vests its statutory functions between the Children's Commissioner and a newly formed Child Development Council, which is responsible for the creation and maintenance of an Outcomes Framework for Children and Young People, and for reporting on and promoting the framework.⁹⁷ The existing framework developed by the Council for the Care of Children should inform the development of any future framework, to ensure that continuity of monitoring against the standards already established is not lost.

The Government and Opposition show consensus on most functions. Both have included in their draft legislation the following functions:

- 1 promoting and advocating for the rights and interests of children;
- 2 promoting the participation by children in decision making which affects their lives;
- 3 advising and making recommendations to ministers, state authorities and other bodies (including non-government bodies) on matters related to the rights, development and wellbeing of children at a systemic level;
- 4 assisting in ensuring that the state, as part of the Commonwealth, satisfies its international obligations in respect of children; and
- 5 engaging with children in the performance of other functions (the Government Bill also requires the development of a strategy to ensure this occurs).⁹⁸

The substantive difference between the Bills concerns the extent of the power of inquiry and investigation. The Government Bill includes the function of inquiry and review of matters relating to rights, development and wellbeing of children at a systemic level, but provides very limited powers to enable those functions to be performed.⁹⁹ The sole source of evidence gathering power is the power to issue a notice to a state authority to give information in its possession to the Commissioner, and the Minister may exempt people or bodies from compliance. Consequences for a failure to comply with a written notice extend no further than reporting the failure to relevant ministers and including details in an annual report.¹⁰⁰ Significantly, there is no power to compel the production of documents or testimony or to inspect or search premises.

The limited powers envisaged by the Government Bill can be contrasted to the powers currently available to GCYP, who has a similar mandate to the anticipated Children's Commissioner, but only for children in care. GCYP has the power to issue a notice to 'any government or non-government organisation that is involved in the provision of services to children'.¹⁰¹ The notice may require the production of information in writing or an identified document, or the attendance of a person to answer questions or produce documents. A person who fails to comply with a written notice is at risk of a pecuniary penalty.¹⁰² There is no power for the Minister to exempt any body or person from compliance with a written notice.

The reduced powers in the Government's proposal for the Children's Commissioner, which has a much broader mandate, is curious.

By contrast, the Opposition Bill includes functions of inquiry and investigation in limited circumstances.¹⁰³ It contemplates inquiries into systems issues and investigations into individual matters, where matters of 'particular significance to children and young people' are raised, and it is in the public interest to do so.¹⁰⁴ The Bill contains broad powers which are in the main appropriate to an independent body engaging in inquiries and investigations.

Certain powers contained in the Opposition Bill directed at the investigation and resolution of individual issues and their resolution are not appropriate, namely the power to:

- require state authorities to refrain from taking specified action;
- require state authorities to conduct a joint investigation with the Commissioner; and
- seek an injunction from the Supreme Court to restrain a person from engaging in conduct in relation to an investigation or proposed investigation.¹⁰⁵

The Government Bill includes additional functions, which require the Children's Commissioner to:

- monitor how complaints by children are dealt with;
- monitor the outcomes of complaints; and
- proactively investigate and report on trends in complaints.¹⁰⁶

The Commission does not support inclusion of these monitoring functions. While these are matters which the Commissioner may, in its discretion, choose to inquire into, a requirement to monitor these topics may detract focus from other aspects of the Commissioner's functions. It is a core responsibility of the state to monitor its own performance in dealing with complaints. The role of the Children's Commissioner is,

where appropriate, to inquire into and investigate the effectiveness of those efforts. It should not be part of the Commissioner's ongoing mandate.

The Bills differ in the manner in which they permit the Children's Commissioner to monitor the effectiveness of agencies' responses to recommendations. The Government Bill includes a requirement on the Minister to report back to the Commissioner after receiving a report from the Children's Commissioner about an inquiry. The obligation exists only if the Children's Commissioner has recommended specific action be taken.¹⁰⁷ The Minister must set out what recommendations will and will not be implemented, and the manner of implementation. It is only after this report has been laid before each House of Parliament, and after consultation with the Minister, that the Children's Commissioner may publish its report.¹⁰⁸ The Commission does not support any restriction on the capacity of the Children's Commissioner to publish information relating to its investigations or inquiries in this manner.

The Opposition Bill includes a similar provision, but the obligation on the Minister to respond is not contingent on the recommendation of specific action.¹⁰⁹ The Opposition Bill includes an additional power permitting the Children's Commissioner to monitor the action taken in response to its recommendations.¹¹⁰

Neither of the Bills fully reflects what the Commission considers to be appropriate powers for this state's Children's Commissioner. The powers provided by the Government Bill are insufficient for the Children's Commissioner to carry out its inquiry and investigative functions in a robust manner. The inclusion of a monitoring function risks overwhelming the capacity of the Children's Commissioner to perform other important services.

The Opposition Bill provides greater powers, including some which are more appropriate to a complaints resolution function, a role not appropriate for the Children's Commissioner.

Finally, the Opposition Bill requires the Children's Commissioner to consult (in addition to children and young people, who are the first priority) parents, families and carers of children, and relevant peak bodies and non-government organisations. The Commission considers these obligations to consult more widely as too onerous. It deflects attention from the central focus on children and young people to oblige inclusion of other voices which have other avenues to advance their own interests. While the Children's Commissioner may well choose to consult with such groups in appropriate cases, there should be no obligation imposed in that regard.

ESSENTIAL ELEMENTS

Selection

A robust process to select the Children's Commissioner is critical to establishing the position's credibility and profile. The selection process should attract and secure a candidate who holds the skills needed to perform the wide range of functions envisaged, together with the necessary personal characteristics and child focus.

The Council for the Care of Children has contended that feedback from children should inform the recruitment, selection and work of a Children's Commissioner.¹¹¹

It recommends a detailed recruitment process including the involvement of children in formulating the selection criteria, interviewing applicants and selecting the preferred candidate.¹¹²

The Commission is unable to make any recommendation as to the best course to adopt in this regard but agrees that children be consulted at each of these stages, and recommends that this ought to be considered by reference to the submission from the Council for the Care of Children.

The Government and Opposition Bills do not agree on the method of appointment of a Children's Commissioner. The Government Bill proposes appointment by the Governor on the recommendation of the Minister (following a process calling for expressions of interest), while the Opposition Bill would have the recommendation to the Governor made by a selection panel.¹¹³ The Commission does not express a preference for either model, but notes that the more usual process for appointment to a position of this profile would be by expression of interest rather than an application and formal selection panel. It is important that the process reflects the calibre of appointment that is sought.

Independence

The Children's Commissioner should be independent of any control by the Minister or Parliament. It would be inappropriate for a body which reports on and enquires into conduct of government agencies to be subject to government direction. Independence would also help develop public confidence in its operations. This independence must be specified in legislation.

Provisions for the appointment and dismissal of the Children's Commissioner should be drafted in a manner that protects the body's statutory independence.

What children want in a Children's Commissioner

The Council for the Care of Children consulted extensively with children about their wishes for a Children's Commissioner, and published a report reflecting the results.¹

Children think a Children's Commissioner must:

- be caring;
- like children and young people;
- know, understand and respect children and young people;
- listen to what they have to say and take them seriously; and
- be someone they can trust, who they know will stand up for them and be proactive in effecting positive change.

Children want the Children's Commissioner to focus on:

- providing help and looking after children, including their safety;
- listening and responding to what matters to children and providing feedback;
- educating the community about children's rights, needs and wellbeing;

- sharing children's views and opinions and using children's feedback to make life better for children and young people; and
- educating adults about how to look after children and young people.

A Children's Commissioner should consider vulnerable children and children who live in rural and remote areas.

A Children's Commissioner has a role to play in keeping children safe. Children's views of safety included:

- safety from abuse, neglect and bullying;
- safety in their living environments;
- providing a safe place to go when needed, including to speak with the Children's Commissioner; and
- that the Children's Commissioner was a person who children could trust with personal matters.

Overwhelmingly, children thought that face-to-face contact was the best type of contact with a Children's Commissioner. Written contact, social media and video chat were also mentioned.

¹ The Council for the Care of Children, *Conversations report 2015: Rights and a Commissioner for children and young people*, Government of South Australia 2015.

The Commission observes that the appointment terms of children's commissioners within other Australian jurisdictions range between three and seven years, with a variety of provisions for reappointment. Both the Government and Opposition Bills contemplate five years, with eligibility for re-appointment, although the Opposition Bill places an overall cap of seven years on the appointment of any individual.¹¹⁴ The term of appointment must be sufficient to allow the Children's Commissioner to engage substantively in its functions and achieve a meaningful working relationship with children.

As to the question of dismissal of a Children's Commissioner, the proposed models exhibit some differences. The provisions of the Opposition Bill are modelled on legislation governing the appointment of the Independent Commissioner Against Corruption.¹¹⁵ Given the anticipated profile of the Commissioner, it would be appropriate that a model of this nature, with the attendant scrutiny attaching to any dismissal, apply to a Children's Commissioner.

Cooperation

The enabling Act should include a provision to require government departments and agencies, including organisations acting under contract to those agencies, to cooperate with the Children's Commissioner. Such a provision would demonstrate the government's commitment and provides authority to the Children's Commissioner in the performance of its functions.

Reporting relationships

The Children's Commissioner would need to have a regular reporting relationship to an identified Minister. Section 17 of the Opposition Bill proposes annual reporting responsibilities to the Minister, who must then lay the report before both houses of Parliament.

The Opposition Bill also contemplates reporting to the Minister on inquiries (systems issues) and investigations (individual issues where certain criteria are met).¹¹⁶ There is a discretion about whether a report on an individual issue is provided to the Minister. For both inquiries and investigations the Children's Commission may make recommendations to the state authority concerned.¹¹⁷

It is anticipated that the Children's Commissioner investigate matters which cross portfolios, including health, housing, correctional services, sports and recreation, and child protection. While there must be one Minister identified as primarily responsible for action on matters referred by the Children's Commissioner, it would be necessary to empower the Commissioner to forward copies of reports to the Minister responsible for the portfolio concerned with the specific matters raised in the report.

The Commission therefore recommends that the Children's Commissioner report to a Minister, and hold the power, in appropriate cases, to also report to the Minister with portfolio responsibilities for any of the

matters raised in the report. This would include an annual reporting requirement in the terms set out in the Opposition Bill, and the power to report on all inquiries and investigations.

Recommendations made by the Children's Commissioner should also be reported to state authorities to whom they relate to take action on implementation. The experience of this Commission is that in the past, oversight bodies have repeatedly made recommendations for action to such authorities, with little evidence of action or accompanying practice change. With this in mind, the Commission recommends that the Children's Commissioner have the authority to require a report from a relevant state authority about action taken on recommendations. The authority from whom a report is required must respond in an identified timeframe, setting out the degree of compliance, any proposed action, and any decision not to act on recommendations and the accompanying reasons.

If the Children's Commissioner remains dissatisfied with the response provided, it may forward both the request and the report of the authority to the relevant Minister. That Minister must then report to Parliament setting out the Minister's response to the Children's Commissioner's report and attach the initial request, and the response by the state authority. These documents should be tabled in both Houses of Parliament. The Commissioner should also be empowered to publish all or part of such documents as he or she sees fit.

This regime is an important feature of government accountability for action and non-action on recommendations. The purpose of conducting investigations and making recommendations has the potential to be lost if there is no capacity to track the Government's response. The public is entitled to be kept apprised of recommendations being made and the actions of the Government in response.

The scheme set out above is modelled on section 21 of the Opposition Bill. That Bill contemplates that before requiring a state authority to provide such a response, the Commissioner must identify and specify grounds for his or her dissatisfaction. The Commission considers this requirement to be a potential barrier to robust monitoring. The Commission supports the Children's Commissioner being empowered to make a request for a report without specifying any particular reason for dissatisfaction. This places the responsibility on the Government to report the extent of compliance, rather than requiring the Children's Commissioner to first identify an issue.

The Children's Commissioner has the capacity to raise the profile of important issues within the public sphere. It must be equipped with the best understanding of the dynamics of the situation to allow it to do so effectively. If recommendations are supported, but barriers are in the way of implementation, it is important that this be known.

The Commission recommends that this reporting regime be extended to include recommendations of CDSIRC and GCYP. This proposal will be discussed in the section below, Relationships between oversight bodies.

Recommended functions

A Children's Commissioner should hold the following functions:

- 1 Promote and advocate for the rights and interests of children and young people in South Australia.
- 2 Promote the participation by children and young people in making decisions that affect their lives.
- 3 Advise, and make recommendations to, Ministers, state authorities and other bodies (including non-government bodies) on matters related to the rights, development and wellbeing of children and young people at a systemic level.
- 4 Assist in ensuring that the state, as part of the Commonwealth, satisfies its international obligations to children and young people.
- 5 Inquire into and investigate topics concerning the rights, development or wellbeing of children at a systemic level, including the investigation of individual cases which, in the opinion of the Children's Commissioner, have the capacity to identify systemic issues which are of sufficient importance to warrant inquiry.
- 6 Prepare and publish reports on matters related to the rights, development and wellbeing of children and young people at a systemic level.
- 7 Engage with children in the performance of other functions and the development of a strategy to ensure this occurs.
- 8 Undertake or commission research into topics which relate to children and young people.

The capacity to inquire into systems should not be restricted to formal, government-based systems. It should extend to informal systems that have developed in the community, and which involve areas or issues which have the potential to have great impact on children's lives, or that may affect a large number of children.¹¹⁸

Recommended powers

It is recommended that, in order to carry out its functions, the Commissioner be provided with the following powers:

- 1 Report to Parliament with an unfettered discretion to publish information, including publication in a manner which is accessible to children;

- 2 Perform its function of inquiry and investigation to a level equivalent to the Ombudsman (which has the powers of a Royal Commission in respect to investigations), including:
 - a compelling production of documents and materials, the equivalent of a subpoena or summons, from bodies or individuals, and extending beyond government bodies to the private sector and individuals;
 - b compelling a person to appear to give evidence;
 - c requiring a person to answer questions;
 - d requiring a person or body to respond in writing to questions;
 - e entering and inspecting property; and
 - f appointing investigators in accordance with the provisions of the Opposition Bill.¹¹⁹
- 3 Refer a complaint or information raising a concern about an individual issue to an appropriate complaints or investigatory body (including the Ombudsman, HCSCC, relevant professional registration bodies, South Australia Police), and to provide information obtained by the Commissioner to those bodies.
- 4 Make recommendations related to investigations or in response to other observed issues.

Pecuniary penalties should accompany non-compliance with the Commissioner's powers of inquiry, as should the power to apply to the Court for a warrant for failure to comply with a summons. It is not sufficient that non-compliance be followed only by a report to a Minister or the Premier.

To allow the Children's Commissioner to obtain information, the enabling legislation should provide an exemption from other laws which would restrict disclosure of relevant information. An example of such a provision is contained in section 43(1) of the Opposition Bill. Both Bills contain provisions which prevent people engaged in the business of the Children's Commissioner from inappropriately disclosing information which they have obtained in the course of their duties, which the Commission also views as appropriate.¹²⁰ Furthermore, it is appropriate that the legislation include protections for whistleblowers, to prevent them being victimised because of making a complaint or otherwise assisting the Children's Commissioner.¹²¹

The powers recommended are necessary for the Children's Commissioner to effectively perform its functions. Restriction of these powers risks frustrating the Commissioner's capacity and undermining public confidence in the office's overall capacity.

Consultation and engagement

A key role of the Children's Commissioner would be consultation with children and young people. This Commission supports the inclusion of legislative provisions which mandate this function. It would be appropriate to articulate the obligation to consult, but decisions about its precise manner should be left to the Commissioner, in consultation with children and young people. The Commission does not support the inclusion of an obligation to publish a strategy about how engagement will occur.

It is appropriate that the Children's Commissioner engage with the community in the performance of its functions, but the Commission does not support provisions requiring the Children's Commissioner to develop and publish a community engagement plan, as contemplated by the Opposition Bill.¹²² Excessive prescription about the manner in which relevant parties will be engaged has the potential to divert the Commissioner's focus.

The Children's Commissioner should consult with individuals and community representatives on an as-needs basis on topics affecting their interests. In particular, it is recommended that the Commissioner consult with Aboriginal and Torres Strait Islander community groups, culturally and linguistically diverse groups, children with a disability and children who reside in regional areas. A requirement to maintain an ongoing consultative committee is not supported. In evidence to the Commission, the former guardian reported that this is not always the best way to conduct consultations, particularly with children, a position which is supported by the Commission.¹²³

Resourcing

The effectiveness of the Children's Commissioner would depend not only on providing appropriate powers and functions: the office should be resourced at a level commensurate with the broad range of expected functions. Resources should be not only financial and staff, they should include the ability to access expertise and knowledge.

The Commission has observed that the statutory bodies currently holding a child focus in South Australia are constrained by insufficient resources. Both the Council and CDSIRC rely on professionals who provide their time and expertise to the state for minimal or no remuneration because of their commitment to the important work.¹²⁴ GCYC receives the greatest allocation of resources—\$874,518 in the 2014/15 financial year—but nevertheless is restricted in capacity to achieve its broad statutory mandate and must be selective in its work.¹²⁵

Although functions vary, a comparison with interstate bodies provides a perspective on the adequacy of funding. Table 22.3 shows the level of funding of some other child oversight bodies.

Table 22.3: Data from annual reports setting out expenditure for 2014/15

WA (Commissioner for Children and Young People)	\$3,114,424
VIC (Commission for Children and Young People)	\$6,428,000
QLD (Family and Child Commission)	\$9,636,000
ACT (Children and Young People Commissioner)	\$3,521,000
NSW (Children's Guardian)	\$27,558,000

Sources: Commissioner for Children and Young People, *Annual report 2014-15*, Government of Western Australia, 2015, pp. 48-52; Commission for Children and Young People, *CCYP Annual report 2014-15*, Victorian Government, 2015, pp. 81-84; Family and Child Commission, *Annual report 2014-15*, Queensland Government, 2015, p. 52; Australian Human Rights Commission, *Annual report 2014-15*, Australian Government, 2015, p. 70; Office of the Children's Guardian, *Annual report 2014-15*, Government of New South Wales, 2015, pp. 72-77.

Despite the level of funding, the Chair of CDSIRC, Dymphna Eszenyi, who observes the operation of Children's Commissioners interstate, told the Commission that 'often the role of a Children's Commissioner is a thankless and under-resourced one'.¹²⁶ She observed:

It would be sad to see South Australia appoint a Children's Commissioner that does not have real teeth. I don't mean real teeth to pursue individual cases, because I think that the Coroner and the Department itself should have those teeth, but real teeth to interact with the bureaucracies to say, 'This has to happen'.¹²⁷

The Commission does not believe the appointment of assistant commissioners¹²⁸ is required. However, the Children's Commissioner should have the capacity to engage experts and commission research as necessary, and funding should be provided for this purpose. The ability to employ staff should not be restricted to seconding existing public service employees. There is a potential for a conflict of interest if the Commissioner was required to engage employees seconded from business units which may become the subject of scrutiny. The Commission supports the inclusion of provisions such as those contained in sections 18 and 19 of the Opposition Bill, which permit the Commissioner to engage employees on terms and conditions determined by the Children's Commissioner, and which allow the Commissioner to make use of staff of a public service business unit by agreement with the responsible Minister. These terms mirror the powers in the *Independent Commissioner Against Corruption Act 2012* (SA).¹²⁹

The Children's Commissioner should be provided with discretionary funds to help children whose rights have not been respected. The funds may be used in flexible ways. One potential use would be to fund legal representation for or on behalf of children in proceedings where it appears that children's rights have not been respected. The Victims of Crime Commissioner in this state has authorised similar undertakings as part of his broad mandate.

THE RELATIONSHIP BETWEEN OVERSIGHT BODIES

CDSIRC and GCYP each hold an existing statutory authority for aspects of child-focused oversight. The Commission supports the maintenance of their independence from the Children's Commissioner.

GCYP has an important role focusing exclusively on children in care, a marginalised and vulnerable group who have particular needs which require a specialist focus. The Children's Commissioner must be able to focus more broadly, on the needs of all children.

CDSIRC holds a specific public health focus. It has no advocacy role. CDSIRC should maintain its independence in the performance of its review functions.

As noted above, the Government Bill proposes consolidation of the functions of the Council for the Care of Children between the functions of the Commissioner and a newly formed Child Wellbeing Committee. The Commission supports the reform of those functions contemplated in the Government Bill.

COORDINATING FUNCTIONS

Notwithstanding the importance of their continued independence, there is capacity for GCYP, CDSIRC and the Children's Commissioner to collaborate and coordinate in performing their respective functions. At an administrative level, there is scope for collocation and sharing of resources to achieve efficiencies, and to make it easier, when appropriate, for children and young people to access the Children's Commissioner and GCYP.

There is also capacity for GCYP and CDSIRC to ask the Children's Commissioner to use its statutory powers to monitor their own recommendations in appropriate circumstances. Both bodies expressed frustration to the Commission about the number of recommendations that had been accepted in principle, but not then implemented.¹³⁰ The fact that some of these recommendations are made repeatedly has contributed to this frustration.

As part of its monitoring functions CDSIRC will enquire of agencies about the implementation of its recommendations. Over time it has lost faith in assurances by agencies that policy change and staff education are achieving the outcomes anticipated by the

recommendations. When CDSIRC does become aware of a failure to properly implement recommendations, its only recourse is to refer to this in its annual report. It has no power to require agencies to demonstrate the extent to which they have implemented recommendations and there are no associated sanctions.¹³¹

The Commission considers a mechanism should be established by which GCYP and CDSIRC could escalate selected matters to the Children's Commissioner. The Children's Commissioner should be empowered to advance those matters (where he or she regards it as appropriate) through the exercise of all of its statutory powers and functions, including employing the regime to monitor government responses to recommendations, and escalate the matter to the Minister and Parliament where necessary.

Legislation should permit GCYP and CDSIRC to refer recommendations or topics of concern to the Children's Commissioner. On receipt of such references the Children's Commissioner may:

- conduct an inquiry or investigation;
- use its power to require a state authority or the Minister to report on the implementation of recommendations, and to report to Parliament if the explanation is unsatisfactory;
- conduct research; and
- engage in advocacy.

As it is proposed that the Children's Commissioner has the power to publish reports and findings, consideration has been given to whether this power should include matters referred by CDSIRC and GCYP.

GCYP already has the power to publish, and make publicly available a range of important reports and recommendations. However, GCYP is mindful of respecting the particular interests of children in care and determines whether or not to publish according to the best interests of that group. The discretion about publication should therefore remain exclusively with GCYP. Where GCYP refers matters to the Children's Commissioner, the latter should not make the material received from GCYP publicly available unless consent is first given by GCYP.

CDSIRC focuses its analysis on system issues and makes recommendations about avoiding death and serious injury in the future.¹³² It is not concerned with identifying individual liability, and does not hear oral evidence from witnesses. It is therefore unlikely to be appropriate for the details of reports and recommendations to be made publicly available. The Commission recommends that where matters are referred by CDSIRC, the Children's Commissioner should not publish information obtained from CDSIRC in the public arena.

These restrictions should not apply to any information which is subsequently obtained by the Children’s Commissioner in the exercise of its own functions where matters have been referred by the GCYP or CDSIRC.

CDSIRC, GCYP and the Children’s Commissioner are each likely to have powerful data and research available on issues of common concern. Legislative reform should permit, but not require, each body to share de-identified data with one another for the purpose of advancing their individual mandates. The Child Development Council is not included within this arrangement, on the basis that the Commission assumes that monitoring data against the outcomes framework would be made publicly available.

The current legislative regime concerning these bodies is fragmented. As the reforms suggested would require legislative amendment, the opportunity should be taken to consolidate the powers for the Children’s Commissioner, CDSIRC and GCYP into a single Act.

The proposed oversight agencies and their reporting relationships are described in Figure 22.1.

REFORMS TO THE CHILD DEATH AND SERIOUS INJURY REVIEW COMMITTEE

In the course of reviews conducted by CDSIRC, information was received about the conduct of practitioners which it considered should be referred to the Australian Health Practitioner Regulation Agency (AHPRA) for investigation. Confidentiality provisions currently prevent CDSIRC from releasing the information, meaning that potentially adverse information about the conduct of registered professionals may never come to AHPRA’s attention.¹³³

The Commission recommends a legislative amendment to permit CDSIRC to refer information obtained to AHPRA or any other professional regulatory body if it is of the opinion that the information may raise disciplinary issues. An example of such a reporting obligation in another context is the obligation on the Law Society to report certain information to the Legal Profession Conduct Commission.¹³⁴

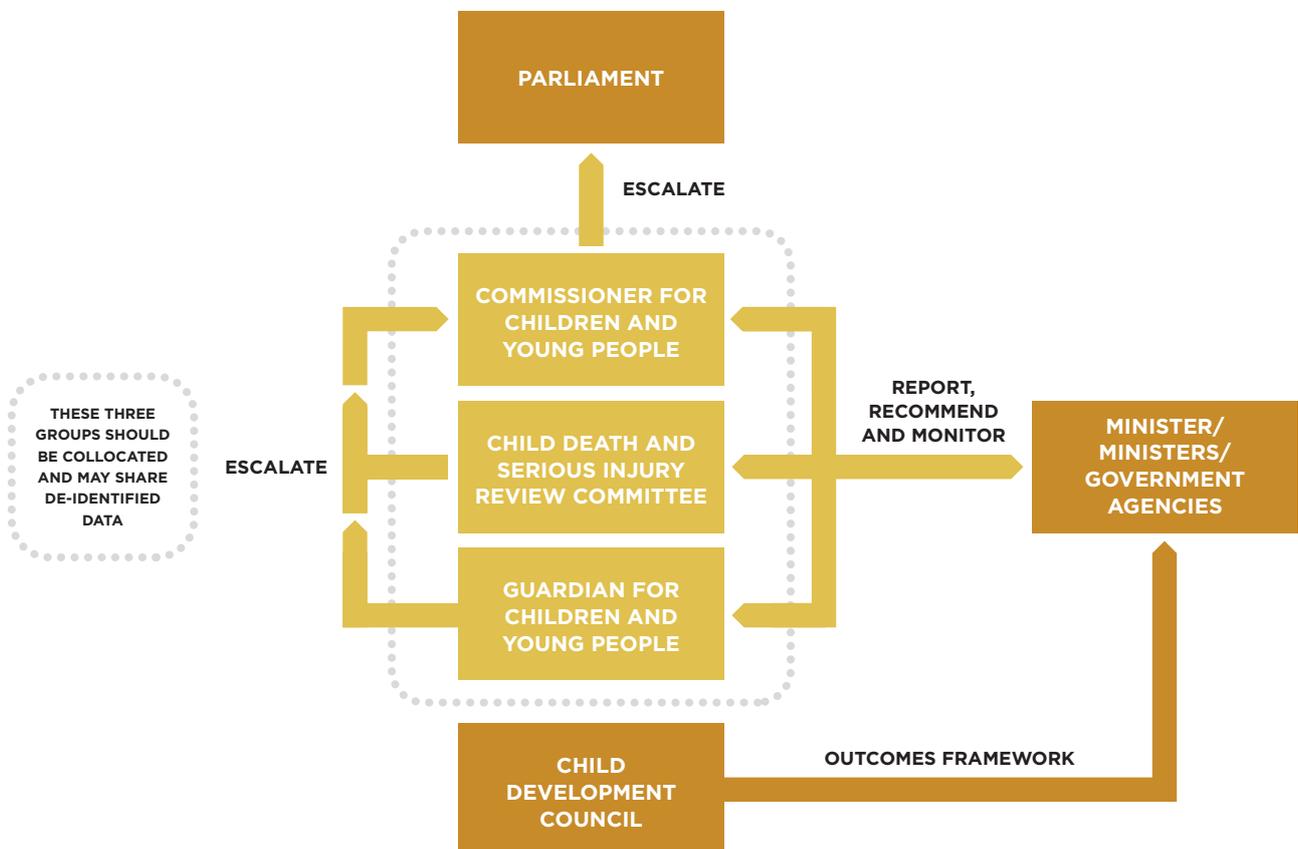


Figure 22.1: Proposed oversight agencies and their reporting relationships

22 PROMOTING SYSTEM TRANSPARENCY

Confidentiality requirements currently restrict CDSIRC from sharing detail of children's stories and experiences as part of its reporting function. The CDSIRC's submissions to the Commission sought a greater capacity to share such details with relevant agencies, while protecting individual children's identity. Sharing these stories would give the CDSIRC's recommendations important context, and greater 'moral imperative' for change.¹³⁵ The Commission recommends that section 52X of the Children's Protection Act be amended to enable disclosure of information about individual cases to the agencies to whom recommendations and reports are directed.

RECOMMENDATIONS

<p>The Commission recommends that the South Australian Government:</p> <p>245 Establish the statutory office of the Commissioner for Children and Young People and provide the Commissioner with the functions and powers referred to in this report.</p> <p>246 Consolidate the legislation for the Children’s Commissioner, the Guardian for Children and Young People (GCYP), the Child Death and Serious Injury Review Committee (CDSIRC) and the Child Development Council in a single Act of Parliament.</p> <p>247 Empower GCYP and CDSIRC to refer matters to the Children’s Commissioner, where they are of the view that escalation through processes available to the Children’s Commissioner is appropriate.</p> <p>248 Empower the Children’s Commissioner to exercise its statutory powers and functions in relation to such matters, including employing the regime to monitor government responses to recommendations, and escalate the matter to the Minister and Parliament where necessary, at his or her sole discretion.</p> <p>249 Collocate the Children’s Commissioner, GCYP, CDSIRC and the Child Development Committee, and make arrangements for the sharing of some administrative functions.</p> <p>250 Amend legislation to permit, but not require, GCYP, CDSIRC and the Children’s Commissioner to share de-identified data.</p> <p>251 Amend legislation to empower the Children’s Commissioner or GCYP to make complaints to the Ombudsman and HCSCC on behalf of a child.</p> <p>252 Amend the <i>Ombudsman Act 1972 (SA)</i> to ensure that complaints about the actions of government agencies, and other agencies acting under contract to the government, concerning child protection services, find principal jurisdiction with the Ombudsman, and not the Health and Community Services Complaints Commissioner, where the complaint is about an administrative act.</p>	<p>253 Amend the <i>Ombudsman Act 1972</i> to permit the Ombudsman to exercise the jurisdiction of Health Care and Community Services Complaints Commissioner (HCSCC) in appropriate cases.</p> <p>254 Develop an administrative arrangement between the Ombudsman and HCSCC to determine matters in which the Ombudsman would exercise dual jurisdictions, including, but not limited to, child protection complaints.</p> <p>255 Develop the capacity of the Ombudsman’s Office to respond specifically to child protection complaints.</p> <p>256 Develop a package of information regarding making complaints about child protection matters, including information and complaint forms which are suitable for children and young people.</p>
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NOTES

- 1 RA Layton (Chair), *Our best investment: A state plan to protect and advance the interests of children*, Report of the Review of Child Protection in South Australia, Department of Human Services, Government of South Australia, Adelaide, 2003, pp. 5.9–5.13.
- 2 The term 'Aboriginal' is used as an inclusive term to refer to Aboriginal and Torres Strait Islander peoples.
- 3 *Children's Protection Act 1993 (SA)*, s. 52C(1).
- 4 *ibid.*, s. 52EB.
- 5 Oral evidence: P Simmons.
- 6 *ibid.*
- 7 *ibid.*
- 8 *ibid.*
- 9 Children's Protection Act, ss. 52AB, 52CA.
- 10 *ibid.*, s. 52C(2), 52EA.
- 11 *ibid.*, ss. 52D, 52DA.
- 12 The Office of the Guardian for Children and Young People (GCYP), *Annual Report 2014–15*, Government of South Australia, 2015, p. 32.
- 13 Children's Protection Act, s. 52J.
- 14 *ibid.*, s. 52F(6).
- 15 The Council for the Care of Children, *Annual report 2014–15*, Government of South Australia, 2015, p. 43.
- 16 Submission: The Council for the Care of Children.
- 17 Oral evidence: F Arney. Submission: The Council for the Care of Children.
- 18 The Council for the Care of Children, *A snapshot of young South Australians*, 3rd edn, Government of South Australia, 2015.
- 19 Children's Protection Act, ss. 52S(6), 52T.
- 20 *ibid.*, ss. 52N(2), 52S(1), 52W.
- 21 *ibid.*, s. 52X.
- 22 Oral evidence: D Eszenyi.
- 23 Department for Education and Child Development, email to the Child Protection Systems Royal Commission, 14 July 2016.
- 24 *Health and Community Services Complaints Act 2004 (SA)*.
- 25 *ibid.*, ss. 4, 9, Parts 5, 6.
- 26 *ibid.*, s. 25(1).
- 27 *ibid.*, ss. 9(f), 29(5).
- 28 Health and Community Services Complaints Commissioner South Australia (HCSCC), *Annual Report 2014–2015*, pp. 16, 19.
- 29 HCSCC, *Annual report 2013–2014*, pp. 36, 39; HCSCC *Annual report 2012–2013*, pp. 34, 37.
- 30 Figures obtained by comparing data produced in the HCSCC *Annual report 2014–15*, p. 16, and the Ombudsman New South Wales *2014–2015 Annual report*, p. 79, against population data from the Australian Bureau of Statistics, 3101.0 Australian Demographic Statistics, Sep. 2015, September Key Figures.
- 31 EP Mullighan, *Children in State Care Commission of Inquiry: Allegations of sexual abuse and death from criminal conduct*, Children in State Care Commission of Inquiry, Adelaide, South Australia, 2008, pp. 425–427, Recommendation 31.
- 32 S Tully, correspondence with the Child Protection Systems Royal Commission, 21 June 2016. Noting also that amendments to the Health and Community Services Complaints Act which enabled children under 16 to make complaints took effect at the end of 2009.
- 33 Health and Community Services Complaints Act, s. 24.
- 34 *ibid.*, s. 24(b), (g), (l).
- 35 *Ombudsman Act 1972 (SA)*, s. 15.
- 36 Definitions for these terms are contained in the Health and Community Services Complaints Act, s. 4.
- 37 Health and Community Services Complaints Act, ss. 9(h), 24(l); S Tully, correspondence with the Child Protection Systems Royal Commission, 21 June 2016.
- 38 Submission: Name Withheld (S127).
- 39 S Tully, correspondence with the Child Protection Systems Royal Commission, 21 June 2016.
- 40 Health and Community Services Complaints Act, s. 4(1)(a).
- 41 *ibid.*, s. 4(1)(c).
- 42 S Tully, correspondence with the Child Protection Systems Royal Commission, 21 June 2016.
- 43 EP Mullighan, *Children in State Care Commission of Inquiry*, p. 424.
- 44 See s. 6(1) and in relation to notifications s. 10 of the Children's Protection Act.
- 45 Children's Protection Act, ss. 19(1), 20(1), 27(1), 37(1).
- 46 *ibid.*, s. 6(2).
- 47 Health and Community Services Complaints Act, s. 30.
- 48 *ibid.*, s. 42.
- 49 *ibid.*, Part 6, Division 2.
- 50 *ibid.*, ss. 16, 17.
- 51 *ibid.*, ss. 56A–56F.
- 52 *ibid.*, ss. 4; Health and Community Services Complaints Regulations 2005, Schedule 2.
- 53 Ombudsman Act.
- 54 *ibid.*, ss. 13, 14.
- 55 *ibid.*, s. 14A.
- 56 *ibid.*, s. 15.
- 57 *ibid.*, s. 17(1).
- 58 *ibid.*, s. 13.
- 59 *ibid.*, s. 3.
- 60 Ombudsman Act, ss. 13, 14A.
- 61 *ibid.*, s. 19.
- 62 *ibid.*, s. 19; *Royal Commissions Act 1917 (SA)*, ss. 5, 10, 11, 11A.
- 63 Ombudsman Act, ss. 19A, 20, 21.
- 64 *ibid.*, s. 25.
- 65 *ibid.*
- 66 *ibid.*; *Royal Commissions Act*, s. 5.
- 67 Health and Community Service Complaints Act, s. 25(1)(f).
- 68 RA Layton (Chair), *Our best investment*, p. 5.10.
- 69 EP Mullighan, *Children in State Care Commission of Inquiry*, pp. 426–427.
- 70 Oral evidence: K Ryan. Submission: Connecting Foster Carers SA Inc.

Some oral evidence, witness statements and submissions were received on a confidential basis. The source is known to the Commission, and is identified by a number in the endnotes.

- 71 *South Australian Civil and Administrative Tribunal Act 2013*, s. 34. However, the Act which confers jurisdiction on SACAT may modify the operation of the Act insofar as it sets out the test on rehearing.
- 72 Ombudsman Act, s. 13.
- 73 *South Australian Civil and Administrative Tribunal Act*, s. 57.
- 74 Ombudsman Act, s. 25.
- 75 *South Australian Civil and Administrative Tribunal Act*, s. 37.
- 76 Ombudsman Act, s. 15(2).
- 77 Oral evidence: N Stewart.
- 78 Oral evidence: P Simmons.
- 79 GCYP, 'What is a Children's Commissioner', website, 30 June 2016, www.gcyp.sa.gov.au/2016/06/what-is-a-childrens-commissioner/
- 80 Submission: The Council for the Care of Children.
- 81 RA Layton (Chair), *Our best investment*, pp. 5.6, 5.10; EP Mullighan, *Children in State Care Commission of Inquiry*, p. 426
- 82 Submission: The Council for the Care of Children.
- 83 Namely the National Children's Commissioner, the ACT Children and Young People Commissioner, the NSW Advocate for Children and Young People, the Queensland Family and Child Commission, the Tasmanian Commissioner for Children, the Victorian Commission for Children and Young People, and the WA Commissioner for Children and Young People.
- 84 The Australian Institute of Family Studies, *Children's commissioners and guardians*, Child Family Community Australia resource sheet, Australian Government, May 2015.
- 85 *Children's Commissioner Act 2016* (NT), s. 10.
- 86 Children's Commissioner Act, s. 10; *Human Rights Commission Act 2005* (ACT), ss. 14(1)(a), 19B(1)(a); *Children, Young Persons and Their Families Act 1997* (TAS), s. 79(1)(a).
- 87 *Commissioner for Children and Young People Act 2006* (WA), s. 23.
- 88 Children's Commissioner for Wales Act 2001 (United Kingdom); Children's Commissioner for Wales Regulations 2001, r. 6.
- 89 Children's Commissioner for Wales, Children's rights in Wales, website, <http://childrensrighthswales.org.uk/children-commissioner.aspx>, accessed on 25 March 2015; Children's Commissioner for Wales Act; Care Standards Act 2000 (United Kingdom).
- 90 Submission: The Council for the Care of Children.
- 91 Submission: Child Death and Serious Injury Review Committee. January 2015.
- 92 Submission: Child and Family Welfare Association.
- 93 Oral evidence: S Schrapel.
- 94 Oral evidence: F Arney.
- 95 Oral evidence: Name withheld (W112).
- 96 Child Development and Wellbeing Bill 2014 (SA), Schedule 1, Part 2.
- 97 *ibid.*, s. 32.
- 98 *ibid.*, s 16; Commissioner for Children and Young People Bill 2014 (SA) ss. 15(3), 15(4).
- 99 Child Development and Wellbeing Bill, s. 16(d).
- 100 *ibid.*, ss. 3, 19.
- 101 Children's Protection Act, s. 52CA(1).
- 102 *ibid.*, s. 52CA(5).
- 103 Commissioner for Children and Young People Bill, ss. 20 and 23.
- 104 *ibid.*, s. 23.
- 105 *ibid.*, ss. 30, 31.
- 106 Child Development and Wellbeing Bill, ss. 16(1)(f), 16(1)(g).
- 107 *ibid.*, ss. 20
- 108 *ibid.*, s. 20.
- 109 Commissioner for Children and Young People Bill, ss. 22, 34.
- 110 *ibid.*, s. 21.
- 111 The Council for the Care of Children, *Conversations report 2015: Rights and a commissioner for children and young people*, 2015, p. 10.
- 112 The Council for the Care of Children, *Step by step... Involving children and young people in the recruitment of a commissioner for children and young people in South Australia*, 20 May 2016.
- 113 Commissioner for Children and Young People Bill, s. 11; Child Development and Wellbeing Bill, s. 14.
- 114 *ibid.*
- 115 Commissioner for Children and Young People Bill, s. 12; *Independent Commissioner Against Corruption Act 2012* (SA), ss. 8(9)–8(13).
- 116 Commissioner for Children and Young People Bill, ss. 22, 34.
- 117 *ibid.*, ss. 21, 32.
- 118 Oral evidence: F Arney.
- 119 Commissioner for Children and Young People Bill, Part 7.
- 120 *ibid.*, s. 43; Child Development and Wellbeing Bill 2014 (SA), s. 35.
- 121 See for example s. 44 of the Commissioner for Children and Young People Bill.
- 122 Commissioner for Children and Young People Bill, s. 15(3)(e).
- 123 Oral evidence: P Simmons.
- 124 Oral evidence: D Eszenyi.
- 125 Oral evidence: P Simmons.
- 126 Oral evidence: D Eszenyi.
- 127 *ibid.*
- 128 See the Commissioner for Children and Young People Bill, s. 14.
- 129 Independent Commissioner Against Corruption Act, ss. 12, 13.
- 130 Oral evidence: D Eszenyi; P Simmons.
- 131 Oral evidence: D Eszenyi. Submission: CDSIRC.
- 132 Children's Protection Act, s. 52S.
- 133 Oral evidence: D Eszenyi.
- 134 *Legal Practitioners Act 1981* (SA), s. 14AB.
- 135 Submission: CDSIRC, September 2015.

Some oral evidence, witness statements and submissions were received on a confidential basis. The source is known to the Commission, and is identified by a number in the endnotes.

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IMPLEMENTATION OF THE RECOMMENDATIONS

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THE GOVERNMENT'S RESPONSE: IMPLEMENTATION, MONITORING AND OVERSIGHT

Throughout this report, the Commission has endeavoured to recommend improvements to establish the best system possible to protect the vulnerable children in our society and enable them to achieve their full potential. However, the work of the Commission will be to no avail unless there is a committed and positive response from the state government as to the implementation and ongoing monitoring of the recommendations. It will not be enough for the government to accept recommendations but then simply rely on the child protection agency to implement them without providing endorsement, support, funding and prompt decision making, together with appropriate independent oversight and a process of monitoring to ensure accountability.

The implementation of recommendations should be continuous. It will also require a multi-agency collaborative commitment that is transparent, independently assessed and robust.

The importance of establishing a framework to monitor the implementation of recommendations is demonstrated by referring to past reviews. For example, the government was not mandated by legislation to respond to, or report progress against, the Layton Review when it was released in 2003.¹ The government produced a report in 2004 that outlined actions taken in 2003/04 as a result of the Layton Review and intended future actions, but there was no publicly available follow-up. Prior to the delivery of the reports of the Children in State Care Commission of Inquiry² and the APY Lands Commission of Inquiry³, legislation was enacted to require ongoing reporting on the recommendations contained in those reports.

Section 11A of the *Commission of Inquiry (Children in State Care and Children on APY Lands) Act 2004* provides that the Minister was required to respond to those reports as follows:

- (a) *within 3 months after receipt of the report by the Governor, the Minister must make a preliminary response indicating which (if any) of the recommendations of the Commissioner it is intended be carried out; and*
- (b) *within 6 months after receipt of the report by the Governor, the Minister must make a full response stating—*
 - (i) *the recommendations of the Commissioner that will be carried out and the manner in which they will be carried out; and*

- (ii) *the recommendations of the Commissioner that will not be carried out and the reasons for not carrying them out; and*

- (c) *for each year for 5 years following the making of the full response, the Minister must, within 3 months after the end of the year, make a further response stating—*

- (i) *the recommendations of the Commissioner that have been wholly or partly carried out in the relevant year and the manner in which they have been carried out; and*

- (ii) *if, during the relevant year, a decision has been made not to carry out a recommendation of the Commissioner that was to be carried out, the reasons for not carrying it out; and*

- (iii) *if, during the relevant year, a decision has been made to carry out a recommendation of the Commissioner that was not to be carried out, the reasons for the decision and the manner in which the recommendation will be carried out; and*

- (d) *a copy of each response must be laid before each House of Parliament within 3 sitting days after it is made.*

In May 2015 the federal Royal Commission into Institutional Responses to Child Sexual Abuse commissioned the Parenting Research Centre to review the status of implementation and recommendations arising from previous inquiries of relevance to that Commission. The review assessed 288 recommendations and found that 48 per cent were implemented in full, 16 per cent were partially implemented, 21 per cent were not implemented and 14 per cent could not be determined.⁴

The review referred to the importance of the development of an accountability framework to monitor implementation to:

- *maintain the momentum of reform and prevent 'slippage' in compliance and standards over time*
- *allow for an assessment of whether implementers have done what they said they would and, if not, determine nonetheless whether what they are doing is good enough*
- *anticipate hurdles and barriers and take action to avoid or address them as they arise*
- *justify resourcing or, where outcomes clearly do not justify resourcing, modify the approach, (that is, financial accountability)*
- *extend the knowledge base about what particular approaches work, and why other approaches don't, providing an opportunity to modify the strategies.*⁵

The review identified that the period immediately following the handing down of recommendations, but before implementation begins, is a critical point at which the impetus for reform can start to wane. Recommendations for the early establishment of monitoring mechanisms were seen as prudent.

This Commission asked the University of South Australia's Australian Centre for Child Protection (ACCP) to conduct a similar review of the implementation of recommendations by independent child protection inquiries in this state.⁶ The ACCP review looked at 349 recommendations arising out of four South Australian inquiries: the Layton Review (206 recommendations), the Children in State Care Inquiry (54 recommendations), the APY Lands Inquiry (46 recommendations) and the DeBelle Royal Commission⁷ (43 recommendations).

As discussed in Chapter 2 of this report, the ACCP review concluded that the intent of the CISC and DeBelle inquiries had been generally met. It found that it was not possible to verify the implementation of a large proportion of the Layton Review recommendations, although a number of key initiatives had been introduced. Regarding the APY Lands Inquiry, the review commented that despite most of the recommendations being reported as accepted in the state government's annual implementation reports, a number of the responses appeared not to have addressed the recommendation's intent or resolved the issue. The ACCP analysis concluded that 'Recommendations are more likely to be implemented where some form of accountability framework and monitoring process is in place'.

IMPLEMENTATION AND MONITORING FRAMEWORK

STAGED AND STRATEGIC APPROACH TO IMPLEMENTATION

The period immediately following the release of this report will involve great change, including the establishment of a new child protection department and the appointment of a new Chief Executive. Although some matters set out in this report can and should be addressed urgently, others require time.

This report has discussed problems posed by Families SA's earlier Redesign reform agenda, including its attempt to implement multiple, complex changes in a short timeframe without sufficient staff support or consultation. The Commission's own recommendations, taken as a whole, represent significantly wider reforms to all parts of the child protection system. A staged and strategic approach is vital to their effective implementation.

In addition to considering what recommendations will be accepted, the government should make a realistic assessment as to what can be done in the short, medium and long terms. These are decisions for Cabinet with specific input from the Child Protection Reform Cabinet Committee.

RESPONSE AND IMPLEMENTATION TEAM

The government should establish a response and implementation team consisting of staff with expertise in child protection, policy, data analysis, stakeholder engagement and legislative development. This team would be responsible for implementing on a day-to-day basis recommendations accepted by the government in accordance with the timeframes determined by the government.

As discussed elsewhere in this report, the effective support of vulnerable children requires coordinated action from a range of government and non-government agencies. An important aspect of the response and implementation team's work is therefore to consult with affected agencies and stakeholders to ensure a coordinated approach.

STEERING COMMITTEE

The government should also establish an across-government steering committee to oversee the response and implementation team and to ensure a coordinated, whole-of-government approach. Committee members should include representatives from key government agencies, including:

- Attorney-General's Department
- Crown Solicitor's Office
- Department for Communities and Social Inclusion
- Department for Education and Child Development
- Department of Health and Ageing
- Department of the Premier and Cabinet
- Department of Treasury and Finance
- South Australia Police.

It should also include other government agencies as and when specific issues relevant to their particular agency arise, such as Aboriginal Affairs and Reconciliation.

The members of the steering committee must have sufficient authority to speak for, and make commitments on behalf of, their respective agencies so as to address any obstacles to implementation that may emerge over time. The steering committee should report to the Minister for Child Protection Reform as Chair of the Child Protection Reform Cabinet Committee.

The steering committee should draw upon expertise external to government where necessary to inform its work, including from the many not-for-profit agencies that form part of the broader child protection system.

In addition, at least one of the steering committee's permanent members should have relevant child protection expertise and be external to the South Australian Government. This member can offer perspective and advice independent to government and assist the committee to assess whether agencies have indeed implemented specific recommendations to improve child health, safety and wellbeing.

SUPPORT FOR THE NEW CHILD PROTECTION DEPARTMENT

The Commission's recommendations require significant change for the newly formed child protection department when compared with the current Agency. The steering committee and the response and implementation team must work to ensure that change within the newly formed department is adequately managed. This will include identifying high-level change agents within the department to build the skills, knowledge and expertise of child protection staff to respond more effectively to the complex needs of vulnerable children and families.

REPORTING

Transparent reporting on reform items is crucial to allow the public to judge the degree to which the government has implemented the Commission's recommendations. Because implementation may take a number of years, it is important that reporting extend for a commensurate period. The government should prepare an initial report on or before 31 December 2016, setting out:

- the recommendations of the Commission that have been implemented either partly or in full;
- the recommendations of the Commission that have been accepted but have not yet been fully implemented, the manner in which they will be fully implemented and the intended timeframe for that implementation; and
- the recommendations of the Commission that will not be implemented and the reason for not implementing them.

The government should prepare subsequent reports by 30 June 2017 and then annually for at least the following five years. These reports should address the first two items listed above. In the event that the government decides to implement a recommendation that it previously indicated was not to be implemented,

the reports should also state the reasons for that decision and the manner in which the recommendation will be implemented.

Reports should be readily available to members of the public, including being published online.

RECOMMENDATIONS

The Commission recommends that the South Australian Government:

- 257** Establish an across-government steering committee to monitor and oversee the implementation of recommendations. Membership of the committee should include representation by senior executives from relevant government agencies and include at least one independent member external to the South Australian Government. The Committee should report directly to the Minister for Child Protection Reform as Chair of the Child Protection Reform Cabinet Committee.
- 258** Establish a response and implementation team consisting of staff with expertise in child protection, policy, data analysis, stakeholder engagement and legislative development.
- 259** Ensure the implementation of recommendations within the newly formed child protection department is adequately managed with high-level change agents and appropriately qualified and skilled child protection staff.
- 260** Respond to the recommendations in this report as follows:
- a** on or before 31 December 2016, provide a report setting out—
 - i** the recommendations of the Commission that have been implemented either partly or in full
 - ii** the recommendations of the Commission that have been accepted, but have not yet been fully implemented, the manner in which they will be fully implemented and the intended timeframe for that implementation
 - iii** the recommendations of the Commission that will not be implemented and the reason for not implementing them;
 - b** on or before 30 June 2017, provide a further report as to—
 - i** the recommendations that have been wholly or partly implemented and the manner in which they have been implemented
 - ii** if a decision has been made not to implement a recommendation that was to be implemented, the reason for not implementing that recommendation
 - iii** if a decision has been made to implement a recommendation that previously was not to be implemented, the reasons for that decision and the manner in which the recommendation will be implemented;
 - c** for a period of not less than five years after the provision of the report referred to in paragraph 4(b) hereof, provide an annual report setting out—
 - i** the recommendations that have been wholly or partly implemented in the relevant year and the manner in which they have been implemented
 - ii** if, during the relevant year, a decision has been made not to implement a recommendation that previously was to be implemented, the reason for not implementing that recommendation
 - iii** if, during the relevant year, a decision has been made to implement a recommendation that previously was not to be implemented, the reasons for the decision and the manner in which the recommendation will be implemented;
 - d** make reports publicly accessible, including being published online.

NOTES

- 1 RA Layton (Chair), *Our best investment: A state plan to protect and advance the interests of children*, Report of the Review of Child Protection in South Australia, Department of Human Services, Government of South Australia, Adelaide, 2003.
- 2 EP Mullighan, *Children in State Care Commission of Inquiry: Allegations of sexual abuse and death from criminal conduct*, Children in State Care Commission of Inquiry, Adelaide, 2008.
- 3 EP Mullighan, *Children on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Inquiry: A report into sexual abuse*, Children on APY Lands Commission of Inquiry, Adelaide, 2008.
- 4 Figures do not total 100 per cent due to rounding. Parenting Research Centre, *Implementation of recommendations arising from previous inquiries of relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse: Final report*, Royal Commission into Institutional Responses to Child Sexual Abuse, May 2015, p. xiv.
- 5 *ibid.*, pp. 142-143.
- 6 S McDougall et al., *The implementation of recommendations made by independent child protection inquiries in South Australia: A report to the Child Protection Systems Royal Commission*, Australian Centre for Child Protection, Adelaide, April 2016, www.agd.sa.gov.au/child-protection-systems-royal-commission
- 7 BM Debelle, *Royal Commission 2012-2013: Report of Independent Education Inquiry*, Independent Education Inquiry, Adelaide, 2013.