



Community and Disability Services Ministers' Conference

Creating Safe Environments For Children- Organisations, Employees and Volunteers

National Framework

Schedule: Guidelines for Exclusion of Persons from Employment/Volunteering in Child-Related Areas

Overview

Objective: to establish standards concerning the exclusion of certain persons from child-related employment/volunteering, based on the premise that certain criminal offences or patterns of offences create an unacceptably high level of risk to children.

The community services sector and the wider public have a genuine and shared interest concerning increasing the safety of children in their dealings with community services organisations. The National Framework: *Creating Safe Environments for Children*, agreed upon by Community and Disability Services Ministers in July 2005, contributes towards a nationally coherent approach and provides a point of reference for development and review of legislation, policy and practice.

This Schedule is the final in the series of national Schedules which express the commitments within the *Creating Safe Environments for Children* Framework. Collectively, the Schedules provide a broad multi-faceted approach to increasing the safety of children in their dealings with community services organisations. This Schedule should be read in conjunction with the earlier Schedules, in particular the *Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*.

The development of guidance concerning the exclusion of persons from employment/volunteering in child-related areas is premised upon several important understandings:

- Minimising the risk of harm¹ to children requires that reasonable steps are taken to prevent persons who may pose such a risk from working in child-related areas.
- If criminal history checking is mandated in the absence of guidance about what offences might prevent a person from being accepted to work with children there may be confusion or misapplication in the use of information.²
- Where one State or Territory, or particular organisations, exclude persons from child-related employment/volunteering, differences and inconsistencies should not allow for them to gravitate towards other jurisdictions and agencies.

The overarching purpose of this Schedule is to provide guidance in relation to the categories of criminal behaviour which could lead to a person being excluded from child-related employment/volunteering, and the principles to be observed in decision-making concerning exclusion.³ These guidelines are informed by national and international research, and structured around key areas of concern for community services from an organisational and public policy perspective.

This Schedule takes account of variations between State and Territory criminal codes and other relevant legislation, and the existing systems for excluding persons from child-related employment/volunteering. For this purpose reference is made to categories of criminal behaviour rather than codified offences.

There is an explicit link between these guidelines and the guidelines pertaining to risk assessment and decision-making because risk assessment generally takes place within an established exclusionary framework.

Legislation in some States and Territories prohibits persons who have been convicted of certain offences from working with children.⁴ Discretionary exclusion is also undertaken, based upon risk assessment which acknowledges that offending history is an important factor although it is not the sole consideration. Although the models guiding these practices vary between jurisdictions, the paramount consideration across all systems is the wellbeing of children and their protection from harm.

These guidelines are not intended to be prescriptive. The different types of exclusion resulting from different processes established in legislation highlight the importance of avoiding a rigid 'criteria based' approach to decision-making.

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1. The Context for Guidelines about who may Work with Children

In the context of creating child-safe environments an employer or organisation impliedly declares they have taken reasonable steps to exclude persons who may pose a risk of harm to children. Adherence to guidelines and processes for excluding certain persons from child-related employment/volunteering is one of the many steps an organisation may take to create a child-safe environment.

Some State or Territory based offender registration systems set an overarching exclusionary framework for prohibiting persons who have been convicted of particular criminal offences from engaging in child-related employment. In some jurisdictions these restrictions also prohibit persons from undertaking volunteer activities in child-related areas. The offences encompassed by the State and Territory registration schemes are those which are generally of a sexual nature or where there is an aspect of offending against children.

Legislative or policy based systems for screening of employees/volunteers in child-related areas include provisions for the exclusion of persons on the basis of criminal history and other matters. Some of these systems have developed since the release of the *Creating Safe Environments for Children* National Framework and the identification of this Schedule as a priority area for attention. Notwithstanding these developments there continue to be a wide cross-section of community services organisations which retain responsibility for criminal history checking and decision-making concerning whether or not to engage a person as an employee or volunteer working in a child-related area.⁵ This is particularly so where organisations are engaging volunteers to work in child-related areas, or where organisations may develop and implement policy concerning specific requirements for particular positions.

2. Principles Guiding Exclusion of Persons from Employment/Volunteering in Child-related Areas

Whether the systems for exclusion of persons from child-related employment/volunteering are legislative or policy based, the principles which guide their operation should be consistent.

Principles which should govern the exclusion of persons from child-related employment/volunteering include:⁶

- the wellbeing of children and their protection from harm is the paramount consideration in all decision-making concerning acceptance or exclusion of persons from working in a child-related area;
- information concerning the categories of offending behaviour which may lead to exclusion should, as far as possible, be made known to the general public and in particular persons who may be considering undertaking professional training related to working with children;
- persons seeking employment/volunteering should be treated equitably, fairly and in accordance with the principles of natural justice and privacy;
- decisions should be made by persons with the knowledge, skills and abilities necessary to competently assess criminal history information;
- decisions should be documented, transparent, defensible, based upon clear risk assessment guidelines and capable of review;
- applicants should be informed of the reason for their exclusion from child-related employment/volunteering, and any relevant review processes.⁷

3. Standards for Excluding Persons from Employment/Volunteering in Child-related Areas on the Basis of Criminal History

It is important to explicitly address the issue of what offence(s) or pattern of offences may indicate whether a person poses a risk to children. As mentioned, each State and Territory may determine specific offences which preclude a person from employment/volunteering with children under any circumstances, and where discretion will be exercised based upon a range of factors. These offences will be categorised according to the criminal law of the particular jurisdiction. In general terms these different processes represent standards for excluding certain persons from child-related employment/volunteering.

Prohibition from Child-related Employment/Volunteering

There are situations in which it is reasonable and justifiable to automatically exclude a person from working with children based upon their history of criminal offences. The offences leading to such exclusion are considered to present a prima facie risk of harm to children, and generally do not encompass a broad range of conduct necessitating assessment.

These serious offence groups may include:⁸

- Sex offences where a child is the victim
- Serious violence in relation to a child
- Child pornography offences
- Offences involving child prostitution

Potential for Exclusion from Child-related Employment/Volunteering

There are also categories of offending behaviour where there can be a presumption that there is a presenting risk of harm to children but further assessment is necessary before a decision to exclude a person can be made. These offences may capture a broad range of behaviour requiring assessment of the implications for working with children.⁹

Where a person has a conviction for an offence of this type, careful assessment is needed to determine whether there are exceptional or particular circumstances relevant to assessment of the risk of harm to children. These potentially influential factors underline the importance of access to contextual information in relation to offences where further assessment is required.

These offence groups may include, but are not limited to:

- Sexual offences
- Violence offences
- Drug offences where children may be involved
- Child abuse offences, for example criminal neglect
- Offences involving exploitation of children
- Sexual 'deviance', for example bestiality

Beyond the categories of offending mentioned above, legislation may provide for the exclusion of persons from child-related employment/volunteering following risk assessment when the circumstances of another type of offence are known or patterns of offending are revealed. In isolation a particular offence may not indicate a potential risk of harm to children. However, in combination with other offences there may be significant indicators of a pattern of behaviour that raises concerns for the safety of children.

The *Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking* identifies the importance of considering the frequency and recency of offending, and the age of the perpetrator at the time of the offence. When considering a person's history of juvenile offending it is particularly important to have due regard for the influence of age-related factors and the outcome of any treatment or intervention programs.

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4. Other Relevant Frameworks Guiding Decision-making

Situations requiring special provisions

The guidelines for risk assessment and decision-making acknowledge that:

situational characteristics, the vulnerability of specific population groups, and the proposed nature of contact with children may be considered in legislation and/or the development of risk assessment frameworks.¹⁰

An organisational risk assessment may determine that situational risks require special provisions for the protection of children from harm. This is especially so where the exercise of a high level of duty of care is required and where the population group is particularly vulnerable. The most widespread example is where residential or home-based care is provided for children.

Government departments responsible for authorisation/licensing of persons working in these situations may be required to make decisions which take into account aspects of a person's criminal history or previous care of children, beyond those matters generally considered in working with children checks.

Processes to enable some form of review and appeal are a key consideration for the establishment of any exclusionary scheme. The Human Rights and Equal Opportunity Commission has emphasised the importance of clear review processes where persons are excluded from employment on the basis of criminal record.

Application of standards in communities with specific needs

It is important to respect the diverse social and cultural contexts in which children live when implementing child-safe practices, including background checking of prospective employees and volunteers. The focus needs to be on enabling communities to observe statutory or other standards. This means recognition of, and support for, the challenges these communities experience.

Organisations in remote areas and Indigenous communities may face practical and cultural challenges in using formal systems not specifically designed for their needs. This is particularly so when the systems relate to excluding individuals from certain activities within the community. These challenges are exacerbated by factors such as communication limitations, isolation and high staff turnover.

Any formal system must consider the capacity of communities to comply with administrative process requirements. For example, proof of identity for background checking may need to be reconsidered in communities where a person may have several names, or where there is ambiguity surrounding birth records.

Consultation with communities is a key to understanding local issues and existing mechanisms for protecting children. Collaborative work with communities is also essential to ensure that local practices are both compliant with the exclusionary framework, and meaningful to the community.

5. The Importance of Review and Appeal Processes

Processes to enable some form of review and appeal are a key consideration for the establishment of any exclusionary scheme. The Human Rights and Equal Opportunity Commission has emphasised the importance of clear review processes where persons are excluded from employment on the basis of criminal record.

At the very least there should be an opportunity for a person with a criminal record to explain the circumstances surrounding their convictions, if that conviction becomes relevant to the decision-making process.¹¹

States and Territories are responsible for the development and management of review and appeal processes that provide for natural justice and procedural fairness. In some jurisdictions review and appeal processes may be established within legislation and specific statutory provisions will guide their operation. Where persons are prohibited from working with children or subject to a life-long ban in accordance with legislation there may not be provision for review or appeal.

Review and appeal processes must be informed by relevant knowledge and undertaken by persons who have capacity for structured decision-making, understand the settings in which child-related employment/volunteering takes place and are competent in the application of natural justice principles and procedures.

Systems for persons to register grievances, request a review, or appeal the outcome of a decision may be managed through tribunals, administrative decision-making bodies and courts. It is important that review and appeal processes are governed by standards of best practice for the operation of such bodies, including:

- information about the review/appeal process is made known to all persons who may be affected;
- the opportunity is provided for persons to make submissions concerning the circumstances surrounding an offence/charge;
- the opportunity is provided for independent representation and involvement of witnesses and support persons;
- decision-making is consistent and impartial.

Consideration of the Burden of Proof

Prior to establishing any system for excluding persons from child-related employment/volunteering it is important to clarify how the issue of burden of proof will be managed.

Existing screening systems allowing for exclusion of certain persons from child-related employment/volunteering reveal variations in where the burden of proof resides, depending upon the nature of the decision and the basis for decision-making. In cases where the criminal history information relevant to the individual suggests a prima facie risk of harm to children it may be appropriate that the individual bears the onus of proving they do not pose such a risk. Conversely, where the criminal history of an individual does not indicate a prima facie risk but where there are other strong indicators of risk that cause concern, it may be appropriate for the decision-maker to bear the onus of proving that the individual poses a risk of harm to children.

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In Summary

Exclusion of certain persons from child-related employment/volunteering does not stand alone in ensuring the safety and wellbeing of children in their dealings with organisations. It is one further measure in the suite of strategies incorporated within the national Schedules as part of the *Creating Safe Environments for Children* Framework. These strategies will continue to be informed by the developing area of research concerning the causes, consequences and prevention of harm to children in organisational settings.

The guidance and decision-making concerning the exclusion of certain persons from working with children must place priority upon the protection of children from harm and minimising associated risks, whilst being ethical, defensible and informed by emerging knowledge. These guidelines for excluding persons from child-related employment/volunteering in conjunction with the *Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking* offer a community services perspective towards increased national coherence in this area.

End Notes

- 1 In the context of the *Creating Safe Environments for Children* National Framework 'harm' means physical, sexual, emotional or psychological abuse and neglect of a child.
- 2 It is important to note that the focus for this Schedule is upon criminal offences or information related to criminal records, although at the State and Territory level other matters may be deemed relevant to decision-making concerning exclusion of persons from child-related employment/volunteering.
- 3 The Schedule does not seek to provide direction as to the specific assessment of the level of risk to children.
- 4 Terms such as 'prohibit', 'ban' and 'exclusion' may have a particular meaning within the legislation of a State or Territory. In the context of these guidelines the language used is not intended to reflect the specific interpretation of any one jurisdiction.
- 5 This decision-making authority is subject to a person not being prohibited by legislation from working in a child-related area in accordance with prohibited employment regimes or jurisdiction based offender registration schemes.
- 6 There may be specific provisions within a jurisdiction with regard to application of the principle of natural justice and the right to review, particularly where the offending history of an individual is considered to pose an insurmountable risk of harm to children.
- 7 Any decision-making concerning exclusion of persons from child-related employment/volunteering should also be cognisant of industrial relations issues and adhere to applicable legislation.
- 8 State/Territory legislation may allow for discretionary exclusion in relation to some of these offence types.
- 9 Western Australia Criminal Record Checking (Working With Children) Bill 2004, Rationale for Offence Categories (as at 13 September 2004) (*Department Document*).
- 10 Community and Disability Services Ministers' Conference (2006) *Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*, National Schedule, p.4.
- 11 Human Rights and Equal Opportunity Commission (December 2004), *Discrimination on the Basis of Criminal Record, Discussion Paper*, pp.37–38.

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