

# **Child Safe Environments**

## **Standards for dealing with information obtained about the criminal history of employees and volunteers who work with children**

**Issued by the Chief Executive,  
Department for Education and Child Development  
(Section 8A, *Children's Protection Act 1993 (SA)*)**

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- SA Health
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- Office for Volunteers
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## Introduction

Protecting children's<sup>1</sup> safety and well being is the shared responsibility of the whole community. Where children and young people access services in the community, organisations should ensure that they take steps to protect them from harm. The *Children's Protection Act 1993* places a legal obligation on certain government, non-government and local government organisations to do so.

An important part of maintaining safe environments for children is ensuring that appropriate people are recruited to work and volunteer with children. As part of establishing and maintaining a safe environment for children, organisations should implement screening processes that promote the appointment of suitable staff and volunteers. Where a person is appointed to work with children the screening process should generally also include a criminal history assessment.

Criminal history assessments help organisations to decide who is suitable to work with children and to manage the risks associated with engaging people to work with children. Implemented alongside other strategies to help keep children safe from harm, criminal history assessments play an important role in promoting and maintaining child safety in an organisation.

The *Children's Protection Act 1993* requires government, non-government and local government organisations providing health, welfare, education, sporting or recreation, religious or spiritual, child care or residential services wholly or partly for children to conduct criminal history assessments for staff and volunteers who are working with or around children in prescribed positions<sup>2</sup>.

This includes all staff and volunteers who:

- have regular contact with children or regularly work in close proximity to children and are not directly supervised at all times,
- manage or supervise such personnel; or
- have access to records relating to children that are prescribed by regulation.<sup>3</sup>

These Standards set out the requirements that all organisations must comply with when conducting criminal history assessments and handling information relating to the criminal history of employees and volunteers who work with children. They are issued pursuant to Section 8A of the *Children's Protection Act 1993* by the Chief Executive of the Department for Education and Child Development.

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<sup>1</sup> A child means a person less than 18 years of age.

<sup>2</sup> Unless an exemption applies.

<sup>3</sup> *Children's Protection Regulations 2010*

<http://www.legislation.sa.gov.au/LZ/C/R/CHILDRENS%20PROTECTION%20REGULATIONS%202010/CURRENT/2010.176.UN.RTF> Regulation 10.

## Role of the Department for Education and Child Development

The Chief Executive, Department for Education and Child Development, is responsible for

- monitoring progress towards child safe environments in the government and non-government sectors and reporting regularly to the Minister for Education and Child Development; and
- developing and issuing Standards to be observed in dealing with information obtained about the criminal history of employees and volunteers who work with children in government or non- government organisations.

Organisations that do not meet their legislative obligation to conduct criminal history assessments for staff and volunteers working with children may face a fine of up to \$10 000.

## Setting the Standards

These Standards are based upon the fundamental principles that every child has the right to be safe from harm and that the responsibility for keeping children safe from harm rests with the whole community. They make explicit what is required of organisations in dealing with criminal history information of employees and volunteers working with children.

The Standards promote good practice and reflect the principles established by the Community and Disability Services Ministers Conference<sup>4</sup> for assessing criminal history information.

The principles include:

- the paramount consideration(s) are the rights, interests and wellbeing of children and their protection from harm
- the assessment will be recognised as one of a range of organisational strategies to protect children
- the assessment will be evidence-based, where evidence exists
- decisions will be ethical and defensible
- assessment and decision-making processes will be efficient and timely
- assessment and decision-making processes will follow principles of natural justice and procedural fairness
- procedures will be transparent, documented and consistently applied
- assessment processes will be accompanied by provisions for review and appeal against a decision and
- the privacy of people will be strictly protected, and sensitive and personal information will be protected from inappropriate disclosure.

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<sup>4</sup> Community and Disability Services Ministers' Conference *Schedule: An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*, 2007a.

The National Framework emphasises the need to engage with Aboriginal and culturally and linguistically diverse communities when developing and implementing processes at a local level to deal with criminal history information.<sup>5</sup>

## About the Standards

Government, non-government and local government organisations that obtain information about the criminal history of employees and volunteers who work with children are required by law to ensure that this information is dealt with in accordance with these Standards.

By following these Standards, organisations will help ensure the fair and reasonable management of criminal history information relating to employees and volunteers working with children.

The Standards aim to be relevant and achievable while also recognising that different organisational contexts will pose challenges at times.<sup>6</sup> For this reason, guidelines are also provided to assist organisations to comply with their obligations under law. These guidelines, which appear below each standard, are not mandatory but provide additional information for organisations and assist organisations to think about what steps they must take in order to comply.

It is important to recognise that criminal history assessments cannot be solely relied on to protect children from people that may harm them. Criminal history assessments should be implemented alongside a range of measures directed at keeping children safe from harm

Criminal history assessments are part of a comprehensive screening process undertaken as part of hiring of staff and volunteers. Organisations are encouraged to develop their own screening procedures and interview questions as part of their hiring/volunteer placement procedures. Organisations should consider a screening process that incorporates criminal history reports with interviews, reference checks and other background checks.<sup>7</sup>

Criminal history assessments should be conducted for all employees and volunteers working in prescribed positions with children regardless of whether the prospective volunteer or employee is known to the organisation. Exemptions from this requirement do apply in some circumstances.

Further information about establishing child safe environments and screening and monitoring of employees and volunteers can be found in the *Child Safe Environments: Principles of Good Practice* published by the Chief Executive of the Department for Education and Child Development.<sup>8</sup>

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<sup>5</sup> Ibid.

<sup>6</sup> Tearfund & NSPCC 'Setting the Standard': A common approach to Child Protection for international NGOs. Tearfund & NSPCC, Middlesex, 2003.

<sup>7</sup> Office of Juvenile Justice and Delinquency Prevention *Guidelines for the Screening of Persons working with children, the elderly and individuals with disabilities in need of support: Summary* US Department of Justice: Washington, 1988, p. 2.

<sup>8</sup> Child Safe Environments: Principles of Good Practice issued by the Chief Executive, Department for Education and Child Development 2012 available from [www.families.sa.gov.au/childsafes](http://www.families.sa.gov.au/childsafes).

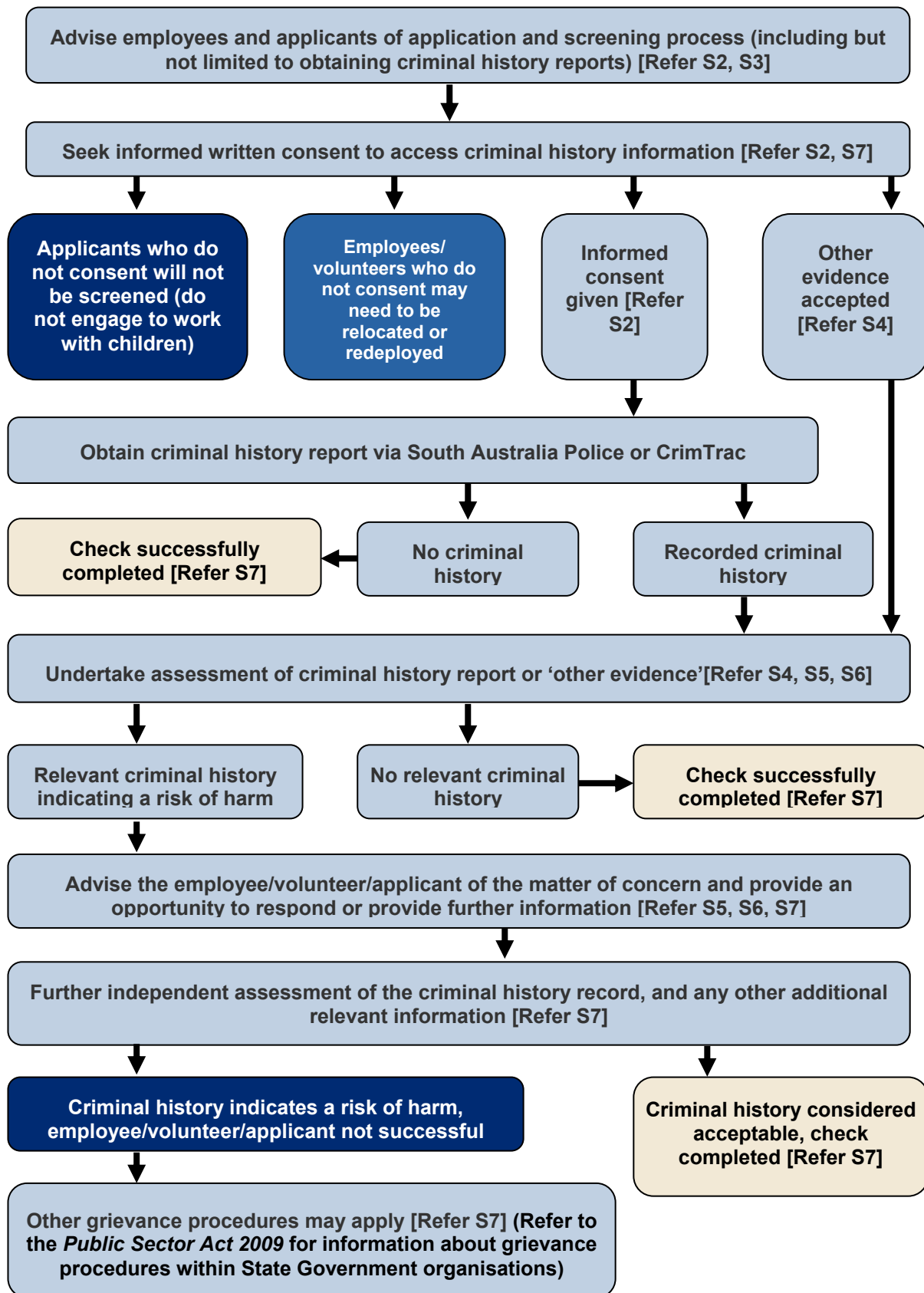
Organisations need to recognise that a criminal history assessment is only one aspect of the recruitment process for people working with children. A wide range of factors, including attitude to physical discipline and acknowledgement of children's developmental status and needs, should be considered when determining a person's suitability to work with children. A person may be deemed 'not suitable' to work with children without automatically implying that the person poses a risk of harm to children.

Organisations may decide to conduct criminal history assessments for many purposes (e.g. working with vulnerable adults, integrity testing, and suitability assessment). While relevant, these Standards have been specifically developed for dealing with criminal history information of employees and volunteers who work with children. Organisations may be required to develop further policies and procedures to meet additional obligations.

## **Conducting Assessments**

The flowchart at figure 1 provides an overview of the process for conducting criminal history assessments. This flowchart provides a quick reference for organisations that choose to conduct assessments themselves. For further detail and guidance in the assessment process, organisations should refer to the relevant Standards and Guidelines.

**Figure 1: Obtaining and assessing criminal history reports<sup>9</sup>**



<sup>9</sup> Note this test is only to be applied to people occupying or acting in a prescribed position.



## Standard 1: Identifying prescribed functions and prescribed positions

**The organisation requires that a criminal history assessment is conducted for all individuals who are engaged in or apply for prescribed positions in the organisation unless an exemption applies.**

**The organisation ensures that it accurately identifies all individuals in the organisation who undertake prescribed functions and must undergo a criminal history assessment.**

### Guidelines

Under the *Children's Protection Act 1993* certain organisations must ensure criminal history assessments are conducted for:

- All existing employees and volunteers who are working with children in prescribed positions and
- Preferred applicants for all roles involving working with children in prescribed positions.

This requirement applies to all organisations providing health, welfare, education, sporting or recreational, religious or spiritual, child care or residential services wholly or partly to children. This requirement is being phased-in over three years from 1 January 2011 to 31 December 2013 (refer to attachment 1 for phasing-in schedule).

Organisations must identify which people and positions in their organisation require a criminal history assessment. An organisation may do this by identifying the prescribed functions and positions in their organisation and considering whether people occupying these positions are employed by their organisation (see below).

The law also exempts some organisations, persons and positions from this requirement in some circumstances (refer to page 11).

### Identify prescribed functions and prescribed positions

Under the *Children's Protection Act 1993*, a prescribed position is a position that involves one or more prescribed functions. An organisation should assess the job descriptions and duty statements for all paid and unpaid positions in their organisation and identify those positions that involve one or more prescribed functions.

The prescribed functions are:

- 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

- 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
- access to records of a kind prescribed by regulation relating to children (i.e.: records relating to children in connection with child protection services, education or child care services, health services, disability services and court orders or proceedings).

When identifying whether a person or position performs prescribed functions, the key consideration should be whether the person's role will ordinarily involve regular contact with children (or their records) rather than their job title or their job description. Consideration should also be given to how the definitions of regular contact, close proximity on a regular basis and prescribed records apply to people and positions within the organisation. These definitions are described below:

**“Regular contact” and “close proximity on a regular basis”**

The *Children's Protection Act 1993* does not specifically define regular contact, regular basis or close proximity. As a result, the terms must be given their ordinary everyday common sense meanings. Generally speaking, the term **regular contact** implies contact that has a constant or definite pattern, or which recurs at short uniform intervals or on several occasions during short periods of time such as a week.

Organisations will need to decide whether the contact that an individual will have with children will be 'regular contact' or be undertaken in 'close proximity on a regular basis'. This will be a question of fact, and organisations should consider this carefully on a case-by-case basis.

**Records prescribed by Regulation**

The organisation will also need to decide whether the position involves access to children's records prescribed by regulation. These are any records relating to children in connection with:

- The administration of the *Children's Protection Act 1993*, *Family and Community Services Act 1972*, *Young Offenders Act 1993* or *Youth Court Act 1993* or
- An educational or child care service for children or
- A “health service” within the meaning of the *Health Care Act 2008* (SA) or
- A “disability service” within the meaning of the *Disability Services Act 2003* (SA) or
- Any court orders or proceedings.

### Identify whether the position constitutes “employment”

Once the organisation has identified positions that involve working with children in prescribed functions, the organisation will need to determine whether the people occupying those positions are “employed” by the organisation.

A person is employed by the organisation if they are employed, contracted, subcontracted, acting as an agent of, or volunteering for, a relevant organisation.

The test set out on page 13 can assist organisations to identify positions where a criminal history assessment must be conducted.

### Consider whether an exemption applies

The *Children’s Protection Regulations 2010* exempts organisations, persons and positions from the requirement to conduct a criminal history assessment in some circumstances. Organisations should assess whether any of the exempting criteria apply to their organisation.

The organisations, positions and persons that are exempt from the requirement to undergo a criminal history assessment are:

- A person who is a registered teacher
- A person who is appointed as a police officer<sup>10</sup>
- A person volunteering for a service or activity in which their child ordinarily participates
- A person volunteering who is less than 18 years of age
- A person working or volunteering for a short-term event or activity of less than 10 days duration or for no more than 1 day in any month
- A person occupying a position in which all work involving children is undertaken in the physical presence of the child’s parents or guardians and in which there is ordinarily no physical contact with the children
- A person who undertakes, or a position that only involves, work that is primarily provided to adults or provided to the community generally and is not provided to any child on an individual basis
- An organisation that provides equipment, food or venues for children’s parties or events but does not provide any other services to children
- A person who has regular contact with a child as part of an employment relationship with that child (such as a person working alongside a child or supervising an employee who is a child).

No exemptions are available to people (other than registered teachers and police officers) who work in positions involving commercial child care, family day care, the administration of the juvenile justice system, child protection, disability services, or residential care or other overnight accommodation specifically for

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<sup>10</sup> Sworn police officers and registered teachers are already subject to comprehensive criminal history assessments as part of their professional registration requirements.

children (unless that accommodation is provided by an interstate visiting worker who does not ordinarily reside in South Australia).

It is important to note that organisations may still require people to undergo criminal history assessments as a matter of good organisational practice, even if an assessment is not required by law.

### Indirect Service Providers

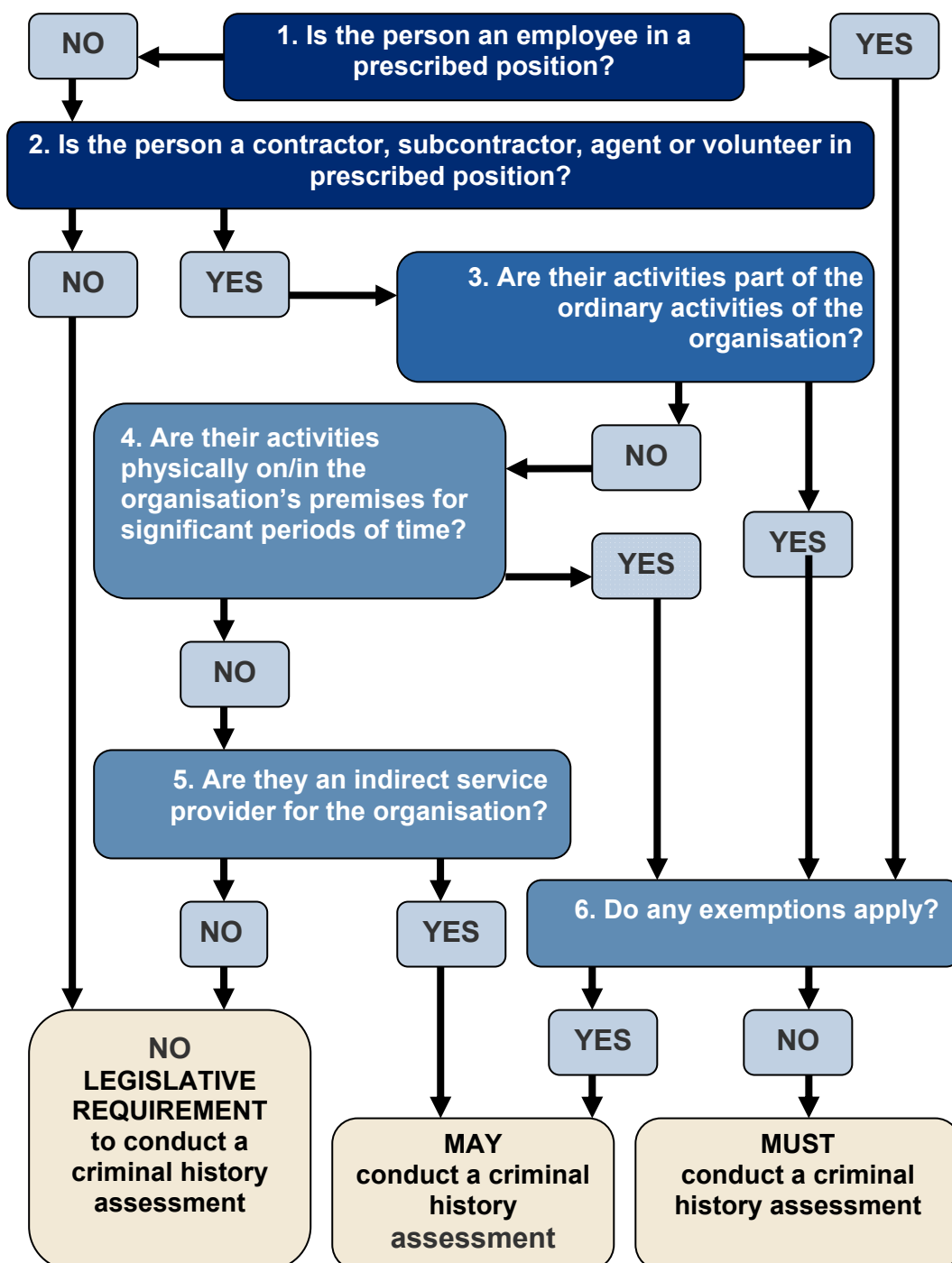
An indirect service provider is a person who carries out the functions for some other body or person who in turn makes the services available to the organisation. Under the *Children's Protection Act 1993*, organisations are not required by law to conduct criminal history assessments on indirect service providers, but do have the option to do so.

Organisations should think very carefully about the level of risk posed by people providing indirect services and consider conducting criminal history assessments where appropriate.

## Summary

- 1.1 The organisation must identify the paid and unpaid positions in their organisation that are prescribed positions.
- 1.2 In doing so, the organisation must consider:
  - 1.2.1 The nature of the duties and responsibilities attached to the position and undertaken by the individual;
  - 1.2.2 The likelihood of the position requiring the incumbent to work regularly with children, or in close proximity to children, particularly without other adults present; and
  - 1.2.3 The likelihood the position will involve access to records of a kind prescribed by regulation.
- 1.3 The organisation must determine whether the people occupying prescribed positions are “employed” by the organisation (see figure 2).
- 1.4 The organisation may consider whether the organisation, or any persons or positions within the organisation, are exempt from the requirement to undergo a criminal history assessment.
- 1.5 The organisation should assess the level of risk posed by people providing indirect services and consider conducting criminal history assessments where appropriate.

Figure 2: Test to identify which prescribed positions require a criminal history assessment<sup>11</sup>



<sup>11</sup> Note this test is only to be applied to people occupying or acting in a prescribed position.

## **Standard 2: Developing understandable and accessible procedures to obtain criminal history reports**

**The organisation ensures that its policy and procedures regarding obtaining and assessing criminal history reports are well communicated and readily available to applicants, employees and volunteers.**

**Where applicable, the organisation ensures that the informed consent of the employee or volunteer is obtained before a criminal history report is sought. Informed consent means that the individual understands the purpose of the request and the likely outcomes of giving consent.**

### **Guidelines**

Organisations must have clear and accessible policies and procedures for obtaining criminal history reports and conducting criminal history assessments for employees and volunteers who are working with children in prescribed positions. The policies and procedures should be available both electronically and in hard copy.

Clear and accessible policies and procedures will ensure that everyone working with children in the organisation is aware of the organisation's responsibility to conduct criminal history assessments. They will also help to protect the organisation, staff, volunteers and children accessing the services.

Policies and procedures for conducting criminal history assessments will vary from organisation to organisation, but should include the following topics:

#### **The organisation's obligations under legislation**

The organisation should clearly state that criminal history assessments are required:

- before a person is appointed to, or engaged to act in, a prescribed position working with children (whether as an employee, volunteer, agent, contractor or subcontractor) and
- at maximum intervals of three years where a person is working with children in a prescribed position in the organisation (whether as an employee, volunteer, agent, contractor or subcontractor).

#### **Conducting the assessment**

Organisations should decide the manner in which they will conduct criminal history assessments and clearly state this in their policies. For example, an organisation may direct the applicant to:

- Apply to a screening unit (such as the Department for Communities and Social Inclusion (DCSI) Screening Unit) for a full risk assessment of a person's criminal history and letter of clearance; or

- Provide a criminal history report or other acceptable evidence (see Standard 4) to a person (or persons) in the organisation that has delegated authority to conduct their own criminal history assessments.

Organisations that choose to conduct the assessment themselves must ensure that they comply with these Standards (see especially Standard 5 – assessing criminal history reports).

### **Meeting the cost of obtaining a criminal history report and/or assessment**

Organisations should clearly state who is responsible for meeting the cost of obtaining a criminal history report and/or assessment. Arrangements for meeting the cost of a criminal history report and/or assessment are a matter for negotiation between the organisation and the individual, as part of the employment arrangements.

The Government is meeting the cost of obtaining criminal history reports for some volunteers who work with children in volunteer organisations through the Volunteer Organisation Authorisation Number (VOAN) system.

For further information about the VOAN scheme, go to:

[http://www.sapolice.sa.gov.au/sapol/services/information\\_requests/police\\_checks/volunteer\\_organisation\\_authorisation\\_number.jsp](http://www.sapolice.sa.gov.au/sapol/services/information_requests/police_checks/volunteer_organisation_authorisation_number.jsp)

### **Consent**

In Australia, the release of criminal history information requires the explicit written consent of the person being checked.

In situations where a criminal history report is obtained from South Australia Police, the explicit written consent of the person being checked is a precondition for the release of criminal history information.

Where an organisation directs a person to apply to the DCSI Screening Unit for a full criminal history assessment and letter of clearance, the person must complete and sign an informed consent form. The consent form is available at [www.dcsi.sa.gov.au/pub/Home/AboutDCSI/Screeningunit/tabid/934/Default.aspx](http://www.dcsi.sa.gov.au/pub/Home/AboutDCSI/Screeningunit/tabid/934/Default.aspx)

Typically the person will be provided with information that explains:<sup>12</sup>

- what a criminal history report is and how it will be obtained
- The purposes for which the criminal history information is being collected (i.e. to assess the individual's suitability to work with children in prescribed positions)
- What will happen to their criminal history information and any person to whom, or agency to which, the criminal history information will be disclosed
- Any law which requires that their personal information be collected and the consequences of not complying
- The basis of decision-making (both in general terms and specifically as it may apply to the individual, refer Standard 5), including:

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<sup>12</sup> Some or all of this information may be included in a consent form.

- offences/convictions that would be considered relevant or present a potential risk of harm to children; and
- that evidence of a criminal history, that may be unrelated to any risk of harm to children, will not automatically preclude a person from being or remaining employed
- that they have a right to provide further information about their criminal history before a final assessment is made (see Standard 6)
- Information about their right to a review of the decision-making process in accordance with the organisation's relevant policies and procedures, as well as external review mechanisms (e.g. SA Ombudsman or Human Rights Commission).

In the event that an employee, volunteer or applicant is not willing to consent to a criminal history assessment, or does not have a valid assessment of their criminal history report or other acceptable evidence, the organisation should preclude the individual from working with children in a prescribed position. (refer to Standard 3 for information about validity and Standard 4 for conditions of acceptance of alternative evidence).

### **100 point identity check**

Where applicable, the organisation must use a 100 point check to identify the true identity of the applicant before the criminal history assessment is conducted. This must include one primary document such as a Birth Certificate or International Travel Document (e.g. Current Passport) or Citizenship Certificate and must include one secondary document such as a Driver's Licence, employee identification card, Centrelink card or student identification card.

In some cases, when confirming the identity of a person who is Aboriginal or from a culturally and linguistically diverse background, alternative processes for establishing the identity of the individual may be required.

Further information about conducting a 100 point check is available at <http://www.ocba.sa.gov.au/licensing/cardsystem/100points.html>.

### **Communication**

It is important that the policies and procedures are well communicated to everyone in the organisation who works with children as well as prospective employees and volunteers.

Organisations may wish to include in their advertisements, job and person specifications and selection criteria (where applicable) a clear statement that the appointment of a candidate will be subject to a satisfactory assessment of their criminal history. The material may also state that people with a criminal history report will not be automatically barred from applying (unless a particular legal requirement applies).<sup>13</sup>

<sup>13</sup> Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*. HREOC, Commonwealth of Australia: Sydney, 2005, p. 8. Note that it is an offence for registrable offenders to apply to work with children under s.65(1) of the *Child Sex Offenders Registration Act 2006*.



### **Procedure for dealing with criminal history information**

Organisations should provide detailed information relating to the procedure for obtaining criminal history reports and conducting criminal history assessments that reflect these seven standards. In particular, organisations should ensure that their policies and procedures set out the basis of decision making (see Standard 5) and their commitment to procedural fairness (see Standard 6).

Organisations should ensure that they retain appropriate records to demonstrate their compliance with these standards (such as confirmation that a criminal history report was obtained and evidence of the decision-making process). This information must be stored securely and confidentially (see Standard 7). Organisations should not retain a person's criminal history report once an assessment has been made regarding their suitability to work with children.

Organisations should refer to attachments 2 and 3 for sample templates that can assist them in meeting this requirement.

Organisations should also ensure that mechanisms are available to respond to any queries or complaints from applicants, employees and volunteers. These issues should be dealt with appropriately, confidentially and sympathetically.

## Summary

- 2.1 The organisation must have policies and procedures for obtaining and assessing criminal history information for people working with children in prescribed positions.
- 2.2 The organisation must publish its policies and procures and communicate them to staff, volunteers and applicants. The policies and procedures should be available both electronically and in hard copy.
- 2.3 Policies should include a commitment that the organisation will:
  - 2.3.1 provide applicants and volunteers with a clear and accurate description of how criminal history reports will be obtained and assessed at the time of first contact
  - 2.3.2 where applicable, use a 100-point check to establish the true identity of applicants prior to assessments being conducted
  - 2.3.3 where applicable, obtain the informed, written consent of the applicant, employee or volunteer and maintain records of all applications.
- 2.4 The organisation must have policies and procedure that address the seven standards issued by the Department for Education and Child Development including:
  - 2.4.1 Standard 5: Assessing criminal history information and the basis for decision-making
  - 2.4.2 Standard 6: Procedural fairness
  - 2.4.3 Standard 7: Ensuring good practices when dealing with criminal history information.

## **Standard 3: Conducting criminal history assessments in a timely and regular manner**

**The organisation ensures that its policy and procedures regarding obtaining and assessing criminal history reports are well communicated and readily available to applicants, employees and volunteers.**

**The organisation ensures that the informed consent of the employee or volunteer is obtained before a criminal history report is sought. Informed consent means that the individual understands the purpose of the request and the likely outcomes of giving consent.**

### **Guidelines**

Under the *Children's Protection Act 1993*, an organisation must ensure that a criminal history assessment is conducted before a person is appointed to, or engaged to, work with or around children and/or their records (i.e. in a prescribed position). An organisation must then ensure that regular criminal history assessments are conducted for current staff and volunteers working with children at least once every three years.

Organisations should review their policies and procedures to ensure that assessments are conducted for new and existing employees and volunteers in a regular and timely manner.

#### **New employees**

The organisation must ensure that a criminal history assessment is conducted prior to the appointment of each new employee and volunteer working with children in a prescribed position. In some cases, it may be acceptable for the organisation to accept other evidence, such as a valid registration document from the South Australian Teacher's Registration Board or a clearance letter from the DCSI Screening Unit (see Standard 4).

In order to prevent unnecessary intrusion, a criminal history assessment should only be conducted for the preferred applicant for a prescribed position wherever possible. However, organisations should be aware that conducting a criminal history assessment can take up to four weeks or in some cases even longer. Therefore, in urgent cases this respect for privacy will need to be balanced with administrative practicality. To expedite clearances, it may be necessary to conduct a criminal history assessment early in the recruitment and screening process to ensure that the successful applicant(s) can be engaged as soon as practicable.

There may be some cases where it is urgent for an individual to be engaged to act in a position. In these circumstances, it is recommended that the organisation require the individual to complete a statutory declaration relating to their suitability to work with children in addition to their criminal history report consent form. The

organisation may then employ the individual to undertake certain duties, but cannot allow the individual to undertake prescribed functions (as described in Standard 1) until a satisfactory criminal history assessment has been undertaken and they have been cleared to work with children in a prescribed position.

Each job applicant should be assessed first on their ability to do the job and then on the relevance of their criminal history to the job applied for (i.e. the decision should be based on merit).<sup>14</sup>

### **Existing employees and volunteers**

Regularly obtaining criminal history assessments for people who work with children in prescribed positions can help organisations to establish and promote child safe environments.

Because a criminal history report summarises an individual's formal criminal history at a point in time, it is important that organisations conduct criminal history assessments on a regular basis. In South Australia, organisations are required to conduct criminal history assessments on employees and volunteers working with children at least every three years. However, where an organisation or position provides a service to children that is assessed as high risk, the organisation may prefer to conduct assessments at shorter intervals.

It is recommended that organisations develop a register to ensure that regular criminal history assessments are conducted for all current employees and volunteers working with children in a prescribed position at least every three years. The register should also include records of any contractors, sub-contractors or agents engaged by the organisation to work with children in a prescribed position. A sample register is annexed as attachment 2.

The register should be communicated to all managers and other relevant people in the organisation.

### **Contractors, sub-contractors and agents**

It is the responsibility of the organisation to ensure that regular criminal history assessments are conducted for all contractors, sub-contractors and agents engaged or appointed by the organisation to work with children in a prescribed position.

Organisations may wish to consider including a clause in any contracts with external organisations that requires the external organisation to provide evidence that criminal history assessments have been conducted on relevant personnel in accordance with these Standards. Organisations should keep a record of this evidence.

### **Additional information**

A criminal history report and/or assessment is based on an individual's criminal history at a point of time. In addition to conducting criminal history assessment at least every three years, organisations should also consider developing policies and procedures that encourage employees and volunteers to notify the

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<sup>14</sup> Ibid, page 22.

organisation if they have had a change in their criminal history at any time before the renewal date for their next criminal history assessment.

Under the Public Sector Code of Ethics issued pursuant to Section 6 of the *Public Sector Act 2009*, Government public sector employees must at the earliest possible opportunity advise their manager if they are charged with a criminal offence. Breaches of the Code may lead to disciplinary action, including termination of employment.

The *Children's Protection Act 1993* also empowers organisations to conduct a criminal history assessment on a relevant person at any time as it thinks necessary or desirable for the purpose of establishing or maintaining child safe environments. This applies to any person who either:

- occupies or acts in a prescribed position (whether as an employee, volunteer, agent, contractor or subcontractor)
- carries out, or is to carry out, as an indirect service provider, prescribed functions for the organisation.

## Summary

- 3.1 Organisations must conduct a criminal history assessment for all prescribed positions in a timely and regular manner.
- 3.2 Organisations must ensure that:
  - 3.2.1 A satisfactory criminal history assessment is conducted before a person is appointed to, or engaged to work with children and/or their records
  - 3.2.2 A satisfactory criminal history assessment is conducted for all existing employees (including contractors, sub-contractors and agents) and volunteers working with children at least every three years.
- 3.3 Organisations must ensure that their policies and procedures require that criminal history assessments are conducted for all people occupying prescribed positions, both prior to appointment and then at least every three years.
  - 3.3.1 Organisations should maintain appropriate records as evidence that criminal history assessments are conducted in a timely manner.
- 3.4 Organisations may develop policies and procedures that encourage employees and volunteers to notify the organisation if they have had a change in their criminal history at any time before the renewal date for their next criminal history assessment.

## Standard 4: Accepting other evidence

In some situations, the organisation may accept the following types of evidence, obtained within the last three years, when assessing criminal history information:

- Letters of Clearance (or other written evidence) relating to an individual's suitability to work with children obtained from a screening unit prescribed pursuant to the Children's Protection Act 1993 or a South Australian CrimTrac-accredited agency
- National Police Certificates (under certain circumstances)
- Criminal History Record Checks undertaken and clearances provided in other Australian jurisdictions i.e. the Blue Card (Qld), Working with Children Check (Vic, WA) and the Ochre Card (NT)
- Statutory Declarations from individuals who have lived in countries other than Australia.

In accepting other evidence, there must be compatibility between the roles of the organisation (based on a risk assessment) and the criminal history reports obtained (i.e. a check to work with children).

## Guidelines

In some cases people may work or volunteer with children in prescribed positions across a number of different organisations. In order to minimise duplication, organisations may decide to accept "other evidence" when assessing criminal history information in some situations. "Other evidence" that may be accepted by an organisation includes a previously obtained criminal history report or criminal history assessment that has been undertaken within three years of the application date.

Organisations should decide in what circumstances, if any, they will accept "other evidence" (for example, the period of validity, types of evidence acceptable). This information should be published and communicated to all members of the organisation.

If an organisation chooses to accept "other evidence" in some circumstances, the organisation must ensure that the evidence is compatible with the person's current position. Factors such as spent convictions schemes and the purpose for which a criminal history report has been sought will influence the criminal history information that is included in a report or assessment. Organisations must ensure that the previous criminal history report or assessment is appropriate to use as evidence of a person's suitability to work with children.

Organisations must ensure that a 100 point identity check is conducted to confirm the identity of the applicant (refer to Standard 2) and that appropriate records are

maintained to prove that evidence has been accepted and validated (refer to Standard 7).

The following information can help an organisation to decide whether it will accept previously obtained criminal history reports or criminal history assessments.

## National Police Certificates

Most people do not have a criminal history. For these individuals, it may be appropriate and sufficient to accept previous reports indicating no recorded criminal history, especially if these criminal history reports have been obtained in the context of working with children.

Before accepting a criminal history report obtained for another purpose, the organisation **must** ensure that the National Police Certificate does not have a caveat stating that it cannot be used as a clearance to work with children. Organisations must also ensure that the Certificate is current (i.e. obtained within the last three years). Organisations should note that the validity period relates to the date on which the Certificate was issued, not the date of the criminal history assessment.

## Criminal history assessments and letters of clearance

### **Letters of clearance from a CrimTrac accredited agency or a screening unit prescribed pursuant to the Children's Protection Act 1993**

Organisations may choose to accept a current letter of clearance conducted for the purpose of working with children provided by a CrimTrac accredited agency (such as a valid registration document from the South Australian Teacher's Registration Board or a clearance letter from the DCSI Screening Unit).

Organisations should be aware that a letter of clearance is potentially an easily forged document. The organisation should seek written confirmation of the validity of the clearance from the CrimTrac accredited agency.

### **Interstate clearances for working with children**

Many Australian jurisdictions have screening units established specifically to conduct working with children checks. Organisations may choose to accept a current clearance conducted in another jurisdiction that was conducted for the purposes of working with children. To check the validity of an interstate clearance go to:

Western Australia: <http://www.checkwwc.wa.gov.au>

Victoria: <http://www.justice.vic.gov.au/workingwithchildren>

Queensland: <http://www.ccypcg.qld.gov.au>

Northern Territory: <http://www.workingwithchildren.nt.gov.au>

## Statutory Declarations

Organisations may seek a statutory declaration for employees or volunteers who have been citizens or permanent residents of another country other than



Australia since turning 18 years of age. The declaration should include statements indicating they have never been convicted of:

- murder or sexual assault
- possessing, distributing or publishing child pornography
- an offence against children
- or sentenced to imprisonment for any other form of assault.

## Summary

- 4.1 An organisation may accept the following types of evidence when assessing criminal history information:
  - 4.1.1 A National Police Certificate that does not have a caveat stating that it cannot be used as clearance to work with children
  - 4.1.2 A Letter of Clearance conducted in the context of working with children from a CrimTrac accredited agency
  - 4.1.3 An interstate clearance for working with children.
- 4.2 Before accepting the above types of evidence, an organisation must:
  - 4.2.1 ensure that the evidence is valid and current (ie obtained no more than 3 years previously) and seek written confirmation of this fact where practicable
  - 4.2.2 confirm the compatibility between the position for which the person's criminal history has previously been assessed and the current position
  - 4.2.3 confirm the identity of the individual using a 100 point identification check (refer Standard 2).
- 4.3 An organisation should specify and publish the conditions of acceptance of criminal history information in its policies and procedures.
- 4.4 An organisation must ensure that appropriate records are maintained to prove that the other evidence was accepted and validated.

## Standard 5: Assessing criminal history reports

**The organisation considers and assesses an individual's criminal history report on a case-by-case basis.**

**Criminal history information is considered in context, based on relevance and the potential risk of harm to children.**

### Guidelines

The *Children's Protection Act 1993* requires that before a person is appointed or engaged to work with children in a prescribed position, an organisation must conduct an assessment of their criminal history. Organisations must also conduct assessments on current employees at least once every three years.

Organisations (or their agents) may conduct their own assessments in accordance with these Standards. Alternatively, they may apply to a third party (such as the DCSI Screening Unit) to conduct an assessment on their behalf. Where the organisation chooses to apply to a third party for an assessment, the organisation is responsible for making the final decision on whether to employ or retain a person based on their assessed risk.

**It is important that organisations recognise that a criminal history assessment is only one aspect of the recruitment process for people working with children.**

Organisations should also consider a wide range of factors, including attitude to physical discipline and acknowledgement of children's developmental status and needs, when considering a person's suitability to work with children. A person may be deemed 'not suitable' to work with children without automatically implying that the person poses a risk of harm to children.

To conduct criminal history assessments, organisations must have policies and procedures in place that specify the method for conducting assessments and the basis on which decisions are made. Only relevant offences should be taken into account when assessing the potential harm to children posed by the person and position. The following guidelines can help organisations to ensure that criminal history assessments are conducted in a transparent and fair manner.

### Assessment of potential risk of harm to children

Where a person has no criminal history, an organisation is not required to take further action in respect to a criminal history assessment. The organisation should still undertake a comprehensive recruitment process to ensure the most suitable person is selected to work with children.

Where a person does have a criminal history of concern, an organisation must undertake an assessment of the potential harm to children posed by the person and position. Harm in the child protection context is defined as the detrimental impact on the physical, psychological, emotional or social safety, wellbeing and development of a child as a result of the actions or inactions of another person.

Risk of harm is the likelihood of inflicting harm (either directly or as a consequence of other actions) and the severity of that harm. Risk may be the result of situational or contextual factors. These are discussed below.

Risk assessment, in a general sense, involves making an assessment of probability regarding a future event. In the area of child protection, **“risk assessment”** refers to a process of evaluating the information received to reach a decision about the risk of harm a person may pose to children<sup>15</sup> if engaged in a particular position.

Organisations should be aware that in the event that a person does have a criminal history of concern, the decision-making process may take several weeks to complete. The organisation must ensure that procedural fairness is applied and that the applicant is given a genuine opportunity to provide contextual information (see Standard 6).

### Offences that indicate a prima-facie risk of harm

In South Australia, ‘relevant criminal history’ is not defined in law. However, there are specific categories of criminal convictions that present a prima-facie risk of harm to children.<sup>16</sup> It is unlikely that a person will be considered suitable to be employed, contracted, hired, retained, accepted as a volunteer, or allowed to undertake prescribed functions if he or she has been convicted of:

- murder or sexual assault
- violence in relation to a child
- an offence relating to child pornography<sup>17</sup>
- an offence involving child prostitution
- a child abuse offence, for example criminal neglect.<sup>18</sup>

### Relevant offences that potentially indicate unsuitability to undertake prescribed functions

There are other relevant offences 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’.<sup>19</sup> In general, these types of criminal offences include:

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<sup>15</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.5.

<sup>16</sup> Ibid.

<sup>17</sup> e.g. under Division 11A *Criminal Law Consolidation Act 1935* or similar legislative provisions in another State or Territory.

<sup>18</sup> e.g. under Division 1A *Criminal Law Consolidation Act 1935* or similar legislative provisions in another State or Territory.

<sup>19</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.5.

- sexually-motivated offences
- violence offences/assault including
- any form of assault which has resulted in a sentence of imprisonment
- offences relating to cruelty to animals<sup>20</sup>
- any other offences against a child (including drug offences).<sup>21</sup>

In addition other criminal offences may be relevant to specific, prescribed functions, including: dishonesty offences, serious drug-related matters or serious traffic offences.<sup>22</sup> None of these offences will automatically preclude an individual from being engaged to undertake prescribed functions. Further assessment of risk and suitability is required to be undertaken on a case-by-case basis when assessing risk of harm to children in organisational settings.<sup>23</sup>

## **Assessment of risk and suitability to undertake prescribed functions**

In some cases the connection between the criminal history and the position will be clear enough for the organisation to decide easily on the suitability of the individual for the position<sup>24</sup> (such as where a person's criminal history indicates a prima-facie risk of harm to children).

However, in most cases, the organisation will also need to assess the contextual factors surrounding the conviction and situational factors relating to the position, in order to determine the likely risk of harm to children. It is recommended that in undertaking a risk assessment where there are strong factors of concern, decision-makers should err on the side of caution.

### **Contextual factors**

An individual's criminal history (e.g. possessing child pornography) may be an indicator of the level of potential risk they may pose to children. Organisations should consider the context within which offences have been committed.

Where relevant, organisations may wish to seek additional information from the individual or through South Australia Police or CrimTrac relating to any or all of the following factors<sup>25</sup>:

<sup>20</sup> e.g. under the *Prevention of Cruelty to Animals Act 1985* or other relevant legislative provisions in South Australia or another State or Territory.

<sup>21</sup> Community and Disability Services Ministers Conference, 2007a, above n.4, 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*, 2007; Department of Health and Aging *Police Certificate Guidelines for Aged Care Providers*. Government of Australia: Canberra, 2006.

<sup>22</sup> e.g. under section 32 of the *Controlled Substances Act 1984* or other relevant legislative provisions in South Australia or another State or Territory.

<sup>23</sup> Where applicable, consideration should also be given to emerging research and professional knowledge. See also Community and Disability Services Ministers Conference, 2007a, above n.4.

<sup>24</sup> Human Rights Commission, above, n 13, pg 41.

<sup>25</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.2

- What is the nature, gravity and circumstances (where known) of the offence or charges and how is this relevant to child-related employment/volunteering?
- How long is it since an alleged offence occurred?
- What is the severity of any penalty imposed by the court? (e.g. did the court elect not to record a conviction where the person entered into and successfully completed a conditional order such as bond or probation, and whether the individual successfully completed the order)
- What was the age of the victim of the offending behaviour and was the offence committed as a juvenile or adult?
- What was the age difference between the person and any victim?
- How serious is the applicant's criminal history based upon all the information available (for example, whether there is a pattern of offending)?
- Have the applicant's circumstances changed since an offence was committed?
- What is the attitude of the applicant to their previous offending behaviour, and what relevant information can be provided by the applicant?
- What were the findings of any assessment reports following attendance at treatment or intervention programs, evidence of rehabilitation, other references, the individual's attitude to the offending behaviour, cultural factors that may be relevant to the offending?
- What were the individual's circumstances at the time of the offences compared to the current circumstances?
- Has the offence been decriminalised in Australia or was it an offence overseas but not in Australia?
- What is the significance of the type of conviction in relation to the duties a person is, or may be, undertaking?
- What is the possibility of an incident occurring if the person continues with, or is employed for, particular duties?
- Has the individual has been satisfactorily employed since the conviction?

### ***Situational Factors***

Situational factors are the circumstances in which a prescribed function is carried out, for example the likelihood of unsupervised access to children or transportation of children may require that close attention is paid to specific offence types (e.g. vehicle offences) when considering the potential risk of harm to children.

Organisations should also consider organisational and situational characteristics, such as:

- Access and level of supervision: the degree of direct and unsupervised access to children or their records

- Considerations include whether the individual will work alone or as part of a team, the level and quality of direct supervision, whether or not there is physical contact, the location of the work i.e. residential, community or home based settings.
- Nature of the prescribed functions: whether the functions are sustained or short-term, level of supervision and whether it involves the provision of overnight care.
- Relevance: an organisation should only have regard to criminal history information that may indicate that the person presents a potential risk of harm to children. Relevance of itself cannot be the basis of an assessment that an individual presents an unacceptable risk of harm to children. The type of criminal history information must be assessed against the prescribed functions that individual is likely to undertake and the contextual factors described above.
- Proportionality: whether excluding a person from engagement is an outcome proportional to the nature and circumstances of the conviction.
- Consequences: what would be the impact of a prospective incident if the person continues, or commences, particular duties?
- Characteristics of children receiving the service: The nature and vulnerability of children receiving the service, including age and maturity, social awareness and competence, physical or intellectual disability, language or cultural based vulnerability, social/emotional based vulnerability (such as children under the Guardianship of the Minister).
- Treatment Strategies: what procedures will assist in reducing the likelihood of an incident occurring, including, for example modification of duties or work environment?

A risk assessment may also lead to other strategies, in addition to obtaining criminal history reports, being implemented by the organisation in order to mitigate the risks of harm to children.<sup>26</sup> For example, the inherent requirements of some prescribed positions may involve unfettered access to children. These roles may present a higher than usual duty of care of the organisation. Such positions may require the organisation to take additional steps to mitigate the risk of harm to children, such as supervised contact or random drug testing of staff depending on the specific risk identified.

## Burden of Proof

Nationally it has been agreed that:<sup>27</sup>

- 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.

<sup>26</sup>Department for Education and Child Development, *Child Safe Environments: Principles of Good Practice*, available at [www.families.sa.gov.au/childsafes](http://www.families.sa.gov.au/childsafes).

<sup>27</sup> Community and Disability Services Ministers Conference, 2007b, p5.

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.

In all cases, before completing a risk assessment of an individual with a criminal history, the organisation must allow the person to provide further information on their criminal history and contextual factors (see Standard 6).

Organisations should also ensure they maintain written evidence (e.g. minutes of assessment meetings; risk assessment procedures) that indicates consideration of individual cases rather than automated clearances or preclusions (see Standard 7).

### **People who cannot work with children**

Under the *Child Sex Offenders Registration Act 2006 (SA)* some people are absolutely prohibited from working with children because they have been convicted of serious offences against children (generally sex offences or offences of violence with a sexual element). These offenders are recorded on the *Australian National Child Sex Offenders Register (ANCOR)*. It is an offence for a registrable offender to apply for child related work. A maximum penalty of two years imprisonment or \$10 000 applies.

## Summary

- 5.1 Organisations must ensure that the process of assessment is transparent and that opportunities are provided for individuals to understand the basis upon which criminal history information is assessed.
- 5.2 Organisations must have transparent assessment policies and procedures that include consideration of:
  - Personal factors of the individual, including the context of the offending and
  - Situational factors, including the nature of the prescribed functions and the nature and vulnerability of the children receiving the services.
- 5.3 Before completing a risk assessment of an individual (with a criminal history), the organisation must allow the individual the opportunity to provide further information on criminal history information and contextual factors.
- 5.4 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.
- 5.5 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.
- 5.6 Organisations should maintain written evidence (e.g. minutes of assessment meetings; risk assessment procedures) that indicates consideration of individual cases rather than automated clearances or preclusions (see Standard 7).



## Standard 6: Ensuring procedural fairness throughout the assessment and decision-making processes

The organisation's decision to employ or retain the services of a person with any recorded convictions is rigorous, defensible, transparent and evidence-based. The overriding purpose in screening employees, volunteers and applicants is to minimise the risk of harm to children.

The organisation ensures that employees, volunteers and applicants have an opportunity to provide input into the decision-making process. In some circumstances, an opportunity to have the decision independently reviewed is provided.

### Guidelines

Procedural fairness is an important aspect of making a decision about a person's employment.<sup>28</sup> Decisions to not employ an individual due to their criminal history must be fair and equitable, based on the principles of procedural fairness. Ensuring that principles of procedural fairness are followed in the decision making process will help ensure that people are not unfairly excluded from working with children and will promote fair and correct decision-making.

While procedural fairness does not have a single recognised definition, at its core, it requires fair, accessible, transparent and equitable decision-making processes.<sup>29</sup>

Procedural fairness arises out of a fundamental sense of justice and good administration, requiring the proper process to be followed rather than being a substantive right. Good governance requires that organisations are clear about the foundations for decision-making. Procedural fairness demands that there is a rationale for excluding persons from child-related employment. This rationale must be transparent, relevant, evident and objective. It cannot be harsh or a disproportionate response to the offence or conviction.

#### Applying procedural fairness to criminal history assessments

At a minimum, the individual must be given the opportunity to confirm their identity and the accuracy of any associated criminal history report (or alternatively the right

<sup>28</sup> Human Rights Commission, *Discrimination in Employment on the Basis of Criminal Record: Discussion Paper*, HREOC, December 2004. At:

<http://www.humanrights.gov.au/human%5Frighs/criminalrecord/discussion.html#toc7.1>

<sup>29</sup> Australian Law Reform Commission, *ALRC 95 Principled Regulation: Federal Civil and Administrative Penalties in Australia*. ALRC, Canberra, 2002. At:

<http://www.austlii.edu.au/au/other/alrc/publications/reports/95/> .

to dispute the contents of a criminal history report).<sup>30</sup> If the criminal history report indicates relevant criminal history, the organisation should give the job applicant, volunteer or employee an opportunity to provide further information, such as the details of the conviction or offence, the circumstances surrounding the offence and other information and references, before assessing the criminal history information.<sup>31</sup>

Organisations should also ensure that their policies and procedures reflect the principles of procedural fairness (as set out in this Standard) and meet any legislative and contractual requirements.

Additional ways a person may be afforded natural justice are by being:

- given the opportunity to provide information regarding his or her criminal history, or other information and references, and for this information to be considered
- informed of any proposed decision to be made about them
- provided with the rationale for the proposed decision, and
- given the right to have a full criminal history assessment decision reviewed by an independent body.<sup>32</sup>

In addition, current employees who are deemed ineligible to work with children in a prescribed position, based on their criminal history have a right of reply<sup>33</sup> unless statutory exemptions specify otherwise. In all cases, decision-makers must act fairly and impartially.

The rights of individuals both to respond and to access grievance processes will reflect:

- the size, nature and resources of the organisation
- the potential impact on the person, if their criminal history will potentially preclude them from working with children in prescribed positions.

Organisations should endeavour to make the decision-making process accessible to each applicant, having regard to their particular circumstances. For example, where appropriate, people affected by the decision may wish to be supported or represented by a third party. Wherever possible, when assessing the criminal history of an Aboriginal person, the decision-making process should include an appropriate Aboriginal person. Any decisions that a South Australian organisation makes may be reviewable by the Human Rights Commission<sup>34</sup> or the South Australian Ombudsman.

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<sup>30</sup> If an individual disputes the accuracy of information contained in their criminal history record, they may apply to South Australia Police through the *Freedom of Information Act 1991* (SA) to correct their record.

<sup>31</sup> Human Rights Commission, 2005, above n.13, p.8.

<sup>32</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.5.

<sup>33</sup> And may have a right to appeal depending on different legislative requirements for different employment sectors.

<sup>34</sup> The Commission may make findings and recommendations only. Its decisions are not binding.

## Summary

- 6.1 Organisations must have documented assessment procedures that meet any legislative and contractual requirements and ensure procedural fairness is applied throughout the assessment and decision-making process.
- 6.2 When considering criminal history reports that contain offences that indicate a prima-facie risk of harm and/or relevant offences that potentially indicate unsuitability to undertake prescribed functions, organisations should provide the individual with an opportunity to:
  - 6.2.1 Confirm or dispute the information contained in the report
  - 6.2.2 Provide contextual information and references before the assessment is conducted.
- 6.3 Organisations must genuinely consider information submitted by the individual without bias or prejudice.
- 6.4 In keeping with the principles of natural justice, organisations should endeavour to:
  - 6.4.1 Communicate a pending decision to the individual and provide the individual with a right of response
  - 6.4.2 Establish internal grievance procedures and advise the applicant of these procedures and the other avenues of appeal available to them
  - 6.4.3 In addition, current employees who are deemed ineligible to work in a prescribed position, based on their criminal history have a right of reply unless statutory exemptions specify otherwise.
- 6.5 It is acknowledged that the ability of organisations to observe the principles set out in 6.4 will be influenced by the size, nature and resources of individual organisations.
- 6.6 Organisations must ensure that the decision and rationale for excluding people is documented and decision-making is rigorous, defensible, transparent and evidence-based
  - 6.6.1 Any decisions made must be recorded (refer to Standard 7).
- 6.7 Organisations should audit, evaluate and review their processes regularly.

## **Standard 7: Ensuring good practices when dealing with criminal history information**

**The organisation establishes and maintains good practices for the management of criminal history information that includes safeguards to prevent loss, unauthorised access, use, modification, disclosure or other misuse, including unauthorised reproduction by any means.**

**The organisation protects the privacy (to the extent possible) and ensures the confidentiality of both criminal history report and the information relating to the assessment of a criminal history report.**

**The organisation does not retain a person's criminal history report once an assessment has been made regarding the person's suitability to work with children. The organisation does not retain criminal history reports relating to an individual for a period of more than three months in any circumstances.**

### **Guidelines**

#### **Confidentiality and management of information**

The law requires that criminal history information is securely managed at all times to protect the privacy of applicants/employees/volunteers and the confidentiality of the criminal history information. Penalties of up to \$10,000 apply if criminal history information is not securely managed.

Organisations must establish policies to ensure people who lawfully come into possession of information about the criminal history of another do not disclose the information except as may be required by law or authorised under law. Organisations should also ensure that they have policies in place to protect against unlawful disclosure of criminal history information. Policies should be clearly communicated to all relevant staff and volunteers.

Organisations must ensure that they have safeguards in place to prevent loss, unauthorised access, use, modification, disclosure or other misuse, including unauthorised reproduction by any means within their respective agencies. Safeguards should include:

- storage of criminal history information separate from other information about the applicant/employee/volunteer
- the use of secure storage and lockable filing systems
- restricted access to criminal history reports and criminal history information.<sup>35</sup>

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<sup>35</sup> Refer to the CrimTrac website for more information (<http://www.crimtrac.gov.au>)

Once a decision has been made regarding the person's suitability to work with children, an organisation must not make criminal history reports or copies a permanent part of its records.

In order to demonstrate compliance with legislative requirements, organisations should retain the following information:

- Confirmation that a criminal history report has been obtained
- How the criminal history report and any other information gathered during the assessment process affected any associated decision-making processes within the organisation regarding the person's suitability to work with children
- Statutory declarations (where applicable).

Organisations must implement appropriate processes to ensure that there is no **conflict of interest** when assessing a person's criminal history information. (For example, family members and friends should not assess each others criminal history information.)

A sample criminal history assessment form is annexed as appendix 3. The form sets out the information that must be retained by the organisation to comply with these Standards.

Criminal history reports or copies should be retained for a period not exceeding three months at which time the report must be destroyed (unless specific legislative exemptions dictate otherwise).

## **Protection from inappropriate disclosure and privacy considerations**

Criminal history information 'is sensitive and rightly subject to privacy considerations and protections'.<sup>36</sup> Clarity concerning how information is dealt with by the organisation 'is an essential component of protecting privacy and civil rights'.<sup>37</sup>

South Australia has no privacy legislation; however organisations should check whether any of the following requirements apply to them:

*Department of the Premier and Cabinet Circular: PC012 – Information Principles Instruction*

Public sector employees of the South Australian Government are governed and protected by the Department of the Premier and Cabinet Circular: PC012 – Information Privacy Principles Instruction. The Circular requires that all South Australian government organisations implement, maintain and observe the privacy principles for and in respect of all personal information.

*Information Sharing Guidelines for promoting the safety and wellbeing of children, young people and their families*

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<sup>36</sup> Community and Disability Services Ministers Conference, 2007b, above n.4, p. 3.

<sup>37</sup> Ibid, p. 3.

Relevant Government and State Government funded non-government organisations are guided by the *“Information Sharing Guidelines for promoting the safety and wellbeing of children, young people and their families”*. These Guidelines were approved by Cabinet in 2008. The Government departments and non government organisations (NGOs) currently covered by the ISG are listed on the Office of the Guardian for Children and Young People’s website: [www.gcyp.sa.gov.au](http://www.gcyp.sa.gov.au).

#### *Privacy Act 1988 (Cth)*

In South Australia, the Privacy Act 1988 (Cth) applies to and protects the privacy of personal information of Commonwealth public sector employees and some private sector employees.<sup>38</sup> For information on the requirements of the Privacy Act 1988, go to the website of the Commonwealth Office of the Privacy Commissioner: [www.privacy.gov.au/](http://www.privacy.gov.au/).

SA Health has a Code of Fair Information Practice based on the National Privacy Principles. This Code applies to the South Australian Department of SA Health and its funded service providers and to others with access to the SA Health’s personal information.

## Summary

- 7.1 Organisations must ensure that their policies and procedures include security and confidentiality statements relating to the management of criminal history information and other personal information.
- 7.2 Organisations must implement safeguards to protect criminal history information from loss, unauthorised access, use, modification, disclosure or other misuse, including unauthorised reproduction by any means.
- 7.3 Where applicable, applications and consent forms should include provisions that specify how criminal history information will be sought and used.
- 7.4 Organisations must ensure that criminal history information is protected, confidentially stored and destroyed according to legislative and contractual arrangements.
- 7.5 Organisations should not retain any records, electronic or otherwise, of criminal history reports other than those authorised and specified by legislative and/or contractual requirements.
- 7.6 Organisations should regularly review and/or audit their procedure for conducting criminal history assessments.
- 7.7 Organisations must ensure they implement appropriate conflict of interest procedures when assessing criminal history information.

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<sup>38</sup> See:  
[http://www.privacy.gov.au/publications/IS12\\_01.html](http://www.privacy.gov.au/publications/IS12_01.html) and  
[http://www.privacy.gov.au/publications/is1\\_01.html](http://www.privacy.gov.au/publications/is1_01.html)

## Legislation

### Children's Protection Act 1993

#### Section 8C: Obligations of certain organisations that provide services for children

Under Section 8C of the *Children's Protection Act 1993*, government, non-government and local government organisations providing health, welfare, education, sporting or recreational, religious or spiritual, child care or residential services wholly or partly for children must have in place appropriate policies and procedures for ensuring that child safe environments are established and maintained.

These policies and procedures must:

- ensure that appropriate reports of abuse or neglect are made by mandated notifiers (under Part 4 of the Act) and
- comply with the *Child Safe Environments: Principles of Good Practice* and *Child Safe Environments: Standards for dealing with information about the criminal history of employees and volunteers who work with children* insofar as they apply to the organisation.

These organisations must also lodge a statement about their child safe environment policies and procedures with the Department for Education and Child Development. A lodgement form is available to complete and submit through the Families SA website. *Principles of Good Practice*, information resources and sample templates that may help organisations to comply are also available to download from this website.

(Refer to [www.families.sa.gov.au/childsafe](http://www.families.sa.gov.au/childsafe) for more information.)

#### Section 8B: Conducting criminal history assessments

Under Section 8B of the *Children's Protection Act 1993*, government, non-government and local government organisations providing health, welfare, education, sporting or recreational, religious or spiritual, child care or residential services wholly or partly for children are required to conduct criminal history assessments:

- for all people in their organisation who work or volunteer in prescribed positions and
- before a person is appointed to, or engaged to act in, a prescribed position in the organisation.

This requirement is being phased-in over a three year period from 1 January 2011 to 31 December 2013. Organisations should check when this requirement will apply to them (refer to attachment 1).

Organisations (or their agent) may choose to conduct criminal history assessments themselves, or accept other evidence (where applicable), in accordance with these Standards. Alternatively, the organisation may choose to



apply to a third party (such as the DCSI Screening Unit) for a full criminal history assessment and Letter of Clearance.

In all cases, the final decision of whether to engage or retain a person to work with children rests with the organisation.

Penalties of up to \$10,000 may apply for non-compliance.

## **Section 8D: Exemptions**

Section 8D of the Act provides that the *Children's Protection Regulations 2010* may exempt organisations, persons and positions, or classes of organisations, persons and positions, from the application of section 8B or 8C.

Regulation 14 of the *Children's Protection Regulations 2010* sets out the organisations, persons and positions that are exempt from Section 8B of the Act. No organisations, persons or positions are exempt from Section 8C of the Act. Refer to Standard 1 for further information.

## **Child Sex Offender Registration Act 2006**

Under the *Child Sex Offenders Registration Act 2006* (SA) some people are absolutely prohibited from working with children because they have been convicted of serious offences against children (generally sex offences or offences of violence with a sexual element). These offenders are recorded on the Australian National Child Sex Offenders Register (ANCOR). It is an offence for a registrable offender to apply for child related work. A maximum penalty of two years imprisonment or \$10 000 applies.



## Glossary of terms

**Abuse or neglect**, in relation to a child, means:

- sexual abuse of the child or
- physical or emotional abuse of the child, or neglect of the child, to the extent that either:
  - the child has suffered, or is likely to suffer, physical or psychological injury detrimental to the child's wellbeing
  - the child's physical or psychological development is in jeopardy.

**Applicant** means an individual who is applying to work or volunteer in a prescribed position, and for whom a criminal history assessment must be obtained under the *Children's Protection Act 1993*.

**Background Checking** in the context of working with children, 'involves obtaining information about potential employees and volunteers, on the basis that the information is deemed relevant to working in a child-related area. The information gathered may include details concerning previous employment and relevant experience; verification of qualifications and professional registration; criminal history information; thorough reference checks; and work history reports'.<sup>39</sup>

**Background checking** includes, but is not limited to the assessment of a criminal history report.

**Checks of criminal history reports** (also known as a National Police Certificate or a National Criminal History Record Check) are checks of the records of all police services that discloses evidence of whether a person:

- has any recorded convictions or
- has been convicted of an offence or
- has been charged with, and found guilty of, an offence but discharged without conviction or
- is the subject of any criminal charge still pending before a Court.

Individuals seeking to obtain a criminal history report through South Australia Police are provided with a National Police Certificate (NPC). Checks undertaken through a CrimTrac accredited agency are referred to as a National Criminal History Record Check (NCHRC). Checks of criminal history reveal and record convictions across all jurisdictions in Australia (subject to each jurisdiction's spent convictions scheme).

**Child** means a person under 18 years of age.

**Contact** under the *Child Sex Offenders Registration Act 2006 (SA)* means any form of contact between a person and a child and includes—

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<sup>39</sup> Community and Disability Services Ministers Conference, 2007a, above n. 4, p. 2.

- (a) any form of physical contact; and
- (b) any form of oral communication, whether face to face or by telephone; and
- (c) any form of written communication, including electronic communication.

A **contractor** or indeed subcontractor is a party to a contract for services (as opposed to an employee who is a party to a contract of services).

**Conviction** means “the complete orders made by a court after finding an accused person guilty of an offence including both the finding of guilt and the sentence passed as a consequence”.<sup>40</sup>

**Criminal History Assessment** is a decision about whether a person is suitable to work with children based on the person’s criminal history (if any) and the assessed risk of harm to children who receive a service from the organisation. The assessment must be conducted by an organisation or authorised screening unit in accordance with Section 8B of the *Children’s Protection Act 1993* and these Standards.

**Criminal History Information** is defined by CrimTrac to mean information relating to **disclosable court outcomes**, or other information regarding the name provided by the **applicant** to a police service and included within a National Criminal History Record Check. This information will only be released subject to relevant spent convictions/non-disclosure legislation and/or information release policies.

**Criminal History Report** is a report from South Australia Police or CrimTrac containing any criminal history information about an individual.

**CrimTrac** is a Commonwealth executive agency that provides police services and accredited agencies with individuals’ national criminal history record information subject to relevant Commonwealth, state and territory legislation.

**Disclosable Court Outcomes** mean the records of court convictions and findings of guilt, which may include spent convictions and findings of guilt that have not been recorded as convictions or deemed to be convictions by the court.

**Duty of Care** is a common law concept that refers to the responsibility of employees and volunteers to provide children with an adequate level of protection against harm. It is usually expressed as a duty to take reasonable care to protect children from all reasonably foreseeable risk of harm. The question of what constitutes reasonable care in any given case will be determined objectively by a court and will depend on the individual circumstances of each case. In their relationships with children, employees and volunteers are required to ensure that the physical and emotional welfare of students is safeguarded, and that their own behaviour with children is always regulated by this duty of care.<sup>41</sup>

<sup>40</sup> Nygh et al, *Concise Australian Legal Dictionary* (2<sup>nd</sup> Edition), Butterworths, Australia, pg 97  
Note that the South Australian Supreme Court case *Vreeker v Police* [2004] SASC 90 discusses the meaning of the word ‘conviction’ and confirms that there is no uniform definition of this term and that it depends on the context in which it is used.

<sup>41</sup> Department for Education and Child Development, Association of Independent Schools of South Australia & Catholic Education SA *Protection Practices for Staff in their Interactions with*

**Emotional abuse** is a chronic attitude or behaviour directed at a child whereby a child's self esteem and social competence is undermined or eroded over time or the creation of an emotional environment which is detrimental to or impairs the child's psychological and/or physical development.

Behaviours may include:

- devaluing
- ignoring
- rejecting
- corrupting
- isolating
- terrorising
- family violence.

**Employment** includes the performance of functions as an agent, contractor or subcontractor, or as a volunteer.

**Employee** means a person employed for remuneration under a contract of employment.<sup>42</sup>

**Government instrumentality** is any body, whether incorporated or unincorporated, which serves the purposes of government.

**Government organisation** means a government department, agency or instrumentality.

**Harm** means physical, sexual, emotional or psychological abuse and neglect of children. Harm is any detrimental effect of a significant nature on a child's physical, psychological or emotional wellbeing.

**Indirect service provider** is someone who carries out the prescribed functions for another person or body which makes those services available to the organisation bound by the provision.

**Informed consent** means that the individual understands the purpose of the request and the likely outcomes of giving consent. Typically it will involve the applicant signing a consent form that sets out:

- what a criminal history report is and how it will be obtained
- the purposes for which the criminal history information is being collected
- any person to whom, or agency to which, the criminal history information will be disclosed
- any law which requires that their personal information be collected and the consequences of not complying.

**Merit**<sup>43</sup> in the context of selection processes as:

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*Students: Guidelines for Schools, Preschools and Out of School Hours Care.* DECD: Adelaide, 2005.

<sup>42</sup> *Fair Work Act 1994 (SA).*

- The extent to which each of the applicants has abilities, aptitude, skills, qualifications, knowledge, experience (including community experience) and personal qualities relevant to the carrying out of the duties in question.
- If relevant:
  - the manner in which each of the applicants carried out any previous employment or occupational duties or functions
  - the extent to which each of the applicants has potential for development.

**Natural justice**<sup>44</sup> can be explained using two primary rules:

- audi alteram partem - ('hear the other side')
- nemo debet esse iudex in propria sua causa - ('no one shall be judge in his or her own case').

With regard to dealing with criminal history information, **natural justice** requires that:

- people are entitled to be informed of allegations made against them
- all persons affected by a decision should be given the relevant information to enable an informed submission to be made to the decision-maker or person subsequently reviewing a decision
- during the review of a decision, all persons affected by a decision should have an opportunity to put their case, relevant arguments should be heard, and relevant information should be accessible to all parties
- decision-makers act fairly and impartially.

**National Criminal History Record Check (NCHRC)** is a check of the criminal history of an individual carried out by South Australia Police or CrimTrac in accordance with the appropriate standards.

**Neglect** is any serious omission or commission by a person which jeopardises or impairs a child's psychological, intellectual or physical development. Neglect is characterised by the failure to provide for the child's basic needs. Behaviours may include:

- inadequate care and supervision of young children for long periods of time
- failure to provide adequate nutrition, clothing or personal hygiene
- failure to provide necessary health care/medical treatment
- disregard for potential hazards in the home
- forcing the child to leave home at an early age
- allowing children to engage in chronic truancy.

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<sup>43</sup> *Public Sector Act 2009 (SA)*.

<sup>44</sup> The Commissioner for Public Employment, *Guideline for the South Australian Public Service for the Protection of Merit and Equity*, Adelaide, 2001, p. 3.

**Non-government organisation (NGO)** means:

- a business; or
- a service provider; or
- a group organised for some purpose, work or undertaking (such as a society, club, institution or body), whether incorporated or unincorporated, and includes a local government organisation but does not include a government organisation.

An organisation may consist of a single person.

**Organisation** means all groups of persons organised for some end or work. This includes: voluntary or otherwise; an association whether incorporated or not; a non-profit organisation; a society, club, institution or body. It may also consist of a single person.

**Physical abuse** is any non-accidental act inflicted upon a child which results in physical injury to the child. Physical abuse results from practices such as:

- hitting, punching, kicking (indicators: marks from belt buckles, irons, fingers, cigarettes)
- shaking (particularly young babies)
- burning, biting, pulling out hair
- alcohol or other drug administration.

A **prescribed position** is a position in an organisation that requires or involves prescribed functions, as defined by Section 8B (8) of the *Children's Protection Act 1993* (see below).

**Prescribed functions** mean:

- regular contact with children that is not directly supervised at all times
- work in close proximity to children on a regular basis that is not directly supervised at all times
- supervision or management of persons who:
  - have regular contact with children or
  - work in close proximity to children on a regular basis
- access to records of a kind prescribed by regulation relating to children (see following definition).<sup>45</sup>

**Prescribed records** are those records relating to children in connection with:

- the administration of the *Children's Protection Act 1993*, *Family and Community Services Act 1972*, *Young Offenders Act 1993* or *Youth Court Act 1993* or

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<sup>45</sup> As of July 2012 no other functions prescribed.

- an educational or child care service for children or
- a health service with the meaning of the *Health Care Act 2008 (SA)* or
- a disability service within the meaning of the Disability Services Act 2003 (SA) or
- legal proceedings.

**Procedural fairness** does not have a single recognised definition. However, at its core, it requires fair, accessible, transparent and equitable decision-making processes.<sup>46</sup>

**Regular contact** implies contact that has a constant or definite pattern, or which recurs at short uniform intervals or on several occasions during short periods of time such as a week. Ultimately it will be up to the courts to decide what it means in the context of the Act.

**Responsible authority** means:

- the Chief Executive for a government organisation
- for a non-government organisation to which Section 8B of the *Children's Protection Act 1993* applies:
  - the managing authority of the organisation or
  - the body approved in the *Children's Protection Regulations 2010* if the managing authority has delegated its responsibility to that body.

**Risk** is the likelihood of anything occurring that can cause harm or loss to a child.

**Risk assessment** in the context of child protection 'refers to a process of evaluating the information received to reach a decision about the risk of harm a person may pose to children'.<sup>47</sup>

**Risk management** is identifying and assessing all potential sources of harm, and taking steps to decrease the likelihood that harm will occur. The aim is to prevent things from going wrong, limit the amount of harm possible and reduce an organisation's liability if harm does eventuate.<sup>48</sup>

**Risk of harm** is the likelihood of inflicting harm to children (either directly or as a consequence of other actions) and the severity of that harm.

**Screening** 'in the context of minimising the risk of harm to children in their dealings with organisations is generally understood to refer to the combined process of background checking, risk assessment and decision-making concerning acceptance/exclusion of persons in areas of child related employment/volunteering'.<sup>49</sup>

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<sup>46</sup> Australian Law Reform Commission, *ALRC 95 Principled Regulation: Federal Civil and Administrative Penalties in Australia*. ALRC, Canberra, 2002. At: [www.austlii.edu.au/au/other/alrc/publications/reports/95/](http://www.austlii.edu.au/au/other/alrc/publications/reports/95/).

<sup>47</sup> Community and Disability Services Ministers Conference, 2007a, above n.4, p.2.

<sup>48</sup> Graff, Linda (2003) *Better Safe ... Risk management in Volunteer Programs and Community Service*. Linda Graff and Associates Inc, Ontario.

<sup>49</sup> Community and Disability Services Ministers Conference, 2007b, above n.27, p.6.

**Sexual abuse** is any sexual behaviour imposed on a child. The child concerned is considered to be unable to alter and/or understand the perpetrator's behaviour due to his or her early stage of development and/or powerlessness in the situation. Sexual abuse occurs when someone in a position of power to the child uses her/his power to involve the child in sexual activity. Behaviour can include:

- sexual suggestion
- exhibitionism, mutual masturbation, oral sex
- showing pornographic material e.g. DVDs, internet
- using children in the production of pornographic material
- penile or other penetration of the genital or anal region
- child prostitution.

**Spent convictions** refer to criminal convictions that lapse after a period of time under the *Spent Convictions Act 2009* (SA) or a spent convictions laws of another jurisdiction, resulting in a 'clean' record. Once a person's conviction has been spent, it cannot be taken into account in many situations.

However, spent conviction laws generally allow all convictions to be taken into account when people are applying for a licence, professional registration or accreditation that requires a personal character test, or applying for some jobs or to work with certain people (such as working with children).

**Volunteering** means an activity which is of benefit to the community, is done of one's free will and is undertaken without monetary reward.<sup>50</sup>

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<sup>50</sup> *Advancing the Community Together A Partnership between the Volunteer Sector and the South Australian Government*, 2003, p2. At <http://www.ofv.sa.gov.au/act.htm>.

## Appendix 1 - Criminal History Assessments Phasing-in Schedule

### Phased in 1 January 2011 – 30 June 2012

Organisations in these categories should have already conducted criminal history assessments for employees and volunteers working in **prescribed positions**.

Category of organisation/business	Class of employee/volunteer working in a <b>prescribed position</b> affected
Child care providers	New and existing employees and volunteers
Residential care providers	New and existing employees and volunteers
Private hospitals (within the meaning of the <i>Health Care Act 2008</i> )	New and existing employees and volunteers
Day procedures centres attached to private hospitals	New and existing employees and volunteers
Welfare services	New and existing employees and volunteers
Ambulance services	New and existing employees and volunteers
Day procedures centres that are not attached to hospitals	New and existing employees and volunteers
General practitioner health services	New and existing employees and volunteers
Dental services	New and existing employees and volunteers
All remaining health services with more than 25 full-time positions	New and existing employees and volunteers
All remaining health services with 25 or less full-time positions	New and existing employees and volunteers
Sporting and recreational services	New and existing employees
Religious and spiritual organisations	New and existing employees
Educational services (except schools)	New and existing employees



## 1 July 2012 – 31 December 2012

Organisations in these categories must ensure criminal history assessments are conducted for employees and volunteers working in **prescribed positions** by 31 December 2012

Category of organisation/business	Class of employee/volunteer working in a <b>prescribed position</b> affected
Sporting and recreational services	New and existing volunteers working with children aged 7 years of age or under
Religious and spiritual organisations	New and existing volunteers working with children aged 7 years of age or under
Educational services (except schools)	New and existing volunteers working with children aged 7 years of age or under

## 1 January 2013 – 30 June 2013

Organisations in these categories must ensure criminal history assessments are conducted for employees and volunteers working in **prescribed positions** by 30 June 2013

Category of organisation/business	Class of employee/volunteer working in a <b>prescribed position</b> affected
Sporting and recreational services	New and existing volunteers working with children aged 12 years of age or under
Religious and spiritual organisations	New and existing volunteers working with children aged 12 years of age or under
Educational services (except schools)	New and existing volunteers working with children aged 12 years of age or under

## 1 July 2013 – 31 December 2013

Organisations in these categories must ensure criminal history assessments are conducted for employees and volunteers working in **prescribed positions** by 31 December 2013

Category of organisation/business	Class of employee/volunteer working in a <b>prescribed position</b> affected
Sporting and recreational services	New and existing volunteers working with children aged 17 years of age or under
Religious and spiritual organisations	New and existing volunteers working with children aged 17 years of age or under
Educational services (except schools)	New and existing volunteers working with children aged 17 years of age or under



## Appendix 2 – Criminal History Assessment Register

Name	Position	Police Certificate Reference Number (or other acceptable evidence)	Date of certificate or other evidence*	Date for renewal**

\* This date refers to the day that the police certificate or other evidence was received and not the day the assessment was completed.

\*\* The date of renewal is a maximum of three years from the day the police certificate or other evidence was issued.

## Appendix 3 - Criminal History Assessment Form<sup>51</sup>

<b>Name of person</b>	
<b>Description of position that the person occupies or will occupy</b>	
<b>The person provided, or consented to providing, acceptable evidence relating to their criminal history</b> <i>(For example, an original or certificate copy report of his/her police certificate, a letter of clearance or an interstate working with children clearance.)</i> See Standards 1 – 4	<b>Yes</b> <i>Record type of evidence accepted (e.g. police certificate, letter of clearance, interstate clearance)</i>  <b>No</b> <i>A person who does not provide evidence, or consent to evidence being obtained, is precluded from engagement to work with children in a prescribed position.</i>
<b>Date evidence requested</b>	
<b>Date evidence received</b>	
<b>The police certificate or other evidence disclosed no convictions</b>	<i>The assessment is successfully completed and no further action in respect to an assessment is required.</i>
<b>The police certificate or other evidence disclosed a conviction requiring further assessment</b>	
<b>The police certificate or other evidence disclosed convictions that indicate a prima-facie risk of harm</b>	<i>Ensure there is evidence on file regarding the further assessment that was undertaken and the result of the assessment.</i>

<sup>51</sup> This template draws on resources prepared by the Department of Health and Ageing (Cth) “Police Certificate Guidelines for Aged Care Providers” 2009, accessed at <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-quality-factsheet-policechecks-guidelines.htm>

See Standards 5 and 6	
<b>The police certificate or other evidence disclosed convictions that potentially indicate a unsuitability to undertake prescribed functions</b> See Standards 5 and 6	<i>Ensure there is evidence on file regarding the further assessment that was undertaken and the result of the assessment.</i>

**Name of Assessor (s):** \_\_\_\_\_

**Position/Title:** \_\_\_\_\_

**Signature:** \_\_\_\_\_

**Date:** \_\_\_\_\_