



Response to Working with Vulnerable People (Background Checking) Bill 2013 Tasmania

15 October 2013

1.0 Introduction

- 1.1 Independent Education Union Victoria Tasmania (IEU) is pleased to make a response to the proposed *Working with Vulnerable People (Background Checking) Bill 2013*. IEU covers teachers and school support staff in both Catholic and independent schools and associated early childhood centres in Tasmania and Victoria. The union represents its members in a broad range of industrial and professional matters, including extensive involvement in the development and implementation of relevant legislation in both states.
- 1.2 The following submission raises a number of issues particularly related to the Bill's proposal to replace or replicate current checking processes involved in the registration of teachers by the process administered under the *Working with Vulnerable People (Background Checking) Act*. In addition, the union's submission will go to the need for longer period of consultation in respect to the proposed Bill, and to the detailing of a number of concerns in relation to specific aspects of the proposed Bill.

2.0 Time frame for consultation and significant impact on schools and early childhood centres

- 2.1 The IEU is aware that formal consultation on the proposed Bill has been relatively short and that there will be some further consultations on the Regulations. Unfortunately IEU was not notified of the community consultations that have now taken place, and is taking the opportunity of the submission process to highlight key issues. While IEU understands that the government is keen for the legislation to be in place for the scheme to commence operation as soon as possible, it is concerned, however, at the time frame allocated to the consultation process. IEU is calling on the government to undertake an more extensive period of consultation, particularly given the existence of a thorough and ongoing checking process undertaken by the Teachers Registration Board of Tasmania (TRB) under *the Teacher Registration Act 2000* in respect to teacher registration, and the complexities associated with broadening a proposed scheme to encompass not only working with children, but with a much more diverse and complicated category of 'vulnerable' adults.

- 2.2 Significant impact of schools - the impact of the introduction of the legislation on Tasmanian schools will be extremely significant. All staff employed in all Catholic, independent and government schools, as well as early childhood centres, will be subject to the provisions of the legislation. Volunteers engaged in activities associated with schools and early childhood centres will also be affected. The scale of implementation of a WWVP registration will require extensive resourcing and reasonable phase in time-lines. These issues will need to be subject to extensive consultation with the various parties involved, including the education unions.
- 2.3 The danger of hasty consideration resulting in significant negative impact on the current effective and timely processes involved in the registration of teachers, cannot be underestimated. In addition, given the scope of the legislation and the large size of the education sector, there is a danger of a significantly negative impact on the smooth running of schools and early childhood centres if the process is not clear and manageable.

3.0 Requirement for dual registration for teachers

- 3.1 IEU is concerned that the Bill appears to require people both applying for and maintaining teacher registration under the TRB to also be separately registered under the *Working with Vulnerable People (Background Checking) Act 2013* (WWVP Act). There are two different possible avenues for exemption under the WWVP Act for registered teachers, but as currently drafted would not apply. IEU submits that the proposed Bill be amended to exempt registered teachers from being required to register under the WWVP legislation.

3.2 Registration under a Corresponding Law

It is not clear in the proposed Bill whether s.14 (3) (c) would/ or is intended to apply to registered teachers from other jurisdictions or those registered within Tasmania. The section refers to a person not being required to be registered if *the person is registered under a corresponding law and –*

- (i) *the regulated activity is substantially similar to an activity or service the person is allowed, by that registration, to engage in under the corresponding law...*

IEU believes that this should apply to registered teachers as registration and its application processes are essentially the same. IEU notes that the wording in the proposed Bill is the same as that contained in the ACT *Working with Vulnerable People (Background Checking) Act 2011*. IEU understands that in the ACT, their 2011 legislation was proposed before teacher registration actually commenced, but was written almost concurrently with the teacher registration legislation. Greater clarity is necessary on the corresponding law provision. It would be useful if this section was able to apply to registered teachers.

Further, the proposed Tasmanian Bill uses the ACT Act's definition of *corresponding law* which is:

- (a) *a law of another jurisdiction corresponding, or substantially corresponding, to this Act; or,*
(b) *a law of another jurisdiction prescribed by the regulation as a corresponding law.*

However, the definition of *jurisdiction* in the proposed Bill's definitions has omitted the ACT's more fulsome definition which is *a State, Commonwealth or an internal Territory including the ACT*.

The proposed Tasmanian Bill should be amended to include a similar definition of *jurisdiction* which would include Tasmania itself as a jurisdiction.

- 3.3 The Bill provides that certain categories of persons are not required to be registered, including in s.14 (3) (i) a list of persons engaged in a list of regulated activities, including police officers, registered health practitioners under the Health Practitioners Regulation National Law (Tasmania). This list does not include registered teachers.

IEU submits that a person who is registered by the TRB under the *Teacher Registration Act 2000* should be included in the list of exempted persons proposed by the WWVP Act. There are a number of reasons why IEU holds this position:

(ii) The checking process undertaken by the TRB is extremely rigorous and in fact broader than the proposed WWVP check, and clearly meets the intentions of the proposed Bill in safeguarding vulnerable people. The Teacher Registration Act provides for the:

- determination of whether the person is of good character (s17J). The Board –
 - (a) is to take into account any conviction of, or charge made against , the person; and
 - (b) is to take into account any behaviour of the person generally expected of a person that –
 - does not satisfy a standard of behaviour generally expected of a teacher; or
 - is otherwise disgraceful or improper; and
 - (c) may take into account any other matter it considers relevant.
- determination of whether the person is fit to be a teacher (s17K). The Board may take into account –
 - (a) any medical, psychiatric or psychological condition of the applicant; and
 - (b) the competence of the person as a teacher; and
 - (c) any other matter it considers relevant

The Board may require the person –

- (a) to undergo a medical examination, including a psychiatric, psychological or other examination; and
- (b) to authorise the medical practitioner, psychologist or other person undertaking the examination to provide a copy of his or her report on the person to the Board

- provision of a Police Report from the Commissioner of Police (s12 or 17C)-
 - (a) for the purpose of considering and determining the application; and
 - (b) following the grant of the application –
 - for the purpose of the renewal of registration or the extension of a limited authority; and
 - for the purpose of an inquiry in respect of that person, whether or not that person is still a registered teacher or holder of a limited authority; and
 - for any other purpose related to the administration of that Act in respect of the person while the person is a registered teacher or the holder of a limited authority

- In addition to the national criminal history check undertaken which shows all matters available under Schedule 1 *Record (Annulled Convictions Act 2003)* in Tasmania, the Board requires applicants/registrants who have lived overseas for more than 12 months as an adult to provide a similar level of check for each country in which they have resided. The Board is able to request these checks on an ongoing basis and/or at specific times as determined

- The scope of teacher registration now extends into the Tasmania VET sector and therefore provides the rigorous and broader checking process of the TRB for persons employed in that sector of education

- There is no exemption from registration for a person engaged in teaching for not more than 28 days in any 12- month period as in the proposed WWVP Act (s.14 (3) (c) (ii) .

- (iii) Teachers registered under the relevant teacher registration Act are exempt from the Working with Children checks in Victoria under the *Working with Children Act 2005*. The IEU sees no reason why a similar exemption could not apply

effectively under the proposed Tasmanian Bill. The requirements to establish fitness to teach and to be registered under Victorian legislation is similar in rigour as that established by the *Teacher Registration Act*.

- (iv) If the WWVP is required in addition to the TRB process, this would constitute an unnecessary duplication of time and resources, increased red tape and costs, as well as the significant possibility of unacceptable delays in the registration of teachers. In addition there is a real chance of confusion in respect to
- different time periods for expiry of registration under the two processes;
 - people being penalised for provision of information, such as changes to name, address and the like, to only one body and not the other;
 - penalties being imposed under both Acts for the same, or effectively, the same breach
- (v) If the WWVP was to replace part of the checking processes for purposes of teacher registration, there would still be requirements for the TRB to separately seek further information, such as that required for ongoing monitoring and disciplinary hearing processes. This would also lead to confusion and duplication and possible significant time delays.

4.0 Definitions

4.1 Vulnerable person (s.4)

IEU is concerned that the definition of vulnerable person is too broad and open to subjective interpretation in respect to its application to an adult. The inclusion of the term “disadvantaged” in the definition is far too vague in both scope and degree. The included *Note* in s.4 does not shed sufficient light on the vulnerability of those included in the examples of disadvantage, that is, “an adult who suffers social or financial hardship”, nor does it give an adequate degree of disadvantage in identifying whether such a person meets the test of vulnerability for purposes of this Act.

IEU believes that there needs to be greater consultation on the inclusion of adults under the provision of the Act, particularly in arriving at clarity in the definition of disadvantage and vulnerability. Greater consideration must be given to where the onus lies in determining whether an adult is vulnerable, disadvantaged, in financial hardship etc. Clearly the responsibility for determining whether a particular adult fits the definition of vulnerable cannot lie with the individual seeking the WWVP check but with the organisation/employer responsible for the regulated activity or service.

4.2 Relevant offence

The definition of relevant offence is extremely broad and has the potential to require notification of very minor offences. This may expose an applicant to being in breach and facing penalties for an offence that is minor and or not relevant to the potential risk intended to be addressed by the Bill.

4.3 Regulated Activity (s.3) and Contact (s.6)

IEU understands that it is intended that the regulations will prescribe activities or services to be defined as 'regulated'. The determination of regulated activities and services and the timetable of phase in under the legislation will need significant consultation, and similarly, the determination of whether the types of *contact* listed in the definitions are incidental or a normal part of taking part in the particular regulated activity.

4.4 Registration

IEU believes that the use of the term 'registration' to apply to a Working with Vulnerable People check will create confusion because the term applies more broadly and nationally to the regulation of professional groups, for example, Teachers and Nurses. The term registration is not used or understood nationally to apply to the Working With Children checks in other States (except for ACT), and IEU submits that nationally consistent terminology is preferable. The term most commonly used is a *Working With Check*.

4.5 Jurisdiction

See above in paragraph 3.2 proposed amendment to the definition of *jurisdiction*. In addition, the definition of 'relevant offence' refers to an offence committed in Tasmania, another jurisdiction or *elsewhere*. This definition should be clearer as to what is intended to be referred to as 'elsewhere'. Is it intended to refer to jurisdictions outside of Australia?

4.6 Non-conviction information

IEU is concerned at the lack of relevance, appropriateness and disregard of principles of natural justice in the inclusion of several matters in the definition of *non-conviction information* to be considered in the risk assessment.

Specifically, IEU submits that the following proposed paragraphs should be deleted:

- (ii) the charge has lapsed, been withdrawn, been discharged or been struck out;
- (b) the person has been acquitted of the alleged offence
- (c) the person has been served with an infringement notice for the alleged offence.

The inclusion of these items in the consideration for a risk assessment has the potential to discriminate against applicants for registration, both in seeking registration and in employment.

5.0 Advisory Committees (Part 2 s.11)

5.1 IEU notes that the proposed Bill provides for the Minister to establish such advisory committees as he or she considers appropriate to advise the Registrar or the Minister, or both, in relation to the administration of this Act; and that both the Minister and the Registrar may refer matters to an advisory committee for consideration and the committee is to report and advise.

IEU, while not opposed to the establishment of advisory committees, believes that the Bill should provide greater clarity at the outset about the scope, parameters and/or general areas of consideration that would fall within the remit of any advisory committee given they are bodies formally constituted under the Act. IEU believes that it

is a reasonable expectation that advisory committees would involve as members representatives of occupational groups/employees covered by the WWVP registration.

6.0 Registration (s.30)

6.1 Term of Registration

The proposed Bill specifies in s.31 (1) that the term of registration/check of a person is for the term not exceeding 3 years, determined by the Registrar. IEU submits that the period should be a term not exceeding 5 years. Given the provision of ongoing updates in respect to criminal charges and convictions, and the requirement for change of name, and address details etc, there would seem to be no administrative reason for a 3 year period, and 5 year periods are operating effectively in similar jurisdictions. The period of registration provided for under the *Teacher Registration Act* is up to 5 years and this is also the period of the Working with Children Check in Victoria. This would assist with the administrative burden associated with processing large groups of people applying and renewing, as well as constitute a more manageable cost burden on those requiring the check.

7.0 Types of WWVP Registration

The proposed Bill provides for a number of types of registration; namely registration, conditional registration and role-based registration. The risk assessment process will examine various factors and information in respect to determining the registration of an applicant. This information includes criminal offences, including driving offences.

7.1 IEU submits that because of the very broad definition of vulnerable persons and significant differences in the scope of work of different occupational and sectoral employees and volunteers, that it would be appropriate to distinguish between risk assessments and forms of registration suitable to different cohorts of applicants. For example, IEU would see as appropriate:

- A Working with Children risk assessment and registration/check
- A Working with Vulnerable Adults risk assessment and registration/check

- A Working with Vulnerable Children and Adults risk assessment and registration/check.

7.2 Conditional and Role-based Registration/Check

IEU believes that greater clarity is needed in determining conditions to be imposed on registration. Any condition imposed needs to be relevant to the type of registration (as proposed above, for example) and also to the inherent scope of the work undertaken under that registration, and not to incidental activities that may be from time to time or indeed never undertaken by the registered person. For example, the consideration of driving offences and a subsequent limiting condition of not driving a vulnerable person as a passenger is one such case. IEU would be concerned, for example, if a registered Teacher or a Teachers Aide or School Canteen employee was issued with a conditional form of registration in respect to driving which is an activity irrelevant or at most, incidental to their work with children. In addition, driving is already the subject of significant regulation and driving offences are already subject to penalties which where relevant would already impose limitations on driving.

8.0 Risk Assessment (Part 5 Division 1 ss. 24 to 25)

- 8.1 IEU believes that a number of provisions of the proposed Bill need to be strengthened in respect to specifying the requirement for matters to be considered in the undertaking of a risk assessment of an applicant. IEU is concerned with the ambiguity of the current wording of s.24 (i) the Minister *may make orders in relation to the conduct of risk assessment*, and s.24 (2) .. *an order may...*

The IEU submits that the proposed Bill should clearly specify

- that the risk assessment process or guidelines **must** be undertaken and
- that the guidelines **must** provide for specific matters that must or may be taken into account.

8.2 IEU believes that that s.24 (2) (b) and (c) of the proposed Bill should be expanded to provide clear details of what must be taken into account in the risk assessment (as is done in the ACT *Working With Vulnerable Persons (Background Checking) Act 2011* Part 5 Division 5.2 s. 29, 30 and 31).

IEU submits that this section would then include the following:

Risk Assessment Process (or Guidelines) – criminal history

The risk assessment guidelines must provide for the following to be taken into account in relation to any offence included in the person's criminal history:

- (a) the nature, gravity and circumstances of the offence;*
- (b) the relevance of the offence;*
- (c) how long ago the offence was committed;*
- (d) the age of the person and the victim at the time of the offence;*
- (e) whether the person's circumstances have changed since the offence was committed;*
- (f) the person's attitude to the offence;*
- (g) if the person has undergone a program of treatment or intervention for the offence – any assessment of the person following the program;*
- (h) if the offence was committed outside of Australia – whether the offence is an offence in Australia;*
- (i) whether the person has committed any other relevant offence;*
- (j) any submission made by the person to the Registrar in relation to the matters mentioned in paragraphs (a) to (i).*

Risk Assessment Process (or Guidelines) – non-conviction information (as defined in the proposed Bill)

The risk assessment guidelines must provide for the following to be taken into account in relation to any relevant offence, or any alleged relevant offence, included in the non-conviction information about the person:

- (a) the nature, gravity and circumstances of the offence or alleged offence;*
- (b) the relevance of the offence or alleged offence;*
- (c) how long ago the offence or alleged offence was committed;*

- (d) *the age of the person and the victim at the time of the offence or alleged offence;*
- (e) *whether this was the person's first offence or alleged offence;*
- (f) *any submission made by the person to the Registrar in relation to the matters mentioned in paragraphs (a) to (e).*

Risk Assessment Process (or Guidelines) – other information

The risk assessment guidelines must provide for the following to be taken into account in relation to any other information that the Registrar believes on reasonable grounds is or may be relevant in deciding whether, in engaging in a regulated activity, the applicant poses a risk of harm to a vulnerable person:

- (a) *how the information was obtained;*
- (b) *the relevance of the information;*
- (c) *the truthfulness, completeness and reliability of the information;*
- (d) *any submission made by the person to the commissioner in relation to the matters mentioned in paragraphs (a) to (c).*

10.0 Additional Information (s.40) Additional Risk Assessment (s.41)

10.1 s.40 specifies that the Registrar may seek information or advice from any entity the Registrar considers may be able to give information etc. IEU is concerned about the unlimited scope of this clause. In the definition of *entity* in the proposed Bill there needs to be clear limitations in respect to an *individual* described therein. *Entity* needs to refer to highly reliable and relevant bodies such as those providing police criminal records checks.

10.2 In respect to s.41 IEU is concerned about the inclusion in the *note* attached to this section of being "suspected of committing a relevant offence". IEU sees suspicion as an inappropriate example.

11.0 Extension of Period of Reconsideration of Negative Assessment

IEU submits that there is an omission in **Division 4 – Negative risk assessments**. There should be included clauses specifying an Extension of periods for requesting

consideration of proposed negative assessment. This would then be consistent with s.34 and s.35 which provide for an extension in respect to a proposed conditional registration. IEU notes that the ACT Act provides clauses for extension in relation to both a proposed negative notice and a proposed conditional notice.

12.0 Availability of Risk Assessment Order s.25 (i)

IEU is concerned about the unspecified access by the public in paragraph (i) *The registrar is to make the risk assessment order available to the public for the inspection in the manner determined by the Registrar.*

IEU believes that wording should more clearly indicate the limited nature and scope of access, for example that:

limited information about a person's registration status will be available online. It is not a "public register". Rather it will act as a validation system for employers who have a person's registration number and the card number. Once inputted, the system will show the type of registration (general, conditional or role-based) and whether it is current. No personal details should be accessible. (from the document - A Guide to Working with Vulnerable People in the ACT)

13.0 Offences

IEU is concerned at what are two areas of excessive or unclear penalties for breaches of the Act.

13.1 The IEU believes that the proposed Bill should include two levels of penalty for breaches, as is the case in the ACT Act . In respect to s.15. s.16 and s. 38, the proposed Bill conjoins the offences of the individual breaching the Act, doing so knowingly, and also recklessly. The penalty is specified as not exceeding 200 penalty units or imprisonment for a term not exceeding 2 years, or both.

IEU submits that a distinction should be drawn in relation to the seriousness of the breach by allowing two levels of offence:

- the penalty for the offences of engaging in regulated activity unless registered; an employer engaging an unregistered person in regulated activity; or a registered person contravening a condition of registration should be specified for example as a *fine not exceeding 50 penalty units* as is the case in the ACT Act. This will allow for consideration of the circumstances of the breach such as knowingly or not;
- the more serious breach in respect to *with reckless disregard* could be separately specified as in the current proposed Bill, that is, for example a *fine not exceeding 200 penalty units etc.*
- The relevant penalties should be set with reference to other state benchmarks

13.2 Offence for registered person to fail to notify change of name or address

IEU believes that a fine in respect to failure to provide a change of name or address is excessive. IEU submits that the proposed bill could require the information to be provided but that no penalty applies for failure.

14.0 Restriction on re-application

The proposed Bill specifies that a person with a negative notice or whose registration has been cancelled may apply for registration only if at least 5 years have passed *or* there has been a change in the relevant information.

IEU believes that specifying a 5 year period is too punitive, and should be a lesser period, say at most 3 years, as in the ACT Act s.22 (s) (a). In addition, a change in the relevant information should also be broadly interpreted and a person able to submit any relevant information for consideration of a further risk assessment.

15.0 Independent Advisors

15.1 IEU notes that the use of Independent Advisors is broader in the ACT Act than the proposed Bill in respect to advice not only on role-based registration, but also other aspects of risk assessment (s.34 (1)). IEU also notes that the ACT Act specifies a range of persons with particular expertise as Independent Advisors (s.34 (2)). The proposed Bill does not define the expertise etc of Advisors.

The broadening of scope of advice would be appropriate. It is unclear however whether the advisory committees are envisaged to provide advice on a specific applicant's risk assessment or on broader more general matters. Greater clarity of the role, expertise etc of both the advisory committees and the Independent Advisors would be appropriate.

16.0 Fees

Fees for the WWVC Registration/Check should be as low as possible. The IEU believes that the costs should not exceed \$40, and should be free for volunteers and unpaid trainees (for example student teachers) who do not need the check for paid employment.