

VicSport Update

The Legalities of the Working With Children Check & Sport

Sport by its very nature, creates close relationships between participants and a range of support workers such as coaches, physiotherapists, masseurs and doctors. The physical nature of sports relationships, and the positions of trust and authority support workers often hold, makes sport a vulnerable area for potential abuse. This is particularly evident where children are concerned as those in positions of trust and authority are able to exert their power and influence.

As much as we would like to think it is not the case, statistics clearly show many of these relationships do develop inappropriately. Results from research conducted by Trish Leahy, a former Senior Psychologist with the Australian Institute of Sport⁽¹⁾, showed 21% of male and 31% of female athletes in both club and elite sport had experienced sexual abuse at some time in their life. While these figures are on a par with general population prevalence rates, what is of added concern is the finding 46% of elite athletes and 25% of club athletes indicated this abuse took place within the sporting context.

This statistical evidence, along with a number of highly publicised cases of coaches developing inappropriate relationships with young athletes clearly shows child protection is an issue sport must take seriously. In recognition of this the recently introduced Working with Children Act 2005 (WWC Act⁽²⁾) has been widely welcomed by the sector.

As with any piece of legislation it is difficult to strike a perfect balance. The purpose of the legislation *“to assist in protecting children from sexual or physical harm by ensuring that people who work with, or care for, them have their suitability to do so checked by a government body”* is beyond question. The importance of protecting children from harm is at the forefront of the mind of every reasonable person. It is the capacity of this broadly defined and far reaching piece of legislation to do this effectively, whilst at the same time privacy and natural justice protection of employees, both paid and volunteer, and on compliance issues for employers, that has been widely commented on by legal experts.

Too often we see instances where a flaw in the system can cause irreparable damage at many levels. In a recent Commentator article *“Burnt at the stake: Unfairness and the ‘Ugly Parent’”*⁽²⁾, Paul J. Hayes outlined the NSW Supreme Court case of *Carter v New South Wales Netball Association (NSWNA)* where a *“blinkered and zealous crusade”* resulted in the sacrifice of natural justice and the rights of the individual. In this case, despite the Plaintiff eventually being cleared of any wrong doing in a court of law, there is no doubt the Plaintiff’s reputation within the community, personal physical and mental health, and future employment prospects had been significantly and irreparably damaged by the accusation.

Under the WWC Act, when examining a person's criminal record, the Secretary will look for pending charges for serious sexual, or other serious child-related, offences. According to the Bill a pending charge is a charge that has not been finally dealt with by either being withdrawn, dismissed, discharged at committal or where the person has been acquitted of the offence.

Both Youthlaw⁽³⁾ and the Law Institute of Victoria (LIV)⁽⁴⁾ have argued the decision to consider pending charges as part of the WWC Check contravenes the basic tenet of the criminal law that a person is innocent until proven guilty, is contrary to the principles of natural justice and may lead to gross denials of Justice. In fact, even the Institute of Child Protection Studies⁽⁵⁾, in consultation with legal advisors from the Australian Child Offenders Register (ANCOR) agreed a charge is not evidence of guilt and it is the democratic right of people to be believed innocent until proven guilty.

While the decision to include pending charges as part of the check has clearly been made to protect children from potential harm, in the case where a charge is not upheld for whatever reason, there is no doubt the potential for the accused to suffer significant damage to both their long-term employment prospects as well as their personal reputation does exist.

The sport community is a small and close knit community and the sudden removal of a coach for example from within the community, as would be the required outcome in a case of a pending charge against that person, would most certainly raise comment and much speculation. While there is no question the ultimate aim must be to protect children from harm, the argument the WWC Act does not adequately protect the rights of the individual has been raised in many quarters.

As an interesting aside, the Office of the Victorian Privacy Commissioner also made note that charges that have not been proceeded with for a range of reasons if they are not formally withdrawn will be adjourned *sine die* and will remain on record even though allegations have been sifted through by the prosecution, tried and dealt with by the court. In a case where the applicant was cleared of any charges that were proceeded with, it is imperative any charges that were not proceeded with are withdrawn or a negative assessment notice will apply.

It should be noted the WWC Act does provide that a person acquitted of a pending charge may re-apply for an assessment notice. The reality however, as the case of *Carter v NSWNA* showed, by this time irreparable damage has more than likely been done. Whilst there is no argument striking a balance between the right to presumption of innocence and the protection of children is a difficult task, there is little doubt the legal system will be called upon to mediate a case of irreparable damage caused as a result of consideration of a pending charge not being upheld at some time in the near future.

In a similar scenario, legal groups have also raised serious concerns around the issue of natural justice and fairness in regard to the mandatory refusal to give an assessment notice on a category 1 application in cases where the offence was committed when the

applicant was a child or young person and that person was engaged in consensual activities. Under the current legislation a Category 1 offence leads to an immediate mandatory ban.

Both Youthlaw and the Young Peoples Legal Rights Centre agreed this process does not appropriately reflect the way in which our criminal justice system, and in particular our juvenile justice system, operates. The juvenile justice system is geared toward rehabilitation of offenders and sentencing of offenders in the children's court reflects this policy.

Youthlaw believes this policy should be reflected in the Working with Children Check.

"It would be anomalous for a decision within a civil law context – the Check – to fail to take matters into account, which the decision maker in the criminal law context does."

It has been strongly argued the potential life-long impact for a juvenile offender being convicted of a Category 1 offence, particularly in cases where the relationship was consensual, for example where a person of 17 engages in a consensual sexual relationship with a 14 year old, by far outweigh the offence itself.

While no group in any way wished to detract from the experiences of victims of sexual offences, nor to ignore the seriousness of the offences deemed to be within Category 1, in a case where the offence was committed when the applicant was a child or young person, it was argued there should be room for a discretionary decision to be made.

In feedback to the Draft Exposure, the Youth Affairs Council of Victoria, Youthlaw and the Law Institute of Victoria all agreed it was imperative the Secretary be given the power to take into consideration issues such as the circumstances surrounding the particular offence, the age of the perpetrator when the offence was committed and the possibility of rehabilitation prior to the issuing of a negative assessment.

Such discretionary power has been provided under section 12 (6) of the Western Australian Working with Children (Criminal Record Checking) Act 2004, which states:

If the CEO:

(a) is aware of a Class 1 offence (committed by the applicant when a child) of which the applicant has been convicted...the CEO is to issue a negative notice to the applicant unless the CEO is satisfied that, because of exceptional circumstances of the case, an assessment notice should be issued to the applicant.

The Victorian Privacy Commissioner noted, it may be that some of the offences listed as being "relevant" in the Bill may not be predictive of future harm to children. For instance, the recently introduced Commonwealth child pornography offences may encompass activities such as a young person sending or receiving a naked picture of self or boy or girl friend over the internet or with the use of a mobile phone camera. While the chance of being convicted of such an offence may be small, the consequences are extreme. The

terms of the legislation mean in such a situation the person would be automatically barred from ever working with children. As a Category 1 listed offence, in this case the Secretary has no discretion here.

When the WWC Act was passed in July 2005, it passed without any discretionary power for the Secretary to consider cases involving juvenile offenders. The only right of appeal therefore is to show a criminal history check was somehow inaccurate. While in the majority of cases where the applicant has committed a Category 1 offence it is agreed they would not be suitable to work with children, in extenuating circumstances, such as a consensual relationship, there is no room for discretion. While the only way to bring about a change to the current situation is to make legislative changes at this point, there is no doubt questions regarding the severity of the punishment for some juvenile offenders will be raised.

There is also a downside for victims to consider here. If you dramatically increase the consequences of being found guilty, for example a juvenile offender being banned from any child related work for the rest of their life, it is possible there will be an increase in the number of defendants pleading not guilty. This may lead to an unfortunate outcome of more victims being required to testify in court. As David Gibson, a lawyer with the Children's Court section of Victoria Legal Aid pointed out, in many cases involving consensual underage relationships, it is not the people involved in the relationship, but rather a parent who discovers the encounter who lays a complaint. Where previously a young offender may have pleaded guilty to such an offence, with the stakes so high it is likely more of these cases will end up in a court of law, a situation which will have a significant impact on all parties involved.

In an effort to ensure natural justice is afforded to an individual to be potentially issued with a negative notice, that person is invited to make a submission within a specified period of not less than 28 days about their eligibility to be given an assessment notice, which is considered to meet the requirements of affording due natural justice to the individual.

While the two issues discussed above focus on the rights and privacy of the applicant, the WWC Act has also raised some valid questions around the rights and responsibilities of employers themselves. The WWC Act very clearly states it is an offence to engage or offer the services of a person in child-related work if they do not have a current assessment notice. In particular, confusion arises in regards to what steps the employer should, and in fact is entitled to take when either a current or potential employee holds an interim negative assessment notice.

As noted previously the WWC Act aims to protect children from harm, while at the same time giving due consideration to privacy and natural justice concerns. As such, the Act specifically makes provision for a person to whom the Department is intending to issue a negative notice, to make a submission outlining why they should not receive such a notice. During this period of review the applicant is issued with an interim negative notice. As an

interim negative notice means a final decision regarding the applicant's suitability to work with children has not been made, the Act allows a person holding an interim negative notice to continue to work pending a final decision.

The question arising here is how the employer, particularly those whose only services involve direct contact with children, will deal with an employee who has been issued with an interim negative notice without contravening the privacy, anti-discrimination, unfair dismissal and other workplace relations rights of the employee; while at the same time protecting children from potential harm. This is a difficult task to say the least, and a problem few employers would wish to assume. In fact, in their feedback to the Draft Exposure Bill Catholic Social Services Victoria⁽¹⁰⁾ made comment that for many community groups, allowing a staff member who holds an interim negative notice to continue their employment pending final outcome could in practice be unworkable.

Similarly, an employer who finds themselves in a situation where a person they are considering for employment holds an interim negative notice faces the same unenviable task of weighing up the need to protect children with the need to respect the rights of the potential employee. Faced with such a decision, it is not unreasonable to expect most employers would take the conservative approach to err on the side of caution and choose not to engage that particular person. One could make a strong case the employer has contravened anti-discrimination requirements by taking into account this information, although it would be difficult to prove the employer had used this information in their decision making.

The difficulties faced in simply writing the last two paragraphs offer simple testament to the fact employers will face numerous and complex WWCC compliance difficulties in the future. Balancing the privacy and justice rights of the individual, the compliance obligations of an employer, and the need to protect children from harm is clearly a difficult task. As a rule, it is virtually impossible to strike a perfect balance with any piece of far-reaching legislation and if the few examples outlined above are any indication, the WWC Act is no exception.

Persons working in the broader sport and recreation sector will not be required to undergo a Working with Children check until phase 3 of roll-out, due to commence in July 2008. As such, the direct impact it will have on sport's volunteers, paid employees and employers will not be evidenced for some time yet. What is clear however, is there will almost certainly be a role for legal experts to play in regard to this legislation in the future.

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