NOT CHILD-RELATED: UNNECESSARY WORKING WITH CHILDREN CHECKS AS IRRELEVANT CRIMINAL RECORDS DISCRIMINATION

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From personal trainers to plumbers, many Victorians are now asked by their employers to pass a working with children check ('WWCC'). Workplaces impose these policies despite not being 'child-related' under the Worker Screening Act 2020 *(Vic). They therefore lack any legal requirement or entitlement to do so. As a consequence, persons with a criminal record are increasingly excluded from employment involving minimal or no contact with children. This paper explores the causes and consequences of unnecessary WWCC policies. Its aims are twofold: first, having regard to the statutory framework for WWCCs and recent developments in anti-discrimination law, it argues that these policies should be framed as a form of irrelevant criminal records discrimination. Secondly, it examines the scope and effectiveness of remedies available to those refused or fired from non-child-related work for failing to pass a WWCC: anti-discrimination complaints on the basis of irrelevant criminal records discrimination; fair work protections; and merits review of WWCC decisions by administrative tribunals. This paper closes by proposing WWCC applications should only be processed where applicants provide evidence of an intention to work with children, and that penalties should be imposed on non-child-related employers requiring staff to pass a WWCC.*

I INTRODUCTION

In 2005, Victoria became the fourth Australian jurisdiction to introduce a legislative scheme of pre-employment screening for those who intend to work with children. It has since become commonplace for employers to require valid working with children ('WWC') clearance for work that is not 'child-related' within the meaning of the *Worker Screening Act 2020* (Vic) ('*Worker Screening Act*').[1] Under the guise of commitment to child safety, some workplaces involving no or minimal

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1 The *Working with Children Act 2005* (Vic) ('*WWC Act*') was recently repealed by the *Worker Screening Act 2020* (Vic) ('*Worker Screening Act*'), which commenced on 1 February 2021 and expands the scope of the legislation to include screening for National Disability Insurance Scheme workers. Much of the former *WWC Act*, including the definition of 'child-related work', is retained in the new *Worker Screening Act*. This paper considers the new statutory framework throughout, but will refer to the former scheme where appropriate.

contact with children have introduced policies directing prospective staff to hold WWC clearance in addition to, or in substitute for, undergoing a police records check. Other non-child-related employers may ask existing employees to obtain WWC clearance even when it was not previously required. Consequently, individuals across disparate employment sectors risk being denied or terminated from non-child-related work because their past criminal offending suggests they pose a threat to children's safety. State administrative tribunals regularly hear WWC review applications filed by construction workers, gardeners, plumbers, personal trainers, and cleaners, among many others, who face difficulty finding or keeping work because their (prospective) employers require WWC clearance. Employers impose these policies despite the *Worker Screening Act* only requiring WWC clearance for work involving usual and direct contact with children in specific and exhaustively enumerated types of workplaces, services, or activities. Non-child-related employers therefore ask staff to obtain WWC clearance despite having no entitlement to do so.[2]

The growing practice of unnecessary working with children check ('WWCC') policies has occurred amid a ballooning number of WWC clearance applications. In 2020–21, almost 1.5 million WWCC applications were processed in Australia, with over 8.8 million applications for clearance to work with children or other vulnerable persons processed since 2015–16.[3] While applications in some jurisdictions, such as Victoria, have slightly decreased since 2017–18, in others they have remained static or increased. The number of applications in Tasmania grew by 20% between 2017–18 and 2019–20, while Queensland saw applications grow by almost 15% in 2019–20 against the previous year. Although published statistics often do not differentiate between first-time or renewal applications, or individual or duplicate applications,[4] elsewhere they offer a glimpse of just how widespread is the (mis)use of the WWC clearance scheme. One in five New South Wales ('NSW') residents (1.84 million) and one in four Victorians (1.64 million)

2 *LMB v Secretary, Department of Justice* [2011] VCAT 595, [43] ('*LMB [No 1]*') (Hampel V-P).

3 See below Table 1. While most Australian jurisdictions use WWCCs, in the Australian Capital Territory ('ACT') and Tasmania a uniform Working with Vulnerable People ('WWVP') scheme exists to screen those who work with children and other vulnerable people (such as disabled adults). Though the scope of regulated work (for which WWVP clearance is required) in the ACT and Tasmania is broader, non-regulated employers may still require WWVP clearance: see *Applicant 032018 v Commissioner for Fair Trading* [2018] ACAT 77, [6] (Senior Member Brennan). In addition, South Australia did not have a WWCC screening unit until 2019, but instead used a 'criminal history assessment': see *Children's Protection Act 1993* (SA) ss 8B–8BA; *Royal Commission into Institutional Responses to Child Sexual Abuse: Working with Children Checks* (Final Report, July 2015) 30, 36–7 <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_working_with_children_checks_report.pdf> ('*Royal Commission Final Report: Working with Children Checks*').

4 Besides being granted or refused, applications can also be withdrawn before a decision is made, so it is difficult to conclude with certainty that one WWCC application represents one individual. However, in Victoria, if duplicate applications are made, only the last will be considered and all previous ones will be deemed as withdrawn: *Worker Screening Act* (n 1) s 55(1).

held *current* WWC clearance as at 30 June 2020.[5] Many of these applications are unnecessary: a 2015 audit showed that 90% of applicants in NSW applied because their employer told them to, despite 20% of employees and 29% of volunteers believing they did not need one.[6] An earlier audit, from 2005, estimated that more than one fifth of applications lodged in NSW were not required.[7]

Table 1:[8] WWCC and Working with Vulnerable People ('WWVP') applications processed in Australia, 2015–16 to 2020–21

	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	Total
ACT	40,227*	38,577*	33,855*	46,405*	46,614*	17,678*	223,356
NSW	339,620	392,991	375,094	480,485	345,541	400,855	2,334,586
NT	28,999	37,176	30,260	39,740	37,334	41,184	214,883
Qld	268,773	337,962	326,766	366,151	419,659	329,253	2,048,564
SA	106,190**	119,815**	155,000**	174,597**	155,232	147,900	858,734
Tas	56,870*	45,169*	39,217*	45,914*	50,754*	67,000*	304,924
Vic	233,000	320,000	458,114	411,000	348,000	319,000	2,089,114
WA	123,555	123,383	132,354	136,888	130,794	145,878	792,852
Total	1,197,234	1,415,073	1,550,660	1,701,180	1,534,118	1,468,748	8,867,013

* Denotes WWVP applications.

** Denotes 'criminal history assessments' of a person's suitability to work with children: South Australia did not have a dedicated WWCC screening system until 2019.

This paper explores the phenomenon of unnecessary WWCC policies and their impact on those denied, or dismissed from, non-child-related employment because

5 Office of the Children's Guardian (NSW), *Annual Report 2019–20* (Report, 2020) 12 <https://ocg.nsw.gov.au/about-us/reports>; 'Resources', *Working with Children Check Victoria* (Web Page, 4 May 2021) <https://www.workingwithchildren.vic.gov.au/about-the-check/resources>.

6 Ernst & Young, *Evaluation of the New Working with Children Check* (Report, 13 August 2015) 29 [6.1] <https://media.opengov.nsw.gov.au/pairtree_root/fd/15/de/64/19/3f/4b/f6/b2/c1/d2/45/af/19/f3/c7/obj/WWCC_EvaluationReport.pdf.aspx.pdf>.

7 Auditor-General (NSW) and Commission for Children and Young People (NSW), *Performance Audit: Working with Children Check Auditor-General's Report Performance Audit* (Report, February 2010) 3 <https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/2010_Feb_Report_Working_With_Children_Check_0.pdf >.

8 This data is sourced from annual reports published by the following bodies: Treasury and Economic Development Directorate (ACT), Office of the Children's Guardian (NSW), Police, Fire, and Emergency Services (NT), Territory Families (NT), Department of Justice and Attorney-General (Qld), Public Safety Business Agency (Qld), Department of Human Services (SA), Department of Justice (Tas), Department of Justice and Community Safety (Vic), Department of Justice and Regulation (Vic), Department of Communities (WA), and Department for Child Protection and Family Support (WA). Some of the data is also obtained through the author's own enquiries: Letter from David Pryce, Deputy Director-General, Access Canberra (ACT) to Nathan Stormont, 26 March 2021; Letter from David Pryce, Deputy Director-General, Access Canberra (ACT) to Nathan Stormont, 26 October 2021; Email from Karin, Project Manager, Department of Human Services (SA) to Nathan Stormont, 14 February 2022.

their criminal record prevents them from holding WWC clearance. Its aims are twofold.

First, it argues that there are compelling reasons to frame unnecessary WWCC policies as a form of irrelevant criminal records discrimination. In almost all cases, decisions to refuse or cancel WWC clearance hinge on the applicant's interaction with the criminal law. Consistent with the purpose of WWC legislation to protect children from harm, applications made by persons with a criminal record are placed into categories determined by the nature and severity of the criminal offending, and are subject to a risk assessment to determine the likelihood of harm to children. Indeed, in Victoria, WWC clearance *must be granted* to an applicant who does not have any record of criminal or other prescribed conduct.[9] Since the WWCC regime exists to protect children by screening those who work with them, non-child-related employers which rely on a WWC exclusion decision to sack or refuse to hire a person do so without undertaking an individuated assessment of the criminal record underpinning the WWC exclusion and its relevance. While non-child-related employers may rely on a number of reasons to justify their WWCC policies, anti-discrimination law nonetheless requires such an assessment. As will be seen in Part IV(A), these policies and their consequences arguably may amount to an impairment or nullification of equal 'opportunity or treatment in employment or occupation' on the grounds of the affected person's 'irrelevant criminal record'.[10] This paper argues that the close relationship between a person's criminal record and the decision to refuse them (or cancel their) WWC clearance, as well as the narrow circumstances in which WWC clearance is required, are relevant considerations to which an anti-discrimination commissioner should have regard when adjudicating such complaints.

But more generally, this paper is concerned with the hurdles those with criminal records face finding or holding work amid the proliferation of unnecessary WWCC policies. Its second aim is therefore to evaluate the scope and effectiveness of the various avenues of redress available to those who suffer detriment because of unnecessary WWCC policies, and to propose targeted reform to address the root causes of this problem. In addition to anti-discrimination complaints, this paper explores the effectiveness of seeking merits review of WWC refusal decisions and of making an unfair dismissal complaint under fair work legislation. In the context of unnecessary WWCC policies, each option provides opportunities for redress, including reinstatement of employment, monetary compensation, and even the setting aside of the WWC refusal or cancellation decision. But each option is imperfect, marred interchangeably by onerous evidentiary thresholds, statutory

9 *Worker Screening Act* (n 1) ss 68(1)–(2). The Supreme Court of Victoria recently ruled that the Secretary to the Department of Justice and Community Safety ('the Secretary') has no residual power to refuse an application for WWC clearance in circumstances where an applicant has no background of relevant criminal offending or disciplinary findings: *GHJ v Secretary, Department of Justice and Community Safety [No 2]* [2019] VSC 411, [35]–[37] (Ginnane J).

10 *Australian Human Rights Commission Act 1986* (Cth) s 3(1) (definition of 'discrimination' para (b)(i)) ('*AHRC Act*'); *Australian Human Rights Commission Regulations 2019* (Cth) reg 6(a)(iii) ('*AHRC Regulations*').

bars and exclusions, and on occasion limited enforcement powers, in addition to the usual financial and emotional costs associated with contested litigation.

I open by establishing the paper's scope and place in existing scholarship. Part III then grounds the following analysis by exploring the statutory definition of 'child-related work' — that is, the kinds of work for which WWC clearance *is* required — and the factors which might explain why many non-child-related employers require staff to pass a WWCC. In Part IV, I explore three redress mechanisms open to those refused or fired from non-child-related employment owing to a failure to hold WWC clearance. First, I examine the grounds on which an irrelevant criminal records discrimination complaint may be made against a non-child-related employer in relation to unnecessary WWCC policies. I argue that an irrelevant criminal record, as a protected attribute, is broad enough to encompass any adverse action taken by a (non-child-related) employer in response to a WWC exclusion, such as refusing or terminating employment. I also consider how recent developments in anti-discrimination law — including the more permissive 'by reference to' test for establishing a relationship between a protected attribute and impugned conduct — have eased the burden borne by complainants and increased the likelihood of a successful anti-discrimination complaint. Secondly, Part IV(B) looks at complaints under fair work legislation, and in particular recent jurisprudence which suggests that employers do not have an automatic right to sever an employment relationship where an employee no longer holds WWC clearance. Part IV(C) closes with an examination of merits review of WWC exclusion decisions. Though tribunals in some jurisdictions are obliged to consider public interest factors, including an applicant's right to (non-child-related) employment, applicants also face insurmountable hurdles. These include the often-impossible task of satisfying the tribunal that an applicant does not pose an unjustifiable risk to children's safety and the recent trend of permanently barring certain serious offenders from ever holding WWC clearance. In the concluding sections of this paper, I consider proposals made by decision- and policymakers to stem the growing number of unnecessary WWCC applications and end with proposals of my own.

II RESEARCH CONTEXT AND SCOPE

Only a few thousand Australians are refused WWC clearance each year. As a result, scholarly attention on the impact of unnecessary WWCC policies is scant. Most studies focus on the large number of applications and resulting strain on resources and screening efficiency,[11] and the overall effectiveness of the pre-employment

11 State Administrative Tribunal (WA), *Annual Report 2009–2010* (Report, 24 September 2010) 21 <https://www.sat.justice.wa.gov.au/_files/Annual_Report_2010.pdf> ('*WASAT Annual Report 2009–2010*'); Leanne Guest, *Review of the Working with Children (Criminal Record Checking) Act 2004)* (Report, July 2012) 23; Australian Human Rights Commission, Submission No 12 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Response to Issues Paper 1* (12 August 2013) <https://humanrights.gov.au/our-work/legal/submission/ahrc-response-working-children-check> ('*Response to Issues Paper 1*'). See also *Royal Commission Final Report: Working with Children Checks* (n 3) 116.

screening system for child welfare.[12] A literature review[13] produced by the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission into Child Abuse') found only one publication which considered the ethical impact of WWC legislation (and specifically information-sharing provisions under the *Crimes Act 1914* (Cth)) on offenders.[14] This paper therefore hopes to close a gap in the scholarship by exploring the effect of blanket WWCC policies on individuals with a criminal background whose employers require them to obtain WWC clearance despite not engaging (or intending to engage) in child-related work.

Table 2:[15] WWC and WWVP Exclusions, 2015–16 to 2020–21

	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	Total
ACT	10*	6*	21*	8*	14*	20*	79
NSW	857	831	768	614	570	516	4,156
NT	186	216	256	96	190	22	866
Qld	2,597	2,199	2,946	3,606	3,586	3,552	18,486
SA	*No data***	*No data***	*No data***	*No data***	322	465	787
Tas	15*	24*	8*	7*	3*	3*	60
Vic	472	611	768	662	606	526	3,645
WA	167	157	166	202	294	238	1,224
Total	4,304	4,044	4,833	5,195	5,585	5,342	29,303

* Denotes WWVP refusal decisions.

** Data is not available as South Australia did not maintain a dedicated WWCC screening unit until 2019.

12 See, eg, William Budiselik, Frances Crawford and Joan Squelch, 'The Limits of Working with Children Cards in Protecting Children' (2009) 62(3) *Australian Social Work* 339.

13 Sandra South, Aron Shlonsky and Robyn Mildon, *Scoping Review: Evaluations of Pre-Employment Screening Practices for Child-Related Work That Aim to Prevent Child Sexual Abuse* (Report, 2014) 43 [5.2] <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/research_report_-_evaluations_of_pre-employment_screening_practices_and_supplementary_materials_-_prevention.pdf>.

14 Attorney-General's Department (Cth), *Review of the Operation of Subdivision A of Division 6 of Part VIIC of the Crimes Act 1914* (Final Report, September 2011) <https://www.ag.gov.au/crime/publications/final-report-2011-review-operation-subdivision-division-6-part-viic-crimes-act-1914>.

15 This data is sourced from annual reports published by the following bodies: Office of the Children's Guardian (NSW), Police, Fire, and Emergency Services (NT), Territory Families (NT), Department of Justice and Attorney-General (Qld), Public Safety Business Agency (Qld), Department of Justice (Tas), Department of Justice and Community Safety (Vic), Department of Justice and Regulation (Vic), Department of Communities (WA), and Department for Child Protection and Family Support (WA). Some of the data is also obtained through the author's own enquiries: Letter from David Pryce, Deputy Director-General, Access Canberra (ACT) to Nathan Stormont, 26 October 2021; Email from Karin, Project Manager, Department of Human Services (SA) to Nathan Stormont, 14 February 2022; Letter from Sarah Nichols, RTI Delegated Officer, Department of Justice (Tas) to Nathan Stormont, 23 March 2022; Email from Jacqui, Customer Support, Department of Communities (WA) to Nathan Stormont, 19 January 2022.

Considerably more has been written on criminal records checking and discrimination. Although WWC clearance is different to a criminal records check — the former being a permit to engage in child-related work, the latter a record of one's criminal history — there is also significant overlap. For example, in Victoria[16] and other jurisdictions,[17] an agency conducting a WWCC must or may have regard to an applicant's criminal history, including being empowered to conduct criminal records checks or to request information about an applicant's criminal record from relevant agencies. Likewise, a refusal to grant WWC clearance will typically, though not universally,[18] hinge on a criminal charge or conviction of some kind. In the last decade, as the number of WWCC applications has increased, so too has the number of criminal records checks: in 2019–20, the Australian Crime Intelligence Commission processed 5,634,321 criminal history checks, up from 2.7 million in 2009–10.[19]

The far-reaching negative impacts of criminal record discrimination have been thoroughly documented. As Pager observes, persons with a criminal history are 'marked' by their criminal record.[20] Many people with criminal records are deterred from applying for jobs requiring a criminal records check. They instead 'self-exclud[e]' on the assumption applying would lead to being stigmatised or discriminated against.[21] Although many studies note work as an important means

16 *Worker Screening Act* (n 1) s 58.

17 *Working with Vulnerable People (Background Checking) Act 2011* (ACT) ss 29–30 ('*WWVP Act (ACT)*'); *Child Protection (Working with Children) Act 2012* (NSW) s 13(3) ('*Child Protection (WWC) Act (NSW)*'); *Care and Protection of Children Act 2007* (NT) s 190(1)(a)(iii) ('*Care and Protection of Children Act (NT)*'); *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 311(1) ('*WWC (Risk Management) Act (Qld)*'); *Child Safety (Prohibited Persons) Act 2016* (SA) ss 8, 38–9 ('*Child Safety (Prohibited Persons) Act (SA)*'); *Registration to Work with Vulnerable People Act 2013* (Tas) s 28(1A)(a) ('*Registration to WWVP Act (Tas)*'); *Working with Children (Criminal Record Checking) Act 2004* (WA) s 34 ('*WWC (Criminal Record Checking) Act (WA)*').

18 In Victoria, for example, certain disciplinary or regulatory findings may trigger WWC exclusion, including decisions to suspend or cancel registration to work in teaching and medicine: *Worker Screening Act* (n 1) ss 3 (definition of 'relevant disciplinary or regulatory finding'), 64(1)(a); *Worker Screening Regulations 2021* (Vic) reg 9. Certain 'reportable conduct' findings under the *Child Wellbeing and Safety Act 2005* (Vic) may also result in a WWC exclusion decision.

19 Australian Criminal Intelligence Commission, *2019–20 Annual Report* (Report, 2020) 54 <https://www.acic.gov.au/sites/default/files/2020-10/2019-20%20ACIC%20Annual%20report.pdf>; Rebecca Bradfield, 'Sentences without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment' (2015) 41(1) *Monash University Law Review* 40, 43. The checks in 2009–10 were processed by CrimTrac. CrimTrac merged with the Australian Crime Commission in 2016 to form the current Australian Criminal Intelligence Commission.

20 Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (University of Chicago Press, 2007) 4.

21 Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171, 189. 'Self-exclusion' from applying for roles requiring WWC clearance has also been reported: see Katie Green, Marrickville Legal Centre and Youth Justice Coalition NSW, *Young People, Criminal Records and Discrimination in Employment* (Report, November 2020) 25 <https://www.mlc.org.au/wp-content/uploads/PRS000690_YOUNG-

of rehabilitation and re-engagement with society, people with a criminal record face significant hurdles re-entering the job market.[22] The consequences of widespread criminal records checking in the United States, where one in three people have a criminal record, has seen the introduction of 'unmarking programs' by lawyers to help felons make use of 'legal record clearing' mechanisms.[23] Efforts to introduce 'Ban the Box' legislation, which limit employers' rights to ask about job applicants' criminal backgrounds, have also been largely successful there.[24] Criminal records discrimination has additionally been viewed as a form of indirect racial discrimination against minority communities disproportionately represented in prison populations.[25] In the Australian context, Naylor, Paterson and Pittard have explored legal protections for Australian jobseekers with a criminal background and have proposed restrictions on employer access to criminal records under privacy laws.[26]

In pursuing its dual aims, this paper hopes to bridge existing scholarship considering both WWCCs and criminal records discrimination while also providing a comprehensive overview of the difficulties workers and jobseekers with a criminal record face because of employers' misuse of WWCCs. This paper therefore limits its focus to applications made by those intending to engage in paid work, or who require WWC clearance to complete a course of study, distinguishing these applications from others made by those who believe WWC clearance would establish 'good character',[27] 'clear their name',[28] or otherwise assist their reintegration into society. Finally, volunteer organisations' WWCC policies are

PEOPLE-CRIMINAL-RECORDS-AND-DISCRIMINATION-IN-EMPLOYMENT.pdf> ('*Young People, Criminal Records*').

22 Georgina Heydon and Bronwyn Naylor, 'Criminal Record Checking and Employment: The Importance of Policy and Proximity' (2018) 51(3) *Australian and New Zealand Journal of Criminology* 372; Jeffrey Selbin, Justin McCrary and Joshua Epstein, 'Unmarked: Criminal Record Clearing and Employment Outcomes' (2018) 108(1) *Journal of Criminal Law and Criminology* 1, 14–20; Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (Report, 2012) 8 <https://humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf > ('*On the Record*').

23 Selbin, McCrary and Epstein (n 22) 1.

24 Amanda Agan and Sonja Starr, 'Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment' (2018) 133(1) *Quarterly Journal of Economics* 191.

25 Selbin, McCrary and Epstein (n 22) 14–15; James B Jacobs, *The Eternal Criminal Record* (Harvard University Press, 2015) 13; Pager (n 20) chs 4–5.

26 Naylor, Paterson and Pittard (n 21) 193–7.

27 '[A] working with children check that does not result in a person being prohibited from working with children is not proof of good character': *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 3(4)(c)(i).

28 *LMB [No 1]* (n 2) [42] (Hampel V-P).

beyond the scope of this paper, though I note decision-makers have found there to be a public interest in engaging with the community through volunteer work.[29]

While there have been calls for a national system of child-related employment screening,[30] each Australian state and territory has its own WWC legislation. Despite this, key principles, including the paramount need to protect children, the definition of 'child-related work', and the measure of risk posed by an applicant, are broadly consistent nationwide. As one of the first Australian jurisdictions to introduce WWC legislation, and with child protection laws representative of those in other states, Victoria offers an interesting case study of the phenomenon of unnecessary WWCC policies. As such, Victoria is the focal point of this paper, although frequent reference is made to practices, legislation, and jurisprudence in other Australian jurisdictions.

III THE WWCC FRAMEWORK AND 'CHILD-RELATED WORK'

To clearly understand when WWCC policies are unnecessary, we first must consider the circumstances in which WWC clearance is legally required. Section 121 of the *Worker Screening Act* requires persons who work or volunteer with children to hold WWC clearance (previously called an 'assessment notice').[31] To obtain WWC clearance, an applicant must pass a WWCC. In Victoria, WWC clearance is valid for a period of five years,[32] although the duration of clearance in other jurisdictions varies. A person who fails to pass a WWCC is, in the Victorian terminology, given a WWC exclusion (previously a 'negative notice'). WWC clearance holders may be subject to reassessment if, for example, they are charged with or convicted of an offence.[33]

The main purpose of the Victorian *Worker Screening Act*, as it applies to child-related work, is to assist in the protection of children from physical or sexual harm by establishing a screening process to vet those 'who work with, or care for, children'.[34] Section 11 of the *Worker Screening Act*, which replicates s 1A of the former *Working with Children Act 2005* (Vic) ('*WWC Act*'), makes protecting children from physical or sexual harm 'the paramount consideration' when the Secretary to the Department of Justice and Community Safety ('the Secretary') or the Victorian Civil and Administrative Tribunal ('VCAT') make a WWC clearance

29 See, eg, *JGF v Secretary, Department of Justice* [2013] VCAT 1728, [27] (Macnamara V-P) ('*JGF*'); *MFK v Secretary, Department of Justice and Community Safety* [2019] VCAT 629, [109] (Deputy President Proctor).

30 *Response to Issues Paper 1* (n 11) 5–7 [11]–[19].

31 *Worker Screening Act* (n 1) s 121.

32 Ibid s 71.

33 Ibid s 78.

34 Ibid s 1(b).

decision.[35] This emphasis on child protection, and the best interests of children generally,[36] is mirrored in WWCC legislation throughout Australia.[37]

A *Child-Related Work*

WWC clearance allows an individual to engage in *any* child-related work. Child-related work, however, is a defined term under the *Worker Screening Act*. Section 7(1) defines it as work 'at or for a service, body or place, or that involves an activity specified in subsection (3)' and 'that usually involves direct contact with a child'.[38] For the purpose of s 7(1)(b), 'direct contact' involves physical or face-to-face contact with a child, or any oral, written, or electronic communication.[39] Not all work or activities involving direct contact with a child require WWC clearance. Instead, the direct contact must be a usual component of that work or activity for the work or activity to become child-related. Section 7(2) expressly states that '[f]or the purposes of this Act, work is not child-related work by reason only of occasional direct contact with children that is incidental to the work'.[40] The former *WWC Act* provided the example of a nurse working in a geriatric ward who one day covers for a sick colleague working in paediatrics. That nurse does not require WWC clearance because her work 'does not usually involve direct contact with children'.[41]

Section 7(3) of the *Worker Screening Act* exhaustively specifies the services, bodies, places and activities in which child-related work may occur.[42] These are

35 Ibid s 11.

36 On the relationship between s 1A of the *WWC Act* (s 11 of the *Worker Screening Act*), the 'best interests of the child', and the parens patriae jurisdiction created by the *WWC Act*, see *Secretary, Department of Justice and Regulation v McIntyre* (2019) 56 VR 526, 536–47 [39]–[84] (Garde J); *ZZ v Secretary, Department of Justice* [2013] VSC 267, [54]–[71] (Bell J) ('*ZZ*'); *PQR v Secretary, Department of Justice and Regulation [No 2]* [2017] VSC 514, [22] (Bell J) ('*PQR*'). In NSW, the Court of Appeal acknowledged the protective jurisdiction of the *Commission for Children and Young People Act 1998* (NSW) in *Commissioner for Children and Young People v FZ* [2011] NSWCA 111, [61] (Young JA). Western Australia also recognises WWC laws as protective, not punitive: *Chief Executive Officer, Department for Child Protection v Grindrod [No 2]* (2008) 36 WAR 39, 56–7 [76] (Buss JA) ('*Grindrod [No 2]*').

37 *WWVP Act (ACT)* (n 17) s 6A; *Child Protection (WWC) Act (NSW)* (n 17) ss 3–4; *Care and Protection of Children Act (NT)* (n 17) ss 4(a), (c), 7, 10(1); *WWC (Risk Management) Act (Qld)* (n 17) ss 5–6, 360; *Child Safety (Prohibited Persons) Act (SA)* (n 17) ss 3(1), (3); *Registration to WWVP Act (Tas)* (n 17) s 2A; *WWC (Criminal Record Checking) Act (WA)* (n 17) s 3.

38 *Worker Screening Act* (n 1) s 7(1).

39 Ibid s 3(1) (definition of 'direct contact').

40 Ibid s 7(2).

41 *WWC Act* (n 1) s 9(1), as at 1 June 2020.

42 WWC clearance is also required for supervisors of child employees in workplaces permitted to employ children: *Child Employment Act 2003* (Vic) s 19(1)(a).

child protection and care services;[43] education services, care, and institutions;[44] 'out of home care services' (including remand and youth justice centres) or 'other residential facilities used by children';[45] student accommodation and 'overnight camps for children';[46] paediatric wards;[47] 'clubs, associations, or movements' providing services to, or predominantly membered by, children;[48] religious organisations and ministers of religion;[49] and fostering, coaching, counselling and support, and 'school crossing services'.[50] Other activities become child-related when conducted 'on a publicly-funded or commercial basis', including babysitting (by commercial agencies);[51] 'transport service[s] specifically for children';[52] and 'in home care service[s] for children'.[53] Party, photography, talent and beauty competition, entertainment, gym, and play services or facilities provided specifically to children 'on a commercial basis and not merely incidentally to or in support of other business activities' are also child-related.[54] Thus, a worker at a McDonald's restaurant with a playground would not require WWC clearance because the play equipment is incidental to the business's main activity of selling fast food, but employees at an entertainment centre that exclusively hosts children's parties would. Finally, several kinds of activities are declared exempt from requiring WWC clearance under the *Worker Screening Act*.[55]

Victoria's definition of child-related work is echoed in other state and territory WWC legislation. All jurisdictions require screening to engage in child-related work that is typically defined as usual and not incidental.[56] Some jurisdictions however construe the term 'usual' quite broadly — where, for example, it is

43 *Worker Screening Act* (n 1) ss 7(3)(a)–(b). This also includes public servants tasked with administering the *Worker Screening Act*: at s 7(7).

44 Ibid ss 7(3)(c)–(d).

45 Ibid ss 7(3)(e)–(f). A person providing 'out of home care' to a child requires WWC clearance even when that 'person is a family member or other person of significance to [the] child': at s 7(6).

46 Ibid ss 7(3)(g), (p).

47 Ibid s 7(3)(h).

48 Ibid s 7(3)(i).

49 Ibid ss 7(3)(j), (5).

50 Ibid ss 7(3)(l), (n)–(o), (q).

51 Ibid s 7(3)(k).

52 Ibid s 7(3)(m).

53 Ibid s 7(3)(s).

54 Ibid ss 7(3)(r)(i)–(iv).

55 Ibid ss 7(8), 110–17.

56 See Anagha Joshi, 'Pre-Employment Screening: Working with Children Checks and Police Checks', *Australian Institute of Family Studies* (Resource Sheet, June 2021) <https://aifs.gov.au/resources/resource-sheets/pre-employment-screening-working-children-checks-and-police-checks>.

'reasonably … expected'[57] or 'likely'[58] that work involves or 'may potentially involve'[59] usual contact with children. Similarly, though minute differences exist between jurisdictions, the definition of 'child-related work' hinges on a connection to certain services, activities, places, or bodies, with broad consistency nationwide.[60]

B *WWC Clearance for Work that is Not Child-related*

Section 7 of Victoria's *Worker Screening Act* shows that the definition of child-related work is both exhaustive and broad, but is grounded on three premises: that there is direct contact with a child, that such direct contact is a usual component of the work or activity, and that the work or activity occurs as, at, or in, a service, body, or place described in s 7(3). Work not involving usual, direct contact with children as, at, or in these services, bodies, or places is not child-related work and therefore does not require WWC clearance.[61]

Nevertheless, tribunals regularly hear matters involving applicants unable to find or keep non-child-related employment because they cannot fulfil their employers' WWCC policies. Non-child-related occupations in Victoria which might unnecessarily require WWC clearance include cleaners,[62] hospitality workers,[63] plumbers,[64] maintenance workers,[65] and air conditioner and refrigeration

57 *WWVP Act (ACT)* (n 17) ss 9–10; *Registration to WWVP Act (Tas)* (n 17) ss 5–6.

58 *WWC (Criminal Record Checking) Act (WA)* (n 17) s 6(1)(a); *WWC (Risk Management) Act (Qld)* (n 17) sch 1.

59 *Care and Protection of Children Act (NT)* (n 17) s 185(2).

60 *See WWVP Act (ACT)* (n 17) sch 1; *Child Protection (WWC) Act (NSW)* (n 17) ss 6–7; *Care and Protection of Children Act (NT)* (n 17) ss 185(2), (5); *WWC (Risk Management) Act (Qld)* (n 17) sch 1; *Child Safety (Prohibited Persons) Act (SA)* (n 17) ss 6(1), 6(3)(a); *Registration to WWVP Act (Tas)* (n 17) ss 4A–5; *Registration to Work with Vulnerable People Regulations 2014* (Tas) pt 2; *Worker Screening Act* (n 1) s 7; *WWC (Criminal Record Checking) Act (WA)* (n 17) s 6.

61 *HJF v Secretary, Department of Justice* [2014] VCAT 193, [141] (Bowman J) ('*HJF*').

62 *EQS v Secretary, Department of Justice and Community Safety* [2019] VCAT 1572; *OTE v Secretary, Department of Justice and Regulation* [2018] VCAT 7; *KVL v Secretary, Department of Justice* [2013] VCAT 100; *FRT v Secretary, Department of Justice* [2012] VCAT 575 ('*FRT*'); *FBG v Secretary, Department of Justice* [2012] VCAT 479.

63 *FKX v Secretary, Department of Justice* [2015] VCAT 404; *PMY v Secretary, Department of Justice* [2011] VCAT 968 ('*PMY*').

64 *BPN v Secretary, Department of Justice and Community Safety* [2020] VCAT 786; *Sarra v Secretary, Department of Justice and Community Safety* [2019] VCAT 1553.

65 *ZRT v Secretary, Department of Justice and Community Safety* [2019] VCAT 1293 ('*ZRT*'); *CZQ v Secretary, Department of Justice and Regulation* [2018] VCAT 798.

repairers.[66] Electricians and construction workers,[67] gardeners and landscapers,[68] personal trainers,[69] and security guards[70] may find their jobs on the line should they be unsuccessful in applying for WWC clearance. So too might aged care workers,[71] IT professionals and computer or laboratory technicians,[72] surgical theatre technicians,[73] those providing disability services[74] or drug and alcohol counselling to adults,[75] and those providing adults with education and training in the tertiary or vocational sectors.[76] Many universities or education providers require students to obtain WWC clearance to complete non-child-related work placements.[77]

Several factors might explain non-child-related employers' reliance on WWCCs. Employers have broad discretion at common law to consider a prospective employee's past criminal offending as a means of risk mitigation.[78] Furthermore, although WWC legislation requires those engaged in child-related work to hold WWC clearance, an applicant is not prevented from applying for such clearance

66 *ZOM v Secretary, Department of Justice* [2011] VCAT 2398; *Uygur v Secretary, Department of Justice and Regulation* [2018] VCAT 140.

67 *Abela v Secretary, Department of Justice and Regulation* [2018] VCAT 929; *Abela v Secretary, Department of Justice and Regulation* [2018] VCAT 80; *JUV v Secretary, Department of Justice and Regulation* [2017] VCAT 51; *VZI v Secretary, Department of Justice and Regulation* [2016] VCAT 444; *VZI v Secretary, Department of Justice* [2012] VCAT 220; *XNZ v Secretary, Department of Justice* [2012] VCAT 1769.

68 *McIntyre v Secretary, Department of Justice and Regulation* [2018] VCAT 1041; *KZD v Secretary, Department of Justice* [2015] VCAT 549.

69 *EYP v Secretary, Department of Justice and Regulation* [2017] VCAT 1273; *SVG v Secretary, Department of Justice* [2015] VCAT 534; *Shohany v Secretary, Department of Justice* [2014] VCAT 1300.

70 *LRB v Secretary, Department of Justice and Regulation* [2018] VCAT 1351; *OUX v Secretary, Department of Justice and Regulation* [2017] VCAT 1809.

71 *Shirley v Secretary, Department of Justice and Regulation* [2018] VCAT 1247.

72 *NVV v Secretary, Department of Justice and Community Safety* [2020] VCAT 566; *VVN v Secretary, Department of Justice and Regulation* [2018] VCAT 1392; *YEE v Secretary, Department of Justice* [2011] VCAT 2399.

73 *Gibbons v Secretary, Department of Justice and Community Safety* [2020] VCAT 838.

74 *MVE v Secretary, Department of Justice and Regulation* [2018] VCAT 550; *VTN v Secretary, Department of Justice and Regulation* [2018] VCAT 54.

75 *Kerri v Secretary, Department of Justice and Community Safety* [2020] VCAT 381.

76 *RJS v Secretary, Department of Justice and Community Safety* [2019] VCAT 230; *DRC v Secretary, Department of Justice* [2013] VCAT 995; *LMB [No 1]* (n 2); *SVP v Secretary, Department of Justice* [2010] VCAT 1496.

77 *Akoka v Secretary, Department of Justice and Community Safety* [2020] VCAT 1036; *LMB v Secretary, Department of Justice and Community Safety* [2019] VCAT 956; *PQV v Secretary, Department of Justice and Regulation* [2016] VCAT 574; *MAB v Department of Justice and Regulation* [2015] VCAT 2033, [56] (Deputy President Lambrick); *HJF* (n 61); *DBN v Secretary to the Department of Justice* [2013] VCAT 143; *JFC v Secretary, Department of Justice* [2013] VCAT 19.

78 Naylor, Paterson and Pittard (n 21) 173–4.

simply because they do not intend to work or volunteer with children,[79] nor are non-child-related employers barred from requiring staff to hold one.

Child welfare is a matter of community concern and, given children's vulnerabilities, those who harm them are widely vilified. Employers are accordingly reluctant to employ those convicted of (or perceived as having committed) child-sex offences.[80] Workplaces may introduce policies — including directing staff to obtain WWC clearance, but also by framing vague descriptors like 'character' or 'integrity' as inherent job requirements — to exclude those they consider undesirable from working in their organisation.

Concerns raised at the Royal Commission into Child Abuse have likewise caused non-government organisations, and especially religious groups, to adopt a cautious approach to roles that might only have incidental contact with children. Reflecting these changes, state and territory parliaments have implemented the Royal Commission's recommendations to expand the types of work deemed to be child-related. Most states have expanded the definition of 'child-related work' to include ministers of religion.[81] Branding themselves as 'child-safe', many religious and non-government organisations have followed suit by requiring *all* staff to obtain WWC clearance, irrespective of whether the work involves direct or usual contact with children.[82] In Victoria, many non-child-related organisations have adopted the Child Safe Standards,[83] guidelines for organisations providing services to children. They consequently 'have developed policies requiring all individuals to obtain Working with Children Checks, regardless [of] legal requirements'.[84] Likewise, some organisations may find funding for projects contingent on *all staff* obtaining WWC clearance.[85]

Another underlying reason is more prosaic. Legislation differs between jurisdictions, entailing confusion about who needs WWC clearance. Employers, aware of potential penalties for not screening their workers, impose blanket

79 *Maleckas (LKQ) v Secretary, Department of Justice* (2011) 34 VR 23, 39 [89] (Kyrou J) ('*Maleckas*').

80 *Young People, Criminal Records* (n 21) 25.

81 See *WWVP Act (ACT)* (n 17) sch 1 cl 1.23; *Child Protection (Working with Children) Regulation 2013* (NSW) reg 13; *Child Protection (WWC) Act (NSW)* (n 17) s 185(5)(a)(i); *WWC (Risk Management) Act (Qld)* (n 17) sch 1 cl 10; *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 6(1)(b); *Registration to WWVP Act (Tas)* (n 17) s 5(1)(l); *Worker Screening Act* (n 1) ss 7(4)–(5); *WWC (Criminal Record Checking) Act (WA)* (n 17) s 6(1)(a)(xi).

82 *Response to Issues Paper 1* (n 11) 8 [21]; *WASAT Annual Report 2009–2010* (n 11) 21; Guest (n 11) 17, 23–4; *QTR v Secretary, Department of Justice* [2009] VCAT 417, [7] (Harbison V-P) ('*QTR*'); *ZRT* (n 65) [6]–[8] (Deputy President Lulham).

83 'Child Safe Standards', *Commission for Children and Young People* (Web Page) <https://ccyp.vic.gov.au/child-safe-standards/>.

84 Department of Justice and Community Safety (Vic), *Annual Report 2018–19* (Report, October 2019) 132 <https://files.justice.vic.gov.au/2021-06/DJCS_Annual_Report_2018%2019_2.pdf>.

85 *Barnard v Secretary, Department of Justice and Regulation* [2017] VCAT 966, [7]–[8] (Harbison V-P).

requirements to ensure they do not fall foul of the law. A review of Western Australia's WWC legislation in 2012 found that employers 'take a risk-averse approach and insist that their employees apply if they have any contact, or even the possibility of contact, with children, regardless of whether their work would be considered child-related'.[86] Approaching this issue from another angle, the Royal Commission asserted that complicated WWC legislation sees organisations spreading scarce resources away from enacting child-safe policies to a focus on ensuring compliance with WWC laws, potentially compromising child safety.[87] Finally, it must be noted that WWC clearance is a 'user pays' system: it is the applicant, and not the employer, who pays the associated fee.[88]

IV REMEDIES FOR UNSUCCESSFUL WWCC APPLICANTS WISHING TO ENGAGE IN NON-CHILD-RELATED WORK

It is clear a balance needs to be struck between the rights of children to be protected from physical and sexual harm on the one hand, and the right of persons to work and choice of occupation on the other. The general principle in Victoria is that child-related employment screening legislation is protective, not punitive.[89] In *Secretary, Department of Justice and Regulation v McIntyre*, Garde J held that the 'protective nature of the *WWC Act* and the paramount consideration results in a "protective jurisdiction" created by the *WWC Act*', encompassing the common law doctrine of parens patriae wherein the State 'assumes a protective responsibility for vulnerable children'.[90] Where a conflict between these rights arises, the paramount consideration and parens patriae jurisdiction of the *Worker Screening Act* are triggered, thereby restricting an applicant's right to work in a non-arbitrary manner.[91]

Nevertheless, the widespread misuse of pre-employment screening by non-child-related employers smacks of arbitrariness. So much was recognised by Bell J in *ZZ v Secretary, Department of Justice* ('*ZZ*').[92] While acknowledging that pre-employment screening for those who work with children is consistent with Australia's obligations under international law, his Honour observed that an 'interpretation [of the risk provisions of the *WWC Act*] which would deny a person access to their chosen field of employment when there was no real risk of harm to children is not indicated' by Australia's international obligations.[93] This

86 Guest (n 11) 23.

87 *Royal Commission Final Report: Working with Children Checks* (n 3) 62.

88 See, eg, *O'Brien v Department of Human Services* [2012] FWA 5678; 'Paramedics Giving Free Rides in Protest against Paying for Working with Children Checks', *ABC News* (online, 1 March 2018) <https://www.abc.net.au/news/2018-03-01/paramedics-furious-over-bill-for-working-with-children-checks/9496428>.

89 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 2014, 2651–3 (Robert Clark, Attorney-General).

90 (2019) 56 VR 526, 539 [50].

91 *PQR* (n 36) [38]–[42] (Bell J), quoting ZZ (n 36) [132], [134]–[135], [137] (Bell J).

92 *ZZ* (n 36).

93 Ibid [68] (Bell J).

observation is particularly salient where an applicant wishes to engage in work that is not 'child-related' and consequently would have minimal contact with, and thus pose minimal risk to, children.

This paper now considers how such a balance could be struck. It does so by exploring the avenues for redress open to those denied or terminated from non-child-related employment because they are unable to hold WWC clearance. First, it argues that there are compelling reasons to frame unnecessary WWCC requirements as a form of irrelevant criminal records discrimination. It unpacks the core elements of an irrelevant criminal records discrimination claim and how they might apply to the unsuccessful WWCC applicant, including the efficacy of federal and state anti-discrimination protections. The paper then turns to two other avenues for redress: protections under fair work legislation and merits review of an agency's WWC exclusion decision. Each subpart explores and evaluates the application and effectiveness of these mechanisms in the context of unnecessary WWCC policies.

A *Unnecessary WWCC Policies as Irrelevant Criminal Records Discrimination: Complaints to Anti-Discrimination Commissions*

As Part III shows, 'child-related work' — work for which WWC clearance is legally required — is narrowly defined, but despite this many non-child-related employers continue to require staff to pass a WWCC. In sectors as disparate as construction, aged care, and commercial cleaning, the many tribunal decisions cited above illustrate that workers and job applicants face real hurdles finding and holding a non-child-related job where their criminal record prevents them from obtaining WWC clearance. The risk of losing one's employment, or being denied work, is a very real one for such people. Where a person's criminal record results in a WWC exclusion decision, and their (prospective) employer, acting on that decision, ends their employment or refuses to hire them, might that person have a valid anti-discrimination complaint?

Australian law generally protects against discrimination on the basis of an irrelevant criminal record. At the federal level, the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*') and its regulations prohibit 'any distinction, exclusion or preference' which 'has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation' on the grounds of 'an irrelevant criminal record'.[94] State and territory protections are expressed in similar terms.[95] In addition, spent convictions schemes, which limit employers' ability to inquire about, or act in response to, certain criminal convictions operate throughout Australia.[96]

94 *AHRC Act* (n 10) s 3(1) (definition of 'discrimination' para (b)(i)); *AHRC Regulations* (n 10) reg 6(a)(iii).

95 See, eg, *Anti-Discrimination Act 1992* (NT) s 20(1)(a) ('*Anti-Discrimination Act (NT)*').

96 See below n 150.

Those refused or terminated from non-child-related employment for failing to hold WWC clearance may seek redress via an anti-discrimination complaint. Mechanisms for making an irrelevant criminal records discrimination complaint are available federally via the Australian Human Rights Commission ('AHRC') as well as in the Australian Capital Territory ('ACT'), Northern Territory ('NT'), and Tasmania. As the below analysis shows, recent developments in anti-discrimination law may be broad enough to include any adverse action taken against a person in non-child-related employment for a failure to hold WWC clearance. First, the AHRC's beneficial interpretation of an 'irrelevant criminal record', which includes the circumstances of an individual's contact with the criminal law as well as any imputation of criminality, appears broad enough to encompass a WWC refusal, given the close relationship between criminal offending and WWC exclusion. Secondly, in recent decades the AHRC has read down the requirement for a causal nexus between a complainant's irrelevant criminal record and the discriminatory act or practice. The scope of the 'inherent requirements of the position' exception has similarly been narrowed, with an individuated assessment, rather than broad assumptions, necessary to enliven this 'defence' to discrimination.

However, an anti-discrimination complaint is also a weak mechanism for redress. Federal anti-discrimination protections distinguish between 'discrimination' and 'unlawful discrimination', with irrelevant criminal records discrimination falling into the former. As enforcement powers and appeal rights to the courts only arise in unlawful discrimination cases, the AHRC's powers in respect of irrelevant criminal records discrimination are severely curtailed and respondents routinely reject its findings and recommendations. By contrast, more robust protections, including enforcement powers, exist in those states and territories which have prescribed irrelevant criminal records discrimination as a form of unlawful discrimination.

1 *Definition of 'Irrelevant Criminal Record'*

An individual who wishes to pursue an irrelevant criminal records discrimination complaint carries the onus of proof, though this pivots to the respondent if they seek to rely on an exception.[97] As a jurisdictional fact, a complainant needs to establish that they have the protected attribute, that is, an irrelevant criminal record, to enliven the jurisdiction of the anti-discrimination organ.[98] Therefore, it is necessary to briefly outline what constitutes an 'irrelevant criminal record'.

Unlike other attributes, such as race, sex, disability, or age, an irrelevant criminal record is

> an unusual protected attribute … because the attribute that is protected is *not* the possession of a criminal record per se, but rather the possession of a criminal record the circumstances of which are irrelevant to the situation in which it is or was

97 Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579, 582.

98 *Pereira v Commissioner of Police* [2012] NTADComm C20100027-02, [5.2] (Hearing Commissioner Rice). See also *Complainant 201908 v Commissioner for Fair Trading* [2020] ACAT 24, [25] (Senior Member Robinson) ('*Complainant 201908*').

> considered. This is the only protected attribute that a person may or may not have depending on the surrounding facts and law.[99]

Though the *AHRC Act* does not define 'irrelevant criminal record', the AHRC has interpreted the term broadly to include spent convictions and criminal charges made against a person, as well as the circumstances surrounding the alleged offending.[100] It has held that a 'criminal record' is not limited to the terms of a police records check, but may also include 'charges which were not proven, investigations, findings of guilt with non-conviction and convictions which were later quashed or pardoned'.[101] In its decisions, the Commission has observed that the term 'criminal record' should be given a liberal construction, noting that it would be 'unduly restrictive to define the term "criminal record" as just meaning the conviction as recorded'.[102] It has accepted that discrimination on the basis of a charge or arrest may be as damaging as a conviction, and found the imposition of a good behaviour bond without conviction still amounts to a criminal record.[103] State and territory legislation echoes this permissive understanding. In the ACT, NT, and Tasmania, irrelevant criminal records include spent or expunged convictions, charges dealt with otherwise than a finding of guilt, or, most relevantly, where 'the person has a conviction for the offence, but the circumstances of the offence are not directly relevant to the situation in which discrimination arises'.[104] Such circumstances, framed as the 'inherent requirements' test and operating as an exception to discrimination, are discussed below. In addition, protections extend to the imputation of an irrelevant criminal record under the *Australian Human Rights Commission Regulations 2019* (Cth) ('*AHRC Regulations*') and ACT, NT, and Tasmanian anti-discrimination laws.[105]

An 'irrelevant criminal record' is therefore not confined to possession of a criminal record itself, but involves consideration of all the circumstances in which an interaction with the criminal law arose, as well as any imputation of a criminal record. It is liberally construed in a manner beneficial to the complainant. For a person who has been refused or fired from non-child-related employment for failing to hold WWC clearance, this permissive construction is arguably broad enough to encompass any adverse action a (non-child-related) employer takes on

99 *Complainant 201908* (n 98) [26] (Senior Member Robinson) (emphasis in original).

100 *Response to Issues Paper 1* (n 11) 9–10. See also *Christensen v Adelaide Casino Pty Ltd* [2002] AusHRC 20 ('*Christensen*').

101 *On the Record* (n 22) 8.

102 *Christensen* (n 100) [10.2] (Tay P).

103 *AG v Commonwealth (Department of Foreign Affairs and Trade)* [2018] AusHRC 123, [98]–[99] (Croucher P) ('*AG*').

104 *Discrimination Act 1991* (ACT) Dictionary s 2 (definition of 'irrelevant criminal record' para (e)) ('*Discrimination Act (ACT)*'). See also *Anti-Discrimination Act (NT)* (n 95) s 4(1) (definition of 'irrelevant criminal record'); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'irrelevant criminal record') ('*Anti-Discrimination Act (Tas)*').

105 *AHRC Regulations* (n 10) reg 6(c); *Discrimination Act (ACT)* (n 104) ss 7(2)(b), (d)–(f); *Anti-Discrimination Act (NT)* (n 95) ss 20(2)(b)–(c); *Anti-Discrimination Act (Tas)* (n 104) s 14(2). See also *On the Record* (n 22) 8.

the basis of a WWC exclusion decision, or at least on the basis of the criminal offending which led to it. If we recall that refusal or cancellation of WWC clearance typically hinges on an applicant having been charged with, or convicted of, a criminal offence, an applicant might argue that the employer acted on the basis of the criminal offending underpinning the WWC exclusion. To this end, protections against discrimination on the basis of an *imputed* irrelevant criminal record play a part. In theory, an employer might not turn its mind to the reason WWC clearance was refused. In practice, however, it is difficult to imagine the employer *not* learning (or forming a view about) why the applicant failed to pass a WWCC. As Green notes, '[m]any employers are unaware that WWCCs can be refused on grounds that do not always directly relate to offences against children' and often the nuances of the WWCC process are not apparent to employers.[106] Where informed that an employee has been deemed not safe to work with children, an employer might jump to their own conclusions about why.

But even beyond the underlying criminal offending, it may be contended that a WWC exclusion *itself* is a form of 'irrelevant criminal record'. This is because of the tight connection between a criminal charge or conviction and a WWC exclusion. While those without a criminal record must be granted WWC clearance in Victoria, those with a criminal record are screened and, depending on the severity of the offending, may or will fail a WWCC. Although the purpose of WWC screening is to protect children from harm, the AHRC has acknowledged the close relationship between a person's criminal record and WWCCs, noting that a person's criminal record will inform the assessment of their suitability to work with children.[107] Finally, a finding of irrelevant criminal records discrimination requires an assessment of a criminal record's relevance to the situation in which it was considered. If an employer requires staff pass a WWCC despite not being engaged in child-related work, the absence of a legal requirement for WWC clearance appears to be a highly significant matter to which the Commission should have regard.

2 *A Distinction, Exclusion, or Preference 'on the Basis of' an Irrelevant Criminal Record*

At first blush, federal protections against irrelevant criminal records discrimination appear to require an act or practice of 'direct' discrimination. That is, there needs to have been a 'distinction, exclusion, or preference' (whether an act or practice) made 'on the ground of' the relevant attribute.[108] This terminology legislates Australia's obligations under the International Labour Organisation *Convention Concerning Discrimination in Respect of Employment and Occupation* ('*ILO Convention No 111*').[109] A first blush reading suggests that indirect discrimination

106 *Young People, Criminal Records* (n 21) 25.

107 Human Rights and Equal Opportunity Commission, 'Discrimination in Employment on the Basis of Criminal Record' (Discussion Paper, December 2004) 21 <https://humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/Criminal_record.pdf> ('Discrimination in Employment').

108 *AHRC Act* (n 10) s 3 (definition of 'discrimination'); *AHRC Regulations* (n 10) reg 6.

109 *Convention Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

— the disparity of outcomes resulting from subjecting different people to the same treatment — could not fall within the scope of protections against irrelevant criminal records discrimination. An apparently neutral policy, such as an organisation-wide WWCC requirement, would therefore not be discriminatory because all employees, including those without a criminal record, must hold WWC clearance. The complainant would instead need to establish a relationship of causation or intention between the exclusion and their criminal record.

In recent decades there has been a shift away from this understanding. The expert committee tasked with overseeing the *ILO Convention No 111* has found that an intention to discriminate is not necessary for a finding of discrimination.[110] The AHRC has also acknowledged that the *ILO Convention No 111* prohibits both direct and indirect discrimination.[111] Furthermore, though the *AHRC Regulations* prescribe any distinction, exclusion, or preference 'on the ground of' an irrelevant criminal record, the Commission appears to have rejected the need for a causal relationship between a protected attribute and the distinction, exclusion, or preference. Instead, it uses the *AHRC Act*'s terminology that discrimination requires the exclusion or distinction to have been made 'on the basis of' an attribute, and has construed the phrase broadly.[112] The Commission has accordingly looked to both the effects of the exclusion or distinction as well as to all of the circumstances in which the exclusion or distinction arose.

In doing so, the AHRC has often considered jurisprudence arising from unlawful discrimination cases, and in particular *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* ('*Macedonian Teachers*').[113] In that case, involving a complaint made under s 9(1) of the *Racial Discrimination Act 1975* (Cth),[114] Weinberg J rejected earlier, restrictive

110 Committee of Experts on the Application of Conventions and Recommendations, 'Equality in Employment and Occupation: General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No 111) and Recommendation (No 111), 1958' (Conference Paper, International Labour Conference, 1988) 23, cited in *Hall v NSW Thoroughbred Racing Board* [2002] AusHRC 19, app A (Commissioner Ozdowski) ('*Hall*'). See also *Anti-Discrimination Act (NT)* (n 95) s 20(4); *Anti-Discrimination Act (Tas)* (n 104) s 14(3)(c).

111 *On the Record* (n 22) 8.

112 *Smith v Redflex Traffic Systems Pty Ltd* [2018] AusHRC 125, 12 [20] (Croucher P); *AG* (n 103) 24 [100] (Croucher P); *BE v Suncorp Group Ltd* [2018] AusHRC 121, 11 [21] (Croucher P) ('*BE*'); *AW v Data#3 Ltd* [2016] AusHRC 105, 7 [22] (Triggs P) ('*AW*'); *AV v DIAL-AN-ANGEL Pty Ltd* [2015] AusHRC 97, 7 [22] (Triggs P) ('*AV*'); *AN v ANZ Banking Group Ltd* [2015] AusHRC 93, 8 [18] (Triggs P) ('*AN*'); *PJ v AMP Financial Planning Pty Ltd* [2014] AusHRC 89, 8 [32] (Triggs P) ('*PJ*'); *TM v Linfox Australia Pty Ltd* [2014] AusHRC 81, 6 [17] (Triggs P) ('*TM*'); *Christensen* (n 100) 10 [10.2] (Tay P); *Hall* (n 110) app B [9.2.1] (Commissioner Ozdowski).

113 (1998) 91 FCR 8 ('*Macedonian Teachers*'). Justice Weinberg's reasoning was upheld by the Full Federal Court on appeal in *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47, 49 [8] (O'Connor, Sundberg and North JJ).

114 Section 9(1) used the terminology 'based on'.

interpretations of the phrase 'based on' as requiring a causal nexus.[115] His Honour observed that 'anti-discrimination legislation should be regarded as beneficial and remedial legislation' and so 'should, therefore, be given a liberal construction'.[116] As the 'phrase "based on" is capable of bearing different shades of meaning', his Honour's preferred construction was that the act be done 'by reference to' the attribute, requiring a close relationship or sufficient connection.[117] Justice Weinberg observed that to read 'based on' 'as meaning only a relationship of cause and effect would be likely to significantly diminish the scope of protection' provided under anti-discrimination legislation.[118]

Although *Macedonian Teachers* arose in the context of a racial discrimination case, and Weinberg J was careful to distinguish between the term 'based on' and provisions using the causative language 'on the ground of',[119] the AHRC has nonetheless adopted the more liberal construction in its irrelevant criminal records discrimination reports. It has routinely observed that a person's criminal record need not be the sole reason for the distinction, exclusion, or preference, but instead that it be 'a' reason,[120] though this should not be taken to require a causal relationship. The Commission has accordingly found there to have been discrimination where a respondent alleged it refused to employ the complainant because the complainant omitted to disclose their criminal record, and not because of the criminal record itself.[121] The AHRC has also found irrelevant criminal records discrimination where the employer claimed to rely on what the criminal record said about the complainant's judgement and character.[122] Discrimination has also been identified where the complainant's criminal record was but one of multiple concerns about their suitability for a given role,[123] or where termination of employment was for reasons of protecting an organisation's media image or financial arrangements.[124] Although the language of causation persists in state and territory anti-discrimination law, decision-makers 'will take into account *all reasons* for doing the act other than those that are not real or genuine or are insubstantial'.[125] Where the protected attribute, 'either alone or in combination

115 *Macedonian Teachers* (n 113) 25–9 (Weinberg J).

116 Ibid 29. This construction has been legislated into ACT anti-discrimination law: see *Discrimination Act (ACT)* (n 104) s 4AA.

117 *Macedonian Teachers* (n 113) 30 (Weinberg J).

118 Ibid 33.

119 Ibid 29–31.

120 *TM* (n 112) [16] (Triggs P), citing *Kong v Australia Post* [1997] AusHRC 3, *Copeman v Derbarl Yerrigan Health Science* [2007] AusHRC 37 and *Macedonian Teachers* (n 113) 29–30 (Weinberg J).

121 *BE* (n 112) 24 [72] (Croucher P); *AW* (n 112) 7–8 [25]–[27] (Triggs P); *AN* (n 112) 8–9 [22], [24] (Triggs P); *AV* (n 112) 7 [23] (Triggs P).

122 See, eg, *Christensen* (n 100) 8–10 [9] (Tay P).

123 See, eg, *PJ* (n 112) 9 [33]–[35] (Triggs P).

124 See, eg, *AG* (n 103) 24 [101] (Croucher P); *AV* (n 112) 11 [49] (Triggs P).

125 *Kovac v The Australian Croatian Club Ltd* [2014] ACAT 41, [90] (emphasis added).

with other reasons, is a real, genuine and not insubstantial reason for the unfavourable treatment', causation will be satisfied.[126]

It follows that a complainant does not need to establish that their irrelevant criminal record was the sole or predominant reason behind the discriminatory act. Nor do they need to prove that there was a particular motive or causal relationship behind such an act. It is enough that the irrelevant criminal record was *a* reason for the discriminatory act. In the context of WWC exclusions, this may greatly assist a complainant to break the respondent's 'monopoly of knowledge' about the reasons behind the alleged discrimination.[127] An employer may argue, for example, that refusal or termination of employment flowed from a failure to provide essential documentation (ie, WWC clearance), and not from the complainant's criminal record. Employers have characterised an employee's failure to obtain WWC clearance in this manner in unfair dismissal cases.[128] However, as noted above, it may not be enough for an employer to rely on another reason for its distinction, exclusion, or preference, whether framed as a failure to provide an essential document, a lack of candour in not disclosing prior criminal offending, or assumptions about the employee's character. Provided a complainant's irrelevant criminal record arises, and the respondent has made an exclusion by reference to that attribute, the complainant's claim may be made out. It then falls to the respondent to establish that its exclusion was based on the inherent requirements of the position in question.

3 *Exceptions to Discrimination: The 'Inherent Requirements' Test*

Where there has been an exclusion on the basis of ('by reference to') a person's irrelevant criminal record, resulting in the nullification or impairment of a person's equality of opportunity in employment, it may nonetheless still not amount to discrimination. This is because such adverse treatment is not discrimination where, in the field of employment, a person's criminal record impacts on their ability to fulfil the inherent requirements of a position,[129] or otherwise where a clean criminal record is 'a genuine occupational qualification'.[130] In addition, specific exemptions exist under Tasmanian and NT legislation for where the work in question involves caring or supervising children.[131] Although 2019 changes to the *AHRC Regulations* added the qualifier 'irrelevant' to the attribute of a criminal record, the explanatory statement makes clear that the inherent requirements test

126 Ibid. See also *Anti-Discrimination Act (NT)* (n 95) s 20(3); *Anti-Discrimination Act (Tas)* (n 104) s 14(3)(a).

127 Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6(4) *Industrial Law Journal* 212, 213, quoted in Allen (n 97) 583.

128 *Sheldon v Centrecare Inc* [2016] FWC 8506, [1], [23] (Deputy President Dean) ('*Sheldon*'); *McGrath v Transfield Services Pty Ltd* [2013] FWC 8455, [42] (Commissioner Bull) ('*McGrath*'); *Lyzette v Safe Places for Children* [2020] FWC 4770, [11] (Commissioner Cambridge) ('*Lyzette*').

129 *AHRC Act* (n 10) s 3(1) (definition of 'discrimination' para (c)).

130 *Anti-Discrimination Act (NT)* (n 95) s 35(1)(b)(i).

131 Ibid s 37; *Anti-Discrimination Act (Tas)* (n 104) s 50.

still applies, though the qualifier gives employers more discretion in assessing a criminal record's relevance.[132]

Whether a requirement is inherent to a position 'invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral';[133] 'incidental', 'inessential or accidental'.[134] An employer must undertake an individuated assessment of the requirements of a specific position and their application to a specific person 'before the inherent requirements exemption may be invoked'.[135] The extent to which a requirement is inherent to a position is to be determined by reference to considerations including the employment contract and the nature and function of the work,[136] but for the exemption to be invoked, there must be both a '"tight correlation" between the inherent requirements' of a position and a person's criminal record, and 'more than a "logical link" between [a] job and a criminal record'.[137] Importantly, an individuated assessment of a position's requirements means that value statements or a person's good repute or character do not generally meet the threshold of an inherent requirement. In *BE v Suncorp Group Ltd*,[138] for example, the AHRC considered a complaint by a jobseeker, BE, whose employment offer with Suncorp Group was rescinded when it learned BE was a convicted child sex offender. Suncorp contended that maintaining 'standards of trust and good character' was a key issue for the company, and that 'by their very nature, Mr BE's convictions may impair his ability to embody these values'.[139] The Commission ultimately was not satisfied that possession of these values sufficiently amounted to an inherent requirement of the advertised role. It noted that

> the application of broad value statements as a basis to disqualify people who have committed other offences may result in people being improperly excluded from employment on the basis of assumptions about their character without a proper assessment of their character or how their criminal record relates to the particular role.[140]

132 Explanatory Statement, *Australian Human Rights Commission Regulations 2019* (Cth) 4–5.

133 *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ) ('*X*'), citing *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 295 (Gaudron J), 305 (McHugh J), 318–19 (Gummow J), 340–1 (Kirby J) ('*Christie*').

134 *Christie* (n 133) 312–13 [95], 318 [114] (Gummow J).

135 *Wall v Northern Territory Police* [2005] NTADComm 1, [5.35] (Commissioner Fitzgerald) ('*Wall*'), citing *Hall* (n 110) 36 [9.4.6] (Commissioner Ozdowski) and *Zraika v Commissioner of Police (NSW)* [2004] NSWADT 67. See also *X* (n 133) 208 [102] (Gummow and Hayne JJ).

136 *Christie* (n 133) 284 [1] (Brennan CJ).

137 *Wall* (n 135) 18 [5.35] (Commissioner Fitzgerald), citing *Hall* (n 110) 35–6 [9.4.4] (Commissioner Ozdowski).

138 *BE* (n 112).

139 Ibid 17 [42] (Croucher P).

140 Ibid 18 [46].

As discussed in Part III(B), many non-child-related employers impose unnecessary WWCC requirements because they wish to appear child-safe, mistakenly believe WWC clearance is necessary, or use such policies as a means of vetting a job applicant's character. Even where the Commission is satisfied an applicant's character, 'integrity' or 'honesty' are inherent requirements of a position, it has found that a criminal record alone does not mean a person cannot be trusted or is of ill repute.[141]

Just as a respondent may argue it dismissed an applicant because of their failure to provide an essential document (ie, WWC clearance) and not because of their criminal record, so too might it contend that holding WWC clearance is an inherent requirement of a given position. In doing so, however, the respondent carries the onus of proof to establish that this is the case.[142] Though the AHRC does not appear to have considered complaints specifically involving unnecessary WWCC policies, its reports and publications, as well as its decisions in analogous cases, suggest that it would likely reject such an argument if made by a non-child-related employer.

In adjudicating complaints before it, the Commission has taken the view that even where some kind of criminal check is a legal requirement, an individuated assessment of the requirements of the role is still necessary. In *Johansson v Masonic Homes Inc*,[143] the AHRC accepted that a national police history certificate was required under the *Aged Care Act 1997* (Cth), but ultimately found in the complainant's favour because the respondent had failed to establish a link between the complainant's criminal record and her fitness to work in aged-care services. Similarly, in *AV v DIAL-AN-ANGEL Pty Ltd*,[144] the AHRC acknowledged that a respondent's funding was contingent on all staff obtaining a national police history certificate, but was not convinced the respondent's policy that all staff have satisfactory clearance was sufficiently individuated because it '[did] not allow for the individualised assessment of a person's suitability for the role'.[145] Elsewhere, the Commission has stressed the need for an individuated assessment of WWC clearance's relevance, even to child-related work. In a 2004 discussion paper, the then Human Rights and Equal Opportunity Commission observed that

> [w]hen examining a person's criminal record for a position in which they will be working with children, one of the overriding factors is to ensure that the safety and well-being of children is protected. In this circumstance, it could be said that an 'inherent requirement' of the job is that the individual can be trusted to work with children, and this may be a high threshold to meet.

141 *AN* (n 112) 12–13 [43]–[47] (Triggs P).

142 Allen (n 97) 582.

143 [2014] AusHRC 65.

144 *AV* (n 112).

145 Ibid 10 [44] (Triggs P).

> However, … another important principle is to ensure that a person's ability to fulfil the inherent requirements be assessed on a case-by-case basis. Thus, while a certain type of criminal record may weigh heavily against a person's suitability to work with children, the inherent requirements principle still requires an assessment of a person's individual circumstances to be weighed against the particular job being performed.[146]

Where there is no legal requirement that an applicant hold WWC clearance, it is difficult to imagine the AHRC finding that such clearance is essential to the inherent requirements of a position, even where the respondent asserts WWC clearance is practically required (for example, owing to funding arrangements).

4 *Limits of the AHRC as a Forum for Redress and Mechanisms Elsewhere*

A complaint to the AHRC on the basis of irrelevant criminal records discrimination appears to offer significant potential for redress in cases involving unnecessary WWCC policies. In practice, however, there are significant limits on the effectiveness of the AHRC as a forum in which to bring a complaint. The Commission's enabling legislation, the *AHRC Act*, distinguishes between discrimination and unlawful discrimination, with the latter applying only to certain forms of treatment based on one's race, age, sex, or disability.[147] Unlawful discrimination complaints — and appeal rights to the courts — can only be made in respect of the latter. Nevertheless, the Commission is empowered to receive discrimination complaints, and to inquire or conciliate to resolve any act or practice related to equal opportunity in employment which may be discriminatory under ss 31(b) and 32(1) of the *AHRC Act*. The AHRC's powers and functions in this regard are limited to making recommendations, including that compensation be paid, and providing a report of its findings to the Commonwealth Attorney-General.[148] The Commission's recommendations are not binding on the respondent and are ignored in the vast majority of cases. As Pittard notes, respondents complied with the Commission's recommendations in only 12% of criminal records discrimination cases.[149] Should a (prospective) employer disagree with the AHRC's findings, nothing compels it to respond or implement the recommendations, including paying any suggested compensation.

However, other avenues for redress exist in some Australian jurisdictions. Enforceable protections against criminal record discrimination under state and territory regimes vary significantly. For example, all states and territories have introduced spent convictions schemes which protect employees or jobseekers from having to disclose certain past criminal offending.[150] Some jurisdictions also

146 'Discrimination in Employment' (n 107) 21.

147 *AHRC Act* (n 10) s 3(1) (definition of 'unlawful discrimination').

148 Ibid s 31.

149 Marilyn J Pittard, 'Criminalization, Social Exclusion, and Access to Employment' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 474, 490.

150 *Spent Convictions Act 2000* (ACT) s 16; *Criminal Records Act 1991* (NSW) s 12; *Criminal Records (Spent Convictions) Act 1992* (NT) s 11; *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 5–6; *Spent Convictions Act 2009* (SA) s 10; *Annulled Convictions Act 2003* (Tas) s 9; *Spent Convictions Act 2021* (Vic) s 20(1)(c); *Spent Convictions Act 1988* (WA) pt 3.

prohibit discrimination on the basis of a person's spent conviction.[151] In the context of unnecessary WWCC policies, however, such protections have little effectiveness. This is because it is irrelevant whether a conviction is spent because a criminal record check triggers, rather than determines, a WWCC assessment. Some jurisdictions' WWC laws expressly provide that 'criminal history' for the purposes of assessing risk to children includes spent convictions.[152] The jobseeker who does not need to disclose a spent conviction in a job application may nonetheless be denied non-child-related employment because the spent conviction triggered an assessment which led to a WWC exclusion decision.

By contrast, in Tasmania,[153] the ACT,[154] and the NT,[155] irrelevant criminal records are a protected attribute, and recourse is available through state and territory anti-discrimination commissions and administrative tribunals for remedies arising from proscribed conduct on those grounds. In these jurisdictions, irrelevant criminal records discrimination is 'unlawful' and so anti-discrimination commissions and administrative tribunals have enforceable and broader powers than the AHRC. This includes the power to order compensation or other remedies. An applicant who believes they have experienced irrelevant criminal records discrimination may seek conciliation at the respective anti-discrimination commission in that jurisdiction. Where conciliation does not achieve a satisfactory result, or where a complainant is dissatisfied with the outcome, the complaint may be referred or otherwise made to the relevant administrative (or anti-discrimination) tribunal in that state or territory.[156] Tribunals there have a broad repertoire of powers available, including to order that a respondent pay compensation or a fine, re-employ a complainant, and cease or not repeat the discriminatory conduct.[157] These jurisdictions' anti-discrimination laws further allow appeals to the relevant Supreme Court of the state or territory on questions of procedure or law,[158] or, in the NT and until recently Tasmania, on questions of fact, too.[159] A person alleging an employer's unnecessary WWCC policy constitutes direct or indirect criminal records discrimination may pursue their claim directly against the respondent consistent with any other discrimination complaint.

151 See, eg, *Equal Opportunity Act 2010* (Vic) s 6(pb).

152 *Child Protection (WWC) Act (NSW)* (n 17) s 5C(1)(a); *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 12(2)(b); *WWC (Criminal Record Checking) Act (WA)* (n 17) s 8(2).

153 *Anti-Discrimination Act (Tas)* (n 104) s 16(q).

154 *Discrimination Act (ACT)* (n 104) s 7(1)(k).

155 *Anti-Discrimination Act (NT)* (n 95) s 19(1)(q).

156 *Human Rights Commission Act 2005* (ACT) ss 45(2)(d), 53A; *Anti-Discrimination Act (NT)* (n 95) ss 86(1), (4); *Anti-Discrimination Act (Tas)* (n 104) s 78.

157 *Anti-Discrimination Act (NT)* (n 95) s 88(1); *Anti-Discrimination Act (Tas)* (n 104) s 89(1).

158 *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 86; *Anti-Discrimination Act (NT)* (n 95) ss 106–7; *Anti-Discrimination Act (Tas)* (n 104) s 100.

159 *Anti-Discrimination Act (NT)* (n 95) s 106(2); *Anti-Discrimination Act (Tas)* (n 104) s 100(1), as amended by *Tasmanian Civil and Administrative Tribunal (Consequential Amendments) Act* 2021 (Tas) s 22.

5 *Conclusion on Irrelevant Criminal Records Discrimination*

As has been seen, recent developments in anti-discrimination law may bring unnecessary WWCC policies within the fold of an irrelevant criminal records discrimination complaint. The beneficial interpretation of a criminal record, together with a more permissive 'by reference to' standard of determining how a person's criminal record played a part in adverse action taken against them, mean it is strongly arguable a non-child-related employer's WWCC policy would amount to irrelevant criminal records discrimination. However, protections against criminal records discrimination remain relatively weak federally in Australia, though more robust protections may be found in those states which have included irrelevant criminal records discrimination as a protected attribute.

B *The Fair Work Commission and Employment Law Protections*

Workplaces have significant discretion in choosing who they employ and on what terms. However, they cannot impose *any* condition on employment. Thus, with few exceptions, it is unlawful for employers to discriminate on the basis of one's race, nationality, gender, religion, gender identity, age, marital status, and so forth.[160] Although WWCC legislation appropriately restricts the common law right to employment in a manner consistent with Australia's international obligations, such constraints only apply when children are in fact at risk. Where a person's chosen employment does not pose a risk to children by virtue of minimal or incidental contact with them, a bar on employment (even one couched in the language of child protection) cannot be validly justified under WWC legislation or by reference to international law. Accordingly, a person whose employment is terminated for failing to meet their employer's WWCC policy may apply to the Fair Work Commission ('FWC') to seek redress, subject to some qualification.

The first, and most fundamental, qualification is that general protections under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') do not extend to irrelevant criminal records discrimination.[161] WWC excluded persons denied non-child-related employment are therefore precluded from seeking redress under employment law. A second and related qualification is that those terminated in the same circumstances face a higher bar than those other dismissals caused by discrimination because their dismissal is neither due to a protected attribute[162] nor the exercise of a workplace right. An applicant in this situation can therefore only rely on unfair dismissal protections and needs to establish that their termination was 'harsh, unjust or unreasonable'.[163]

As only a small number of people are refused WWC clearance each year, consideration of how the FWC would decide on these issues is hampered by scant

160 *Fair Work Act 2009* (Cth) s 351 ('*Fair Work Act*').

161 Ibid s 351(1).

162 As defined under s 351(1) of the *Fair Work Act*, as opposed to attributes protected under other legislation, such as the *AHRC Act* and the *AHRC Regulations*.

163 *Fair Work Act* (n 160) s 385(b).

jurisprudence. Where this issue has arisen, the Commission has predominantly heard cases where the employee's work was, in fact, child-related,[164] or where the employee's failure to provide WWC clearance was ancillary to the dismissal.[165] However, this is not to say that the FWC has not heard cases that have hinged on the relevance of WWC clearance to the termination of employment, nor that the FWC has not provided guidance on the scope of remedies available to aggrieved ex-employees.

In *Carrick v Life Without Barriers*, the FWC considered the dismissal of a person whose Queensland-issued Blue Card (WWC clearance) was cancelled for alleged drug offences.[166] Life Without Barriers ('LWB') policy dictated that all staff hold Blue Cards, although Queensland's law provided that a Yellow Card, being accreditation for those who work with adult disabled persons, was sufficient for Mr Carrick's position. Importantly, it must be noted that the criminal charges laid against Mr Carrick, and not the loss of his Blue Card, gave rise to his dismissal.[167] In finding that Mr Carrick had been unfairly dismissed, Deputy President Asbury accepted LWB's evidence that there was overlap between the organisation's disability services and home care programs, and that because LWB required its staff to hold a Blue Card, reinstatement was not a suitable remedy for Mr Carrick.[168] In a later decision, however, concerned with quantifying the amount of compensation to which Mr Carrick was entitled, Deputy President Asbury found that the cancellation of Mr Carrick's Blue Card bore no weight on the length of time he would have remained in the role but for his dismissal.[169] In doing so, the Deputy President cited the FWC decision in *O'Connell v Catholic Education Office, Archdiocese of Sydney* ('*O'Connell*').[170] The Full Bench found in that case that the requirement under the *Child Protection (Working with Children) Act 2012* (NSW) ('*Child Protection (WWC) Act (NSW)*') that those engaged in child-related work must hold valid WWC clearance 'does not prevent an employer continuing to employ a person provided that the person is not employed "in child-related work"'.[171] The Commission in *O'Connell* noted that '[a]n employer could, for example, continue to employ the person on suspension, on leave or assigned to duties not involving child-related work' until such time as that person had exhausted all review rights of the cancellation or refusal to grant WWC

164 *Charaneka v Australian Islamic College of Sydney* [2016] FWC 3572 ('*Charaneka*').

165 *Pyle v CVGT Australia* [2013] FWC 1944, [21] (Commissioner Ryan); *Efe v Broadspectrum (Australia) Pty Ltd* [2019] FWC 7442, [23] (Deputy President Sams).

166 [2015] FWC 8980.

167 The Deputy President considered that, in respect of the drug charges, LWB owed Mr Carrick the benefit of the doubt, given the length of his employment and no prior performance issues, and that by setting out to dismiss him on the basis of those charges, LWB had not afforded Mr Carrick that benefit: ibid [91] (Deputy President Asbury).

168 Ibid [105].

169 *Carrick v Life Without Barriers* [2016] FWC 4906, [30]–[37] (Deputy President Asbury).

170 [2016] FWCFB 1752.

171 Ibid [58] (Ross P, Hatcher V-P, Deputy President Hamilton, Commissioner Roberts and Commissioner Johns).

clearance.[172] Any statutory obligation to dismiss a person from child-related work for failing to hold WWC clearance, therefore, amounts to a termination of employment and enlivens the FWC's jurisdiction.

Full Federal Court authority supports the conclusion in *O'Connell*, albeit in the context of applicants engaged in child-related work. In *Mahony v White*,[173] a case involving the dismissal of a teacher in a Catholic school, Jessup, Tracey and Barker JJ affirmed *O'Connell* while overturning the FWC's first instance decision in *White v Mahony*.[174] In *White v Mahony*, the Full Bench considered that the provisions of NSW's WWC legislation prohibiting the retention of a staff member engaged in child-related work without WWC clearance amounted to frustration of contract, and not termination of employment. The Full Bench in *White v Mahony* noted 'the continuation of employment is not permissible and is inconsistent with the *Child Protection (Working With Children) Act 2012* (NSW)' and that '[t]o do so would be illegal on the part of the employer'.[175] The Full Bench concluded that 'it cannot be fairly said that Mr Mahony's employment was terminated on the employer's initiative pursuant to s 386(1)(a) of the [Fair Work] Act'.[176] The Full Federal Court disagreed, holding that

> the termination of the employment of the employee concerned was the deliberate, considered, act of the CEO [Catholic Education Office]. Even if the CEO were under a statutory obligation of the kind which, on its submission, arose under s 9(1) of the *Child Protection Act*, compliance with that obligation required it, rather than Mr Mahony or Mr O'Connell, to take the initiative in bringing the relevant employment to an end.[177]

Mahony v White is Full Federal Court authority that legislative provisions preventing employers from continuing to employ persons without WWC clearance in child-related work still require employers to take the initiative of ending the employment relationship. Although untested in relation to unnecessary WWCC policies, *Mahony v White* suggests that an employer who dismisses a worker because they do not hold WWC clearance engages in a positive act of terminating the employment. The door to an unfair dismissal claim is thereby open.

However, the implications of *Mahony v White* are potentially limited in a number of ways. The decision only concerned NSW legislation, and not similar provisions in other jurisdictions. The Full Federal Court was also reticent to comment on the operation of s 9(1) of the *Child Protection (WWC) Act (NSW)*.[178] It noted that the

172 Ibid.

173 (2016) 262 IR 221, 229 [28] (Jessup, Tracey and Barker JJ) ('*Mahony v White*').

174 (2015) 251 IR 1.

175 Ibid 2 [4] (Catanzariti V-P, Deputy President Booth and Commissioner Roberts).

176 Ibid 2 [5]. See also *Charaneka* (n 164) [53] (Deputy President Lawrence), where the Commission adopted similar reasoning in respect of a teacher whose WWC clearance was suspended.

177 *Mahony v White* (n 173) 228 [24] (Jessup, Tracey and Barker JJ).

178 The provision barring employers from continuing to employ a person without WWC clearance in child-related work.

FWC had not considered this in *White v Mahony* and had determined in *O'Connell* that the employer had a choice to terminate Mr O'Connell without deciding whether the termination mandated by the *Child Protection (WWC) Act (NSW)* was a dismissal under the Fair Work Act.[179] In doing so, the Court left it to the FWC to determine the operation of this provision. Furthermore, the FWC has since narrowed the scope of *O'Connell* by holding that the operational burden to the employer of redeploying a staff member from child-related work for an indeterminate period of time could give rise to a valid reason for dismissal.[180] Thus while *O'Connell* suggests protections exist against automatic dismissal for those issued with an interim bar or with an appeal on foot, retention of employment is constrained by logistical concerns, including the centrality of contact with children to an applicant's position and the length of time a review application takes to be finally resolved. Finally, this jurisprudence arose from matters involving applicants who were engaged in child-related work. Where the work appears not to have been child-related, such as in the case of a counsellor and a cleaner, the Commission has not turned its mind to whether WWC clearance was required as a matter of law, and in any event, the point has not been raised by applicants.[181] Due to the small number of persons refused WWC clearance and the fact most WWCC applications involve those who actually intend to work with children, it is unlikely that judicial authority in respect of an unnecessary application will be imminently forthcoming.

Applicants may face other hurdles which must be overcome in seeking redress for unfair dismissal arising from the failure to hold WWC clearance. First, as a threshold question, where providing WWC clearance (or a police records check) is a condition of prospective employment, the FWC may find that an employment relationship has not crystallised, such that there is no 'termination' if the employer rescinds its offer of employment.[182] Secondly, any 'out of hours' conduct, such as criminal behaviour resulting in the cancellation of WWC clearance, might otherwise lead to termination if an employer can establish that conduct has affected its interests, is incompatible with the employee's duties, or is objectively viewed as likely to cause serious damage to the employer-employee relationship.[183] However, this encompasses only conduct transpiring while the employee is employed. In non-child-related work, it is unlikely that pre-employment conduct leading to a WWC exclusion would create a valid dismissal reason where an employee had previously disclosed the conduct, or was not required to disclose it

179 *Mahony v White* (n 173) 226 [15], 228–9 [26] (Jessup, Tracey and Barker JJ).

180 *Toohey v White* [2017] FWC 4722, [106]–[113] (Deputy President Booth). See also *Lyzette* (n 128), [19] (Commissioner Cambridge), in which the Commission reiterated that an employee is entitled to a presumption of innocence when charged with criminal offences, notwithstanding the suspension or cancellation of the employee's WWC clearance pending the outcome of criminal proceedings.

181 *Sheldon* (n 128); *McGrath* (n 128). See also *RV and Department of Commerce (NSW)* [2009] NSWIRComm 21.

182 *Kelly v Melba Support Services* [2021] FWC 3233, [52] (Deputy President Hamilton).

183 *Rose v Telstra Corporation Ltd* [1998] AIRC 1592 (Ross V-P), cited in *Hunt v Coomealla Health Aboriginal Corporation* [2018] FWC 3743, [21], [24] (Deputy President Colman).

under a spent convictions scheme.[184] Termination due to 'out-of-hours' conduct and any consequential cancellation or refusal of WWC clearance would also be otherwise constrained by the benefit of the doubt to which those charged with criminal offences are entitled and, in the context of WWCCs, the exhaustion of review rights subject to redeployment opportunities (where work is child-related).

Third, some jurisdictions shield employers from any liability for dismissing an employee pursuant to WWC laws, and curtail the powers of tribunals or other decision-makers to impose penalties on employers for doing the same. In NSW, for example, 'the Industrial Relations Commission or any other court or tribunal' has no jurisdiction to 'order the re-instatement or re-employment of a person' barred under NSW's child protection laws from working with children.[185] Such tribunals are also blocked from ordering 'the payment of damages or compensation for any removal from employment of a person from employment prohibited under this Act'.[186] Similarly, in Queensland an employer who does not employ (or continue to employ) a person barred from working with children is not liable for doing so.[187] However, it is not clear whether non-child-related employers would enjoy these protections, given the legislation purports to indemnify only child-related employers.

In summary, a complaint under fair work laws is open to those whose employment is terminated as a result of WWCC policies. In its decisions, the FWC has signalled that a dismissal resulting from a failing to obtain WWC clearance is a 'termination', even where WWC clearance is a legal requirement. It has further suggested employers must avail themselves of all possible redeployment opportunities before terminating employment. But because a criminal record is not a protected attribute under fair work laws, the FWC only has powers in respect of current employees, not to job applicants, and limits complaints to those alleging unfair dismissal.

C *Merits Review of WWC Exclusion Decisions*

Many people who are refused WWC clearance turn to the administrative tribunal in their state or territory,[188] which are empowered under relevant child protection

184 *Duggan v Metropolitan Fire and Emergency Services Board* [2018] FWC 4945, [190]–[191] (Deputy President Masson).

185 *Child Protection (WWC) Act (NSW)* (n 17) s 47(2).

186 Ibid. Where the NSW Industrial Relations Commission has considered the operation of s 47(2), in a case involving a school support worker, it did not turn its mind to how that provision would apply in respect of non-child-related work: *Douglas v Secretary, Department of Education* [2021] NSWIRComm 1044, [43]–[64] (Commissioner Murphy). See also Office of the Children's Guardian (NSW), 'Statutory Review of the Child Protection (Working with Children) Act 2012' (Discussion Paper, 3 May 2017) 14 <https://www.parliament.nsw.gov.au/ladocs/other/10719/Discussion%20Paper%20-%20Children%27s%20Guardian.pdf> ('Statutory Review of the WWC Act').

187 *WWC (Risk Management) Act (Qld)* (n 17) s 356(3).

188 In Tasmania and the NT, the Magistrates Court (Administrative Appeals Division) and Local Court respectively review WWC exclusion decisions. The term 'tribunal' is here used for convenience.

legislation to conduct reviews of such decisions on the merits.[189] Overturning an agency's WWC exclusion decision allows a person to meet their non-child-related employer's WWCC policies, but, for a number of reasons, merits review is an imperfect mechanism for redress.

On the one hand, tribunals are bound to apply the same law as the primary decision-maker. This precludes persons found to pose an unjustifiable risk to children from holding WWC clearance, even though the applicant has no intention to work with children. This hurdle is made all the more insurmountable in 'all-purpose' jurisdictions, where the degree of risk is assessed against the applicant's hypothetical engagement in *any type* of child-related work.[190] Additionally, in Victoria and elsewhere, some individuals are statute-barred from holding WWC clearance because they are presumed to always pose an unjustifiable risk to children. However, on the other hand, in those jurisdictions where the public interest is a mandatory or relevant consideration, applicants found not to be a risk to children may successfully argue that there is a public interest in allowing them to work or study.

1 *The 'Unjustifiable Risk' Threshold*

In reviewing a WWC exclusion decision, a tribunal's paramount consideration is the protection of children from physical and sexual harm. Accordingly, the tribunal's task is to make an assessment of the risk an applicant poses to the safety of children. At first glance, the terminology of this task differs between jurisdictions. In Victoria, the risk must not be 'unjustifiable',[191] while in the ACT, NT, South Australia and Tasmania, the question is whether the applicant poses an 'unacceptable' risk to children's safety.[192] In NSW there must not be 'a real and appreciable risk to the safety of children'.[193] Conversely, the test in Queensland requires a determination of whether the application 'is an exceptional case in which it would not be in the best interests of children' for WWC clearance to be

189 *WWVP Act (ACT)* (n 17) s 63, sch 2; *Child Protection (WWC) Act (NSW)* (n 17) s 27(1); *Care and Protection of Children Act (NT)* (n 17) s 194; *WWC (Risk Management) Act (Qld)* (n 17) s 354; *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 43; *Registration to WWVP Act (Tas)* (n 17) s 53; *Worker Screening Act* (n 1) ss 105–8; *WWC (Criminal Record Checking) Act (WA)* (n 17) s 26.

190 See below n 213.

191 *Worker Screening Act* (n 1) ss 106(6), 107(1), 108(2)(b).

192 *WWVP Act (ACT)* (n 17) s 23(1); *Care and Protection of Children Act (NT)* (n 17) s 189(2); *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 26(1); *Registration to WWVP Act (Tas)* (n 17) s 25.

193 *Child Protection (WWC) Act (NSW)* (n 17) s 5B. See also *R v Commission for Children and Young People* [2002] NSWIRComm 101, [104], [165] (Haylen J), where the NSW Industrial Relations Commission considered 'risk' under s 9 of the former *Child Protection (Prohibited Employment) Act 1998* (NSW) to mean 'an unacceptable risk, a real risk, a likelihood of harm'. This decision was cited favourably by the NSW Court of Appeal in *Commissioner for Children and Young People v FZ* [2011] NSWCA 111, [60] (Young JA).

granted.[194] In Western Australia there must likewise be an assessment of 'the particular or exceptional circumstances of the case'.[195]

Despite these semantic differences, jurisprudence reveals remarkable consistency in the application of this test. The Western Australian tribunal must make a finding about whether there is an 'unacceptable risk' an applicant will physically or sexually harm a child.[196] While the Queensland tribunal will err if it asks itself whether an applicant poses an unacceptable risk to children (rather than the correct question of whether granting WWC clearance would harm the best interests of children),[197] the degree of risk posed by an applicant may be a relevant consideration.[198] The common thread, therefore, is whether any risk posed by an applicant is 'unjustifiable', 'unacceptable', or 'real and appreciable'. Adopting the Victorian terminology, I will refer to the risk assessment model tribunals use as the 'unjustifiable risk' test.

In Victoria, the tribunal on review must consider four matters in making a decision on the application. First, it must assess whether an applicant poses an unjustifiable risk to the safety of children by having regard to the same considerations as the primary decision-maker, including (inter alia) the 'nature and gravity' of the impugned conduct and 'its relevance to child-related work', 'the period of time' since the offending, 'the [age] of the applicant and … any victim at the time' of the conduct, 'the applicant's behaviour since' the offending, 'the sentence imposed' (if any), and whether the conduct has been decriminalised.[199] Secondly, it must be satisfied that the applicant would not pose an unjustifiable risk to children if they were to engage in any type of child-related work. Thirdly, the tribunal must also be satisfied that a reasonable person would allow their child to have direct contact with the applicant while the applicant was engaged in any type of child-related work. These two criteria apply for Category A and B applications; for Category C cases, only one or the other must apply.[200] Finally, the Tribunal may only direct WWC clearance be granted if satisfied it is in the public interest to do so. Indeed, it must refuse the application unless so satisfied, even where it finds an applicant

194 *WWC (Risk Management) Act (Qld)* (n 17) s 221(2).

195 *WWC (Criminal Record Checking) Act (WA)* (n 17) s 12(8).

196 *Grindrod [No 2]* (n 36) 59 [81] (Buss JA, Wheeler JA agreeing at 41 [1]).

197 *Commissioner for Children and Young People and Child Guardian v Eales* [2013] QCATA 303, [5] (Senior Member Endicott), discussing *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291 and *Commissioner for Children and Young People and Child Guardian v Maher* [2004] QCA 492 ('*Maher*'). However, see also *Reardon v Chief Executive Officer, Public Safety Business Agency* [2016] QCAT 61, [50] (Member Travers), in which the tribunal member observed that '[i]n looking at the nature of the offence, sentence imposed and when it occurred the Tribunal is, in effect, assessing the degree and seriousness of any future risk to children if the applicant were to be engaged in child-related employment and the likelihood of any such future risk materialising'.

198 *Commissioner for Children and Young People and Child Guardian v Brittain* [2009] QDC 112, [10]–[11] (McGill J), discussing *Maher* (n 197) [28] (Philippides J, McPherson JA agreeing at [1], Jerrard JA agreeing at [7]).

199 *Worker Screening Act* (n 1) ss 106(6), 107(1), 108(1).

200 Ibid ss 106(7), 107(2), 108(2).

does not pose an unjustifiable risk to children.[201] Public interest considerations are therefore afforded the highest importance in Victoria, and VCAT is permitted broad discretion to determine what is, and is not, in the public interest.[202]

It is clear from this summary of the mandatory considerations to which tribunals must have regard that the scales are already tipped in favour of applicants who do not pose an unjustifiable risk to children's safety. Where satisfied the risk an applicant poses to children is less than 'unjustifiable', a tribunal may direct the relevant agency to issue WWC clearance to an applicant, and, in doing so, allow the applicant to meet their employer's policies. However, because tribunals are bound by their assessment of the risk posed by an applicant to children's safety, it follows that merits review can do little to assist applicants who fail to pass the 'unjustifiable risk' test. Two VCAT cases illustrate the importance for applicants of crossing this threshold, and the consequences of not doing so: *LMB v Secretary, Department of Justice* ('*LMB [No 1]*')[203] and *FRT v Secretary, Department of Justice* ('*FRT*').[204]

In *LMB [No 1]*, the applicant was a vocational nursing teacher whose work occasionally placed him in contact with students under the age of 18.[205] LMB was issued a WWC exclusion because, in 1996, he had sexually assaulted a child while experiencing adverse side effects to prescribed medication.[206] He had applied for WWC clearance on the belief, shared by his employer, that one was required.[207] Having regard to factors including the circumstances of the crime, the length of time that had passed and lack of similar offending, psychological evidence that LMB had matured considerably, and the existence of social supports now which LMB lacked in 1996, the tribunal was satisfied he did not pose a risk to children's

201 Ibid ss 106(8), 107(3), 108(3). Section 107(3), applying to Category B applications, read that '[e]ven if VCAT is satisfied ... that giving a WWC clearance would not pose an unjustifiable risk to the safety of children, VCAT must determine that it is appropriate to refuse to give the clearance unless it is satisfied that it is in the public interest to give the clearance'. Section 108(3), applying to Category C applications, read that '[e]ven if VCAT does not determine … that it would be appropriate to refuse to give a WWC clearance, VCAT must determine that it is appropriate to refuse to give the clearance unless it is satisfied that it is in the public interest to give the clearance'. Section 106(8), applicable to Category A applications, states that '[i]f VCAT is satisfied that giving a WWC clearance would not pose an unjustifiable risk to the safety of children, VCAT may by order direct the Secretary to give the WWC clearance to the applicant if it is satisfied that, in all the circumstances, it is in the public interest to do so'.

202 Drafting materials for both the Working with Children Bill 2005 (Vic) and Worker Screening Bill 2020 (Vic) refer to, but do not define, the 'public interest'. However, it appears public perceptions of the rigor of the WWCC system is not a mandatory consideration: *Secretary, Department of Justice v LMB* [2012] VSCA 143, [21]–[44] (Warren CJ, Osborn JA and Cavanough AJA) ('*LMB [No 2]*').

203 *LMB [No 1]* (n 2).

204 *FRT* (n 62).

205 *LMB [No 1]* (n 2) [7] (Hampel V-P).

206 Ibid [14].

207 Ibid [38].

safety. Accordingly, it directed LMB be granted WWC clearance.[208] Conversely, in *FRT*, the applicant worked as an after-hours school cleaner and had sought WWC clearance believing it was necessary to keep her job.[209] FRT sought a stay of an interim WWC exclusion resulting from several charges of recklessly causing injury to her own child as well as breaches of family violence orders.[210] Her review application hinged on the 'considerable task' of persuading the tribunal that she did not pose an unjustifiable risk to children due to subsequent offending.[211] Her failure to do so likely resulted in the applicant losing her job, which did not fall within the scope of 'child-related work' under Victoria's then *WWC Act*.[212]

The 'unjustifiable risk' test therefore is a significant hurdle for persons who have applied for WWC clearance at the request of their (prospective) employer despite not intending to engage in child-related work. However, this hurdle is made all the more insurmountable in jurisdictions using an 'all-purpose' WWCC scheme.[213] In these jurisdictions, an applicant must satisfy the reviewing tribunal that they would not pose an unjustifiable risk to children if they were to engage in *any type* of child-related work. Victoria is the only state to expressly link the risk assessment to the definition of child-related work in its WWC legislation.[214] Courts and upper tribunals in the other all-purpose jurisdictions — NSW, Queensland, and Western Australia — have, however, imported this standard to the assessment of risk posed by an applicant to children.[215] This all-purpose outcome creates a high bar for applicants with chequered histories, who must satisfy the tribunal that they would not pose a risk to children if they were to engage in *any* child-related work.[216] The definition of 'child-related work' in s 7 of the *Worker Screening Act* is exhaustive, but its scope is broad. It encompasses activities ranging from assisting children to cross the street through to fostering children or providing them with residential or

208 Ibid [30].

209 *FRT* (n 62) [20] (Deputy President Lambrick).

210 Ibid [8]–[15].

211 Ibid [24].

212 Ibid [24], [26].

213 Half of Australian jurisdictions operate an all-purpose WWCC system, meaning that, once granted, WWC clearance permits its holder to engage in *any* child-related work. The ACT, the NT, South Australia, and Tasmania operate conditional or hybrid systems, where WWC clearance can be granted subject to conditions such as the nature of the intended work: *Royal Commission Final Report: Working with Children Checks* (n 3) 101.

214 Victoria is the only all-purpose state to legislate the 'any type of child-related work' standard in assessing the risk an applicant poses. However, in NSW, the tribunal must be satisfied that 'a reasonable person would allow his or her child to have direct contact with the affected person … while the affected person was engaged in any child-related work': *Child Protection (WWC) Act (NSW)* (n 17) s 30(1A)(a).

215 See *BKE v Office of Children's Guardian* [2015] NSWSC 523, [27] (Beech-Jones J); *Commissioner for Children and Young People and Child Guardian v Ram* [2014] QCATA 27, [24] (Senior Member Endicott and Member Browne); *Grindrod [No 2]* (n 36) 61–2 [94] (Buss JA, Wheeler JA agreeing at 41 [1]).

216 See *Worker Screening Act* (n 1) ss 106(7), 107(2), 108(2). See also *HYC v Secretary, Department of Justice and Community Safety* [2019] VCAT 2030, [59]–[60] (Deputy President Lulham).

overnight accommodation or care. An applicant who may not pose any risk to children in one setting might present an unjustifiable risk in another.

2 *Mandatory Exclusion from WWC Clearance for Serious Offenders*

We have seen that the 'unjustifiable risk' test sets a high bar for applicants, who have to argue, often futilely, that they would not pose an unjustifiable risk to children through their engagement in any type of child-related employment. But, as noted above, this test involves an assessment. Qualifiers like 'unjustifiable' and 'unacceptable' leave open the possibility that the risk posed by an applicant — even one with a background of serious offending against children — is acceptable or justifiable. In this context, merits review in Victoria provided an invaluable, if imperfect, means of redress for persons whose serious prior criminal offending led to their application being classed as Category A and therefore subject to mandatory refusal at the primary stage.[217] While the Secretary was obliged to refuse the application, VCAT could set aside the WWC exclusion decision if satisfied the applicant did not pose an unjustifiable risk to children (and if it was in the public interest to do so).[218]

For these most serious offenders, merits review no longer offers a path to redress in Victoria. Changes introduced by the *Children Legislation Amendment Act 2019* (Vic) mean that most Category A applicants have lost the right to seek review of a WWC exclusion decision and accordingly face mandatory exclusion from WWC clearance.[219] The principal exceptions to this mandatory exclusion are where the applicant was a minor at the time of the criminal offending which led to the application being classed as Category A, or where, as a question of fact, the applicant was not charged with, convicted, or found guilty of the relevant offence.[220] The explanatory memorandum to the Children Legislation Amendment Bill 2019 (Vic) provides insight on the rationale for the changes. It notes that the amendments were to give effect to recommendations by the Royal Commission into Child Abuse, namely that stripping Category A applicants of their review rights 'recognises a key finding of the Royal Commission that some individuals will always pose a risk to children'.[221]

It is not clear on what basis the drafters concluded that all Category A applicants will always pose a risk to children. While the Royal Commission into Child Abuse did propose permanently barring people from WWC clearance where they had been convicted of certain serious offences,[222] it also recommended that, with the

217 See *Children Legislation Amendment Act 2019* (Vic) s 25.

218 *Working with Children Act 2005* (Vic) ss 26(1)–(3).

219 *Worker Screening Act* (n 1) s 106(2).

220 Explanatory Memorandum, Children Legislation Amendment Bill 2019 (Vic) 10.

221 Ibid 12.

222 These offences were murdering a child, indecently or sexually assaulting a child (including incest where the victim was a child), or child pornography-related offences, but a permanent bar only

exception of such individuals, '[a]ll state and territory governments should ensure that any person the subject of an adverse WWCC decision can appeal to a body independent of the WWCC screening agency'.[223] Furthermore, offences giving rise to a Category A application are broader than those flagged by the Royal Commission into Child Abuse, and do not necessarily have any proximate relationship to children. By way of example, in addition to serious criminal offending involving children, Category A offences include rape, murder, or an attempt to commit a Category A offence.[224] Finally, and noting the rigorous risk assessment employed by tribunals and the concomitant high threshold applicants must pass, many people, including those who have committed sexual crimes against children, have been found not to pose an unjustifiable risk to children.

Victoria is not alone in stripping serious offenders of review rights. In NSW, persons convicted of a number of serious offences, including murder, are not entitled to seek review of a WWC exclusion decision.[225] Similarly, in South Australia, persons convicted of certain prescribed offences committed while they were an adult are statute-barred from applying for WWC clearance because they are presumed to always pose an unacceptable risk to children.[226] As there is no entitlement to apply, they are taken not to have been refused WWC clearance and so no reviewable decision arises.[227] For persons who only apply for WWC clearance to meet their (non-child-related) employer's WWCC policies, the narrowing scope of redress offered by merits review is troubling. A blanket ban on applications made by serious offenders, irrespective of the risk they may pose, smacks of arbitrariness, especially where child protection agencies are aware the WWCC system is being misused (as discussed in Part V).

3 *An Applicant's Rights to Work and Rehabilitation as Being in the Public Interest*

I have examined some of the shortfalls of merits review as a means of redress for an applicant required by their non-child-related employer to obtain WWC clearance. While the preceding discussion paints a rather bleak picture of merits review in the WWC context, administrative tribunals tasked with reviewing legally unnecessary WWCC applications have been at times creative in seeking to reach a just outcome for the applicant. This is particularly so in jurisdictions where the public interest is a relevant (or mandatory) consideration. Here, tribunals have frequently championed an applicant's right to work as a public interest factor underpinning the grant of WWC clearance, even where the applicant has no

applied where a person was convicted of the offence as an adult and served a full-time custodial sentence: *Royal Commission Final Report: Working with Children Checks* (n 3) 11, 92.

223 Ibid 14.

224 *Worker Screening Act* (n 1) sch 2.

225 *Child Protection (WWC) Act (NSW)* (n 17) s 26, as amended by *Child Protection Legislation Amendment Act 2015* (NSW) sch 2 item 30.

226 *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 26A.

227 Ibid ss 15(1)(c), 43. For the operation of the South Australian legislation vis-a-vis prescribed persons, see *GJC v Department of Human Services* [2020] SACAT 38, [39]–[42] (Senior Member Rugless).

intention to work with children. However, it must be stressed that the public interest is not a consideration in all states and territories,[228] where prejudice or hardship faced by an applicant is irrelevant,[229] and where the best interests of children are the paramount — though not the only — consideration.[230] Conversely, in Victoria, the public interest is arguably afforded the greatest level of importance because even if it finds an applicant does not pose an unjustifiable risk to children, the tribunal must refuse the application unless satisfied it is in the public interest to do otherwise.[231] In any event, public interest considerations will only become determinative when an applicant passes the 'unjustifiable risk' test described above.

Where relevant legislation allows consideration of public interest factors, it is open to administrative tribunals to determine that an applicant's right to work is in the public interest.[232] As a term 'of broad import',[233] the public interest is a nebulous concept which, in the context of WWC legislation, is based on all the circumstances and includes 'a vast range of considerations' that might rationally be considered relevant.[234] These considerations encompass an applicant's ability to find work and for a rehabilitated person to 're-engage fully in the community' when no threat to children is posed,[235] as well as the flow-on factors of social inclusion and financial stability.[236] More explicitly, as the Victorian *Worker Screening Act* contemplates that some people might apply for WWC clearance without intending to work with children, VCAT cannot make an adverse public interest finding simply because an applicant does not work (or intend to work) with children.[237]

228 See, eg, *WWC (Criminal Record Checking) Act (WA)* (n 17) s 12(8).

229 *Chief Executive Officer, Department for Child Protection v Scott [No 2]* (2008) 38 WAR 125, 131 [23] (McLure JA). Cf *Grindrod [No 2]* (n 36). In *Grindrod [No 2]*, Buss JA observed that 'the civil rights of applicants who are issued with a negative notice will be affected adversely and, in some circumstances, those applicants with non-conviction charges may suffer serious or even irretrievable damage to their reputations or a significant diminution in their earning capacity' but that, nonetheless, Western Australia's WWCC legislation 'does not have a punitive or disciplinary purpose': at 57 [76].

230 *Grindrod [No 2]* (n 36) 55–6 [70]–[71] (Buss JA).

231 *Worker Screening Act* (n 1) ss 106(8), 107(3), 108(3). See above n 228.

232 *LMB [No 2]* (n 202) [63], [89] (Warren CJ, Osborn JA and Cavanough AJA). This case has been applied in other jurisdictions: see, eg, *DPH v Children's Guardian* [2019] NSWCATAD 202, [123]–[127] (Senior Member Leal and General Member Foreman) ('*DPH*').

233 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 162 [20] (French CJ, Gummow and Crennan JJ).

234 *LMB [No 2]* (n 202) [28] (Warren CJ, Osborn JA and Cavanough AJA).

235 *NJL v Secretary, Department of Justice and Regulation* [2016] VCAT 749, [60] (Deputy President Lambrick).

236 *HUD v Secretary, Department of Justice* [2013] VCAT 331, [96]–[97] (Jenkins V-P).

237 *Maleckas* (n 79) 39 [89] (Kyrou J). This observation was made in the context of the *WWC Act*. Noting the substantive similarities between the *WWC Act* and the *Worker Screening Act*, his Honour's words would appear to apply equally to the new scheme.

Employer WWCC policies have become a public interest factor a tribunal may consider in deciding an application. Tribunals have accordingly treated applications made by individuals not intending to engage in child-related work as if WWC clearance was, in fact, required. Two VCAT cases decided in 2011 illustrate this approach: *LMB [No 1*] and *PMY v Secretary, Department of Justice* ('*PMY*').[238] In *LMB [No 1]*, discussed above, Hampel V-P distinguished between cases like LMB's and those in which an applicant hoped the grant of WWC clearance would 'somehow clear the slate, clear their name or move on'.[239] Her Honour held that a person should have 'some real purpose' for obtaining WWC clearance and observed that LMB was 'worse off' for having applied unnecessarily.[240] LMB's unusual situation became one of a number of public interest factors supporting his application.[241] In *PMY*, Davis V-P held that an applicant's inability to find work in hospitality due to employers' WWCC policies was 'a matter of concern', but not one which 'should be visited against the applicant in this case' given the public interest in the applicant's rehabilitation and re-entry into the workforce.[242] VCAT's reasoning was approved by the Supreme Court of Victoria on appeal.[243] The Court noted that 'it was not an impermissible consideration' that WWC clearance would assist LMB's rehabilitation and employment prospects.[244] Further, noting the bar on repeat applications following a negative notice and the fact that LMB's employability was sufficiently given a factual basis on the evidence, the Court considered it open for the tribunal to find that LMB's employment was 'more than a hypothetical issue'.[245] More recently, in *Secretary, Department of Justice and Community Safety v EDX*, the Supreme Court of Victoria upheld VCAT's approach in considering, as a public interest factor, the practical necessity of WWC clearance to a naturopath who faced a real risk of losing his employment without it.[246] Such consideration, in the Court's view, 'was anchored in [the applicant's] circumstances' and reflected that a person's 'private interest in pursuing employment was a facet of the public interest in people being able to pursue employment'.[247]

It should not, however, be taken as absolute that an applicant's rehabilitation and gainful employment alone is sufficient to satisfy a tribunal that there is a public interest in supporting the grant of WWC clearance. In *ZRT v Secretary, Department of Justice and Community Safety* ('*ZRT*'), VCAT was not satisfied that the public

238 *PMY* (n 63).

239 *LMB [No 1]* (n 2) [42].

240 Ibid [42], [44].

241 Ibid [44].

242 *PMY* (n 63) [39].

243 *LMB [No 2]* (n 202) [88]–[89] (Warren CJ, Osborn JA and Cavanough AJA).

244 Ibid [63].

245 Ibid [63]. Their Honours made similar observations about PMY: at [89].

246 [2020] VSC 583.

247 Ibid [43] (Richards J).

interest factors supporting the grant of WWC clearance to a maintenance worker at a non-profit alcoholic rehabilitation clinic.[248] The applicant, ZRT, only applied for WWC clearance due to a change in workplace policy requiring *all staff* to hold one.[249] Notwithstanding the likelihood of ZRT losing his job should WWC clearance not be granted, the tribunal considered that the ease at which the applicant could find work elsewhere, his lack of special skills or experience of benefit to children, and the absence of a skills-shortage of maintenance staff generally were factors counting against the grant.[250] The tribunal distinguished the case of the maintenance worker from that of a specialist in a remote medical centre, suggesting that the public interest factors in gainful employment alone are not enough. In the tribunal's view, an applicant must instead offer skills, knowledge, or experience that meet a social need and which benefit society more broadly than the mere rehabilitation of an offender.[251]

WWCC applicants will also only be aided by public interest considerations where tribunals have regard, and give weight, to the motives underpinning an individual's application for WWC clearance. However, tribunals may decline to make a finding about whether an applicant intends to engage in child-related work. The NSW Civil and Administrative Tribunal, for example, has often declared that '[i]t is not for the Tribunal to determine whether the work the applicant seeks to undertake is child related'.[252] Where, as in NSW, public interest factors are a consideration, such an approach potentially restricts the scope for an applicant to mount a successful public interest argument.

4 *Conclusion on Merits Review*

In sum, merits review may see a WWC exclusion decision overturned, allowing an applicant to satisfy their employer's policy, even if WWC clearance is not legally required. But merits review tribunals are bound by the purpose and provisions of WWC legislation, tipping the balance in favour of applicants found not to pose an unjustifiable risk to children. Legislative changes have further reduced tribunals' powers to review WWC exclusion decisions in respect of those with a background of serious criminal offending. However, where tribunals must or may have regard to public interest considerations, applicants have successfully sought WWC clearance on the basis that gainful employment, and the social and financial stability it entails, is in the public interest.

248 *ZRT* (n 65).

249 Ibid [8] (Deputy President Lulham).

250 Ibid [6]–[8], [22], [95].

251 Ibid [22], [95].

252 *BFU v Children's Guardian* [2015] NSWCATAD 6, [19] (Principal Member Higgins). See also *CMR v Children's Guardian* [2017] NSWCATAD 80, [14] (Principal Member Higgins and General Member Foreman); *CPU v Children's Guardian* [2017] NSWCATAD 131, [15] (Principal Member Higgins and Senior Member Davison).

D *Conclusion on Remedies*

In the preceding section I have considered and evaluated three pathways to redress open to a person who has experienced detriment in employment owing to an unnecessary WWCC policy: anti-discrimination complaints, fair work complaints, and merits review of WWC exclusion decisions. I have aimed to provide a comprehensive overview of the hurdles to finding or keeping non-child-related work faced by those who are subject to WWC exclusion decisions. In doing so, I have argued that unnecessary WWCC policies may amount to irrelevant criminal records discrimination and explored recent developments in discrimination and employment law relevant to this paper's enquiry. I have also examined the high thresholds and changing goalposts of merits review in this context. In the concluding section, I turn to policymakers' and tribunals' proposals regarding unnecessary WWCC policies, and make my own proposals about the role child protection agencies should play in preventing misuse of pre-employment screening.

V PROPOSALS

Numerous bodies have acknowledged the problem of blanket WWCC policies for work that is not child-related. The AHRC, for example, has expressed concern that employer reliance on WWCCs has become commonplace. It has noted that 'widespread, "blanket" checking for those not directly involved with children's work diminishes the value of a check, places a strain on resources' and 'may unfairly prevent people from work and volunteer opportunities where they would in fact pose no threat to children'.[253] The former President of the Western Australian State Administrative Tribunal ('WASAT') likewise observed an uptick in employers requiring prospective or longstanding staff to obtain WWC clearance for non-child-related work. The WASAT report considered this a phenomenon 'lead[ing] to harsh and unnecessary consequences,' including, in some cases, 'depriving people of employment, and indeed effectively terminating their employment, in occupations where no unacceptable risk to children exists'.[254] The WASAT report continued to note that

> '[i]n some cases that have come before the Tribunal, applicants have been in employment with the same employer for a number of years without incident, but the new requirement to obtain an assessment notice puts that employment in jeopardy by reason of prior convictions'.[255]

Despite acknowledging the problem, proposals for addressing unnecessary WWCC policies have occasionally been deeply insufficient. In *PMY*, for example, Counsel for the Victorian Secretary unhelpfully suggested that PMY, whose ability to find work in hospitality was constrained by employer WWCC policies, 'should simply not apply for those positions' unnecessarily requiring clearance.[256] In a

253 *Response to Issues Paper 1* (n 11) 8 [21].

254 *WASAT Annual Report 2009–2010* (n 11) 21.

255 Ibid.

256 *PMY* (n 63) [32] (Davis V-P).

similar vein, none of the 23 recommendations made in a review of Western Australia's WWC laws proposed mechanisms to prevent unnecessary applications, even as the issue was discussed at some length.[257]

A *Government and Tribunal Proposals to Address Unnecessary WWCC Policies*

1 *Proposals from State Administrative Tribunals*

State administrative tribunals have not shied away from critiquing the undesirability of blanket employer policies mandating WWC clearance for non-child-related work. As early as 2009, VCAT acknowledged that many organisations 'have taken the view that the rigorous standards applied under the *Working With Children Act* should be enforced regardless of whether their officers are engaged in strictly child-related work (as that term is defined under the Act) or in broader welfare activities'.[258] Tribunals have criticised unnecessary WWCC policies as being a 'general catchall' for organisations wanting more than 'a simple probity check of an intending applicant',[259] a surrogate test of 'good character', and 'a precondition to employment generally, or … an arbitrary barrier' preventing people from being considered for work that is not child-related.[260] Tribunals have further noted the consequent strain on public resources, as well as the stress for applicants of unnecessary proceedings.[261] In doing so, they have proposed relevant government agencies adopt a more proactive role in advising an applicant that they do not need a working with children check prior to issuing an interim WWC exclusion which, once issued, precludes an applicant from withdrawing their application and bars them from re-applying for five years.

In 2019, Hampel V-P of VCAT directly commented on this state of affairs in *QPS v Secretary, Department of Justice and Community Safety*.[262] QPS worked as a snake catcher at Victorian schools and, on occasion, for the Department of Health and Human Services.[263] Vice President Hampel refused QPS's review application as the tribunal was satisfied the nature of his past offending (including the indecent

257 Guest (n 11) 16–19. Western Australian legislation empowers that State's child protection agency to cancel a person's WWC clearance if the agency becomes aware that the person is not engaged in child-related work; however, it is unclear how frequently this power is used: *WWC (Criminal Record Checking) Act (WA)* (n 17) s 21A.

258 *QTR* (n 82) [7] (Harbison V-P). The Tribunal called this 'an entirely appropriate attitude to be adopted' in the circumstances of the case, reasoning that the applicant, a volunteer with the Salvation Army, was engaged in child-related work by virtue of the duties of a religious vocation, despite QTR working in a senior administrative role which did not bring him in contact with children: at [7]–[8].

259 *Kozanoglu v Secretary, Department of Justice and Regulation* [2016] VCAT 1697, [125] (Harbison V-P).

260 *QPS v Secretary, Department of Justice and Community Safety* [2019] VCAT 477, [10] (Hampel V-P) ('*QPS*').

261 *DPH* (n 232) [130] (Senior Member Leal and General Member Foreman).

262 *QPS* (n 260).

263 Ibid [2] (Hampel V-P).

assault of a minor) posed an unjustifiable risk to children.[264] However, Hampel V-P repeated concerns her Honour previously expressed in *LMB [No 1]* about the role the Secretary should play in advising applicants to withdraw their application prior to a decision when the intended work is not child-related.[265] Vice President Hampel stressed that the Secretary, upon becoming aware that an applicant does not intend to engage in child-related work, should advise them that WWC clearance is not required and allow them to withdraw the application prior to a decision being made.[266] Had the Secretary done so, QPS would have been spared the 'stigma' of both the WWC exclusion decision and an unsuccessful review application.[267]

2 *Changing the Definition of 'Child-Related Work'*

The definition of 'child-related work' has been central to proposals for stemming the proliferation of unnecessary WWCCs. The Royal Commission into Child Abuse and WASAT have both highlighted that ambiguity has led to the growing number of applications, with the Royal Commission noting that broad similarities notwithstanding, there is significant divergence between jurisdictions about the definition of child-related work.[268] The Royal Commission recommended greater consistency across Australian jurisdictions, retaining key planks of the Victorian definition, namely that child-related work involve usual contact with children at or as one of the enumerated bodies, services, or places, while proposing a national approach to determining clear and precise definition of the workplaces encompassed.[269]

Similarly, the AHRC has recommended that the definition of child-related work be read through '[c]omprehensive and clear criteria'.[270] Nonetheless, the AHRC proposed placing the onus on employers and employees, rather than the relevant statutory decision-maker, to determine whether they fall within the scope of the definition.[271] While acknowledging that too many people were unnecessarily applying for a WWC clearance, the Western Australian statutory review believed that such blanket requirements were the result of misunderstandings and expressed hope that, with time and education, employers and applicants would come to understand when WWC clearance was needed.[272]

264 Ibid [91].

265 Ibid [96]; *LMB [No 1]* (n 2) [38], [43] (Hampel V-P).

266 *QPS* (n 260) [19] (Hampel V-P).

267 Ibid [24].

268 *Royal Commission Final Report: Working with Children Checks* (n 3) 61–2; *WASAT Annual Report 2009–2010* (n 11) 21.

269 *Royal Commission Final Report: Working with Children Checks* (n 3) 72.

270 *Response to Issues Paper 1* (n 11) 8 [22].

271 Ibid. It must be noted, however, that the AHRC called on employees and employers to determine when WWC clearance is required 'with the agreement of the checking agency'.

272 Guest (n 11) 24.

3 *Other Proposals*

One novel proposal to stem overreliance on WWCCs came from the NSW Children's Guardian, which in 2017 explored the possibility of imposing penalties on employers who required WWC clearance for non-child-related work. However, the Children's Guardian believed a penalties system would see compliance, rather than child protection, becoming a focus of the screening scheme. It also noted that penalties would require employers to be identified, something out of step with NSW's all-purpose WWC clearance.[273] Other proposals floated by the Children's Guardian included introducing a small fee for volunteer checks to deter those who did not need one and making no changes to the existing system.[274]

B *Unnecessary WWCC Policies as Irrelevant Criminal Records Discrimination and the Case for Targeted Reform*

It is clear that many of the proposals discussed above are manifestly insufficient. Education alone, for example, has not turned the tide of unnecessary WWCC policies. Child protection agencies' websites contain detailed information about when WWC clearance is required.[275] Despite the availability of this information, the many cases discussed or cited above demonstrate that hopes education and time would cure the shortfalls of the all-purpose WWCC system have not materialised.

However, some other proposals are more insightful. There is merit to tribunals' suggestion that child protection agencies play an active role in pre-emptively advising whether WWC clearance is required, and this proposal could be readily implemented under existing laws in some jurisdictions, and require only minor amendments in others. In my view, the solution to the issues discussed in this paper is twofold. First, anti-discrimination and fair work protections should be expanded to provide more robust mechanisms of redress for those who experience discrimination in employment owing to an irrelevant criminal record. Secondly, existing WWC laws should be amended to require only those who actually intend to work with children to apply for clearance to do so, while imposing penalties on non-child-related employers who insist their staff obtain WWC clearance.

1 *Unnecessary WWCC Policies as Irrelevant Criminal Records Discrimination*

This paper has argued that there are compelling reasons unnecessary WWCC policies should be viewed as a form of irrelevant criminal records discrimination. However, as discussed in Part IV(A)(4), despite promising developments in this

273 Office of the Children's Guardian (NSW), 'Statutory Review of the WWC Act' (n 186) 15.

274 Ibid.

275 See, eg, 'Who Needs a Check', *Office of the Children's Guardian (NSW)* (Web Page, 19 October 2022) <https://ocg.nsw.gov.au/working-children-check/who-needs-check>; 'When You Need a Check', *Working with Children Check Victoria* (Web Page, 4 May 2021) <https://www.workingwithchildren.vic.gov.au/about-the-check/when-you-need-a-check>; 'Who Needs a WWC Check?', *Government of Western Australia* (Web Page, 7 January 2021) <https://workingwithchildren.wa.gov.au/about/categories-of-child-related-work>.

field, complaints on the basis of irrelevant criminal records discrimination are hampered by a lack of enforcement powers and low compliance by employers with the AHRC's recommendations.

There have been many calls for stronger protections against irrelevant criminal records discrimination.[276] This paper supports those calls but does not propose to cover well-trodden ground by discussing them in any depth. Instead, it hopes the issues discussed in this paper demonstrate how the existing state of the law throws up barriers to individuals precluded from holding WWC clearance and why change needs to happen.

In brief, it is my view that the *Fair Work Act* should be amended to extend general protections to other forms of discrimination Australia has recognised. Doing so would extend those protections to job applicants and create an avenue for redress on the basis of discrimination in employment. The scope of unlawful discrimination under the *AHRC Act* should likewise be expanded to include more attributes than race, sex, disability, or age, and the AHRC's decisions in irrelevant criminal records discrimination cases should be enforceable. In addition, protections against unlawful irrelevant criminal records discrimination as exist in the ACT, NT, and Tasmania should be introduced in all states and territories. Tribunals and anti-discrimination commissions throughout the country ought to be empowered to investigate, conciliate, determine, and resolve complaints alleging discrimination on the basis of an irrelevant criminal record.

In the context of the WWC legislative framework, it must be stressed that such protections would not impact the assessment of risk to the safety of children where an individual proposes to engage in child-related work. Nationwide protections against irrelevant criminal records would operate in tandem with Australia's international obligations vis-a-vis child protection. Accordingly, they would protect those with a criminal record from being barred from their chosen field of work *only where* children are not at risk. In doing so, they would be consistent with the comments of Bell J in *ZZ* that individuals should not be denied freedom of choice in occupation unless doing so would pose a threat to children.[277] In line with the paramount consideration of the *Worker Screening Act*, child protection should be the highest priority, and child-related employers should not be punished for terminating the employment of a person unable to engage in child-related work in the absence of WWC clearance.

However, robust protections against irrelevant criminal records discrimination would allow a person to seek redress from a prospective employer if their job application is refused because they do not hold WWC clearance. The applicant would retain the onus of litigating, but the existing scope of remedies available under state and territory anti-discrimination laws, including to compensation, would be open to the applicant. The experience in Tasmania and the NT, for example, where anti-discrimination laws protect those with an irrelevant criminal

276 See generally Naylor, Patterson and Pittard (n 21) 194; *Young People, Criminal Records* (n 21) 44–6.

277 *ZZ* (n 36) [68].

record, suggests that litigation initiated by the aggrieved person results in more robust outcomes than the recommendations of the AHRC, including enforceable directions and far-reaching powers to make orders including compensation. State and territory anti-discrimination tribunals and commissions already have broad powers to sanction those who discriminate, with appellate rights to superior tribunals or courts on questions of law, procedure, and even fact.

2 *WWC Clearance Should Only be Requested where Legally Required*

Broader protections against irrelevant criminal records discrimination are not enough, however. Where the impetus for the discrimination is a decision of an administrative character, complainants should not carry the burden alone, especially one as heavy as bringing an anti-discrimination complaint. The child protection agencies tasked with administrating WWC legislation also have a role to play. The following three proposals suggest what this role might look like and how the bare bones statutory framework already exists to implement it.

First, WWC clearance should only be issued where an applicant provides evidence that they genuinely intend to engage in child-related work. Before a WWCC is conducted, an applicant should be required to provide details of their proposed employment or volunteer activity. This information should be more substantial than job advertisements indicating WWC clearance is required. Instead, applicants should provide an employment offer or contract setting out the tasks of the intended role. As a preliminary step, the Secretary should assess this evidence and determine whether the intended work is child-related before considering the substantive application. Speculative applications, where an applicant applies without any concrete intention of engaging in child-related work, should be discouraged. Rather, applicants should have 'some real purpose' for obtaining WWC clearance.[278] That purpose should be consistent with the objective of WWC legislation, which is to protect children from harm by screening those who intend to work with them. Simply put, those who do not intend to work with children should not apply for clearance to work with them.

Though child protection agencies have objected to adopting a compliance role, the statutory framework for them to do so already exists in Victoria and elsewhere. In every jurisdiction, child protection agencies are empowered to request applicants to provide such information as considered necessary to make a decision on the application.[279] Some jurisdictions go further. Victorian law, for example, requires WWC clearance holders to notify the Secretary of a change of child-related employer — and to provide the contact details of any new employer — within 21

278 *LMB [No 1]* (n 2) [42] (Hampel V-P).

279 *WWVP Act (ACT)* (n 17) s 19(1); *Child Protection (WWC) Act (NSW)* (n 17) ss 13(2)(b), (3)(c)–(d); *Care and Protection of Children Act (NT)* (n 17) s 188(3); *WWC (Risk Management) Act (Qld)* (n 17) s 190(1)(b); *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 27(1)(c); *Registration to WWVP Act (Tas)* (n 17) s 22(1); *Worker Screening Act* (n 1) ss 54(5), 58(3); *WWC (Criminal Record Checking) Act (WA)* (n 17) s 9(4).

days of such a change.[280] Indeed, it is an offence not to do so. Similar requirements exist in Queensland, South Australia, and NSW.[281] Such powers could be used to request or require evidence that a given employer is actually engaging in child-related work.

Secondly, where work is not child-related, the Secretary should be empowered to dispose of such applications without a WWC exclusion decision being made. For example, applications made without any evidence of a child-related job offer or contract should be deemed invalid or automatically withdrawn. Analogous provisions already exist under the *Worker Screening Act* in respect of exempt persons, who are not required to hold WWC clearance despite engaging work or activities involving contact with children. The Secretary has a discretion to consider a WWCC application lodged by an exempt person and may consider it, but is not required to. If the Secretary declines to consider the application because the person is exempt, the application is taken to have been withdrawn.[282] Deemed withdrawal provisions which apply where an applicant fails to provide information also exist in some jurisdictions. In Western Australia, for example, an application is taken to have been withdrawn relevantly where an applicant fails to respond to a request for information about whether they are engaged in child-related work.[283] By deeming unnecessary WWCC applications as withdrawn or invalid, applicants who otherwise would be subject to WWC exclusion would be spared both the stigma of such a decision as well as the consequences which flow from it.[284]

Finally, penalties should apply to non-child-related employers that require WWC clearance. Information gathered by the Secretary in assessing whether proposed work is child-related should be retained. Where the Secretary becomes aware a non-child-related employer is wilfully or repeatedly requiring staff or prospective staff to obtain WWC clearance, penalties should be imposed. Again, WWC laws in all states and territories already provide for penalties where an employer contravenes the relevant Act by, for example, employing in child-related work a person who does not hold WWC clearance.[285] These same provisions, and the investigative and regulatory framework surrounding them, could be transposed to create an offence for requiring WWC clearance for non-child-related work. In addition to the threat of a fine, WWC legislation should be amended to expose such employers to civil liability as well. Where they exist, provisions indemnifying employers from liability under WWC legislation should be amended so only

280 *Working Screening Act* (n 1) s 73(2).

281 *Child Protection (WWC) Act (NSW)* (n 17) s 36B; *WWC (Risk Management) Act (Qld)* (n 17) s 349; *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 17(1)(c).

282 *Worker Screening Act* (n 1) s 57.

283 *WWC (Criminal Record Checking) Act (WA)* (n 17) s 11(2).

284 *QPS* (n 260) [24] (Hampel V-P).

285 *WWVP Act (ACT)* (n 17) s 14(1); *Child Protection (WWC) Act (NSW)* (n 17) ss 9(1), 9A(1); *Care and Protection of Children Act (NT)* (n 17) s 187(2); *WWC (Risk Management) Act (Qld)* (n 17) ss 175–6; *Child Safety (Prohibited Persons) Act (SA)* (n 17) s 18(1); *Registration to WWVP Act (Tas)* (n 17) s 17(1); *Worker Screening Act* (n 1) s 123(1); *WWC (Criminal Record Checking) Act (WA)* (n 17) s 22(2).

'child-related' employers are protected. The threat of civil liability would serve as an additional deterrent to misusing the WWC scheme and would indeed foster better understanding among employers about when WWC clearance is and is not needed.

VI CONCLUSION

Each year, over a million Australians apply for clearance to engage in child-related work. Many, however, do not intend to work with children. Instead, they apply because their (prospective) employer requires them to, even though the position involves, at most, only incidental contact with children. For many applicants, this is a minor inconvenience. For some, however, whose background of criminal offending precludes the grant of WWC clearance, such unnecessary policies may amount to discrimination on the grounds of an irrelevant criminal record.

This paper has explored the phenomenon, and consequences, of unnecessary WWCC policies. It has detailed the narrowly construed definition of 'child-related work' under relevant child protection laws and examined some factors which might explain non-child-related workplaces' increasing reliance on WWC clearance *where it is not necessary*. It then turned to the remedies available to those whose choice of non-child-related work is restricted by unnecessary WWCC policies, detailing the barriers applicants and complainants face in seeking redress before merits review tribunals, the FWC, and anti-discrimination bodies. It has attempted to provide a comprehensive overview of the benefits and shortfalls of these for persons denied WWC clearance, and the state of the law more generally as it applies to such people. Underpinning this overview is the argument that unnecessary WWCC policies should be framed as a form of irrelevant criminal records discrimination.

This paper has also provided an overview of proposals made by both decision-makers and policymakers to stem the growing problem of unnecessary WWCC policies. It closed by making its own proposals: that protections against irrelevant criminal records discrimination be drastically strengthened Australia-wide; and that agencies administering WWC laws take a more active role in ensuring only people intending to work with children apply for WWC clearance. This paper hopes these proposals will result in consistent and just outcomes for those seeking rehabilitation when child safety is not endangered, and for those wishing to overcome the presumption, articulated by Macnamara V-P in *JGF v Secretary, Department of Justice*, that 'once a person has taken [a] wrong turn, that person can never be redeemed'.[286]

286 *JGF* (n 29) [27].