

# Child Safe Environments

Standards for dealing with information about a person's criminal history as part of a relevant history assessment



Government  
of South Australia  
Department for Education  
and Child Development

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

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## Introduction

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

An important part of establishing and maintaining a safe environment for children is ensuring that the most suitable people are recruited to work and volunteer with children. Organisations should adopt robust screening processes to enable the appointment of suitable staff and volunteers.

Some organisations have a legal obligation to ensure that the screening process for people who occupy, or will occupy, a prescribed position<sup>2</sup> includes an assessment of the person's **relevant history**. This requirement applies to any organisation providing health, welfare, education, sporting or recreational, religious or spiritual, cultural, entertainment, party, child care, disability or residential services wholly or partly for children.

Some sole traders, people working in partnership arrangements, responsible authorities of organisations and volunteers (who are not appointed or engaged by an organisation) also have obligations with respect to their relevant history. These obligations apply to individuals who provide health, welfare, education, sporting or recreational, religious or spiritual, child care, disability, cultural, entertainment, party or residential services wholly or partly for children.

These individuals are prohibited from performing a prescribed function unless they have obtained an assessment of their relevant history from an authorised screening unit or obtained a criminal history report from South Australia Police, the Australian Crime Commission (ACC) or an ACC accredited agency or broker in the last three years.<sup>3</sup>

A 'relevant history' assessment always includes an assessment of the person's disclosable criminal history (if any). However, relevant history can incorporate additional information depending on who is conducting the assessment (refer to paragraphs A and B below).

- A. When an organisation elects to conduct its own assessment of a person's relevant history, this assessment is conducted on the basis of the person's criminal history (if any), any information provided by the person for the purpose of the assessment and these Standards.
- B. Where an assessment is undertaken by an authorised screening unit<sup>4</sup>, this assessment incorporates a broader range of information. In addition to assessing a person's criminal history and any information provided by the person for the assessment, an authorised screening unit may also assess information relating to findings of guilt and charges (including information about interstate convictions and charges) and information lawfully obtained or held for any purpose by a person or body prescribed by regulation (such as child protection information).<sup>5</sup>

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

<sup>2</sup> See Standard 1 for information about prescribed positions. The term 'prescribed position' is defined in section 8B (8) of the *Children's Protection Act 1993*.

<sup>3</sup> Criminal history reports prepared before 1 July 2016 must have been prepared by South Australia Police, CrimTrac or a CrimTrac accredited agency or broker.

<sup>4</sup> Currently the Department for Communities and Social Inclusion Screening Unit

<sup>5</sup> This is a summary only. See Section 8B (8) of the *Children's Protection Act 1993* for the full definition of what constitutes 'relevant history'.

These Standards set out the requirements that all organisations must comply with when handling and assessing information related to a person's criminal history and information provided by a person for the purpose of the assessment. They are issued pursuant to Section 8A (j) of the *Children's Protection Act 1993* by the Chief Executive of the Department for Education and Child Development (DECD).

These Standards do not address the assessment of other types of information that may form part of a person's relevant history and may be assessed by an authorised screening unit. Separate standards have been issued by the Chief Executive, Department for Education and Child Development for this purpose.

The assessment of a person's relevant history can help organisations to determine whether a person may, if appointed to, or engaged to act in, a position, pose a risk of harm to children. This assessment is an important and necessary part of the recruitment process for people who seek to work or volunteer with children. However, the value of such an assessment is limited to identifying individuals whose past conduct and behaviour raises concerns about the risk they may pose to children if appointed to a prescribed position. As such, it must be understood that no level of screening can wholly guard against risks to children and young people. Screening must be implemented alongside a broad range of measures aimed at keeping children safe in organisational settings, including staff selection and recruitment, risk management, child protection policies and ongoing staff supervision and professional development.

Organisations that do not meet their legislative obligation to conduct relevant history assessments for staff and volunteers working with children in prescribed positions may face a maximum penalty of \$10 000.

### **What is 'relevant history?'**

On 1 July 2014 changes to the *Children's Protection Act 1993* commenced. These changes introduced an obligation to assess 'relevant history' rather than the previous obligation to assess 'criminal history'.

Where organisations conduct their own assessment of a person's criminal history, the term 'relevant history' refers to the information that is released as part of a national criminal history record check. This means that organisations may meet their legislative obligations by continuing to assess any information disclosed through a person's national criminal history record check and any information provided by the person for the purpose of the assessment in accordance with the following Standards.

Where assessments are conducted by an authorised screening unit, the term 'relevant history' has a broader meaning and explicitly permits a wider range of information to be taken into account. This includes information relating to findings of guilt and charges, expanded information obtained through the Exchange of criminal history information for people working with children intergovernmental agreement and information held by Government agencies (such as child protection information, and outcomes of disciplinary matters and special investigations conducted by some government departments).

## Role of the Department for Education and Child Development

The Chief Executive, DECD, has the following functions:

- monitoring progress towards child safe environments in the government and non-government sectors and reporting regularly to the Minister for Education and Child Development; and
- developing and issuing Standards to be observed in dealing with information obtained in connection with an assessment of a person's relevant history (whether under section 8B, 8BA or otherwise).

### Context for the Standards

These Standards are based on the fundamental principles that every child has the right to be safe from harm and that the responsibility for keeping children safe from harm rests with the whole community.

The Standards promote good practice and reflect the principles established by the Community and Disability Services Ministers Conference<sup>6</sup> for assessing criminal history information.

The principles include:

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

The Creating safe environments for children – organisations, employees and volunteers - National Framework<sup>7</sup> also emphasises the need to engage with Aboriginal and culturally and linguistically diverse communities when developing and implementing processes at a local level to deal with criminal history information.

In South Australia, government, non-government and local government organisations that obtain information about the criminal history of people who work with or in close proximity to children or their records are required to ensure that this information is dealt with in accordance with these Standards. These Standards aim to be relevant and achievable while also recognising that different organisational contexts will pose challenges at times.<sup>8</sup> For this reason, guidelines are also provided to assist organisations to comply with their obligations under law. These guidelines appear below each standard.

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<sup>6</sup> Community and Disability Services Ministers' Conference *Schedule: An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*, 2007a.

<sup>7</sup> Creating safe environments for children – organisations, employees and volunteers. National Framework (July 2005) Community and Disability Services Minister's Conference.

<sup>8</sup> Tearfund & NSPCC *'Setting the Standard': A common approach to Child Protection for international NGOs*. Tearfund & NSPCC, Middlesex, 2003.

An assessment that incorporates consideration of a person’s criminal history should be conducted for all employees and volunteers working in prescribed positions with children regardless of whether the prospective volunteer or employee is known to the organisation. Exemptions from this requirement do apply in some circumstances.<sup>9</sup>

On its own, the assessment of a person’s criminal history cannot be solely relied on to protect children from people that may harm them. Assessments should be implemented alongside a range of measures directed at keeping children safe from harm.

The assessment of a person’s criminal history must be part of a comprehensive screening process undertaken as part of hiring of staff and volunteers. Organisations must develop their own screening procedures and interview questions as part of their hiring/volunteer placement procedures. Organisations should implement a screening process that incorporates assessment of criminal history alongside interviews, reference and qualification checks and other background checks.<sup>10</sup>

A person may be deemed ‘not suitable’ to work with children without automatically implying that the person poses a risk of harm to children.

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

Further information about establishing child safe environments, including background checking and supervising employees and volunteers who work with children, can be found in the Child safe environments: Principles of good practice published by the Chief Executive of the Department for Education and Child Development.<sup>11</sup>

## Conducting Assessments

The flowchart at Figure 1 provides an overview and reference for organisations of the process for conducting criminal history assessments themselves. For further detail and guidance in the assessment process, organisations should refer to the relevant standards and guidelines.

For organisations that choose to utilise the services of an authorised screening unit, go to <http://screening.dcsi.sa.gov.au/> for information relating to the assessment process.

As of 1 July 2016 CrimTrac merged with the Australian Crime Commission (ACC).

Criminal history reports prepared prior to 1 July 2016 must have been prepared by South Australian Police, CrimTrac or a CrimTrac accredited agency or broker.

Criminal history reports prepared after 1 July 2016 must be prepared by South Australian Police, the ACC or an ACC accredited agency or broker.

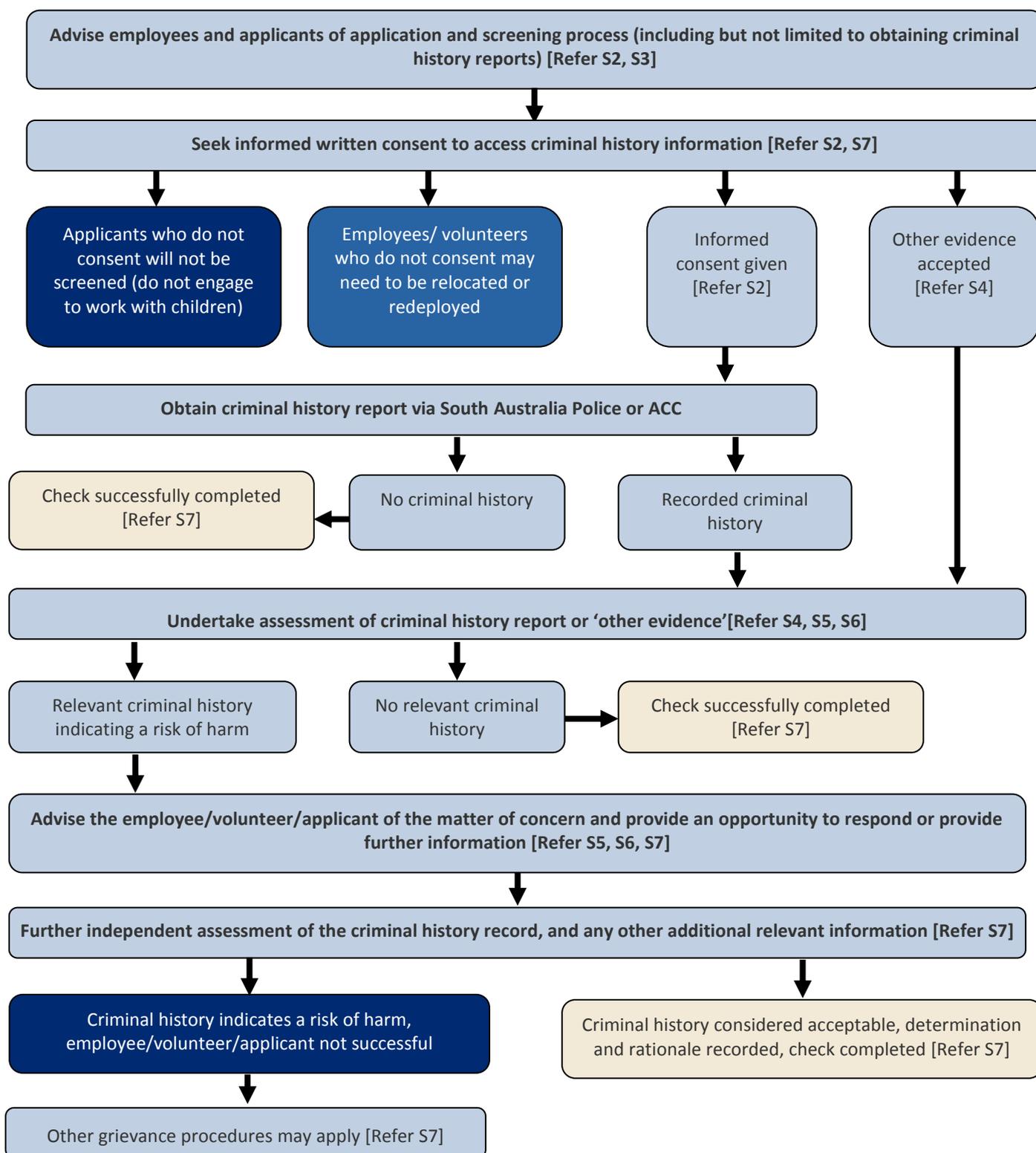
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<sup>9</sup> Refer to Regulation 14 of the Children’s Protection Regulations 2010

<sup>10</sup> Refer to Principle 4 of the Child Safe Environments: Principles of Good Practice. See also Office of Juvenile Justice and Delinquency Prevention Guidelines for the Screening of Persons *working with children, the elderly and individuals with disabilities in need of support: Summary* US Department of Justice: Washington, 1988, p. 2.

<sup>11</sup> Child safe environments: Principles of good practice issued by the Chief Executive, Department for Education and Child Development 2012 available from <https://www.decd.sa.gov.au/child-protection/child-safe-environments>.

**Figure 1: Obtaining and assessing criminal history reports<sup>12</sup>**



<sup>12</sup> The process outlines in this flowchart is only relevant to people occupying or acting in a prescribed position. Where an assessment is undertaken by an authorised screening unit, additional information will be taken into account (if available) in addition to criminal history. The additional information is not included in this flowchart.

## Standard 1: Identifying prescribed functions and prescribed positions

The organisation ensures that an assessment of a person's relevant history is conducted in accordance with the *Children's Protection Regulations 2010* for each person who occupies, or will occupy, a prescribed position in the organisation. Assessments must be conducted prior to each person's appointment and then at least every three years, unless an exemption applies.<sup>13</sup>

The organisation ensures that it accurately identifies all individuals in the organisation who undertake prescribed functions and must undergo an assessment of their relevant history.

The responsible authority (who is a natural person) of an organisation, people who operate a business as a sole trader or in a partnership, and volunteers who are not appointed or engaged by an organisation ensure that they do not perform any prescribed functions unless:

- an assessment of their relevant history has been undertaken in accordance with the *Children's Protection Regulations 2010* within the preceding 3 years; or
- they have obtained a criminal history report prepared by South Australia Police, the ACC or an ACC accredited agency or broker within the preceding 3 years.

### Guidelines

#### Organisations that appoint or engage people to act in prescribed positions

Under the *Children's Protection Act 1993*, certain organisations must ensure that before a person is appointed to, or engaged to act in a prescribed position in the organisation, an assessment of the person's relevant history<sup>14</sup> is undertaken in accordance with the *Children's Protection Regulations 2010*.

The Child Safe Environments: Principles of Good Practice<sup>15</sup> also require that organisations ensure relevant history assessments are conducted for employees, volunteers and contractors working with children in prescribed positions at least every three years.<sup>16</sup>

This requirement applies to all organisations that provide health, welfare, education, sporting or recreational, religious or spiritual, cultural, entertainment, party, child care, disability or residential services wholly or partly to children.

This requirement applies to any person who is, or may be appointed, to a prescribed position within the organisation as an employee, volunteer, contractor, sub-contractor or agent.

#### Sole traders, people working in partnerships, responsible authorities of organisations and volunteers not appointed or engaged by organisations

The Children's Protection Act 1993 prohibits:

- sole traders
- people working in partnerships
- responsible authorities for organisations<sup>17</sup>, and

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<sup>13</sup> Information relating to exempting criteria is set out on page 13 and 14 of these Standards.

<sup>14</sup> On 1 July 2014, the obligation to assess a person's 'criminal history' was amended to refer to a persons' relevant history'.

<sup>15</sup> Issued by the Chief Executive, DECD pursuant to Section 8A of the Children's Protection Act 1993.

<sup>16</sup> Assessments are conducted at a 'point in time' and must be repeated at regular intervals to ensure currency.

- volunteers not appointed or engaged by organisations

who provide health, welfare, education, sporting or recreational, religious or spiritual, child care, cultural, entertainment, party or residential services wholly or partly for children from performing a prescribed function unless they have obtained prescribed evidence relating to their relevant history.

The prescribed evidence is:

- a letter or certificate relating to the outcome of a relevant history assessment conducted by an authorised screening unit within the preceding 3 years; or
- a criminal history report prepared by South Australia Police, the ACC or an ACC accredited agency or broker within the preceding 3 years.

These individuals must carefully consider whether they are likely to perform any of the prescribed functions described below and ensure that, before they perform any of these functions, they have obtained a criminal history report or assessment of their relevant history from an authorised screening unit.

### **What are prescribed positions and prescribed functions?**

A prescribed position is a position that involves one or more prescribed functions.

Prescribed functions are:

- regular contact with children or working in close proximity to children on a regular basis unless that contact or work is directly supervised at all times; or
- supervision or management of persons in positions requiring or involving regular contact with children or working in close proximity to children on a regular basis; or
- access to records that are prescribed by regulation relating to children;<sup>18</sup> or
- functions of a type prescribed by regulation (currently the provision of overnight care or a prescribed passenger transport service).<sup>19</sup>

A prescribed position also includes a position, or a position of a class, in a government organisation designated (by notice in the Government Gazette) by the responsible authority for the government organisation as a prescribed position.

### **Identifying prescribed functions and prescribed positions**

Organisations must identify which people and positions in their organisation require an assessment of their relevant history. An organisation may do this by identifying the prescribed functions undertaken by their organisation and considering whether the people performing these functions are employed by the organisation.<sup>20</sup> In doing so, an organisation should assess the job descriptions and duty statements for all paid and unpaid positions in their organisation.

The table on page 14 can assist organisations to identify which prescribed positions require a relevant history assessment.

When identifying whether a person or position performs prescribed functions, the key consideration should be whether the person's role will ordinarily involve regular contact with children or work in close proximity to children (or their records) rather than their job title or their job description. Consideration should also be

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<sup>17</sup> Where the responsible authority is a natural person

<sup>18</sup> *Children's Protection Regulations 2010* Regulation 10.

<sup>19</sup> *Children's Protection Regulations 2010* Regulation 10A.

<sup>20</sup> Either as an employee, volunteer, contractor, sub-contractor or agent.

given to how the definitions of regular contact, close proximity on a regular basis and prescribed records apply to people and positions within the organisation. These definitions are described below:

### **‘Regular contact’ and ‘close proximity on a regular basis’**

The *Children’s Protection Act 1993* does not specifically define regular contact, regular basis or close proximity. As a result, the terms must be given their ordinary everyday common sense meanings.

Generally speaking, the term **regular contact** implies contact that has a constant or definite pattern, or which recurs at short uniform intervals or on several occasions during short periods of time such as a week. The term ‘close proximity’ implies that a child or children are within sight of the person performing a prescribed function and/or the person has the capacity to engage in dialogue with child/ren.

### **Records prescribed by Regulation**

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

- the administration of the *Children’s Protection Act 1993*, *Family and Community Services Act 1972*, *Young Offenders Act 1993* or *Youth Court Act 1993* or
- an educational or child care service for children or
- a ‘health service’ within the meaning of the *Health Care Act 2008* (SA) or
- a ‘disability service’ within the meaning of the *Disability Services Act 2003* (SA) or
- legal proceedings.

### **Identify whether the position constitutes ‘employment’**

Once the organisation has identified positions that involve working with children in prescribed functions, the organisation will need to determine whether the people who occupy, or will occupy, those positions are ‘employed’ by the organisation.

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

The test set out on page 14 can assist organisations to identify positions where a relevant history assessment must be conducted.

### **Consider whether an exemption applies**

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

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

- a person who is a registered teacher
- a person appointed as a police officer<sup>21</sup>
- a person volunteering to provide a service or activity in their capacity as a parent or guardian of a child who is ordinarily provided with the service or engaged in the activity

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<sup>21</sup> Sworn police officers and registered teachers are already subject to comprehensive criminal history assessments as part of their professional registration requirements/employment arrangements.

- a person volunteering who is less than 18 years of age
- a person working or volunteering for a short-term event or activity that takes place over a period of not more than 10 consecutive days or for no more than 1 day in any month
- a person occupying a position in which all work involving children is undertaken in the physical presence of the child's parents or guardians and in which there is ordinarily no physical contact with the children
- a person who undertakes, or a position that only involves, work that is not for the exclusive benefit of children and is not provided to any child on an individual basis
- an organisation that provides equipment, food or venues for children's parties or events and does not provide any other services
- a position that only involves prescribed functions because children are employed or engaged to work as volunteers by the person occupying the position or their employer (such as a person working alongside a child or supervising an employee who is a child).

It is important to note the *Children's Protection Act 1993* also empowers organisations to conduct a new relevant history assessment for certain people at any time the organisation thinks necessary or desirable for the purpose of establishing or maintaining child safe environments (even if an exemption may otherwise apply). This applies to any person who either:

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

### **Circumstances in which exemptions are not available**

No exemptions are available to people (other than registered teachers and police officers) who work in positions:

- that involve the provision of
  - child care or babysitting for which approval is required under the *Children's Services Act 1985* or the *Education and Early Childhood Services (Registration and Standards) Act 2011*
  - disability services if provided only to children who have a disability,
  - residential or other overnight accommodation for children (other than overnight care by a person who is not ordinarily resident in this State)
- related to the administration of the juvenile justice system or child protection services.

### **Other circumstances in which non-government organisations may require a person to undergo a relevant history assessment**

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

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

## Other circumstances in which a relevant history assessment may be undertaken by an authorised screening unit

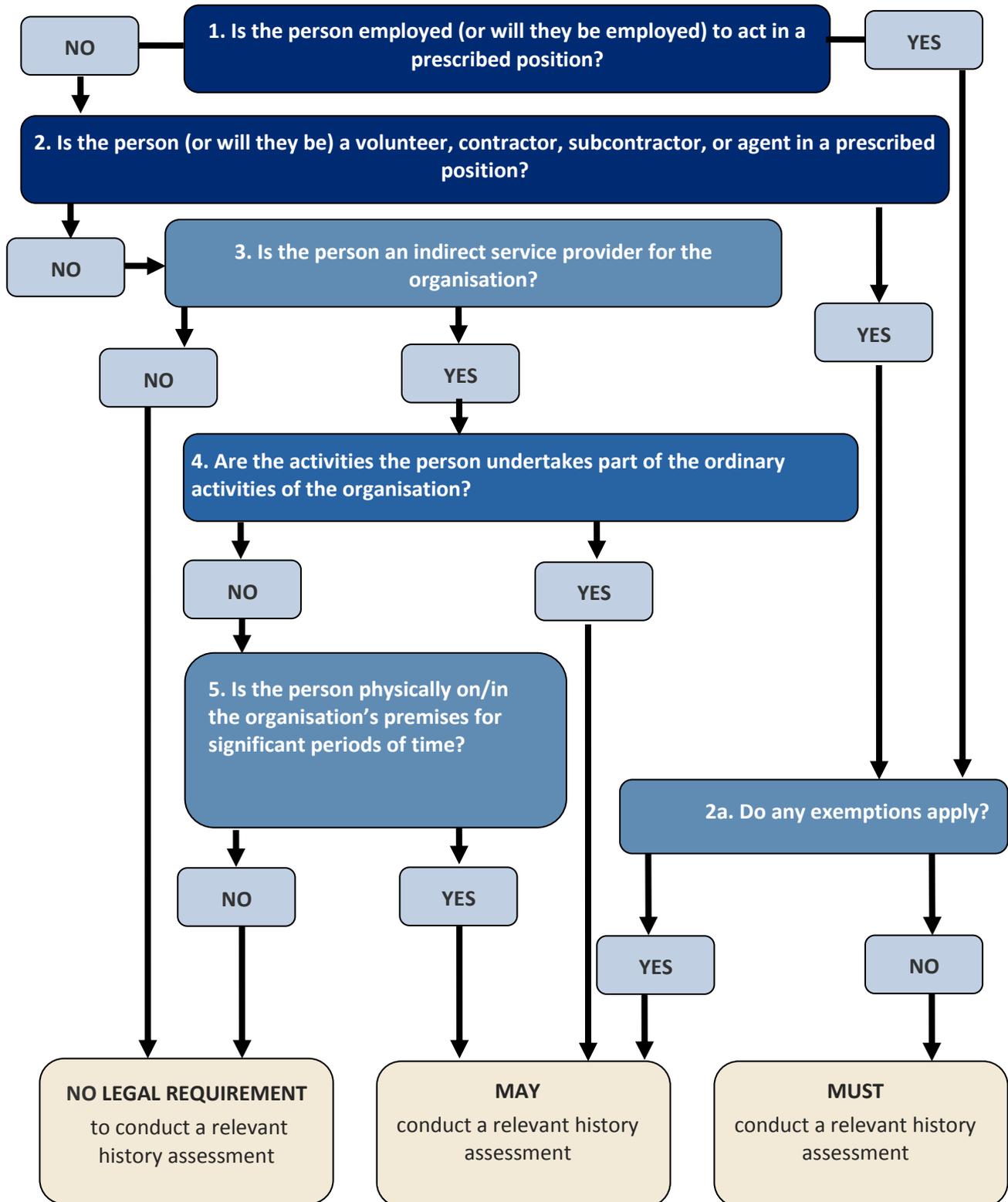
A Government authorised screening unit is also permitted to undertake an assessment of a person's relevant history (where the assessment relates to the care and protection of children)

- for the purpose of assessing the person's suitability for enrolment as an adult in secondary education
- if the assessment is required under a contract entered into with a state government agency or instrumentality
- where a child is undertaking a workplace learning program in connection with an approved learning program (within the meaning of section 75D of the *Education Act 1972*)
- where the person is an indirect service provider for an organisation.

### Summary

- 1.1 The organisation must identify the paid and unpaid positions in their organisation that are prescribed positions.
- 1.2 In doing so, the organisation must consider:
  - 1.2.1 The nature of the duties and responsibilities attached to the position and undertaken by the individual;
  - 1.2.2 The likelihood of the position requiring the incumbent to work regularly with children, or in close proximity to children, particularly without other adults present; and
  - 1.2.3 The likelihood the position will involve access to records of a kind prescribed by regulation.
- 1.3 The organisation must determine whether the people occupying prescribed positions are 'employed' by the organisation (see figure 2).
- 1.4 The organisation may consider whether the organisation, or any persons or positions within the organisation, are exempt from the requirement to undergo a relevant history assessment.
- 1.5 The organisation should assess the level of risk posed by people providing indirect services and consider conducting relevant history assessments where appropriate.
- 1.6 A sole trader, person working in a partnership arrangement, responsible authority for an organisation or volunteer not engaged by an organisation must ensure that they do not perform any prescribed functions unless
  - 1.6.1 an assessment of their relevant history has been undertaken in accordance with the regulations within the preceding 3 years; or
  - 1.6.2 they have obtained a criminal history report prepared by South Australia Police or ACC or an ACC accredited agency or broker within the preceding 3 years.

Figure 2: Test to identify which prescribed positions require a relevant history assessment<sup>22</sup>



<sup>22</sup> Note this test is only to be applied to people occupying or acting in a prescribed position.

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

**If the organisation elects to conduct its own relevant history assessments, it must ensure that it develops a clear policy and/or procedure for obtaining and assessing criminal history information.**

**The policy and/or procedure must be well communicated and readily available to applicants, employees, volunteers, contractors, subcontractors and agents. The organisation must ensure that the informed consent of the person is obtained before a criminal history report is sought.**

**The organisation must ensure the individual is provided with an opportunity provide further information in the event that a criminal history is disclosed.**

**If the organisation chooses to utilise the services of an Authorised Screening Unit to conduct relevant history assessments, this decision must be clearly stated in the organisations policies and procedures and well communicated to applicants, employees, volunteers, contractors, subcontractors and agents.**

### **Guidelines**

Organisations must have clear and accessible policies and/or procedures for obtaining criminal history reports and/or conducting relevant history assessments for any person who will occupy, or is occupying, a prescribed positions as an employee, volunteer, contractor, subcontractor or agent. The policies and procedures should be available both electronically and in hard copy.

Clear and accessible policies and procedures will ensure that everyone in the organisation is aware of the organisation's responsibility to conduct relevant history assessments and the manner in which the assessments will be undertaken. They will help to protect the organisation, staff, volunteers and children accessing the services.

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

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

The policy or procedure should clearly state that a relevant history assessment is required before a person is appointed to, or engaged to act in, a prescribed position (whether as an employee, volunteer, agent, contractor or subcontractor), and then at maximum intervals of 3 years.

Additionally, if the responsible authority for the organisation is a natural person and their role involves performing one or more prescribed functions, the policy should state that the responsible authority is prohibited from performing prescribed functions unless they have obtained prescribed evidence relating to their relevant history within the last 3 years (ie a child related employment screening from an authorised screening unit or a criminal history report from SA Police, the ACC or an ACC accredited agency or broker).

#### **Conducting the assessment**

Organisations should decide the manner in which they will conduct relevant history assessments for relevant employees, volunteers, contractors, subcontractors and agents and clearly state this in their policies.

An organisation may direct the applicant to:

- Apply to an authorised screening unit (the Department for Communities and Social Inclusion (DCSI) Screening Unit) for an assessment of their relevant history (child related employment screening); or
- Provide a criminal history report obtained from South Australia Police, the ACC or an ACC accredited agency or broker, or other acceptable evidence (see Standard 4) to a person (or persons) in the organisation who has delegated authority to assess criminal history information for the purpose of determining whether the person may pose a risk to children if engaged by the organisation.

Where a relevant history assessment is conducted by an authorised screening unit, the screening unit will issue a letter or certificate to the applicant regarding the outcome of the assessment.

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

Organisations should clearly state who is responsible for meeting the cost of obtaining a criminal history report from South Australia Police, the ACC or an ACC accredited agency or broker or a relevant history assessment from an authorised screening unit. Arrangements for meeting the cost of a criminal history report or relevant history assessment are a matter for negotiation between the organisation and the individual, as part of the employment arrangements.

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

For further information about the VOAN scheme, go to <https://www.police.sa.gov.au/services-and-events/volunteer-organisation-authorisation-number>.

### **Informed consent**

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

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

Where an organisation directs a person to apply to an authorised Screening Unit for an assessment of their relevant history, the person must complete and sign an informed consent form which authorises the release of their relevant history (including their criminal history).

The person may be provided with information that explains:

- what a criminal history report is and how it will be obtained
- the purposes for which the criminal history information is being collected (i.e. to assess whether a person may pose a risk to children if engaged to work in a prescribed position)
- to whom information about their criminal history may be disclosed to
- any law which requires that their personal information be collected and the consequences of not complying
- the basis of decision-making (both in general terms and specifically as it may apply to the individual, refer Standard 5), including:
  - offences/convictions that would be considered relevant or present a potential risk of harm to children; and

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

In the event that an employee, volunteer or applicant is not willing to consent to an assessment of their relevant history and does not have other prescribed evidence that is acceptable to the organisation (see Standard 4), the organisation should preclude the individual from working with children in a prescribed position.

### **100 point identity check**

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

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

Further information about conducting a 100 point check is available at <http://www.cbs.sa.gov.au>.

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

If an organisation elects to conduct its own assessments, it should provide detailed information relating to the procedure for obtaining and assessing criminal history reports that accord with these 7 standards. In particular, organisations should ensure that their policies and procedures set out the basis of decision making (see Standard 5) and their commitment to procedural fairness (see Standard 6). If a criminal history report discloses a criminal history which may have a bearing on the outcome of the assessment, the applicant must be provided with an opportunity to provide meaningful input into the decision making process.

Organisations should ensure that they retain appropriate records to demonstrate their compliance with these standards (such as confirmation that a criminal history report was obtained and evidence of the decision-making process). This information must be stored securely and confidentially (see Standard 7). Organisations should not retain a person's criminal history report once an assessment has been made regarding whether the person may, if appointed to, or engaged to act in, a position, pose a risk to the safety of children.

Organisations should refer to attachments 1 and 2 for sample templates that can assist them in meeting this requirement.

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

If an organisation elects to use the service of an authorised screening unit, its procedure for dealing with criminal history information should clearly specify how it will handle any information disclosed by the

Screening Unit during the assessment process. This procedure should include how the information will be stored, who is entitled to have access to this information and how long the information will be retained for.

## Communication

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

Organisations may wish to include in their advertisements, job and person specifications and selection criteria (where applicable) a clear statement that the appointment of a candidate will be subject to a satisfactory assessment of their relevant history and the manner in which this will be undertaken. The material may also state that people with a criminal history will not be automatically barred from applying (unless a particular legal requirement applies).<sup>23</sup>

### Summary

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

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<sup>23</sup> Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*. Commonwealth of Australia: Sydney, 2012, p. 5. Note that it is an offence for registrable offenders to apply to work with children under s.65(1) of the *Child Sex Offenders Registration Act 2006*.

## Standard 3: Assess criminal history in a timely and regular manner

**The organisation ensures that criminal history information is obtained and assessed in a timely manner.**

**Assessments must be conducted before a person is engaged or appointed to act in a prescribed position and then at agency defined intervals up to a maximum validity period of three years.**

**A sole trader, person working in a partnership, responsible authority for an organisation or volunteer (who is not engaged or appointed by an organisation) must ensure that they do not perform any prescribed functions unless they have obtained a criminal history report or assessment of their relevant history within the last 3 years.**

### Guidelines

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

#### New employees

The organisation must ensure that prior to the appointment of each new employee and volunteer to a prescribed position, an assessment of the person's relevant history is conducted. In some cases, it may be acceptable for the organisation to accept other evidence, such as a valid registration document from the South Australian Teacher's Registration Board or a child related employment screening from an authorised screening unit (see Standard 4).

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

Each job applicant should be assessed first on their ability to do the job and then on the relevance of their criminal or other relevant history to the job applied for.<sup>24</sup>

#### Existing employees and volunteers

A criminal history report that comprises part of a person's relevant history summarises an individual's formal criminal history at a point in time. It is therefore important that organisations ensure that relevant history assessments are conducted on a regular basis. In South Australia, the Child Safe Environments: Principles of Good Practice require organisations to conduct relevant history assessments for employees and volunteers working with children at least every three years. However, where an organisation or position provides a service to children that is assessed as high risk, the organisation may prefer to conduct assessments at shorter intervals.

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<sup>24</sup> Ibid, page 22.

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

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

### **Sole traders, people working in partnerships and responsible authorities**

A person who is:

- a sole trader
- working in a partnership arrangement
- the responsible authority for an organisation, or
- a volunteer (who is not engaged or appointed by an organisation)

must ensure that before they perform any prescribed functions:

- an assessment of their relevant history has been undertaken in accordance with the *Children's Protection Regulations 2010* within the preceding 3 years<sup>25</sup>; or
- they have obtained a criminal history report prepared by South Australia Police, the ACC or an ACC accredited agency or broker within the preceding 3 years.

This applies to those providing a health, welfare, education, sporting or recreational, religious or spiritual, child care, cultural, entertainment, party or residential service wholly or partly for children

These individuals must also, upon written request from a parent, guardian or carer of a child in relation to whom the person may perform a prescribed function, produce evidence of their compliance with this requirement. Suitable evidence includes an original copy of the person's criminal history report or a letter or certificate communicating the outcome of the assessment from an authorised screening unit.

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

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

Organisations may wish to consider including a clause in any contracts with external organisations that requires the external organisation to provide evidence that relevant history assessments have been conducted on relevant personnel in accordance with these Standards. Organisations may also wish to specify the manner in which such assessments are to be conducted (ie by the organisation itself or by an authorised screening unit). Organisations should keep a record that relevant history assessments have been conducted for these personnel.

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<sup>25</sup> An assessment of the person's relevant history is undertaken in accordance with the *Children's Protection Regulations 2010* by having an authorised screening unit assess the relevant history of the person and issue a letter or certificate communicating the outcome of that assessment.

## Additional information

A criminal history report and/or assessment is based on an individual's criminal history at a point of time. In addition to conducting an assessment of a person's criminal and/or other relevant history at least every three years, organisations should develop policies and procedures to require employees and volunteers to notify the organisation if they have had a change in their criminal history at any time before the renewal date for their relevant history assessment.

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

### Summary

- 3.1 Organisations must conduct relevant history assessments in a timely and regular manner.
- 3.2 Organisations must ensure that:
  - 3.2.1 A satisfactory relevant history assessment is conducted before a person is appointed to, or engaged to a prescribed position; and
  - 3.2.2 A satisfactory relevant history assessment is conducted for all existing employees (including contractors, sub-contractors and agents) and volunteers occupying prescribed positions at least every three years.
- 3.3 Sole traders, people working in partnership arrangements, responsible authority (who is a natural person) of the organisation or a volunteer not engaged or appointed by an organisation must ensure that before they perform any prescribed functions:
  - 3.3.1 an assessment of their relevant history has been undertaken in accordance with the regulations within the preceding 3 years; or
  - 3.3.2 they have obtained a criminal history report prepared by South Australia Police or ACC or an ACC accredited agency or broker within the preceding 3 years.
- 3.4 Organisations must ensure that their policies and procedures require that relevant history assessments are conducted for all people occupying prescribed positions, both prior to appointment and then at least every three years.
- 3.5 Organisations should maintain appropriate records as evidence that relevant history assessments are conducted in a timely manner.
- 3.6 Organisations may develop policies and procedures that encourage employees and volunteers to notify the organisation if they have had a change in their criminal history at any time before the renewal date for their next relevant history assessment.

## Standard 4: Accepting other evidence

Pursuant to Regulation 6 of the Children’s Protection Regulations 2010, the following types of evidence, obtained within the last three years, are prescribed as evidence of a person’s relevant history that may be accepted by an organisation in order to conduct an assessment of a person’s relevant history pursuant to Section 8B of the Act:

- A certificate or letter obtained from an Authorised Screening Unit authorised pursuant to Regulation 7 of the Children’s Protection Regulations 2010.
- A National Police Certificate (under certain circumstances)
- A valid registration document issued by the Teachers Registration Board of South Australia
- Clearance products provided in other Australian jurisdictions

For those people captured by Section 8BA of the Children’s Protection Act 1993 (ie sole traders, people in partnerships, responsible authorities of relevant organisations and volunteers (who are not appointed or engaged by an organisation)), evidence must consist of either a national police certificate or child related employment screening issued by an authorised screening unit.

In addition to conducting an assessment in accordance with the regulations, if an individual has lived in countries other than Australia (when over 18 years of age) the organisation may consider asking the individual to provide an original or certified copy of their national overseas criminal history record check. If this is not practicable, the organisation should consider asking the individual to sign a Statutory Declaration regarding their criminal history.

### Guidelines

In some cases people may work or volunteer with children in prescribed positions across a number of different organisations. In order to minimise duplication, organisations may decide to accept other ‘prescribed evidence’ when conducting a relevant history assessment. ‘Other evidence’ that may be accepted by an organisation includes a previously obtained criminal history report (in some circumstances) or a letter or certificate relating to a relevant history assessment that has been undertaken by an authorised screening unit within three years of the application date.

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

Organisations that work with, or enter into contracts with, some Government organisations should be aware that only a relevant history assessment conducted by an authorised screening unit will generally be accepted.

If an organisation chooses to accept ‘other prescribed evidence’ in some circumstances, the organisation must ensure that the evidence is compatible with the person’s current position. Factors such as spent convictions schemes and the purpose for which a criminal history report has been sought will influence the criminal history information that is included in a report or assessment. Organisations must ensure that the previous criminal history report or assessment is appropriate to use to assess the potential risk of harm a person may pose if engaged to work with children.

Organisations must ensure that a 100 point identity check is conducted to confirm the identity of the applicant (refer to Standard 2) and that appropriate records are maintained to prove that evidence has been accepted and validated (refer to Standard 7).

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

### **National Police Certificates**

Most people do not have a criminal history. For these individuals, it may be appropriate and sufficient to accept previous reports indicating no recorded criminal history, especially if these criminal history reports have been obtained in the context of working with children. However, organisations should be aware that a criminal history report is a 'point in time' check and must be repeated at regular intervals to ensure currency.

Before accepting a criminal history report obtained for another purpose, the organisation must ensure that the criminal history report does not have a caveat stating that it cannot be used to work with children. Organisations must also ensure that it is current (i.e. obtained within the last 3 years). Organisations should note that the validity period relates to the date on which the report was issued, not the date of the relevant history assessment was conducted.

### **Relevant history assessments conducted by Government and statutory bodies**

#### **Letters, certificates or registration documents issued by an Authorised Screening Unit or Teacher's Registration Board of South Australia.**

Organisations may choose to accept the following kinds of evidence issued by an authorised screening unit or Teacher's Registration Board, issued within the preceding three years:

- a letter or certificate issued by an authorised screening unit
- a valid and current registration document from the South Australian Teacher's Registration Board.

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

Many Australian jurisdictions have screening units established specifically to conduct working with children checks. Organisations may choose to accept a current clearance product conducted in another jurisdiction that was conducted for the purposes of working with children. Information on interstate working with children clearances is available from:

Western Australia:	<a href="http://www.checkwwc.wa.gov.au">http://www.checkwwc.wa.gov.au</a>
Victoria:	<a href="http://www.justice.vic.gov.au/workingwithchildren">http://www.justice.vic.gov.au/workingwithchildren</a>
Queensland:	<a href="http://www.bluecard.qld.gov.au/">http://www.bluecard.qld.gov.au/</a>
Northern Territory:	<a href="http://www.workingwithchildren.nt.gov.au">http://www.workingwithchildren.nt.gov.au</a>
New South Wales	<a href="http://www.kidsguardian.nsw.gov.au">http://www.kidsguardian.nsw.gov.au</a>
Australian Capital Territory	<a href="https://www.accesscanberra.act.gov.au/">https://www.accesscanberra.act.gov.au/</a>
Tasmania	<a href="http://www.justice.tas.gov.au/working_with_children">http://www.justice.tas.gov.au/working_with_children</a>

### **Overseas Criminal History Reports and Statutory Declarations**

If a person has been a citizen or permanent resident of a country other than Australia since turning 18 years of age the organisation may consider asking the person to provide an original or certified copy of their overseas criminal history record check.

If it is not practicable to obtain the overseas criminal history record check, the organisation may consider seeking a statutory declaration. The declaration should include statements from the person indicating they have never been convicted of:

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

The overseas criminal history record check or statutory declaration must be in addition to, and not in lieu of, conducting an assessment of the person's criminal and/or other relevant history as required by the *Children's Protection Act 1993*.

## Summary

- 4.1 An organisation may accept the following types of evidence when assessing relevant history information:
  - 4.1.1 a criminal history report that does not have a caveat stating that it cannot be used as clearance to work with children
  - 4.1.2 a Letter, certificate or registration document issued by an authorised screening unit or Teacher's Registration Board of South Australia.
  - 4.1.3 an interstate clearance for working with children.
- 4.2 Before accepting the above types of evidence, an organisation must:
  - 4.2.1 ensure that the evidence is valid and current (ie obtained no more than 3 years previously) and seek written confirmation of this fact where practicable
  - 4.2.2 confirm the compatibility between the position for which the person's criminal history has previously been assessed and the current position
  - 4.2.3 confirm the identity of the individual using a 100 point identification check (refer Standard 2).
- 4.3 An organisation should specify and publish the conditions of acceptance of criminal and other relevant history information in its policies and procedures.
- 4.4 An organisation must ensure that appropriate records are maintained to prove that the other evidence was accepted and validated.
- 4.5 If a person has been a citizen or permanent resident of a country other than Australia since turning 18 years of age an overseas criminal history record check or statutory declaration should be sought.

## Standard 5: Assessing criminal history reports

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

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

### Guidelines

The *Children's Protection Act 1993* requires that before a person is appointed to, or engaged to work with, children in a prescribed position, an organisation must ensure that an assessment of their relevant history is conducted.

In accordance with the *Child Safe Environments: Principles of Good Practice*, organisations must also conduct assessments for current employees and volunteers at least once every three years.

Organisations (or their agents) may conduct their own assessments by obtaining a criminal history report and assessing any information disclosed in accordance with these Standards and any information provided by the person being assessed. Alternatively, they may apply to an Authorised Screening Unit to conduct an assessment on their behalf.

Where the organisation chooses to use the services of an Authorised Screening Unit for an assessment, the organisation is responsible for making the final decision on whether to employ or retain a person based on the assessed risk.

**It is important that organisations recognise that an assessment of a person's relevant history is only one aspect of the recruitment process for people working with children.**

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

As set out under Standard 2, organisations must have policies and procedures in place that specify the method for conducting assessments and the basis on which decisions are made. Only relevant offences should be taken into account when assessing the potential risk of harm to children posed by the person being assessed. The following guidelines should be applied to ensure that the assessment of a person's criminal history as part of a relevant history assessment is conducted in a transparent and fair manner.

### Assessment of risk of harm to children

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

Where a person does have a criminal history, an organisation must undertake an assessment of the potential harm to children posed by the person being assessed. Harm in the context of child safe environments means

the detrimental impact on the physical, psychological, or emotional safety, wellbeing and development of a child as a result of the actions or inactions of another person.

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

Risk assessment, in a general sense, involves making an assessment of probability regarding a future event. When assessing a person's relevant history, '**risk assessment**' refers to a process of evaluating the information received to reach a decision about the risk of harm a person may pose to children<sup>26</sup> if engaged in a particular position.

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

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

There are specific categories of criminal convictions that present a prima-facie risk of harm to children.<sup>27</sup> It is unlikely that a person will be considered suitable to be employed, contracted, hired, retained, accepted as a volunteer, or allowed to undertake prescribed functions if he or she has been convicted of:

- murder or sexual assault
- violence in relation to a child
- an offence relating to child pornography<sup>28</sup>
- an offence involving child prostitution
- a child abuse offence, for example criminal neglect<sup>29</sup>

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

There are other relevant offences where 'there can be a presumption that there is a presenting risk of harm to children but further assessment is necessary before a decision to exclude a person can be made'.<sup>30</sup> In general, these types of criminal offences include:

- sexually-motivated offences
- violence offences/assault including any form of assault which has resulted in a sentence of imprisonment
- offences relating to cruelty to animals<sup>31</sup>
- any other offences against a child (including drug offences).<sup>32</sup>

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<sup>26</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.5.

<sup>27</sup> Ibid.

<sup>28</sup> e.g. under Division 11A *Criminal Law Consolidation Act 1935* or similar legislative provisions in another State or Territory.

<sup>29</sup> e.g. under Division 1A *Criminal Law Consolidation Act 1935* or similar legislative provisions in another State or Territory.

<sup>30</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.5.

<sup>31</sup> e.g. under the *Prevention of Cruelty to Animals Act 1985* or other relevant legislative provisions in South Australia or another State or Territory.

<sup>32</sup> Community and Disability Services Ministers Conference, 2007a, above n.4, Community and Disability Services Ministers Conference, *Creating Safe Environments for Children – Organisations, Employees and Volunteers National Framework Schedule: Guidelines for Exclusion of Persons from Employment/Volunteering in Child-Related Areas*, 2007;

Other criminal offences may also be relevant, including: dishonesty offences, serious drug-related matters or serious traffic offences.<sup>33</sup> None of these offences will automatically preclude an individual from being engaged to undertake prescribed functions. Further assessment of risk is required to be undertaken on a case-by-case basis when assessing risk of harm to children in organisational settings.<sup>34</sup>

### Assessment of risk of harm

In some cases the connection between the criminal history and the position will be clear enough for the organisation to decide easily on the risk an individual may pose to children if appointed to a prescribed position<sup>35</sup> (such as where a person's criminal history indicates a prima-facie risk of harm to children).

However, in most cases, the organisation will also need to assess the contextual factors surrounding the conviction and relevant situational factors, in order to determine the likely risk of harm to children. This should include any information provided by the applicant for the purpose of the assessment. In undertaking a risk assessment where there are strong factors of concern, decision-makers should err on the side of caution.

### Contextual factors

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

Where relevant, organisations should seek additional information from the individual and/or through South Australia Police relating to any or all of the following factors<sup>36</sup>:

- What is the nature, gravity and circumstances (where known) of the offence or charges and how is this relevant to child-related employment/volunteering?
- How long is it since an alleged offence occurred?
- What is the severity of any penalty imposed by the court? (e.g. did the court elect not to record a conviction where the person entered into and successfully completed a conditional order such as bond or probation, and whether the individual successfully completed the order)
- What was the age of the victim of the offending behaviour and was the offence committed as a juvenile or adult?
- What was the age difference between the person and any victim?
- How serious is the applicant's criminal history based upon all the information available (for example, whether there is a pattern of offending)?
- Have the applicant's circumstances changed since an offence was committed?
- What is the attitude of the applicant to their previous offending behaviour, and what relevant information can be provided by the applicant?

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Department of Health and Aging *Police Certificate Guidelines for Aged Care Providers*. Government of Australia: Canberra, 2006.

<sup>33</sup> e.g. under section 32 of the *Controlled Substances Act 1984* or other relevant legislative provisions in South Australia or another State or Territory.

<sup>34</sup> Where applicable, consideration should also be given to emerging research and professional knowledge. See also Community and Disability Services Ministers Conference, 2007a, above n.4.

<sup>35</sup> Human Rights Commission, above, n 13, pg 41.

<sup>36</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.2

- What were the findings of any assessment reports following attendance at treatment or intervention programs, evidence of rehabilitation, other references, the individual's attitude to the offending behaviour, cultural factors that may be relevant to the offending?
- What were the individual's circumstances at the time of the offences compared to the current circumstances?
- Has the offence been decriminalised in Australia or was it an offence overseas but not in Australia?
- What is the significance of the type of conviction in relation to the duties a person is, or may be, undertaking?
- What is the possibility of an incident occurring if the person continues with, or is employed for, particular duties?
- Has the individual has been satisfactorily employed since the conviction?

### Situational Factors

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

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

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

A risk assessment may also lead to other strategies, in addition to obtaining criminal history reports, being implemented by the organisation in order to mitigate the risks of harm to children.<sup>37</sup> For example, the inherent requirements of some prescribed positions may involve unfettered access to children. These roles may present a higher than usual duty of care of the organisation. Such positions may require the organisation to take additional steps to mitigate the risk of harm to children, such as psychometric testing, supervised contact or random drug testing of staff depending on the specific risk identified. For positions deemed to be high risk, the organisation may consider using the services of an authorised screening unit to ensure that an expanded range of relevant history information is assessed.

### **Burden of Proof**

Nationally it has been agreed that:<sup>38</sup>

- In cases where the criminal history information relevant to the individual suggests a prima facie risk of harm to children it may be appropriate that the individual bears the onus of proving they do not pose such a risk.

Conversely,

- where the criminal history of an individual does not indicate a prima facie risk but where there are other strong indicators of risk that cause concern, it may be appropriate for the decision maker to bear the onus of proving that the individual poses a risk of harm to children.

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

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

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

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

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<sup>37</sup>Department for Education and Child Development, *Child Safe Environments: Principles of Good Practice*, available at <https://www.decd.sa.gov.au/child-protection/child-safe-environments>.

<sup>38</sup>Community and Disability Services Ministers Conference, 2007b, p5.

## Summary

- 5.1 Organisations must ensure that the process of assessment is transparent and that opportunities are provided for individuals to understand the basis upon which criminal history information is assessed.
- 5.2 Organisations must have transparent assessment policies and procedures that include consideration of:
  - 5.2.1 Personal factors of the individual, including the context of the offending and
  - 5.2.2 Situational factors, including the nature of the prescribed functions and the nature and vulnerability of the children receiving the services.
- 5.3 Before completing a risk assessment of an individual (with a criminal history), the organisation must allow the individual the opportunity to provide further information on criminal history information and contextual factors and this information must be taken into account during the assessment.
- 5.4 Where the criminal history information relevant to the individual suggests a prima facie risk of harm to children it may be appropriate that the individual bears the onus of proving they do not pose such a risk.
- 5.5 Where the criminal history of an individual does not indicate a prima facie risk but where there are other strong indicators of risk that cause concern, it may be appropriate for the decision maker to bear the onus of proving that the individual poses a risk of harm to children.
- 5.6 Organisations should maintain written evidence (e.g. minutes of assessment meetings; risk assessment procedures) that indicates consideration of individual cases rather than automated clearances or preclusions (see Standard 7).

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

The organisation ensures that employees, volunteers and applicants are given notice that factors of concern exist that may influence the decision making process. The organisation ensures that employees, volunteers and applicants are given an opportunity to provide input into the decision-making process and respond to factors of concern.

The organisation ensures that information provided by the person for the purpose of assessing relevant history information is taken into account during the assessment and decision making process.

Where applicable, the person must be provided with information regarding internal and external grievance procedures available to them.

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

### Guidelines

Procedural fairness is an important aspect of making a decision about a person's employment.<sup>39</sup> Decisions to not employ an individual due to their criminal history must be fair and equitable, based on the principles of procedural fairness. Ensuring that principles of procedural fairness are followed in the decision making process will help ensure that people are not unfairly excluded from working with children and will promote fair and correct decision-making.

While procedural fairness does not have a single recognised definition, at its core, it requires fair, accessible, transparent and equitable decision-making processes.<sup>40</sup>

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

As observed by the Human Rights and Equal Opportunity Commissioner, it is likely that applicants who have a criminal history will be scrutinised more heavily than other applicants and that *'[e]mployers should be aware that this extra scrutiny may place added pressures on such applicants and employers should do their best to make the process as open as possible.'*<sup>41</sup>

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<sup>39</sup> Human Rights Commission, *Discrimination in Employment on the Basis of Criminal Record: Discussion Paper*, HREOC, December 2004. At: <http://www.humanrights.gov.au/human%5Frights/criminalrecord/discussion.html#toc7.1>

<sup>40</sup> Australian Law Reform Commission, *ALRC 95 Principled Regulation: Federal Civil and Administrative Penalties in Australia*. ALRC, Canberra, 2002. At: <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>.

<sup>41</sup> Ibid.

## Applying procedural fairness to assessing a person's criminal history

The *Children's Protection Regulations 2010* require that an assessment of a person's criminal history must take into account any information provided by the person for the purpose of the assessment.

Organisations must provide people with the opportunity to confirm their identity and the accuracy of any associated criminal history report (or alternatively the right to dispute the contents of a criminal history report).<sup>42</sup> If the criminal history report indicates relevant criminal history that requires further assessment, the organisation must give the applicant, volunteer or employee notice of the information being considered and an opportunity to provide further information. Organisations must genuinely consider information submitted by the individual without bias or prejudice.

Relevant information for a person to include in a submission may include:<sup>43</sup>

- details regarding the conviction or offence
- circumstances surrounding the conviction or offence
- character references surrounding the offence
- how their circumstances may have changed since that time
- any other information or references.

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

A person may be afforded natural justice by being:

- given the opportunity to provide information regarding his or her criminal history, or other information and references, and for this information to be considered
- informed of any proposed decision to be made about them
- provided with the rationale for the proposed decision, and
- given the right to have a full relevant history assessment decision reviewed by an independent body.<sup>44</sup>

In addition, current employees who are deemed ineligible to work with children in a prescribed position, based on their criminal history have a right of reply<sup>45</sup> unless statutory exemptions specify otherwise. In all cases, decision-makers must act fairly and impartially.

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

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

Organisations should endeavour to make the decision-making process accessible to each applicant, having regard to their particular circumstances. For example, where appropriate, people affected by the decision

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<sup>42</sup> If an individual disputes the accuracy of information contained in their criminal history record, they may apply to South Australia Police through the *Freedom of Information Act 1991 (SA)* to correct their record.

<sup>43</sup> Australian Human Rights Commission, 2012, above n.26, p.27.

<sup>44</sup> Community and Disability Services Ministers Conference, 2007a, above, n.4, p.5.

<sup>45</sup> And may have a right to appeal depending on different legislative requirements for different employment sectors.

may wish to be supported or represented by a third party. Wherever possible, when assessing the criminal history of an Aboriginal person, the decision-making process should include an appropriate Aboriginal person.

Any decisions that a South Australian organisation makes may be reviewable by the Human Rights Commission<sup>46</sup> or the South Australian Ombudsman. In addition, organisations should consider establishing internal grievance procedures and advise the applicant of these procedures and the other avenues of appeal available to them.

## Summary

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

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<sup>46</sup> The Commission may make findings and recommendations only. Its decisions are not binding.

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

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

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

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

### Guidelines

#### Confidentiality and management of information

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

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

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

- storage of criminal history information separate from other information about the applicant/employee/volunteer
- the use of secure storage and lockable filing systems
- restricted access to criminal history reports and criminal history information.<sup>47</sup>

Once a decision has been made regarding whether the person may pose a risk to children, an organisation must not make criminal history reports or copies a permanent part of its records.

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

- confirmation that a criminal history report has been obtained

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<sup>47</sup> Refer to the Australian Crime Commission website for more information (<http://www.acic.gov.au>)

- how the criminal history report and any other information gathered during the assessment process affected any associated decision-making processes within the organisation regarding potential risk a person may pose to children
- statutory declarations (where applicable).

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

A sample relevant history assessment form is annexed as appendix 2. The form sets out the information that must be retained by the organisation to comply with these Standards.

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

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

Criminal history information 'is sensitive and rightly subject to privacy considerations and protections'.<sup>48</sup> Clarity concerning how information is dealt with by the organisation 'is an essential component of protecting privacy and civil rights'.<sup>49</sup>

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

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

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

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

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

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

In South Australia, the *Privacy Act 1988* (Cth) applies to and protects the privacy of personal information of Commonwealth public sector employees and some private sector employees.<sup>50</sup> For information on the requirements of the Privacy Act 1988, go to the website of the Commonwealth Office of the Privacy Commissioner: [www.privacy.gov.au/](http://www.privacy.gov.au/).

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

<sup>48</sup> Community and Disability Services Ministers Conference, 2007b, above n.4, p. 3.

<sup>49</sup> Ibid, p. 3.

<sup>50</sup> See: [http://www.privacy.gov.au/publications/IS12\\_01.html](http://www.privacy.gov.au/publications/IS12_01.html) and [http://www.privacy.gov.au/publications/is1\\_01.html](http://www.privacy.gov.au/publications/is1_01.html)

## Summary

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

## Glossary of terms

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

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

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

**Australian Crime Commission (ACC)** is a Commonwealth executive agency that provides police services and accredited agencies with individuals' national criminal history record information subject to relevant Commonwealth, state and territory legislation.

**Authorised Screening Unit** means a screening unit authorised by the Chief Executive, Department for Education and Child Development pursuant to Regulation 7 (1) of the *Children's Protection Regulations 2010*.

**Background Checking** in the context of working with children 'involves obtaining information about potential employees and volunteers, on the basis that the information is deemed relevant to working in a child-related area. The information gathered may include details concerning previous employment and relevant experience; verification of qualifications and professional registration; criminal history information; thorough reference checks; and work history reports'.<sup>51</sup>

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

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

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

**Conviction** means 'the complete orders made by a court after finding an accused person guilty of an offence including both the finding of guilt and the sentence passed as a consequence'.<sup>52</sup>

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

**Criminal History Reports**, also known as National Police Certificates or a National Criminal History Record Checks, are reports from South Australia Police, the ACC or an ACC accredited agency or broker that contains any disclosable criminal history information about an individual. Criminal history reports disclose evidence of whether a person:

- has any recorded convictions or
- has been convicted of an offence or
- has been charged with, and found guilty of, an offence but discharged without conviction or

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<sup>51</sup> Community and Disability Services Ministers Conference, 2007a, above n. 4, p. 2.

<sup>52</sup> Nygh et al, *Concise Australian Legal Dictionary* (2<sup>nd</sup> Edition), Butterworths, Australia, pg 97 Note that the South Australian Supreme Court case *Vreeker v Police* [2004] SASC 90 discusses the meaning of the word 'conviction' and confirms that there is no uniform definition of this term and that it depends on the context in which it is used.

- is the subject of any criminal charge still pending before a court.

Checks of criminal history reveal and record convictions across all jurisdictions in Australia (subject to each jurisdiction's spent convictions scheme). A criminal history report is simply a list of a person's disclosable criminal history within Australia and does not include an assessment or interpretation of the information disclosed.

Criminal history reports may be obtained through South Australia Police, the ACC or an accredited agency or broker.

**CrimTrac** was the Commonwealth executive agency that provided police services and accredited agencies with individuals' national criminal history record information subject to relevant Commonwealth, state and territory legislation, prior to 1 July 2016. This service is now provided by the Australian Crime Commission.

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

**Duty of Care** is a common law concept that refers to the responsibility of employees and volunteers to provide children with an adequate level of protection against harm. It is usually expressed as a duty to take reasonable care to protect children from all reasonably foreseeable risk of harm. The question of what constitutes reasonable care in any given case will be determined objectively by a court and will depend on the individual circumstances of each case. In their relationships with children, employees and volunteers are required to ensure that the physical and emotional welfare of students is safeguarded, and that their own behaviour with children is always regulated by this duty of care.<sup>53</sup>

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

Behaviours may include:

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

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

**Employee** means a person employed for remuneration under a contract of employment.<sup>54</sup>

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

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

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<sup>53</sup> Department for Education and Child Development, Association of Independent Schools of South Australia & Catholic Education SA *Protection Practices for Staff in their Interactions with Students: Guidelines for Schools, Preschools and Out of School Hours Care*. DECD: Adelaide, 2005.

<sup>54</sup> *Fair Work Act 1994 (SA)*.

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

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

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

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

**Merit**<sup>55</sup> in the context of selection processes as:

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

**Natural justice**<sup>56</sup> can be explained using two primary rules:

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

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

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

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

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

- inadequate care and supervision of young children for long periods of time

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<sup>55</sup> *Public Sector Act 2009 (SA)*.

<sup>56</sup> The Commissioner for Public Employment, *Guideline for the South Australian Public Service for the Protection of Merit and Equity*, Adelaide, 2001, p. 3.

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

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

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

An organisation may consist of a single person.

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

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

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

**A prescribed position means'**

- a position in an organisation that requires or involves prescribed functions, as defined by Section 8B (8) of the *Children's Protection Act 1993* (see below) or
- a position, or a position of a class, in a government organisation designated (by notice in the Gazette) by the responsible authority for the government organisation as a prescribed position.

**Prescribed functions** mean:

- regular contact with children that is not directly supervised at all times
- work in close proximity to children on a regular basis that is not directly supervised at all times
- supervision or management of persons who:
  - have regular contact with children or
  - work in close proximity to children on a regular basis
- access to records of a kind prescribed by regulation relating to children (see following definition).
- Functions of a type prescribed by Regulation (as of 1 June 2016, overnight care and prescribed passenger transport services have been prescribed).

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

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

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

**Procedural fairness** does not have a single recognised definition. However, at its core, it requires fair, accessible, transparent and equitable decision-making processes.<sup>57</sup>

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

**Relevant history information** refers to information of a kind defined in section 8B (8) of the *Children's Protection Act 1993*.

**Relevant history assessments** involve assessing information about a person's relevant history for the purpose of determining whether a person may pose a risk of harm to children if appointed to, or engaged to act in, a prescribed position within an organisation. The assessment must be conducted by an organisation or authorised screening unit in accordance with the *Children's Protection Act 1993* and associated regulations.

**Responsible authority** means:

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

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

**Risk assessment** in the context of child protection 'refers to a process of evaluating the information received to reach a decision about the risk of harm a person may pose to children'.<sup>58</sup>

**Risk management** is identifying and assessing all potential sources of harm, and taking steps to decrease the likelihood that harm will occur. The aim is to prevent things from going wrong, limit the amount of harm possible and reduce an organisation's liability if harm does eventuate.<sup>59</sup>

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

**Screening** 'in the context of minimising the risk of harm to children in their dealings with organisations is generally understood to refer to the combined process of background checking, risk assessment and decision-making concerning acceptance/exclusion of persons in areas of child related employment/volunteering'.<sup>60</sup>

**Sexual abuse** is any sexual behaviour imposed on a child. The child concerned is considered to be unable to alter and/or understand the perpetrator's behaviour due to his or her early stage of development and/or

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<sup>57</sup> Australian Law Reform Commission, *ALRC 95 Principled Regulation: Federal Civil and Administrative Penalties in Australia*. ALRC, Canberra, 2002. At: [www.austlii.edu.au/au/other/alc/publications/reports/95/](http://www.austlii.edu.au/au/other/alc/publications/reports/95/).

<sup>58</sup> Community and Disability Services Ministers Conference, 2007a, above n.4, p.2.

<sup>59</sup> Graff, Linda (2003) *Better Safe ... Risk management in Volunteer Programs and Community Service*. Linda Graff and Associates Inc, Ontario.

<sup>60</sup> Community and Disability Services Ministers Conference, 2007b, above n.27, p.6.

powerlessness in the situation. Sexual abuse occurs when someone in a position of power to the child uses her/his power to involve the child in sexual activity. Behaviour can include:

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

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

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

**Suitability** refers to the establishment of confidence that a person has the required experience and the emotional, physical, intellectual and ethical capacity to be engaged to work in a prescribed position within the organisation. It may include, but is not limited to, consideration of curriculum vitae, character references, interview, work observations, testing, family observation, assessment, testimonials, declarations, relevant history screening, any other source of permissible information or as prescribed in legislation.

**Volunteering** means an activity which is of benefit to the community, is done of one's free will and is undertaken without monetary reward.<sup>61</sup>

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<sup>61</sup> *Advancing the Community Together a Partnership between the Volunteer Sector and the South Australian Government*, 2003, p2. At <http://www.ofv.sa.gov.au/act.htm>.

## Appendix 1 – Relevant History Assessment Register

Name	Position	Child related employment screening certificate or Police certificate reference number (or other acceptable evidence)	Date of certificate or other evidence*	Date for renewal**

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

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

## Appendix 2 - Relevant History Assessment Form<sup>62</sup>

Note: This is an example of a template that may be adopted by non-government organisations that elect to conduct their own assessments of relevant history on the basis of the criminal history report (or other acceptable evidence) and any information provided by the applicant for the purpose of the assessment.

<b>Name of person</b>	
<b>Description of position that the person occupies or will occupy</b>	
<p><b>The person provided, or consented to providing, acceptable evidence relating to their criminal history</b></p> <p><i>(For example, an original or certificate copy report of his/her police certificate, child related employment screening or an interstate working with children clearance.) See Standards 1 – 4</i></p>	<p><b>Yes</b> <i>Record type of evidence accepted (e.g. police certificate, child related employment screening from the Authorised Screening Unit, interstate clearance)</i></p> <p><b>No</b> <i>A person who does not provide evidence, or consent to evidence being obtained, is precluded from engagement to work with children in a prescribed position.</i></p>
<b>Date evidence requested</b>	
<b>Date evidence received</b>	
<b>The police certificate or other evidence disclosed no convictions or other information</b>	<i>The assessment is successfully completed and no further action in respect to an assessment is required.</i>
<b>The police certificate or other evidence disclosed no information requiring further assessment</b>	<p><i>Record the nature of the information recorded and the rationale for why it is not relevant to the assessment process.</i></p> <p><i>The assessment is successfully completed and no further action in respect to an assessment is required.</i></p>
<b>The police certificate or other evidence disclosed information requiring further assessment</b>	<i>Ensure there is evidence on file regarding the relevant information.</i>
<b>The police certificate or other evidence disclosed convictions or other information that indicate a prima-facie risk of harm (See Standards 5 and 6)</b>	<i>Ensure there is evidence on file regarding the further assessment that was undertaken and the result of the assessment.</i>
<b>The police certificate or other evidence disclosed convictions or other information that potentially indicate a unsuitability to undertake prescribed functions. (See Standards 5 and 6)</b>	<i>Ensure there is evidence on file regarding the further assessment that was undertaken and the result of the assessment.</i>
<b>The applicant provided information relevant to the assessment process (See Standards 5 and 6)</b>	<i>Ensure there is evidence on file regarding how and when the applicant was provided with an opportunity to submit information, what was provided and how it contributed to the assessment process.</i>

<sup>62</sup> This template draws on resources prepared by the Department of Health and Ageing (Cth) 'Police Certificate Guidelines for Aged Care Providers' 2009, accessed at [health.gov.au/ageing-quality-factsheet-policechecks](http://health.gov.au/ageing-quality-factsheet-policechecks)

