

Improving probity standards for funded organisations

A special report to Parliament under section 31
of the *Ombudsman Act 1974*

December 2010



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Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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NSW Ombudsman

December 2010

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Dear Madam President and Mr Speaker

I submit a report pursuant to s.31 of the *Ombudsman Act 1974*.

I draw your attention to the provisions of s.31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make it public forthwith.

Yours faithfully

Bruce Barbour
Ombudsman



Ombudsman's message

Each year an estimated 3,000 organisations receive almost \$2 billion in funds and subsidies to deliver a range of community-based services on behalf of the NSW government. The government's reliance on non-government organisations to deliver services on its behalf will undoubtedly continue to increase in the future.

With increases in funding and responsibilities comes the need for greater accountability. Non-government organisations must be transparent and accountable not only for the public funds that they receive but for the services that they provide to many of the most vulnerable in our community.

The community reasonably expects that organisations which receive public funds will have adequate safeguards in place in relation to their screening of prospective employees, management committee members and other volunteers.

This report considers the adequacy of probity checking standards that government agencies have put in place for non-government organisations that they fund in the health and human services sectors. In particular, the report focuses on the inconsistency of requirements relating to probity checking of prospective employees, board members and others involved in the planning or delivery of funded services to vulnerable people.

Our work in reviewing the delivery of community services and oversighting employment related child abuse allegations has revealed cases where funded agencies have failed to undertake basic checks of prospective employees who have histories of violence, fraud and substance abuse. Failing to identify and properly address serious probity issues has the potential to not only damage the credibility of organisations but also lead to unidentified and unmanaged risks for agencies and the vulnerable individuals they care for and assist. It is essential that effective and consistent probity checking be introduced in these agencies.

Our review has identified that there are significant inconsistencies in the probity checking requirements imposed by funding agencies across the health and human services sectors. Our findings have been informed by our review of specific cases and extensive discussions with government and non-government agencies in this area. It is clear that there is strong support for a more consistent, efficient and rigorous probity checking system to be adopted. This report makes a range of recommendations designed to assist in meeting this challenge.



Bruce Barbour
Ombudsman

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Chapter 1.

Introduction

In April 2010 we convened a roundtable forum of NSW government agencies with responsibilities for health and human services (funding agencies), peak bodies that represent many of the thousands of non-government organisations (NGOs) funded to deliver services (funded organisations) and oversight and regulatory bodies with responsibilities in this area (see Annexure A for a list of participants). The forum examined the various screening processes that funded services use when checking for information about the probity of prospective employees, board or management committee members and other volunteers involved in the planning or delivery of community services. Through the forum and in subsequent consultations with other stakeholders, we sought advice on:

- current practices to identify individuals with any histories of violence, fraud, substance abuse and other such problems, including the nature of probity checking that government agencies require funded organisations to conduct and the systems in place to promote and monitor compliance, and
- the adequacy of current systems for ensuring that concerns which come to light through employment screening and other probity checks are appropriately assessed and managed.

We prepared a discussion paper in August 2010 summarising issues raised in the forum and inviting feedback about practical options for streamlining the array of current practices. The responses to our discussion paper have greatly assisted in finalising this report.

Our use of the term 'probity checking' in this report refers to a range of formal and informal processes which can be used by funded services to assess the integrity, character and honesty of prospective employees, board or management committee members and other volunteers who are, or are likely to be, engaged by government-funded services.

This report examines current inconsistencies with respect to probity checking practices across the health and human services sectors, and suggests options for developing a more consistent approach to support stronger probity checking in the non-government sector. Its principal focus is on the adequacy of systems for identifying and addressing particular probity risks at the point that individuals enter an organisation or move within an organisation to take on new responsibilities, whether as employees, board members and other volunteers, student placements or contractors. We also consider the issue of periodic rechecking of existing employees and other key appointees.

It is important to note that the kind of probity screening processes discussed in this report should be distinguished from broader strategies to manage risks with government-funded services. In this regard, DHS and other funding agencies are investing in programs to strengthen the general standards of probity and governance within the non-government organisations that they fund.

1.1 Our oversight and review role

Our concerns about the adequacy of probity checking by funded agencies in the health, child and family, disability and housing sectors, stem mainly from our role in monitoring the delivery of community services under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. We also receive notifications from certain government agencies and NGOs that provide services to children regarding 'child abuse' allegations against their employees. Additionally, we have developed a strong focus on funded organisations in Aboriginal communities and the particular issues that affect and shape their delivery of services to Aboriginal people.

This work has highlighted a range of issues relating to the inconsistent manner in which screening is carried out by many non-government community service organisations in relation to their employees, board or management committee members and other volunteers. We have seen cases where services have failed to undertake basic checks of prospective employees who have histories of violence, fraud, substance abuse and other such problems, thereby placing vulnerable clients in potentially unsafe situations and jeopardising the decision-making and governance of the funded service.

Failing to properly address serious probity issues can damage the credibility of an organisation and undermine community willingness to use the services that it provides. These problems can also damage public confidence in the government agencies that fund such services, especially if the government agency is seen to wash its hands of serious probity issues.

More generally, we are of the view that the community expects organisations receiving public funds to have adequate safeguards in place in relation to their screening of prospective employees, management committee members and other volunteers. Thus our principal concerns relate to: the adequacy of current probity checks; whether funded services are taking appropriate steps to identify and properly manage probity related risks; and what practical guidance the government sector is, and should be, providing in this critical area.

1.2 The expansion of the NGO sector

NGOs are increasingly important players in the planning and delivery of health and human services. Each year, an estimated 3,000 organisations receive almost \$2 billion in funds and subsidies to deliver a range of community-based services on behalf of the NSW Government.¹

The government's reliance on NGOs to deliver services on its behalf is particularly evident in the disability sector. In 2009–2010, Ageing, Disability and Home Care paid \$1.32 billion in grants and subsidies to some 900 funded organisations to provide services on its behalf.² This represents a substantial investment in community-based programs. In the mid-1990s about 40 per cent of all government spending on disability services in NSW was directed through NGOs. By 2006, NGOs accounted for 60 per cent of government disability spending. The NGO sector's share continues to grow as *Stronger Together* and other key disability plans highlight the need for community-based programs to greatly expand the availability of flexible, responsive disability services.³

Similarly, *Keep Them Safe*,⁴ the NSW Government's response to the recommendations of the Special Commission of Inquiry into Child Protection Services in NSW, has confirmed that non-government service providers will play a more prominent role in the delivery of frontline services to children, young people and families in NSW.⁵ The Special Commission of Inquiry recommended that, over time, Community Services would become 'a provider of last resort' as NGOs progressively take on greater responsibility for delivering a wider range of community-based services.⁶

The government's shift towards using NGOs to deliver more and more child protection, family support, disability and other community services, presents both opportunities and challenges. *Stronger Together* and *Keep Them Safe* highlight the benefits of established and emerging NGOs taking on significant additional responsibilities, but also acknowledge that their capacity to do so can often be limited. Thus capacity building in the community sector is critical to the success of these reforms. *Keep Them Safe* commits the NSW Government to 'developing stronger partnerships' with NGOs and 'leading workforce and cultural change throughout the community services sector', but cautions that this will take time:

While some NGOs already have the capacity to deliver more services, others will need time and assistance to assume a greater role. Cultural change is needed to encourage better information-sharing and trust between Government and NGOs.⁷

Current NSW Government initiatives to build the capacity of NGOs and develop their professional and volunteer workforces include:

- Specific plans and reviews such as *Stronger Together*, *Keep Them Safe*, the NSW Health NGO review and the reviews of funding for Out of Home Care and Community Service Grants Program services, which all feature commitments to build capacity in the non-government sector.
- The Better Services and Value Plan, a general review of government sector expenditure, including services purchased through NGOs.
- A funding reform project established as part of the service delivery plan for the new Department of Human Services, which aims to deliver a standardised approach to NGO funding, reduce costs and improve service quality.⁸

1 NSW Department of Premier and Cabinet (2009) *NGO Support Stocktake: Developing and supporting human service non-government organisations in NSW: A stocktake of current activities*, p.1.

2 Ageing, Disability and Home Care (16 June 2009), *ADHC Budget 2009–10*, p.2.

3 NSW Government (2006) *Stronger Together: A new direction for disability services in NSW 2006–2016*, p.28.

4 NSW Government (2009) *Keep Them Safe: A shared approach to child wellbeing*.

5 *NGOs and the new system* http://www.keepthemsafe.nsw.gov.au/ngos_and_the_new_system. Accessed on 16 June 2011.

6 Special Commission of Inquiry into Child Protection Services in NSW (2008), *Executive Summary and Recommendations*, page v.

7 NSW Government (2009) *Keep Them Safe: A shared approach to child wellbeing, Action Plan, at III and IV*.

8 KPMG (2010) *Keep Them Safe Discussion Paper – NGO Capacity Building and Workforce Development Plan*, pp.5–6.

Aboriginal organisations have been singled out for particular attention. *Keep Them Safe* and *Stronger Together* both recognise that there are presently too few Aboriginal services and that a partnership approach between agencies and Aboriginal communities is essential to delivering services that are tailored to the specific needs of Aboriginal communities. Much of the added capacity in this area is expected to come from new or expanding NGOs, or established Aboriginal NGOs with limited direct experience in delivering these kinds of services.⁹

The Federal Government has also flagged its interest in strengthening NGOs and making them more accountable, while reducing or removing unnecessary burdens and costs. A recent Productivity Commission review of direct government funding of not-for-profit organisations highlighted the need for better regulation, improved funding arrangements and greater innovation in service delivery.¹⁰

The Disability Council noted that the current shift towards using NGOs to deliver a range of community-based services on behalf of the government coincides with increasing recognition of the rights of people with a disability.

... this topic is of significance and growing importance to people with a disability in the light of the unambiguous trend towards greater autonomy and independent living for people with a disability supported to live in the community by non-government service providers funded by taxpayer funds through government endorsed strategies such as Stronger Together and (in the future) by new arrangements such as the possible national disability care and support scheme.¹¹

Australia also has obligations under international law to act on these risks. In its submission, the Disability Council argued that probity within funded disability services is a fundamental requirement of the United Nations Convention on the Rights of Persons with Disabilities. Article 16 of that convention states:

Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse... [and] take all appropriate measures to prevent all forms of exploitation, violence and abuse...¹²

Article 16 additionally requires steps to be taken to ensure the independent monitoring of facilities and programs for people with disabilities.

1.3 Sharing the responsibility for improving accountability

With increases in funding and responsibility comes the need for greater accountability. The NSW Government emphasises that NGOs must be transparent and accountable for the public funds that they receive and that government has a role in ensuring this money is managed effectively.¹³ At the same time, funding arrangements are becoming more complex. The Productivity Commission's recent report on the *Contribution of the Not-for-Profit Sector* explained that although direct government funding of not-for-profit organisations (NFPs) is 'substantial, widespread and growing', it has changed in character over recent decades from relatively simple grants to more complex purchasing arrangements.¹⁴

Increasingly, the service agreements, contracts and guidelines governing these funding arrangements stipulate certain standards or performance requirements. The nature of these can vary enormously, adding to the costs and complexity of compliance. In many cases, the government's expectations of NGOs are less than clear.

The challenge for government funding agencies is to make NGOs accountable for the services and outcomes that they are funded to deliver, without imposing burdens and costs that may unnecessarily impede their efficiency and effectiveness. This requires commitment by both the NGOs and the government agencies funding them. NGOs must exercise due diligence and not simply expect funding agencies to impose and enforce compliance regimes. At the same time, government agencies should take an active interest in the quality of NGOs' decision-making and program outcomes, but not to the extent that they make decisions for them or 'micro-manage' their affairs.

9 KPMG (2010) *Keep Them Safe Discussion Paper – NGO Capacity Building and Workforce Development Plan*.

10 Productivity Commission (2010) *Contribution of the Not-for-Profit Sector*, page xxxvi. However, it should also be noted that the role of its proposed National Registrar would be confined to Commonwealth regulation and does not include responsibility for setting standards in assessing prospective staff or volunteers.

11 Disability Council NSW submission, 22 September 2011.

12 Article 16, Convention on the Rights of Persons with Disabilities. Australia is a signatory to the convention and has ratified the convention and the optional protocol.

13 NSW Government (2006) *Stronger Together: A new direction for disability services in NSW 2006–2016*, p.30.

14 Productivity Commission (2010) *Contribution of the Not-for-Profit Sector*, p.303.

According to the Productivity Commission, the government sector has primary responsibility for setting minimum standards and establishing the reporting frameworks needed to make these accountability mechanisms work:

The specification of tendering, contracting and reporting requirements has to walk a fine line between ensuring accountability and probity in the use of public funds and providers having sufficient autonomy to design and deliver cost-effective services. Achieving an appropriate balance between accountability and autonomy is easier when there is clarity about the outcomes the government is seeking. This should allow contractual and reporting requirements to be outcome focused rather than process driven.

In the context of human services, an important dimension of this challenge is ensuring that services are of an acceptable minimum standard. Where feasible and appropriate, governments should rely on existing external quality assurance frameworks rather than creating contract-specific accountability and reporting mechanisms. This has the advantage of reducing the complexity of contracts and the associated compliance burden.¹⁵

The NSW Government hopes to increase accountability and reduce complexity by streamlining its regulation and monitoring across different program areas.¹⁶ It also aims to better match its monitoring of NGOs' performance 'to an organisation's size, and funding a risk-management approach to monitoring and reporting'.¹⁷

¹⁵ Productivity Commission (2010) *Contribution of the Not-for-Profit Sector*, p.339.

¹⁶ NSW Department of Premier and Cabinet *Non-government organisations Red Tape Reduction* December 2009, p.5.

¹⁷ NSW Government (2006) *Stronger Together: A new direction for disability services in NSW 2006–2016*, p.30.

Chapter 2.

The current system in NSW

2.1 Introduction

In preparing for our roundtable forum, we asked participating agencies to provide advice on the systems that health and human sector agencies currently use to assess the probity of prospective employees, board members and other volunteers involved in the planning and delivery of government-funded services in NSW. Their responses highlighted significant variations in the measures currently used to identify and address potential probity problems.

A critical factor is the differing standards that each government agency appears to expect of the services that they fund. This is reflected in the guidance that they provide which can vary greatly from one government agency to the next. Even within an individual agency, the approach used by differing programs can vary. Occasionally the differences reflect differing levels of risk. However, in many cases, there is no clear rationale for the disparities and inconsistencies.

One of the few forms of probity checking applied with any degree of consistency are the checks imposed by legislative schemes, such as the working with children check for individuals seeking certain forms of child-related employment and the criminal record checks carried out by the Registrar of the *Aboriginal Land Rights Act 1983* with respect to individuals seeking positions as a board members, chief executive officers or employees of Local Aboriginal Land Councils. Although these checks are consistently carried out, their effectiveness could be improved. As noted below, NSW's working with children check is currently the subject of a statutory review.

Some legislative probity checking requirements are also linked to funding conditions, such as the criminal record checks required by certain programs funded by the Federal Government. For example, screening is required by the Commonwealth's *Aged Care Act 1997*. Similarly, NGOs in the health sector, which receive Commonwealth funding support, generally require pre-employment criminal record checks. The NSW Ageing, Disability and Home Care agency requires non-government aged care providers to conduct criminal record checks of their employees and some volunteers.

The participants at our roundtable forum and other stakeholders agreed that probity checking is, or at least should be, incorporated into funded organisations' selection and recruiting practices. This involves processes to identify the best person for a particular job, or the suitability of a volunteer for a particular role in certain circumstances. In addition to those circumstances requiring working with children checks and criminal record checks, the process can also include previous employment checks (including checks for information about any formal employment proceedings or disciplinary issues), and other types of probity or reference checks.

The following sections draw on the submissions responding to our discussion paper and the information provided by forum participants about the differing screening practices and requirements currently used in NSW. We also consider gaps or limitations with respect to service agreements and other mechanisms that set out the standards expected of NGOs with respect to identifying and addressing probity concerns.

2.2 Working with children check

2.2.1 Limitations of working with children check in NSW

Working with children checks are intended to assess the potential level of risk to children which may be posed by individuals who are engaged in child-related employment. In general terms, working with children checks give consideration to certain information about an individual's:

- criminal convictions
- apprehended violence orders and any other orders, prohibitions or reporting obligations
- criminal charges
- relevant allegations or police investigations, and
- employment or disciplinary proceedings relating to certain allegations and incidents.¹⁸

18 Australian Institute of Family Studies (2010) *Pre-employment screening: Working with child checks and police checks*, Resource sheet No.13.

The NSW scheme considers sexual offences, offences against children and certain offences involving violence – but not any history of serious drug offences or fraud. Records of relevant charges, apprehended violence orders (AVOs) and disciplinary proceedings are included, but only in relation to specified conduct – this means that AVOs related to incidents involving children are checked, but AVOs arising from incidents involving adults are not.

There are two broad types of working with children checks in Australia. States such as Queensland and Victoria have certification or ‘card’ schemes that require individuals seeking to engage in child-related work to apply for certification that permits them to work with children for a specified period. In the case of Queensland’s ‘blue card’ system, certificates are valid for three years.¹⁹ When the card expires, individuals must apply to be screened again. In some states, this certification approach has been adapted to provide a framework for assessing the risks associated with individuals working with vulnerable clients other than children, such as employees or volunteers providing services in the homes of adults with certain disabilities.

By contrast, NSW uses what is sometimes described as ‘point in time’ checks, whereby employers conduct background screening each time individuals (including certain volunteers) enter into child-related positions. The key components of the working with children check in NSW are:

- Preferred applicants for ‘certain child-related employment’ are subject to background checks. Individuals checked include paid employees and contractors in many organisations that provide services to children *and* who have direct unsupervised contact with children.
- The records checked include convictions for certain offences and charges relating to those offences, relevant AVOs, and certain previous employment records or ‘relevant employment proceedings’ that relate to allegations of sexual assault, assault or psychological harm of a child.

The NSW working with children check is currently being reviewed as part of a statutory review of the *Commission for Children and Young People Act 1998*. Our submission to that review noted concerns relating to the working with children check; some of which are relevant to probity checking more generally.²⁰

In our submission, we strongly endorsed the importance of considering ‘Relevant Employment Proceedings’ (REPs) in connection with the working with children screening process. A REP is a finding made by an employer that an employee is, or may have, engaged in a certain type of conduct against, or with, a child. The Employer Guidelines issued by the Commission for Children and Young People lists the relevant conduct as:

- any sexual offence or sexual misconduct, committed against, with or in the presence of a child, including a child pornography offence
- any child-related personal violence offence
- any assault, ill treatment or neglect of a child
- any behaviour that causes psychological harm to a child, or
- an act of violence committed by an employee in the course of employment and in the presence of a child.²¹

However, while we believe that there is strong evidence supporting the need for REPs, we are of the view that the current system for handling completed REPs requires a major overhaul to make it fairer for employees and more useful as an indicator of potential risks to children. REPs were identified in the NSW Auditor-General’s Performance Audit report on the Working with Children Check as being a useful tool in identifying people who may pose a risk to children. By comparison, Queensland’s consideration of REPs is much more restricted and Victoria does not appear to use REPs at all, leaving employers in the dark about potential risks that should be managed.²²

Other limitations to the current working with children check in NSW that should be considered in the development of any future system include the scope of records considered and the lack of review and updating information.

Scope of records considered

There are three types of records considered under the current working with children check scheme in NSW: relevant criminal records, relevant apprehended violence orders (AVOs) and relevant employment proceedings. ‘Relevant criminal records’ and ‘relevant apprehended violence orders’ do not include records relating to a range of acts that may indicate significant risk to children, such as serious drug supply offences and some offences involving violence towards adults. In order to ensure that the records screened are sufficient to identify all behaviour that may constitute a risk to children, we proposed that consideration be given to broadening the range of offences screened.

¹⁹ Commission for Children and Young People and Child Guardian, www.ccypcg.qld.gov.au, accessed 6 July 2010.

²⁰ A full copy of our submission is available on our website at www.ombo.nsw.gov.au.

²¹ Commission for Children and Young People, *Employer Guidelines*, 2010, <https://check.kids.gov.au/employer-guidelines.php>, accessed 12 August 2010.

²² Australian Institute of Family Studies (2010) *Pre-employment screening: Working with child checks and police checks*, Resource sheet No.13.

Lack of review and updating of information

Working with children checks in NSW are only required when an individual commences child-related employment with an agency. If that person later commits a relevant offence or is subject to a relevant AVO, there are no formal mechanisms for alerting the employer or triggering a risk assessment.

A significant benefit of the 'blue card' system in Queensland is that certification is for a limited period (three years) and must be periodically renewed. Also, the Queensland Police Service and the Commission for Children and Young People and Child Guardian (CCYPCG) have information systems which are linked, enabling approved blue card holders to be flagged on the police system. Police have a statutory requirement to inform the CCYPCG of any relevant incidents. The CCYPCG can then notify employers if approval has subsequently been suspended or further action is required, such as a risk assessment. In our view, this kind of arrangement can only work effectively if such a 'flagging' process is in place.

Our submission to the review of the *Commission for Children and Young People Act 1998* recommended that consideration be given to requiring periodic re-certification of a person's suitability to work with children. We also noted that, if a certification process is adopted, consideration should be given to distinguishing between disqualifying offences and other offences which may only impact on eligibility (subject to a risk assessment).

Several responses to our discussion paper also raised the need for periodic re-certification, including that by Carers NSW:

*We believe that the 'point in time' working with children checks that currently exist in NSW are inadequate as relevant information regarding offences that take place during the course of an employee's tenure, may not be available to the employer. The arrangements under the 'blue card' system in Queensland could, in our view, form the basis of a more adequate and consistent system.*²³

Similarly, Women's Health NSW agreed that a system that requires working with children checks only when an individual commences child-related employment with an agency is inadequate. In its view, the benefits of a 'blue card' accreditation system would be a way of addressing this.²⁴

On the other hand, the Children's Guardian warned that completely replacing point in time checking with a system of accreditation should be avoided:

*A move away from point in time checking, as has been mooted, is also likely to prevent some larger government employers accessing combined WWCC and national criminal records for the cost of a WWCC. The Paper might emphasise that the criminal record cost impacts of moving towards a certification WWCC model should not result in any move away from national criminal record checks.*²⁵

Limited purpose of working with children checks

It is important to recognise that the specific purpose of working with children checks is to identify potential risks that individuals engaged in child-related employment may pose to children. This is currently in the Commission for Children and Young People Act and in advice published by the Commission for Children and Young People:

WWCCs do not purport to be exhaustive probity checks. This is made clear in information on WWCCs published by the CCYP and is implicit in s.34(b) of the Act, which provides that background checking includes 'any other relevant probity check relating to the previous employment or other activities of the person'.²⁶

Yet when the working with children check was first introduced to NSW, the Children's Guardian said that some employers regarded it as a sufficient probity check and ceased requiring broader criminal record checks for child-related employment.

The current review of child-related employment screening is likely to expand the scope of matters considered. But even if a wider range of matters is considered, as the purpose of the process is only to identify certain risks to children, the working with children check should not be seen as a substitute for other forms of employment screening.

23 Carers NSW submission, 14 September 2010.

24 Women's Health NSW submission, 2 September 2010.

25 Children's Guardian submission, 15 October 2010.

26 Ibid.

2.2.2 Working with children check as part of a suite of measures

In its initial response to our discussion paper, the Department of Human Services claimed that the working with children check 'provides a sufficient level of criminal record checks for employees to safeguard children and young people'.²⁷ However, it qualified its comments about the adequacy of the working with children check in its subsequent submission:

*... DHS considers that a range of strategies are required rather than a reliance on criminal records checks within the WWCC system as the main vehicle for ensuring probity. The department shares your view that an appropriate risk-based definition of 'child-related employment', broadening the range of offences screened, along with preventative approaches to ensuring employers maintain child safe work environments and effective compliance monitoring, are key elements to be developed within the proposed new accreditation system.*²⁸

In relation to what elements should be incorporated into any broad probity checking requirements and the standards that should be applied, DHS acknowledged the desire on the part of the disability sector to have a process put in place for employment probity which is as consistent as possible with that undertaken by government services working with vulnerable clients.

*The primary elements of such a scheme would include: more rigor in role definition and accountabilities, thorough screening practices (referee checking and interview technique), defined performance management and disciplinary procedures, and portability of a criminal record check, to ensure that one check can be used across multiple employers over a period of time to reduce duplication in process, particularly for casual staff.*²⁹

2.2.3 Creating efficiencies between the working with children check and broader probity checks

DHS's recognition of the need for any new checking processes to reduce duplication and improve efficiency is important. As the working with children check will only ever form part of an overall probity framework, any reforms contemplated in relation to the working with children check as part of the review of the *Commission for Children and Young People Act 1998* must be considered in the context of the need to create an efficient overall probity checking system. Such a system would require that there are well designed synergies between the probity checking processes employed by any accrediting agency under the working with children check, and the processes which employers would carry out in conducting their broader probity checks. In fact, to totally divorce the operation of these two processes would be inefficient and would substantially increase costs.

2.3 Criminal record checks

A common form of probity checking carried out by funded agencies involves full criminal record checks. However, the information provided by participating agencies at our forum indicated that there are significant variations in the use of criminal records checks in NSW, depending on:

- **The role or duties of the individual:** often, but not always, the focus of criminal record checking by NGOs is on whether the position requires an individual to have direct unsupervised access to vulnerable clients. Even employers, who required checks on this basis, often overlooked staff whose unsupervised contact with clients was infrequent or not an obvious feature of their job.
- **The nature of the position:** when screening is in place, checks usually cover paid employees, but screening practices relating to trainees, elected board members or other volunteers can vary widely.
- **The type of service:** criminal record checks are a requirement for NGOs in the aged care and health sectors, but there is no such requirement for organisations providing disability services or services to high-need social housing clients, such as those with mental health disorders, significant cognitive impairment or serious substance abuse problems.
- **The source of funding:** Ageing, Disability and Home Care and NSW Health both indicated that much of the criminal record checking undertaken by NGOs that they deal with is in response to federal funding requirements.
- **Requirements in funding agreements:** contracts, service agreements and guidelines may stipulate screening and risk-management requirements. However, there is no consistent practice across the health and human services sectors in this regard.

²⁷ Department of Human Services submission, 12 October 2010.

²⁸ Department of Human Services submission, 8 November 2010.

²⁹ Department of Human Services submission, 12 October 2010.

2.3.1 Obtaining a criminal record check

CrimTrac, the federal agency that provides National Criminal Record Checks, screens records from all Australian jurisdictions. It provides public sector agencies with the information that they need to comply with statutory screening requirements, and for pre-employment screening or probity checking processes.³⁰

Accredited private sector entities, including non-government organisations, can also request national criminal history checks either for their own direct use or for the use of their clients. Such requests require the explicit written consent of the person being checked, and measures to protect any information provided from improper access or use.³¹

Individuals, such as students or trainees requiring criminal record checks as a pre-requisite for a professional placement in the education or health sectors, may request CrimTrac to provide a National Police Certificate. Individuals can apply via their local police or use a 'broker' accredited by CrimTrac. The certificate lists findings of guilt (with or without conviction), and may include outstanding court matters. 'Spent' convictions are not included.

NSW Health is the only department in the health and human services sectors that still arranges for criminal record checks on behalf of the organisations that it funds.³² If any organisation (government or non-government) conducts more than 500 checks in a three-year period, it may seek accreditation to deal directly with CrimTrac.³³ Smaller organisations must submit their requests via an accredited agency such as NSW BusinessLink.³⁴

NSW Health charges for paid employee checks and for volunteer checks which includes a small administrative fee plus the costs of charges imposed by CrimTrac. BusinessLink, a division of the Department of Human Services, charges \$37 to check paid employees and \$17 for volunteers. The fees cover the costs of charges imposed by CrimTrac.

As part of the review of the working with children check and the *Commission for Children and Young People Act 1998*, consideration is being given to whether it would be preferable for a single central agency to process requests for criminal record checks.

2.3.2 Current checking practices

The extent of criminal record checking requirements placed on funded organisations varies widely.

NSW Health

NSW Health appears to have the most extensive requirements for criminal record checks, requiring that preferred applicants for any of the following positions be subject to screening:

- paid employees
- volunteers
- students (Australian and international) undertaking clinical placements
- visiting practitioners
- overseas applicants seeking employment with NSW Health.

NSW Health may provide advice to funded organisations where any criminal record checks reveal records that may be relevant to an applicant's probity and suitability for the position.

Ageing Disability and Home Care (ADHC)

ADHC expects funded services to conduct criminal record checks when there is a legal requirement to do so.³⁵ ADHC advises that at present the following requirements apply with respect to criminal record checking by funded or licensed organisations:

- **Home and Community Care:** HACC service providers must screen staff to determine their suitability to provide home services to frail, elderly and/or people with a disability. They must also have a policy stipulating that all employees, volunteers and sub-contractors undergo a criminal record check prior to commencing work.³⁶

30 See www.crimtrac.gov.au, accessed 8 July 2010.

31 Ibid.

32 ADHC ceased providing this service in 2009. Note that many departments also conduct criminal record checks because they are approved to conduct working with children checks.

33 http://www.crimtrac.gov.au/criminal_history_checks/500ormoreChecks.html, accessed 8 July 2010.

34 As at 17 May 2010, the other accredited public sector agencies in NSW were the NSW Commission for Children and Young People, Department of Education and Training, Health Administration Corporation, Transport and Infrastructure, Rural Fire Service, and State Emergency Service. www.crimtrac.gov.au, accessed 8 July 2010.

35 ADHC response to Ombudsman information request, 7 April 2010.

36 ADHC (August 2009), *NSW guidelines for Home and Community Care (HACC) funded services*, p.14.

- **Aged care services:** ADHC funded services that also receive federal funding for aged care services are required to ensure that all new staff and volunteers have had a Commonwealth National Police Check within the past three years.
- **Disability funded services:** checks are at the discretion of the service provider. ADHC told us that it includes the following 'example of good practice' in its guidance to disability services on recruitment practices: 'An agency appoints new staff for a probationary period, subject to a satisfactory criminal records check.'³⁷
- **Licensed Residential Services:** criminal record checks are required of licensees and licensed managers at the time of licence application or a change of licensed manager, but are only recommended for all other staff.³⁷

By far the most important determinant as to whether criminal records are required by ADHC is whether the organisation receives federal funding through its aged care or home and community care programs, and is therefore subject to the requirements of the Commonwealth's *Aged Care Act 1997* or the *Home and Community Care Act 1985*. The HACCC guidelines list the avenues for obtaining criminal record checks.

ADHC's expectations are less clear in relation to funded organisations engaged in disability services. The good practice example that ADHC provided to us (cited above) appears to refer to guidelines published in 1998.³⁸ The example is qualified by a note explaining that, at the time of writing, the department was '*looking at employment screening relating to vulnerable adults*'. ADHC is yet to introduce any such screening requirements for disability services. One peak organisation representing clients of disability services told us that ADHC had indicated in 2008 that it intended to publish guidelines addressing probity issues for people working with vulnerable groups, including much needed guidance about how disability services could go about doing this. ADHC's *Guidelines for disability action planning by NSW Government agencies* (2008) do not mention screening for vulnerable adults, either as 'good practice' or in any other context.³⁹

Community Services

Community Services, one of the largest purchasers of services from the non-government sector, does not require funded organisations to conduct any criminal record checks, other than the screening conducted as part of the working with children check.

Service agreements and other contractual documents generally stipulate the need for funded services to comply with 'relevant laws and procedures'. In practice, the 'relevant laws' relating to probity screening are mainly the working with children check required by organisations that provide services to children. There are no such requirements for the many organisations funded by Community Services to assist vulnerable adults, such as SAAP services.

In this context, Community Services' references to 'relevant procedures' generally relate to the terms of its service agreements. In recent years, its standard agreements have tended to include a requirement that the funded organisation uphold the standards set out in the Community Services' *Good Practice Guidelines for DoCS-Funded Services Manual* (2006). While these guidelines include helpful instructions about issues such as fraud prevention, performance management and the steps that should be taken to discipline inappropriate behaviour, there are significant gaps in relation to general probity checking and related risk-management requirements. In particular, there is no general requirement on funded organisations to conduct criminal record checks.

Housing NSW

Housing NSW requires assisted housing providers to meet legislative requirements regarding probity checking. However, it does not – either through its contracts or other mechanisms – specify any other checking requirements for staff or volunteers, including the need to conduct criminal record checks.

In response to our request for information about the standards expected of community housing providers, the Chief Executive of Housing NSW noted:

*Community housing providers have a distinctly different business from the majority of non-government organisations in the social and community services sector in NSW... The providers undertake the tenancy and property management for the housing and the rental income covers the costs of management. As such, community housing providers are not an outsourced provider of a social or community service.*⁴⁰

³⁷ ADHC response to Ombudsman information request, 7 April 2010. It should be noted that the Youth and Community Services Regulation 2005 requires a criminal record check authorisation form to be completed and signed by each staff person in relation to new licence applications. There does not appear to be any requirement on licensees to conduct criminal record checks of staff they employ after ADHC has awarded the relevant licence.

³⁸ ADHC (1998), *Standards in Action – Practice Requirements and Guidelines for Services Funded Under the Disability Services Act*.

³⁹ ADHC (2008), *Guidelines for disability action planning by NSW Government agencies*.

⁴⁰ Housing NSW Chief Executive, Mike Allen, letter dated 31 March 2010.

While the services offered by community housing organisations are different from other 'outsourced' social and community service providers, it is important to recognise the particular vulnerabilities of social housing clients. Priority must be given to individuals and families with the greatest needs. Increasingly, community housing providers have programs to target and assist tenants who are dealing with the effects of mental illness, substance abuse, domestic violence issues or other problems.⁴¹ While community housing providers may enter into agreements with other service providers to address the support needs of clients with particular vulnerabilities, from time to time staff employed by community service providers will visit clients in their homes. Therefore, while tenancy and property management are a focus for community housing providers, there is the potential for staff employed by community housing providers to have unsupervised contact with particularly vulnerable tenants.

The Registrar of Community Housing, a separate and independent statutory office reporting to the Minister for Housing, regulates community housing organisations. The framework for community housing, introduced in 2009,⁴² uses a regulatory code to prescribe the standard requirements that registered community housing providers must comply with.

The DHS submission explained that Part 6 of the Regulatory Code requires registered community housing providers to maintain high standards of probity. In this context, standards of probity involve community housing providers meeting three broad performance outcomes:

- the prevention, detection, and response to fraud, corruption and criminal conduct
- use of a code of conduct for its governing body, employees and volunteers, and
- notification to the Registrar of any incident relating to its operations that damages or may damage the reputation of the community housing sector.⁴³

The Regulatory Code sets requirements to meet key outcomes for the delivery of community housing services using a risk-based approach, specifically:

- limiting the application of the regulation to activities that represent a significant risk and which cannot be managed cost-effectively through other regulatory mechanisms, and
- focusing only on activities that relate to the community housing business of an organisation.⁴⁴

The registrar's *Application and Evidence Guidelines* provide advice on how community housing providers can demonstrate compliance with the Regulatory Code of the Housing Regulation 2009. In particular, the guidelines provide advice to the community housing sector on the performance requirements and evidence in relation to Part 5 (Sound Governance) of the Regulatory Code.

According to DHS, 'where the Registrar is concerned that a provider may not be meeting the probity outcomes required, they may take steps to ensure that this situation is remedied, including, ultimately, by deregistering the provider. Upon deregistration Housing NSW is required to withdraw its assistance'.⁴⁵ The Registrar may also issue Guidance Notes to address any sector-wide concerns.

Although the current regulatory code has a focus on standards of probity and sound governance generally, there are no specific requirements in relation to employment screening.

We sought advice from DHS about how the new compliance framework being developed would ensure that compliance monitoring activities of registered community housing providers would be adequate. In response, the DHS qualified its initial advice with some important caveats. It acknowledged that:

*The Regulatory Code does not specifically include community housing providers' human resource management and recruitment/election practices.*⁴⁶

In relation to the mechanisms for promoting compliance:

*DHS acknowledges that this regime focuses mainly on probity at the organisational rather than individual level.*⁴⁷

As such, the new regime does not yet adequately address the need to assess potential risks posed by individuals who have significant and unsupervised contact with vulnerable clients, or who have financial or other significant responsibilities necessitating a high level of probity.

41 In 2008–09, 71 per cent of new community housing tenancies in NSW were allocated to households with special needs, higher than any other state or territory. 'Special needs' included: (1) Indigenous households; (2) Non-English speaking households; (3) Disability households; (4) Households with support needs; (5) Older person households (principal resident over 75); (6) Young person households (principal resident less than 24 years old); (7) Newly arrived migrants, refugees or asylum seekers; and (8) Other special needs. Australian Institute of Health and Welfare, *Community Housing 2008–09*, www.aihw.gov.au, accessed 9 July 2010.

42 Regulatory Code of the Housing Regulation 2009.

43 Department of Human Services submission, 12 October 2010.

44 Ibid.

45 Ibid.

46 Department of Human Services submission, 8 November 2010.

47 Department of Human Services submission, 8 November 2010.

DHS added that the Registrar has released a compliance framework for consultation, and is currently seeking the views of stakeholders on the proposed approach to compliance monitoring.

*The consultation and development work for the Compliance Framework presents the opportunity for consideration and consultation with the community housing industry on the inclusion of new employment screening and criminal record checks requirements under the Regulatory Code.*⁴⁸

The compliance framework and evidence guidelines will become operational from May 2011.

Local Aboriginal Land Councils

The position of an individual seeking to be a board member, chief executive officer or employee of a Local Aboriginal Land Council provides an interesting point of comparison. The Registrar of the *Aboriginal Land Rights Act 1983* is responsible for carrying out criminal record checks in relation to individuals wishing to occupy these positions.

Individuals are automatically disqualified from holding office as a board member if they have been convicted of any offence in the last five years that is punishable by imprisonment for 12 months or more.⁴⁹ Chief executive officers and prospective employees are also automatically disqualified from employment if they have been convicted of certain offences in the past five years.⁵⁰ An important feature of this scheme is that individuals can apply to the registrar for an exemption from the disqualification requirements on the grounds of the time that has passed since the conviction or triviality of the acts giving rise to the offence.⁵¹

In practice, the automatic disqualification provisions mean that individuals seeking to work or volunteer for positions in these organisations are therefore subject to more stringent requirements than for equivalent positions in other community sector organisations. This level of probity checking applies not just to staff who have unsupervised contact with potentially vulnerable clients, but to all individuals with key responsibilities.

A recent review of the Aboriginal Land Rights Act has clarified and extended a number of the Registrar's powers and responsibilities, yet there has been no corresponding increase in resources. In practice, the Registrar and his four staff must process comprehensive criminal history checks of thousands of individuals seeking election to Local Aboriginal Land Councils across NSW each year. This is in addition to the Registrar's many other statutory responsibilities. The Registrar has advised that further amendments are needed, including changes to strengthen probity standards, but these amendments will need to be supported by additional resources to ensure their effectiveness.

2.3.3 Checks carried out in response to federal requirements

As previously noted, organisations funded to provide aged care or home and community care services are generally subject to requirements in the Commonwealth's *Aged Care Act 1997* and the *Home and Community Care Act 1985*. With respect to criminal record checks by aged care providers, 'police certificates' are required for:

- Any employees who are reasonably likely to have access to care recipients, whether supervised or unsupervised.⁵²
- Any volunteers who have unsupervised access to care recipients.

A police certificate is essentially a national criminal record check and must be renewed every three years.⁵³ Individuals with convictions for murder or sexual assault, or who have been imprisoned for assault, are ineligible to work in aged care.⁵⁴ Similar requirements apply to organisations that receive federal funding to provide home and community care services to clients who are frail, elderly and/or have a disability.⁵⁵

48 Ibid.

49 Section 66(1)(c) *Aboriginal Land Rights Act 1983*.

50 Prospective employees are disqualified from employment under the *Aboriginal Land Rights Act 1983* if they have been convicted under Part 3, 4, 4A or 5 of the *Crimes Act 1900* within the past five years (s.79(1)). Prospective CEOs are disqualified if they have been convicted of an offence related to the management of a corporation within the past five years, or convicted of an offence that is punishable by 12 months or more in prison in the last five years (s.78B(1)(c)).

51 s.78B(2), s.66(2) *Aboriginal Land Rights Act 1983*.

52 Note that when this system was introduced in 2007, police certificates were only required for staff who had unsupervised access to clients. In 2008, the requirement for police checks was extended to all staff who have access to clients, either supervised or unsupervised. The Hon Justine Elliot MP Minister for Ageing, *Media Release* 21 February 2008.

53 Department of Health and Ageing, *Police Certificate Guidelines for Aged Care Providers* (updated 2009) and *Accountability Principles 1998* made under subsection 96–1(1) of the *Aged Care Act 1997*.

54 *Accountability Principles 1998* made under subsection 96–1(1) of the *Aged Care Act 1997*.

55 The HACC Program is a joint Commonwealth, State and Territory initiative under the auspices of the *Home and Community Care Act 1985*. The overall objective of HACC is to provide funding for services which support people who live at home and whose capacity for independent living is at risk or who are at risk of premature or inappropriate admission to long term residential care *ADHC NSW Guidelines for Home and Community Care Funded Services*, p.2.

2.3.4 Limitations of criminal record checking

As with the working with children check, criminal record checks can only ever be one element of a probity checking framework. The information from criminal record checking can be limited, and agencies should be careful not to rely too heavily on criminal record checks alone to identify risks. This point was emphasised by many stakeholders, both in the roundtable forum we convened in April 2010, and in the submissions responding to our discussion paper.

There was also broad agreement that it would be irresponsible to disregard this source of information altogether. As previously noted, the Children's Guardian claims that one unintended consequence of introducing the working with children check in NSW was that some agencies ceased checking criminal records as they wrongly assumed these checks would be sufficient to identify wider probity risks.⁵⁶

Urgent consideration should be given to standardising criminal checking processes, reducing the disparities and duplication in current practices and looking for ways to achieve synergies with other forms of probity checking. These issues are considered further in Chapter 3 of this report.

2.4 Previous employment and referee checks

Previous employment checks can involve information or reports provided by:

- referees nominated by the prospective employee
- previous employer not nominated as a referee, and
- professional bodies.

Participants at the forum reported that they believe the seeking of referee reports would usually be part of the standard checking process to assess the suitability and qualifications of prospective paid employees. However, apart from NSW Health, we were not provided with any specific information by the funding agencies to indicate that they require this kind of checking in their funding agreements.

A related issue concerns whether there are requirements on funded organisations to ensure that applicants disclose all relevant 'past employment' matters. This could involve requiring applicants to provide their consent for relevant records to be checked, and for previous employers not nominated as referees to be contacted, as part of the application process.

The kind of processes which need to be in place must also ensure the identification of individuals who have been the subject of relevant employment proceedings or other disciplinary action. In this regard, NSW Health is the only funding agency that participated in the forum which provided a policy relating to those disciplinary matters which are deemed to be of sufficient seriousness to require a disclosure in a referee check.

Also of concern are incomplete disciplinary proceedings – in particular, the need for a consistent practice to deal with those circumstances when an employee confronted with an allegation of serious misconduct leaves their employment before their employer has an opportunity to finalise their investigation. The comments made in 2005 by Lauren Kelly and Julie Blyth of the Northern Sydney Sexual Assault Service at the 2nd National Ageing and Disability Conference, illustrate the need for a consistent and sophisticated approach in this area. They noted that:

Offenders will often move from facility to facility. When suspicions arise in one place, they move on. We were contacted recently about an offender who has now [allegedly] sexually assaulted in at least three different facilities. However because he hasn't been formally charged he is still working with an agency which provides locums to disability and aged care services. He always targets clients with little or no verbal communication.⁵⁷

Once again, NSW Health has sought to address this issue through promoting a consistent approach. NSW Health advises employers when confronted with this situation to continue with their investigation (even after the individual has moved on), appropriately document the available evidence, and, if possible, test the veracity of the allegations. The employer is also expected to complete their investigation after providing the past employee with an opportunity to comment on the proposed findings.

Finally, in cases where adverse findings have been made by professional bodies, such as those in the teaching and health professions, any probity checking system should be capable of identifying all such matters.

⁵⁶ Children's Guardian submission, 15 October 2010.

⁵⁷ From a paper presented at the 2nd National Ageing and Disability Conference, 18–20 July 2005, Hobart. Quoted in Suellen Murray and Anastasia Powell *Sexual assault and adults with a disability: Enabling recognition, disclosure and a just response*, Australian Centre for the Study of Sexual Assault, Issues No 9, 2008, p.5.

The Children's Guardian recommended that further consideration should be given to whether, and in what circumstances, organisations should be able to contact previous employers who have not been nominated as referees to obtain information on a person's probity or suitability for employment in a particular position. The Guardian noted that designated agencies that provide statutory/supported care have traditionally found it difficult to access relevant information from previous employers of carers and other staff, with persons contacted regularly stating they were unwilling to disclose such information 'for privacy reasons'. These difficulties were experienced notwithstanding Commonwealth and State legislation permitting such information to be shared for this purpose.⁵⁸ In this respect, the Children's Guardian's submission was as follows:

It is recommended that the Paper discuss the application of privacy legislation to the disclosure of information about a person's suitability for employment and recommend further education on the law in this area. While applicant consent for the release of such information does not appear to be a legislative requirement, I agree requiring applicants to consent to previous employment and referee checks would be a sensible arrangement.⁵⁹

In this context, it is also important to note the work currently being undertaken by DHS and the Children's Guardian to create a register of authorised carers to address current gaps in the screening of carers, including employers' difficulties in identifying a person's previous employment history. For example, designated agencies currently have no means of determining whether a prospective authorised carer has previously been authorised by another designated agency.

They may therefore be unable to access relevant information about a prospective authorised carer. The Children's Guardian and Human Services are seeking to address this by establishing an Online Register of Authorised Carers, which would be hosted by the Children's Guardian.⁶⁰

The Children's Guardian is also considering whether the register might contain information on carer training and a checklist of probity checks undertaken during the authorisation process. For example, such a checklist might include a requirement that agencies indicate whether they have conducted a working with children check, national criminal record check, and previous employment check in relation to certain individuals.

2.5 Who should pay for screening?

Our discussion paper noted that some participants at our forum expressed concerns about who should bear the cost of probity screening. While funding is currently being provided for certain probity checking by funded organisations, there is clearly a need for these costs to be consistently met within the funding arrangements across the health and human services sectors.

The majority of submissions, including those received from DHS and NSW Health as funding agencies, stressed the need for the consideration of the cost of checking, including any imposts associated with administering an enhanced probity checking system. Carers NSW said the additional costs associated with probity checks should be factored into funding to ensure that all organisations, large and small, are able to meet the established probity standards for the sector. NCOSS and the Aboriginal Child, Family & Community Care State Secretariat (AbSec) also argued that the cost of probity checking was part of the cost of doing business, and that funding agencies should pay these costs:

The benefits of improved and more consistent probity standards are mutual. However, the costs can be significant.

For example, NSW Meals on Wheels currently has 35,000 staff and volunteers with high turnover rates. The cost of CrimTrac processes for this organisation would be prohibitive.

NCOSS believes that the benefits for responsible government agencies of improved probity practices in the non-profit sector justify the cost being borne in full by the funding agency.⁶¹

58 The Children's Guardian noted that the Commonwealth's *Privacy Act 1988* does not apply to employee records – see s.7B(3) and definition of employee records at s.6 of the Act – and that the *Privacy and Personal Information Protection Act 1998* (NSW) is confined to NSW public sector agencies, excluding information or an opinion about an individual's suitability for appointment or employment as a public sector official – see s.4(3)(j).

59 Children's Guardian submission, 15 October 2010.

60 Ibid.

61 NCOSS submission, 30 September 2010.

Chapter 3.

The need for a consistent probity checking approach

We believe there are very strong public interest grounds for introducing a consistent probity checking system across the NGO health and human services sector. As previously noted, a number of other jurisdictions have already moved in this direction. We believe the community would expect that, given the very large amount of public funds involved and the nature of the work performed, there needs to be some consistency in this area of probity checking to ensure that those appointed to positions by funded NGOs are people with a high level of probity.

There was strong support for greater consistency expressed in many of the submissions. DHS said that it shared our interest in examining ways to improve probity standards and develop a more consistent checking standard for funded organisations. It also acknowledged that *'probity in employment within these [funded] organisations is an issue of vital importance to ensure the safety and well being of our vulnerable client groups'*.⁶²

However, in its initial submission in response to our discussion paper, DHS indicated that the current system of monitoring and compliance for screening employees, volunteers and management committee members – in the context of working with children – is adequate.

DHS also noted that the NSW Department of Fair Trading, the Registrar of Indigenous Corporations and the Australian Securities and Investments Commission have legislative responsibilities to administer and monitor management committees and boards, and these responsibilities 'should not be altered'. Given the somewhat limited nature of the monitoring role played by these regulatory organisations, we sought further advice from the DHS about how the activities of these agencies would address the substantive probity issues raised in our discussion paper.

In its further response, DHS went on to note that broader governance and probity issues not related to child protection, are currently regulated by the funded service's registering body and organisational policy. DHS also noted that Community Services' standard service agreements with funded agencies, require these agencies to demonstrate that they are complying with relevant statutory schemes.

However, it was our view, that these schemes primarily relate to basic corporate governance and financial accountability requirements. This fact was acknowledged by DHS in its further response, it noted that:

[the existing statutory scheme] focuses mainly on probity at the organisational rather than individual level and does not provide adequate safeguards for ensuring that at least those board members who have significant and unsupervised contact with vulnerable clients, or who have financial or other significant responsibilities necessitating a high level of probity, are adequately screened prior to their appointment.

Furthermore, DHS said that while the existing legislative regime *'does not represent a comprehensive model to set the benchmark for financial and governance practice, it may provide a foundation which could be further explored and developed in consultation with key stakeholders'*.⁶³

NSW Health stated its in-principle support for *'the intent and ideas encompassed in the discussion paper'*, including greater consistency across human service agencies, the development of good practice guidelines and the strengthening of accountability mechanisms.

Similarly, peak bodies that represent a broad cross-section of the many NGOs funded to deliver services have also expressed their support for more consistent practices among NGOs in the health and human services sector. NCOSS argued that probity standards are a significant part of ensuring that the sector continues to be effective in delivering services to vulnerable and disadvantaged people:

*For the long-term reputation of the non-profit human services sector it is important that standards of probity are consistent and adequate to manage risk across the entire sector.*⁶⁴

AbSec, whose executive officer is also the vice president of NCOSS, endorsed the NCOSS submission, indicating that stronger, more consistent practices would help establish and reinforce acceptable standards of behaviour across the NGO sector.

⁶² DHS submission, 12 October 2010.

⁶³ DHS cited the following examples of existing probity standards in the current legislation cited the DHS were the: *Associations Incorporation Act 2009* provides the regulatory body with the power to order an audit (s.51); power to appoint an administrator (s.55); power to prosecute for wrongfully incurring debts (s.68) or acting fraudulently (s.69); *Cooperatives Act 1992* provides the regulatory body with the power to supervise cooperatives (Part 14); *Corporations (Aboriginal and Torres Strait Islanders) Act 2006* provides the regulatory body with the power to disqualify someone from managing a corporation (Part 6.5) and imposes sanctions for wrongful record keeping. (Part 7.6); *Corporations Act 2001* provides the regulatory body with the power to examine financial reports (s.323EC), or to deregister (s.601AB).

⁶⁴ NCOSS submission, 30 September 2010.

The submissions of the Disability Council NSW, NCOSS and Carers NSW also signalled their endorsement of systems to support more consistent practices among NGOs in the health and human services sector. In this regard, the submission received from the Disability Council well summarises the views expressed by a range of peak bodies:

Probity within funded organisations requires, therefore, the development and rigorous application of at least the following strands:

- I. Risk management strategies based on contemporary best practice models.*
- II. Effective preventative measures that go beyond criminal record checking to draw on the developing research and evidence base of good practice with regard to probity.*
- III. Good governance arrangements based on best practice in NGOs with clear separation (and necessary 'firewalls') between strategic governing roles and day to day operations.*
- IV. Mandatory record checking (criminal and previous employment) in clearly defined circumstances for an agreed set of appropriately identified roles (not necessarily restricted to direct individual support positions).*
- V. A consistent approach to probity across the whole of government.⁶⁵*

The Disability Council also noted that:

Pre-employment checking of potential employees and volunteers who may work with 'vulnerable' or potentially 'vulnerable' people with a disability is a necessary but insufficient safeguard. Criminal record checking and employer references are, we believe, minimum requirements of good probity practice when considering potential applicants for paid or unpaid roles in organisations that are likely to result in contact with potentially 'vulnerable' people with a disability.

3.1 Components of a more consistent probity checking system

3.1.1 Baseline checking

In relation to achieving adequate standards and greater consistency in probity screening practices, we believe the components of a baseline approach to probity checking could include consideration of:

- full criminal record checks and effective referee and previous employment checks for all paid employees
- full criminal record checks and effective referee and previous employment checks for board/management committee members who have financial or other significant responsibilities and/or who have significant and unsupervised contact with vulnerable clients, and
- tailored probity checking for other volunteers, contractors and student placements where the performance of such roles includes a not insubstantial level of unsupervised contact with vulnerable clients or specific financial responsibilities.

3.1.2 Defining vulnerability

While there was broad support for the suggestion that situations involving unsupervised contact with vulnerable clients should be a key factor in relation to requiring probity checks, DHS submitted that:

... the development of an agreed definition and criteria of vulnerability is required, as these terms can have various meanings depending on the circumstances of the particular client or client group.⁶⁶

The Executive Officer of the Disability Council of NSW also made a similar observation at the roundtable discussion in April 2010, noting that a person with a disability might be vulnerable in one context, but not in another, and that care should be taken before excluding less vulnerable clients from the protection provided by additional probity screening. In the Disability Council's submission, the complexity of defining 'vulnerability' in this context was further acknowledged:

The concept of vulnerability is (at best) ill-defined and imprecise. Not all people with a disability receiving support are necessarily potentially 'vulnerable'. The Disability Council would not support, therefore, mandatory criminal records checking for all disability services NGO employees. Work needs to be done to identify roles (paid and unpaid) that would necessitate mandatory criminal record checking.⁶⁷

⁶⁵ Disability Council NSW submission, 22 September 2010.

⁶⁶ Department of Human Services submission, 12 October 2010.

⁶⁷ Disability Council NSW submission, 22 September 2010.

DHS indicated that this issue of vulnerability should be subject to further consideration in developing a new probity screening model:

Both NDS and the Disability Council of NSW have noted that there are complexities in the disability sector which warrant particular exploration and treatment based on the vulnerability of clients. There is a specific need to provide guidance and guidelines to disability service providers (and their boards) about ensuring that the people that they hire do not have history that could compromise the safety and dignity of the most vulnerable. There is also a duty of care for providers that they ensure that they have undertaken due diligence in broader screening of their prospective employees to ensure that, as far as possible, they are aware of any past issues (for example disciplinary action).⁶⁸

We support the need for general agreement to be reached on this issue of vulnerability. However, we also believe that client vulnerability is not the only risk factor requiring consideration in this area of probity checking. Another important factor to consider in terms of who should be the subject of baseline probity checking includes financial risks which should be identified and managed. A failure by a funded organisation to identify such a risk in relation to a person that they have engaged is likely to significantly damage the organisation's reputation should that person engage in fraudulent activity.

3.2 Deviating from the usual probity checking requirements

While we support a more consistent approach, we also recognise that there should be some scope for either additional or less stringent checking requirements if this is warranted.

3.2.1 Exemptions from the baseline approach

In consultation with the NGO sector, it will be important for DHS, NSW Health and other funding agencies to determine those programs and activities where the risks are so low that the usual probity checking requirements need not apply. In this regard, there are a number of particular issues which will require careful consideration.

Discrete events

A number of participants at the forum said that they could identify areas where exemptions should apply. For example, they referred to funded, low risk, 'one-off' (or occasional) events, as often warranting only the most basic probity measures. On this issue, NCOSS stated:

While we are strongly supportive of consistency, the provision for flexibility around discrete events is sensible. This exemption does emphasise the need for capacity building within the sector to ensure organisations are able to make an assessment of what is a 'low risk' event that would meet the expectations of funders and the broader sector.⁶⁹

Whole sector exclusion

A few participants indicated that the overall nature of their business was such that there may be a case for exempting their whole sector. For example, the Registrar of Community Housing indicated that providers of community housing services are inherently 'low risk' and should be exempt from standard probity checks because their principal responsibility is to manage assets which provide outsourced social or community services to vulnerable people.

However, in our view, it was important to recognise that community housing tenants can be particularly vulnerable and workers in these services do have unsupervised client contact (albeit limited). In addition, the 'workers' in this sector exercise considerable discretion in relation to decisions which can have a fundamental effect on the lives of their vulnerable clients and this sector now also controls a large (and rapidly growing) pool of publicly funded resources.

In its recent discussion paper, *Regulation and Growth of the Not for Profit Housing Sector*, the Australian Government surveyed prudential or probity regimes in sectors that it considered comparable to community housing, and listed 'suitability of key personnel and criminal history checks' as a key issue requiring consideration in relation to possible national regulation of this sector.⁷⁰

68 Department of Human Services submission, 12 October 2010.

69 Disability Council NSW submission, 22 September 2010.

70 Australian Government *Regulation and Growth of the Not for Profit Housing Sector* Discussion Paper April 2010, p.19.

In our discussion paper, we argued that all of these types of issues should be factored into any determination about whether the community would expect those appointed to positions in this sector should be exempt from a common probity checking approach. As previously outlined in section 2.3.2, the Registrar of Community Housing subsequently acknowledged that the existing regime to regulate community housing providers does not yet adequately address the need to assess potential risks posed by individuals who have significant and unsupervised contact with vulnerable clients, or who have financial or other significant responsibilities necessitating a high level of probity.

It is also important to carefully consider potential cascading risks from exempting certain sectors and roles from common probity checking requirements. For example, in recent years, sexual assault services have warned that organisations funded to assist adults with disabilities have become a target for potential abusers. They argue that individuals deterred from working in areas with higher scrutiny, such as child-related employment, have sought refuge in organisations with comparatively lax requirements, and that uniform staff and volunteer vetting processes are needed to reduce the risks to certain groups of vulnerable clients.⁷¹

NCOSS expressed concerns about the suggestion that whole sectors might be considered for exclusion from baseline probity screening requirements, noting that such exemptions have the potential to create dangerous gaps in the probity framework:

On the issue of 'whole sector exclusion' NCOSS believes that there would need to be strong evidence to show potential risks are well-managed in other ways... The prospect of providing widely variable standards across various parts of the sector may facilitate the actions of predatory individuals and therefore needs to be addressed.⁷²

Board members and other volunteers, student placements and contractors

In a number of submissions, there was strong support for the view expressed in our discussion paper, that any probity checking framework should consider the distinct role of boards in making policy decisions, setting the strategic direction of an organisation and determining who has access to services.

In our discussion paper, we noted that a number of Aboriginal organisations that we have consulted, including AbSec, have indicated their support for full criminal record checks in relation to all members of boards of management, particularly given their role in setting policy and making decisions about how services are delivered. AbSec noted that 'more often than not' communities know if someone closely involved in a service has a criminal record and that this can affect the reputation of the organisation and impact on their willingness to use it. In more extreme cases, 'criminals' can become involved in the governance of community organisations in order to wield influence and, on occasions, can intimidate others from voting against them.

NCOSS has argued that it is essential for boards of management to be held to reasonable standards 'if the public is to continue to have faith in our sector'.⁷³

The important role that boards or management committees play in the sector differentiates this set of volunteers from others in an organisation. Board members are legally liable for the organisation. They make the strategic decisions which lead the organisation. They are ultimately responsible for the finances of the organisation, how it handles difficult problems such as serious staff misconduct and organisational reputation. So they should be considered separately from other volunteers in the discussion about probity standards.⁷⁴

In contrast to NCOSS's views on volunteers, a number of other stakeholders supported rigorous checking of not only board members but other volunteers. For example, the Commission for Children and Young People noted that:

The commission has found that with the working with children check the community wants vulnerable people to have the same level of protection from volunteers as from paid workers. In determining who should be subject to high levels of checking, issues like the extent and type of contact with vulnerable people may be as significant as the distinction between volunteer and paid worker.⁷⁵

The Children's Guardian not only acknowledged the need for rigour in relation to volunteers but also emphasised the need to consider contractors and student placements.

In formulating our baseline approach to probity checking we have paid close attention to the strong views expressed by key stakeholders about the importance of stringent probity requirements for at least those board members who have significant and unsupervised contact with vulnerable clients or who perform other high risk roles. While we have not suggested that the baseline approach should be a requirement for all board members, we acknowledge that many organisations may take the view that the risks are such as to warrant screening for all members.

⁷¹ Murray and Powell, p.11, accessed on 26 May 2010 <http://www.aifs.gov.au/acssa/pubs/issue/i9.html>.

⁷² NCOSS submission, 30 September 2010.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Commission for Children and Young People submission 28 September 2010.

Insofar as other volunteers, student placements and contractors are concerned, our baseline approach reflects that given the disparate nature of these roles, there is a stronger case to be made for tailoring probity checking to match the particular risks related to the role being performed and the client group receiving the service.

3.2.2 Additional or extended checking

It is important to recognise that extended checks might be needed to screen individuals who take on high-risk roles and responsibilities, such as those who provide personal care to highly vulnerable clients in unsupervised settings.

The nature of these extended or additional checks might include seeking, with the applicant's written consent, reports from previous employers who were not nominated as referees, reports from professional bodies, and perhaps character references from respected community members who are well-placed to provide relevant advice.

The need for extended screening will vary. Certain organisations and program areas will routinely encounter higher risk situations. As previously noted, this State already has in place a reasonably comprehensive system for notifying, investigating, assessing and screening those who work in the child-related employment field. This system was established to ensure better identification of, and responses to, risks posed to children. A number of submissions that we received in response to our discussion paper supported consideration of a similar system to the WWCC process being adopted in the disability field – particularly in relation to those who have responsibility for caring for those people with disabilities who have a high level of vulnerability.

On a separate but related note, in response to our discussion paper, DHS noted the:

... significant concern in the disability sector where the working with children check, which includes screening for relevant REPs, does not operate in relation to employees who work with vulnerable persons over 18.⁷⁶

On this issue of extended checking, it is also important to again note that the proposed enhancements to the WWCC process need to, as far as practical, complement broader probity screening practice. For example, the Children's Guardian submitted that if NSW moves in the direction of an accreditation system for WWCCs in which a centralised checking agency would receive criminal updates from the NSW Police Force, then one consequence of this would be:

... employers would not have access to this information – they would only be told if an employee's certification was withdrawn.⁷⁷

While we acknowledge that this deficiency exists in the accreditation system in other jurisdictions, we do not accept that if NSW adopts an accreditation system for child-related employment (or for other areas involving highly vulnerable people), that it is inevitable there will be a disconnect between what the 'checking agency' knows and what the current (and future) 'employer(s)' also need to know. However, unless the design of an accreditation process takes into account the need for employers to be 'in the loop' insofar as critical information is concerned, then there is the risk that the process will fail to ensure employers are made aware of critical information in relation to offending behaviour and past relevant employment proceedings. Against this background, it is important to note that a number of stakeholders emphasised the need to ensure that this State's probity screening systems are robust and avoid multiple checking of the same information.

What is also important to recognise about accreditation, is the fact that an accreditation system has been established, does not of itself, guarantee a thorough probity screening system. For example, if such a system is not integrated with complementary systems which provide for adequate responses by employers to serious employment matters, and fails to ensure reporting to the accrediting agency of all significant risks identified from such matters, then it would be unsafe for an employer to place much reliance on the fact that a person has been accredited.

Furthermore, as illustrated in our earlier discussion around the comments made by the Children's Guardian on certain limitations which can exist in relation to accreditation systems, it is important to stress that, if any accreditation system is to be established, it needs to be designed in such a way as to ensure that the accrediting body plays an active role in making employers aware of significant probity risks. And while we believe this is certainly achievable, we should not simply assume that any proposed accreditation system will automatically meet this need.

3.2.3 Criminal record checking of existing appointees

As there is no guarantee that all relevant appointments under our current ad hoc system will have been the subject of criminal record screening, a number of stakeholders have suggested that, following the introduction of a baseline probity screening system, all current employees (and relevant others) would need to be subject to criminal record checking. (Obviously, this would not be necessary for those who have already been screened in this way – or at least for those who have been the subject of recent criminal record screening).

⁷⁶ Department of Human Services submission, 14 October 2010.

⁷⁷ Children's Guardian submission, 15 October 2010.

While we accept that this proposal requires consideration, we believe that if employers already have cogent evidence of the probity profile of an existing employee, then this could be taken into account when considering whether a criminal record check is required, particularly for positions which are not in very high risk areas.

3.2.4 Periodic re-checking

A number of stakeholders suggested that a baseline probity checking system should also include regular re-checking of individuals, insofar as criminal record checks are concerned. For the reasons that we have previously outlined, there would appear to be a strong case for periodic re-checking in high risk areas.⁷⁸

However, what needs to be carefully considered is whether baseline probity screening practice across the whole human services and health sector, should include a requirement for periodic re-checking. In considering this issue, a number of factors may need to be taken into account. One relates to whether or not a person has remained in the same position with the same employer since the time of their last check. Other relevant risk factors are the length of time that a person has remained in the same position/with the same employer and the nature of the work performed.

Prior to adopting a whole of sector approach to periodic re-checking, it will be important to consider the available evidence from this and other jurisdictions, which is relevant to the extent to which across the board re-checking has, or is likely to, identify significant probity risks previously unknown to employers (and in what circumstances). In addition, it is also important to recognise that any move towards re-checking requirements for funded agencies, will have implications for government agency appointees operating in comparable areas of work.

3.2.5 Current triggers for checks

Finally, it is worthwhile considering current practices relating to those circumstances which under our existing ad hoc system may trigger criminal (and other) screening checks. Without baseline sector standards, under the present system for each new appointment, an applicant may be required to undergo fresh criminal record checks, regardless of the currency of an individual's previous checks. As part of moving towards a more consistent and efficient system, there is scope to develop business rules for when employers should be able to reasonably rely on past criminal record checks. Associated rules should also be developed in relation to the retention of, and the provision of access to, both relevant criminal records and 'standardised' previous employment history reports. If such rules were to be developed, this would have the potential to reduce unnecessary checking and associated costs, and promote consistent practice.⁷⁹

3.2.6 A centralised approach

Also related to the need to explore opportunities for creating efficiencies in the systems for probity screening, a number of submissions suggested that there could be benefits in designating an agency with the responsibility for handling all probity checking for funded agencies. We believe this suggestion merits close consideration, particularly if it can lead to more streamlined, reliable and less costly checking for not only the non-government sector but also government agencies. An agency performing this role would be well placed to develop and promote best practice and to also explore information technology based solutions with the potential to provide substantial improvements to the cost and efficiency of the probity systems.

As discussed previously at section 2.2.3, any reforms contemplated in relation to the working with children check must be considered in the context of the need to create an efficient overall probity checking system.

3.2.7 Other services commissioned or licensed by government

One area that is not covered by the scope of our review, relates to services commissioned or licensed by government. In response to our discussion paper, DHS noted that:

It is considered that the notion of consistency should also be extended beyond the funding arrangement (which is the current focus of the discussion paper) and extended to other services commissioned or licensed by government. In particular, ADHC is interested in considering how the recommendations in the final report might be interpreted in the context of licensed boarding houses where the Ombudsman has in other reports recommended particular approaches to employment screening in that industry.

⁷⁸ If an accreditation process is put in place which provides a guarantee of ongoing updates of all relevant criminal charges/convictions, then in the future, there may be no need for a separate re-checking process. While such a system appears theoretically possible, it does not currently exist in relation to current relevant accreditation systems. For example, to-date automatic criminal record updates drawn from the national criminal database are not currently provided in any relevant accreditation system.

⁷⁹ The development of business rules in these areas would need to emphasise the importance of the rights of relevant appointees, including the need to observe procedural fairness and to maintain appropriate confidentiality standards.

In the NCOSS submission, it said:

With respect to Licensed Residential Services, NCOSS strongly urges that criminal record checks become a requirement for all staff because clients of Licensed Residential Services are often vulnerable individuals with a greatly diminished access to people outside the facility.

NSW Ageing, Disability and Home Care (ADHC) is correct in noting that, for a number of years, our office has expressed concerns about the lack of adequate probity screening for licensed residential services (boarding houses).

In correspondence to ADHC dated 14 July 2010 about a draft Regulation, we expressed the view that the proposed regulatory change was inadequate because it only went so far as to require criminal record checks to be conducted on the licensee, licensed manager and direct care staff in relation to *new* licence applications. However, notwithstanding the concerns that we expressed, the Youth and Community Services Regulation 2010 which was recently passed, does not deal with the need to ensure that *existing* boarding house personnel are also subject to criminal record checking requirements. Against this background, we support ADHC's view that the issues relating to the need for consistency in probity checking practice in the funded services sector, have broader application to 'other services commissioned or licensed by government'.

3.3 Assessing and responding to risks

3.3.1 Prohibiting offences

A significant issue which must be addressed is how to assess and respond to concerns identified through probity checking. Most screening frameworks, including NSW's scheme for the working with children check, specify the kinds of serious offences that would ordinarily result in an individual being barred from the position or type of work sought. The NSW system of working with children checks prohibits anyone who has been convicted or found guilty of certain 'prohibiting offences' (whether in NSW or elsewhere) from engaging in child-related employment. These consist of any of the very serious offences against children listed in section 33B of the *Commission for Children and Young People Act 1998*, and any offence that could lead to a person being registered under the *Child Protection (Offenders Registration) Act 2000*.⁸⁰

However, in developing a consistent approach to probity checking and related risk management, we would not support any system which *generally* excludes people on the basis of previous convictions (or past employment related disciplinary action) alone. To adopt such an approach would mean that vulnerable client groups would not benefit from those who have made mistakes and learnt from them. In fact, it is not uncommon for community organisations to engage staff, volunteers and board members who have personal experience of the issues affecting their clients. In some cases, and in some situations, this experience will be a significant asset. Thus, a drug and alcohol treatment service might engage someone with a past history of drug use to help current users deal with problems of addiction.

3.3.2 Relevant offences

A consistent probity checking and risk management approach could also include identifying particular types of offences which, although not resulting in an automatic exclusion to individuals being appointed, should nevertheless require organisations to carefully consider whether an individual should be appointed, and if so, how associated risks can be managed.

In its submission, NCOSS commented that advocacy organisations such as the Women in Prison Advocacy Network and Justice Action include people with criminal histories in key positions to be effective in reaching out to and providing services to ex-prisoners. At the same time, NCOSS acknowledged that it was important to recognise and manage any associated probity risks:

*... there is a need for organisations to then determine the appropriateness for an individual to join a Board or be employed and to have appropriate and explicit internal processes to manage any potential risk.*⁸¹

⁸⁰ <https://check.kids.nsw.gov.au>, accessed 6 July 2010.

⁸¹ Council of Social Service of NSW submission, p.7.

By way of example, relevant concerns may relate to a one-off error of judgement, an incident or incidents that occurred long ago or conduct that has no direct bearing on the position sought. Alternatively, the issues identified through probity checking might present potential risks to vulnerable clients, but there may be practical ways to manage or reduce the associated risks by providing appropriate supervision and support, restricting the person's duties, and other such measures. Much depends on the issues identified through screening, the vulnerability of the clients, the likely benefits or costs associated with bringing the person into the organisation, and other such variables. The use of additional or extended probity checks could also assist in providing a practical avenue for clarifying the issues raised and assessing what risk-management strategies might be necessary.

By way of illustration, it is instructive to consider the requirements for the aged care sector. These exclude anyone who has been convicted of murder or sexual assault, or convicted and imprisoned for any other form of assault, from being employed, contracted, hired, retained, or accepted as a volunteer by any service involved in providing aged care. With respect to other 'non-exclusionary' offences, the Department of Health and Ageing lists the following factors that aged care providers should consider when assessing the potential risks involved in engaging a person who has been convicted of such offences. These factors include:

- **Access:** The degree of access to care recipients, their belongings, and their information, whether the individual will work alone or as part of a team, the level and quality of direct supervision, and the location of the work (i.e. residential, community or home-based settings).
- **Relevance:** Whether the conviction indicates that the person is unable to perform the inherent requirements of the position sought.
- **Significance & proportionality:** The type and seriousness of the conviction and whether excluding a person from employment is proportional to the type of conviction.
- **Timing & employment history:** How long ago the conviction occurred, the person's employment record since then.
- **Information about the individual:** The findings of any assessment reports following attendance at treatment or intervention programs, or other references, and information about the person's attitude to the offending behaviour.
- **Pattern & likelihood:** Whether the conviction represents an isolated incident or a pattern of criminality and the probability of an incident occurring if the person continues with, or is employed for, particular duties.
- **Consequences:** The impact of a prospective incident if the person continues, or commences, particular duties.
- **Treatment strategies:** Procedures that will assist in reducing the likelihood of an incident occurring, including, for example modification of duties.⁸²

It is worth noting that this type of approach provides simple, commonsense guidelines to assist funded organisations to make informed decisions about potential risks associated with previous offences. While a formal risk assessment tool would provide a more prescriptive approach to guide decision making around whether a person should be appointed to a position – and such an approach may be necessary in certain high risk employment context (for example, child related employment) – we believe that, in many circumstances, simple, practical guidance of the kind used in the aged care sector would provide sufficient guidance to agencies in making sound employment decisions where probity checks have identified probity related issues.

Many submissions to our discussion paper, including the submission from DHS, acknowledged the need for practical guidelines to inform practices in relation to how to respond to information about previous offences, disciplinary proceedings and other such conduct. DHS commended the guidance provided by the Department of Health and Ageing, adding:

*... there needs to be simple practical guidelines, such as those outlined [above] ... to assist agencies to make sound decisions where checks have identified criminal history.*⁸³

Women's Health NSW suggested that there should be:

*... common sense guidelines to assist NGOs to make decisions about potential risks, particularly in relation to previous offences by prospective employees or any previous formal employment proceedings involving them.*⁸⁴

Carers NSW also supported the need to develop 'standardised risk management principles and guidelines for probity checking.'⁸⁵

⁸² Department of Health and Ageing *Police Certificate Guidelines for Aged Care Providers (updated 2009)* p.11.

⁸³ Department of Human Services submission, 14 October 2010.

⁸⁴ Women's Health NSW submission, 2 September 2010.

⁸⁵ Carers NSW submission, 14 September 2010.

3.3.3 Previous employment and referee checks

Our preceding discussion in this report has concentrated on the potential risks associated with previous offences. However, participants at our forum quite correctly, *strongly* emphasised the importance of previous employment checks in assessing the suitability of prospective employees and others appointed to key positions in organisations. A number of participants expressed the view that they rely heavily on information gathered through referee checks, and that this source can often be more pertinent to assessing the probity of prospective appointees than information obtained from other sources.

In connection with both previous employment and referee checks, forum participants discussed a range of challenging practice issues which arise, including the need for clear guidance around what should (and should not) be provided through referee and previous employment checks. As noted previously in section 2.4, the Children's Guardian recommended that further consideration be given to whether, and in what circumstances, organisations should be able to contact previous employers who have not been nominated as a referee to obtain information on a person's probity. By way of example, the Guardian noted that designated agencies providing statutory/supported care were often told by previous employers when conducting probity checks that they were unwilling to disclose information due to 'privacy reasons' – notwithstanding Commonwealth and State legislation permitting such a disclosure. For this reason, the Guardian has suggested that further guidance be provided in relation to the relevant law in this area.

On a related note, for funded agencies to be able to consistently and appropriately identify, assess and respond to risks, it is also critical that they are aware of whether an individual seeking an appointment has been the subject of previous formal employment proceedings or other disciplinary action.

It is only once all of the relevant information has been obtained from all of these avenues, that a sound basis for a risk assessment exists (either through applying the kind of commonsense guidelines referred to previously or, in certain high risk situations, a more formal risk assessment process). However, as we discussed in section 2.4 of this report, apart from NSW Health, there is generally a lack of clear requirements (and related guidance) provided by the funding agencies to the funded organisations in this critical (and sometimes complex) area. In this regard, DHS agreed that there is a general lack of clear requirements and guidance for funded organisations in relation to referee and previous employment checks.

3.4 Strengthening accountability and guidance mechanisms for funded agencies

Funded organisations must be accountable for the services that they are funded to deliver. This must include taking appropriate steps to assess and manage issues related to the probity and integrity of personnel involved in the planning and delivery of these services.

However, this represents only one side of the equation. It is critical that government agencies play their part in relation to the development of appropriate minimum standards for probity checking and assist organisations to achieve these standards through effective engagement, clear guidelines and ongoing monitoring and support.

For probity screening to work effectively, there must be a clear understanding between funded organisations and government agencies regarding their respective responsibilities. As we have previously noted, a more consistent probity checking approach by funding agencies across the health and human services sectors should help achieve this.

The mechanism for creating some level of consistency in this area could also involve including model clauses in service agreements and other contractual documents. With the recently created Department of Human Services NSW now incorporating Community Services, Ageing Disability & Home Care, Housing and other human service agencies, the prospect of achieving some consistency in standard minimum requirements (and in being able to successfully promote these requirements) is now much more realistic.

In addition, to the possibility of including model clauses in funding agreements which specify *what should be done*, there is also a need to bring within the funding contracts certain binding obligations as to *how things should be done*. Model clauses which also obligate funded agencies to comply with guidelines, which are schedules to the funding agreements, would be one way of achieving and promoting best practice in connection with *how things are done*.

Women's Health NSW supported the use of model clauses in funding agreements to make clear the expectations on funded agencies in relation to probity checking:

Having model clauses specifying what needs to be done and how things should be done embedded in funding agreements would ensure consistency and best practice, particularly with agencies working with vulnerable clients.

NCOSS took the same position on this issue, it said that it:

... agrees with the statement that there needs to be 'a clear understanding between funded organisations and government agencies regarding their respective responsibilities. The concept of model clauses for service agreements and other contracts is sensible. This should form part of the overall effort to reduce red tape and increase consistency across agencies.

In terms of the regulated out-of-home care sector, the Children's Guardian indicated that if probity screening requirements were mandated either through legislation or funding agreements, she would then be able to require out-of-home care services 'to demonstrate that they have appropriate national criminal record checking systems in place'.⁸⁶

Consistent with our earlier observations in this report, relevant guidelines to promote good practice could deal with a range of practical issues including:

- Who and what should be checked, and how the checks should be done.
- Guidelines for assessing those risks which are identified from criminal record checks and past employment-related and referee checks: including factors to consider when determining whether any offences or other relevant conduct should affect the suitability of an applicant for a position and, where risks factors are identified and an appointment is still made, how to manage any related risks.⁸⁷
- The expectations of employers in relation to completing and recording employment proceedings and disciplinary matters in cases where an employee who is the subject of serious allegations resigns before a matter is finalised.
- The requirements on, and expectations of, previous employers who are asked to provide references; including details relating to what information they should (and should not) provide; and the need for full and frank disclosure.
- The requirements on, and expectations of, prospective employers in relation to carrying out previous employment and other referee checks, including the nature of the information that they should seek (and how best to obtain it).
- Processes for requiring declarations and consents from those seeking appointments/employment as part of the pre-appointment checking process.
- Requirements in relation to accessing, recording and maintaining information received from various sources during and after checking processes. For example, these requirements should deal with protecting an individuals' privacy during and after any checking processes.⁸⁸
- Documenting decision-making processes.
- Critical procedural fairness requirements, and internal review mechanisms for individuals who have been refused employment on the basis of probity issues identified through criminal record or other probity checks.⁸⁹

It is also important to recognise that improvements in this area of probity screening should take place within the context of strengthening broader risk management and accountability systems. The agencies, participating in our forum warned against relying too heavily on screening alone to identify risks. Many emphasised that pre-employment screening should always be a part of a broader suite of probity strengthening measures. This point is also supported by relevant research in this area:

Screening alone is not sufficient (i.e., it is limited to identifying known perpetrators) and needs to be coupled with interviews, thorough reference checks, policy development for child-safe environments, and robust accountability frameworks for responding to allegations.⁹⁰

In response to our discussion paper, both government and non-government agencies again strongly emphasised this point. For example, Women's Health NSW indicated that its support for the 'creation of a more consistent probity checking approach (was) within an overall framework of risk management for community organisations.'

⁸⁶ The current Children and Young Persons (Care and Protection) Regulation 2000 only makes it clear that national criminal record checks may be conducted for authorised carers – in these circumstances, the Guardian is not able to mandate accreditation criteria requiring such checks. Children's Guardian submission, 15 October 2010.

⁸⁷ Related to this issue, DHS noted that there is also a need for good guidance on performance management of staff where issues may arise during the course of employment that could indicate a risk for clients or the organisation. DHS submission, 12 October 2010.

⁸⁸ In her submission, the Children's Guardian recommended that specific guidance be provided on the application of privacy legislation in the context of probity screening.

⁸⁹ Several stakeholders supported consideration being given to an appeal mechanism for reviewing those circumstances where people have been refused employment on the basis of probity checks.

⁹⁰ Berlyn, Holzer and Higgins, *Pre-employment screening: Working With Children Checks and Police Checks* Australian Institute of Family Studies Resource Sheet Number, 13 February 2010.

Similarly, the Disability Council advocated for ‘the development and rigorous application of ‘... *risk management strategies based on contemporary best practice models; and effective preventative measures that go beyond criminal record checking to draw on the developing research and evidence base of good practice with regard to probity.*’

NCOSS highlighted the related need for substantial capacity building to take place in the area of risk assessment and management given the rapid expansion of the sector, noting that:

This needs to include an understanding of the need to provide information and resources to support organisations as probity reforms take place.

One area of capacity building that should be a high priority is building the skills of the sector about risk management. Regardless of what level of probity checking may be required in the sector, each individual organisation needs to be able to assess the risks associated with their Board, staff and volunteers. They also need to be able to assess risks associated with particular events.⁹¹

In relation to the expansion of the Aboriginal child and family sector, AbSec suggested that information and resources should be provided to funded organisations during probity reforms to help services develop sound risk management skills. AbSec also noted that this type of initiative should be factored into ongoing capacity building.

Finally, an integral part of strengthening accountability mechanisms in relation to probity checking is the need for funding agencies to ensure that there is an adequate system in place for monitoring funded organisations’ compliance with requisite standards. In relation to this issue, Women’s Health NSW noted that:

Having a suite of probity strengthening measures available to organisations and a transparent monitoring process for compliance is also very important.⁹²

Similarly, Carers NSW said that:

... a review of probity standards and any subsequent introduction of a consistent checking system across the sector must include an education program and audit strategy to support all organisations to comply with requirements.⁹³

Given that it would be neither desirable nor practical for each and every funded organisation to be routinely ‘audited’ by the funding agency in this area, successfully implementing a consistent approach across the health and human services sectors would be dependent on:

- successful educative and other strategies developed jointly by the funding agencies and funded organisations within each sector to promote core competencies in this area. On this issue, NCOSS has noted that it ‘strongly advocates that NGOs take the initiative on best practice in terms of risk management and probity checking’,⁹⁴ and
- a targeted auditing strategy by the funding agencies based on a rigorous risk management approach.

91 NCOSS submission, 30 September 2010.

92 Women’s Health NSW submission, 2 September 2010.

93 Carers NSW submission, 14 September 2010.

94 NCOSS submission, 30 September 2010.

Chapter 4.

Recommendations

Our discussion paper recommended that the involved funding agencies consult with the non-government sector, and each other, prior to providing this office with their advice on the proposals outlined in our paper. In light of the broad support for a more consistent, efficient and rigorous probity checking system to be adopted in this State for funded services, we recommend the following:

1. In consultation with the non-government sector and the Department of Health, the Department of Human Services should develop and implement a more consistent probity checking system for organisations that are funded in the health and human services sector. The development of such a system should:
 - a. explore the scope for clearly articulating critical baseline probity checking requirements, in order to promote consistent and efficient practice, and have regard to the observations outlined in section 3.3.1 of this report.
 - b. include clear guidelines which promote good practice and deal with a range of practical issues including (but not necessarily limited to):
 - i. who and what should be checked, and how the checks should be done.
 - ii. assessing those risks which are identified from criminal record checks and past employment-related and referee checks: including factors to consider when determining whether any offences or other relevant conduct should affect the suitability of an applicant for a position and, where risks factors are identified and an appointment is still made, how to manage any related risks.
 - iii. the expectations of employers in relation to completing and recording employment proceedings and disciplinary matters in cases where an employee who is the subject of serious allegations, resigns before a matter is finalised.
 - iv. the requirements on, and expectations of, previous employers who are asked to provide references; including details relating to what information they should (and should not) provide; and the need for full and frank disclosure.
 - v. the requirements on, and expectations of, prospective employers in relation to carrying out previous employment and other referee checks, including the nature of the information that they should seek (and how best to obtain it).
 - vi. processes for requiring declarations from those seeking appointments/employment as part of the pre-appointment checking process.
 - vii. requirements in relation to accessing, recording and maintaining information from various sources during and after checking processes. These requirements should adequately reflect relevant privacy considerations and outline good practice in this regard, including the circumstances in which it is appropriate to obtain consent.
 - viii. documenting decision-making processes.
 - ix. critical procedural fairness requirements, and review mechanisms for individuals who have been refused employment on the basis of probity issues identified through criminal record or other probity checks.

2. As part of developing a more consistent, efficient and rigorous probity checking system, the Department of Human Services should:
 - a. reach agreement with the non-government sector regarding the best strategies for:
 - i. ensuring compliance with mandatory probity checking requirements.
 - ii. promoting best practice not only in relation to probity checking but also in connection with strengthening risk management and accountability systems more generally, and
 - iii. monitoring the implementation by funded agencies of practice requirements (and the adoption of best practice).
 - b. have regard to the issues canvassed in section 3 of this report in relation to:
 - i. additional or extended checking
 - ii. criminal record checking of existing appointees
 - iii. current triggers for checks, and
 - iv. a centralised approach to probity checking.
3. In light of the current statutory review concerning the working with children check process, the Departments of Health and Human Services should actively consult with those who have carriage of the review process to ensure that any changes which are proposed in relation to the working with children check system, are well-integrated into the broader changes which need to take place regarding probity checking more generally.
4. The Registrar of Community Housing gives consideration to recommending to Government that Part 6 of the Regulatory Code of the Housing Regulation 2009, be amended to empower the Registrar to introduce a probity checking system for community housing providers which will adequately align with the system that will be developed for funded community services providers in response to recommendation 1.
5. The Department of Human Services, in consultation with other key government and non-government agencies, considers the extent to which the probity screening requirements for 'other services commissioned or licensed by government', should be aligned with the probity checking system which will be developed in response to recommendation 1.
6. Ageing Disability and Home Care (ADHC), as an agency of the Department of Human Services, provide advice to Government on the best way of effectively dealing with the current shortcomings of the Community Services Regulation 2010, insofar as it fails to require that *all existing* licensees, licensed managers and direct care staff of licensed boarding houses be subject to criminal record checks.
7. The Departments of Human Services and Health, in consultation with the non-government sector, prepare a business case for Government relating to the costs of developing and implementing consistent, efficient and rigorous probity checking systems.
8. A comprehensive response to these recommendations be provided by each relevant agency by 31 March 2011.

Annexure A.

Agencies consulted

Agencies that participated in the forum convened at the Ombudsman's office on 14 April 2010 to discuss probity requirements for funded organisations

Funding agencies

- Community Services
- Housing NSW
- Aboriginal Affairs NSW
- Ageing, Disability and Home Care
- Juvenile Justice
- NSW Health
- Sport and Recreation, Communities NSW

Bodies representing funded organisations

- Association of Children's Welfare Agencies (ACWA)
- Homelessness NSW
- Women's Health NSW
- National Disability Services
- Aboriginal Child, Family and Community Care State Secretariat (NSW)
- NSW Federation of Housing Associations
- NSW Council of Social Service
- Youth Accommodation Association
- Disability Council of NSW

Agencies with oversight and regulatory responsibilities

- Commission for Children and Young People
- NSW Children's Guardian
- Independent Commission Against Corruption
- Office of the Registrar, Aboriginal Land Rights Act (NSW)
- Audit Office of NSW
- Registrar of Community Housing

Other agencies consulted

- People with Disability Australia
- Physical Disability Council of NSW
- Indigenous Disability Advocacy Service
- Carers NSW
- Interchange Respite Care NSW Inc
- Early Childhood Intervention Australia

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