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Submission to the Department of Justice: Response to the Working with Children Bill 2005 Discussion Paper - December 2004 (submitted 1 March 2005)

Thank you for the opportunity to respond to the Working with Children Bill 2005 Discussion Paper (Bill).

VALS wishes to make the following comments on the Working with Children check (check):

Indigenous Australians recognise the need to protect children who make up a large proportion of the Indigenous Australian community. There is a sentiment in the Indigenous Australian community that ‘children are the future’ and this requires that children are cared for ‘now’. However, VALS is concerned that the Bill is too broad. The definition of ‘child-related work’ is too broad and wide sweeping and will lead to all sorts of confusion. The threshold for the check and the process must be as simple as possible. The check seems unnecessarily complicated and unnecessarily creates a middle man (ie: Secretary of Department of Justice).

The definition of child-related work is too broad and VALS notes that in NSW volunteers are excluded from the check and we urge the Government to give this approach serious consideration. The requirements in section 31 relating to timeframes are arbitrary. VALS notes that volunteers could be checked through supervision. Also organisations engaging volunteers should be held responsible for educating and training volunteers about risks and appropriate behaviour.

The consideration of disciplinary proceedings has the effect of making the check too broad. VALS argues that the check should be made as simple as possible and disciplinary proceedings should be omitted from the check, as is the case in Western Australia. VALS has concerns about procedural fairness of disciplinary proceedings and using the information obtained via a disciplinary proceeding against the applicant. If disciplinary proceedings are omitted from the check, and convictions, pending criminal matters and updated matters (ie: future charges) are included, the check could perhaps be called a criminal justice check.

Section 9(3) is an example of the Bill being too broad: “a person is engaged in child-related work if he or she is a member of the committee of management of an unincorporated body or association that is engaged in child-related work”. It is the experience of VALS that management committee members have limited contact with children compared to employees who do the ground work and so the clause seems excessive.

Another example of the Bill being too broad is the fact that a negative notice lasts for life. The check is reflective of a tough on crime approach, which is not necessarily a smart on crime approach. The check emphasizes punishment as it will result in an offender being punished twice and treated as a second class citizen. The offender will firstly be punished through imprisonment and secondly through barriers to re-intergrating into society. VALS identifies that there is need to create more space for alternative approaches to offending, such as rehabilitation. There is also need to give people a chance to reform their ways. At the moment the Bill is too broad as it rules out any possibility of a person reforming their ways by making a negative notice last for life.

Having said the above, VALS seeks clarification on a point relating to how long a negative notice lasts. There appears to be a contradiction or anomaly at page 22 of the Discussion Paper. It is stated both that a negative notice lasts for life and that a person with a negative notice can re-apply for an assessment notice in certain circumstances. The inappropriate and confusing consequence of this is that a person will have both a negative notice and an assessment notice, which begs the question ‘which notice takes precedence?’

Also, VALS acknowledges that the Bill gives the Secretary discretion to inquire into whether a criminal record is outweighed by other factors [ie: offence happened 20 years ago and the person may not have offended since – sections 13(2) and 14(4)]. VALS has supported the principle of spent convictions in submissions to the Human Rights and Equal Opportunity Commission (‘Discrimination in Employment on the Basis of Criminal Record Discussion Paper 2004’) and Department of Justice ‘Uniform Spent Convictions: A proposed Model Discussion Paper August 2004 (submitted 11 October 2004) and Scrutiny Of Acts And Regulations Committee’s Inquiry Into ‘Discrimination In The Law (June 2004)’.

VALS noted in the Discrimination in the Law submission that there is danger in a discretion to consider whether a criminal record is outweighed by other factors being used in a discriminatory manner. VALS identified that in the absence of clear directions for the Minister of Corrections in considering the above in relation to granting Official Aboriginal Prison Visitor status (OAPV), the Minister could make decisions based on prejudicial value judgements and not be held accountable. At the time of writing the submission only two Indigenous Australians held the status of OAPV and VALS is concerned that a similar scenario will arise in the context of child-related work. Directions about how to use the discretion might include considering recidivism rates for different offences etc. It is essential that as many appropriate Indigenous Australians are permitted to work with Indigenous Australian children in the interests of cultural sensitivity. It is important that the checks do not encourage or result in discrimination or prejudice and checks and balances are in place to prevent this.

VALS is also concerned that the check is too broad and as a result civil liberties in relation to privacy are undermined in the way information is shared between the Department of Justice, employers and Victoria Police [also s11(c)and (d)]. For instance,

VALS is concerned by the proposal for the Secretary to send an interim negative notice to potential/employers prior to the individual making a submission (ie: about their reformed ways). The interim notice has the potential to cause great prejudice to the applicant. Even if a negative notice is ultimately not issued, the applicant's chances of employment by the informed employer may be inappropriately compromised (ie: miss out on promotion). VALS notes that at page 21 of the Discussion Paper that employers are to decide how best to treat an employee who is on an interim negative notice. Standards of practice for employers in this situation should be developed to keep employers accountable and protect employees.

VALS is concerned about the potential for the check to result in discrimination in employment on the basis of criminal record. VALS is concerned by the fact that there is not sufficient legal protection from discrimination in employment on the basis of criminal record. The Equal Opportunity Act 1995 (Act) does not include make discrimination on the basis of criminal record unlawful, as the existence of a criminal record is not an attribute protected by the Act. The Act should be amended to include criminal record as an attribute protected by the Act (s6). VALS made this argument in the submission to the Human Rights and Equal Opportunity Commission 'Discrimination in Employment on the Basis of Criminal Record Discussion Paper 2004' (submitted March 2005).

VALS is concerned by sections 37(2)(c), (d), (e), (f) or (g) and the impact it will have on the civil liberties of the applicant, such as privacy. VALS is particularly concerned about section 37(2)(d) which relates to the use of information obtained in the course of the check in the course of legal proceedings. VALS argues that the inclusion of a blanket statement in legislation that permits information relating to a check to be admitted in legal proceedings as evidence will prejudice the applicant unfairly. VALS is concerned to stress that information provided to a legal practitioner [s 37(2)(f)] should only provided with the consent of their client. Also, it should be clearly stated to the applicant at the beginning of the check process that information they disclose could be used against them in future Court cases. Also, VALS seeks clarification on whether information provided for a submission falls within section 36(1) or s37(2)? VALS notes that such information should fall within the latter so as to be consistent with sections 16(4)(a-d) which state that such information is not admissible in proceedings.

VALS is in a position to identify the following additional likely effects of the check on the Indigenous Australian community:

- Organisations mentioned in the following list will be effected by the check and this list is by no means exhaustive. The Government should consult with such organisations before the Bill is enacted. Also, such organisations should be targeted in the proposed education campaign about the Bill and such education should be culturally sensitive and involve Indigenous Australians in its development and implementation.
 - The list is as follows: Victorian Aboriginal Child Care Agency (s9(2)(a), Indigenous Australian foster carers (s9(2)(k), Yappera (s9(2)(b), KODE schools (s9(2)(d), Aboriginal co-operatives or corporations (s9(2)(h), Aboriginal Family Violence Prevention and Legal Service which provides

counseling and Elizabeth Hoffman House which provides counseling (s9(2)(n) and is a refuge for Indigenous Australian female victims of family violence (s9(2)(f), Indigenous Community Volunteers. VALS will be affected in the following way: VALS staff attend juvenile detention centres to provide a service to children (section 9(2)(e), VALS staff go on overnight camps with children (s9(2)(o) and VALS CEO and Board will be affected by s9(3).

The above organisations will feel the burden of the check, which will serve to create a barrier for Indigenous Australians undertaking child-related work. Indigenous Australians experience many barriers to participating in society (ie: discrimination) and the Bill will be the source of additional barriers such as the following:

- VALS is concerned that cost of the check will be a barrier for Indigenous Australians accessing the check. VALS is concerned by the description of the check at page 11 of the Discussion Paper as imposing “significant obligations and costs on employers and voluntary organisations” and the effect this will have on Indigenous organisations and voluntary organisations that benefit Indigenous Australians. Indigenous Australian organisations and voluntary organisations are severely under-funded and the check will further stretch resources. VALS considers it appropriate that child-related organisations, voluntary organisations are provided Government funding to meet the obligations which relate to public health. Fees for the check should also be kept to a minimum.
- The cost of the check for volunteers should also be kept to a minimum. VALS is concerned that the check will serve as a disincentive for people to volunteer. This is a concern given that the Indigenous Australian community is indebted to volunteers who assist them because funding for paid support positions is non-existent or insufficient. The check could result in a reduction in services or service quality provided to Indigenous Australian children. Indigenous Australians prefer to access services that involve Indigenous Australians. Volunteers fill gaps in service delivery to Indigenous Australians and such service delivery is taken for granted by non-Indigenous Australians.
- VALS is concerned that Indigenous Australians, who have a criminal record but who are considered eligible at the discretion of the Secretary for an assessment notice, will not volunteer because of a reluctance to undergo a criminal record check. Such applicants may not volunteer because of poor relations between the Indigenous Australians community and police and the fact that the criminal record check is associated with the latter. Such applicants may experience shame at undergoing a criminal record check.
- VALS is concerned that the result of Indigenous organisations, voluntary organisations or Indigenous Australian individuals struggling to meet their obligations is that they will be charged with offences against the Bill. For instance, the requirements on voluntary organisations to keep records in line with

section 31 is too burdensome. VALS is concerned that the offences outlined in the Bill have the potential to criminalize poverty. For instance, an Indigenous Australian with a clean criminal record who cannot afford the check may avoid the check and work with children and be charged with an offence against the Bill.

- VALS is also concerned about the value of the check in terms of what it will add to the present situation of monitoring who works with children. The value of an assessment notice is questionable given that it is not a positive notice and the onus still rests on employers to take additional precautions to protect children. VALS is concerned that the check is superfluous as most employers already undertake criminal record checks so the check is creating an unnecessary middle man (Secretary). At VALS lawyers already undergo scrutiny in order to be admitted to practice as a lawyer and employees undergo criminal record checks. Also, a Sexual Offenders Register already exists.
- VALS impression of the check is that it is attempting to be everything to everyone, but actually delivering little. VALS sees the choice of the terminology of ‘assessment notice’ as an attempt to downplay the fact that the notice is not a guarantee and protect the Department of Justice. VALS recommends changing the term assessment notice to ‘risk assessment’ notice or criminal justice check.
- VALS acknowledges section 11(3) and how it aims to prevent duplication of checks. However, the section appears only to protect the Department of Justice in incurring unnecessary expenses rather than employers or employees. In the situation when a criminal record check has not been completed by the employer/employee prior to the check the following situation may arise: the Secretary may apply for a criminal record check for sexual, violent and drug offences and an employer may apply for a criminal record check for other matters, such as fraud or dishonesty offences. The employer/employee will bear the financial burden of multiple criminal record checks.
- VALS is concerned that Indigenous Australians will experience barriers (eg: illiteracy) in applying for a notice, providing a submission or appearing in person to talk to an interim negative notice (s16(1)(iii)). VALS stresses the importance of ensuring that support workers are available to assist people and advocate on their behalf in such circumstances (ie: Koorie Liaison worker).
- VALS is concerned that the effect of the exemption relating to people working with closely related children (section 30) is that Indigenous Australians will be disadvantaged because kinship relationships will not be recognized under the exemption. VALS wishes to highlight the need to broaden the exemption and be culturally inclusive and sensitive and take into account kinship networks. Also VALS questions the exemption for parents coaching teams in which their children are involved. Does the Department of Justice have evidence that adults are unlikely to commit an offence if their child is in their care or non-parents are more likely to offend? If volunteers were not required to undergo the check this

anomaly would be avoided. Also, the exemption for closely related people means that the check overlooks the fact that most offences against children are committed by people they know so the check is cracking down on a small proportion of offenders only.

Housekeeping Issues

VALS has identified the following housekeeping issues that need clarification:

- There appears to be lack of consistency between the Discussion Paper and the Bill in relation to what can be considered when undergoing category 2 and 3 checks. The Discussion Paper at page 6 recognises that it is important that the criminal records that are taken into account are relevant to employment in the child related field. The Discussion Paper gives the impression that offences in relation to children will only be considered. It is also recognized that professional disciplinary proceedings that are taken into account need to be relevant (ie: child related, also page 35). However, on VALS reading the Bill fails to give the above mentioned impression in relation to category 2 and 3 checks. To overcome the above problems the Bill should clearly outline whether offences against adults or children or both can be considered whilst undertaking a check. For instance the definition of relevant offence in section 3 should clearly outline the following:
 - Category 1 checks involve checking offences relating to adults or children.
 - Category 2 checks involve checking offences relating to children only.
 - Category 3 checks involve checking disciplinary proceedings relating to children only.
- The above messages should be clearly and consistently distributed throughout the Bill (ie section 12, 13, 14 etc).
- In the interests of clarity and consistency section 11(2)(d) of the Bill should actually mention giving a submission, as outlined in the Discussion Paper. Also, sections 11 and 16 should be linked.
- The confidentiality of information obtained for the purposes of a re-assessment should also be maintained and so s37(1)(b) should make a reference to s21.
- The Bill should make it clearer that it is not only an offence to engage, offer to engage or be engaged in child-related work without an assessment notice, but also an offence to engage, offer to engage or be engaged in child related work with a negative notice. Neither sections 35 or 36 make this explicit. The Bill should be amended to reflect the fact that the following situations need to be covered: a) an applicant neglects to get any notice or an employer neglects to check the status of a notice & b) an employer engages an applicant with a negative notice or an applicant with a negative notice engages in child-related work.

- The Bill does not address the issue of whether a person has committed an offence against the Bill will be able to work with children in the future or apply for a notice in the future.
- Perhaps an additional offence should be mentioned which prevents a notice being applied for and granted by inappropriate means other than that mentioned (ie: bribery of delegate/Secretary).
- VALS wishes to raise a question: Will category 2 checks take into account a breach of an Intervention Order that covers a child?

Thank you for the opportunity to comment on the Bill and if you have any questions please contact Greta Jubb.