

Guide: Working with Children Checks for Victorian Community Organisations

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Overview

Whenever your not-for-profit organisation is looking to recruit new team members, whether employees, contractors or volunteers, it is important that the organisation conducts appropriate screening procedures for potential candidates. There are varying levels of screening that are available depending on your circumstances, including:

- ▶ Working with children checks;
- ▶ Criminal record (police) checks;
- ▶ Reference checks;
- ▶ Medical tests; and
- ▶ Drug and alcohol checks.

Note: This fact sheet only deals with the first of these screening procedures, 'Working with Children Checks'. For details on laws applying to the other background checks listed above, please contact PilchConnect and we will do our best to assist you.

Knowing which (if any) of these different levels of background checks will be appropriate for your organisation is important. Depending on the type of organisation you represent, or the type of clients your organisation has contact with, there may be legal obligations to perform certain levels of checks before recruiting. Organisations should think carefully before conducting background checks beyond those they are required to perform (eg. under legislation or funding agreements), as many screening tests will not be relevant to the position on offer, and decisions made on the results of such tests could be challenged by an applicant.

PilchConnect has composed this fact sheet to assist Victorian not-for-profit community organisations to understand their obligations in relation to these checks. While this fact sheet focuses solely on Working with Children Checks, a separate fact sheet to be composed by PilchConnect in the future will outline the requirements for background checks generally.

Note: The information in this document is a guide only, and is not legal advice. If you have a legal problem you should talk to a lawyer before making a decision about what to do. The information is written for people and organisations affected by the laws in Victoria, Australia, and is current at 1 February 2011.

When are Working with Children Checks compulsory under law?

The Victorian *Working with Children Act 2005* (**WWC Act**) identifies certain roles and responsibilities which cannot be undertaken until a Working with Children Check (**WWC Check**) has been undertaken. Failure to comply with these requirements can result in serious penalties for both the organisation and the employee or volunteer that has failed to undertake the check. In Victoria, most individuals who perform 'child-related' work are required to undergo a WWC Check. This concept is discussed in further detail below.

A 'child' is defined in the WWC Act as any person under 18 years old, and the activities that will be considered to be 'child-related work' for the purposes of a WWC Check are where:

- ▶ a person performs work (including both paid and unpaid work); and
- ▶ the work usually involves (or is likely to usually involve) direct contact with a child; and the contact with the child is not directly supervised by another person.

If all of the above points are satisfied, the next step is to consider whether this work falls within one of the specific activities identified in the WWC Act. There are currently 20 different child-related activities that require a WWC Check to be performed, these are:

- ▶ Child protection services.
- ▶ Children's services.
- ▶ Pediatric wards of hospitals.
- ▶ Community services, remand centres and youth residential centres.
- ▶ Religious organisations.
- ▶ Fostering children.
- ▶ Coaching or tuition services for children.
- ▶ Refuges and residential facilities used by children.
- ▶ Commercial gym or play facilities specifically for children.
- ▶ Commercial photography services specifically for children.
- ▶ Child care services.
- ▶ Educational institutions.
- ▶ Overnight camps for children.
- ▶ Commercial entertainment party services specifically for children.
- ▶ Baby sitting or child minding services.
- ▶ Transport services for children.
- ▶ School crossing services.
- ▶ Counseling or other support services for children.
- ▶ Groups with activities for children, or whose membership mainly consists of children.
- ▶ Commercial talent or beauty competition specifically for children.

Tip: Specific examples and commentary on the above activities are available on the Department of Justice website which can be found under the 'Related Resources' section at the end of this fact sheet.

If the work falls within one of these categories, and meets the criteria for 'child-related work' outlined above then it is likely that a WWC Check will be compulsory in Victoria, unless an exemption applies (see below).

Does the WWC Check differ from a Police Check?

Yes. If a volunteer or employee is required to undertake a WWC Check, it will not matter whether they have recently had a police check as these two screening procedures are established for different purposes.

The WWC Check focuses on specific offences (ie, those that may impact on the safety of children), and unlike police checks, the WWC Check is 'ongoing', meaning that the applicant's criminal record is monitored throughout the life of the WWC Check. The WWC Check will also make inquiries with certain professional disciplinary bodies beyond law enforcement agencies (currently the Victorian Institute of Teaching and the Out of Home Carers Suitability Panel), however more bodies may be included in the future.

Your organisation may wish to conduct both WWC Checks *and* police checks depending on the nature of the work being conducted by your staff or volunteers. For example, not all criminal offences will be relevant for the WWC Check, only those that the Department of Justice considers to pose a risk to children, therefore previous convictions such as traffic offences or minor thefts may not be revealed through a WWC Check. A police check allows an organisation to be aware of all previous convictions – child-related or not – and this may be appropriate if you are seeking an employee or volunteer who, for example, may be handling money or driving clients between locations.

Important: If you decide to require that applicants should undergo police checks prior to recruitment, you must not refuse an applicant simply because he or she has a prior conviction revealed for an offence that has no relevance to the available position. There are legal protections against discrimination on the basis of criminal record, and you should only refuse an applicant on the basis of a criminal past when you believe that the prior offence prevents the applicant from performing the 'inherent requirements' of the position.

Are there any exemptions from the WWC Check?

Yes, there are limited exemptions for when a WWC Check will be required in Victoria when child-related work is undertaken. These exemptions apply to workers or volunteers that are:

- ▶ under the age of 18 years; or
- ▶ participating in an activity with a child on the same basis as that child; or
- ▶ volunteer parents of a child that is participating or ordinarily participates in the relevant activity; or
- ▶ closely related to each child they are in contact with during their 'child-related work'; or
- ▶ students aged 18 or 19 years who are undertaking volunteer roles at their educational institution, or on behalf of their educational institution; or
- ▶ workers visiting Victoria, who do not ordinarily perform child-related work in Victoria; or
- ▶ teachers that hold current registration with the Victorian Institute of Teaching; or
- ▶ sworn police officers (Victorian or AFP) who are on active duty.

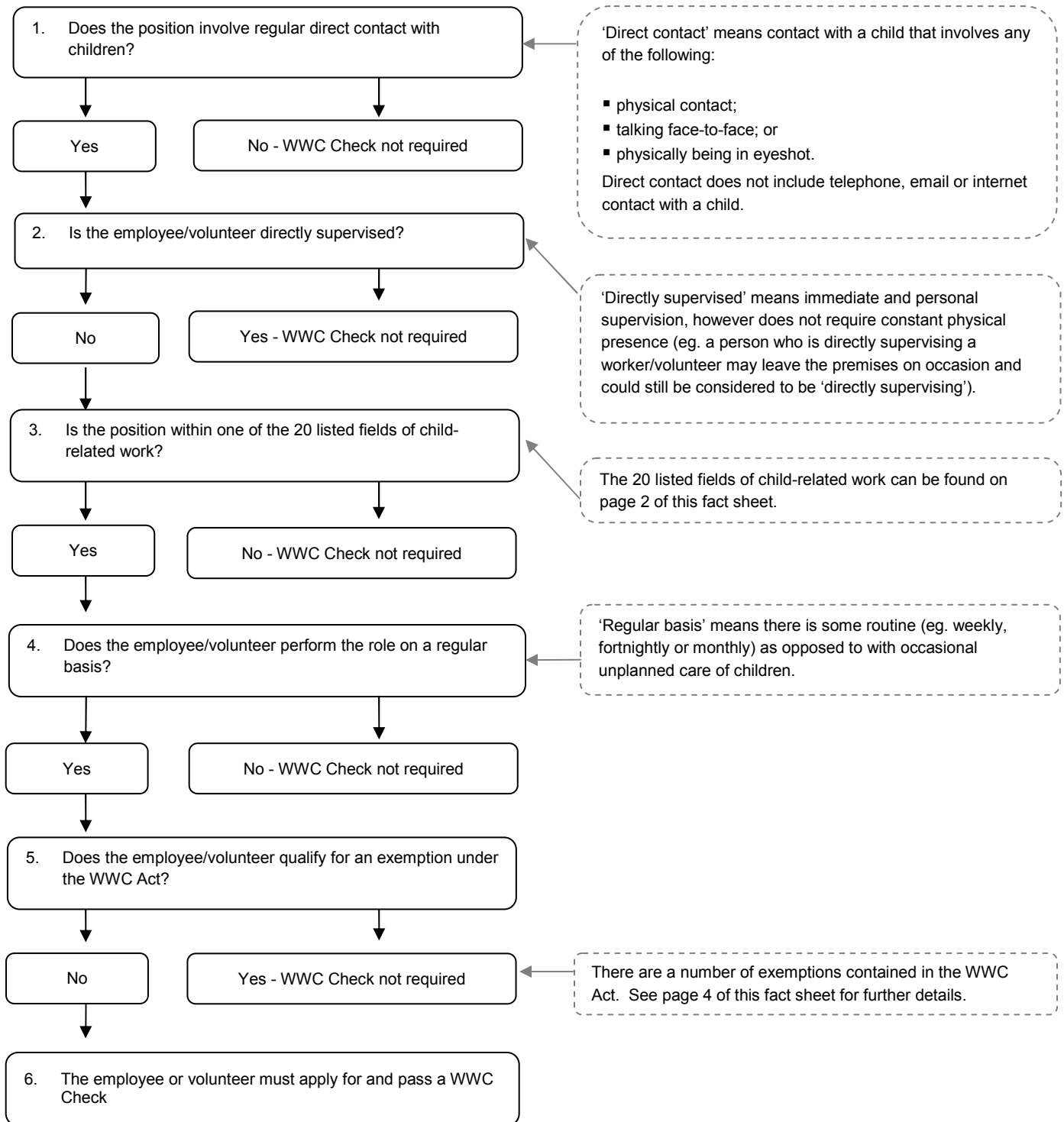
Where a volunteer or employee of a not-for-profit organisation falls into one of the above categories, they will not be required to undergo a WWC Check. This will be the case even where they are performing 'child-related work' according to the definition in the WWC Act, and where this work falls within one of the 20 fields outlined on page 2 of this fact sheet.

However, even if an employee or volunteer falls within one of the above exemptions, they are still eligible to apply for and receive a WWC Check. If you are in doubt about whether an exemption applies, it is advisable that a WWC Check is performed just to be on the safe side.

The following diagram summarises the rules on when a WWC Check will be required for employees and volunteers in Victoria.

Remember: Just because you may fall within one of the WWC Check exemptions when starting out in a role, you should always be aware that when your circumstances change, you may not be able to continue to rely on the exemption. For example, if you are 17 years old when you begin part-time work at a children's day care facility, you are exempt from the WWC Act as a minor, however you will be required to undergo a WWC Check prior to your eighteenth birthday unless another exemption applies.

Diagram 1: When is a Working with Children Check Necessary?



How can employees or volunteers apply for a WWC Check?

Application forms for the WWC Check are available from most Australia Post outlets, or they can be ordered in bulk from the Department of Justice website (see 'Related Resources' section at the end of this fact sheet).

Once the application has been completed, the WWC Check form can be lodged at most Australia Post shopfronts. When lodging, you will need to produce original identification documents (eg. driver's licence, passport), a passport-sized photograph, and the relevant application fee unless you are exempt from paying this as a volunteer applicant. For information about fee exemptions, see our below section titled '*How much does a WWC Check cost?*'

If a person is required to undertake a WWC Check, they must apply for the check before they begin their child-related duties. If your organisation carries out child-related work, your team members must hold a current WWC Check card, or at least have lodged an application.

Tip: While the law only requires that a person apply for WWC Check before undertaking child-related work, many organisations may choose to introduce an internal policy which states that individuals can only begin to perform child-related work once the WWC Check results have been confirmed.

Depending on the nature of the work to be undertaken, there may be an 'application deadline date' that applies to your organisation. This is due to the 'phasing-in' of the WWC Check regime in Victoria; however, as at 1 January 2011, most child-related work has now been phased in. For a full list of the 'phasing in' schedule, visit the Department of Justice's website, listed below under our section titled '*Related Resources*'.

How much will a WWC Check cost in Victoria?

In Victoria, applicants that will be undertaking 'child-related work' for remuneration or gain are required to pay a non-refundable application fee of about \$80 to undertake a WWC Check. This amount was current at the time of writing this fact sheet, however is of course subject to change from time-to-time.

Volunteer applicants for the WWC Check are not required to pay an application fee, and will receive a 'volunteer assessment notice'. A person is still identified as a 'volunteer' even where they receive reimbursement for expenses they incur as part of their role in the organisation, however, as soon as a volunteer becomes a paid employee or contractor, they are required reapply for an employee WWC Check as the volunteer check will no longer be adequate.

Remember: Make sure that all unpaid staff list that they are 'volunteers' on their WWC Check form as this will exempt them from any application fee. If they move into paid work at a later date, they will need to reapply under the 'employee' category.

Should organisations bear costs of WWC Checks for employees?

There is no legal requirement that an organisation pays for or refund its staff for any expenses incurred when obtaining a WWC Check. However, some organisations will, as a matter of policy, agree to reimburse WWC applicants that will be working with the organisation.

Tip: In most circumstances, if the WWC Check relates to your employment, this expense may be claimed as a deduction from your taxable income.

What happens once a WWC Check application has been lodged?

Once a WWC Check application has been lodged, the processing of the application is likely to take between 3 to 12 weeks depending on the nature of any information that arises while the check is being conducted. For example, if you have had not been subject to any previous convictions or infringements notices, the processing time is likely to be much shorter.

Once a valid application has been lodged, applicants who pass the WWC Check will receive their WWC card. Previously, both the applicant and the organisation would receive an Assessment Notice, however from 1 December 2010 the card itself is now the Assessment Notice. Employers and volunteer organisations will continue to receive an Assessment Notice but this will take the form of an official copy of the front and back of the WWC card.

Those who do not initially pass the assessment will be issued an Interim Negative Notice, meaning the applicant should not undertake any further 'child-related' work. If a person is issued with an Interim Negative Notice or Negative Notice, the organisation responsible for that individual will also receive a copy of the Notice, however this will not include specific information about the criminal history.

A review of an Interim Negative Notice can be sought through the Victorian Civil and Administrative Tribunal (see the below section titled '*What if an applicant is unable to pass a WWC Check?*').

If you are successful in obtaining a WWC card, the check will remain valid for a period of 5 years. During that time, it is your responsibility to advise the Department of Justice about any relevant change in your circumstances, including:

- ▶ if you change your name;

- ▶ if you change your address; or
- ▶ if you change your employer or volunteer organisation, including changes to the organisation's contact details.

The contact details for the Department of Justice can be found in the 'Relates Resources' section at the bottom of this fact sheet.

Throughout the five year lifespan of a WWC Check, there is a 'rolling check' system where a WWC card holder's profile will be updated if there are any incidents that are relevant to the person's ability to undertake child-related work.

Is an organisation responsible for monitoring WWC Checks?

An organisation has certain responsibilities to ensure the WWC scheme is complied with by its employees and volunteers. This includes a duty to ensure that:

- ▶ All employees or volunteers who are required to hold a WWC Card apply for the Check by the due date stipulated on the application form;
- ▶ You do not engage a person in 'child-related work' if they must apply for a Check and have not done so by the due date;
- ▶ Employees or volunteers who are given an Interim Negative Notice or a Negative Notice do not, under any circumstances, engage in 'child-related work';
- ▶ Employees hold an 'employee' Assessment Notice, not a 'volunteer' Assessment Notice; and
- ▶ Assessment Notices are renewed every five years (six months before or up to three months after the expiry date on the WWC Check Card).

How should an organisation monitor the WWC Checks?

An organisation has a responsibility to ensure that its employees, volunteers or contractors do not undertake child-related work if they are yet to apply for a WWC card. The following steps might be of use to your organisation when keeping tabs on team members and their WWC status:

- ▶ Confirm that all employees and volunteers have passed (or applied for) the WWC Check by physically sighting their WWC card (or their application receipt).
- ▶ Keep a register which lists each employee and volunteer, and records their WWC status, including:
 - ▶ for new WWC applicants, the unique Application Receipt Number that is provided when an application for a WWC Check is lodged; or

- ▶ for current holders of WWC cards, the WWC Check card number and the expiry date of their card.
- ▶ Establish procedures for regular monitoring of your WWC register to ensure that it is up-to-date. This task may be a recurring agenda item for the organisation's committee of management, or delegated to a particular person with responsibilities for recruitment of staff and volunteers.
- ▶ WWC assessment notices should be kept on file by organisations for ongoing checks. They should be filed in a safe, secure place and in accordance with the following principles:
 - ▶ Only information that is necessary for performance of functions can be gathered;
 - ▶ Information from a WWC Check can only be used for the purpose for which it was given or with the consent of the person;
 - ▶ Any information kept must be accurate, complete and up to date;
 - ▶ It is important that steps are taken to protect the information from misuse, loss, unauthorised access, modification or disclosure;
 - ▶ The organisation should have clearly expressed policies available upon request which detail the management of personal information;
 - ▶ A person should be free to access their own information and correct inaccuracies; and
 - ▶ Each file should have a unique identification to prevent information being misplaced.

What will a WWC Check reveal?

Once a WWC Check has been submitted to the Department of Justice, the applicant will be subjected to the following checks:

- ▶ National police records check, which may reveal criminal history information held by police in both Victoria and other jurisdictions;
- ▶ Review of any findings of certain professional disciplinary bodies; and
- ▶ Review of any findings by the Victorian Civil and Administrative Tribunal under the Health Professions Registration Act 2005.

There are three broad categories of offences that will be relevant to WWC Checks:

Category 1 offences are the most serious and prevent the applicant from passing the WWC Check (receiving an Assessment Notice) in any circumstance.

Example: The applicant is a registered sex offender or has committed other sex offences against children.

Category 2 offences will not necessarily prevent the applicant from passing the WWC Check. The Department of Justice (DOJ) has discretion to pass the applicant depending on how much of a risk the applicant is to children's safety.

Example: The applicant has committed offences against adults, sex offences as a child, or other non-sex offences.

Category 3 offences are less serious. The DOJ will pass the applicant unless it would be unreasonable to do so.

Example: The applicant has committed offences that have caused injury to another, or relate to obscene exposure.

If a prospective employee/volunteer's WWC Check shows Category 2 or Category 3 offences, the WWC may still be successful, subject to conditions such as:

- ▶ Reporting obligations imposed by the Sex Offender Registration Act; or
- ▶ An extended supervision monitoring order under the Serious Sex Offenders Monitoring Act.

Throughout the five year life of a WWC Card, there is a 'rolling check' system where a WWC card holder's profile will be updated if there are any incidents that are relevant to the person's ability to undertake child-related work.

If someone currently holding a WWC Card is later charged with a relevant offence, this will be made known to the relevant WWC authority, who will in turn convey this to the organisation. It would then be illegal for a person to continue working if they have been found guilty of a relevant offence.

Are there limits to what WWC Checks can achieve?

It must always be remembered that WWC Checks are only one way of reducing the risk of recruiting or associating with individuals who may be unsuitable for child-related work. No background check by itself can guarantee an individual's suitability, and organisations should ensure that they have internal policies and procedures to ensure the safety of all those who interact with the group – particularly those in a position of vulnerability such as children.

It is also worth pointing out that the determination of which offences are to be considered as relevant for the purposes of a WWC Check will differ across States and Territories.

Tip: It is advisable for organisations to use WWC Checks as only one of several screening and monitoring tools. References checks, police checks and organisational supervision and training are all ways to ensure the safety of staff and clients, as well as assisting in finding the most suitable applicant when recruiting.

What if an applicant is unable to pass a WWC Check?

If an applicant fails to pass the WWC Check, they will receive an Interim Negative Notice – a copy will also be sent to the organisation. This is a notice that indicates the Department of Justice intends to fail the applicant, and the applicant will have an opportunity to write a submission, explaining why they believe they should be granted a WWC card. If the submission fails, the applicant may then apply to the Victorian Civil and Administrative Tribunal (VCAT) to appeal the decision. During this appeal process, the applicant should not undertake child-related work.

If a current team member's eligibility comes under question (eg. an Interim Negative Notice is issued), your organisation should make alternate arrangements until the decision is finalised. If a prospective employee/volunteer receives a Negative Notice from the Department of Justice for their WWC Check, they are strictly not allowed to undertake child-related work. If a person fails the WWC Check, they will be prohibited from applying for a five year period.

Discretionary background checks

Even where there is no legal requirement that background checks be performed, it is often the case that organisations may still take it upon themselves to undertake some level of screening for volunteers and employees. This is because all organisations have a responsibility to ensure they maintain a safe environment for its employees, volunteers and clients. Due to this overarching duty of care, organisations should always try to be informed about the individuals they select as their representatives.

As part of a risk management process, an organisation may attempt to use background checks as a way of satisfying this duty of care by identifying potential problems before they occur. While the performance of background checks will not automatically discharge an organisation's duty of care obligations, it will show that the health and safety of those associated with the organisation is taken seriously by the group.

Remember: While finding the right person to fill a vacant role is important, an organisation has an overarching duty to provide a safe environment for staff, volunteers and clients. Good screening procedures when recruiting is a key way for organisations to try and address problems before they arise.

From a much more practical perspective, undertaking basic informal background checks such as asking for referee details is certainly a good way for an organisation to assure itself that they are making the right choice when recruiting a new employee or volunteer. In addition requiring WWC Checks may be beneficial for your organisation should it undertake any child-oriented work in the future.

Related resources

Related PilchConnect resources

For online legal information resources for Victorian community organisations about:

- ▶ the People Involved, see www.pilch.org.au/thepeopleinvolved

Related legislation

Working with Children Act 2005 (Vic)

Working With Children Regulations 2006 (Vic)

Related links

- ▶ Victorian Department of Justice - Working with Children Checks, see www.justice.vic.gov.au
The Working with Children section of the Victorian Department of Justice's website provides information about the requirement for your employees volunteers to get WWC Checks if they are involved in 'child-related work'. The site includes application forms and details of the fields of work covered by the legislation.
- ▶ Volunteering Australia - Background Checks and Volunteers, see www.volunteeringaustralia.org
Volunteering Australia has a resource which provides an overview of background check requirements and the associated costs across the various states and territories.

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