



# Advocacy Tasmania Inc

Response to

## ***Working with Children and Vulnerable People Discussion Paper***

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## A. Introduction

Advocacy Tasmania Inc (ATI) welcomes this opportunity to comment on the *Working with Children and Vulnerable People* Discussion Paper. As the Discussion Paper makes clear, this issue has been languishing without resolution for far too long. We congratulate the Department of Health and Human Services for progressing the initiative, and for embracing the need to protect vulnerable adults as well as children. It is time now for action in establishing a screening framework. Although there will inevitably be disagreement about some elements of the eventual framework, and while the implementation of that framework will doubtless expose unanticipated problems, further delay is not warranted. We are at the point now where only that implementation will generate further advances in our understanding.

Advocacy Tasmania has a long history of work with Tasmania's most vulnerable people. Our advocacy work has provided us with far too many examples of the damage that can be done when staff and volunteers in service-providing organisations exploit that vulnerability. However, we have also provided advocacy support to individuals whose past record as offenders has left them vulnerable to discrimination and exploitation. Our approach below seeks to reflect that duality and the need to strike a balance where the rights of *all* vulnerable people – service consumers and potential service providers alike – are recognised and protected.

We note that at the same time that DHHS is engaged in consultations about *Working with Children and Vulnerable People*, the Department of Justice is receiving feedback on its *Breaking the Cycle* Discussion Paper as part of its review of Tasmania's corrections system. In essence, both exercises begin from the same starting point. *Breaking the Cycle* is frank in its assessment that the Tasmanian rate of re-offending is too high and that this rate appears resistant to change under current arrangements (especially for those who receive custodial sentences). The unspoken assumption behind calls for screening systems based on police checks is that our corrections system punishes but does not *correct* – that those who have previously offended are likely to re-offend. Using past behaviour as a primary predictor of future behaviour is only defensible in such a context. Take away the likelihood of re-offending and entirely different approaches to screening will be required. In the body of our submission below, we argue that even without significant changes to the rate of re-offending, it is crucially important that Tasmania's screening framework (including the screening efforts of service-providing organisations) does not solely rely on evidence of past offences.

Transformation of our justice system so that its key product is indeed *correction* will be an important contribution to the protection of vulnerable Tasmanians in service settings. We urge DHHS to actively participate in the whole-of-government approaches required to build a more effective corrections system in Tasmania and to recognise this participation as a key component of its overall protective strategy.

## B. Defining terms

The definition of “vulnerable adults” is crucially important. The definition must reflect broad community understandings if the WWCVP framework is to earn the support of that

community, but it must also be in a form that can be applied in the practical settings required in the implementation of the framework.

The Discussion Paper acknowledges some important dangers associated with particular approaches to this definitional task. Specifically, it is acknowledged that listing “broad categories of people who might generally be considered to be vulnerable” would be “considered patronising or offensive” (p20). However, having acknowledged the danger, the proposed approach falls into the same trap. The preferred approach to “vulnerable adults” uses access to nominated service types as the basis for inclusion, where those service types are understood to “alleviate the effects of physical, social, financial and/or psychological disadvantage”. The Discussion Paper signals that these services are to be “addressed later in this paper” but what is offered instead – as Annex B – is a lengthy list of “proposed regulated activities”. No further explanation of this list is provided.

Access to services, put bluntly, is not vulnerability. That access reflects a need for the specified service but that need will only express itself as a form of vulnerability in quite particular circumstances. The proposed definition inaccurately labels service users in ways that many will undoubtedly find “patronising or offensive”. Advocacy Tasmania acknowledges that it will be necessary to compile a list of services likely to include vulnerable clients. That is an inevitable component of the process of identifying the sites where our citizens are most likely to be at risk. The compilation of such a list, however, should *derive* from a coherent definition of vulnerability, not *constitute* such a definition or *substitute* for one.

Even a cursory examination of the proposed “regulated activities” in Annex B reveals the difficulties – and downright sillinesses – that are bound to arise from this approach. Public housing is listed, for example. Acceptance of this inclusion would deem all public housing tenants to be “vulnerable adults” for the purposes of the WWCVP framework. Patronising *and* offensive.

**Rec 1: The proposed definitional approach to “vulnerable adult” is inappropriate and should be replaced by an approach that seeks to describe the key elements of vulnerability. Consideration should be given to a reworking of that component of the British *No Secrets* definition that stresses “may be unable to take care of themselves or protect themselves against serious harm or exploitation” and that stipulates that the need for services is “due to a mental disability, other disability, age or illness”.**

A further definitional difficulty arises with the approach taken in Section 8.3 of the Discussion Paper to “regulated people”. Appropriately, attention is given to “engagement type”, “contact type” and “supervision”, but it is unclear how these components will be integrated in a final filtering mechanism. Advocacy Tasmania supports an approach where “regulated people” will be identified by sequentially applying the three categories listed above. That is, those who fall into nominated “engagement types” would be further assessed on the basis of the “contact type” list. Where an individual falls into a nominated “engagement type” category (such as a board member of a service-providing organisation) but was unlikely to have contact with vulnerable people (because their engagement was restricted to regular meetings with other board members), then they would not be classified as “regulated people”.

**Rec 2: DHHS should move to further clarify the ways in which it is proposed that these definitional categories relating to the concept of “regulated people” will be operationalised.**

### **C. Screening: Avoiding three unwanted outcomes**

All screening systems – irrespective of their specific intent or the scale of their operation – generate three categories of unwanted outcomes. In broad terms, these can be described as:

- *False positives* – where screening points to a problem that does not in fact exist;
- *False negatives* – where screening fails to identify real problems; and
- *Screening flight* – where potential participants are deterred by their perception of the nature of the screening process.

We have structured the remainder of our response to the Discussion Paper around these three categories.

### **D. Avoiding false positives**

As indicated earlier, the rationale behind the use of police checks as a central component of risk management is the idea, expressed clearly in the Discussion Paper, that “past behaviour is a reasonable indicator of possible future behaviour” (p33). As a generalisation, this premise is difficult to refute, and Advocacy Tasmania agrees with it in its generalised form. The problem, of course, is that the proposed screening process will not be applied to the population in general but to individuals, one at a time. Those individuals will share characteristics, but will also exhibit important differences.

The Discussion Paper fails to convey any sense of where “past behaviour” will cease to be a “reasonable indicator” of future behaviour. At what point, in response to what trigger, does it become “reasonable” to conclude that an individual applicant is no longer likely to re-offend? For example, the Discussion Paper proposes that individuals “who have received a negative notice will be prohibited from reapplying to the WWCVP Screening Unit for registration for a period of five years”<sup>1</sup> (p38). Will minor property crimes have the same ‘half-life’ as predictors of risk that serious abuse convictions have?

In our long-overdue efforts to develop screening protocols to protect our most vulnerable citizens, we must continually remind ourselves that we are in effect codifying a system of further restrictions on the citizenship of past offenders. We are restricting the capacity of these past offenders, after they have discharged the obligations determined by a court of law, to fully participate in the workforce and in the voluntary tasks of civil society.

Let us be clear: Advocacy Tasmania supports this restriction – our priority must always be the interests of those who are most vulnerable. However, ATI is not prepared to accept the subtext of the WWCVP screening approach offered in the Discussion Paper – that behaviour is essentially a function of individual ‘character’, and that character is either unchangeable or at least resistant to change. We assert that people do change in fundamentally important ways. We further assert that citizens must be provided with regular, supported opportunities to demonstrate that they are capable of fulfilling the full range of the obligations of citizenship. Put simply, if we are to apply extra-judicial extensions of the ‘sentences’ incurred

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<sup>1</sup> other than where a conviction has been quashed or pending charges acquitted.

by offenders, we need to ensure that ‘parole’ processes are in place and applied sensitively. Advocacy Tasmania supports the proposed review and appeal procedures outlined in Section 14 – and the underlying commitment to procedural fairness and natural justice – but contends that natural justice will be significantly undermined by the application of onerous prohibitions on reapplication for registration.

**Rec 3: Proposed prohibitions on reapplication for registration are unreasonable. Individuals should be able to reapply on an annual basis if they so choose and should be provided with support in that endeavour. The WWCVP Screening Unit must be compelled to apply a full risk assessment in response to reapplications for registration and to provide reasons for any further denial of registration.**

## **E. Avoiding false negatives**

False negatives – instances where the screening approach fails to identify real problems where they exist – are always more concerning than false positives. In the case of the proposed WWCVP processes, there are a number of ways in which false negatives may arise. Moreover, there is a danger – inherent in all screening approaches across a range of contexts – that the very existence of an agreed screening approach will lead to more, not fewer, inappropriate employees and volunteers in our human services sector.

We now understand that regular mammograms can contribute to early detection of breast cancer. We also recognise that mammograms are best used in conjunction with regular self-examination for abnormalities. Where a reliance on mammograms *replaces* regular self-examination, the overall impact on detection is likely to be negative – detection will be lessened. A similar danger arises with the use of screening approaches for employees/volunteers that are based on police checks *if these checks replace, rather than augment, other risk management approaches*. It has already been observed that some Tasmanian community service organisations have enthusiastically adopted routine police checks as a proxy for more comprehensive risk management approaches. These organisations will require assistance with their risk management frameworks to ensure that they do not view WWCVP ‘clearance’ as a sign that their governance/management responsibilities have been adequately discharged.

**Rec 4: That DHHS include in its WWCVP framework a program of organisational capacity building that targets risk management skills and understandings in service-providing organisations. This program should have a specific focus on staff/volunteer selection approaches that can be appropriately deployed to augment the work of the WWCVP Screening Unit. The capacity building efforts should specifically include training for organisations so that they can appropriately identify opportunities for the use of position-based assessments.**

In essence, organisations will need to recognise that while problematic past behaviour may well be indicative of worrying ‘character’ attributes, it does not follow that the absence of (evidence of) those past behaviours is sufficient to establish that the individual’s character is without blemish. Organisations must be encouraged to use a suite of approaches in their assessments of potential employees and volunteers. Those approaches will include the skilled use of conventional interview techniques, close observation of individuals in a range of

interaction contexts, careful questioning of former employers and colleagues, and the direct involvement of service consumers in assessing the suitability of applicants.

There are other contexts in which proposed WWCVP screening may fail to identify risks to service consumers. The list of ‘relevant offences’ offered in Section 11.2 of the Discussion Paper appears comprehensive. However, it is currently proposed that “an applicant’s driving record ... would not be considered” (p34). This is an unwarranted omission, as the unsafe driving practices of an employee or volunteer can be directly relevant to contexts where vulnerable people are transported (on outings, to medical or other appointments, etc). If those classified as vulnerable are likely to face difficulties in (a) assessing the driving capacity of the individual concerned; (b) communicating any concerns to that individual; or (c) complaining to managers or other parties about their concerns, then unnecessary risks will be experienced.

**Rec 5: Where police checks reveal serious driving offences, these should be included in the risk assessment process that will determine whether a negative notice or interim negative notice is issued.**

A further example of ways in which the screening protocols may fail to detect individuals who pose an unacceptable risk to vulnerable people is acknowledged in Section 10.3 relating to ongoing monitoring. The Discussion Paper confirms that automatic cross-matching of criminal records is not currently available in Tasmania (unlike some other jurisdictions) and that the Screening Unit will therefore not be alerted if registered individuals are charged with, or convicted of, a crime relevant to the objects of WWCVP. Advocacy Tasmania contends that this record-matching capacity is an essential feature of any successful screening framework and we reject the notion that the development of this capacity “would take some years” (p33).

**Rec 6: The Tasmanian Government should immediately commence work on the development of automated record-matching systems designed to ensure that the WWCVP Screening Unit is immediately advised of changes in the criminal record of registered individuals.**

## **F. Avoiding screening flight**

The search for less-invasive approaches to screening (for, say, cervical and prostate cancers) arises not just from a sense that alternative approaches may prove to be more reliable than pap smears and digital rectal examinations. That search is a response to the reluctance of individuals to subject themselves to the current screening because of their perception that the process will be painful, humiliating or both.

So too with the screening proposed in the Discussion Paper. If individuals who would otherwise have sought paid or unpaid employment in our human services sectors choose to not do so because of the screening approaches adopted, we will have undermined the workforce development interests of those sectors – ultimately to the detriment of the vulnerable Tasmanians we seek to support and protect.

In this context, it is critically important that every effort is made to ensure that the screening process (as opposed to the screening outcome) is not a barrier to participation. A number of issues arise in this regard:

#### *Cost*

The benefits of WWCVP screening will be shared by the whole Tasmanian community and it is appropriate that the costs also be shared as with other public goods. While many human service-providing organisations would doubtless be prepared to meet the costs of screening (just as they often do with existing police checks), there is a real danger that inconsistencies of approach would represent a barrier to participation. Moreover, many applicants will seek screening Positive Notices in anticipation of attempts to obtain paid or voluntary positions. It is likely that WWCVP Cards will form a standard element in the résumés compiled by job applicants and by volunteers who participate in a range of organisations.

**Rec 7: The Tasmanian Government should recognise the public good status of WWCVP screening and absorb all costs associated with the initiative.**

#### *Clarity of information*

It is important that prospective applicants receive detailed, reliable information about the screening process and the ways in which information will be used. This information should include details about rights of appeal.

#### *Access to support*

Individual applicants who are unsure about their capacity to negotiate the screening process and/or who wish to make a specific case for (say) a position-based assessment should be offered support. We need to remind ourselves that it is only six months ago that the Tasmanian Government released *A Social Inclusion Strategy for Tasmania*, a comprehensive framework for addressing the various drivers of social exclusion. Two of the key themes in that framework are the roles played by workforce participation and volunteering as pathways for inclusion. Among those identified by the *Strategy* as being at high risk of social exclusion are those with criminal records, especially those who have served custodial sentences.

**Rec 8: The Tasmanian Government, as part of its commitment to social inclusion and in pursuit of the reintegration goals of its proposed *Breaking the Cycle* corrections plan, should ensure that access to advocacy and related support services is available for individuals who would otherwise struggle to negotiate the WWCVP screening process.**

#### *Broadening access to position-based assessments*

The Discussion Paper proposes that “applicants who have been unsuccessful in becoming registered with the WWCVP Screening Unit will have the option of making a further application for a position based risk assessment” (p36). Advocacy Tasmania supports the concept of position-based assessments as an important contribution to social inclusion principles. However, it is unreasonable and unhelpful to set applicants up to fail, and that is what the current proposal does. Applicants who know they have past offences that are likely

to exclude them from certain roles will nevertheless be expected to apply and have that application rejected before they can seek a position-based assessment. This will constitute a significant barrier to participation for ex-offenders.

Instead of building failure into the system, individuals should be encouraged to apply for position-based assessments at the outset. Moreover, the WWCVP Screening Unit should promote itself as a source of advice to prospective applicants about the likely restrictions (and remaining opportunities) arising from any past offences.

**Rec 9: Position-based assessments should be viewed as an important mechanism for encouraging social inclusion while protecting the interests of vulnerable Tasmanians, not as a residual, post-rejection option. The WWCVP Screening Unit should position itself as a resource to prospective applicants, offering advice on the participation options likely to be open to individuals with a record of past offences.**

## **G. Conclusion**

We reiterate our congratulations to DHHS and to the project team that developed the WWCVP Discussion Paper. It is clear that much thought and effort has been devoted to this important task. It is also clear that the resulting proposals appropriately prioritise the interests of Tasmania's most vulnerable people, and we support that prioritisation.

At the outset we stressed the duality of vulnerability that applies to this screening initiative – that there are two categories of vulnerable Tasmanians to be considered: those receiving services and those seeking to participate in the delivery of those services. Finding an appropriate balance between those two sets of interests will almost certainly be a case of 'successive approximations' where we never quite get it right. Nevertheless, we feel that the proposals outlined in the Discussion Paper are still some distance from that elusive balance.

We know that those who have been convicted of criminal offences are frequently characterised by the same sources of vulnerability that we see in those accessing our human services: disability, mental illness, substance dependence, isolation from family and community supports, and poverty. In addition to those characteristics, they now have an added vulnerability deriving from the fact that they have a criminal record. We are obligated, surely, to ensure that mechanisms that further exclude ex-offenders from the workforce and from voluntarism are developed and implemented with a conscious sensitivity to that complex pattern of vulnerability.

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