

## **Here a vet. There a vet. Everywhere a police vet. Education vetting in New Zealand.**

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The introduction of mandatory police vetting for some types of employees in the education sector in New Zealand has changed the landscape in terms of guaranteeing the safety of children in our schools. Or has it?

Some two years on from the implementation of the vetting and safety checking components of the Vulnerable Children Act 2014 (the “Act”), is the purpose of the Act being achieved? Vetting in the education sector currently makes up almost 30% of all police vetting enquiries in New Zealand. This has created significant delays and has provided instances where schools circumvent the law in order to provide the necessary resources.

The New Zealand School Trustees Association (“NZSTA”) provides employment support to Boards of Trustees and is well placed to comment on the issues through its involvement in advising in excess of 2,400 Boards of Trustees throughout New Zealand.

This presentation seeks to highlight the unintended issues that have arisen, examine the factors that have contributed to them and discuss ways to mitigate or remove the risk to schools. It will take a look at the problem the legislation was designed to address, how that has worked in the education setting and suggested changes needed to ensure that the Act is delivering on its purpose.

**Keywords:** Vulnerable children, vetting, safety

### **Introduction**

In June 2012, Mel Smith and Judith Aitken completed the Ministerial Inquiry into the Employment of a Convicted Sex Offender in the Education Sector (the “Person A Inquiry”). This followed from the extraordinary lengths that Henry Te Rito Miki’s (“Miki”) went to in order to avoid detection and continue his offending against children within a school setting. Miki had previously been imprisoned for his offending in at least seven schools. Following his release from prison in 2004, he appeared determined to offend again so stole an identity which enabled him to gain full teacher registration and offend again at another two schools.

Whilst some of Miki’s methods of avoidance were sophisticated (such as the identity theft), there were a number of opportunities for agencies to expose him which were stifled. This was due, in the main, to lack of proper process. The Person A Inquiry made a number of recommendations that have influenced change in the way adults are checked for their suitability to interact with children.

## School governance in New Zealand

New Zealand has just over 2,400 schools. Following the introduction of *Tomorrow's Schools* in 1989, each school is an individual Crown entity governed by a Board of Trustees (the "Board"). These Boards are elected on a triennial basis and are made up of representatives of the parent community, the principal as well as a staff and student representative.

The Board's primary objective is to ensure that every student at the school is able to attain his or her highest possible standard in educational achievement.<sup>i</sup> In order to meet that primary objective, the Board must ensure that the school is physically and emotionally safe for both students and staff.

Whilst the principal acts as the Chief Executive Officer in terms of the day-to-day management of the school, the Board has the ultimate responsibility in employing staff. This is codified in the Education Act 1989 (the "Ed Act") in Schedule 6:

### **4 Board is governing body of school**

- (1) A board is the governing body of its school.
- (2) A board is responsible for the governance of the school, including setting the policies by which the school is to be controlled and managed.
- (3) Under section 76, the school's principal is the board's chief executive in relation to the school's control and management.

### **6 Staff**

Subject to Parts 8A and 31, a board may, in accordance with the State Sector Act 1988, appoint, suspend, or dismiss school staff.

The New Zealand School Trustees Association ("NZSTA") is a membership based organisation that, on contract from the Ministry of Education, provides advice and guidance to Boards in relation to governance and employment matters as well as providing professional development opportunities for Boards through a structured education programme. It runs an Advisory and Support Centre that acts as the first port of call for Boards who have queries about employment or governance matters. In the 2016 calendar year, NZSTA answered in excess of 41,000 calls for service.<sup>ii</sup> A number of these calls were in relation to the suitability of applicants to hold positions within schools.

## Vulnerable Children Act 2014

One of the key recommendations from the Person A Inquiry was for government agencies to have a more cohesive approach in relation to the safety of children and a key outcome was placing accountability on those agencies for "...achieving results for vulnerable children."<sup>iii</sup> Those agencies, Social Development, Health, Education, Police, Justice, Housing and Te Puni Kokiri (Ministry for Maori Development) are those that are integral in establishing a complete picture as to the child's vulnerability.

A further significant outcome of the Person A Inquiry was the introduction of the Vulnerable Children Act 2014 (the "Act") which came into force on 1 July 2014. This has the purpose of supporting government's priorities for improving the well-being of vulnerable children and ensuring that key agencies work together to improve the well-being of those vulnerable children.<sup>iv</sup>

The Act applies to all government agencies including school boards. All other organisations are voluntary unless they are contracted or funded by a government agency to deliver

children's

services.

A vulnerable child is defined as:

Vulnerable children are children who are at significant risk of harm to their wellbeing, now and into the future, as a consequence of the environment in which they are being raised, and in some cases, due to their own complex needs. Environmental factors that influence child vulnerability include not having their basic emotional, physical, social, developmental and/or cultural needs met at home or in their wider community.<sup>v</sup>

They are those most at risk and those that deserve protection.

The Act has had a staged implementation for safety checks as follows:

- From 1 July 2015, all new children's core workers were required to be safety checked
- From 1 July 2016, all new children's non-core workers were required to be safety checked
- From 1 July 2018, all existing children's core workers are required to be safety checked
- From 1 July 2019, all existing children's non-core workers must be safety checked

### **Safety checking**

Children's worker safety checking is codified in section 21 of the Act as follows:

#### **21 Purpose of this Part**

The purpose of this Part is to reduce the risk of harm to children by requiring people employed or engaged in work that involves regular or overnight contact with children to be safety checked.

Section 31 of the Act defines what safety checking is.

#### **31 Requirements of safety checks**

- (1) Every safety check of a person must comply with the requirements for safety checks for core workers or for non-core workers (as appropriate) prescribed by this section and by regulations made under section 32.
- (2) Every safety check of a person must include—
  - (a) confirmation of the identity of the person, carried out as prescribed by regulations made under section 32; and
  - (b) consideration of specific information prescribed by regulations made under section 32; and
  - (c) a risk assessment, carried out as prescribed by regulations made under section 32, that assesses the risk the person would pose to the safety of children if employed or engaged as a children's worker.
- (3) Despite anything in the Criminal Records (Clean Slate) Act 2004, nothing in that Act authorises the concealment of a conviction for a specified offence of a person who is subject to a safety check in relation to employment or engagement as a core worker, even if the person is otherwise deemed to have no criminal record.

Safety checking has three clear parts:

- i. Verifying identity
- ii. Consideration of specific information; *and*
- iii. A risk assessment

Verifying the identity of the individual is captured as part of the vetting process. Approved identification must be sighted, and verified that it has been sighted, as part of the process. The consideration of specific information is narrowly thought to simply be police vetting, whereas

proper due diligence would indicate that it can, and should, be wider than that. A risk assessment should be undertaken against all employees in order to provide assurance that information has been gathered and properly assessed before a decision is made.

Currently, there is an over reliance on police vetting as the sole method of assessing a persons suitability for a role within schools.

### **Who needs to be vetted**

All teachers must be vetted. This is done every three years. This is on the basis that a teacher is a core worker. The Act defines a “core worker” as follows:

**Core worker** means a children’s worker whose work in or providing a regulated service requires or allows that, when the person is present with a child or children in the course of that work, the person –

- a) Is the only children’s worker present; or
- b) Is the children’s worker who has primary responsibility for, or authority, over the child or child present

Support staff within schools also need to be vetted however the definition of a core worker doesn’t fit all roles within a school. For example, is the Executive Officer, whose role is essentially office bound and administrative, a core worker? Or what about the Groundsperson whose role is to maintain the grounds of the school? The answer is that they are not strictly core workers but because they have the opportunity to be alone with a child, they absolutely should be vetted.

### **Vetting in New Zealand**

Vetting, per se, is not new. The New Zealand Police had previously run a Vetting and Validation Section which has now become the New Zealand Police Vetting Service (the “Police Vetting Service”) which provides criminal history checks and other relevant information on potential and current employees, volunteers and vocational trainees to Approved Agencies that provide care to children and vulnerable members of society.<sup>vi</sup>

Police vets are obtained by approved agencies; they are not available for individuals. Approved agencies include government departments and those with legislative or other obligations to obtain police vets.<sup>vii</sup> Individuals are able to obtain a criminal record check through the Ministry of Justice. The difference between a Ministry of Justice criminal record check and police vetting is that the criminal record check only covers convictions. As well as your criminal record, police vetting can also include information on any contact you’ve had with the police.<sup>viii</sup>

Information that the Police Vetting Service may release includes (but is not limited to):

1. Conviction history and infringement/demerit reports
2. Active charges and warrants to arrest
3. Charges that did not result in a conviction including those that were acquitted, discharged without conviction, diverted, or withdrawn
4. Any interaction you have had with New Zealand Police, including family violence incidents, and investigations that did not result in prosecution
5. Information subject to name suppression where that information is necessary to the purpose of the vet

A specified offence under Schedule 2 of the Act makes it easy. You simply cannot be employed in a school if you have a conviction for a specified offence. These include (in the main) sexual offending and serious assaults. So, in that regard, it's black and white. It is the information potentially disclosed in items 3, 4, and 5 above that becomes problematic for schools of Boards because it is not black and white, and when it's not black and white, judgement has to be used.

Vetting is a snapshot in time and is not the panacea to fix all. Over reliance on it in isolation will, unfortunately, result in children being exposed to further risk. Vetting is a critical tool but must be used in conjunction with the other tools in the child protection tool box.

Miki was an exception, but very few people vetted for work within schools will return results showing criminal convictions for specified offences. The 'at risk' people are those that have no convictions but may exhibit behaviour (past or present) that is of concern. Recognising and acting on those concerns is part of on-going Board education.

### **Issues arising**

#### *Delay*

The first issue arising out of police vetting is the delay in obtaining the results. The Police Vetting Service aims to have vets completed within 20 working days. This hasn't transpired in practice with some schools experiencing delays of up to nine weeks. In 2016, 26% of all vets in New Zealand were education related— almost 171, 000 vets.

For the employment of non-teaching staff within a school, the delays have a significant impact. Often the need for a new staff member arises because of an influx of students or, more often, the arrival of a learning support student and funding for a teacher aide that is tagged to that student. In that case, the need for a teacher aide is immediate and the child shouldn't be excluded from the school for weeks because a thorough safety check is not able to be completed. Situations like this are compounded when the teacher aide has in fact been recently safety checked at the school down the road but, because safety checking is particular to the school, that check (more specifically the vet) is not valid. Legally the teacher aide cannot start until properly safety checked.

#### *Over-vetting*

The mandatory need for vetting has meant that a massive number of vets have been placed in the pipeline within the first two years of the introduction of the Act. This has compounded the delays outlined above because a large number of these vets are being done when there is no specific need or because the legislation requires them to be done on multiple occasions.

An example of vets being done when there is no specific need is the vetting of a Board of Trustees. It's laudable that the Board wish to be seen to be 'walking the walk' but the actual effect is to clog the pipeline.

Legislation has also conspired to significantly clog the pipeline when an individual is required to be vetted multiple times for different organisations. This is because the vets are employer specific. For example, a contractor that works across multiple schools will be required to be vetted for each school. A New Zealand company with a national safety contract for schools has one contractor responsible for around 50 schools. That contractor is required to have 50 vets completed if there is the chance that they may be alone with children

at the school. The contractor cannot simply have one vet performed by his or her employer because it is the Board's responsibility to ensure a safe environment.

Of the almost 171,000 vets performed during the 2016 calendar year, almost 50% (83,997) were requests from schools so are likely to have been non-teaching staff and volunteers. Just over 25% were from Early Childhood Centres (45,662), with just over 20% coming from the Education Council of New Zealand (the "Education Council") (37,314). The remaining 5% (approximately) were from the Ministry of Education and NZSTA (3,600)<sup>ix</sup>. To provide some context in the New Zealand setting, there are approximately 56,000 teaching roles and 16,000 non-teaching roles<sup>x</sup> These figures would indicate that there is a significant amount of over-vetting, particularly in the area of non-teaching staff and volunteers.

#### *Reliance on vet*

As mentioned earlier in this paper, the most at risk individuals will (most often) return the cleanest vetting report. Therefore, reliance on the vet in isolation, creates significant risk.

In a teaching context, having a current registration means that the individual has been vetted. The assumption is that the vet has been entirely acceptable. Because vetting of teachers is part of the teacher registration process, the Education Council owns this part of the process. The Education Council is the professional body that, among other services, oversees teacher registration in New Zealand. When a teacher is vetted, it is done so by the Education Council and the results are communicated directly with the teacher. Teacher registration is evidence of an acceptable vet however registration may have been granted even when there could be concerns. These concerns could be noted in a letter to the teacher when registration is approved. The issue with this is that the employer (in this case the Board) has no right to see the contents of the letter because it is a matter between the Education Council and the individual. As an example, the teacher may have been noted by Police hanging around playgrounds when he or she has no children. This may be information that the Board might want to consider as the employer. If the Board does not have all the information, how does it perform a proper risk assessment?

#### *Poor and ad hoc recruiting processes*

As separate Crown entities, schools are responsible for employing their own staff. Teachers vacancies are advertised nationally however non-teaching roles are generally advertised locally. Often, in rural or provincial New Zealand, vacancies are filled by family members or friends of current staff. Familiarity can cause issues – "I know them, they must be OK."

#### *Risk assessments*

Currently, the performance of risk assessments in the education sector is poor. This is because of the over reliance on the vetting process as described above. Evidence suggests that a Board is rarely involved in risk assessing a new employee within a school because it delegates the day-to-day running of the school to its Chief Executive. How, then, can a Board as the employer of all staff within a school, assure itself that a process has been followed correctly?

#### *Cost recovery*

As of 1 July 2017, Police Vetting Service has introduced cost recovery measures, charging \$8.50 (plus gst) per vet. Previously it had been free. The impact on the education sector should be minimal as the fee is captured in the teacher registration process but is a new cost to schools for non-teaching staff. It does pose the question of who should actually pay for the

vet? The cost is passed onto the teaching employee but the employer meets the cost. Should it be user pays?

## **Mitigation**

### *Delay*

Some steps are already being taken to mitigate delay. The introduction of cost recovery meant that a large number of vets were filed before the charges were introduced. Since 1 July, there has been a marked drop off in vetting, allowing the Police Vetting Service to clear the pipeline. Current vets are being processed in around 14 working days.

There had been plans the Ministry of Education and the Education Council to supply funding to allow up to two staff to be embedded into the Police Vetting Service, solely processing education vets. This has not been able to be achieved however there has been a service level agreement which will see 5,000 priority vets being processed within 2-5 days. This will make a considerable impact on the urgency of the teacher aide situation described above.

### *Over-vetting*

The current practice of each Board of vetting staff (other than teaching staff) and volunteers means that multiple vets are performed on individuals. As an example, I coach boys basketball. When my children moved from one school to another, I was required to be vetted in the new school despite having been vetted in the old school some five months before. This seems a nonsense given that vetting is a snapshot in time. On a particular day, with the information available, I am either suitable or not suitable; that could change the next day.

A sensible solution would be the issue of a clearance that covers a period of time – for example three years. This could be evidenced by the issue of a card (such as the Blue card<sup>xi</sup>) or a tag to the individual's government identity (such as RealMe). This, on its own, would significantly reduce the number of vets having to be completed.

### *Reliance on vetting*

...reliance by the employer on any single mode such as police vetting, which signals criminal conviction but neglects a wide range of other information, would be “woefully inadequate.”<sup>xiii</sup>

Proper due diligence suggests that a range of information is important in assessing character. Vetting is a part of this but equally important are reference checks and asking the right questions of the right people. If you have concerns you need to ensure that you get to the stage that those concerns have been addressed.

### *Recruiting processes*

Employment is part of the managerial tasks of a Chief Executive but they often don't have the capacity to be across all aspects of it. Executive Officers or Assistants are often delegated the tasks associated with recruiting; ensuring that the proper checks have been done is part of this. As individual Crown entities, there is no consistent process across schools. Teachers vacancies must be advertised and the process is subject to the State Sector Act 1988 in terms of merit based appointment and review processes, however the school owns its own process. Bigger schools may be in a constant state of recruitment, smaller schools might recruit less often – both have risks if the process is not run correctly.

In response to this, NZSTA is developing an end-to-end recruitment management system that enables vacancies to be loaded and managed on-line, forms to be generated as well as checks such as vetting and reference checks, to be completed and a risk assessment to be done. This is seen as a key risk mitigation tool for the recruitment of new staff that can provide the Board with the assurance that proper and robust process has been followed. As a registered charity, NZSTA is exempt from the \$8.50 (plus gst) vetting charge. This is a further tangible benefit of seeking assistance from NZSTA.

#### *Risk assessments*

Proper, informed risk assessments are a key part in keeping children safe. But they are also the hardest part to complete. The hardest because what Boards might be dealing with is subjective rather than objective; it's not black and white therefore judgement has to be used. They are also challenging conversations to have with an individual and not everyone is equipped or confident enough to do so. An educative piece on this is under development by NZSTA to assist Boards to understand the responsibilities as an employer. This will focus on the process and form of a risk assessment, how to conduct those practically and how to have those challenging conversations.

It may not fit within a legal box, but if it doesn't feel right then you should listen to your gut. There is risk on both sides. There is an employment risk in that you may be seen to disadvantage a prospective employee. The counter risk is that a child is harmed. My personal belief is that the latter far outweighs the former and, having followed a sound process, any challenges to the decision making are more likely to be defensible.

#### **Conclusion**

The Act changes the legal landscape for people who interact with children. Legally applicable to those who work in or for government agencies, its use is becoming wider than that, with many organisations requiring safety checks to be completed despite no real legal basis. The pushback is minimal because safety of children is involved.

Vetting is not simply a compliance issue and it is not the panacea for all. It is a tool to be used with a range of other tools, the most important one of which is common sense. The Person A Inquiry mentions the maxim commonly attributed to President Ronald Reagan, "Trust – but verify" which is, of itself, an oxymoron. A more accurate maxim would be to "Trust nothing – verify everything."

## References

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- <sup>iv</sup> Vulnerable Children Act 2014, section 4
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- <sup>vi</sup> <sup>vi</sup> New Zealand Police website, [www.police.govt.nz/vetting](http://www.police.govt.nz/vetting), last accessed 4 July 2017
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- <sup>xii</sup> Ministerial Inquiry Into the Employment of a Convicted Sex Offender in the Education Sector, Mel Smith CNZM and Dr Judith Aitken, 15 June 2012, at page 20