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Secretariat
Social Services Committee
Select Committee Services
Parliament Buildings
WELLINGTON 6160

Submission on the Vulnerable Children Bill

1.0 Introduction

1.1 The Dental Council ("Council") welcomes the opportunity to make submissions on the Vulnerable Children Bill (the "Bill").

1.2 The Bill is an outcome of Government's Children's Action Plan following the Green and White Papers on Vulnerable Children. It has as a primary focus the vetting and screening of those who work with children. A best practice guideline for screening and vetting known as the *Vetting and Screening Guidelines* ("Guidelines") has been developed concurrently.

1.2 Council supports the principles of Bill and Government's expressed wish to set priorities for improving the well-being of vulnerable children and ensure that children's agencies work together to improve their well-being. Council is of the view however, that the breadth of the Bill as currently drafted is a concern and much of the detail is to be the subject of yet unpublished regulations that will not be the subject of consultation.

1.3 In concert with the development of the Bill, the Ministry of Health has been consulting on draft Guidelines. The Guidelines require responsible authorities such as Council to undertake the vetting and screening of registered health practitioners that would under the Bill otherwise fall to be undertaken by a specified organisation. This is of real concern to Council. Whilst the objectives of the Bill and Council's enabling legislation, the Health Practitioners Competence Assurance Act, 2003, (the "HPCA Act") are broadly similar, the latter establishes of bench marks for fitness for registration and ongoing fitness to practise which do not sit comfortably with that espoused by the Bill.

1.4 As a not for profit statutory body funded entirely by practitioners, Council is acutely aware of its fiduciary duty to those practitioners. Accordingly it is concerned that it may be required to undertake additional vetting and screening activities, which are beyond its present capabilities and which do not sit comfortably with its statutory objectives.

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1.5 Council's submissions focus on Part 1, Subpart 3 of the Bill – *Children's worker safety checking*; and to a lesser extent upon Part 2 of the Bill – *Child harm prevention orders*.

2.0 Dental Council

2.1 The Dental Council is a responsible authority constituted under the Health Practitioners Competence Assurance Act, 2003 the principal purpose of which is to:

> "...protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions."[1]

2.2 As at 6 October 2013, there were 4,953 oral health practitioners registered with the Dental Council, 4,065 of who held an annual practising certificate ("APC"). They were comprised of dentists and dental specialists, dental hygienists, orthodontic auxiliaries (a subset of dental hygiene), dental therapists, dental technicians and clinical dental technicians.

	Registered	APC
Dentists & Dental Specialists	2657	2056
Dental Hygienists	708	606
Orthodontic Auxiliaries	128	103
Dental Therapists	850	781
Dental Technicians	415	342
Clinical Dental Technicians	195	177
TOTAL	4953	4065

2.3 Approximately 90% of dentists are engaged in private practice but over 700 district health board contracts are held by dental practices to provide oral health care for adolescents aged 13-17 years and children under 13 years when the scope of practice is outside that of a dental therapist A majority of dental hygienists, dental technicians and clinical technicians are engaged in private practice; a majority of dental therapists are employed by district health boards to manage the oral health care of children and adolescents up to age 17 years.

2.4 Council has the following key statutory functions:[2]

- registering and recertifying oral health practitioners;
- setting standards of clinical competence, cultural competence and ethical conduct;
- reviewing and promoting the competence of oral health practitioners; and,
- acting upon concerns about the health and conduct of oral health practitioners.

[1] Section 3, Health Practitioners Competence Assurance Act, 2003

[2] The functions of Council are set out in section 118 of the Health Practitioners Competence Assurance Act, 2003

3.0 Part 1 Subpart 3 of the Bill

3.1 Clauses 25 to 27 of the Bill provide that *specified organisations* are responsible for ensuring that a safety check occurs before any children's worker is employed, and are repeated triennially. A *specified organisation* that fails to conduct a safety check a children's worker commits and offence for which it may be liable to a fine of up to $10,000.

3.2 The term *children's workers* is defined by clause 23 of the Bill to include those who work with children in providing personal or public health services; and that work "...**may** or does involve regular ...contact with a child or children..."[*emphasis added*] without a parent being present. Most oral health practitioners fall within the definition of children's workers.

3.3 Clause 24 of the Bill defines the term *specified organisation* to include a State service that employs or engages a children's worker to provide private or public health services or any individual or organisation that is funded wholly or in part by a State service to do so.

3.4 Clause 31 sets out the fundamental requirements of a safety check, including identity verification; consideration of specific information to be prescribed by regulation and a risk assessment which is to be carried out, as prescribed by regulations to be made under clause 32 of the Bill.

3.5 Clause 32 of the Bill creates the power for the making of regulations to prescribe the requirements for safety checking, in particular clause 32(1)(a) providing:

> "...that certain forms of checking undertaken by the licensing body of any specified profession or occupation may be treated as satisfying the requirement for safety checking, or for satisfying any 1 or more prescribed requirements for safety checking:"

3.6 Clearly it is intended that Council and the other 15 responsible authorities constituted under the HPCA Act are expected to undertake a role in the safety checking of the practitioners they are administer.

3.7 Council agrees that child vetting and screening safety checks should be conducted on health practitioners as part of the employment process conducted by specified organisations. The employer is best placed to carry out safety checking interviews; the employer has the position description and understanding of the breadth of the role to be undertaken, including the level of involvement and risk around contact with children, and the workplace, team structures and other protections that exist in the working environment. In the view of Council, the level of intervention must be proportionate to the level of risk presented. In particular, care needs to be taken not to impose too large a regulatory burden where the risk is low and where existing regulatory and workplace arrangements already provide protection. It is noteworthy that oral health practitioners would very rarely treat patients in complete isolation. It is normal practice for an oral health practitioner to work alongside a chair-side assistant in the delivery of clinical care to a patient.

3.7 A vast majority of oral health practitioners, whether employed in the public health sector, or in private or corporate practice fall within the definition of a children's worker. However that may not be the case for all oral health practitioners. Where a practitioner is in private practice and does not have a contract with a DHB or undertake ACC work, where does the responsibility lie for determining whether that practitioner is a children's worker? Who will undertake the safety screening of a children's worker where he or she is not employed by a specified organisation?

3.8 Because the screening check is the responsibility of State services and employers, we suggest that the responsibility for acting on concerns raised as a result of a child screening check should also lie with the State service and employer. Council further submits that the Bill be amended to address what action a State agency or employer can, and should take in the event that a screening check identifies a potential risk of harm. This provision should further outline what should happen to information collected by means of a child safety check, and who is permitted to access this information.

4.0 Regulations and Guidelines

4.1 The Guidelines which have been consulted on by the Ministry of Health would appear to be a blue-print for the regulations proposed to made pursuant to clause 32 of the Bill. Assuming that is the case, then Council submits that consultation on the proposed regulations (rather than upon best practise guidelines) is both necessary and appropriate to ensure that equity is preserved.

4.2 The Guidelines suggest that responsible authorities would be expected to "*decline registration or renewal*" should a practitioner be identified as a potential risk by means of a child safety check. It is important to note that neither the Bill, nor the HPCA Act, provide responsible authorities with the explicit legal authority to decline registration or renewal on this basis. Decision making under the HPCA Act is governed by statutory criteria, tried and tested policy, and by the extensive body of case law that governs the exercise by Council of its discretionary powers. Each Council determination must be legally defensible.

4.3 Similarly, the Guidelines have suggested that face-to-face interviews be conducted with each applicant for registration and thereafter, triennially. Council has pointed out to the Ministry of Health that this is a requirement better handled by an employer, and if the responsibility was to be devolved on Council it would result in estimated additional costs of $700,000 each year and a further $1.65 million every three years. It is an expensive and logistically impractical obligation to be shouldered by responsible authorities.

5.0 Safety Checking in the Context of Current Council Processes

5.1 Existing Council processes may assist State agencies and employers, as identified in the regulatory impact statement and anticipated in the Guidelines, and in particular that: it takes steps to verify an applicant's identity; verify the applicants qualifications; requires

applicants coming to New Zealand to provide a Certificate of Good Standing; requires applicants to make a statutory declaration about prior convictions and disciplinary action; and receives notifications from the registrar of the Courts in the event of a conviction in New Zealand, and takes action where a conviction indicates that a practitioner may present a risk of harm.

5.2 Council does not conduct reference or curriculum vitae checks, nor does it conduct face-to-face interviews, Police checks, or whether an applicant has a working visa. Such responsibilities appear to lie better with the employer. The responsible authorities' enabling legislation, the HPCA Act provides mechanisms to ensure practitioners are competent and fit to practise their professions; it is not job specific. In fact, there is no requirement when registering a practitioner that the practitioner has a job.

5.3 As noted, requiring Council to undertake face-to-face interviews and reference checks, as proposed in Guidelines, would have a significant financial cost to Council, and result in an increase of the APC fee to practitioners, at a time when the Minister of Health is exhorting responsible authorities to reduce APC fees. In addition, practitioners would be required to travel to Wellington for a face-to-face interview every three years, placing an additional time and monetary cost on individual practitioners.

5.4 While requiring responsible authorities to undertake a Police and criminal record check as suggested in the regulatory impact statement is unlikely to impose any significant monetary cost on practitioners or Council, it will cause a delay in the registration process and the Minister of Health has strongly expressed the view that this must be efficient and not cause delays to registration. In Council's experience, Police checks and Police Certificates received from a number of foreign jurisdictions cannot be accepted as reliable or determinative.

5.5 Council does not check that applicants hold a work visa, as suggested by the regulatory impact statement, because practitioners who come to New Zealand from another country generally obtain a work visa after obtaining registration. Reversing this process would likely either mean that appropriately qualified practitioners from another country would not be able to gain a working visa (because Immigration has no assurance that they will be able to gain registration as a practitioner at the time of application for a working visa) or, that under-qualified members of the public may be granted a working visa as a "practitioner", but would then not be permitted to work in New Zealand because they lack the qualifications needed to gain registration.

5.6 Council's vetting and screening process for applicants commences when a candidate first applies for registration, and in the case of overseas practitioners relocating to New Zealand, because registration must be gained before a visa is granted, there is frequently a substantial time delay between registration and the issue of an APC. Whilst additional checks are undertaken where there is a significant delay between initial registration and an application for an APC, it is submitted that consideration should be given to the time at which safety checks should be undertaken.

5.7 Once registered, a number of international applicants never apply for an APC. This may be due to a number of circumstances, including using New Zealand registration as

a 'springboard' to practising in Australia by transferring their registration to that jurisdiction (as of right), under the Trans-Tasman Mutual Recognition Act 1997; or due for example, to immigration issues or a change in circumstances. Accordingly safety checking at the time of registration (as opposed to the time of application for an APC) is potentially an inefficient use of time, money and resources.

5.8 Council has very robust policy and business process for determining fitness for registration, fitness to practise and for verifying the identity of applicants for registration, which may be of assistance to employers in the vetting and screening of practitioners. It must however restrict its processes to those permitted by the HPCA Act and not incur unacceptable legal risk or cost.

6.0 Children's Workers who are not Employees of Specified Organisations

6.1 A majority of oral health practitioners will fall within the classification of children's workers by virtue of their employment in the public health system, or because they have a contractual relationship with a district health board or ACC. There will however be some in private practice who have neither a contract with or receive funding from a district health board or ACC, but nonetheless still fall within the definition of a children's workers.

6.2 The Bill does not address who is responsible for conducting safety checks on such practitioners. As noted, neither Council nor the other 15 responsible authorities constituted under the HPCA Act have the capacity nor expertise to carry out the full range of safety checks that a specified organisation is required to complete under the Bill. However, where there is no employment, contractual or funding relationship between a State service or a specified organisation and a children's worker, no party is obliged to undertake the requisite checking. Who then does a children's worker turn to have the testing undertaken, in order that he or she may work with children without risk of penalty. This presents a significant a loophole

6.3 The Bill presents the oral health professions with insufficient clarity about where the responsibilities rest for safety checking practitioners who work with children. With the blurred lines of responsibility for safety checking oral health practitioners, more considered thought is required to address issues concerning who exactly is required to do what in in vetting practitioners; what others can rely on as having been done; how do we avoid rework, multiple checking at different levels, excessive cost and delay; and how do we ensure consistency of approach?

7.0 An Independent Safety Checking Agency

7.1 Council suggests that consideration be given to the establishment of an independent safety checking agency to cater not only for those children's workers in private practice who have no employment, contractual or funding relationship with a State service or

specified organisation, but to provide a centralised, consistent, objective and transparent process for all children's workers.

7.2 In Council's submissions to the Ministry of Health on the proposed Guidelines, it noted in particular the subjective nature of the evaluation processes being proposed and the reliance being placed upon the intuition of the evaluator. No valid and reliable screening tools were proposed, which is both morally repugnant and, because of a complete lack of natural justice, legally indefensible. In addition, the proposals raised a number of disturbing issues not only about the nature of the process and their fundamental unfairness, but also about the use and privacy of information; and the rights of a practitioner and of the public to have access to, use, or challenge it. Accordingly, the evaluation processes that were proposed were noted by Council as being fraught with legal risk, and as they were devoid of the elements of natural justice, judicial review would be a natural and probable result.

7.3 For these reasons, Council submits that the safety checking process to be imposed by the Bill must be objective, using reliable and tested screening tools; defensible and transparent. As Council has seen little evidence of these characteristics in the proposed Guidelines, it reiterates its suggestion that an independent safety checking agency be established to check all children's workers.

8.0 Part 2 of the Bill – Information Sharing About Child Harm Prevention Orders

8.1 Council is concerned that Part 2 of the Bill does not contain any provision permitting the sharing of information about Child Harm Prevention Orders.

8.2 Part 2 of the Bill permits restrictions to be placed upon a practitioner who poses a "high risk of causing serious harm" to children. In particular, the court may impose a Child Harm Prevention Order upon a practitioner who has been convicted of a *qualifying offence* where it is believed that the practitioner poses a high risk of committing further offences that would cause serious harm to children. In such cases, the Court may suppress the identity of the practitioner who is subject to the order, and the order may remain in force for a period of up to 10 years.

8.3 The courts are required by section 67 of the HPCA Act to notify Council of the conviction of any registered practitioner of an offence punishable by imprisonment for a term of three months or longer, or for an offence against any one of a number of prescribed Acts. Accordingly, Council should be notified of the initial conviction that led to the making of a Child Harm Prevention Order. However, where an Order is imposed on a practitioner preventing them from working with children, Council submits it would be completely inappropriate not to share that information with it in order that the implications for the practitioner's practise of his or her profession can be assessed and where appropriate acted upon.

8.4 Council suggests that an information sharing provision be included in Part 2 of the Bill to ensure that responsible and other appropriate regulatory authorities are notified of the

contents of any Child Harm Prevention Orders that are imposed upon any of their registrants.

9.0 Dental Council's Submission

9.1 Council agrees that child safety checks should be conducted on health practitioners as part of the employment process conducted by specified organisations. However, the level of intervention must be proportionate to the level of risk presented. In particular, care needs to be taken not to impose an excessive regulatory burden where the risk is low and where existing regulatory and workplace arrangements already provide protection.

9.2 It agrees that specified organisations should bear the responsibility for the safety checking of children's workers. This is because the employer will be in a better position to assess an individual children's worker's likely involvement in the care of children, the particular risks associated with the role, and the workplace, team structures and other protections that exist in the working environment.

9.3 Whilst specified organisations should retain the responsibility for safety checking children's workers, Council submits that there are sound reasons for constituting an independent agency to manage the process.

9.4 There needs to be consultation on any regulations proposed to be made under clauses 32 and 33 of the Bill.

9.5 While Council can increase the level of its current screening and vetting of applicants to include Police and criminal record checks, to extend the process beyond that as proposed by the Guidelines would require additional resources, could very significantly increase costs and, introduce delays in the registration and annual practising certificate renewal processes.

9.6 Council is willing to consider amending its policies and internal business processes to accommodate or better align the requirements of the Bill with those of the HPCA Act. It is comfortable to ensure best practice business process is maintained within the strictures of the HPCA Act.

9.7 Any screening and vetting tools introduced pursuant to regulation under clause 32 of the Bill must be objective, reliable, transparent and legally defensible.

9.8 An information sharing provision should be included in Part 2 of the Bill, to ensure that any relevant agencies are notified of the content of a Child Harm Prevention Order, and that these provisions include the notification of responsible authorities when the person subject to an order is a registered health practitioner.

The Dental Council is grateful for the opportunity of making its written submissions to the Select Committee on the Vulnerable Children Bill and advises that it does not wish to avail itself of the opportunity to appear before the Committee. If the Committee has any questions

about Council's submissions, please contact Mark Rodgers, the Registrar of the Dental Council, on (04) 499 4820 or inquiries@dcnz.org.nz .

Yours faithfully,

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Chair