# Supreme Court says working with children checks should only be refused where engagement in child-related work would pose risk

**Case note: PQR v Secretary, Department of Justice and Regulation (No 2) [2017] VSC 514 (26 September 2017)**

## Summary

The Supreme Court has found that the Victorian Civil and Administrative Tribunal (VCAT) committed an error of law in its interpretation and application of the ‘unjustifiable risk’ test in ss. 13(2) and 26B(1) of the *Working with Children Act 2005* (Vic) (WWC Act).

Proper administration of the test requires determining whether **giving the assessment notice** would pose an unjustifiable risk to the safety of children.

## Background

PQR had been found guilty of several criminal offences over the previous 15 years. He was found guilty of assaulting his then de facto partner in 2002, and had been convicted of several drug offences. Most seriously, in 2012 he was convicted of trafficking in dangerous drugs as part of a large-scale drug trafficking syndicate in Queensland. He was sentenced to six years’ imprisonment, with a minimum term of two years. He was a model prisoner and received parole at the earliest opportunity. There was no evidence that PQR had been involved in dealing drugs to children.

After being released from prison, PQR moved to Victoria and commenced university studies to become an exercise physiologist. He required a Working with Children Check (WWCC) to complete the student placements that he had to complete to obtain his degree.

PQR applied to the Secretary to the Department of Justice and Regulation (the secretary) for a WWCC in 2015. The 2002 assault meant that his application was a ‘category B’ assessment under the WWC Act. The secretary also considered the drug offending in assessing his application. His application was refused.

PQR sought review of the secretary’s decision in VCAT. Deputy President Dwyer accepted that PQR was a low risk of harming children directly, and indeed was caring towards them. However, he refused to grant a WWCC on the basis that there was a ‘potential future threat of harm to children’ of an indirect kind.

The Supreme Court summarised the VCAT’s decision as follows (at [5]):

There was no evidence before the deputy president that there was any risk that the applicant would sell drugs to or otherwise directly harm children, including any with whom he would come into contact during child-related work. The secretary did not seek, and the deputy president did not make, such a finding. In determining the application for review, the deputy president did not focus upon or make express findings about how giving the assessment notice would pose an unjustifiable risk to the safety of children. Rather, he focused upon how, and made findings that, children generally might be at potential future risk of harm if the applicant were to relapse into drug-related activity. On this basis, he upheld the secretary’s decision to refuse to grant the assessment notice.

PQR contended that VCAT had committed an error of law by failing to consider the level of risk posed to the safety of children by PQR’s engagement in child-related work, as opposed to the risk of reoffending in a general sense. In particular, PQR argued that VCAT had failed to consider how **giving the WWCC**would affect the level of risk posed to the safety of children, as required by s. 26B(1) of the WWC Act.

The appeal was commenced 91 days outside the usual 28-day time limit to appeal. The delay was in part caused by a VCAT error that meant that the decision was not sent to PQR’s solicitor. The remainder of the delay was caused by PQR seeking legal advice on the merits of an appeal and a pre-commencement pseudonym order.

## Reasons for decision

### The appeal

Justice Bell established at the outset that the WWC Act is not directed at protecting children from harm generally and in all situations. Instead, its aim is to protect children from the risk of harm caused by people who work with or care for them (at [23]). The primary function of the Secretary and VCAT, therefore, is one of risk assessment.

Citing his previous judgment in [ZZ v Secretary to the Department of Justice and Regulation [2013] VSC 267](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2013/267.html)(**ZZ**)), his Honour J emphasised the seriousness of denying a person access to employment. Given the potential impact on the applicant, he reiterated that VCAT and the secretary must make rational, objective and evidence-based assessments of the nature and degree of the risk which **giving the WWCC**would pose.

Importantly, Justice Bell agreed with PQR that the test of unjustifiable risk is one that must be assessed in the context of potential child-related work. He held that under the WWC Act (at [46]):

there is a connection between the necessary evaluative assessment about the seriousness of the harm identified and the probability of it occurring (ie the nature and degree of the risk), on the one hand, and the required causal connection between the relevant risk and the giving of the assessment notice on the other. Unless the focus is upon the risk (if any) that arises from the giving of the notice, it is not possible to properly determine whether it is unjustifiable by evaluating its nature and degree. There is a real danger of a determination being made by reference to some other risk, which is not what s. 13(2) stipulates and the statutory function of VCAT requires. That, in the end, is the error of law that, on the analysis that follows, was committed in the present case.

His Honour held that VCAT did not apply the ‘unjustifiable risk’ test in ss. 13(2) and 26B by reference to a risk to the safety of children arising from the giving of an assessment notice. This was evident from both:

1. The written reasons, which incorrectly stated the test in the terms that VCAT was ‘not satisfied that [PQR] does not pose an unjustifiable risk to the safety of children’, and
2. The whole context of the decision, which failed to analyse the risk that might be caused by giving PQR the ability to work with children.

Justice Bell further found that VCAT did not properly evaluate the nature and degree of even the **generalised** risk of relapse, noting that references to the ‘potential’ for future reversion to drug-related activity. It was held that proper consideration under the WWC Act requires more than just the identification of potential future risk – the risk must be ‘unjustifiable’ for an application to be refused.

Though it was not a primary issue in the appeal, his Honour also expressed ‘strong reservations’ with VCAT’s proposition that the reasonable person test in ss. 13(3)(a) and 26B(2)(a) could be equated with a ‘pub test’. This was said to be a distraction from the true test, which ‘relies upon a “reasonable” person having knowledge of all the facts and surrounding circumstances’.

### Extension of time application

His Honour held that the interests of justice required that time for the commencement of the appeal be extended. It was relevant that:

* after receiving the decision, the instructing solicitor took immediate steps to obtain instructions from PQR and brief counsel for advice
* the 91-day delay was said to be ‘modest’ and reasonably explained
* PQR had an arguable case of legal error
* there were important personal and occupational interests at stake, and the issues were important and consequential, and
* the secretary would not be prejudiced beyond the need to participate in the rehearing.

## Commentary

VCAT has previously demonstrated a reluctance to allow people with past drug offences to work with children. The decision in PQR (No 2) will have a particular impact in cases in which people have prior offences that are serious, but do not create a direct risk to children. Because of PQR, VCAT and the secretary will now need to assess whether there is any evidence of a direct risk to children if the applicant is allowed to obtain a WWCC. That is, the question will be whether the granting of the WWCC will cause a risk to children.

This decision is available online at the [Austlii website](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2017/514.html) (http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2017/514.html).

**Note:** Victoria Legal Aid acted on behalf of the applicant at the hearing, with the assistance of Ms Kristen Walker QC and Ms Jessie Taylor.

*Case note prepared by Gemma Cafarella, Civil Advocate, Victoria Legal Aid.*