

***WORKING WITH CHILDREN (CRIMINAL RECORD CHECKING)  
BILL 2004***

***EXPLANATORY MEMORANDUM***

The *Working with Children (Criminal Record Checking) Bill 2004* is a Bill for an Act:

- to provide for procedures for checking the criminal record of people who carry out child-related work or who propose to carry out such work;
- to prohibit certain people who have been convicted of or charged with certain offences from carrying out child-related work; and
- to provide for related matters.

**Part 1 – Preliminary**

**Clause 1      Short title**

The short title of the Bill is the *Working With Children (Criminal Record Checking) Bill 2004*.

**Clause 2      Commencement**

The Bill is to come into operation on a day, or different days, to be fixed by proclamation published in the Government Gazette.

**Clause 3      Principle that best interests of children are paramount**

The paramount consideration of the CEO and the State Administrative Tribunal, in performing the functions of the Bill, is to be the best interests of children.

**Clause 4      Terms used in this Act**

Clause 4 defines terms and expressions used throughout the Bill. These terms have been defined to ensure the provisions of the Bill are interpreted and applied in the manner intended. Of particular note are the following terms:

**“child”** – For the purposes of this Bill, a child is a person who is under 18 years of age.

**“child-related business”** - A child-related business is child-related work carried out for gain or reward by an individual, otherwise than in

the course of child-related employment. This is intended to capture child-related work carried out by individuals such as self-employed people, partners and company directors.

**“child-related employment”** – The definition of this term is intended to capture child-related work carried out by individuals who are in an “employment-like” relationship, including where that work is carried out on an unpaid or voluntary basis, and where no written contract of employment exists. It is also intended to capture child-related work carried out as a minister of religion or in any other capacity for the purposes of a religious organisation.

**“contact”** – This definition is intended to be broad enough to capture electronic communications, such as communications over the internet. It is not intended to capture contact in the normal course of duties between an employer and an employee, or between employees of the same employer.

**“criminal record”** – This definition is intended to include every unspent or spent conviction and every charge (pending or non-conviction) made against a person for an offence in Western Australia or elsewhere.

**“educational institution for children”** – This definition includes schools defined under the *School Education Act 1999*. It does not include educational institutions recognised or established as universities under a written law, or educational institutions prescribed by the regulations, even if the university institution has students under 18 years of age.

**“non-conviction charge”** – This definition refers to any charge that does not result in a conviction. This is intended to capture charges:

- that result in an acquittal after a trial (found not guilty, charge dismissed);
- that are withdrawn by the prosecution and do not proceed to a court decision (nolle prosequi);
- where the court has found a person guilty but not recorded a conviction;
- where the court is unable to decide a matter (eg unfitness to plead).

## **Clause 5      Managerial Officers**

This clause is intended to capture managerial officers of corporate licence holders in relation to a child care service under the *Children and Community Services Act 2004*, and includes directors, majority shareholders and, in the case of an incorporated association, committee members. For the purposes of this Bill, such persons are taken to be carrying on a child-related business, even if they do not carry out any child-related work as a managerial officer. Clause 5(2)(b) deems such managerial officers to be carrying out child-related work in connection with a child care service. This is intended to capture, for example, a

director of a child care service who does not have contact with children as part of their usual duties.

## **Clause 6      Meaning of "child-related work"**

Clause 6(1) defines the scope of work captured under the Bill. Work will be "child-related work" if:

- under clause 6(1)(a), the usual duties of the work involve, or are likely to involve, contact with a child in connection with the places or services specified in paragraphs (i) – (xix); or
- under clause 6(1)(b), the work is conducted as part of duties delegated to the person by the CEO under clause 45.

Some categories of child-related work under clause 6(1)(a) contain specific exemptions relating to informal arrangements. In particular:

- paragraphs (iv), (xii) and (xiv) are not intended to capture informal arrangements entered into for private or domestic purposes; and
- paragraph (v) is not intended to capture informal arrangements made by the parent of a child or where accommodation or care is provided by relatives.

Clause 6(1)(b) is intended to capture persons who are involved in the exercise of powers or performance of duties under the Bill on behalf of the CEO, such as persons who conduct criminal record checks on applicants.

Clause 6(2) provides that, for the purposes of determining what constitutes "child-related work" under clause 6(1), "contact with a child" does not include contact between:

- an employer and an employee, where the employee is a child; or
- employees who are employed by the same person, where one or more of the employees is a child,

as long as the contact is lawful and arises in the normal course of the child's employment.

Clause 6(3) exempts children who carry out work on a voluntary basis in the areas of "child-related work" captured under clause 6(1). It also provides for exemptions from "child-related work" to be specified in the regulations.

Clause 6(4) clarifies that exemptions may be prescribed in regulations under clause 6(3)(b), in relation to a person or class of persons by reference to some form of criminal record check required under another Act or otherwise. This does not limit other exemptions that may be made under clause 6(3)(b).

## **Clause 7      Meaning of "Class 1 offence" and "Class 2 offence"**

This clause establishes two classes of offences under Schedules 1 and 2 of the Bill – a "Class 1 offence" and a "Class 2 offence". Whether a person has been charged with or convicted of a Class 1 offence or Class 2 offence has significant consequences throughout the Bill. In particular, the existence of Class 1 offences and Class 2 offences are fundamental to:

- The CEO's decision to issue an Assessment Notice or Negative Notice under Part 2 of the Bill;
- Certain prohibitions relating to child-related work under Part 2, Division 5 of the Bill; and
- Employer, employee and self-employed persons' reporting obligations under Part 3 of the Bill.

Clauses 7(1)(b) and 7(2)(b) provide that a Class 1 offence or Class 2 offence includes offences under the laws of other jurisdictions, where the elements of the offence would constitute an offence under Class 1 or Class 2 (respectively) if the offence had occurred in Western Australia. This is intended to capture similar offences prosecuted interstate or overseas.

Clauses 7(1)(c) and 7(2)(c) enable the addition of Class 1 and 2 offences, through regulations, where the offence is under the law of another jurisdiction. This power is intended to provide flexibility to amend Schedules 1 and 2 where a relevant offence exists under the law of another jurisdiction, but there is no equivalent offence under Western Australian law.

Clauses 7(1)(d) and 7(2)(e) provide that offences of a kind referred to under Schedules 1 and 2, committed before the commencement of the legislation, are to be treated as a Class 1 or Class 2 offence, as appropriate. These clauses are intended to capture repealed offences under West Australian laws or the laws of another jurisdiction which are of a kind similar to the offences listed in Schedules 1 and 2.

Clause 7(2)(d) provides that an offence of attempting, or of conspiracy or incitement to commit a Class 1 offence or Class 2 offence will constitute a Class 2 offence.

## **Clause 8      References to convictions**

A reference to a conviction under this Bill is a reference to:

- a court making a formal finding of guilt in relation to an offence;
- a court convicting a person of an offence, where there has been no formal finding of guilt before conviction;
- a court accepting of a guilty plea in relation to an offence;
- an acquittal under s.27 of *The Criminal Code* (or equivalent in another jurisdiction) that is made on account of unsoundness of mind; and
- a conviction that is a spent conviction under the law of any jurisdiction;

but does not include a conviction that is subsequently quashed or set aside by a court.

Under clause 8(3), a conviction becomes a spent conviction for the purposes of this Bill if, under any law in any jurisdiction, the person concerned is permitted not to disclose the fact that he or she was convicted or found guilty of the offence. This is intended to capture convictions that are spent under the *Spent Convictions Act 1988* (WA), or its equivalent in other jurisdictions. It is also intended to capture

juvenile convictions, which a person may be permitted not to be disclosed under other laws.

## **Part 2 – Assessment notices and negative notices**

### **Division 1 Application for assessment notice**

#### **Clause 9 Application for assessment notice (child-related employment)**

Clause 9 provides that a person who proposes to be, or who is already, employed in child-related employment may apply to the CEO for an assessment notice. The application is to be made in the approved form, which includes identifying information about the applicant and certification by the employer that the employer is proposing to employ or continue employing the person in child-related employment. The application is to be accompanied by a fee as prescribed in regulations. On receipt of the application, the CEO is permitted to request, by written notice or otherwise, further information in order to establish the applicant's identity or for a proper consideration of the application.

#### **Clause 10 Application for assessment notice (child-related business)**

Clause 10 provides that a person who proposes to carry-on, or who already carries on, a child-related business may apply to the CEO for an assessment notice. The application is to be made in the approved form, which is to provide for identifying information to be given about the applicant and accompanied by a fee as prescribed in regulations. On receiving the application, the CEO is permitted to request, by written notice or otherwise, further information in order to establish the identity of the applicant or for a proper consideration of the application.

#### **Clause 11 Withdrawal of application for assessment notice**

Clause 11(1) provides that an applicant can withdraw their application at any time prior to a decision on the application being made.

Clause 11(2) provides a mechanism for applications to be deemed to be withdrawn where the applicant has provided insufficient information for the CEO to establish their identity. Applications will only be deemed to have been withdrawn after:

- the CEO has given the applicant written notice which complies with the requirements under clause 11(2)(b);
- the applicant fails to comply with the written notice within the time specified in the notice; and
- the CEO gives the applicant a further written notice stating that the applicant is taken to have withdrawn the application.

Clause 11(3) requires the CEO to give the applicant's employer or proposed employer, as the case may be, written notice of the fact that an application has been withdrawn, or is deemed to have been

withdrawn.

## **Division 2 Issue of assessment notices and negative notices**

### **Clause 12 Decision on application for an assessment notice**

Clause 12 sets out the decision-making framework which the CEO must follow when assessing an application made under clause 9 or clause 10. The CEO's obligations regarding the issue an assessment notice or negative notice under clause 12 depend on the nature of the applicant's criminal record and the CEO's assessment of circumstances of the applicant's particular case.

Clause 12(1) requires the CEO to decide an application made under clause 9 or clause 10 by issuing either an assessment notice or a negative notice to the person.

Clause 12(2) prohibits the CEO from deciding an application without having conducted a criminal record check in respect of the applicant.

The CEO's decision-making obligations, as described in relation to clauses 12(3) to 12(7) below, are intended to operate as a hierarchy. It is intended that the CEO's decision-making under clause 12 is guided by the sub-clause which deals with the most serious charges or convictions on an applicant's criminal record.

Clause 12(3) requires the CEO to issue an assessment notice if:

- the CEO is not aware of any convictions on the applicant's criminal record;
- the CEO is not aware of any charges on the applicant's criminal record; or
- if the CEO is only aware of charges, which are not charges for a Class 1 or 2 offence, on the applicants criminal record.

Clause 12(4) requires the CEO to issue an assessment notice to an applicant where the CEO:

- is not aware of any convictions on the applicant's criminal record; and
- is aware that an applicant has a non-conviction charge for either a Class 1 or Class 2 offence,

unless the CEO is satisfied that, because of the particular circumstances of the case, a negative notice should be issued to the applicant.

Clause 12(5) requires the CEO to issue an assessment notice to an applicant where the CEO is aware of a conviction for an offence which is not a Class 1 or Class 2 offence, unless the CEO is satisfied that, because of the particular circumstances of the case, a negative notice should be issued to the applicant.

Clause 12(6) requires the CEO to issue a negative notice where the CEO is aware:

- of a Class 1 offence (committed by the applicant when a child) of

- which the applicant has been convicted;
  - of a Class 2 offence of which the applicant has been convicted; or
  - that the applicant has a pending charge in respect of a Class 1 offence or Class 2 offence,
- unless the CEO is satisfied that, because of the exceptional circumstances of the case, an assessment notice should be issued to the applicant.

Clause 12(7) requires the CEO to issue a negative notice to persons who have a conviction for a Class 1 offence that was committed by the person as an adult.

Clause 12(8) requires the CEO to consider the following information when making a decision that "particular circumstances" or "exceptional circumstances" exist to issue an assessment notice or negative notice, as the case may be, under clauses 12(4), 12(5) or 12(6):

- the best interests of children;
- when the offence was committed or is alleged to have been committed;
- the age of the applicant when the offence was committed or is alleged to have been committed;
- the nature of the offence and any relevance it has to child-related work;
- any information given by the applicant in, or in relation to, the application; and
- anything else the CEO reasonably considers relevant to the decision.

**Clause 13 CEO to invite submission about criminal record and issue interim negative notice**

Submissions:

Clause 13(1) provides that where the CEO proposes or is required to decide an application under clause 12 by issuing a negative notice to the applicant the CEO is required to give the applicant written notice which:

- informs the applicant of the proposed decision;
- states the information about the applicant's criminal record of which the CEO is aware; and
- invites the applicant to make a submission to the CEO, within a specified time, about their criminal record and their suitability to be issued with an assessment notice.

Under clause 13(6), the CEO must allow a reasonable time for the applicant to make their submission, and in any case, this must be at least 28 days from the date of the notice.

Under clause 13(5), where the CEO is aware that an applicant's criminal record includes a conviction for a Class 1 offence, committed while an adult, the applicant is only permitted to make a submission if they reasonably believe that their record does not include that conviction. This may either be because:

- the record is wrong (for example, it relates to another person who

- has the same name); or
- the offence on their record does not constitute a conviction for a "Class 1 offence" under this Bill.

Under clause 13(7), if the applicant makes a submission with the specified time, the CEO must consider that submission before making a final decision on the application.

Issue of interim negative notice:

The interim negative notice is a protective measure, to ensure that during the time it takes the CEO to reach a final decision on an application, an applicant to whom the CEO proposes to issue a negative notice is not permitted to start or continue in child-related work.

Under clause 13(1), the CEO may issue an interim negative notice to an applicant once the CEO becomes aware of the applicant's criminal record and proposes to issue the applicant with a negative notice.

Under clause 13(2), the CEO is required to issue an interim negative notice to an applicant where the CEO is aware that the applicant has a conviction for a Class 1 offence, where that offence was committed while an adult.

Under clause 13(3), where the CEO issues an interim negative notice to an applicant, and the CEO is aware that the applicant is or proposes to be employed in child-related employment by another person, the CEO must give a copy of the interim negative notice to the other person.

Under clause 13(4), an interim negative notice has effect until the CEO decides the application, and issues an assessment notice or negative notice to the applicant.

**Clause 14      Duration of assessment notices and negative notices**

This clause provides that an assessment notice has effect for three years, unless it is cancelled sooner under another provision of the Act. It also provides that a negative notice has effect until its cancellation under the Act.

**Clause 15      Further assessment notice may be obtained**

Clause 15(1) enables persons whose assessment notice has expired, or is due to expire, to apply for an assessment notice or a further assessment notice to be issued. If the person holds a current assessment notice, they may only apply for a further assessment notice in the 3 months prior to its expiry.

Clause 15(2) provides for the application for a further assessment notice to be dealt with as though it were an application under clause 12. Upon application for a further assessment notice, the CEO can consider the person's entire criminal record, including:

- Class 1 offences or Class 2 offences that the applicant has

- committed since the last assessment (ie. any "relevant change" as defined in clause 27); and
- Offences outside of Schedule 1 and Schedule 2, for which there is no reporting requirement under Part 3.

The CEO's re-examination of the applicant's entire criminal record under clause 12 may result in the issue of a negative notice, even taking into account offences which previously resulted in an assessment notice. This is because a re-examination of the applicant's entire criminal record, including subsequent offending during the currency of the previous assessment notice, may reveal patterns of offending which indicate an unacceptable risk of harm to children.

### **Division 3** **CEO may require assessment notice to be applied for**

#### **Clause 16** **CEO may require certain employees to apply for assessment notice**

Clause 16(1) enables an employer to provide the CEO with written notice of a reasonable suspicion that an employee's criminal record contains a charge or conviction which the employer reasonably believes makes it inappropriate for the employee to continue to carry out child-related work. The notice must set out the grounds on which the employer's suspicion and belief are held.

Clause 16(2) permits the CEO to request further information from the employer about the employer's suspicion and belief.

Clause 16(3) permits the CEO to issue a written notice to the employee, requiring the employee to apply for an assessment notice within 10 days of the notice, where the CEO is satisfied that the employer has reasonable grounds for holding the suspicion and belief.

Clause 16(4) clarifies that the CEO may issue a written notice to an employee under clause 16(3), regardless of whether the employee holds a current assessment notice.

An employee who does not comply with a notice given under clause 16(3) within 10 days commits an offence under clause 16(5).

Under clause 16(6) a person charged with an offence under clause 16(5) has a defence to that charge if they can prove that they ceased child-related employment prior to or immediately upon expiry of the 10-days following the date of the notice.

#### **Clause 17** **CEO may require certain other people to apply for assessment notice**

Clause 17(1) permits the Police Commissioner to inform the CEO of certain information in relation to a person charged with or convicted of a Class 1 offence or Class 2 offence, where the Police Commissioner reasonably believes that the person is:

- a person who carries out child-related work; or
- a person in respect of whom clause 33 applies.

This clause is intended to apply in relation to charges (including non-conviction charges) or convictions which were made prior to, or after the commencement of, this Act.

Clauses 17(1)(c) to 17(1)(g) set out the information which the Police Commissioner is permitted to give to the CEO in relation to the person and the relevant charge or conviction.

Clause 17(3) permits the CEO to give the person a written notice requiring that person to apply within 10 days for an assessment notice. Before the CEO can issue such a notice under clause 17(3), the CEO must be satisfied that there are reasonable grounds for believing that the person:

- carries out child-related work; and
- has been charged or convicted of a Class 1 offence or Class 2 offence of which the CEO was not previously aware.

Under clause 17(4), the CEO may issue such a notice to a person, whether or not the person holds a current assessment notice. As such, clause 17 may apply to a person who has not reported a "relevant change" to the CEO under Part 3 of the Bill or who is in child-related work but has not yet applied for an assessment notice.

A person who does not comply with a notice given under clause 17(3) within 10 days commits an offence under clause 17(5).

Under clause 17(6) a person charged with an offence under clause 17(5) has a defence to that charge if they can prove that they ceased child-related work immediately upon expiry of the 10 days following the date of the notice.

**Clause 18      CEO may issue negative notice if assessment notice not applied for**

Where a person does not comply with a notice issued by the CEO under clause 16(3) or clause 17(3), the CEO is permitted to issue a negative notice in respect of that person.

If the CEO issues a negative notice under this clause and is aware of the person's employer, the CEO must provide the employer with written notice that they have issued a negative notice in respect of the employee.

This is a protective measure, to ensure that a person who refuses to comply with the CEO's request to apply for an assessment notice under clause 16(3) or clause 17(3), is not permitted to commence child-related work. This is a person about whom the CEO is satisfied that there are reasonable grounds for believing the person's record contains a relevant offence that may pose an unacceptable risk of harm to children. Such a person is not permitted to commence or continue in

child-related work until the CEO has considered and assessed their criminal record. By refusing to comply with the CEO's request, the person is denying the CEO the opportunity to conduct this assessment.

## **Division 4 Cancellation of assessment notices and negative notices**

### **Clause 19 Applications for cancellation of negative notice**

This clause allows persons issued with a negative notice to apply to the CEO for the notice to be cancelled. The application cannot be made sooner than three years after the negative notice was issued, or sooner than three years since the last application for cancellation.

However, clauses 19(3) and 19(4) permit a person to lodge an application for cancellation of a negative notice before three years has passed in the following circumstances:

- where a charge for a Class 1 or Class 2 offence is later disposed of by a court otherwise than by way of conviction;
- when a conviction is later quashed or set aside on appeal; or
- where the negative notice was issued under clause 18.

Under clause 19(5)(c), the application for cancellation of a negative notice must be accompanied by the fee prescribed in the regulations.

Under clause 19(7), a person who is applying for cancellation of a negative notice may, in their application, state any information or make any submission which relates to their suitability to carry out child-related work or any change in their personal circumstances. However, they will not be permitted to only state information or make submissions that they have included in previous applications under the Bill.

Under clause 19(8), where a person applies for cancellation of a negative notice, the CEO must assess the application in accordance with the procedures specified under clauses 12(2) – 12(8). This includes conducting a further criminal record check in respect of the applicant.

Under clause 12(9), where the CEO grants an application for cancellation of a negative notice, the CEO must cancel the negative notice and provide the applicant with written notice of their decision. The CEO must also, upon request from the applicant, issue the applicant with an assessment notice.

Under clause 12(10), where the CEO refuses an application for cancellation of a negative notice, the CEO must provide the applicant with written notice of the decision and the reasons for that decision. The notice must also state that the applicant has 28 days to apply to the State Administrative Tribunal for review of that decision and explain how the application for review is made.

**Clause 20 Cancellation of notice because of wrong or incomplete information**

This clause permits the CEO to cancel an assessment notice or a negative notice and substitute the correct notice if the CEO is satisfied that:

- the first notice was issued on the basis of wrong or incomplete information; and
- based on the correct or complete information, the correct notice should be issued.

Under clause 20(3), if the CEO proposes to substitute a negative notice for an assessment notice, the CEO must comply with clause 13 before making their final decision.

Clause 20(4) provides that the application for cancellation of a negative notice can be initiated by the person to whom the notice was issued.

Clause 20(5) enables the CEO to cancel a negative notice and issue an assessment notice where the negative notice was initially issued on the basis of wrong or incomplete information without requiring the person who holds the negative notice to apply under clause 19.

Under clause 20(6), where the CEO issues a correct notice under clause 20(2), and the CEO is aware that the person is or is proposed to be employed in child-related work, the CEO must provide the person's employer or proposed employer with a copy of the correct notice.

**Clause 21 Issue of notice cancels any previous notice**

Clause 21(1) provides that the issue of an assessment notice to a person cancels any current assessment notice, interim negative notice or a negative notice previously issued to the person.

Clause 21(2) provides that the issue of a negative notice cancels any current assessment notice or interim negative notice previously issued to the person.

Clause 21(3) provides that the issue of an interim negative notice cancels any current assessment notice previously issued to the person.

**Division 5 Prohibitions relating to child-related work**

**Clause 22 Employers not to employ certain people in child-related employment**

Under clause 22(2), an employer is prohibited from starting or continuing to employ a person in child-related employment if the employer is aware:

- that the person has been convicted of a Class 1 or Class 2 offence; or
- that the person has a pending charge in relation to a Class 1 or Class 2 offence; and

- that the person does not hold a current assessment notice and has not made an application for a notice that is pending.

Under clause 22(3), an employer is prohibited from starting or continuing to employ a person in child-related employment if the employer is aware that a person holds a current interim negative notice or negative notice.

Under clause 22(4), an employer is prohibited from starting or continuing to employ a person in child-related employment in connection with a child care service if the person does not hold a current assessment notice or has not made an application for an assessment notice that is pending.

Under clause 22(5), an employer is prohibited from starting or continuing a person in child-related employment where the employer is aware that the person has withdrawn an application for an assessment notice.

Clause 22(6) prohibits an employer from employing a person in child-related employment for more than 5 days in a calendar year where the person does not hold a current assessment notice and the person does not have a pending application for an assessment notice.

Clause 22(7) clarifies that clause 22(6) does not apply if any of clauses 22(2), 22(3), 22(4) or 22(5) apply in relation to the employment of a person.

Under clause 22(8), a person charged with an offence under clause 22 may be convicted of any other offence under section 22, if that offence is established by the evidence.

**Clause 23      Person issued with negative notice or interim negative notice not to carry out child-related work**

This clause provides that if a person holds a current interim negative notice or a current negative notice, the person must not start or continue to work in child-related employment or start or carry on a child-related business.

**Clause 24      Person without current assessment notice not to carry out child-related work**

This clause provides a prohibition on persons starting or continuing in child-related work (whether as an employee or as a child-related business) without holding a current assessment notice.

**Clause 25      Defence for section 24**

This clause provides a number of defences that may be available to certain persons charged under clause 24. A person will be able to defend a charge under clause 24 if they can prove that:

- at the time the offence is alleged to have been committed they had a pending application for an assessment notice, which was not later withdrawn (clause 25(1)); or
- they were in child-related work on no more than 5 days during the calendar year in which the offence is alleged to have occurred (clause 25(3)).

Clauses 25(2) and 25(4)(a) provide that neither of these defences is available to a person convicted of a Class 1 offence committed while an adult.

Clause 25(4)(b) provides that the defence under clause 25(3) is not available to those carrying out child-related work in connection with a child care service. Such persons will only be able to defend a charge under clause 24 where they can prove they had a pending application, which was not later withdrawn, at the time they commenced child-related work.

## **Division 6 Review by State Administrative Tribunal**

### **Clause 26 Review by State Administrative Tribunal**

This clause permits a person to apply to the State Administrative Tribunal within 28 days for review of a decision by the CEO, where the CEO's decision was:

- to issue a negative notice to the person; or
- not to grant an application for a negative notice issued to the person to be cancelled.

Under clause 26(1), the 28-day period to apply for review commences from the date of issue of the negative notice or the date of the notice given to the person under clause 19(10), as the case may be.

Clause 26(3) provides that the CEO's decision continues to have effect pending the outcome of any review, unless the State Administrative Tribunal orders otherwise.

## **Part 3 – Changes in criminal record and criminal record checks**

### **Division 1 Relevant changes in criminal record**

#### **Clause 27 Meaning of relevant change in criminal record and requirement to give notice of that change**

Clause 27(1) provides that a relevant change in a person's criminal record occurs when the person is charged with or convicted of a Class 1 offence or Class 2 offence, whether or not the person already has a criminal record.

Clause 27(2) provides that a person who is required to give notice of a relevant change under Part 3, Division 1 is not required to give any information about the change, other than the fact that a change has occurred. A person in child-related work will not be required to reveal

in the notice of relevant change the nature of the offence, whether it is a charge or conviction or any details of the offence. All that an employer who has been notified of a relevant change needs to know about that relevant change is that it relates to a serious offence under either Schedule 1 or Schedule 2.

**Clause 28 Relevant change in criminal record of certain applicants**

Clause 28 applies where a person has made an application for an assessment notice or for cancellation of a negative notice, which is pending. If such a person has a relevant change in criminal record, they must give the CEO written notice of a relevant change as soon as practicable after the change has occurred. This is intended to ensure that the CEO does not decide an application on the basis of an incomplete record of any Class 1 offence or Class 2 offence that the applicant may have.

**Clause 29 Relevant change in criminal record of person employed in child-related employment**

This clause provides that persons employed in child-related employment must give written notice to their employer of a relevant change as soon as practicable after the change occurs. Under clause 29(2), the person's employer is required to give the CEO written notice of a relevant change in the employee's criminal record as soon as is practicable after receiving written notice from the employee.

**Clause 30 Relevant change in criminal record of person carrying on child-related business.**

This clause provides that a person carrying on a child-related business must give written notice to the CEO of a relevant change in their criminal record, as soon as practicable after the change occurs.

**Clause 31 Relevant change in criminal record of other people**

This clause applies to a person who holds a current assessment notice, and is not currently undertaking child-related work. If such a person has a relevant change in criminal record after the issue of the assessment notice, they must not re-commence child-related work until they have lodged an application for a further assessment notice (which is pending) or they have been issued with a further assessment notice. Such a person will not have a defence that they have been in child-related work for less than 5 days in a calendar year (under clause 25(3)).

**Clause 32 CEO to treat notice of relevant change in criminal record as application for assessment notice**

This clause requires the CEO to treat a notice of relevant change, given by an employer under clause 29(2), or given by a person in child-related business under clause 30, as though it were an application for

an assessment notice or, in respect of persons who already have an assessment notice, as though it were an application for a further assessment notice. The CEO must follow decision-making procedures under clauses 12 and 13 when considering the relevant change. This includes conducting a criminal record check in respect of a person who notifies a relevant change.

**Clause 33      People not to start or continue child-related work if convicted of Class 1 offence**

If the relevant change in a person's criminal record is a conviction of a Class 1 offence, committed while an adult, this clause prohibits the person from starting or continuing in child-related work. This creates an offence for such persons continuing in child-related work, regardless of whether the person notifies the CEO or their employer of the relevant change.

**Division 2      Criminal record checks**

**Clause 34      CEO may carry out criminal record check**

This clause permits the CEO to access information about a person's criminal record.

Clause 34(2) specifies the persons about whom the CEO may seek information under clause 34. This is limited to persons:

- who hold a current assessment notice;
- who have lodged an application with the CEO for an assessment notice;
- who have applied to the CEO for a negative notice to be cancelled; or
- if the CEO has been given a notice of a relevant change under clause 29(2) or clause 30, and that notice is to be treated under clause 32(1) as an application by a person for an assessment notice.

Under clause 34(3), the CEO is permitted to ask the Police Commissioner for information or access to the Police Commissioner's records to determine whether a person captured under clause 34(2) has a criminal record, and if so, to obtain details of the person's criminal record.

Where the criminal record check conducted under clause 34(3) reveals that a person has a criminal record, the CEO is permitted under clause 34(4) to ask "authorised persons" under clause 34(1), being:

- the Police Commissioner;
- the Director of Public Prosecutions; and
- the CEO of the department of the public service principally assisting the Minister in the administration of the *Sentencing Act 1995*,

about the circumstances of a conviction or charge mentioned in the criminal record.

Clause 34(5) permits these “authorised persons” to comply with such a request from the CEO despite any other Act or law. It is intended that such persons may release information to the CEO under clause 34(4), despite limitations expressed in other laws. The CEO may wish to request information about a person’s criminal record held in Department of Public Prosecutions, court, prison, parole board or police records. This applies where the CEO requires further information about a person’s criminal record and the circumstances of a conviction or charge mentioned in a person’s criminal record in order to conduct a proper assessment and make informed decisions under clauses 12 and 13.

## **Part 4 – General**

### **Clause 35 False or misleading information**

Under clause 35, persons who knowingly provide false or misleading information to a person who employs or proposes to employ the person in child-related employment, or to the CEO, commits an offence.

### **Clause 36 Return of assessment notice to CEO**

Under clause 36, persons must return their assessment notices to the CEO as soon as practicable after:

- the person is convicted of a Class 1 offence committed while an adult; or
- the CEO issues an interim negative notice or a negative notice to the person.

### **Clause 37 Exchange of information with corresponding authorities**

This clause enables the exchange of information with authorities in jurisdictions outside WA that perform functions that correspond to the functions of the CEO under the Act.

Under clause 37(2) , the CEO can disclose to a corresponding authority information obtained under the Act which relates to:

- a person’s criminal record;
- an application made by a person; or
- a notice issued to a person,

under the Act.

Clause 37(3) permits the CEO to request corresponding information from a corresponding authority in relation to a person who has made an application or been issued with a notice under the Act.

### **Clause 38 CEO may disclose to certain bodies information about issue of negative notices and interim negative notices**

Clause 38(2) permits the CEO to provide public authorities, prescribed in the regulations, with written notice that an interim negative notice or negative notice has been issued in respect of a person. The CEO must

not release such information unless the CEO considers it is in the public interest to do so.

Clause 38(3) permits the CEO to provide the CEO of the Department of the Public Service principally assisting the Minister in the administration of the *Children and Community Services Act 2004* with written notice that the CEO has issued a person with an interim negative notice or negative notice where the CEO reasonably believes that:

- the person holds a licence under Part 8 of the *Children and Community Services Act 2004*; or
- the person is a supervising officer, nominated supervising officer or a managerial officer, as defined under s.197 of the *Children and Community Services Act 2004*.

If the CEO has provided a written notice under clause 38(2) or 38(3), and the relevant negative notice is cancelled or an assessment notice is subsequently issued to the person, the CEO must provide notice of this fact to the public authority, or the CEO of the Department referred to under clause 38(3), as the case requires.

### **Clause 39 Confidentiality of information**

Under this clause, a person who is or has been engaged in the performance of the functions of this Act is prohibited from directly or indirectly disclosing or making use of information obtained while performing those functions. A number of exemptions from this prohibition are also provided for, where information is disclosed or made use of:

- for the purpose of, or in connection with, performing the functions of the Act;
- for the purpose of investigating a suspected offence under the Act or the conduct of proceedings against a person for such an offence;
- as required or allowed by the Act or another written law; or
- with the consent of the Minister or the person to whom the information relates.

### **Clause 40 Protection from liability for wrongdoing**

Clause 40(1) provides a person acting in good faith in the performance of, or purported performance of, functions under the Act with protection from civil liability associated with relevant actions or omissions.

Clause 40(2) clarifies that the protection provided by clause 40(1) applies even if the thing done was capable of being done regardless of the enactment of this legislation.

Clause 40(3) relieves the State of any liability arising in relation to the actions or omissions of a persons protected from liability under clause 40(1).

**Clause 41 Employer to comply with Act despite other laws, etc**

This clause provides protection from liability for employers who act in compliance with a provision of this Act, despite any other Act or law, or industrial award, order or agreement. In particular, it provides employers with protection from liability where they do not start or continue to employ a person in child-related employment, where required to do so in compliance with the Act.

Clause 41(3) provides that the protection from liability afforded to employers under clauses 41(1) and 41(2) does not affect a person's right to seek or obtain remedies under the *Industrial Relations Act 1979*, unless:

- the remedy sought is for the dismissal of the person by their employer;
- the reason the employer dismissed the person was in order to comply with their requirements under this Act; and
- the grounds on which the person seeks the remedy relate to the fact that the person was dismissed for that reason.

**Clause 42 CEO may require information to confirm compliance with Act**

This clause permits the CEO to require a person who carries on a child-related business, or a person employing others in child-related employment, to provide the CEO with information or documents that the CEO reasonably needs to establish that the person has complied with their obligations under the Act. When informing a person of this requirement, the CEO must specify the information and documents required, and a reasonable time for the person to provide the information or documents to the CEO.

**Clause 43 Liability of partners for certain offences**

This clause provides that where an employer that is a partnership is in breach of the Act, the offence is taken to have been committed by each of the partners in the partnership. A partner will only be relieved of liability under this clause where they can prove that:

- the offence was committed without the partner's consent or connivance; and
- the partner exercised all due diligence that ought to have been exercised to prevent the commission of the offence, having regard to the nature of the partner's functions and to all the circumstances.

**Clause 44 Evidentiary matters**

This clause provides guidance in relation to certain evidentiary matters which may have to be proved in proceedings taken under the Act. This clause operates in addition to, and does not affect the operation of, the *Evidence Act 1906*.

Clauses 44(1) and 44(2) provide that, in proceedings for offences

under this Act, certain allegations will be taken to be proved by the prosecution in the absence of evidence to the contrary.

Clause 44(3) provides that in proceedings for an offence under this Act, a copy of an assessment notice, negative notice or interim negative notice, which has been certified by the CEO to be a true copy of the original, may be tendered to prove the existence of these items.

Clause 44(4) provides that where a document is purported to have been signed by the CEO, it will be presumed to have been signed by a person who was CEO at the time, unless the contrary is proved.

Clause 44(5) provides that where a document is purported to have been signed by a delegate of the CEO, it will be presumed to have been signed by an authorised delegate at the time it was signed, unless the contrary is proved.

#### **Clause 45 Delegation**

The CEO is permitted to delegate any powers or duties under this Act to a public sector employee, as defined under the *Public Sector Management Act 1994*, without requiring any further approval. The CEO must have Ministerial approval to delegate powers or duties to any other person.

Under clause 45(3), any delegation must be in writing and signed by the CEO.

Under clause 45(4), a person to whom a power or duty is delegated is prohibited from sub-delegating that power or duty, unless expressly authorised by the CEO to do so.

Where a person exercises a power or performs a duty delegated to them under this clause, they will be taken to have done so in accordance with the terms of the delegation unless the contrary is shown.

#### **Clause 46 Regulations**

Clause 46(1) contains the general regulation-making power under the Act, under which the Governor is permitted to make regulations:

- prescribing all matters that are so required or permitted to be prescribed under the Act; or
- that are necessary or convenient to be prescribed for giving effect to the purposes of the Act.

Clause 46(2) further provides that, without limiting the regulation-making power under clause 46(1), regulations may be made in respect of the following matters:

- the receipt and storage of information relating to a person's criminal record which has been obtained under this Act;
- the restriction of access to such information; and
- the creation of offences, and provision for penalties not exceeding

\$6,000 in relation to such offences.

**Clause 47 Minister to review and report on Act**

This clause requires the Minister responsible for the administration of this Act to carry out a review of the operation and effectiveness of the Act, as soon as practicable after the fifth anniversary of the commencement of the Act. The Minister is also required to prepare a report based on the review and cause it to be laid before each House of Parliament as soon as practicable after its completion.

**Part 5 – Consequential amendments to Children and Community Services Act 2004**

Part 5 details the consequential amendments to “Part 8 - Child care services” of the *Children and Community Services Act 2004*, which provides for a regulatory framework for the licensing of child care services.

**Clause 48 The Act amended**

Clause 48 identifies that the consequential amendments are to the *Children and Community Services Act 2004*.

**Clause 49 Section 197 amended**

Section 197 of the *Children and Community Services Act 2004* provides for the terms used in Part 8 – Child care services.

Clause 49(1) inserts definitions for “assessment notice”, “interim negative notice” and “negative notice”.

Clause 49(2) amends the definition of “managerial officer”.

**Clause 50 Section 207 amended**

Section 207 of the *Children and Community Services Act 2004* provides for restrictions on granting a child care service licence to an individual applicant. The effect of the consequential amendment will result in an individual applicant for a child care licence being required to have a current assessment notice before a licence can be granted.

**Clause 51 Section 208 amended**

Section 208 of the *Children and Community Services Act 2004* provides for restrictions on granting a child care service licence to a body corporate applicant. The effect of the consequential amendment will result in:

- the person nominated by the corporate applicant as the supervising officer of the proposed child care service; and
- any managerial officer,

being required to have a current assessment notice before a licence

can be granted to the corporate applicant.

**Clause 52      Section 209 amended**

Section 209 of the *Children and Community Services Act 2004* provides for restrictions on granting a child care service licence to a public authority applicant. The effect of the consequential amendment will result in the person nominated by the public authority applicant as the supervising officer of the proposed child care service, being required to have a current assessment notice before a licence can be granted to the public authority applicant.

**Clause 53      Section 220 amended**

Section 220 of the *Children and Community Services Act 2004* provides for suspension of a child care service licence. The effect of the consequential amendment is that the following additional grounds for the suspension of a child care service licence are inserted:

- where the child care service licensee has contravened section 22 of *Working with Children (Criminal Record Checking) Act* by employing certain prohibited people;
- where an individual child care service licensee has been issued with an interim negative notice;
- where, in the case of a child care service licensee who is a body corporate other than a public authority, the supervising officer or any managerial officer has been issued with an interim negative notice; and
- where, in the case of a child care service licensee who is a public authority, the supervising officer has been issued with an interim negative notice.

**Clause 54      Section 221 amended**

The amendment to section 221 is a consequence of the amendment to section 220 of the *Children and Community Services Act 2004*.

**Clause 55      Section 224 amended**

Section 224 of the *Children and Community Services Act 2004* identifies the grounds for cancellation of a child care service licence.

The effect of the consequential amendment is that the following additional grounds for the cancellation of a child care service licence are inserted:

- where the child care service licensee has contravened section 22 of *Working with Children (Criminal Record Checking) Act* by employing certain prohibited people; this ground for cancellation will apply whether or not the licence is or has been suspended for that contravention;
- where there are reasonable grounds for believing that:
  - an individual child care service licensee has been issued with a negative notice;

- in the case of a child care service licensee who is a body corporate other than a public authority, the supervising officer or any managerial officer of the service has been issued with a negative notice; and
- in the case of a child care service licensee who is a public authority, the supervising officer has been issued with a negative notice.

## **Part 6 – Transitional provisions**

It is intended that, by provisions set out in this Part and by regulations prescribed under the Act, different groups of persons in child-related work will be required to apply for assessment notices at different times following the day on which clause 24 comes into operation.

### **Clause 56 Terms used in this Part**

This clause states that, for the purposes of this Part of the Act, the term “commencement day” means the day on which section 24 comes into operation.

### **Clause 57 People continuing a child-related business**

This clause provides for different days to be prescribed in regulations for persons carrying on a child-related business. This may be done by reference to:

- the kind of child-related work carried out by the person;
- the kind of person who carries out the child-related work;
- the kind of place where the child-related work is carried out by the person;
- whether the person is a continuing operator or new operator of a child-related business.

### **Clause 58 Volunteers continuing in child-related employment**

This clause provides a day to be prescribed in regulations for the application of sections 22(6) and 24(a) to continuing volunteers. This may be done by reference to the ages of the children in respect of whom the child-related work is being carried out by the continuing volunteer.

### **Clause 59 Ministers of religion etc continuing in child-related employment**

This clause provides for different days to be prescribed in regulations for the application of sections 22(6) and 24(a) to persons employed in child-related employment as a continuing minister of religion.

### **Clause 60 Other people in child-related employment**

This clause applies only in relation to persons to whom sections 58 and 59 do not apply. It provides for different days to be prescribed in regulations for the application of sections 22(6) and 24(a) in relation to such persons. This may be done by reference to:

- the kind of child-related work carried out by the person;
- the kind of person who carries out the child-related work;
- the kind of place where the child-related work is carried out by the person;
- whether the person is a continuing employee or a new employee;
- whether a criminal record check (however described) has been made in respect of the person under another Act or as prescribed by the regulations.

**Clause 61 Transitional regulations**

This is a standard clause which enables the Governor to make regulations prescribing any matters relating to transitional issues which have not already been sufficiently provided for.

**Schedule 1 – Class 1 offences**

Schedule 1 contains a list of offences which constitute “Class 1 offences” under the Act. Where a person has a conviction for such an offence, committed while an adult, the CEO must issue an interim negative notice under clause 13(2) and a negative notice under clause 12(7). This will result in a life-long prohibition from working in child-related work. Such convictions are considered to demonstrate an unacceptable risk of harm for working with children such that no further assessment is required. The only basis upon which review of the CEO’s decision to issue a negative notice in relation to such an offence can be sought is that the applicant reasonably believes that their criminal record does not include that conviction.

**Schedule 2 – Class 2 offences**

Schedule 2 contains a list of offences which constitute “Class 2 offences” under the Act. A pending charge or conviction for a Class 2 offence will result in the issue of a negative notice under clause 12(6), unless the CEO is satisfied that there are exceptional circumstances that warrant the issue of an assessment notice.