

**WORKING WITH CHILDREN (CRIMINAL RECORD CHECKING)
AMENDMENT BILL 2009**

EXPLANATORY MEMORANDUM

Overview of the Bill

The *Working with Children (Criminal Record Checking) Amendment Bill 2009* (the Bill) amends the *Working with Children (Criminal Record Checking) Act 2004* (the WWC Act), and the *Spent Convictions Act 1988* (the Spent Convictions Act).

The Bill amends the WWC Act to address key issues that have arisen in the operation of the legislation requiring legislative amendment to tighten the effect and strength of the legislation.

The Bill amends the Spent Convictions Act to enable spent convictions to be shared with screening authorities approved through an intended Inter-Governmental Agreement (IGA). Western Australia, the Commonwealth and other States and Territories have agreed through the Council of Australian Governments (COAG) to amend its spent convictions legislation to accommodate this agreement. Other jurisdictions are making similar amendments in line with the COAG agreement for the exchange of criminal record information that will include spent convictions for the purposes of screening those individuals who work with children under legislation or regulation in another jurisdiction.

PART 1 PRELIMINARY

Clause 1 Short Title

Clause 1 provides that the title of the proposed Act is the *Working with Children (Criminal Record Checking) Amendment Act 2009*.

Clause 2 Commencement

Clause 2 provides that Part 1 is to come into operation on the day that the Act receives Royal Assent. The balance of the Act will commence on a day fixed by proclamation, and different days may be fixed for different provisions.

**PART 2 – WORKING WITH CHILDREN (CRIMINAL RECORD CHECKING) ACT 2004
AMENDED**

Clause 3 *Working with Children (Criminal Record Checking) Act 2004* amended

Clause 3 provides that Part 1 amends the *Working with Children (Criminal Record Checking) Act 2004*.

Clause 4 Section 4 amended

Clause 4 proposes to insert definitions into the WWC Act in alphabetical order and amend certain other definitions currently in the WWC Act.

Clause 4(1) proposes to insert definitions into the WWC Act.

Class 3 offence

The proposed definition of a **Class 3 offence** is an offence which is not a Class 1 or Class 2 offence as defined in section 7 of the WWC Act. The introduction of the definition of Class 3 offence makes the provisions of the WWC Act easier to read, as it replaces the current terminology used: an offence that is neither a Class 1 offence nor a Class 2 offence.

Education Provider

The proposed definition of an **education provider** is to provide the meaning for this term where it appears in clauses 5, 19, 22, 23(3), the proposed definition of student and the proposed additional paragraph (d) to the definition of child-related employment. The definition captures tertiary institutions, including universities, TAFE's and post-secondary educational institutions, which provide educational or vocational courses that offer a practical training component to students who are completing a course of study. The intention is to capture those educational institutions that offer courses where a practicum in child-related employment is a requirement or an option for completion of the student's chosen course of study.

Student

The proposed definition of **student** is inserted to provide the meaning for this term where it appears in clauses 5, 19, 22, 23(3), the proposed definition of education provider and the proposed additional paragraph (d) to the definition of child-related employment. A student is a person who is undertaking an educational or vocational course of study with an education provider and may or must undertake child-related work as part of that course of study.

Child-related employment

Clause 4(2) proposes to amend the definition of **child-related employment**. The existing definition of child-related employment in paragraph (a) refers to an "apprenticeship". An amendment to the *Vocational Education and Training Act 1996* deleted reference to an apprenticeship and replaced this with the term training contract. The amendment to paragraph (a) of the definition is to ensure consistency with the term "training contract".

It is proposed to insert a paragraph (d) into the definition of child-related employment. The intention of the paragraph is to include certain relationships between a student and a placement provider in the definition of the term "child-related employment". An education provider arranges a practicum for the student with a placement provider, being the workplace where the student completes a practicum in child-related employment as part of their chosen course of study.

Parent

Clause 4(3) proposes to amend the definition of **parent**. The amendment is to enable prospective adoptive parents, who have a child placed with them with a view to the child's adoption, to access the same provisions provided for "parents" doing volunteer work with their child in connection with the various categories of child-related work. The intention of the amendment is to cover the period from placement of the child with the prospective adoptive

parent until the making of an adoption order by the Family Court under the *Adoption Act 1994*. Following the making of an adoption order by the Family Court, the prospective adoptive parent is at law treated as the parent of the child and therefore captured under the current definition of parent.

Clause 5 Sections 9A and 9B inserted

Clause 5 proposes to insert sections 9A and 9B into the WWC Act to address situations where students undertake practicum's in child-related work as part of their chosen course of study with an education provider and must apply for an assessment notice. Clause 4 has proposed amendments to insert definitions of student, education provider and child-related employment. These terms are applied in clause 5 and the proposed amendments contained in clauses 19, 22, and 23(3).

The intention of the proposed amendments is to apply the powers, duties, obligations and functions of employers of people in child-related employment contained in the WWC Act to both the education providers (who arrange the practicum's) and the placement providers (the work place where the practical training is occurring). The proposed amendments make the distinction between an education provider who is "procuring" the child-related work, and the placement provider who is "employing" the student to carry out the child-related work. The proposed amendments extend legislative powers, duties, obligations and functions to education providers, where students carry out child-related work during a practicum as part of their chosen course of study.

Proposed section 9A Application of certain provisions to students employed in child-related employed as part of an educational or vocational course

Proposed section 9A addresses the operational aspects. The proposed section applies in relation to a student and if the section applies:

- the approved form to apply for an assessment notice can be signed by an education provider or an employer to certify the student is or is proposed to be employed in child-related employment
- where a student withdraws their application for an assessment notice, the written notice in section 11(3) can be given to the education provider or, if known, the employer
- copies of assessment notices or negative notices (proposed section 13A), interim negative notices (section 13(3)) or the correct notice under section 20 can be given to the education provider or, if known, the employer
- section 16(1) applies as indicated in section 9A(2)(d), so that a student's education provider or employer who procures employment or employs the student in child-related employment may give written notice to the CEO of a reasonable suspicion that the student's criminal record contains a charge or conviction which the education provider or employer reasonably believes makes it inappropriate for the student to continue to carry out child-related work
- a copy of a negative notice issued under section 18(2) can be given to the education provider or, if known, the employer
- the student gives relevant change notice under section 29(1) to their education provider, in addition to their obligation to give notice to the CEO
- where the CEO receives notice of a relevant change in a student's criminal record, the CEO may advise the student's education provider of the relevant change, and

- where the student meets the criteria in section 31(1), and the student is offered a practicum in child-related employment with a placement provider, the student is obliged to give notice under section 31(3) to their education provider and the CEO.

Education providers are better positioned to ensure compliance with the WWC Act. It is not practical, nor in the interests of the safety of children, for one placement provider to receive correspondence and notices from the CEO when students are likely to be placed with several providers during a course of study. Education providers are in a better position to ensure the protection of children as contemplated by the WWC Act. They are aware of the placement location of a particular student during the course of study and are able to take prompt action should the CEO issue a negative notice or interim negative notice after a student has moved from the initial placement provider.

Proposed section 9B Education provider not to procure employment for certain students in child-related employment

Proposed section 9B creates offences for education providers who procure child-related employment for a student with a placement provider where they are aware of certain matters. These offences largely reflect the offences contained in section 22 of the WWC Act, with the significant difference being that the education provider is procuring the child-related employment with a placement provider, who is the employer of the student. Section 22 of the WWC Act applies to the placement provider as the “employer” of the student.

The education provider must not procure child-related employment for a student where:

- the education provider is aware the student has been convicted or has a pending charge for a Class 1 or Class 2 offence and the student does not have a current assessment notice or an application for an assessment notice that is pending (section 9B(1))
- the education provider is aware that negative notice or interim negative notice has been issued to the student and is current (section 9B(2))
- the student does not have a current assessment notice or an application for an assessment notice that is pending where the child-related employment is in connection with a child care service (section 9B(3))
- the education provider is aware that the student has withdrawn an application for an assessment notice (section 9B(4))
- the student has previously been employed by the placement provider for more than 5 days in a calendar year and the student does not have a current assessment notice or an application for an assessment notice that is pending (section 9B(5)).

The penalties are consistent with the monetary penalties contained in section 22 of the WWC Act, granted that education providers are not natural persons.

Proposed section 9B(6) clarifies that proposed section 9B(5) does not apply if any of the sections 9B(1), 9B(2), 9B(3) or 9B(4) apply in relation to the procurement of child-related employment by the education provider.

Under proposed section 9B(7), an education provider charged with an offence under proposed section 9B may be convicted of any other offence under that section, if that offence is established by the evidence.

Clause 23 proposes to insert sections to provide guidance in relation to certain evidentiary matters, which may have to be proved in proceedings taken under section 9B against an education provider.

Clause 6 Section 11 amended

Clause 6 proposes to insert amendments to prohibit certain people from withdrawing their applications for an assessment notice and extending circumstances where an applicant will be deemed to have withdrawn their application for an assessment notice.

Clause 6(1) proposes to insert a subsection to prevent an applicant from being able to withdraw an application for an assessment notice where the Chief Executive Officer (CEO) has proposed to issue a negative notice and issued an interim negative notice under section 13 of the WWC Act. This also requires an amendment to section 13, which is contained in clause 8.

Clauses 6(2) and 6(3) propose amendments to sections 11(2)(a) and 11(2)(b)(i). A person can only apply for an assessment notice if the person is or proposes to be employed in child-related employment or carry on a child-related business. A problem arises where a person applies for an assessment notice, and despite requests for information to establish that the person is employed in child-related employment or carrying on a child-related business, no response is received from the applicant.

The proposed amendment will additionally deem an application for an assessment notice as withdrawn after a notice is sent to the applicant seeking specified information about their child-related employment or child-related business and no response is received.

Clause 6(5) proposes to insert a subsection in section 11. This proposed amendment relates to the proposed amendments to section 17 contained in clause 9. In cases where the proposed section 17 applies, a person who has a current assessment notice cannot withdraw from what proposed section 17(3)(d)(i) allows the CEO to treat as an application for an assessment notice before a final decision is made.

Clause 7 Section 12 replaced

Clause 7 repeals section 12 and inserts in its place, proposed section 12, which encapsulates the decision-making framework and proposed section 13A capturing the outcomes and processes where a decision is made on an application for an assessment notice. Proposed section 12 replaces the current section 12 in a tabular form for ease of reference.

Proposed section 12 Decision on application for an assessment notice

Proposed sections 12(1) and 12(2) repeat the existing sections 12(1) and 12(2).

Proposed section 12(3) inserts a Table specifying how the CEO is to decide an application for an assessment notice. The Table is intended to be exhaustive of the situations that may arise when a criminal record check is conducted. Where only one condition in the Table applies, the provision opposite that condition stipulates how the application is to be decided. For example, if the applicant had a charge of common assault dismissed, item 2 of the Table would be applicable and section 12(4) would require the issue of an assessment notice.

The Table creates a hierarchy of situations in relation to which the CEO must consider applications for assessment notices. The decision-making framework progresses from situations where there is no discretion but to issue an assessment notice to situations that finally removes the ability of the CEO to issue an assessment notice. The hierarchy is as follows:

- items 1 to 3 in the Table require the issuing of an assessment notice, there being no discretion (the applicable provision is section 12(4))

- items 4 to 6 require the issue of an assessment notice unless the CEO is satisfied that because of the particular circumstances of the case a negative notice should issue (the applicable provision is section 12(5))
- items 7 to 10 require the issue of a negative notice unless the CEO is satisfied that because of the exceptional circumstances of the case an assessment notice should issue (the applicable provision is section 12(6))
- item 11 requires the issue of a negative notice there being no discretion (the applicable provision is section 12(7)).

The conditions in items 1 to 3, 5, 6, 8 to 11 and the applicable provisions repeat the existing sections 12(3), 12(4), 12(5), 12(6) and 12(7).

The condition in item 4 in the Table is to enable the CEO to make a decision on an application in circumstances where an employer under section 16 or the Commissioner of Police under the proposed section 17 notifies the CEO that a person has a pending charge for a Class 3 offence. When deciding an application in these circumstances, the CEO is to issue an assessment notice unless satisfied that because of the particular circumstances of the case a negative notice should be issued. Section 16 and proposed section 17 provide a necessary safeguard to over inclusion of irrelevant offences, as the CEO is required to be satisfied of specified grounds contained in those sections before requiring a person to apply for an assessment notice or proceeding to conduct an assessment. An amendment is proposed in clause 11 to ensure consistency in decision-making where the pending charge for a Class 3 offence is later disposed of by a court otherwise than by way of a conviction.

The condition in item 7 in the Table is to enable the CEO to make a decision on an application in circumstances where:

- an applicant's criminal record contains a conviction for a Class 3 offence, and
- the facts of the offence (not necessarily the elements of the offence) indicate that in the course of committing the Class 3 offence the applicant performed an indecent act.

The default position is to issue a negative notice, unless satisfied that because of the exceptional circumstances of the case an assessment notice should be issued. The circumstances of the offence constituting the Class 3 conviction may involve an indecent act and the higher onus of exceptional circumstances should be the appropriate test. This amendment will improve the protective value of the WWC Act in these circumstances.

The intention is that the term "indecent" will be interpreted in its ordinary context as meaning anything that is unbecoming or offensive to ordinary standards of propriety prevailing at the relevant time. The provision is intended to apply where sexual behaviour is not an element of the offence, but is clear from the facts of the offence, that the person has performed an indecent act that causes concern. It is intended that this provision will apply, for example, in the following type of case:

- wilful exposure offences where the offender commits the offence by exposing their genitals in a sexual way, e.g. by "flashing", as opposed to an offender being intoxicated and commits the offence by exposing themselves while urinating in a public place (see section 203 of the *Criminal Code*).

Where more than one condition in the Table is applicable, the provision opposite the condition that is the highest item number on the Table stipulates how the application is to be decided. For example, if the conditions under items 6 and 9 applied the applicable provision would be section 12(6) and a negative notice would issue unless the CEO is satisfied that because of the exceptional circumstances of the case an assessment notice should issue. The non-conviction charge in respect of a Class 1 or Class 2 offence (the condition in item 6) would be considered as part of the exceptional circumstances of the case. This would be consistent with the interpretation of the Court of Appeal in *Chief Executive Officer, Department for Child Protection v Grindrod [No. 2]* (2008) 36 WAR 39, 54-5, where there was

consideration of the proper construction of section 12(4) when read with section 12(8). When considering the particular circumstances of the case, the CEO is having regard to the particular circumstances of the applicant's application by reference to the exhaustive criteria in section 12(8).

Particular circumstances of the case refers to those circumstances that can be identified in relation to an assessment of the application, which would include the circumstances of the non-conviction charge for a Class 1 or Class 2 offence where the CEO reasonably considers that information relevant to the decision. This is equally applicable when the CEO is considering the exceptional circumstances of the case.

Proposed section 12(8) largely repeats the existing section 12(8), with an additional factor for consideration when the CEO is deciding whether he or she is satisfied in relation to the particular or exceptional circumstances of the case. The CEO must now also have regard to the effect of future conduct in relation to a child were the applicant to behave in a similar or like manner to an offence or charge contained in the applicant's criminal record. This factor is directing the CEO to an assessment of the behaviours the applicant is demonstrating in their criminal record and the effect of such future conduct on a child if the applicant continues to offend in a similar manner.

Proposed section 13A Issue of assessment notice or negative notice

Proposed section 13A largely repeats the existing subsections (9) and (10) of repealed section 12. There is an additional requirement to indicate to an applicant that they may apply to the State Administrative Tribunal subject to the proposed section 26(3A) in clause 14 (if they have not made a submission to the CEO, an application to the State Administrative Tribunal cannot be made, without the leave of the Tribunal).

Clause 8 Section 13 amended

Clause 8 proposes an amendment to section 13(4), to remove an inconsistency with the proposed amendment in clause 6(1), as an applicant cannot withdraw their application after the issue of an interim negative notice.

Clause 9 Section 17 replaced

Clause 9 proposes to repeal section 17 and inserts in its place, proposed section 17. The proposed section 17 will permit the Police Commissioner to notify the CEO of all convictions and charges of relevance to child-related work and enable the CEO to take certain actions where reasonably satisfied of certain criteria.

Proposed section 17 CEO may require certain people to apply for assessment notice

The proposed section 17(1) permits the Police Commissioner to notify the CEO of certain information in relation to a person charged with or convicted with any offence. The Police Commissioner is required to reasonably believe that the person is a person in respect of whom section 34 applies or carries out child-related work and the charge or conviction makes it inappropriate for the person to continue to carry out child-related work.

This is intended to apply in relation to charges or convictions which were made prior to or after the commencement of this Act.

The intention of the amendment is to enable the Police to advise the CEO of pending charges and convictions for Class 3 offences that are of relevance to child-related work and cause concern that the person is continuing to carry out child-related work.

There are two separate processes, one where a person does not have a current assessment notice (proposed section 17(3)(c)) and another where a person does (proposed section 17(3)(d)). Before the CEO can proceed to issue a written notice or make a decision under those provisions, the CEO must be satisfied that there are reasonable grounds for believing that the person:

- carries out child-related work or has a current assessment notice; and
- has been charged with or convicted of an offence of which the CEO was not previously aware and that offence makes it inappropriate for the person to continue to carry out child-related work.

If the CEO is so satisfied, the CEO may, if the person does not have a current assessment notice, give the person a written notice requiring the person to apply within 10 days for an assessment notice (proposed section 17(3)(c)). A person who does not comply with a notice given under proposed section 17(3)(c) within 10 days commits an offence under proposed section 17(4). Under proposed section 17(5), a person charged with an offence under proposed section 17(4) 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.

If the CEO is so satisfied, the CEO may, if the person does have a current assessment notice, proceed to make a decision under the new section 12 (proposed section 17(3)(d)). This proposed provision permits the CEO to treat such notice from the Police Commissioner as if an application for an assessment notice had been made under sections 9 or 10, as the case requires. In these cases, the intention is that proposed section 12 will apply to the application as if a reference in that section to issuing an assessment notice were a reference to issuing an assessment notice or a further assessment notice.

This proposed amendment has also required amendments to section 18 (clause 10), section 25 (clause 13) and the insertion of proposed section 21A (clause 12).

Clause 10 Section 18 amended

Clause 10 proposes to amend section 18(1) to ensure consistency with the proposed amendment in clause 9, which replaces section 17.

Clause 11 Section 19 amended

Clause 11 proposes to amend section 19(3) to include a paragraph (c) to ensure consistency with the proposed amendment in clause 7, which replaces section 12. This amendment is necessary so a person may apply to cancel a negative notice sooner than 3 years after its issue where the pending charge for the Class 3 offence is later disposed of by a court otherwise than by way of a conviction.

If the pending Class 3 charge were disposed of by a court, otherwise than by way of a conviction, this would constitute a non-conviction charge for a Class 3 offence, which requires the issue of an assessment notice. This amendment will ensure consistency in decision-making, so that a person with a pending Class 3 charge who was issued with a negative notice, but the charge was later withdrawn, would not be at a disadvantage to a person who already had a non-conviction charge for a Class 3 offence.

Clause 12 Sections 21A, 21B and 21C inserted

This clause inserts proposed sections 21A, 21B and 21C into the WWC Act.

Proposed section 21A Cancellation of assessment notice of certain persons not involved in child-related work

Where the CEO is notified in writing by the person, in respect of whom the CEO has received written notice from the Police Commissioner under proposed section 17, that the person is not in child-related work, the CEO is to cancel the assessment notice previously issued to that person (proposed section 21A(1)).

If the CEO is required to make a decision in accordance with proposed section 17(3)(d), and the person gives the CEO written notice under proposed section 21A(1) the CEO may cancel the person's assessment notice and not make a decision under proposed section 17(3)(d). The result of the proposed section 21A(2)(b) is that the CEO would no longer be required to make the decision that he or she would otherwise be required to make in accordance with the proposed section 17(3)(d).

If the person's assessment notice is cancelled, the person is prohibited from carrying out child-related work without a pending application or a current assessment notice. If the person intends to recommence child-related work, the person may apply under Division 1 of the WWC Act for an assessment notice. As a safeguard, an amendment is proposed in clause 13 to section 25, the effect of which will be that the defence in section 25(3) to a charge of an offence under section 24 will not apply to a person whose assessment notice has been cancelled.

Proposed section 21A(3) requires the CEO, if the person's assessment notice is cancelled, to issue a written notice to the person advising of the cancellation. Additionally, clause 20, inserts an amendment to section 36, which requires the return of the assessment notice to the CEO.

Proposed section 21B Cancellation of assessment notice on person's request

Proposed section 21B grants the CEO the discretion to cancel an assessment notice where the person requests this in writing, or in a form approved by the CEO, and the CEO reasonably believes that the applicant is not in child-related work.

If the person's assessment notice is cancelled, the person is prohibited from carrying out child-related work without a pending application or a current assessment notice. If the person intends to recommence child-related work, the person may apply under Division 1 of the WWC Act for an assessment notice.

Proposed section 21B(2) requires the CEO, if the person's assessment notice is cancelled, to issue a written notice to the person advising of the cancellation. Additionally, clause 20, inserts an amendment to section 36, which requires the return of the assessment notice to the CEO.

The intention of this amendment is to enable the CEO to cancel an assessment notice in circumstances where there is a reasonable belief that the applicant is not in child-related work. Where the CEO is reasonably satisfied that the person is not in child-related work, the assessment notice should be able to be cancelled, as the CEO has no legislative authority in relation to persons not carrying out child-related work.

Proposed section 21C Cancellation of assessment notice of certain persons taken to have applied for an assessment notice

A person is taken to have withdrawn their application and the CEO is required to cancel the person's assessment notice if:

- a written notice given to the CEO of a relevant change under sections 29(1) or 30 is treated as an application for an assessment notice, and
- the person who gave the notice advises the CEO they have ceased carrying out child-related work, and
- the person has a current assessment notice, and
- the person requests the CEO not to decide the application.

A power is required to allow the CEO to cancel the applicant's assessment notice in these circumstances.

Proposed section 21C(2) requires the CEO, if the person's assessment notice is cancelled, to issue a written notice to the person advising of the cancellation. Additionally, clause 20, inserts an amendment into section 36, which requires the return of the assessment notice to the CEO.

The person is prohibited from carrying out child-related work without a pending application or a current assessment notice. If the person intends to recommence child-related work, the person may apply under Division 1 of the WWC Act for an assessment notice. As a safeguard, an amendment is proposed in clause 13 to section 25, the effect of which will be that the defence in section 25(3) to a charge of an offence under section 24 will not apply to a person whose assessment notice has been cancelled.

Clause 13 Section 25 amended

Clause 13(1) proposes to insert a new paragraph into section 25(4). The defence in section 25(3) to a charge of an offence under section 24 will not apply to a person whose assessment notice has been cancelled under proposed sections 21A or 21C in clause 12. A person who has had their assessment notice cancelled under these proposed sections, has either:

- notified the CEO of a relevant change in their criminal record (they have been charged or convicted of a Class 1 or Class 2 offence) or
- the Police Commissioner has given notice of a charge or conviction that is believed to make it inappropriate for them to continue to carry out child-related work.

Clause 13(2) proposes to insert sections 25(5), 25(6) and 25(7).

Proposed section 25(5) stipulates that the defence in section 25(3) to a charge of an offence under section 24 will not apply to a person whose assessment notice has been cancelled under proposed section 31(5) in clause 16. A person in these circumstances is no longer permitted to be in child-related work for no more than 5 days during the relevant calendar year without applying for an assessment notice.

Proposed section 25(6) stipulates that the defence in section 25(3) to a charge of an offence under section 24 will not apply to a person who withdraws their application for an assessment notice before a decision is made where the person:

- was required to apply for an assessment notice under section 16(3) or proposed section 17(3)(c), or
- gave the CEO written notice of a relevant change that is treated as an application for an assessment notice under section 32(1), or

- was given written notice under section 13 that the CEO proposes or is required to decide an application under proposed section 12 by issuing a negative notice.

Proposed section 25(7) stipulates that the defence in section 25(3) to a charge of an offence under section 24 will not apply to a person referred to in proposed section 17(3)(d) (clause 9).

Clause 14 Section 26 amended

Clause 14(1) proposes to insert an additional definition of “defined period” in which an application to the State Administrative Tribunal can be made.

Clause 14(2) proposes to make a person’s right to apply to the State Administrative Tribunal subject to the proposed section 26(3A).

Clause 14(3) proposes to insert sections 26(3A) and 26(3B).

The intention of clause 14 is to ensure that the CEO, as the first tier decision maker, is given the opportunity to make the correct and preferable decision on information that is capable of being made available to the CEO, through the submission process under section 13, prior to the CEO’s final decision. Currently, a person may not make a submission to the CEO, a negative notice issues and the person may subsequently seek a review of the CEO’s decision before the State Administrative Tribunal, presenting information to the State Administrative Tribunal the CEO has not previously been given the opportunity to consider. This additional evidence presented to the State Administrative Tribunal may have persuaded the CEO that the issue of an assessment notice was the appropriate outcome on the person’s application.

The amendment proposes that a person cannot make an application to the State Administrative Tribunal for the review of a decision to issue a negative notice where the person has not made a submission to the CEO after being invited to do so, unless leave is obtained from the Tribunal.

If the matter comes back for determination before the CEO and further information is made available for the CEO’s consideration, the CEO can reassess the decision to issue a negative notice and where appropriate issue an assessment notice because the decision to issue the negative notice was based on wrong or incomplete information (see section 20).

If:

- the person was refused leave to apply to the State Administrative Tribunal for review, and
- the person subsequently made a submission to the CEO, and
- the CEO refused to cancel the negative notice and substitute the correct notice,

the person may apply to the State Administrative Tribunal within 28 days of that decision for review.

It is the intention of the proposed amendment that this further right of review is limited in its application. This further right of review is not to extend to general situations where the CEO considers further information under section 20 and refuses to cancel a negative notice and substitute the correct notice.

Clause 14(3) proposes to insert an amendment in section 26(3). The decision to refuse to cancel the negative notice and substitute the correct notice will continue to have effect pending the outcome of the review, unless the State Administrative Tribunal orders otherwise.

Clause 15 Section 29 amended

Clause 15(1) proposes an amendment to section 29(1) to require a person employed in child-related employment to give both their employer and the CEO notice of a relevant change (being a charge or conviction for a Class 1 or Class 2 offence) in the person's criminal record as soon as is practicable after the change occurs. This is desirable so that the employer can make the necessary arrangements to protect the safety of children and the CEO can take action in a timely manner for the protection of children.

Clause 15(2) proposes to delete section 29(2) and replace the provision. As the person employed in child-related employment must give notice to both the CEO and their employer it is not considered necessary that the employer give the CEO written notice and be subject to penalties. It is considered appropriate that the CEO be permitted to inform the person's employer, if known, that the person has had a relevant change in their criminal record to ensure that the employer can make the necessary arrangements to protect the safety of children.

These proposed amendments also require an amendment to be made to section 32 (clause 18).

Clause 16 Section 31 amended

Clause 16 proposes to insert sections 31(4), 31(5) and 31(6). The intention of the amendment is to reduce the risk associated with persons who have a current assessment notice, have had a relevant change and claim to no longer be carrying out child-related work.

The proposed amendments will apply to a person if the person meets the criteria in section 31(1). A person to whom the section applies must give written notice to the CEO of a relevant change as soon as is practicable even in cases where a person with a current assessment notice is not employed in child-related employment or carrying on a child-related business. Where the CEO receives notice, the CEO cancels the person's assessment notice.

Proposed section 31(6) requires the CEO, where the person's assessment notice is cancelled, to issue a written notice to the person advising of the cancellation. Additionally, clause 20, inserts an amendment into section 36, which requires the return of the assessment notice to the CEO.

The person is prohibited from carrying out child-related work without a current assessment notice or an application for an assessment notice that is pending. If the person intends to recommence child-related work, the person may apply under Division 1 of the WWC Act for an assessment notice. As a safeguard, an amendment is proposed in clause 13 to section 25, the effect of which will be that the defence in section 25(3) to a charge of an offence under section 24 will not apply to a person whose assessment notice has been cancelled.

Clause 17 Section 32A inserted

The proposed amendments in clause 16 create an obligation on a person with a current assessment notice to give notice of a relevant change to the CEO, and the CEO is required to cancel the person's assessment notice.

Proposed section 32A Certain people to notify proposed employer of relevant change in criminal record

Clause 17 inserts proposed section 32A to address those situations where the person is not able to comply with the obligation in subparagraph (a) of section 31(3) to give a proposed employer written notice that there has been a relevant change in the person's criminal record since the person's current assessment notice was issued. This amendment is needed as the

person will not be able to comply with 31(3) because the CEO is likely to have cancelled the assessment notice, as required by section 31(5).

Where the person's assessment notice has been cancelled under the proposed section 31(5) and the person has applied for an assessment notice, which is pending, the person must give their proposed employer written notice of any relevant change in their criminal record since the cancelled assessment notice was issued. The clause also imposes a penalty that is consistent with the penalty for the similar offence in section 31.

Clause 18 Section 32 amended

Clause 18 proposes to amend section 32(1) to ensure consistency with the proposed amendment in clause 15 to allow the CEO to treat a notice of a relevant change in a person's criminal record given by the person to the CEO under section 29 (as amended) as an application for an assessment notice.

Clause 19 Section 35 amended

Clause 19 proposes to insert paragraph (c) into section 35 to capture students who give false or misleading information to the education provider.

This proposed paragraph relates to the proposed amendments contained in clauses 4, 5, 22, and 23(3) in relation to students and education providers.

Clause 20 Section 36 amended

Clause 20 proposes to insert paragraph (c) into section 36, which requires the return of assessment notices to the CEO as soon as practical. Currently, the CEO is only able to require the return of an assessment notice where a person is convicted of a Class 1 offence as an adult or where an interim negative notice or negative notice is issued to the applicant.

The intention of the proposed amendment is to require a person to return a cancelled assessment notice where written notice has been given of the cancellation (see clauses 12 and 16).

Clause 21 Section 38 amended including replaced heading

Clause 21 proposes to amend section 38. Currently section 38 permits the CEO, where it is in the public interest to do so, to give written notice to prescribed public authorities and the Department, that a negative notice or interim negative notice has been issued to a person.

The bodies prescribed as "public authorities" in reg. 7 of the *Working with Children (Criminal Record Checking) Regulations 2005* are:

- Department for Child Protection
- Department of Health
- Department of Transport
- Western Australian College of Teaching
- Western Australia Police.

The Department refers to the department responsible for the implementation of the *Child Care Services Act 2007*.

The proposed amendments are to permit the CEO, where it is considered in the public interest to do so, to give written notice to a prescribed public authority or the Department that:

- an application for an assessment notice has been lodged by a person,
- an assessment notice has been issued to a person,
- a negative notice or an interim negative notice has been issued to a person,
- an application for an assessment notice has been withdrawn by a person, or
- a person does not have a current assessment notice (clauses 21(1) and 21(2)).

The intention of the proposed amendment is to improve the protection of children from persons who may pose a risk to them. It is appropriate, in particular cases, for this power to be used to provide such information to the Department and/or the public authorities prescribed in the regulations, which are responsible for ensuring standards, licensing or registration of people working in sectors which work with children.

Clause 21(3) proposes to insert section 38(5). If the CEO decides it is in the public interest to notify the Western Australia Police that a person:

- has been issued with an Interim Negative Notice or Negative Notice;
- has lodged an application for an assessment notice,
- has been issued with an assessment notice,
- has withdrawn an application for an assessment notice, or
- does not have a current assessment notice

the CEO is also to be permitted to notify of that person's employment details, being his or her employer and type of child-related work. The intention of this proposed amendment is to permit the CEO to notify the Western Australia Police of this information to assist in the monitoring of child sex offenders registered on the Australian National Child Offender Register (ANCOR) and in the investigation of persons suspected of crimes against children.

The heading to section 38 is to read "Disclosure of information by CEO to certain bodies".

Clause 22 Section 42 amended

Clause 22 proposes to insert paragraph (c) into section 42 to capture education providers to enable the CEO to require information to confirm compliance with the WWC Act.

This proposed paragraph relates to the proposed amendments contained in clauses 4, 5, 19, 22, and 23(3) in relation to students and education providers.

Clause 23 Section 44 amended

Clauses 23(1) and 23(2) propose amendments to delete reference to the term "complaint" and insert the term "prosecution notice". This is to ensure consistency with the practice and procedure set out in the *Criminal Procedure Act 2004* and the *Magistrates Court Act 2004*.

Clause 23(3) proposes to insert sections 44(3A) and 44(3B) to provide guidance in relation to certain evidentiary matters which may have to be proved in proceedings taken under section 9B against an education provider. Proposed sections 44(3A) and 44(3B) provide that in proceedings for offences under proposed section 9B (clause 5), certain allegations will be taken to be proved by the prosecution in the absence of evidence to the contrary. These proposed sections relate to the proposed amendments contained in clauses 4, 5, 19, 22, and

23(3) in relation to students and education providers and are consistent with the current provisions in section 44.

Clause 24 Schedule 1 amended

Clause 24 proposes to insert *Criminal Code* offences with the specified condition relating to the age of the victim, being a child under 13.

A conviction for a Class 1 offence committed as an adult results in an automatic issue of a negative notice. The additional five sexual offences are indicative of predatory sexual acts against children, and are consistent with the offences currently listed with the specified condition that the child is under 13 years of age.

Clause 25 Schedule 2 amended

Clause 25 proposes to delete the current reference to section 186 and insert a reference to section 186 of the *Criminal Code* with the specified condition relating to the age of the victim, being a child 13 or over. This will ensure consistency with the proposal to list the offence in Schedule 1 where the child is under 13 years of age.

PART 3 – SPENT CONVICTIONS ACT 1988 AMENDED

Clause 26 Spent Convictions Act 1988 amended

Clause 26 provides that Part 3 amends the *Spent Convictions Act 1988*.

Clause 27 Section 28 amended

The proposed amendment amends section 28 of the Spent Convictions Act to enable Western Australia to share spent conviction information with screening authorities in other States and Territories that are approved through an intended Inter-Governmental Agreement (IGA). This is in line with the Premier's endorsement of a Council of Australian Governments' (COAG) project that will allow sharing of enhanced criminal history information with authorised screening units in other jurisdictions. This includes not only spent convictions but also pending and non-conviction charges, juvenile offences, and details of these records.

All jurisdictions are making similar provision through new legislation or amendments to spent convictions legislation that allows for the exchange of spent convictions for the limited purpose of implementing the COAG agreement. It is, therefore, the intention of the proposed amendments that the spent convictions scheme in Western Australia apply only to the extent necessary to enable the inter-jurisdictional criminal history information exchange for the screening of people for decisions about their safety to work with children.

An interim MOU and a final IGA will give effect to the endorsed COAG framework that places strict conditions on the receipt and use of this expanded inter-jurisdictional criminal history information including:

- (a) The participating screening unit has a legislative basis which specifically enables consideration of this information for decisions about whether persons may harm children in the course of working with them.
- (b) The screening scheme reflects the principles of natural justice.
- (c) Prohibitions apply for disclosure and use of this information for other reasons. Exceptions to this include disclosure to for purposes of review of decisions or to protect a child or group of children

- (d) If a participating screening unit undertakes screening both for decisions about child safety and for general employment or registration, this information is not to be disclosed for the latter decisions.
- (e) The participating screening unit has suitably skilled staff that utilise assessment frameworks.
- (f) The written consent of the individual is obtained for this information.

Clause 27(1) proposes to insert definitions that are applicable to the amended section 28. This being a definition of a **child** to mean a person under 18 years of age and a definition of **official criminal record** being the record containing information about the results of criminal proceedings kept for the purposes of the functions of the police, courts, government departments or public authorities in Western Australia.

Clause 27(2) proposes to delete section 28(2) and inserts in its place, proposed section 28(2). Section 28(1) creates an offence where a person obtains information about a spent conviction from an official criminal record. Proposed section 28(2) stipulates that section 28(1) will not apply to a prescribed person if:

- the person is required or permitted under a prescribed law of another jurisdiction to obtain or deal with information about a person who works, or seeks to work, with a child, and
- the purpose of obtaining the information from an official criminal record is to obtain or deal with the information in accordance with the prescribed law.

Regulations will prescribe the persons and laws of other jurisdictions to whom the proposed section 28(2) will apply.

Clause 28 Schedule 3 amended

Clause 28 proposes to insert clause 2(7) into Schedule 3 of the Spent Convictions Act to include an additional exception to section 28 of the Spent Convictions Act.

The Spent Convictions Act currently permits Western Australian spent convictions to be received for criminal record checks conducted under the WWC Act (Schedule 3, clause 2(6)).

Section 37 of the WWC Act provides for the exchange of information obtained under the WWC Act to corresponding authorities. A corresponding authority is a person or body of another jurisdiction with functions that correspond to the functions of the CEO under the WWC Act. Section 37(2) permits the CEO to disclose to a corresponding authority information obtained under the WWC Act that relates to a person's criminal record, or to an application made by, or a notice given to a person under the WWC Act. The proposed amendment is to extend the exception to section 28 under the Spent Convictions Act by reference to these corresponding authorities under the WWC Act.