WORKING WITH CHILDREN (CRIMINAL RECORD CHECKING) AMENDMENT BILL 2009

Second Reading

MR A.J. SIMPSON (Darling Range — Parliamentary Secretary) [12.48 pm]: I move —

That the bill be now read a second time.

The Working with Children (Criminal Record Checking) Act 2004 came into operation on 1 January 2006. The reach of the act is extensive and applies to paid employees, volunteers and self-employed persons in specified types of child-related work. This bill proposes amendments to strengthen the working with children legislation, including an additional consideration that must be taken into account in deciding whether to issue a person with an assessment notice in the form of a working with children card. It also proposes amendments that will reduce barriers to taking the necessary action in cases in which a person's criminal record indicates that that person presents an unacceptable risk of harm and should not be in child-related work.

The rate of applications for a working with children check has increased rapidly following a slow start in 2006. Up to 12 000 applications have been received in a single month. By the end of March 2010, over 290 000 applications had been received since January 2006. Over 280 000 assessment notices had been issued, including those renewed after three years, and over 150 negative notices were in place to prohibit people from carrying out child-related work. The negative notices were issued for a wide variety of criminal charges and convictions, including sexual offences, severe physical violence and selling drugs to children. Varying numbers of interim negative notices are also in place at any particular point in time. An interim negative notice can be issued to prohibit a person from working with children while that person's application is being assessed. This occurs in cases in which people are considered to pose an immediate risk of harm to children.

Although criminal record checking is a vital child protection strategy to screen people working with children, it does not stand alone. A working with children check can consider only what is known from an individual's criminal record. Services that work with children must have other child-safe practices such as good selection and recruitment practices. Employees and volunteers should also have training and skills to respond to the developmental needs of children and to listen and respond to their concerns.

People issued with assessment notices either have no criminal record at all or have charges or convictions that do not indicate that a child may be placed at risk of harm from the person in a work setting. One of the strengths of the act is that the working with children screening unit receives information about new relevant charges or convictions that may be made against a cardholder after a card has been issued. This information is mostly provided by Western Australia Police, including through an automatic information systems link. This bill proposes amendments that will strengthen the actions that can be taken to stop people with new relevant offences from working with children.

Before the working with children legislation came into effect in Western Australia, people with offences of concern could gain access to children by opening their own businesses or working for employers or organisations in which there was no or inadequate criminal record checking. It is now unlawful to be in child-related work in Western Australia without a card or pending application for one, but some of the compliance provisions have proved to be cumbersome. This bill introduces amendments to improve the screening unit's capacity to take prompt action.

Other issues that have emerged in implementing the legislation are addressed through this amendment bill to support sensible, effective application of the legislation. I will highlight these as I turn to the amendments proposed in the bill.

It is important for the successful implementation of the checking scheme that the application process is as user friendly as possible. The current provisions have proved difficult to implement for students doing their placements in child-related work. Clause 5 inserts new sections 9A and 9B into the act to address these operational difficulties. The outcome is that education providers, including universities and colleges that arrange placements for students in child-related work—such as nursing, teaching or child care—will be able to take on functions previously limited to those providing the placement. Certifying the application forms and complying with the obligations under the act has been an administrative burden for placement providers—often small businesses that may have a student on placement for only a week or two. It is more practical and effective if the education provider is allowed to take on this role, as the universities and colleges know their students and can quickly terminate placements if necessary. Many universities and colleges have requested this capacity.

This bill proposes amendments to close loopholes that may allow some people who pose a risk to children to avoid being issued with a negative notice. Section 11 currently provides for the withdrawal of an application for an assessment notice at any time before a notice is issued. A new subsection (2A) will mean that people who

have been issued with interim negative notices will no longer be able to withdraw their applications. Interim negative notices are issued to people only if it is considered that they pose such a high risk to children that they cannot be permitted to continue their work while the assessment is in process. Another amendment, proposed section 11(4), similarly prevents people withdrawing their applications when Western Australia Police have notified the screening unit under section 17 about cardholders who have been newly charged with or convicted of offences of concern.

An operational issue that has emerged is applicants not providing sufficient information to the screening unit, which then prevents the proper processing of some applications. For example, a working with children check can be carried out only when the identity of the person is established and it is confirmed that the person is, or is proposed to be, in child-related work. A copy of the assessment or negative notice issued must also be sent to the employer for compliance purposes. If people do not provide, on request, sufficient identification details, their applications can be deemed to have been withdrawn. Amended section 11(2)(a) and (b) now extends this provision to situations in which the necessary information about their child-related work is not received. Finalising these applications by deemed withdrawal means that there is not a current pending application and the person must not be in child-related work.

Section 12 is the heart of the act, providing the framework for making decisions about whether or not a person with certain types of charges or convictions should get a card enabling that person to be in child-related work. This framework is being strengthened to more clearly indicate when this government intends that people should be prohibited from working with children. This complex section is now more clearly presented in a table that sets out the tests that must apply. These tests are set out in a hierarchy linked to the type of offence; for example, whether it is a class 1 or class 2 conviction, a pending or "non-conviction" charge, or any other offence, which the bill proposes now be defined for simplicity as a class 3 offence.

The item that matches the highest offence type will determine which of the four decision-making tests must be used. These tests include section 12(7), the automatic issue of a negative notice—item 11; section 12(6), the issue of a negative notice unless exceptional circumstances are identified—items 7 to 10; section 12(5), the issue of an assessment notice unless particular circumstances are identified—items 4 to 6; and section 12(4), the automatic issue of an assessment notice—items 1 to 3. When there is more than one type of offence, the higher test applies. An example is a person who has a conviction for grievous bodily harm—a class 2 conviction—which may on its own not be significant to child-related work, but who also has concerning non-conviction charges for class 1 or class 2 sexual offences; a negative notice will be issued for this person unless exceptional circumstances are identified. The automatic issue of negative notices is limited to class 1 convictions; these are offences that involve the sexual penetration by adults of children younger than 13 years of age. There is no circumstance that can be considered sufficient to mitigate the risk of these offenders to children. Another five offences have been added to this category.

The most challenging function for the screening unit and the State Administrative Tribunal is to consider, under section 12(8), whether there are exceptional or particular circumstances. Since the implementation of the act, important case law has been established to guide these considerations. Complementing the significant Court of Appeal determination that the risk to a child must be unacceptable rather than likely, proposed new subsection 12(8)(e) proposes that specific consideration be given to the effect on the child were the applicant to behave in a similar way to a previous charge or conviction.

It is the government's intention that, even when an offence against a young person took place many years ago, the passage of time without further charges or convictions will not be sufficient to issue an assessment notice if a repetition of that type of behaviour would result in significant harm to a child. This government views the risk that these people pose to children to be unacceptable. Time without offending is a major component of psychological actuarial tools, which provide statistical profiles developed for decisions including sentencing and parole of sexual offenders. However, statistical profiles are not sufficient as the basis for decisions that allow specific offenders to work with children. There are severe consequences should a known offender who may fit a "low-risk profile" go on to harm a child. This risk is unacceptable.

This bill will also enable the screening unit to consider pending charges of concern that it previously could not, such as the highly publicised cases of children allegedly assaulted in child care. Section 12 is being amended under proposed new item 4 to include pending class 3 offences when notification is received from employers or police. Further toughening of the act will also occur through proposed new item 7, which enables the higher test—issuing a negative notice unless there are exceptional circumstances—to be applied to class 3 convictions that involve indecent acts. For example, offences of wilful exposure can capture a wide range of behaviours including deliberate genital display for sexual reasons or the grooming of children.

The Western Australia Police are active partners in the implementation of this act and will no longer be limited to providing the screening unit with notifications of only class 1 or class 2 charges or convictions. Under

proposed new section 17(1) the police will be able to notify of any offence that is reasonably believed to make it inappropriate for the person to carry out child-related work. These amendments also enable the screening unit to consider and act on the expanded police notifications. An example of this change is a scenario when the police notify that a working with children cardholder has been convicted of a class 3 offence such as supplying drugs in the vicinity of a school, or a domestic violence assault witnessed by children. The screening unit will be able to assess these offences and determine whether there are particular circumstances under which a negative notice should be issued. Previously this was not possible, and reassessment could occur only on the person's application for renewal after three years of holding a card.

This bill contains other improvements to the compliance provisions of the act. Proposed new section 17(3)(d) will enable the screening unit to act more promptly when notified by police that a cardholder has been charged with, or convicted of, an offence of concern. Currently, even when there are serious new charges such as child pornography, the cardholder must be given 10 days to make a new application before any action can be taken, such as the issue of an interim negative notice.

Another major compliance issue that has emerged in implementing the act is the inability to cancel the assessment notices of people who are no longer in child-related work and who have been charged with, or convicted of, offences of concern. It is unacceptable that these people continue to be in possession of the card, and there is a risk that they may use the card even though it is an offence to do so without making a new application. Proposed new section 21A proposes that the card be cancelled in situations in which there is a notification from police under proposed new section 17 and the cardholder advises in writing that the child-related work has ceased. Proposed new section 21C makes similar provision for cardholders who self-notify about a relevant change in their criminal record and who are no longer working with children.

Occasionally people apply for a working with children check mistakenly but in good faith, and later want their card cancelled. Proposed new section 21B under clause 12 of the bill allows for cancellation of these assessment notices. In all situations people are advised that their cards have been cancelled and a penalty of $12 000 and imprisonment for 12 months applies if the cards are not returned. The legislation strives to rigorously implement these tough checks and to ensure that there is sensible flexibility to cater for those who suddenly find themselves working with children and for employers who suddenly need to staff services. For example, a person who usually coaches adults fills in for a sick colleague to coach children. If the person does child-related work for no more than five days in a calendar year, section 25 currently provides a defence for most people against a charge of working without an assessment notice. This five-day threshold should not, however, be available to people who clearly pose a risk to children. Those who have been charged with or convicted of a class 1 offence do not have access to this defence. Amendments to sections 25(4)(c) to 25(7) will extend this restriction to people who withdraw their application after notification is received by the unit about an offence of concern, or who withdraw after receiving a proposal for a negative notice. People who apply for a new working with children check after a previous card was cancelled will similarly not have access to the five-day threshold.

The decisions made under this act are difficult ones. The best interests of children are the paramount consideration, but decisions to prohibit a person from working with children can impact on his or her livelihood and status. The act includes natural justice provisions, including section 26 which enables the State Administrative Tribunal to independently review a decision of the screening unit to prohibit a person from working with children. The tribunal, like the screening unit, must consider whether a person is an unacceptable risk to the safety of children, and places the best interests of children as being more important than a person's desire to pursue a particular occupation. There is agreement that requests for the review of negative notices to SAT should not be heard unless the screening unit, as the first tier decision maker on behalf of the chief executive officer of the Department for Child Protection, has first received and been able to consider a submission. The screening unit is required to invite the applicant to make a submission about the applicant's criminal record information or suitability to work with children when it is proposed that a negative notice be issued but before a final decision is made. Consideration is then given to more detailed information about the circumstances of the offence or if there have been significant corroborated changes in the applicant's life situation. Proposed new sections 26(3A) and (3B) will require applicants who have not already done so to make a submission to the screening unit, unless they are given leave by the State Administrative Tribunal. If the negative notice is still upheld by the screening unit after considering the applicant's submission, the applicant's request for a review may then be considered by the tribunal.

Another operational matter is the current requirement that people employed in child-related work notify their employer if they have a relevant change in their criminal record. The employer is then required to notify the screening unit. This has proved to be cumbersome in practice. The screening unit is often already aware of the change in criminal record via police notification, but cannot act until this advice is received through the appropriate channels and must often use unnecessary resources to prompt this action. Amendments to

section 29(1) will require employees to notify the screening unit directly, which can then act faster if it is necessary to remove the person from child-related work.

Proposed new section 29(2) under clause 15 of the bill will enable the screening unit to advise the employer so that appropriate protective action can be taken during the assessment process. Employees can still be breached if they do not notify their employer, in case there are multiple employers not known to the unit. Similar provisions in amendments to sections 31 and 32A will require a person who is currently not working with children, but who has a relevant change in criminal record, to notify the screening unit. The assessment notice will be cancelled and the person must advise a proposed future employer of this.

The Working with Children (Criminal Record Checking) Act 2004 complements other legislation which contributes to the protection of children, such as the Children and Community Services Act 2004 and the Community Protection (Offender Reporting) Act 2004. Also, a range of government departments and authorised bodies approve the standards, licensing and registration of people to work with children such as teachers, childcare providers and driving instructors. Currently, the capacity to release information to these bodies in the public interest is restricted to information that a negative notice or interim negative notice has been issued to an individual. This is too limited, and it is considered that public interest in the better protection of children often requires these bodies to know also about whether a working with children application has been lodged, whether or not a card has been issued or an application has been withdrawn. It is also essential that the current information sharing restrictions are reduced so that the screening unit can share information with the police when there are concerns that a person may commit an offence against a child. The amendments to section 38 will enable this proper sharing of information.

The bill also proposes a consequential amendment to the Spent Convictions Act 1988. This is in line with the Premier's endorsement of an important Council of Australian Governments' project that will allow enhanced criminal history information to be shared with authorised screening units in other jurisdictions. This includes spent convictions as well as juvenile offences, pending and non-conviction charges and details of these records. Jurisdictions with spent convictions legislation are undertaking similar amendments to remove legislative barriers to this exchange.

A memorandum of understanding is being developed for a one-year trial of the enhanced criminal history information exchange. Following evaluation of the trial, an intergovernmental agreement will be developed to give effect to the Council of Australian Governments framework that places strict conditions on the receipt and use of this information. For example, authorised screening units must be subject to legislation that governs the use of the enhanced criminal history information, including that use is only for the purpose of making decisions about the safety of children with those who work with them. This information is not to be used for general employment or registration purposes, and there must be natural justice provisions, as well as an assessment framework and staff with appropriate skills.

The provisions of the Working with Children (Criminal Record Checking) Act meet all these requirements and the working with children screening unit will be authorised by this government to use enhanced criminal history received from other jurisdictions. The successful trial and implementation of this exchange will mean that the screening unit will no longer be restricted to information about convictions from other jurisdictions. As it does within this state, the unit will also receive information about spent convictions and pending and non-conviction charges from elsewhere. The only disappointment is that Victoria has not agreed to share non-conviction charges. Nevertheless, the implementation of this information exchange will considerably improve the quality of information received by the screening unit to make decisions on whether a person should be allowed to work with children on the basis of a working with children check.

Every week there are media articles about people who abuse children, including those who are working with them. We need to do what is reasonable, and no doubt there will be ongoing improvements to this important legislation. This bill will strengthen capacity to take the necessary action to exclude from child-related work those people whose criminal history means that they pose an unacceptable risk of harm to children.

I commend the bill to the house.

Debate adjourned, on motion by **Mr M. McGowan**.