

## CHILD CARE SERVICES BILL 2007

### EXPLANATORY MEMORANDUM

The purpose of the Child Care Services Bill is to enable the implementation of recommendations 4 and 5 of the independent Review of the Department for Community Development.

The Review report recommended the restructuring of the Department, by the creation of two departments, one relating to child protection and one to communities (Recommendations 2 and 3). It further recommended that the Child Care Licensing and Standards Unit together with the current resources be transferred to the Department for Communities (Recommendation 4), and that the *Children and Community Services Act 2004* ("the current Act") be amended to reflect the move of the child care licensing function (Recommendation 5). Part 8 of the current Act is concerned with the licensing of child care services for children.

In order to prevent ambiguity and ensure clarity the creation of a new Act is the preferable way to achieve the required legislative change.

The Bill provides for the transfer of Part 8 of the current Act which relates to child care services together with a small number of ancillary provisions duplicated with necessary changes to provide for the effective operation of the child care licensing function.

In the course of drafting this Bill Parliamentary Counsel has suggested some drafting variations to the existing provisions. These clarify and enhance the provisions, however, do not constitute any changes to their intent. These are included.

Clause 56 of the Bill enables the continuation of the four sets of regulations relating to child care. The *Children and Community Services Regulations 2006* contain regulations relating to both child care and non-child care related functions and will be amended prior to the commencement of the new Child Care Services Act.

There are no procedural or substantive changes for child care services in Western Australia, only the structural changes necessary to allow for the transfer of the child care licensing function to the Department for Communities.

## **Child Care Services Bill 2007**

### ***Part 1 — Preliminary***

Part 1 of the Bill contains the title of the Act, the relevant commencement provisions and definitions of terms used within the Bill.

#### Clause 1: Short title

The short title of the Bill is the *Child Care Services Act 2007*.

#### Clause 2: Commencement

Sections 1 and 2 of the Bill are to come into operation on the day on which the Act receives Royal Assent with the remaining sections to be proclaimed on a date or dates to be set.

#### Clause: Terms used in this Act

Contains the definition of the terms used in this Bill.

#### Clause 4: Meaning of “child care service”

Defines child care service for the operation of this Bill as a service for the casual, part-time or day-to-day care of a child under 13 years of age (or prescribed age) provided for payment or reward, as a benefit of employment, or an ancillary service to a commercial or recreational activity.

Expressly excludes care provided to a child in certain circumstances.

#### Clause 5: Object

States the object of the Bill namely to protect, and promote the best interests of children who receive child care services.

#### Clause 6: Best interest of children paramount

Provides that in performing a function or exercising a power under this Bill a person or body (includes the State Administrative Tribunal) must regard the best interest of children as the paramount consideration.

#### Clause 7: Guiding principles

These principles are additional to the paramount principle of best interest of children and must be considered when carrying out functions under the Bill. They have an emphasis on protecting the child’s physical and emotional wellbeing and stimulating the child’s developmental abilities. Participation of parents is to be encouraged and the diverse nature of the community is to be recognised.

## Clause 8: Crown bound

This clause expressly binds the Crown in right of the State.

## ***Part 2 — Licensing of child care services***

### **Division 1 — Licensing requirement**

This division requires a person to hold a licence in order to provide a child care service.

## Clause 9: Offence to provide child care service without a licence

Prohibits, and imposes a substantial penalty for providing a child care service other than in accordance with the licence authorising the service.

### **Division 2 — Application process**

This Division sets out who may apply for a licence and the form in which the application must be made. It also introduces a stringent screening process to ensure the applicant is not only suited to looking after children but also has a specialised ability for doing so.

## Clause 10: Who may apply for licence

Applications must be made to the CEO. An application can be made by either an individual, a body corporate or, in the case of a public authority that is not a body corporate, the chief executive officer on behalf of the authority.

## Clause 11: Application for licence

The application must be made on an approved form, accompanied by any prescribed documents and information and accompanied by a fee where prescribed.

## Clause 12: Further information relevant to application

Provides the CEO with broad powers to enquire into the suitability of the applicant to ensure they are a fit and proper person to provide or be involved in the provision of a child care service. Applicants are required to have a criminal record check (prescribed in regulations), knowledge and understanding of the legislation and child development. Additionally the CEO may, if considered necessary, require the applicant to undergo medical, psychiatric or psychological testing. Costs associated with complying with these requests must be met by the applicant unless otherwise determined by the CEO. Applications need not be considered until all the CEO's requests for information in support of the application are complied with.

### **Division 3 — Grant of licence**

#### Clause 13: Power of CEO to grant licence

Enables the CEO to grant a licence authorising a person to provide a particular type of child care service at a specified place. A licence cannot be granted to two or more persons; a licence can only apply to one child care service, however two or more licences may be granted to the one person.

#### Clause 14: General restrictions on grant of licence

Sets out the grounds on which the CEO must not grant a licence. The CEO must not grant a licence if there are reasonable grounds for believing that the provision of a child care service would constitute an unacceptable risk to the wellbeing of children or unless he/she is satisfied that:

- (a) the applicant is capable of providing the service in accordance with the regulations and the terms and conditions of the licence;
- (b) the place is suitable for the purpose;
- (c) the licence or equivalent authority has not been cancelled in the five years before the application is made;
- (d) the applicant is of sound financial reputation and stable financial background; and
- (e) in the case of a family day care service, each usual occupant is a fit and proper person to associate with children.

#### Clause 15: Restrictions on grant of licence: individual applicant

Prohibits the CEO from granting a licence to an individual applicant if the person has been found guilty of a prescribed offence, unless there are exceptional reasons for doing so. In addition the CEO must be satisfied that the person has a current assessment notice under the *Working with Children (Criminal Record Checking) Act 2004*, is a fit and proper person to provide a child care service and has the ability to supervise and control the service on a day-to-day basis.

#### Clause 16: Restrictions on grant of licence: corporate applicant

As above, this clause prohibits the CEO from granting a licence to a corporate applicant if the nominated supervising officer or a managerial officer has been found guilty of a prescribed offence, unless there are exceptional reasons for doing so. Additionally the CEO must not grant a licence to a corporate applicant unless satisfied that:

- (i) a licence or equivalent authority issued to the nominated supervising officer or a managerial officer has not been cancelled in the five years before the application;
- (ii) the nominated supervising officer is not supervising another child care service that is or will be provided at the same time as the service to which the application relates;
- (iii) the nominated supervising officer and each managerial officer have a current assessment notice;

- (iv) the nominated supervising officer has the ability to supervise and control the service on a day-to-day basis; and
- (v) the nominated supervising officer and each managerial officer are fit and proper people to be involved in the service.

Clause 17: Restrictions on grant of licence: public authority

The provisions of this clause relate to restrictions on the grant of a licence to a public authority and are the same as those in clause 16, except there is no reference to a 'managerial officer'.

**Division 4 — Licence conditions**

Clause 18: Condition as to supervision and control

Requires the supervising officer for a child care service to be present at the place where and when the service is being provided except where provided for in regulations.

Clause 19: Other conditions

Makes provision for the CEO to grant a licence subject to conditions prescribed by regulations and provides the ability for the regulation to apply to all licences or a specified type of service.

Clause 20: Contravention of conditions

Provides for a penalty of \$12,000 where a licensee contravenes a condition of a licence.

**Division 5 — Duration and renewal of licence**

Clause 21: Duration of licence

A licence may be issued for a period of up to 3 years and has effect for the period specified in the licence unless the licence has been suspended, cancelled, surrendered or an application, in accordance with the provisions of this Bill, has been made for renewal in which case the licence continues to have effect until the application is determined.

Clause 22: Application for renewal of licence

The renewal application must be in an approved form, lodged within the prescribed time, accompanied by any document or information prescribed and if applicable the prescribed fee. The same scrutiny of the applicant applies for renewal of a licence as for an original application.

### Clause 23: Restrictions on renewal of licence

Prohibits the CEO renewing a licence unless satisfied certain criteria have been met. Specifically, the CEO must not renew a licence if no longer satisfied that the licensee meets the criteria relevant to the granting of a licence. Further, if the CEO is satisfied the licensee has persistently or frequently contravened the terms and conditions of the licence, or the regulations, the licence must not be renewed. Moreover, the CEO must not renew the licence if there are reasonable grounds for believing that the continued provision of the service would constitute an unacceptable risk to children.

### Clause 24: Renewal of licence

Provides the CEO with flexibility, on renewing a licence, to renew or alter existing conditions, or to impose new conditions. The only condition that cannot be varied is the requirement of a supervising officer to be present where and when the service is being provided.

## **Division 6 — Suspension and cancellation of licence**

This division recognises the significance of the suspension or cancellation of a licence for a licensee and the families using the service. It provides a well defined procedure to ensure procedural fairness. Most significantly, it provides access to the State Administrative Tribunal has power to hear and determine questions of suspension and cancellation of a licence.

### Clause 25: Suspension of licence

Provides the CEO with power to give the licensee written notice of suspension of a licence. There must be reasonable grounds for belief that the licensee has: contravened a term or condition of the licence or regulations, contravened section 22 of the *Working with Children (Criminal Record Checking) Act 2004* or has an interim negative notice under that Act, or the continued provision of the service constitutes or would constitute an unacceptable risk to the wellbeing of the children for whom the service is provided.

The written notice must state: a) the day on which the suspension takes effect; b) the reasons for the decision; c) where appropriate, the steps to be taken to rectify the contravention or eliminate the reason for suspension; and d) information regarding the licensee's right to apply to the State Administrative Tribunal for a review of the CEO's decision.

Except where there is an unacceptable risk to the wellbeing of children for whom the service is being provided a suspension cannot take effect until the licensee has been given an opportunity to make representations to the CEO

regarding the contravention. Accordingly, the CEO must first give the licensee a written notice of proposed suspension under clause 26.

#### Clause 26: Notice of proposed suspension

Where the ground for suspension is a contravention of the terms and conditions of the licence, the regulations, the *Working with Children (Criminal Record Checking Act 2004)* the CEO must give written notice to the licensee of the proposed suspension. The notice must state the proposal to suspend the licence, the reasons and give information on the licensee's entitlement to make representation to the CEO. Any representation by the licensee must occur within 21 days after the day on which the licensee is given notice. The CEO must take into account the representation in considering whether to proceed with the suspension.

#### Clause 27: Revocation of suspension

If the CEO is satisfied the licensee has taken the steps specified in the suspension notice, the CEO must, by written notice, revoke the suspension. Alternately, if the circumstances of a particular case suggest it is appropriate, the CEO may, by written notice, revoke the suspension.

#### Clause 28: Duration of suspension

The suspension of a licence takes effect on and from the day and time specified in the suspension notice until either, the suspension is revoked by the CEO, the licence is cancelled under clause 29, or the licence expires, or is surrendered.

#### Clause 29: Cancellation of licence

The grounds for cancellation of a licence are identified. Where the CEO considers grounds exist for the cancellation of a licence provision is made for the CEO to refer the matter to the State Administrative Tribunal. Once the referral has been made to the Tribunal the CEO must, as soon as practicable, notify the licensee in writing of the referral.

If the Tribunal is satisfied that grounds for cancellation exist, it may cancel the licence.

### **Division 7 — Review of licensing decisions**

#### Clause 30: Review by State Administrative Tribunal

Identifies the decisions of the CEO relating to which a person aggrieved can apply to the State Administrative Tribunal for a review and defines "person aggrieved".

## **Division 8 — General**

### Clause 31: Licence not transferable

Places a prohibition on the transferring of a licence, preventing a person, public authority or corporate body obtaining a licence without undergoing the application process.

### Clause 32: Amendment of licence

Provides the CEO with the power to impose new conditions, change or remove existing conditions on a licence. The power may be exercised at any time by the CEO or on application by the licensee.

### Clause 33: Licence document

Places a requirement on the CEO, where a licence is granted, to issue a licence document stating the prescribed details of the licence.

### Clause 34: Production of licence document for amendment

Where a licence is amended or renewed a requirement is placed on the licensee to produce the licence document for amendment. Creates an offence carrying a penalty of \$6,000 for not producing the licence within the period specified by the CEO.

### Clause 35: Return of licence document if licence no longer in effect

Creates an offence carrying a penalty of \$6,000, for the person that held the licence, not to return the licence document to the CEO where the licence has expired, not been renewed, suspended, cancelled, or surrendered. This requirement is directed at preventing the use of a defunct licence.

### Clause 36: Advertising

Creates an offence carrying a penalty of \$6,000 for a person to advertise or hold out that the person provides a child care service unless the person is licensed to provide the service or is exempt by order published in the *Gazette* from holding a licence.

## **Part 3 — Administration**

### Clause 37: Cooperation and assistance

Requires the CEO to work in cooperation with public authorities and non-government agencies in carrying out the CEO's functions, and to promote the establishment, implementation and regular review of procedures in order to do so. The CEO may request a public authority to take specific action to assist in carrying out the CEO's functions, and the authority must endeavour to comply with such a request where it is consistent with its duties and

responsibilities and does not prejudice the performance of its functions. Nothing in the clause is designed to limit the operation of clause 38, relating to exchange of information.

#### Clause 38: Exchange of information

Enables the exchange of information in particular circumstances, provided it is, in the opinion of the CEO, relevant to the wellbeing of a child or a class or group of children, or to the performance of a function under the Bill.

Authorises the CEO or an authorised officer of the Department to disclose to or request relevant information from a public authority, a “corresponding authority” or an “interested person”. “Corresponding authority” and “interested person” are defined. Any such request for relevant information overrides any law of the State relating to secrecy or confidentiality.

Protects a person, who provides information in good faith, from civil or criminal liability. Disclosure of the information is not a breach of any duty of confidentiality, secrecy or professional ethics or standards imposed by law, and is not considered unprofessional conduct.

Requires the CEO to establish procedures for the disclosure of relevant information and allows for regulations to be made in respect of the receipt and storage of information disclosed and the restriction of access to the information.

#### Clause 39: Delegation by CEO

Enables the CEO to delegate his or her powers and responsibilities under the Bill to a departmental officer or other person and requires that any delegation is in writing and that the person to whom the power or duty is delegated cannot delegate that power or duty.

#### Clause 40: Licensing officers

Enables the CEO to appoint officers of the department as licensing officers to carry out functions and duties under the Bill. The CEO must ensure each licensing officer is issued with an identity card which the officer must display when exercising powers under the Bill. The production of the identity card by a licensing officer is to be taken as proof of his or her appointment.

#### Clause 41: Advisory bodies

Enables the Minister to establish advisory bodies to give advice or assist the Minister or the CEO on issues relevant to the administration of the Bill, but does not give the Minister the power to establish a body corporate. The Minister may appoint anyone he or she considers appropriate. Members are to be entitled to remuneration and entitlements determined by the Minister for Public Sector Management.

The establishment of an advisory body is to be by an instrument signed by the Minister and published in the *Gazette*. The instrument is to set out the duties of the advisory body, identify the members, length and conditions of their appointment and any other matters relevant to the operation of the body the Minister considers appropriate.

Gives the Minister power to amend or cancel an instrument at anytime, by way of a signed instrument.

#### ***Part 4 — Enforcement***

##### Clause 42: Powers of entry and inspection

Gives licensing officers certain powers of entry and inspection designed to ensure licensees' compliance with the terms and conditions of a licence and the regulations. Creates an offence for a person to fail to comply with an authorised request of a licensing officer in the pursuit of his or her duties. The penalty is \$6,000.

Empowers a magistrate to issue a warrant to either a licensing officer or a police officer authorising that person to enter and inspect a place believed on reasonable grounds to be a place where an unauthorised child care service is being conducted.

##### Clause 43: Legal proceedings

Provides that proceedings for an offence under this Bill may be taken in the name of the CEO, by the CEO or a person authorised to do so by the CEO.

The clause does not limit the ability of a person to make a complaint or conduct the prosecution of an offence if he or she has the authority to do so by law.

##### Clause 44: Evidentiary certificate

Facilitates the prosecution for an offence under this Bill, by providing that a certificate signed by the CEO is evidence of the facts stated in the certificate.

#### ***Part 5 — Other matters***

##### Clause 45: Exemptions

This clause gives the Minister the power to exempt certain child care services from the application of clause 9, the regulations or specified provisions of the regulations.

Exemptions can only be made by the Minister, by order published in the *Gazette*. In exercising the power to exempt, the Minister must have regard to the best interests of the children concerned, their special needs and interests, the views of parents of the children, the needs of the locality and the

desirability of, or need for, short term, special, innovative, experimental, culturally appropriate and culturally specific child care services.

#### Clause 46: Production of child care records

Defines the use of the term “child care record” for the purposes of this clause.

This clause applies if a party to legal proceedings requires the CEO or departmental officer or an officer or employee of a public authority to produce to the party, or the Court or tribunal concerned a child care record.

Sets out the procedure for access to a child care record. It requires the requesting party to describe the record by reference to the child care service, the person/s, the period and the circumstances to which it relates. The child care record must be relevant to the proceedings.

Protects a person’s right to privacy by making it an offence for a person to disclose, record or use information obtained through the lawful release of a child care record except for the purposes connected with the relevant proceedings. Provision is made for a penalty of \$ 12,000

Lists the categories of people who may have access to a child care record once it has been lawfully produced for a Court or tribunal. It requires the Court or tribunal to take all reasonable steps to ensure access is limited only to those people listed.

Creates an offence for a person who has been given access to a child care record by a Court or tribunal to reproduce or copy the record without the approval of the Court or tribunal. Penalty of \$6,000. Such approval may be conditional.

#### Clause 47: Obstruction

Makes it an offence for a person to obstruct or hinder a person who is performing or attempting to perform a function under this Bill.

Provision is made for a penalty of \$12,000 and imprisonment for one year.

#### Clause 48: Impersonating a licensing officer

Makes it an offence for a person to falsely represent, by words or conduct, that he or she is a licensing officer.

Provision is made for a penalty of \$12,000 and imprisonment for one year.

#### Clause 49: False information

Creates an offence with a penalty of \$6,000 for a person to knowingly provide false or misleading information either orally or in writing in relation to, an application, report or other document prepared for the purposes of this Bill.

#### Clause 50: Confidentiality of information

Sets out the circumstances under which a person, who has been engaged in performing functions under this Bill, may record, disclose or make use of information obtained during the course of his or her work and creates a penalty of \$12,000 and imprisonment for one year where these are not adhered to.

The clause is not intended to stop the disclosure of statistical or other information that could not reasonably be expected to lead to a person's identity. Other exemptions apply.

#### Clause 51: Protection from liability for wrongdoing

Provides protection from an action in tort for a person who does anything in good faith in the performance, or purported performance, of a function under this Bill. A reference to the doing of anything includes the omission to the doing of anything.

The State of Western Australia is not, however, relieved from liability in relation to the above.

#### Clause 52: Regulations

States that the Governor may make regulations for the purposes of the Bill including those listed in schedule 1.

#### Clause 53: Review of Act

Requires the Minister, responsible for the administration of this Bill, to carry out a review of the operation and effectiveness of the Act, as soon as practicable after the fifth anniversary of its commencement and at the expiry of each 5 yearly interval after that anniversary.

A written report must be prepared and tabled in each House of Parliament within 12 months of the relevant anniversary.

### ***Part 6 — Transitional provisions***

#### Clause 54: Terms used in this Part

Provides a definition of "commencement day" and "Part 8 provisions".

#### Clause 55: *Interpretation Act 1984* not affected

This Part is additional to and does not affect the operation of the *Interpretation Act 1984* (in particular, section 36 of that Act) in relation to the repeal and re-enactment of the Part 8 provisions by this Bill.

#### Clause 56: Continuation of certain regulations

Provides for the continuation and enforcement of child care regulations made under the *Children and Community Services Act 2004*.

#### Clause 57: Exemptions

An order under the *Children and Community Services Act 2004* section 229(1) that is in force immediately before the commencement day has effect on and after that day, with all necessary changes, as if it were an order made under section 45(1) and may be amended or repealed accordingly.

#### Clause 58: Applications for licence or renewal of licence

An application for a licence or the renewal of a licence made under the Part 8 provisions that has not been finally determined immediately before the commencement day is to be dealt with and determined as if it were an application for a licence or the renewal of a licence under this Act.

#### Clause 59: Licences

- (1) A licence under the Part 8 provisions that is in force immediately before the commencement day is to be regarded on and after that day as a licence under this Act and may be dealt with accordingly.
- (2) The reference in subsection (1) to a licence under the Part 8 provisions includes a reference to a licence or permit that has effect as if it were a licence under the Part 8. This relates to licences granted under the *Community Services Act 1972*, which are the subject of a transitional provision in the *Children and Community Services Act 2004*.

#### Clause 60: References to Part 8 provisions

If in a written law or other document or instrument there is a reference to a Part 8 provision, the reference is, unless the context otherwise requires, to be read on and after the commencement day as a reference to the provision of this Act that corresponds to the Part 8 provision.

#### Clause 61: Transitional regulations

- (1) If there is no sufficient provision in this Part for dealing with a transitional matter, regulations under this Act may prescribe all matters that are required or necessary or convenient to be prescribed for dealing with the matter.
- (2) In subsection (1) —  
“transitional matter” means a matter that needs to be dealt with for the transition from the Part 8 provisions to the provisions of this Act.

- (3) Regulations under subsection (1) may provide that specified provisions of a written law do not apply, or apply with specified modifications, to or in relation to any matter.
- (4) If regulations under subsection (1) provide that a specified state of affairs is to be taken to have existed, or not to have existed, on and from a day that is earlier than the day on which the regulations are published in the *Gazette* but not earlier than the commencement day, the regulations have effect according to their terms.
- (5) In subsections (3) and (4) —  
“specified” means specified or described in the regulations.
- (6) If regulations contain a provision referred to in subsection (4), the provision does not —
  - (a) affect, in a manner prejudicial to any person (other than the State, an authority of the State, or a local government), rights that the person had before the regulations were published in the *Gazette*; or
  - (b) impose liabilities on any person (other than the State, an authority of the State, or a local government) in respect of anything done or omitted to be done before the regulations were published in the *Gazette*.

### ***Part 7 — Other Acts amended***

Provides for consequential amendments to the following Acts.

Division 1 – *Children and Community Services Act 2004*

Division 2 – *Constitution Acts Amendment Act 1899*

Division 3 – *Evidence Act 1996*

Division 4 – *Working with Children (Criminal Record Checking) Act 2004*

### **Schedule 1- Purposes for which regulations may be made**

Lists the purposes for which regulations may be made by the Governor.