

## EXPLANATORY MEMORANDUM

### CHILDREN AND COMMUNITY SERVICES AMENDMENT (REPORTING SEXUAL ABUSE OF CHILDREN) BILL 2007

#### INTRODUCTION

The Children and Community Services Amendment (Reporting Sexual Abuse of Children) Bill 2007 implements the State Government's decision to introduce legislation for the mandatory reporting of child sexual abuse by amending the *Children and Community Services Act 2004* ("the Children and Community Services Act").

The Bill also makes consequential amendments to the *Evidence Act 1906* ("the Evidence Act") and the *Freedom of Information Act 1992* ("the Freedom of Information Act").

#### *Long title*

The long title sets out the purpose of the Bill which is to amend the Children and Community Services Act, the Evidence Act and the Freedom of Information Act.

#### *Clause 1 Short title*

This clause provides the short title of the Act.

#### *Clause 2 Commencement*

Clauses 1 and 2 of the Bill are to come into operation on the day on which the Act receives the Royal Assent.

The remaining clauses are to come into operation on a day fixed by proclamation being a day that is later than 31 December 2008.

#### *Clause 3 The Act amended*

This clause provides that the amendments are to the Children and Community Services Act, except for the amendments contained in clauses 12 and 13 of the Bill.

#### *Clause 4 Section 23 amended*

Clause 4 of the Bill amends section 23 of the Children and Community Services Act.

Section 23 of the Children and Community Services Act is a provision which relates to the disclosure of information. If information is disclosed in good faith pursuant to section 23 of the Children and Community Services Act then a person is relieved from certain types of liability.

The effect of the amendment to section 23 of the Children and Community Services Act is to ensure that disclosure of information under that section is not to be regarded as a breach of any principles of conduct applicable to the person's employment. For example, the principles of conduct which apply to a person under the *Public Sector Management Act*

1994. This amendment is consistent with the amendments to be made to sections 129 and 142 of the Children and Community Services Act.

**Clause 5            Division 9A inserted in Part 4**

The Bill inserts a new Division into Part 4 of the Children and Community Services Act. Part 4 of the Children and Community Services Act relates to the protection and care of children.

Division 9A contains the following clauses:

**Clause 124A      Terms used in this Division**

Clause 124A of the Bill contains the definitions of words used in Division 9A of Part 4 of the Act. In particular:

"Doctor" is defined to mean a natural person who is registered as a medical practitioner under the *Medical Practitioners Act 2006*.

"Midwife" is defined to have the meaning given in section 3 of the *Nurses and Midwives Act 2006*.

"Nurse" is defined to have the meaning given in section 3 of the *Nurses and Midwives Act 2006*.

"Sexual abuse" in relation to a child is defined to include sexual behaviour in circumstances where:

- (a) the child is the subject of bribery, coercion, a threat, exploitation or violence; or
- (b) the child is in a position of less power with another person involved in the behaviour; or
- (c) there is a significant disparity in the developmental function or maturity of the child and another person involved in the behaviour.

The definition of "sexual abuse" is not an exhaustive definition.

"Teacher" is defined to mean:

- (a) a person who, under the *Western Australia College of Teaching Act 2004*, is registered, provisionally registered or has a limited authority to teach.
- (b) A person who is appointed under the *School Education Act 1999* section 236(2) as a member of the teaching staff of a community kindergarten;
- (c) a person who provides instruction in a course that is-
  - (i) mentioned in the *School Education Act 1999* section 11B(1)(a), (b) or (e); and
  - (ii) prescribed for the purposes of this definition.

- (d) a person who instructs or supervises a student who is participating in an activity that is-
  - (i) part of an educational programme of a school under an arrangement mentioned in the *School Education Act 1999* section 24(1); and
  - (ii) prescribed for the purposes of this definition;
- (e) a person employed by the chief executive officer as defined in the *Young Offenders Act 1994* section 3 to teach detainees at a detention centre as defined in that section.

Paragraph (a) includes teachers who teach in schools governed by the *School Education Act 1999* as all these teachers are required to be registered or have a limited authority to teach under the *Western Australia College of Teaching Act 2004*.

A community kindergarten is not a school for the purposes of the *School Education Act 1999*. Accordingly, paragraph (b) includes within the definition of teacher, members of the teaching staff of a community kindergarten.

Year 11 and 12 students may participate in a number of options whilst at school. These options include undertaking a course of study provided by a university, a higher education course registered under the *Higher Education Act 2004*, a course or a skills training programme accredited under the *Vocational Education and Training Act 1996*. If the course is prescribed then a person who provides instruction in one of these courses will fall within paragraph (d) of the definition of "teacher" in the Bill.

Under section 24 of the *School Education Act 1999* an arrangement may be entered into for a student to attend at some place other than the school at which he or she is enrolled and there to participate in activities that are part of an educational programme of the school. If the activity is prescribed then a person who provides instruction or supervision to a student who is participating in such an activity will fall within the definition of "teacher" in the Bill.

The Department of Corrective Services employs teachers to teach detainees in juvenile detention centres. Accordingly, paragraph (e) includes within the definition of teacher, persons employed to teach detainees at a detention centre.

It is not necessary to define the words "CEO", "child", or "police officer" because these terms are already defined in section 3 of the Children and Community Services Act.

***Clause 124B Matters concerning sexual abuse of children to be reported by certain persons***

This clause sets out who is required to make a report of child sexual abuse and the basis upon which such a report is to be made.

The obligation to report falls upon doctors, nurses, midwives, police officers and teachers. The definition of each of these professionals is contained in clause 124A of the Bill.

A person who is within one of these classes of person will be required to make a report in the following circumstances:

- (1) if he/she believes on reasonable grounds that a child has been the subject of sexual abuse that occurred on or after the commencement day or is the subject of ongoing sexual abuse; and
- (2) he/she forms the belief in the course of his/her work (whether paid or unpaid) on or after the commencement day.

The belief must be reported as practicable after the person forms the belief.

The report must be made to the Chief Executive Officer, a person approved by the Chief Executive Officer or a person who is a member of a class of persons approved by the CEO.

A person who contravenes clause 124B(1) of the Bill commits an offence. The maximum penalty for the offence is a fine of \$6,000.

It is a defence to a prosecution for an offence contrary to clause 124B(1) of the Bill for the person charged to prove that he or she honestly and reasonably believed that all of the reasonable grounds for his or her belief had been the subject of a report made by another person or the child's wellbeing is or was the subject of an inquiry or action under sections 31 and 32 of the Children and Community Services Act. For example, if the Department of Child Protection receives a information from the relative of a child that the child is suspected to have been sexually abused, the Department make refer the child to a medical practitioner for an examination. In such a case the medical practitioner will not be required to make a mandatory report to the Chief Executive Officer because he or she will be aware that the Department of Child Protection has received a report of sexual abuse or is currently taking action in relation to the report of sexual abuse.

A requirement that a person report child sexual abuse under clause 124B(1) of the Bill is in addition to, and does not affect, any other function that the person has in respect of the child in the course of the person's work as a doctor, nurse, midwife, police officer or teacher.

A person who gives a report which he or she knows to be false or misleading in a material respect commits an offence contrary to section 244 of the Children and Community Services Act.

#### ***Clause 124C Reports: form and content***

Clause 124C of the Bill sets out how the report is to be made and what information the report is to contain.

A report may be written or oral. However, an oral report must be confirmed in writing as soon as practicable thereafter. A written report may, but does not need to be, in a form approved by the CEO.

A report is to contain the following information: information about the person making the report; information about the child; the grounds for the belief that the child has been the

subject of sexual abuse or is the subject of ongoing sexual abuse; and prescribed information.

A person mentioned in clause 124B(2)(b) or (c) who receives a report must, if the report is a written report, give the report to the CEO or, if the report is an oral report, inform the CEO of the contents of the report. A person who contravenes clause 124B(4) of the Bill commits an offence. The maximum penalty for the offence is a fine of \$6,000.

The CEO is required to acknowledge receipt of the report as soon as practicable after receiving it.

***Clause 124D Reports: who receives copies***

Clause 124D of the Bill requires the CEO to give a copy of each report to the Commissioner of Police. This provision will facilitate the investigation and prosecution by the Western Australia Police of offences of a sexual nature against a child which might not otherwise have been brought to their attention.

This clause also makes it clear that the requirement to provide a copy of each written report to the Commissioner of Police does not affect the functions of the CEO or other persons under sections 23, 31 or 32 of the Children and Community Services Act.

Section 23 of the Children and Community Services Act relates to the exchange of information between the CEO or an authorised officer and a public authority, a corresponding authority, a service provider or an interested person.

Section 31 of the Children and Community Services Act provides that if the CEO receives information that raises concerns about a child's wellbeing, the CEO may cause any inquiries to be made that the CEO considers reasonably necessary for the purpose of determining whether action should be taken to safeguard or promote the child's wellbeing.

Section 32 of the Children and Community Services Act sets out what further action the CEO may undertake to safeguard or promote a child's wellbeing.

***Clause 124E When a prosecution can be commenced***

The usual time limit for the prosecution of a simple offence is 12 months pursuant to section 21(2) of the *Criminal Procedure Act 2004*. However, given the fact that many cases of child sexual abuse are not disclosed until years later, the 12 month time limit is considered inappropriate for the prosecution of an offence of failing to make a report.

Clause 124E of the Bill provides that a prosecution for an offence contrary to clause 124B(1) of the Bill may be commenced within 36 months after the date on which the alleged offence was committed and, with the consent of the Attorney General, may be commenced at any time after that period.

***Clause 124F Confidentiality of reporter's identity***

Clause 124F of the Bill contains provisions to protect the identity of a reporter by making it an offence for identifying information to be disclosed to another person except in limited circumstances.

The circumstances in which identifying information may be disclosed to another person are:

- (1) for the purposes of, or in connection with, performing functions under the Act;
- (2) with the written consent of the reporter;
- (3) to or by a police officer for the purpose of, or in connection with, an investigation of a suspected offence in relation to the child or the conduct of a prosecution of an offence under a written law in relation to the child; or
- (4) for the purpose of, or in connection with, the prosecution of certain offences under the Act relating to the reporter or the report;
- (5) by an officer of the Department of Child Protection in specified legal proceedings (for example, child protection proceedings);
- (6) in other legal proceedings with the leave of the court or tribunal;
- (7) the identifying information has already been disclosed in legal proceedings and the court or tribunal concerned has not made an order prohibiting further disclosure.

The protection contained in this clause also extends to a person who, in good faith, provided information on the basis of which a report was made or was otherwise concerned in making a report or causing a report to be made. This is because of the extended definition of the word "reporter".

A person who contravenes clause 124F(1) of the Bill commits an offence. The maximum penalty for the offence is a fine of \$24,000 and imprisonment for 2 years.

#### ***Clause 124G Evidence and legal proceedings***

Clause 124G of the Bill contains provisions which limit the use of the report and the information contained therein as evidence in legal proceedings. The clause also contains provisions which restrict the questions which may be asked of witnesses in legal proceedings.

A report is not required to be disclosed by way of prosecution disclosure under the *Criminal Procedure Act 2004* unless the proceedings are for the prosecution of an offence mentioned in clause 124F(2)(d) or the court concerned orders otherwise.

A party to any legal proceedings cannot require a person to produce a report or evidence of the contents of a report unless the proceedings are for the prosecution of an offence mentioned in clause 124F(2)(d) or the court or tribunal give leave to do so.

A report or evidence of the contents of a report is not admissible in any legal proceedings unless the proceedings are for the prosecution of an offence mentioned in clause 124F(2)(d), the report or evidence of the contents of a report is given by an officer of the Department of Child Protection in proceedings of a kind mentioned in clause 124F(2)(e) to (i) or the court or tribunal orders otherwise.

In any legal proceedings a person must not be asked any and, if asked, is entitled to refuse to answer, any question the answer to which would give identifying information in relation

to a reporter unless the proceedings are for the prosecution of an offence mentioned in clause 124F(2)(d) or the person is an officer of the Department of Child Protection and the proceedings are of a kind mentioned in clause 124F(2)(e) to (i) or the court or tribunal gives leave to do so.

In any legal proceedings a person must not be asked and, if asked, is entitled to refuse to answer, any question as to whether a particular matter is the subject of a report unless the proceedings are for the prosecution of an offence mentioned in clause 124F(2)(d), the person is an officer of the Department of Child Protection in proceedings of a kind mentioned in clause 124F(2)(e) to (i) or the court or tribunal gives leave to do so.

Any other evidence as to identifying information in relation to a reported must not be adduced in any legal proceedings unless the proceedings are for the prosecution of an offence mentioned in clause 124F(2)(d), the evidence is adduced by an officer of the Department of Child Protection in proceedings of a kind mentioned in clause 124F(2)(e) to (i) or the court or tribunal concerned orders otherwise.

***Clause 124H Orders, leave of court etc***

Clause 124H of the Bill sets out the circumstances in which a court or tribunal may grant leave or make an order for the purposes of clause 124F and 124G of the Bill.

Clause 124H(2) of the Bill acts as a prohibition on the making of an order or the granting of leave unless the court or tribunal is satisfied as to any of the matters contained in paragraphs (a), (b) and (c) of that subclause. First, the court or tribunal must not make an order or grant leave unless it is satisfied that to safeguard and promote the wellbeing of the child about whom the report was made it is necessary for the order to be made or for leave to be given. Second, the court or tribunal must not make an order or grant leave unless it is satisfied that the identifying information, or the content of the report is of critical important in the proceedings; and there is a compelling reason in the public interest for disclosure of the identifying information, or disclosure, production or adducing of the report or evidence. Third, the court or tribunal must not make an order or grant leave unless it is satisfied that in a case concerning the disclosure of identifying information in relation to a reporter, the reporter consents to the disclosure.

The court or tribunal may make an order or grant leave on any condition that it thinks fit having regard to the need to prevent, as far as practicable, further disclosure of the information that is the subject of the order or leave.

An application for an order or leave must not be heard in public and must be dealt with in a way that protects, as far as practicable, the identity of the reporter pending a decision.

It is to be noted that even if the court or tribunal grants leave or makes an order, section 239 of the Children and Community Services Act provides for persons to object to disclosing certain information during legal proceedings.

***Clause 6 Section 129 amended***

Clause 6 of the Bill amends section 129 of the Children and Community Services Act.

Section 129 of the Children and Community Services Act provides that persons who, in good faith, provide information to the CEO or another officer, are protected from liability for making the report in three different ways. First, the person does not incur any civil or criminal liability. Second, the person is not to be taken to have breached any duty of confidentiality or secrecy imposed by law. Third, the person is not to be taken to have breached any professional ethics or standards to have engaged in unprofessional conduct.

The effect of the amendment is to extend the protection offered by section 129 of the Children and Community Services Act to persons who are required to make mandatory reports to the CEO under the Children and Community Services Act or by regulations made under the *Child Care Services Act 2007*.

The three protections from liability have also been extended to apply a person who, in good faith, provided information on the basis of which a report or notification was made or who was otherwise concerned in making a report or notification or causing a report or notification to be made. The justification for extending the protection is that if these persons had reported the information directly to the CEO rather than through a mandatory reporter, they would be entitled to the protections contained in section 129(2) of the Children and Community Services Act. The three protections from liability will also apply to a person who receives a report from a mandatory reporter and is required to pass that report on to the CEO.

The amendment also ensures that disclosure is not to be regarded as a breach of any principles of conduct applicable to the person's employment. This amendment is consistent with the amendments made to sections 23 and 142 of the Children and Community Services Act.

***Clause 7            Section 142 amended***

Clause 7 of the Bill amends section 142 of the Children and Community Services Act.

Section 142 of the Children and Community Services Act relates to protection from liability for preparing or giving a report to the Court.

The amendment also ensures that disclosure is not to be regarded as a breach of any principles of conduct applicable to the person's employment. This amendment is consistent with the amendments made to sections 23 and 129 of the Children and Community Services Act.

***Clause 8            Section 238 amended***

Clause 8 of the Bill amends section 238 of the Children and Community Services Act.

Section 238 of the Children and Community Services Act relates to the production of records of the Department of Child Protection in legal proceedings. Sections 238(5) to (8) of the Children and Community Services Act restrict the use, copying and disclosure of the report once a record is produced.

The effect of the amendment is to remove production of reports made under clause 124B(1) from the operation of section 238 of the Children and Community Services Act except in proceedings for the prosecution of an offence mentioned in clause 124F(2)(d).



However, if a court or tribunal grants leave under clause 124H then section 238(5) to (8) of the Children and Community Services Act apply as if the report had been produced under section 238(2) of the Children and Community Services Act.

***Clause 9            Section 240 amended***

Clause 9 of the Bill amends section 240(1) of the Children and Community Services Act.

Section 240 of the Children and Community Services Act relates to confidentiality of a notifier's identity.

Clause 9 of the Bill amends section 240 of the Children and Community Services Act in two respects. First, by amending the definition of "notifier". Second, by amending the provisions relating to the disclosure of identifying information.

The effect of the first amendment is to include a person who notifies the CEO of an allegation in accordance with a requirement to do so under regulations made under the *Child Care Services Act 2007* and certain other persons mentioned in section 129(3) of the Children and Community Services Act within the definition of reporter.

However, a reporter (as defined in clause 124A of the Bill) is excluded from the definition of "notifier" in section 240 of the Children and Community Services Act. This amendment is required because clause 124F contains confidentiality provisions which apply specifically to reporters.

The effect of the second amendment is to make section 240 of the Children and Community Services Act consistent with clause 124G of the Bill so that the same exceptions to the obligation of confidentiality apply to notifiers and reporters.

***Clause 10            Section 241 amended***

Clause 10 of the Bill amends section 241 of the Children and Community Services Act.

Section 241 of the Children and Community Services Act is a general provision relating to the confidentiality of information. Section 241(2) of the Children and Community Services Act contains some exceptions to the duty of confidentiality.

The effect of the amendment is to make it clear that nothing in section 241(2) of the Children and Community Services Act permits the disclosure of identifying information as defined in clause 124A of the Bill if its disclosure is prohibited under clause 124G of the Bill.

***Clause 11            Section 249 amended***

Clause 11 of the Bill amends section 249 of the Children and Community Services Act.

Section 249 of the Children and Community Services Act provides for the review of the Children and Community Services Act at 5 yearly intervals.

The effect of the amendment is that the Minister will be required to carry out a review of the operation and effectiveness of the amendments made to the Children and Community

Services Act by the Bill as soon as is practicable after the expiry of 3 years from the day on which clause 4 of the Act comes into operation.

**Clause 12      *Evidence Act 1906 amended***

Clause 12 of the Bill amends the Evidence Act by inserting a reference to clause 124F of the Bill in section 19L(5) of the Evidence Act.

Sections 19A to 19M of the Evidence Act protect counselling communications made in confidence by or in relation to a victim of sexual assault from being disclosed in criminal proceedings except with the leave of the Court.

A report made under clause 124B(1) of the Bill may contain counselling communications which are protected from disclosure under the Evidence Act.

The effect of the amendment is to ensure that the protection provisions in the Evidence Act do not affect the operation of clause 124F of the Bill. That is, whilst a court may give leave for the disclosure of a counselling communication under the Evidence Act, clause 124G of the Bill protects the confidentiality of a reporter's identity in criminal proceedings unless the Court has granted leave under clause 124H of the Bill.

**Clause 13      *Freedom of Information Act 1992 amended***

Clause 13 of the Bill amends the Freedom of Information Act so that matter is exempt matter under Schedule 1 clause 14(5) if its disclosure would reveal or tend to reveal the identity of anyone as:

- (1) a person who has given, or a person who is mentioned in, a notification that is required to be given by a licensee under regulations under the *Child Care Services Act 2007*;
- (2) a person who has made, or is a person mentioned in, a report under clause 124B(1) of the Bill;
- (3) a person who is a notifier as defined in section 240(1) of the Children and Community Services Act or a person about whom the information mentioned in that definition is given; or
- (4) a person who has given, or a person who is mentioned in, a notification under section 160(2) or (3) of the *Family Court Act 1997*.

The effect of the amendment to the Freedom of Information Act is to provide equal protection to persons who voluntarily report to the CEO under the Children and Community Services Act, persons who are required to report to the CEO under the Children and Community Services Act, the *Child Care Services Act 2007* and the *Family Court Act 1997* and persons mentioned in these reports.