THIRTY-EIGHTH PARLIAMENT

REPORT 45

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

WORKING WITH CHILDREN (CRIMINAL RECORD) AMENDMENT BILL 2009

Presented by Hon Adele Farina MLC (Chairman)

March 2010

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Nigel Hallett MLC (Deputy Chairman)

Hon Liz Behjat MLC

Hon Helen Bullock MLC

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Government Response

This Report is subject to Standing Order 337:

> *After tabling, the Clerk shall send a copy of a report recommending action by, or seeking a response from, the Government to the responsible Minister. The Leader of the Government or the Minister (if a Member of the Council) shall report the Government's response within 4 months.*

The four-month period commences on the date of tabling.

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EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

WORKING WITH CHILDREN (CRIMINAL RECORD) AMENDMENT BILL 2009

EXECUTIVE SUMMARY

1 On 18 November 2009 the inquiry into the Working With Children (Criminal Record Checking) Amendment Bill 2009 (Bill) was referred the Legislative Council pursuant to Standing Order 230A.

2 The Bill amends two Acts, the *Working with Children (Criminal Record Checking) Act 2004* and the *Spent Convictions Act 1988*.

3 The Amendments to the *Working with Children (Criminal Record Checking) Act 2004* are in response to operational issues that have arisen following the implementation of the Act in 2006.

4 The Amendments to the *Spent Convictions Act 1988* give effect to the Memorandum of Understanding for a National Exchange of Criminal History Information for People Working with Children signed on 26 November 2009.

5 This report sets out relevant information and matters of concern that came to the Committee's attention during its scrutiny of the above legislation.

RECOMMENDATIONS

6 Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of why Clause 2(b) does not specify a date for proclamation.

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Recommendation 2: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of:

i) the definition of "indecent act" that will be applied in clause 7 proposed section 12 item 7; and in particular

ii) the reason that the term "indecent act" is not defined in the Bill; and

iii) whether it is the Government's intention to apply a broad definition of an indecent act under section 203 of the *Criminal Code* (contrary to the case law which states a narrow definition should be applied).

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Recommendation 3: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation as to:

i) whether it is the Government's position that any risk, even a risk arising from an offender who has a 'low risk profile', is an unacceptable risk. If this is the case, will the Minister explain the application of proposed section 12(8)(e), particularly in relation to the 'length of time' risk assessment; and

ii) the administrative and investigatory steps by which the Department determines whether an allegation made in the statement of material facts is true or false.

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Recommendation 4: The Committee recommends that the Minister for Child Protection provide to the Legislative Council, with reference to clause 9 proposed section 17, an explanation of:

i) whether there are guidelines in place for the exercise of the Police Commissioner's power under proposed section 17(1);

ii) whether the Police Commissioner has the authority to delegate the exercise of the power granted under proposed section 17(1) and if so, what is the lowest level officer to whom this power can be delegated; and

iii) the checks and balances that are in place to protect against inappropriate use of the power under proposed section 17(1).

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Recommendation 5: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of why the Department for Child Protection would make the decision to cancel an assessment notice in the circumstances arising in proposed section 21(A)(2) rather than proceeding to complete that assessment and, if required, issue a negative notice.

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Recommendation 6: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of why the Bill does not provide a mechanism for the CEO to treat notification of a relevant offence under proposed section 31(4) as if an application had been made by the person under section 9 or 10 of the *Working with Children (Criminal Record Checking) Act 2004*, which would allow an assessment to be made.

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Recommendation 7: The Committee recommends that Clause 27 proposed section 28(2) be amended to include:

i) a requirement for the relevant Minister to be satisfied that any body prescribed under section 28(2) complies with all the safeguards that currently apply to participating screening units as set out in Schedule 1 of the Memorandum of Understanding for a National Exchange of Criminal History Information for People Working with Children; and

ii) all matters found in Schedule 1 of the Memorandum of Understanding for a National Exchange of Criminal History Information for People Working with Children.

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Recommendation 8: The Committee recommends that the Working With Children (Criminal Record) Amendment Bill 2009 is amended to provide for the relevant Minister to conduct a review of the effect of Clause 27 and to report to the Legislative Council within 12 months of the commencement date of the Bill.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

WORKING WITH CHILDREN (CRIMINAL RECORD) AMENDMENT BILL 2009

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1 REFERENCE AND PROCEDURE

1.1 The Working with Children (Criminal Record Checking) Amendment Bill 2009 (**Bill)** was introduced to the Legislative Council on 18 November 2009 by Hon Robyn McSweeney MLC, the Minister for Child Protection (**Minister**).[1]

1.2 Following its Second Reading, the Bill stood referred to this Committee pursuant to Standing Order 230A, which requires the Committee to report within 30 days of referral.

1.3 The Legislative Council adjourned for the summer recess on 1 December 2009. The Committee was required to report no later than 2 March 2010.

2 INQUIRY PROCEDURE

2.1 The Committee advertised the inquiry in *The West Australian* on 28 November 2009 and wrote to stakeholders (a list of whom is attached at **Appendix 1**) on 8 December 2009. Details of the Committee's inquiry were published on its website. The Committee also wrote to the Minister on 25 November 2009 requiring provision of the supporting documents for the Bill.

2.2 The following stakeholders provided written submissions to the Committee:

- Ms Michelle Scott Commissioner for Children and Young People
- The Western Australian Council of State School Organisations Inc
- The Western Australian College of Teaching
- Mr Hylton Quail, President, Law Society of Western Australia
- The Department of Education
- The Department of Training and Workforce Development

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[1] Hon Robyn McSweeney MLC, the Minister for Child Protection, WA, Legislative Council, *Parliamentary Debates Hansard*, 18 November 2009, p9192.

- Clinical Assoc. Prof. Peter M Winterton and Ms Lee Henry, Head of Department, Child Protection Unit, Princess Margaret Hospital on behalf of the Child and Adolescent Health Service

- The WA Police provided two submissions.

2.3 A letter was received from Ms Yvonne Henderson, Commissioner for Equal Opportunity drawing the Committee's attention to the Equal Opportunities review of the *Equal Opportunity Act 1984* tabled in Parliament in May 2007.

2.4 Of the submissions received, seven indicated support for the Bill, one advised that the Bill had no negative impact on their organisation and one suggested a further amendment to the Act.

2.5 On 9 February 2009 the Committee held hearings with the following officers of the Department for Child Protection (**Department**):

- Ms Tara Gupta, General Counsel; and

- Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit,

appeared on behalf of the Department.

2.6 The transcripts of the hearing can be accessed at: http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Legislative+Council+-+Current+Committees. Click on Uniform Legislation and Statutes Review Committee; Current enquiries; Working With Children (Criminal Record Checking) Amendment Bill 2009.

2.7 The Committee thanks the witnesses for their assistance in this inquiry.

3 SUPPORTING DOCUMENTS

3.1 The Minister provided the Committee with the following supporting documents which are reproduced at **Appendix 2**:

- Memorandum of Understanding for a National Exchange of Criminal History Information for People Working With Children- 26 November 2009; and

- COAG Communiqué Decision of 29.11.2008.

4 FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

4.1 The establishment of a Committee to scrutinise uniform legislation arose from a concern that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, bind a State Parliament to enact

legislation to give effect to national uniform schemes or an intergovernmental agreement.[2]

4.2 When scrutinising uniform legislation, the Committee considers various fundamental legislative scrutiny principles. Although not formally adopted by the Legislative Council as part of the Committee's Terms of Reference, the Committee applies these principles as a convenient framework.[3] These principles are set out in **Appendix 3**.

5 UNIFORM LEGISLATION

5.1 National legislative schemes implementing uniform legislation take a variety of forms. Nine different structures, each with varying degrees of emphasis on national consistency or uniformity of laws and adaptability, have been identified; however, this is not an exhaustive list. The structures are constantly evolving and changing in step with the way in which national ministerial council evolve and change. The structures are summarised in **Appendix 4**.

5.2 The Bill in effect resembles Structure 1 *Complementary Commonwealth-State or Co-Operative Legislation* being a Memorandum of Understanding which has as its end goal an intergovernmental agreement.

6 BACKGROUND

6.1 The Bill amends two pieces of legislation, *Working with Children (Criminal Record Checking) Act 2004* (**Act**) and the *Spent Convictions Act 1988*.

6.2 The Act sets up a system for screening the criminal histories of individuals who work with children. It requires employees, self employed persons and volunteers to apply the Department for an assessment prior to commencing working with children.

6.3 An application for an assessment will result in:

- an assessment being issued; or
- a negative notice being issued (a negative notice must be premised by notice to the applicant providing an opportunity for the applicant to make submissions on the matter).

6.4 The issuing of a negative notice prevents the applicant from engaging in child related work or conducting a child-related business.

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[2] Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004.

[3] Further background on fundamental legislative principles can be found in a report by the predecessor Committee, the Standing Committee on Uniform Legislation and General Purposes. Refer to Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 23, *The Work of the Committee During the Second Session of the Thirty-Sixth Parliament - August 13 2002 to November 16 2004*, November 2004, pp4-9.

6.5 The Act also provides for issue of an interim negative notice which has effect until the assessment is finalised.[4]

6.6 Part 2 of the Bill amends the Act to address operational concerns that have arisen following its implementation on 1 January 2006.

6.7 Part 3 of the Bill amends the *Spent Convictions Act 1988* in order to give effect to the National Exchange of Criminal History Information for People Working With Children signed on 26 November 2009 (**MOU**).

6.8 The amendments to Part 3 of the Bill arise from recognition, nationally, that there was a need to improve inter-jurisdictional exchange of criminal history information of people working with children.

6.9 Historically child related employment screening units have been able to access extensive criminal history information within their jurisdiction. Inter-jurisdictional access to criminal history has, however, been limited to unspent convictions.[5] In 2007 there was in principle agreement by the Council of Australian Governments (**COAG**) to a framework for improving the inter-jurisdictional exchange of criminal history information.[6]

6.10 On the 29 November 2008 COAG, affirming the need for an inter-jurisdictional exchange to be in place as soon as possible, endorsed an implementation plan. The plan included the preparation and passage of legislation by jurisdictions to facilitate exchange of criminal history information in 12 months. COAG noted that all jurisdictions except Victoria and the Australian Capital Territory,[7] would exchange information on non-conviction charges for screening of people working with children.[8]

6.11 The COAG agreement to provide inter-jurisdictional access to criminal history information culminated in the MOU.

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4 Section 13 *Working with Children (Criminal Record Checking) Amendment Act 2004.*

5 Memorandum of Understanding for a National Exchange of Criminal History Information for People Working With Children- 26 November 2009, Recitals:B.

6 Communiqué, Council of Australian Governments' Meeting, Canberra, 13 April 2007, p9.

7 The Department for Child protection advised that: *The ACT has made changes so that they will be passing on non-conviction charge information; there is no indication that Victoria will change its position. Their legislation that is equivalent to our Working with Children Act does not allow a consideration of a non-conviction charge. The effect of that is that if a person applies for a WA working with children card, we are not going to know about non-conviction charges from Victoria.* Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection. *Transcript of Evidence*, 9 February 2010, p27.

8 Communiqué, Council of Australian Governments' Meeting, Canberra, 26 November 2008, p11.

7 MEMORANDUM OF UNDERSTANDING FOR A NATIONAL EXCHANGE OF CRIMINAL HISTORY INFORMATION FOR PEOPLE WORKING WITH CHILDREN

Duration

7.1 Clause 8.9 of the MOU sets out that the memorandum and the national exchange of criminal history information for people working with children will be in effect for the duration of the commencement period. The Commencement period covers:

> *(a) the first twelve months of operation of the exchange from the date of the commencement of the exchange (**"the exchange's initial 12 months"**); and*
>
> *(b) the time in which the project implementation committee prepares the evaluation report; and*
>
> *(c) the additional time in which the parties prepare and sign the proposed intergovernmental agreement on permanent arrangements for the exchange referred to in Part 10.*[9]

7.2 The Committee notes that the Commencement period concludes on the date that the proposed intergovernmental agreement is signed.

7.3 Key features of the MOU are:

- parties agree to establish a national exchange of criminal history information for people working with children;
- the exchange will take place through participating screening units;
- parties will exchange an expanded criminal history which will include spent convictions, pending charges and with the exception of Victoria, non conviction charges;[10]
- parties will also exchange circumstances information, typically in prosecution briefs or statements of material facts, which may not be evident from the record of offence or alleged offence;

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9 It is the intention of the parties that upon receipt of the evaluation report the parties will prepare an intergovernmental agreement, for signature of First Ministers at COAG, that will replace this memorandum and provide for arrangements for the operation of the exchange on a permanent basis (the **"proposed intergovernmental agreement on permanent arrangements for the exchange"**).

10 The Committee was advised that Victoria's legislation does not permit the consideration of non conviction charges. Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection. 9 February 2010, p26.

- parties have made or will make legislative changes to facilitate receipt and supply of information under the exchange;

- parties are required to comply with participation requirements set out in schedule 1 of the MOU and agree to make the required legislative and administrative requirements to do so;

- existing arrangements for exchange of information with police services and CrimTrac will continue to apply;[11]

- to avoid duplication and cost in screening, with the consent of the person involved, a participating screening unit may provide limited information about that person,s criminal history to a third party government entity;[12] and

- dual function participating screening units[13] are not to use expanded criminal history information screening information for general employment suitability screening.

7.4 A party may withdraw from the MOU by giving two months' notice and a participating screening unit may withdraw following notice in writing.

7.5 Within three months' of the conclusion of the exchange's initial 12 months the exchange is to be evaluated by the project implementation committee. The implementation committee will then prepare a report which will:

- be accompanied by a draft intergovernmental agreement; or

- make recommendations about the content of such an agreement.[14]

7.6 The Committee was advised that the amendments to the *Spent Convictions Act 1988* are the only legislative change required in Western Australia as this state is currently complying with the other requirements of the MOU.[15]

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11 Crim Trac is defined in the MOU to mean; *the Crim Trac Agency, an executive Agency established under section 65 of the Public Service Act 1999 (Cth)(ABN 171 93 904 699).* On its website Crim Trac advises: *CrimTrac is an Australian Government agency, established on 1 July 2000 to develop the technology required to give police ready access to information needed to solve crimes. Our primary role is to provide national information sharing solutions to support the effective operation of police services and law enforcement agencies across state and territory borders. We broker a wide variety of information to assist investigations by law enforcement agencies and are responsible for finding emerging information technologies and opportunities to enhance information sharing.* Viewed on 21 December 2009 at http://www.crimtrac.gov.au/about_us/index.html.

12 Part 5 Memorandum of Understanding for a National Exchange of Criminal History Information for People Working With Children.

13 *Units that undertake screening with a general employment suitability or probity screening element as well as a child safety screening element.* Clause 5.4 Memorandum of Understanding for a National Exchange of Criminal History Information for People Working With Children.

14 Ibid, Clause 9.

7.7 The exchange commenced on 30 November 2009[16]. The Committee was advised by the Minister that:

> *Pending passage of the consequential amendments, temporary arrangements have been put in place by the Western Australia Police (WA Police) to release spent convictions to ensure that Western Australia does not hold up this agreement. The information required for the exchange release is being exchanged under the provisions of the 'Public Sector Commissioner's Circular 2009-29 (Policy Framework and Standards for Information Sharing Between Government Agencies) and the 'WA Police Privacy Statement' until the appropriate legislation is enacted. The WA Police have advised that this is an interim strategy only.* [17]

8 OVERVIEW OF THE BILL

8.1 The Bill is in three Parts:

- Part 1 contains the short title and commencement information.
- Part 2 amends the Act to address operational concerns that have arisen following implementation of the Act since 1 January 2006.
- Part 3 contains the uniform provisions, amending the *Spent Convictions Act 1988.*

8.2 The Department provided the Committee with a summary of consultation undertaken about the terms of the Bill which is attached at **Appendix 5**.

9 SPECIFIC CLAUSES PART 1 OF THE BILL

Clause 2

9.1 Clause 2 of the Bill relates to Commencement:

> *This Act comes into operation as follows —*
>
> > *(a) Part 1 — on the day on which this Act receives the Royal Assent;*

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15 Letter from Minister for Child Protection, 9 December 2009, p2.

16 Memorandum of Understanding for a National Exchange of Criminal History Information for People Working With Children. Clause 8.2.

17 Letter from Minister for Child Protection, 9 December 2009, Attachment 1.

> *(b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.*

9.2 Unless an Act's commencement provisions provide otherwise, the Act will commence operation on the 28th day after the day on which it receives the Royal Assent. Section 20(2) of the *Interpretation Act 1984* provides:

> *Every Act to which the Royal Assent is given on or after 1 July 1984 shall, unless the contrary intention appears in that Act, come into operation on the 28th day after the day on which that Act receives the Royal Assent.*

9.3 Providing for part of an Act to come into operation on a day fixed by proclamation means that there is a discretion left with the executive to indefinitely suspend the operation of laws passed by the Parliament.

9.4 The Committee asked the Department why clause 2(b) had been used; and whether a delay in proclamation could impact on the evaluation and reporting process as set out in clause 9 of the MOU.

9.5 Mr Dixon, Senior Legal Officer, Working with Children Screening Unit, advised the Committee that they had not provided a direct drafting instruction to Parliamentary Counsel in relation to clause 2(b).[18] Ms Gupta, General Counsel, Department for Child Protection, further advised: [19]

> ... ***Ms Gupta****: …I think that possibly one of the reasons why the provision is phrased as it is, is that there is potential for regulations in terms of the definition of "education provider"; and, in the event that there were circumstances that came up that had not been envisaged at the time of drafting, an extra regulation would be required.*

9.6 The Committee remains unclear as to the reason that clause 2(b) does not specify a commencement date.

9.7 In relation to the MOU, the Department advised that as the Police were already releasing spent conviction information the MOU was not jeopardised.[20]

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18 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p2.

19 Ms Tara Gupta, General Counsel, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p28.

20 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010,p2.

9.8 The Committee is satisfied that the proclamation date will not impact on requirements under the MOU.

9.9 The Committee considers that further clarification is required in relation to the failure to specify a date for proclamation.

Recommendation 1: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of why Clause 2(b) does not specify a date for proclamation.

10 SPECIFIC CLAUSES PART 2 OF THE BILL

Introduction

10.1 Section 3 of the Act provides:

> *In performing a function under this Act, the CEO or the State Administrative Tribunal is to regard the best interests of children as the paramount consideration.*

10.2 Section12 of the Act sets out the manner in which applications for an assessment are to be decided. In some instances the Act requires the CEO to issue an assessment notice or a negative notice.

10.3 In ss12(4) and 12(5) the Act requires the CEO to issue an assessment unless they are satisfied that, because of the particular circumstances of the case, a negative notice should issue.

10.4 Section 12(6) of the Act requires the CEO to issue a negative notice unless they are satisfied that because of the exceptional circumstances of the case, an assessment notice should issue.

10.5 The CEO is required to satisfy himself in relation to the particular or exceptional circumstances of the case having regard to the factors listed in section 8 below:

> *(8) If subsection (4), (5) or (6) applies in respect of an offence, the CEO is to decide whether he or she is satisfied in relation to the particular or exceptional circumstances of the case having regard to —*
>
> *(a) the best interests of children;*
>
> *(b) when the offence was committed or is alleged to have been committed;*

> *(c) the age of the applicant when the offence was committed or is alleged to have been committed;*
>
> *(d) the nature of the offence and any relevance it has to child-related work;*
>
> *(e) any information given by the applicant in, or in relation to, the application;*
>
> *(f) anything else that the CEO reasonably considers relevant to the decision.*

10.6 Sections 12(4) and 12(5) of the Act have been considered independently by the Court of Appeal.[21] In both cases, Buss J examined the significance of the words 'the CEO is satisfied' in ss 12(4) and 12(5) and stated as follows:

> *As Gummow J explained in* ***Minister for Immigration and Multicultural Affairs v …*** *which entitled the respondent in that case to the grant of a visa only if the Minister were 'satisfied' that the respondent answered the description in s 36(2) of that Act:*
>
> *The 'jurisdictional fact', upon the presence of which jurisdiction is conditioned, need not be a 'fact' in the ordinary meaning of that term. The precondition or criterion may consist of various elements and whilst the phrase 'jurisdictional fact' is an awkward one in such circumstances it will, for convenience, be retained in what follows. In* ***Bankstown Municipal Council v Fripp*** *[(1919) [1919] HCA 41; 26 CLR 385 at 403], Isaacs and Rich JJ pointed out that, with the object of preventing litigation on questions of jurisdictional fact, the legislature may introduce into the criterion elements of opinion or belief by the decision-maker (651) [130].*
>
> *In my opinion, s 12(4) imposes on the CEO an obligation, relevantly, to evaluate whether or not, because of the particular circumstances of the case, a negative notice should be issued to the applicant. It is the existence of the CEO's satisfaction which enlivens the power to issue a negative notice.* [22]

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[21] *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] 36 WAR 39 and *Chief Executive Officer, Department for Child Protection v Scott (No 2)* 38 WAR 125.

[22] Ibid, at 55 and at 146.

10.7 Buss J further stated:

> *The Legislative scheme reveals the adoption of a precautionary approach generally in relation to protecting children from the risk of sexual or physical harm. …*[23]
>
> *… The adoption of this approach is discernible from the following:*
>
> *(a) the CEO in performing, relevantly, the function under s 12(5) and (8), is to regard the best interests of children as 'the paramount consideration';*
>
> *(b) whether or not a negative notice is to be issued under s 12(5) depends upon the CEO's 'satisfaction' (that is, his or her state of mind) in relation to the particular circumstances of the case, rather than upon the existence of an objective 'fact', as ordinarily understood; and*
>
> *(c) the CEO may decide an application under s 12 by issuing a negative notice to the applicant after, relevantly, inviting the applicant to make a submission to the CEO about information concerning the applicant's criminal record of which the CEO is aware and about the applicant's suitability to be issued with an assessment notice (s 13(1)(a)), without any provision for or contemplation of a hearing for the purpose of determining facts or any other question*[24]

10.8 A decision by the CEO not to grant an assessment is reviewable by the State Appeals Tribunal.

> *The Tribunal has, when dealing with a matter in the exercise of its*
>
> *review jurisdiction, functions and discretions corresponding to those*
>
> *exercisable by the decision-maker in making the reviewable decision.*[25]

---

23 Chief Executive Officer, *Department for Child Protection v Scott (No 2)* 38 WAR 125 at 148.

24 Ibid, 149.

25 Section 29(1) *State Administrative Tribunal Act 2004.*

Clause 4

10.9 Clause 4 of the Bill proposes to amend s4 of the Act by inserting four new defined terms. One of the new terms is 'Class 3 Offence' which is defined as:

> *an offence that is not a Class 1 offence or Class 2 offence.*

10.10 The Committee noted that Class 1 and 2 offences are listed in Schedules 1 and 2 of the Act respectively. It also noted the new defined term did not alter the current categories of offences:

> *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.*[26]

10.11 The Committee was concerned that the broad nature of Class 3 did not provide certainty to anyone working with the Bill.

10.12 The Committee raised with the Department the fact that Class 3 offences appeared to include everything in the *Criminal Code*. Mr Dixon agreed that this was the case, and noted that the Department had to consider a number of things in relation to the Clause 3 offence including its relevance to child related work. He further advised that:

> *The difficulty that we see in that is that if you identify specific offences, you are identifying the three or four specific elements that make up those offences; you are not necessarily identifying the behaviour that the person has embarked upon in committing an offence. So there needs to be some flexibility there so that we can consider offences to see whether they are relevant … .* [27]

10.13 The Committee inquired as to why relevant Class 3 offences could not be specified in a schedule:

> ***Mr Dixon****: Yes. For example, if you are going to identify offences such as common assault or assault occasioning bodily harm, experience shows that quite a significant portion of those are between two adults with no relevance to child-related work. Some of the experiences show that they are highly relevant to child-related work because of the circumstances in which they have committed those offences.*

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26 Explanatory Memorandum p2.

27 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p2.

> ***The CHAIRMAN****: Can you explain that little bit further? Are you saying that it is only relevant to working with children if the assault is against a child?*
>
> ***Mr Dixon****: No, I would not be as restrictive as that. Certainly, if somebody was to assault a child, on the face of it that would seem to suggest that that charge or conviction is relevant to the person's suitability of doing child-related work. But, as we found in our experience, every offence is quite unique and is quite different. You need that flexibility. …*
>
> *… We have had some occasions where assaults involving two adults have been committed in the presence of young children and been committed on adults when one of the victims is holding a child in their arms while they are being assaulted. They are the sorts of examples where we would find some possible relevance to their suitability to doing child-related work. If we are looking at offences, the classic example would be: it is closing time at licensed premises, people are intoxicated and there is a fight outside. It is difficult to see relevance to child-related work in those circumstances. The problem is that those sorts of decisions can never be picked up just by the elements of the particular offences, which is why we have not wanted to specify.* [28]

10.14 The Committee sought further clarification of when an offence may be relevant to child related work, inquiring of the Department whether fraud would be an offence likely to relate to children. Mr Dixon was not aware that the Department had ever found relevance to a child-related work by a person committing fraud.[29]

10.15 Ms Gupta also advised the Committee:

> *... by making a very long list or short list, it could end up by being somewhat prescriptive, because there may be an offence that is not on that list that in particular circumstances could have relevance to child-related work. I suppose my concern would be that given that we are talking about the best interests of children, it is better to be less rather than more prescriptive as to what is included and can be considered.* [30]

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28 Ibid, p3.

29 Ibid, p4.

30 Ms Tara Gupta, General Counsel, Department for Child Protection, *Transcript of Evidence*, 9 February 2010 p4.

10.16 Subsequently the Department provided additional information to support the breadth of the Class 3 offences category, advising that the *Working with Children (Criminal Record Checking) Act 2004*:

> *is required to consider all convictions including those from outside of Western Australia. It is anticipated that if attempts are made to prescribe a limited range if Class 3 offences, there will be a need for ongoing legislative amendment to keep up with amending and creation of offences. This may possibly extend to a need to amend the legislation or regulations as other states and territories amend various offences with potential relevance to suitability to be in child related work. The practical delays in making these amendments are a concern to child safety, as it may be impossible to make appropriate action without a legislative amendment.*[31]

10.17 The Committee was advised that decisions in relation to whether a Class 3 offence was relevant to child related work were made by the CEO and some staff had delegated power to make some decisions[32]. The Committee inquired into the subjective nature of the decision making process:

> ***Hon LIZ BEHJAT****: But don't you also find that each officer has a different and unique way of measuring these offences, and that is where we are saying that subjectivity can be a bit of a problem?*
>
> ***Mr Dixon****: …the way the decisions are made within the screening unit—these are the decisions that are delegated down from the CEOs—these sorts of difficult decisions are made by three very senior people within the unit, who generally agree. On occasions where we disagree we have been consulting some experts in various fields that we have on a panel of expert advisers.*[33]

10.18 The Committee subsequently received the following advice from the Department:

> *… Senior staff charged with these responsibilities are required to have relevant qualifications such as legal practitioners or social work and psychology degrees. There is also a quality assurance process whereby recommendations for adverse decisions are further considered by senior officers who have not done the assessment.*

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31 Letter from Mr Terry Murphy, Director General, Department for Child Protection, 15 February 2010.

32 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p3.

33 Ibid, p3.

Where expertise outside the Working with Children Screening Unit is required, the Director seeks advice primarily from members of the panel of expert advisors established for this purpose. Consultation may occur with others including like bodies in other jurisdictions in Australia and internationally. [34]

10.19 The Committee inquired as to whether guidelines existed for the decision that a Class 3 offence was relevant to child related work and subsequently a negative notice should issue.

10.20 The Department advised that guidelines were in place but were in draft stage. The Committee requested a copy of the guidelines and was provided with guidelines which were developed prior to commencement of the Act and finalised in January 2006.[35] See **Appendix 6**.

10.21 Subsequently the Department confirmed to the Committee that the new assessment guidelines that were being developed will contain a greater level of detail than those developed in 2006. As these were not available, the Committee makes no further comment.

10.22 The Department also advised that the guidelines were one part of the decision making process which included the following factors:

- *The framework for consideration of all criminal records is contained in section 12(8) of the Act. Guidelines build on this.*
- *All assessments discuss each factor under section 12(8) as it relates to the case in question.*[36]
- *Section 12, currently and in the proposed amendments, requires that decisions are made about the particular (or*

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34 Letter from Mr Terry Murphy, Director General, Department for Child Protection, 17 February 2010.

35 Letter from Mr Paul Dixon, Department for Child Protection, 15 February 2010, p2.

36 The Committee notes the reference to section 12(8) *Working With Children (Criminal Record Checking) Amendment Act 2008* which reads as follows*;*

If subsection (4), (5) or (6) applies in respect of an offence, the CEO is to decide whether he or she is satisfied in relation to the particular or exceptional circumstances of the case having regard to —

(*a) the best interests of children;*

(b) when the offence was committed or is alleged to have been committed;

(c) the age of the applicant when the offence was committed or is alleged to have been committed;

(d) the nature of the offence and any relevance it has to child-related work;

(e) any information given by the applicant in, or in relation to, the application;

(f) anything else that the CEO reasonably considers relevant to the decision.

exceptional) circumstances of the case, and decisions are not restricted to a single offence.

- *This can mean that there is only one Class 3 offence and there are no other convictions or charges. On the other hand Class 3 offences can be part of a 'pattern of offending'.*

> *For example: An applicant has a number of Class 3 convictions which include violence against adults that shows an escalation pattern of seriousness such as use of weapons and frequency. There is a lack of self control and anger management evident to such an extent that there may be unacceptable risk that the applicant, if angry, will assault a child in the course of child related work. One of the Class 3 offences, considered in isolation, may not raise concern for the person's eligibility to carry out child related work.*

- *While there are obvious Class 3 offences which alert the Working with Children Screening Unit to the possible need for further investigation, such as those that involve violence or drug trafficking, some offences which are generally not related to child related work may be relevant in certain circumstances.*

> *For example: An applicant has offended sexually in the past when he has been abusing alcohol. There is no recent history of sexual offences but there have been numerous recent traffic offences and disorderly behaviour where serious alcohol abuse is apparent. While traffic offences are generally not relevant, this pattern may be relevant in considering whether there is an unacceptable risk of harm.*

> *For Example: An applicant has over 20 convictions for loitering. While this may usually be of no relevance to child-related work, this case involved peeping-tom behaviour that demonstrated substantial sexual deviance.* [37]

10.23 The Committee considered the Department's justifications for the necessity of the broad definition of a Class 3 offence in the context of Section 3 of the Act.

> *In performing a function under this Act, the CEO or the State Administrative Tribunal is to regard the best interests of children as the paramount consideration.*

[37] Letter from Mr Terry Murphy, Director General, Department for Child Protection, 17 February 2010.

10.24 Whilst the Committee remains uncomfortable with the scope of Class 3 it notes the explanations provided by the Department and the prior approval of Parliament of the inclusion of this category of offence in the primary Act.

10.25 In relation to the guidelines, the Committee notes the requirement for the CEO to be satisfied in relation to the particular circumstances of the case and acknowledges further advice from the Department that guidelines are only part of the process. The Committee's observation is accompanied by a desire to see a consistent decision making process in place and it was pleased to receive the Department's advice that the new assessment guidelines being developed will contain a greater level of detail than the previous version.

Clause 7 proposed s12(3)

10.26 Clause 7 of the Bill deletes the existing s12 of the Act, *Decision on application for an assessment notice* and inserts a proposed new s12. Proposed s12(3) inserts a table setting out how the CEO is to decide an application for an assessment notice.

10.27 The Act currently provides that where the CEO is aware of a Class 3 conviction an assessment notice must issue unless the CEO is satisfied that, due to particular circumstances, a negative notice should issue. The Bill does not alter this situation which is now found at item 5 of the proposed new s12.

10.28 The table introduces two categories, items 4 and 7, that were not specified previously.

10.29 Item 4 is in relation to a situation where, if the CEO is made aware of a pending charge for a Class 3 offence by an employer or the Commissioner of Police, the CEO is to issue an assessment notice unless, because of the particular circumstances, a negative notice should be given.

10.30 Item 7 concerns a situation where the CEO is aware of a Class 3 offence of which the applicant has been convicted and reasonably believes that in the course of committing the offence the applicant performed an indecent act. In this case a negative notice is to be issued unless exceptional circumstances exist.

> *7. The CEO —*
>
> *(a) is aware of a Class 3 offence of which the applicant has been convicted; and*
>
> *(b) reasonably believes that in the course of committing the offence the applicant performed an indecent act.*

10.31 The Bill does not contain a definition of the term 'indecency' or of 'indecent act'.

10.32 The Committee notes that the process of forming a reasonable belief that an indecent act has occurred is an administrative one at first instance,[38] and the outcome for an applicant is significant. If it is reasonably believed that an 'indecent act' was performed, a negative notice must issue unless exceptional circumstances exist.

10.33 The Explanatory Memorandum (**EM**) states as follows:

> *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).* [39]

10.34 Mr Dixon provided the case example that had prompted the amendment :

> *What the facts alleged, and what the person pleaded guilty to, was rubbing a seven-year-old girl on her genitals, but for some inexplicable reason he was charged by the police with an aggravated assault. That action does fall within the definition of an assault. It was open to the police to charge him with something such as indecent dealing, … .* [40]

10.35 Offences like that referred to by Mr Dixon are found in Part V of the *Criminal Code* entitled *Offences against the person and relating to parental rights and duties and against the reputation of individuals*. Chapter XXXI of Part V Sexual Offences sets out s320 *Child under 13, sexual offences against*:

> *s320(4) A person who indecently deals with a child is guilty of a crime and is liable to imprisonment for 10 years.*

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38 Section 26 *Working with Children (Criminal Record Checking) Amendment Act 2004*.

39 Explanatory Memorandum, p6.

40 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p6.

10.36 Mr Dixon identified the meaning of the word indecency that applies for offences where the indecency is in the context of interference with the person of another which would apply in the case example he provided:

> *… it is an act that would offend community standards of propriety and decency and it has a sexual connotation.*

10.37 The Director General of the Department has subsequently advised that:

> *The Bill is drafted in such a way that it is expected that the common law definition of "indecency" will apply to these decisions. I understand the definition to mean that contravention of standards of decent behaviour relating to sexual modesty or privacy.*[41]

10.38 The Committee notes the EM refers to s203 of the *Criminal Code* which sets out the offence of *Indecent acts in public*. Section 203 is a proposed Class 3 offence under the Bill. The offence is found in Part IV entitled *Acts injurious to the public in general* under the sub heading Chapter XXII *Offences against morality*.

10.39 The example provided in the EM is identified as an offence under s203. The test of indecency identified in the EM is:

> *… anything that is unbecoming or offensive to ordinary standards of propriety prevailing at the relevant time … .*[42]

10.40 In the Queensland case of Bryant[43] the interpretation of decency set out above has been held to be too broad when applied to offences equivalent to s203 of the *Criminal Code*, requiring in addition *a bodily act* of the accused that is judged *by prevailing community standards*[44]

10.41 The 1992 case of *Drago*,[45] involved an appeal against a conviction under what was then s189 of the *Criminal Code*, indecently dealing with a child under the age of 16 years. The West Australian Court of Criminal Appeal found in Drago that:

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41 Letter from Mr Terry Murphy, Director General Department for Child Protection, 24 February 2010, p2.

42 Explanatory Memorandum, p6.

43 *R v* Bryant [1984] 2 Qd R 545

44 In that case McPherson J in the majority found the test of "unbecoming' or offensive to common propriety to be too broad noting that it was *"hardly the function of the Criminal Code to punish mere lapses of taste or manners"*[44]. His Honour noted that the context of the act in question was important and cited favourably Canadian cases that required an element of 'moral turpitude' or 'acting in a base and shameful manner'. His Honour in reference to those cases noted " *The emphasis throughout falls on some bodily act of the accused that is indecent judged by prevailing community standards. …to impose criminal responsibility by the imprecise test of whether a person has acted in a base and shameful manner be open to objection that it may "allow undue scope to varying juries. But it is greatly to be preferred to … anything that is unbecoming or offensive to common propriety"*.

45 *Drago v The Queen (1992)* 8 WAR 488.

> *there are very strong reasons present why the word "indecently" in s189(1) should bear a different meaning to that which it has in s203 when used with reference to "any indecent act'*. The former is referable to bodily contact while the latter is left at large. …*the good reason in the case of the decision in Bryant was to circumscribe the application of the word indecent when it is used in a statutory setting involving the creation of criminal liability without any reference to the limited circumstances of the presence of bodily conduct.* [46]

10.42 It appears to the Committee that the definition of "indecency" may vary depending on the statutory context of the act in question. The EM refers to the broad definition of indecency in relation to behaviour which would be grounds for an offence under s203. Given the case law referred to above, it appears to the Committee that this is contrary to the case law referred to above.

10.43 In relation to the information that follows, it is noted that item 7 requires conviction of a Class 3 offence.

10.44 Mr Dixon advised the Committee of the circumstances which gave rise to the inclusion of item 7 in the Bill:

> *What led to this new power to be considered whereby there has been a conviction for a class 3 offence and a reasonable belief that in the course of committing the offence, the applicant performed an indecent act, was an actual case example that the screening unit dealt with. It was a very early 1980s conviction. The person was convicted; charged and pleaded guilty to a charge of aggravated assault under the legislation as it was back in the early 1980s. The circumstance of aggravation was the fact that the victim was a girl. What the facts alleged, and what the person pleaded guilty to, was rubbing a seven-year-old girl on her genitals, but for some inexplicable reason he was charged by the police with an aggravated assault. That action does fall within the definition of an assault. It was open to the police to charge him with something such as indecent dealing, as it then was, but for unknown reasons they charged him with an aggravated assault. This section is effectively there for a very narrow range of offences where the elements of the offence do not necessarily describe any indecency or sexual behaviour, but there are concerns about the behaviour that has led to the conviction.*[47]…

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46 Ibid, p498.

47 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p6.

10.45 The Committee queried whether the existing legislation would permit consideration of an indecent act in the above scenario:

> ***The CHAIRMAN****: However, would that not have been picked up as a class 3 offence that has relevance in relation to working with children?*
>
> ***Ms Gupta****: There would be a different threshold.*
>
> ***Mr Dixon****: Yes, what we are doing effectively with this proposed amendment is changing the default position on making that decision. When we pick them up on a class 3 conviction we are required to issue them with an assessment notice, unless the particular circumstances require a negative notice.*
>
> ***The CHAIRMAN****: In those circumstances, arguably, it would.*
>
> ***Mr Dixon****: Yes. What item 7 of the table in clause 7 requires us to do is to issue a negative notice unless the exceptional circumstances of the case allow us to issue an assessment notice. It is placing, if you like, a higher onus on issuing a negative notice than would be the case if we considered it as a class 3 conviction.*
>
> ***The CHAIRMAN****: It seems to me that they overlap quite considerably.*
>
> ***Mr Dixon****: In the sense that item 7 speaks about class 3 convictions where there is indecent behaviour or an indecent act committed, whereas class 3 offences are quite silent on that point.*
>
> ***The CHAIRMAN****: But they would pick up an indecent act?*
>
> ***Ms Gupta****: They would, but again, the threshold would be different as to —…*.[48]

10.46 Mr Dixon referred to the case discussed at paragraph 10.44 and noted that:

> *This section is effectively there for a very narrow range of offences where the elements of the offence do not necessarily describe any indecency or sexual behaviour, but there are concerns about the behaviour that has led to the conviction. …*[49]

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48 Ms Tara Gupta, General Counsel, Department for Child Protection and Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p6.

49 Ibid.

10.47 The Department subsequently advised that:

> *In administering the legislation, over 250,000 people have applied for a WWC card. It has been our experience that the number of applicants who have convictions for Class 3 offences where an indecent act has been performed that is relevant to child related work has been rare.* [50]

10.48 The Committee was concerned that the Bill was providing the CEO with the power to make a decision that an indecent act has occurred:

- when police, after reviewing all the evidence, had chosen not to lay a charge that was relevant to indecent assault; or
- where a charge proceeds through the courts and there is no finding that an indecent act occurred.

10.49 When asked by the Committee why the legislation assumed that the CEO was in a better decision to make an assessment about an indecent act than police or the courts Mr Dixon advised:

> *… it is a focus on risk to children, it is a focus on child protection, rather than proof of a criminal charge to the criminal standard.*[51]

10.50 The Committee inquired as to the protections in place for an individual when it was proposed that a negative notice issue on the basis of consideration of the circumstances surrounding item 7:

> ***The CHAIRMAN****: I think you may have already touched on this, Paul: what rights of appeal or application of natural justice exist in the process of the CEO exercising this discretionary power, and are these rights protected in the legislation?*
>
> ***Mr Dixon****: In cases where we are proposing to issue a person with a negative notice—I keep saying we; I mean the CEO's delegates—we must advise the person in writing that we are proposing to issue a negative notice, we must give them all information that we are aware of about their criminal history and we invite them to make a submission to us within a minimum period of 28 days before we make a final decision. The rights of review were limited to two cases. One, where we have issued a negative notice, the person has a right to*

[50] Letter from Mr Terry Murphy, Director General, Department for Child Protection, 24 February 2010, p2.

[51] Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p7.

have that decision reviewed by the State Administrative Tribunal. The other right of review is if we have issued a negative notice, generally speaking every three years a person has a right to apply for that negative notice to be cancelled, and if a decision if made by the CEO not to grant them the application to cancel the negative notice, they have a right at the State Administrative Tribunal for review of that decision. The current amending bill alters the review process in this way: there is a desire, if you like, that applicants do their best to exhaust all avenues with the first tier decision maker. …

***The CHAIRMAN**: Is there any capacity to vary that 28 days within which someone needs to respond to the CEO?*

***Mr Dixon**: The legislation specifies that it must be a minimum of 28 days. As a matter of course, where applicants have contacted us and indicated there are difficulties complying with that period of time, as long as there is a genuine attempt and a good explanation as to why they cannot comply, we do grant extensions.*

***The CHAIRMAN**: I would have thought that in some cases an applicant would want to have a lawyer write that response back to the CEO. I think people would be struggling, in many cases, to get access to a lawyer and have a lawyer prepare a response within 28 days. Would that be a sufficient justification for an extension of time?*

***Mr Dixon**: If the lawyer requires more time to properly represent their client; in most cases, yes.*

10.51 The Committee notes that the Act provides for applicants to make submissions in relation to the information before the Department arising from their criminal records. A decision to issue a negative notice pursuant to proposed item 7 is also reviewable by SAT.

10.52 Section 12(5) of the Act as it is currently, permits the Department to consider an indecent act as part of the particular circumstances of a case where there has been a conviction of a Class 3 offence.

10.53 As the Department advised, the amendment in proposed item 7 is effectively changing the default position in relation to Class 3 offences.[52]

[52] Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p6.

10.54 The Committee concludes that proposed item 7 arises out of the Department's concern that an offence involving an indecent act warrants the application of the more stringent conditions found in proposed s12(6).

10.55 The existence of the more stringent conditions in proposed s12(6) and the fact that the decision in relation to the performance of an indecent act is an administrative one, highlighted the need, in the Committee's view, to clarify which definition or definitions of "indecent act" will be applied. As noted at paragraph 10.42, it appears to the Committee that the definition of "indecency" may vary depending on the statutory context of the act in question.

Recommendation 2: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of:

i) the definition of "indecent act" that will be applied in clause 7 proposed section 12 item 7; and in particular

ii) the reason that the term "indecent act" is not defined in the Bill; and

iii) whether it is the Government's intention to apply a broad definition of an indecent act under section 203 of the *Criminal Code* (contrary to the case law which states a narrow definition should be applied).

Clause 7 proposed s12(8)(e)

10.56 Section 12(8) currently sets out an exhaustive list of matters to be considered by the CEO in deciding whether they are satisfied in relation to particular or exceptional circumstances of a case as follows:

> *8) If subsection (4), (5) or (6) applies in respect of an offence, the CEO is to decide whether he or she is satisfied in relation to the particular or exceptional circumstances of the case having regard to —*
>
> *(a) the best interests of children;*
>
> *(b) when the offence was committed or is alleged to have been committed;*
>
> *(c) the age of the applicant when the offence was committed or is alleged to have been committed;*
>
> *(d) the nature of the offence and any relevance it has to child-related work;*

(e) any information given by the applicant in, or in relation to, the application;

(f) anything else that the CEO reasonably considers relevant to the decision.

10.57 Section 12(8) above is amended to insert an additional matter,proposed section 12(8)(e), which introduces a new requirement that:

the effect of future conduct by the applicant in relation to a child if that future conduct were the same or similar to conduct the subject of

(i) any offence committed by the applicant;
or
(ii) any charge against the applicant;

10.58 The Minister referred to s8(e) in the second reading speech as follows:

… 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. [53]

10.59 In relation to the concept of unacceptable risk referred to by the Minister in the second reading speech as extracted above, the majority of the Western Australian Court of Appeal has found that:

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53 Hon Robyn McSweeney MLC, the Minister for Child Protection, WA, Legislative Council, *Parliamentary Debates Hansard*, 18 November 2009, p9193.

… it is implicit in s12(5) and (8), in the context of s3 and WWC Act as a whole, that the CEO is not entitled to issue a negative notice under s 12(5) unless the CEO finds, on the basis of the information and other material properly before him or her, and after having regard to the criteria in pars (a) - (f) of s 12(8) (including, in particular, the paramount consideration of the best interests of children), that there is an 'unacceptable risk' that the applicant might cause sexual or physical harm to children, in the course of carrying out child-related work.

…'Unacceptable risk' is a familiar concept in other contexts including, for example, under the Dangerous Sexual Offenders Act 2006 (WA) and in family law disputes in relation to parenting (custody or access) matters. In M v M (1988) 166 CLR 69, the High Court held that, in considering an allegation of sexual abuse in custody or access contexts, the Family Court should not make a positive finding that the allegation is true unless it is so satisfied according to the civil standard of proof with due regard to the seriousness of the allegation: Briginshaw v Briginshaw[54] *(1938) 60 CLR 336, 362. The High Court also held, however, that custody or access should not be granted to a parent if it would expose the child to an 'unacceptable risk' of sexual abuse. Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ said: …*

> *…the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.*
>
> *In the present case Gun J was not satisfied that the husband had not sexually abused the child. We take that to mean that his Honour was not so satisfied according to the civil onus. On this footing his Honour was unable to exclude the possibility that the husband had so abused the child. His Honour obviously concluded that there existed an*

[54] In relation to the case of Briginshaw referred to above Murray AJA, in *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] 36 WAR 39 at 71, summarised the requirements as follows:

In short, before making a finding adverse to a party on the civil standard of proof where the matter to be proved is of the seriousness of criminal conduct or fraud, clear and cogent evidence will be required before the court or tribunal makes a finding adverse to the party concerned.

> *unacceptable risk that the child would be exposed to sexual abuse if the husband were awarded custody or access (78)….*[55]

> *… The critical question for the CEO under s 12(5) (and, on review, the Tribunal) is whether, on all the information and other material properly before him or her, there is an 'unacceptable risk' that the applicant might, in the future, cause sexual or physical harm to children, in the course of carrying out child-related work. The risk in question has to be unacceptable, not likely.*
>
> *The factors which bear upon risk (and which should be taken into account under s 12(8)(a), (d), (e) or (f), as the case may be) include, for example:*
>
> *(a) the circumstances which culminated in the applicant being convicted of an offence other than a Class 1 offence or a Class 2 offence;*
>
> *(b) the degree and seriousness of any future risk to children if the applicant were to be engaged in child-related employment; and*
>
> *(c) the likelihood of any such future risk materialising.* [56]

10.60 The Committee found the test of unacceptable risk an interesting one given that it implies that there is an acceptable level of risk of harm to children. The Committee noted with interest the comments of McLure JA in the case of Scott referred to at paragraph 10.59 above:

> *I am not persuaded the term 'unacceptable risk' is consistent with the statutory scheme. First, it implies that a magnitude or level of risk is acceptable and secondly, that the acceptable level of risk may vary according to the circumstances of the case. The High Court endorsed the use of that term in the family law context where there is tension, and the need to strike a balance, between the risk of sexual abuse by a parent and the acknowledged benefit to the child of having access to both parents: M v M (1988) 166 CLR 69, 78. The question in that case was what magnitude of risk justified a court in denying a parent access to a child. In the context of the WWC Act, it cannot be the case*

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55 *Chief Executive Officer, Department for Child Protection v Scott (No 2)* 38 WAR 125 at 152 and see also in relation to s12(4) and (8) *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] 36 WAR 39 at 59.

56 *Chief Executive Officer, Department for Child Protection v Scott (No 2)* 38 WAR 125 at 153 and see also in relation to s12(4) and (8) *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] 36 WAR 39 at 60.

> *that the issue of a negative notice to an applicant could result in the denial of a benefit to children that would justify imposing, or varying, a minimum risk threshold. Further, I see nothing in the scheme of the WWC Act to support the contention that the magnitude of the risk should vary according to the seriousness of the harm. The criminal infliction of any sexual or physical harm to children is not in their best interests. However, the nature and seriousness of the harm may be relevant when considering whether the risk has been negatived.*[57]

10.61 The Committee sought further advice from the Department as to how proposed s8(e) would be applied:

> ***Mr Dixon**: When the legislation was first considered judicially by the State Administrative Tribunal—this is going back to 2006—there was some suggestion that what would benefit decision making under section 12(8) would be some expert psychological or psychiatric actuarial risk assessment opinions. The research that has been done within the working with children screening unit would suggest that although it is helpful, there needs to be some balancing on the actuarial risk assessments because research that we carried out it is, generally speaking, a statistical model based on some actual studies of some offenders in northern America. They asked those people about 12 set questions. Based on the answers to those questions, they can come back with a prediction the person might be a 10 per cent risk of reoffending or the person might be a 20 per cent risk of reoffending. The purpose of proposed subsection (8)(e) is that if you are going to consider that sort of evidence, balanced against that you need to consider the impact on the child if a person is part of that 10 per cent or 20 per cent that goes on to reoffend. So effectively it is properly weighting any actuarial risk assessments with the harm to a child if the person does actually go on to reoffend.*
>
> ***The CHAIRMAN**: Does subsection (8)(e) require a calculation of whether the future conduct of the type in question could cause harm to a child and/or the level of risk of future conduct reoccurring or occurring?*
>
> ***The CHAIRMAN**: My understanding is it is one of the list of criteria to be considered. Things you have to consider are the length of time it has been since the person committed the offence. You have to weight that against if the person was to offend in a similar way what is going to be the harm to a child. My interpretation is no, it does not require a*

[57] Chief Executive Officer, Department for Child Protection v Scott (No 2) 38 WAR 125 at 131.

risk assessment; it requires appropriate weighting against some of the other criteria in subsection (8).

***The CHAIRMAN**: But are you not assessing the risk of the likelihood of the person committing the offence again?*

***Mr Dixon**: My understanding is what overrides all of these criteria in subsection 8 is the best interests of children. A decision maker under the legislation can be confronted with a situation whereby a person has committed a serious offence that is highly relevant to working with children but the offence was committed a fairly long time prior. That is significant. What is also significant is what harm is going to occur to a child if the person was to offend in a similar way? It is weighting the two competing interests, if you like.*

***The CHAIRMAN**: How would you come to a conclusion in weighting those two competing interests?*

***Mr Dixon**: Every case is unique.*

***The CHAIRMAN**: Would it be fair to assume that if the harm to a child was considered serious, the length of time since the last offence would be fairly irrelevant when weighted against an assessment of harm to the child?*

***Mr Dixon**: Yes, I think I would agree with that*[58].

10.62 The Committee also asked the Department to provide examples of acceptable and unacceptable risk in terms of proposed s8(e) generally:

***Mr Dixon**: Okay. I will admit it is a difficult decision when you are considering a non-conviction charge whereby it has led to either a discontinuance or an acquittal. I can say this as general ways of thinking: the strongest cases where you would issue negative notices where a person has a non-conviction charge would be that the nature of the charge is relevant to child-related work—for example, a child sexual offence. The strongest case might involve the person making a complete confession to the police, but the complainant is unable to give any evidence for a range of reasons, so that results in an acquittal. So here we have a person with a non-conviction charge highly relevant to child-related work who has actually admitted the conduct. It is not very difficult, I would suggest, to find the particular*

[58] Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, pp9,10.

circumstances in that case, that the person needs a negative notice. We get into a consideration where an applicant has a series of non-conviction charges involving a number of child complainants, all with a lot of similarities in the behaviour alleged—the sexual offending—but because each of those sets of charges has been considered in isolation by a jury to the criminal standard on the evidence of that one complainant, the person may have been acquitted of all charges. But when you put the series of continual allegations together, and we are looking for whether there might be things such as the various complainants colluding or knowing each other—but if there is no suggestion of that, the fact that so many allegations have been made by children that in isolation have not been proved to a criminal standard, then again it is not very difficult, I would suggest, to find particular circumstances in those cases. So 12(8)(e), I suppose I am saying—in a way I am answering that by saying: in what cases would we find an unacceptable risk in a person's non-conviction of class 1 or 2 offences, because I think that is probably the best way to view it?

***The CHAIRMAN**: Are you able to just clarify for the committee what amount of risk would be considered acceptable?*

***Mr Dixon**: I keep having to answer these questions by indicating that every application is unique. Every person's criminal record is unique. Every individual offence is unique. Even though they all might be charged with an indecent assault or a sexual penetration, all the circumstances of that applicant are quite unique, so it is difficult to succinctly indicate what is acceptable and what is unacceptable. In practice, if all an applicant has is class 2 charges, there has only ever been the one allegation, if you like, the person has had their trial, they have been acquitted, it is a case where there is no evidence other than the complainant's evidence to support the allegation, and it has been some time ago, generally speaking that is not enough for us to find an unacceptable risk. There needs to be something a bit more. Having said that, though, if there is something in the materials that would seem to support part of a complainant's allegation, then we would find the person is an unacceptable risk. We are mindful that false allegations can be made; we are mindful of that. Part of the difficulty of our assessments is trying to make some form of an informed judgement on that point.* [59]

[59] Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p14.

10.63 Proposed s12(8)(e)(ii) refers to 'a charge against the applicant'. The Committee notes Mr Dixon's comments above in relation to false allegations. The Committee does not have before it information indicating how the Department makes a decision about whether an allegation is false in the absence of testing the veracity of the allegation.

10.64 In the Committee's view the Minister's comments in the second reading speech indicated that where a repetition of the offence in question would result in significant harm to a child, an unacceptable risk to a child would arise.[60]

10.65 The above view differs to that of Mr Dixon who, in relation to proposed s8(e) advised that:

> *My understanding is it is one of the list of criteria to be considered. Things you have to consider are the length of time it has been since the person committed the offence. You have to weight that against if the person was to offend in a similar way what is going to be the harm to a child.* [61]

Recommendation 3: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation as to:

i) whether it is the Government's position that any risk, even a risk arising from an offender who has a 'low risk profile', is an unacceptable risk. If this is the case, will the Minister explain the application of proposed section 12(8)(e), particularly in relation to the 'length of time' risk assessment; and

ii) the administrative and investigatory steps by which the Department determines whether an allegation made in the statement of material facts is true or false.

Clause 9

10.66 Section 17 of the Act currently sets out the circumstances where the Police Commissioner may give notice of a charge or conviction of a Class 1 or 2 offence to the CEO who may then require the person in question to apply for an assessment notice.

10.67 Clause 9 inserts a proposed new ss17(1) and(2) (see **Appendix 7**) provide for notice to be given of <u>any</u> offence if the Commissioner of Police believes:

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60 Hon Robyn McSweeney MLC, the Minister for Child Protection, WA, Legislative Council, *Parliamentary Debates Hansard*, 18 November 2009, p9193.

61 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p10.

- the person to be in child related employment; and

- that the charge or offence makes it inappropriate for the person to carry out child related work or have an assessment notice.

10.68 Proposed new section 17(3) sets out the procedure to be followed by the CEO on receipt of notice from the Police Commissioner.

10.69 Currently if the CEO is satisfied based on the requirements of the section that an assessment should occur, the CEO gives the person written notice to apply for an assessment within 10 days of the date of the notice. This is the case even when the person has a current assessment notice.

10.70 Proposed new s17(3) provides that where a person does not have an assessment the 10 day notice is required but where a person has a current assessment notice the CEO can proceed to make a decision under proposed new s12.

10.71 The EM notes the amendment is intended to apply to charges and convictions occurring prior to commencement of the Amendment Act.[62] The section gives the Commissioner power to notify of any offence or charge in the stipulated circumstances.

10.72 The Department advised that the current power had been too restrictive in the past:

> ***Mr Dixon …*** *There have been a couple of quite high-profile cases of childcare workers being charged with what would now, under the amending bill, be class 3 offences—assaults on children in their care at child centres. The problem with the current section 17 is that it did not allow the police to notify us and the legislation would not allow any action to be taken while those class 3 offences were pending before the courts, which, experience has shown, can be as long, in some cases, as 12 months with the charges pending.* [63]

10.73 The Committee noted that the legislation did not contain guidelines for the exercise of the Police Commissioner's discretion under proposed new s17. It was also concerned that the power of the Police Commissioner to notify regarding a pending charge appeared contrary to the presumption that an accused is innocent until proven guilty. Mr Dixon provided the following information:

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62 The provision is not retrospective. Note the following comments of the Victorian Full Supreme Court in *Robertson v City of Nunawading* [1973] VR 819 at 824 as cited in. DC Pearce, RS Geddes, *Statutory Interpretation in Australia*, Butterworths, Australia, 2001, p252, in relation to the question of retrospectivity…*"[the] principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that."*

63 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p12.

> *Firstly, the power under section 17 imparts a discretion on the police. It is only those cases where they reasonably believe that the charge or conviction makes it inappropriate for the person to carry out child-related work. … … Then, on top of that, once the CEO's delegates receive that notification, the CEO themselves has a discretion as to what action they are going to take once they have received that notification*
>
> *… Again, we are going back to the Court of Appeal decision in the Grindrod case that sets down the test to be applied where there are cases where there are charges but not convictions. We are not looking for proof to the criminal standard; we are trying to make a decision as to whether that person presents as an unacceptable risk to the safety of children.*[64]

10.74 Mr Dixon advised the Committee that it was his understanding that the Commissioner for Police was able to delegate the discretion in s17 to another police officer. He was unaware of the extent of that delegation or what checks and balances are in place to protect against the inappropriate use of that power.

10.75 In relation to the method of disclosure and the nature of the material provided the Department advised as follows:

> ***Mr Dixon**: The method of disclosure is a secure electronic link-up between two information technology systems. We gain access to a person's identifying details—full name, date of birth. We will be provided with the summary, or the offence description of the offence they are charged with, and we will be provided with a fairly brief summary of the allegations—the police statement and material facts that would be read to the court if the person was to plead guilty. That is what we would be getting, and whatever other information we requested on top of that.*[65]

10.76 The Committee noted that a statement of material facts may be incorrect statements or false allegations. The application of Section 17 may result in an applicant being

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64 The Department is referring to the judgement of Buss JJA (with Wheeler JJA agreeing) in relation to the function the CEO's under s12(4) noted the following:

It is not the CEO's function (under s 12(4)) or the Tribunal's function (on a review application) to adjudicate upon whether the applicant is, in fact and at law, guilty or not guilty of the non-conviction charge in question. The relevant function involves an analysis and evaluation of risk. It is not concerned with the proof of offences which the applicant may have committed previously, but with the prevention of potential future harm

65 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p13.

penalised without the opportunity to test the veracity of the material facts. Mr Dixon advised that in the event that a negative notice was proposed all the information would be provided to the applicant who could respond by way of submission. The Committee noted however that this does not provide the same opportunity as arises in the forensic testing of all the evidence in a court of law.[66]

10.77 Mr Dixon advised that where a negative notice issued pursuant to s17 and the person was acquitted of a Class 3 offence or the prosecution was discontinued, they could apply for cancellation of a negative notice.[67] He further noted that if the applicant applies for cancellation, and only has a Class 3 non-conviction charge on their criminal record, the person must be given an assessment notice.[68]

10.78 The Committee noted that there was an assumption within the amendment to s17 that there were some individuals who were working with children without an assessment but were not necessarily in breach of the Act. The Committee understood that phase in provisions existed and asked the Department to provide information about those provisions. The Department advised that the legislation provided for a staggered phasing in process:

> *The class of people where it was determined that it was appropriate to phase them in between 2008, 2009, 2010 were, generally speaking, people that had been in child-related work since before the act was enacted and for employers and in occupations where they have had an adequate level of criminal record checking prior to commencing that job. The phasing in will conclude at the end of this year.*[69]

66 Ibid.

67 Ibid, p14.

68 Ibid, p13. See also clause 11 proposed new 19(c) and current s19(9) (below) of the *Working with Children (Criminal Record Checking) Act 2004*:

(*9) If the CEO grants the application, the CEO —*

(a) is to cancel the negative notice and give written notice to the applicant accordingly; and

(b) if the person so requests — is to issue an assessment notice to the person.

69 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p16.

Recommendation 4: The Committee recommends that the Minister for Child Protection provide to the Legislative Council, with reference to clause 9 proposed section 17, an explanation of:

i) whether there are guidelines in place for the exercise of the Police Commissioner's power under proposed section 17(1);

ii) whether the Police Commissioner has the authority to delegate the exercise of the power granted under proposed section 17(1) and if so, what is the lowest level officer to whom this power can be delegated; and

iii) the checks and balances that are in place to protect against inappropriate use of the power under proposed section 17(1).

Clause 12

10.79 Clause 12 inserts proposed new s21A as follows:

> *(1) If a person in respect of whom the CEO has received a notice under section 17(1) has a current assessment notice and that person gives the CEO written notice that the person is not employed in child-related employment or carrying on a child-related business, the CEO is to cancel the assessment notice.*
>
> *(2) If a person in respect of whom the CEO is required to make a decision in accordance with section 17(3)(d)gives the CEO a notice under subsection (1), the CEO may —*
>
> *(a) cancel the person's assessment notice; and*
>
> *(b) not make a decision in accordance with that paragraph.*
>
> *(3) If the CEO cancels the person's assessment notice, the CEO is to give the person written notice of the cancellation.*

10.80 The Department advised that proposed s21A arose out of concerns that:

> *a person with a current assessment notice could indicate they were no longer in child-related work, and it was open to interpretation that no further action could be taken by the Department.*[70]

[70] Letter from Mr Terry Murphy, Director General, Department for Child Protection, 15 February 2010, p2.

10.81 Whilst the above situation had not arisen the Department sought the power to cancel a current assessment notice in those circumstances.[71]

10.82 During the drafting of the Bill a further requirement was identified. In relation to s17(3)(d) (see **Appendix 7**), the CEO would also require a power to cancel an assessment notice and to not undertake a further assessment under s17(3)(d), to avoid an applicant arguing that, despite cancellation, they had a pending application for an assessment and they were, therefore, still able to work with children.[72] This power is provided in proposed s21A(2).

10.83 In circumstances where the CEO makes a decision in accordance with proposed s17(3)(d) the CEO is, at that point, satisfied that there are reasonable grounds for believing that charge or conviction in question makes it inappropriate for the person to work with children or have an assessment notice.

10.84 A person who has had their assessment cancelled under s21A(2) can, at a future date, make an application for an assessment and carry out child related work while their application is pending.

10.85 The Committee notes the following safeguards contained in the Act:

- Where the conviction or charge in question is for a Class 1 or Class 2 offence and an assessment notice is cancelled, if the person applies for child related employment in the future proposed s32A will apply. The person will be required to notify any prospective employer, in writing, that they have had a relevant change to their criminal record since the date that of issue of their previously cancelled assessment.[73] See paragraph 10.106.

- Section 33 of the Act makes it an offence for a person to be employed in child-related employment or carry on a child-related business where the relevant change to their criminal record is conviction of a Class 1 offence (other than a Class 1 offence committed as a child).

- The Committee notes that proposed s25(4)(c) prevents anyone whose assessment has been cancelled under proposed s21A(1) or (2) from using the defence found in s25(3)[74]. See paragraph 10.93.

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71 Ibid.

72 Letter from Mr Terry Murphy, Director General, 15 February 2010, p2 and 24 February 2010.

73 Clause 17 proposed s32A. See also proposed s21C in relation to cancellation of an assessment where there is a relevant change in criminal record and the person has a current assessment but is not in child related work.

74 That is, that the person charged was employed in child-related employment or carried on a child-related business, as the case requires, on no more than 5 days during the calendar year in which the offence is alleged to have occurred.

10.86 In relation to a Class 3 offence there is no requirement to notify an employer of a conviction or charge of a Class 3 Offence while an application for an assessment is pending.

10.87 The Committee asked the Department if there would be a situation where they would proceed to an assessment under s 12 of the Act pursuant to proposed s17(3)(d) if:

- a person held a current assessment; and
- advised they were no longer in child related work.

10.88 The Department advised that there may be situations where they cannot be satisfied that an applicant has in fact ceased child related work and in this case they may proceed to an assessment.[75]

10.89 The Committee is concerned that a person, who has had their assessment cancelled under proposed s21A(2), can at a future date, make an application for an assessment and carry out child related work while their application is pending. For example, in the case of a Class 3 offence where:

- there is no obligation to notify a future employer of the charge or conviction in question;
- and
- the CEO is satisfied that there are reasonable grounds for believing that charge or conviction in question makes it inappropriate for the person to work with children or have an assessment notice.

10.90 It is not clear to the Committee, why, in order to avoid the situation in paragraph 10.89, the Department would not proceed with the assessment. By cancelling an assessment notice rather than proceeding with an assessment, it appears to the Committee that a person, who:

- has come to the attention of the CEO pursuant to proposed s17; and
- could potentially receive a negative notice if an assessment were completed'

may at a later date, apply for an assessment and work with children while their application is pending. This will be in circumstances where an employer may be unaware of the previous charge of offence that led to the CEO's notification under proposed new s17.

[75] Letter from Mr Terry Murphy Director General , 24 February 2010, p3.

Recommendation 5: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of why the Department for Child Protection would make the decision to cancel an assessment notice in the circumstances arising in proposed section 21(A)(2) rather than proceeding to complete that assessment and, if required, issue a negative notice.

Clause 13

10.91 Section 24 of the Act currently makes it an offence for a person to be in child related employment or carry out a child related business without a current assessment as follows:

> *(1)A person who does not have a current assessment notice must not —*
>
> > *(a) be employed in child-related employment; or*
> >
> > *(b) carry on a child-related business.*
>
> *Penalty: a fine of $60 000 and imprisonment for 5 years.*

10.92 Section 25 sets out defences to the offence in s24 including the defence found in s25(3) for a person who does child-related work for no more than five days in a calendar year as follows:

> *(1) It is a defence to a charge of an offence under section 24 to prove that —*
>
> > *(a) at the time the offence is alleged to have been committed, the person charged had applied for an assessment notice and the application was pending; and*
> >
> > *(b) the application was not later withdrawn.*
>
> *(2) Subsection (1) does not apply to a person convicted of a Class 1 offence (other than a Class 1 offence committed by the person when a child) at the time the offence is alleged to have been committed.*
>
> *(3) It is a defence to a charge of an offence under section 24 to prove that the person charged was employed in child-related employment or carried on a child-related business, as the case requires, on no more than 5 days during the calendar year in which the offence is alleged to have occurred.*
>
> *(4) Subsection (3) does not apply to a person —*

(a) convicted of a Class 1 offence (other than a Class 1offence committed by the person when a child); or

(b) carrying out child-related work in connection with a child care service.

10.93 Clause 13 amends s25 to extend the list of persons who cannot utilise a s25(3) defence. The clause proposes an amendment to s25(4) to include a person whose assessment has been cancelled under ss21A(1) or (2) or 21C(1). Sections 25(5), 25(6) and 25(7) are also proposed. The amendments are as follows:

s25(4) (c) whose assessment notice has been cancelled under section 21A(1) or (2) or 21C(1).

(5) Subsection (3) does not apply to a person who has had an assessment notice cancelled under section 31(5) if the person —

(a) has not been issued with a further assessment notice; or

(b) has applied for a further assessment notice and the application was pending at the time the offence under section 24 is alleged to have been committed.

(6) Subsection (3) does not apply to a person —

(a)who has applied for an assessment notice having been required to do so under section 16(3) or 17(3)(c); or

(b) who has given the CEO a notice that is to be treated under section 32(1) as an application by the person for an assessment notice; or

(c) has been given a written notice by the CEO under section 13 that the CEO proposes or is required to decide an application under section 12 by issuing a negative notice,

if the person withdraws the application for an assessment notice before the CEO decides the application.

(7) Subsection (3) does not apply to a person referred to in section 17(3)(d).

10.94 The Department advised that it is standard practice for the screening unit to confirm in writing with an applicant that they have withdrawn their application for an assessment notice under the Act. The Department further assured the Committee that all

applicants affected by the amendments to section 25(3) will receive advice in writing that they are not entitled to the defence referred to in s25(3).

Clause 14

10.95 Section 26 provides for review by the State Administrative Tribunal (**SAT**). Clause 14 amends s26 in the manner set out in the paragraphs below.

10.96 Clause 14(1) amends s26 by creating a time limit for the lodging of a review application to the SAT in relation to a decision by the CEO[76] to refuse to cancel a negative notice and substitute the correct notice.

10.97 Clause 14(2) and (3) amend s26 to require that:

- where a person lodges an appeal from a CEO's decision; and
- they have not previously provided submissions about their matter to the CEO,

they will be required to seek leave from the SAT to appeal.

10.98 Where the SAT:

- refuses leave; and
- requires the person to make submissions to the CEO,

a further 28 day time limit is provided for that person that will run from the date of the CEO's decision following consideration of those submissions.

Clause 16

10.99 Under the Act a relevant change in a criminal record is '*where a person is charged with or convicted of a Class 1 or a Class 2 offence*'.[77]

10.100 Section 31 below sets out the obligations of a person who has a current assessment notice:

- but is not employed in child related employment or carrying on a child related business; and
- has had a relevant change to their criminal record since their assessment notice was issued.

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76 Section 4 *Working with Children (Criminal Record Checking) Amendment Act 2004 defines CEO as 'the chief executive officer of the Department'.*

77 Section 27 *Working with Children (Criminal Record Checking) Amendment Act 2004.*

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

(1)This section applies to a person if —

(a) the person has a current assessment notice and is not employed in child-related employment or carrying on a child-related business; and

(b) there has been a relevant change in the person's criminal record since the assessment notice was issued to the person.

(2) A person to whom this section applies must not be employed in child-related employment or carry on a child-related business unless —

(a) the person has been issued with a further assessment notice; or

(b) the person has applied for a further assessment notice and the application is pending.

Penalty: a fine of $60 000 and imprisonment for 5 years.

(3) A person to whom subsection (2)(b) applies who is offered child-related employment must give the person's proposed employer written notice that —

(a) there has been a relevant change in the person's criminal record since the person's current assessment notice was issued; and

(b) the person has applied for a further assessment notice and the application is pending.

Penalty: a fine of $60 000 and imprisonment for 5 years.

10.101 Currently a person who has an assessment but is not in child related employment is required to notify future employers of a relevant change and apply for a further assessment in the event that they want to be employed with children. In these circumstances the person may be in child related employment while the assessment is pending. The Department has indicated that it was concerned about ensuring compliance in the current situation.[78]

[78] Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p21.

10.102 The amendments set out in Clause 16 aim to reduce, by cancellation, risks associated with persons who have had a relevant change to their criminal record, hold a current assessment and are not employed in child related employment or carrying on a child related business.

10.103 As set out below the amendments to s31 require that:

- a person notify the CEO of a relevant change in their criminal record; and
- the person's assessment notice is to be cancelled by the CEO; and;
- the CEO is to notify the person in writing of the cancellation.

10.104 Clause 16 amends s31 to insert proposed ss31(4),31(5) and 31(6) in relation to cancellation of an assessment as follows:

> *(4) A person to whom this section applies must give written notice to the CEO of a relevant change in the person's criminal record as soon as is practicable after the change occurs.*
>
> *Penalty: a fine of $60 000 and imprisonment for5 years.*
>
> *(5) If the CEO receives a notice from a person under subsection (4), the CEO is to cancel the person's assessment notice.*
>
> *(6) If the CEO cancels the person's assessment notice, the CEO is to give the person written notice of the cancellation.*

10.105 Clause 20 amends s36 to require persons who have their assessments cancelled under proposed s31(5) to return their assessments to the CEO. There is a penalty of $12 000 and imprisonment for 12 months for failure to return an assessment notice.

Clause 17

10.106 Clause 17 inserts proposed s32A, which requires a person whose assessment has been cancelled under s31(5) and who has a pending application for an assessment, to give any proposed employer notification of any relevant change in their record as follows:

> *32A If a person who has had his or her assessment notice cancelled (the cancelled assessment notice) under section 31(5) —*
>
> > *(a) has applied for a further assessment notice and the application is pending; and*
> >
> > *(b) a person (the proposed employer) proposes to employ him or her in child-related employment, the person must give the*

proposed employer written notice of any relevant change in the person's criminal record since the cancelled assessment notice was issued.

Penalty: a fine of $60 000 and imprisonment for 5 years.

10.107 The Explanatory Memorandum advises that proposed s32A was inserted because existing s31(3) requires written notice of the required information in relation to the date of issue of a current assessment. Section 32A requires written notice of the required information in relation to the date of issue of a cancelled assessment notice.

10.108 The Committee asked the Department to provide a practical example of the effect of proposed s32A:

> ***Mr Dixon**: ... What the proposed amendments are doing is, in this situation where a person has a relevant change but has a current working with children card and they have stopped their child-related work, the card will be cancelled.*
>
> *It recognised that they still have a right, if you like, to further apply for a working with children card and have that information properly assessed. The obligation in section 32A is that in this situation where they have had their card; they have stopped their child-related work; they have had the card cancelled; they want to start a new job in child-related work, the employer is going to say, "You have to apply for the assessment notice. Once your application is pending, you can commence child-related work." They have also got an obligation to tell that employer, "Yes, that is fine, but I am required to let you know that there has been a relevant change to my criminal record", so that the employer is aware and can take whatever appropriate supervisory or child protection measures are required.*
>
> ***The CHAIRMAN**: The relevant change is not sufficient to stop them from working with children?*
>
> ***Mr Dixon**: It may well be, but a relevant change is no more than a charge or a conviction of a class 1 or a class 2 offence. It needs to be assessed, because there will be some situations where it is appropriate for the person to have the working with children card … .*[79]

[79] Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p21.

10.109 The Committee raised concerns that this situation was putting children at risk.

> ***Mr Dixon**: Well, yes, and that is why the obligation is there on the people to notify employers that there has been a relevant change. You see, one of the difficulties with the legislation is, we have to recognise that there needs to be some practicality. We cannot present unreasonable barriers to people commencing employment. We cannot present unreasonable barriers for people assisting in emergency-type situations; I am not saying it is trivial, but as minor as somebody needs to relieve a footy umpire on the weekend. There needs to be that flexibility in the system. It was recognised as being desirable that in this situation where a person applied for a card, was granted the card but has had a relevant change, which falls somewhere between a charge or a conviction of a class 1 or a class 2 offence, it could be as unrelated to child-related work as—I am going back to, like, the pub brawl-type situation—a charge of grievous bodily harm. It was viewed as being appropriate to allow those people the ability to subsequently apply for a card, but to notify the employer that there has been a relevant change. The onus in this situation is squarely on the screening unit to quickly identify these people and assess them quickly and take whatever protective action is necessary, such as issuing interim negative notices, if the case requires ... .*
>
> ***Mr Dixon**: ... the obligation on the employer is to ensure that the employee has a pending application for a working with children card. An employer cannot employ a person in child-related employment if they know that the person has a class 1 or a class 2 charge or conviction and the person has not applied for a working with children card.*
>
> ***The CHAIRMAN**: In the case where there is a charge pending for an indecent assault on a child, would the employer still be able to employ that person until an assessment is made?*
>
> ***Mr Dixon**: If the person has a pending application and the employer decides it is appropriate to employ the person, so long as the person's application for the working with children card is pending then the employer has complied with the legislation. The legislation is always presented in community education as it is only part of a strategy employers need to put into place to make their workplaces child safe.*

Other strategies include adequate supervision and properly tailoring duties to the proper people; things of that nature. [80]

10.110 The Committee notes the following safeguards in the Act:

- Section 33 of the Act makes it an offence for a person to be employed in child-related employment or carry on a child-related business where the relevant change to their criminal record is conviction of a Class 1 offence (other than a Class 1 offence committed as a child).

- A person to whom proposed s31(5) applies, that is, their assessment is cancelled by the CEO, is not permitted to use the defence found in s25(3).[81]

10.111 The Committee notes that s31 as amended only provides a mechanism for cancellation upon notification under s31(4) that a person has had a relevant change to their criminal record. The proposed arrangement for cancellation of the assessment is to improve compliance in this area. It also, however, has the effect of alerting the CEO to the relevant change prior to the person applying for future employment. Section 31 does not provide a mechanism for the CEO to proceed to a further assessment once they have received notification from a person of a relevant change in their criminal record.

10.112 The Committee notes in practice, the CEO may receive notification from the Police Commissioner under s17 in relation to relevant offences and this process may also give rise to cancellation of the person's assessment where they are not carrying out child related work..

10.113 By not proceeding with an assessment at the point of notification, it appears to the Committee, that a person, who;

- has come to the attention of the CEO; and

- could potentially receive a negative notice,

may, in the event that at a later date they apply for an assessment, work with children while their application is pending. The Committee notes the requirement for the person to notify the employer of a relevant change.

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80 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, Transcript of Evidence, 9 February 2010, pp21,22.

81 Clause 13, proposed section 25(5) Working with Children (Criminal Record Checking) Amendment Bill 2009.

Recommendation 6: The Committee recommends that the Minister for Child Protection provide to the Legislative Council an explanation of why the Bill does not provide a mechanism for the CEO to treat notification of a relevant offence under proposed section 31(4) as if an application had been made by the person under section 9 or 10 of the *Working with Children (Criminal Record Checking) Act 2004,* which would allow an assessment to be made.

Clause 19

10.114 Section 35 creates an offence of knowingly providing false or misleading material to employers and the CEO. Clause 19 of the Bill is a consequential amendment to s35 making it an offence to knowingly providing false or misleading material to education providers.

10.115 One of the submissions provided by the WA Police[82] raised an issue in relation to the quantum of the penalty imposed under s35 which is not amended by the Bill.

10.116 The Committee provides the following information for the consideration of the House.

10.117 The submission referred to the recent sentencing of an individual who had extensive criminal convictions for sexual offences against children. The offender had given misleading information to the CEO and his employer and had also falsified documents. As a result of the deceptions the offender was issued with an assessment notice and was in child related employment for some months before the deception was discovered.

10.118 The WA Police declined to charge under s35 of the Act due to their view that the penalty was inadequate, choosing instead to lay charges for fraud and forgery under the *Criminal Code*. Each of these offences carries a penalty of up to seven years imprisonment.

10.119 The Office of Deputy Commissioner noted that in the above instance:

> *the criminality involved in the offence was commensurate with the criminality involved in offences under sections 22(2), 22(3) and (23) of the Act (which relate to employment of persons the subject of negative notices despite prior knowledge of convictions, or a negative notice).*[83]

10.120 The Office of Deputy Commissioner advised that West Australian Police are of the view that:

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82 Submission No 10 from Office of Deputy Commissioner WA Police, 29 January 2010, p2.

83 Ibid, p2.

> *consideration should be given to an increase in the penalty for an offence under section 35 of the Act, either generally, or by way of the creation of an aggravated form of the offence where, for example, the false information was provided by a person who has been convicted of, or has a pending charge of, a Class 1 or Class 2 offence.*[84]

10.121 The Committee asked the Department to comment generally on the criminality of an offence under s35 and the proposals for amendment set out at paragraph 10.120 above:

> *I disagree that section 35 offences are commensurate with the criminality in the other offences—22(2), 22(3) and 23. Those offences—22(2), 22(3) and 23—capture employers employing people without working with children cards where they know the person has class 1 or class 2 convictions or charges, and employers employing people with negative notices or interim negative notices, whereas section 35 encompasses a wide range of potential offending. The elements of it are no more than a person providing false or misleading information either to an employer or a proposed employer or to the CEO or to an education provider. The penalty is currently a $24 000 fine and imprisonment for two years. If an allegation is going to fall within the elements of the other offences mentioned—22(2), 22(3) and 23—that is what the prosecution would charge then, because the charge would adequately reflect the criminality. I did a little bit of research in terms of roughly similar offences: section 244 of the Children and Community Services Act creates an offence of giving false information orally or in writing regarding an application under that act. The only penalty there is a $6 000 fine; there is no term of imprisonment. There are analogous offences under the Road Traffic Act, which, from recollection, carry a maximum penalty of a $600 fine; no imprisonment. Section 16 of the Criminal Investigation (Identifying People) Act 2002 has an offence of giving a false name, and the penalty there is imprisonment for 12 months. The provisions under our section 35 are arguably higher than these other roughly analogous offences in any event, and we disagree that all incidents of this offence are commensurate with the other offences mentioned in the proposal. So the answer to that is, yes, we do consider the penalties are adequate.*[85]

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84 Ibid.

85 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p30.

10.122 Section 38 currently permits, where the CEO considers it in the public interest, disclosure of information about negative and interim negative notices to departments and statutory bodies. Clause 21 proposes to expand the nature of information that may be provided to include that —

> *(a) an application for an assessment notice has been made by a person in respect of which no decision has yet been made under section 12; or*
>
> *(b) an assessment notice has been issued to a person; or*
>
> *(c) an application for an assessment notice has been withdrawn by a person; or*
>
> *(d) a negative notice or an interim negative notice has been issued to a person; or*
>
> *(e) a person does not have a current assessment notice.*

10.123 Where the information is released to the WA Police notice of the person's employment details may also be provided.

10.124 The Committee received a submission from the Western Australian College of Teaching (**WACOT**) which noted that it has only received advice from the Department in relation to the issue of a negative notice, on seven occasions.

10.125 The Department advised the Committee that the public interest test would be met where the Department found that an applicant was a member or was likely to be a member of WACOT. In this instance WACOT would receive notification of the issuing of a negative notice. The Department would find the relevant information in the following manner;

- a person indicates in their application that they are a member of WACOT (a box can be ticked to indicate this on the application form);
- the employment details indicate that the person is likely to be registered with WACOT; or
- other information either in the applicants submission or in the criminal history indicates the person is likely to be registered with WACOT.[86]

[86] Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p25.

10.126 Section 38(4) of the Act requires that where the CEO has given notice to a public authority in relation to the issue of a negative or interim negative notice, if the notice is subsequently cancelled or an assessment is issued, the public authority is to be notified.

10.127 Mr Dixon, for the Department, was unable to recall an instance where the circumstances referred to above had eventuated. He noted as follows:

> *Bearing in mind that the legislation has only been in place since 2006, we have only started to require school teachers who have been teaching for a period of time to apply in the last two years, so we are talking about a class of people where they have had the negative notice for three years and applied for a cancellation and been successful. It has never happened. I suppose, as a matter of statistical certainty, we might get one or two cases at some stage, but I cannot anticipate it will be an enormous volume.*[87]

10.128 The Committee was satisfied that the Department's practice in relation to notifying WACOT of negative notices was appropriate.

Clause 23

10.129 Section 44 sets out evidentiary matters relating to proceedings for offences under the Act. The section is amended by clause 23 to include prosecution of an education provider. Proposed ss44(3A) and 44(3B) provide as follows:

> *(3A) In proceedings for an offence against section 9B(1), (2) or (4), an allegation in the prosecution notice that an education provider was aware at a specified time of a specified matter referred to in that subsection is, in the absence of evidence to the contrary, taken to be proved.*
>
> *(3B) In proceedings for an offence against section 9B(1), (2), (3), (4) or (5), an allegation in the prosecution notice that the procurement by an education provider of employment for a student in child-related employment was for the purpose of enabling the student to complete the syllabus for a course conducted by the provider is, in the absence of evidence to the contrary, taken to be proved.*

10.130 The relevant offences in 9B are as follows:

> *(1) An education provider must not, for the purpose of enabling a student to complete the syllabus for a course conducted by the*

[87] Ibid, p25, 26.

provider, procure employment for the student in child-related employment if —

(a) the education provider —

(i) is aware of a Class 1 offence or a Class 2 offence of which the student has been convicted; or

(ii) is aware that the student has a pending charge in respect of a Class 1 offence or a Class 2 offence;

and

(b) the student does not have a current assessment notice and has not made an application for an assessment notice that is pending.

Penalty: a fine of $60,000

(2) An education provider must not, for the purpose of enabling a student to complete the syllabus for a course conducted by the provider, procure employment for the student in child-related employment if the education provider is aware that a negative notice or an interim negative notice has been issued to the student and is current.

Penalty: a fine of $60 000.

(3) An education provider must not, for the purpose of enabling a student to complete the syllabus for a course conducted by the provider, procure child-related employment for the student in connection with a child care service if the student does not have a current assessment notice and has not made an application for an assessment notice that is pending.

Penalty: a fine of $12 000.

(4) An education provider must not, for the purpose of enabling a student to complete the syllabus for a course conducted by the provider, procure child-related employment for the student if the education provider is aware that the student has withdrawn an application for an assessment notice.

Penalty: a fine of $12 000.

(5) An education provider must not, for the purpose of enabling a student to complete the syllabus for a course conducted by the

*provider, procure child-related employment for the student with a person (an **employer**) if —*

(a) the student has previously been employed by the employer in child-related employment for the purpose of enabling the student to complete the syllabus for that course for more than 5 days in a calendar year; and

(b) the student does not have a current assessment notice and has not made an application for an assessment notice that is pending.

Penalty: a fine of $12 000.

10.131 At common law it is clearly established that the burden or 'onus' of proving every element of an offence rests with the prosecution. This 'burden' is often referred to as the persuasive burden of proof.[88]

10.132 The standard to which prosecution must discharge the persuasive burden of proof is beyond reasonable doubt. This requirement is central to the common law right of a person to be presumed innocent until proven guilty.

10.133 In Western Australia, the criminal law is not based on the common law but is principally based on the *Criminal Code*. However, as the *Criminal Code* is silent in relation to the persuasive burden of proof, it has been accepted that the common law rule operates with respect to criminal proceedings.

10.134 Historically, Committees of the Legislative Council have noted and commented on provisions where the burden of proof has been reversed.[89]

10.135 The Committee is of the view that proposed section ss44(3A) and (B) inserted by clause 23(3) of the Bill reverse the onus of proof.

10.136 The Committee notes that the amendment to s44(3A) mirrors existing s44(2) of the Act which, in the Committee's view, also reverses the onus of proof in relation to an employer.

10.137 Proposed s44(3A) requires that, instead of the prosecution being required to prove beyond reasonable doubt that an education provider was aware that that a student ;

- had been convicted of a Class 1 or Class 2 offence;

88 *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481- 482,

89 Western Australian, Legislative Council, Uniform Legislation and Statutes Review Committee, Report 36, *Child Exploitation Material and Classification Legislation Amendment Bill 2009*, May 2009, pp9,10.

- had a pending charge in respect of a Class 1 or Class 2 offence;
- a negative notice or interim negative notice had been issued to a student; or
- the student had withdrawn an application or assessment notice,

the onus is shifted to the education provider to establish that they were not aware of the above matters.

10.138 Similarly, under proposed s44(3B) the education provider must establish that procurement of employment for a student in child-related employment was for the purpose of enabling the student to complete the syllabus for a course conducted by the provider.

10.139 The Committee asked the Department for justification of the reversal of the onus of proof found in ss44(3A) and (3B). The Department considered the reversals to be evidentiary assumptions which were replicated in the amendments to the Act in order to maintain consistency between employers and education providers.[90]

10.140 Whilst ss44(3A) and (3B) contain reversals of the onus of proof the Committee notes that Parliament has already approved reversals of the onus of proof in the Act. On this basis the Committee makes no further comment.

11 SPECIFIC CLAUSES PART 3 OF THE BILL

11.1 The *Spent Convictions Act 1988* provides for people who have been convicted of certain offences to apply for a declaration that the offence is 'spent'. Applications can be made following a prescribed waiting period of ten years plus any period of imprisonment served as a result of the conviction. The process for the application differs depending on whether a conviction is classed as a 'serious' or 'lesser' conviction.

11.2 Part 3 of the *Spent Convictions Act 1988* sets out the effect of a conviction becoming spent, including prohibition of discrimination against a person on the basis of a spent conviction by parties such as employees, employment agencies and contractors. Persons who are discriminated against have remedies under the *Equal Opportunities Act 1984*.

11.3 Division 2 of Part 3 sets out exceptions to the effect of that Part including court proceedings and bail applications. Further exceptions to Part 3 are found in Schedule 3 of the *Spent Convictions Act 1988*.[91] These exceptions require a person to disclose spent convictions when being considered for certain positions and provide in some

90 Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, *Transcript of Evidence*, 9 February 2010, p22.

91 See section 16 *Spent Convictions Act 1988*

circumstances for a spent conviction to be taken into account without constituting an unlawful discrimination.

11.4 Notably, Schedule 3 clause 2 sets out exceptions to the *Spent Convictions Act 1988* for certain offences in order to protect children.

11.5 Section 28(1) is found in Part 3 of the *Spent Convictions Act 1988* and creates an offence of unlawful access to criminal records.

> ***28. Unlawful access to criminal records***
>
> *(1) A person shall not, without lawful reason, obtain information about a spent conviction, or the charge to which the conviction relates, from an official criminal record.*
>
> *Penalty: $1 000.*
>
> *(2) In subsection (1)* ***official criminal record*** *means a record containing information about the results of criminal proceedings kept for the purposes of its functions by any police force, court, government department, local or other public authority in Western Australia.*

11.6 Persons in respect of whom s34 of the *Working with Children (Criminal Record Checking) Act of 2004* applies[92] are already exempted from this provision in relation to all spent convictions.[93]

Clause 27

11.7 Section 28 of the *Spent Convictions Act 1988* has been amended by clause 27 of the Bill to include a definition of child[94] and to create a further exemption in proposed s28(2) from s28(1) as follows:

> *28(2)Subsection (1) does not apply to a prescribed person*
>
> *if —*
>
> *(a) the person is required or permitted under a prescribed law of the Commonwealth, another State or a Territory to obtain or deal with information about a person who works, or seeks to work, with a child; and*

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92 Section 34 *Working with Children (Criminal Record Checking) Amendment Act 2004* authorises the CEO to request authorised persons for information about a person's criminal record.

93 Clause 2(6) Schedule 3 *Spent Convictions Act 1988.*

94 'Child means a person less than 18 years of age'.

> *(b) 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.*

11.8 Section 33(1) of the *Spent Convictions Act 1988* Act contains the general regulation making power which would be used to prescribe a person for the purposes of clause 27.

> *The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.*

11.9 The MOU notes that;

> *COAG acknowledges the sensitive nature of criminal history information and the potential of its provision to affect adversely individuals' rights to rehabilitation, privacy, paid employment and the freedom to participate in their community as volunteers. The rights implications are particularly acute when the criminal history information is an acquittal, or untested information, such as pending or withdrawn charges, or relates to offences allegedly committed by the person when they were a juvenile.*
>
> *Accordingly, COAG has stipulated that, in order to participate in the exchange, child related employment screening units must conform with strict conditions on the receipt and use of the expanded range of criminal history shared information. These participation requirements are referred to in clause 4.11 of this memorandum.*[95]

11.10 Clause 4.11 of the MOU states:

> *Given the sensitivity of the expanded criminal history information, parties:*
>
> *4.11.1 agree that, to participate in the exchange, child related employment screening units should meet the conditions on the receipt, use, storage and destruction of the expanded criminal history information contained in Schedule 1 to the memorandum (the **"participation requirements"**); and*
>
> *4.11.2 affirm that each child related employment screening unit they have nominated for inclusion in Schedule 2 meets the participation*

[95] Memorandum of Understanding for a National Exchange of Criminal History Information for People Working With Children, Recitals F and G.

requirements or will meet the participation requirements before the unit makes its first request for criminal history information under the exchange.

11.11 The Committee is concerned that proposed s28(2) in its current form authorises prescription of a person who is not a participating screening unit for the purposes of the MOU and who may not be a party to any future governmental agreement. The only requirement is that they are:

> *required or permitted under a prescribed law … to obtain or deal with information about a person who works, or seeks to work, with a child*[96]

11.12 The requirement set out above could apply to any organisation, government or private company who is an employer who is *required or permitted under a prescribed law of the Commonwealth, another State or a Territory to obtain or deal with information about a person who works, or seeks to work, with a child.* The Committee notes that not all Australian jurisdictions require a criminal record to be sourced through a screening unit.[97] In any event, legislation relating to criminal history screening arrangements could be amended in other states from time to time. Given this situation, provision for protection of the sensitive information of individuals should be found in the Bill.

11.13 The Committee cannot see a requirement in the proposed amendment to s28(2) for a prescribed body to meet all the requirements set out in Schedule 1 of the MOU. The Committee notes that proposed ss22(8)(a) and (b) conform in essence with matters set out in items (a) and (b) of Schedule 1 of the MOU by requiring that the person receiving the information has legislative authority to do so.

11.14 The Department advised the Committee that the Attorney General is responsible for the administration of the Spent Convictions Act 1998 and that Department of the Attorney General will be drafting the relevant regulations with input from the Department to provide details. The Department further advised that:

- at the time of providing drafting instructions Schedule 1 of the MOU was not in existence;
- they will only request the prescribing of laws and persons that meet the participation requirements of the MOU; and

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96 Clause 27. proposed s 28(2)(a) Working with Children (Criminal Record Checking) Amendment Bill 2009.

97 See for example s8B *Children's Protection Act 1993(*SA).

- they will ensure that the Department of Attorney General is aware that the regulations can only prescribe laws and persons that are permitted to be prescribed by the MOU and the Intergovernmental Agreement, once entered by Western Australia.[98]

11.15 The Committee asked the Department, in relation to its concerns regarding proposed s28(2), if they had considered setting out a list of requirements that must be met prior to the Minister prescribing a person for the purposes of proposed s28(2) and was advised that:

> *Advice received from Parliamentary Counsel was that it was not possible to refer to an intergovernmental agreement that had not yet been entered into. In these circumstances and in an attempt to meet the November deadline imposed by the COAG working group, a decision was made to prescribe the persons and laws by future regulations.*
>
> *The Department has ensured that this approach is accurately reflected in the explanatory memorandum in the Bill.*[99]

11.16 The Commonwealth Crimes Amendment (working with Children-Criminal History) Bill 2009 proposes amendments to the *Crimes Act 1914*[100] to implement the COAG agreement to facilitate the inter-jurisdictional exchange of criminal history information for people working with children[101]. This Bill contains clauses identical to proposed section 28(2) which take effect in relation to disclosure of information about spent convictions.[102]

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98 Letter from Mr Paul Dixon, Senior Legal Officer, Working with Children Screening Unit, Department for Child Protection, 15 February 2010, p2.

99 Ibid, p4.

100 The Crimes Amendment (Working with Children-Criminal History) Bill 2009 amends the *Crimes Act 1914* to exempt prescribed persons or bodies from Part VIIC Divisions2 and 3. Division 3 of the *Crimes Act 1914* prohibits the taking into account of spent convictions in particular circumstances. The Bill was referred to the Senate Legal Constitutional Affairs Committee on 10 September 2009. The report of that Committee was tabled in the Senate on 19 November 2009.

101 Commonwealth, The Senate, Legal and Constitutional Affairs Legislation Committee, *Crimes Amendment (Working With Children—Criminal History) Bill 2009*, November 2009, p5.

102 For example: **85ZZGB Exclusion: disclosing information to a person or body**

> *Divisions 2 and 3 do not apply in relation to the disclosure of information to a prescribed person or body if:*
>
> *(a) the person or body is required or permitted by or under a prescribed Commonwealth law, a prescribed State law or a prescribed Territory law, to obtain and deal with information about persons who work, or seek to work, with children; and*
>
> *(b) the disclosure is for the purpose of the person or body obtaining and dealing with such information in accordance with the prescribed law.*

11.17 The Committee notes that the Crimes Amendment (Working with Children-Criminal History) Bill 2009 also contains a section which sets out the following safeguards with regard to which the Minister must be satisfied before a person or body is prescribed:

> *85ZZGE Prescribed persons and bodies*
>
> *Before the Governor-General makes a regulation prescribing, for the purposes of section 85ZZGB, 85ZZGC or 85ZZGD, a person or body:*
>
> > *(a) to which information may be disclosed; or*
> >
> > *(b) by which information may be taken into account or disclosed;*
>
> *the Minister must be satisfied that the person or body:*
>
> > *(c) is required or permitted by or under a Commonwealth law, a State law or a Territory law to obtain and deal with information about persons who work, or seek to work, with children; and*
> >
> > *(d) complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and*
> >
> > *(e) complies with the principles of natural justice; and*
> >
> > *(f) has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.*

11.18 The Committee noted that the safeguards set out in 85ZZGE above do not include all the requirements of Schedule 1.

11.19 The Committee does not consider that MOU's, intergovernmental agreements and Explanatory Memoranda provide sufficient safeguards for the individual in relation to sensitive information proposed to be exchanged under the *Spent Convictions Act 1988*.

11.20 Whilst the Committee takes the point made by Parliamentary Counsel in relation to references to Intergovernmental Agreements not yet entered into it does not see an impediment to including the contents of Schedule 1 to the MOU in some other form.

11.21 The Committee agrees with the sentiments expressed in clauses F and G of the Recitals to the MOU referred to in paragraph 11.9. Accordingly, it is of the view that safeguards protecting the information of individuals should remain within the purview of the Parliament and form part of the primary legislation.

Recommendation 7: The Committee recommends that Clause 27 proposed section 28(2) be amended to include:

i) a requirement for the relevant Minister to be satisfied that any body prescribed under section 28(2) complies with all the safeguards that currently apply to participating screening units as set out in Schedule 1 of the Memorandum of Understanding for a National Exchange of Criminal History Information for People Working with Children; and

ii) all matters found in Schedule 1 of the Memorandum of Understanding for a National Exchange of Criminal History Information for People Working with Children.

Clause 28

11.22 Section 37 of the Act provides for the exchange of information to corresponding authorities[103].

11.23 Currently a corresponding authority can be provided with information that relates to a person's criminal record or to an application made by, or a notice issued to, a person under the Act.

11.24 As mentioned at paragraph 11.4 above further exceptions to Part 3 of the *Spent Convictions Act 1988* are found in Schedule 3 of that Act.[104]

11.25 Clause 28 proposes the insertion of clause (2)7 into Schedule 3 of *Spent Convictions Act 1988* which excepts the CEO[105] from the provisions of 28(1) if the disclosure is to a corresponding authority and if they are prescribed under proposed s28(2). Proposed clause (2)7 reads as follows:

> *(7) The CEO as defined in the Working with Children (Criminal Record Checking) Act 2004 section 4 is excepted from the provisions of section 28(1) in respect of all spent convictions in disclosing information under section 37(2) of that Act if the disclosure is to a corresponding authority as defined in section 37(1) of that Act and that authority is a person prescribed under section 28(2).*

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103 A 'corresponding authority' is defined in s37(1) to mean a person or body with functions that correspond to the functions of the CEO under the Act

104 *Spent Convictions Act 1988*, Section 16,

105 Ibid, Section 4 *Working With Children (Criminal Record Checking) Amendment Act 2004*, ***CEO*** means the chief executive officer of the Department.

11.26 There is no requirement in the Act for a corresponding body to meet the requirements set out in Schedule 1 of the MOU. Again, in this instance, protection of an individual's sensitive information would rely on the safeguards set out in Schedule 1 forming part of proposed s28(2).

Review

11.27 The Bill does not contain any requirement for the amendments to the *Spent Convictions Act 1988* to be reviewed by the Minister.

11.28 As the Committee has noted, the information to be provided under the proposed amendments to the *Spent Convictions Act 1988* is of a sensitive nature. The MOU creates a novel situation, and the Committee considers that the Bill should provide for a mechanism of review by the Minister to insure the information provided under the *Spent Convictions Act 1988* exchange is treated appropriately.

Recommendation 8: The Committee recommends that the Working With Children (Criminal Record) Amendment Bill 2009 is amended to provide for the relevant Minister to conduct a review of the effect of Clause 27 and to report to the Legislative Council within 12 months of the commencement date of the Bill.

Sovereignty of State Parliament

11.29 An issue the Committee examines in considering uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or provision of a uniform bill itself, derogates from the sovereignty of the State.

11.30 In a sense, all uniform legislation has this effect. As the Standing Committee on Uniform Legislation and General Purposes pointed out in its Report No. 19:

> *Where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.*[106]

11.31 The Standing Committee on Uniform Legislation and General Purposes identified derogation in State Parliament sovereignty in: fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation; and lack of notice and detailed information as to negotiations inhibiting Members formulating questions and performing their legislative scrutiny role.[107] (This is not an exhaustive

106 Western Australia, Legislative Council, Standing Committee on Uniform and General Purposes, Report 19, *Uniform Legislation and Supporting Documents,* August 2004, p11.

107 Ibid.

list of the ways in which State sovereignty might be impinged by uniform agreements or schemes.)

11.32 Again in its Report No. 19, the Standing Committee on Uniform Legislation and General Purposes said:

> *it is important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws.*
>
> *The Committee, while prevented by the standing orders from examining the policy behind a uniform law, is in a position to alert the Council to the constitutional issues associated with particular forms of uniform laws as they are introduced.*[108]

11.33 The Committee has concluded that the Bill raises no particular constitutional issues. The final intergovernmental agreement on permanent arrangements for the inter-jurisdictional exchange of criminal history information is yet to be drafted.[109] The Committee is unable to comment on whether the final intergovernmental agreement will give rise to issues impacting on the sovereignty of State Parliament.

Conclusion

11.34 The Committee commends this report to the house for its consideration.

Hon Adele Farina MLC
Chairman

4 March 2010

108 Ibid.

109 Clause 10, Memorandum of Understanding for a National Exchange of Criminal History Information for People Working with Children, signed on 26 November 2009.

APPENDIX 1

LIST OF STAKEHOLDERS

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Mr Dennis Eggington, Chief Executive Officer, Aboriginal Legal Service

Mr Des Wood, President, Australian Driver Trainers Association of Western Australia (Inc)

Mr Tom Percy QC, Western Australia Director, Australian Lawyers Alliance

Mr Mark Olson, Secretary, Australian Nursing Federation

Ms Rachelle Tucker, Executive Officer, Child Care Association of Western Australia

His Honour Judge Dennis Reynolds, President, Children's Court of Western Australia

Ms Michelle Scott, Commissioner, Commissioner for Children and Young People

Mr Peter Weygers, President, Council for Civil Liberties

Associate Professor Frank Morgan, Director, Crime Research Centre

Mr Richard Utting, Criminal Lawyers Association of Western Australia

Mr Glen Barton, Head, Curtain Business School, Curtin University of Technology

Mr Phil Della, Head, School of Nursing and Midwifery, Curtain University of Technology

Ms Cheryl Gwilliam, Director General, Department of the Attorney General

Mr Terry Murphy, Director General, Department of Child Protection

Mr Richard Stictland, Chief Executive Officer, Department of Education Services

Ms Sharyn O'Neil, Director General, Department of Education

Mr Menno Henneveld, Director General, Department of Transport

Mr Bruno Fiannaca, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions

His Honour Judge Kevin Hammond, Chief Judge, District Court of Western Australia

Mr Greg Robson, Head, School of Education, Edith Cowan University

Professor Mark Stoney, Head, School of Law and Justice, Edith Cowan University

Ms Jan Pool, President, Enrolled Nurses Association of Western Australia

Ms Yvonne Henderson, Commissioner, Equal Opportunity Commission

Ms Theresa Howe, Secretary, Independent Education Union of Western Australia

Ms Heather Kay, Executive Officer, Law Reform Commission of Western Australia

Mr David Price, Director, The Law Society of Western Australia

Mr George Turnbull, Director, Legal Aid Western Australia

Mr Steven Heath, Chief Magistrate, Magistrates Court

The Honourable Hal Jackson, Chairperson, Ministerial Advisory Council on Child Protection

Dr Judy MacCallum, Dean School of Education, Murdoch University,

Professor Gabriel A Moens, Dean of Law, School of Law, Murdoch University

Professor Bronwyn Jones, Acting Dean, School of Nursing and Midwifery, Murdoch University

Ms Robyn Collins, Chief Executive Officer, Nurses and Midwifes Board of Western Australia

Ms Wendy Murray, Director, Office of Crime Prevention

Ms Lee Henry, Head of Department, Child Protection Unit, Princess Margaret Hospital

Justice John Chaney, President, The State Administrative Tribunal

Mr David Kelly, General Secretary, State School Teachers' Union of Western Australia

The Hon Wayne Martin, Chief Justice, Supreme Court of Western Australia

Ms Ruth Shean, Director General, Department of Training and Workforce Development

Ms Meredith Hammat, President, Unions Western Australia

Associate Professor Jane Power, Dean, School of Law, University of Notre Dam

Professor Selma Alliex, School of Nursing, University of Notre Dam

Professor Helen Wildy, Dean, Faculty of Education, University of Western Australia

Professor William Ford, Dean, Faculty of Law, University of Western Australia

Dr Karl O'Callaghan, Commissioner of Police, Western Australian Police

Mr Grant Donaldson SC, President, The Western Australian Bar Association

Ms Cheryl Cassidy-Vernon, Manager, Youth Legal Service Inc

Ms Suzanne Parry, Director, Western Australian College of Teaching

Professor Ian Puddey, Dean, Faculty of Medicine, Dentistry and Health Sciences, University of Western Australia

Ms Mara Basanovic, Chief Executive Officer, Volunteering Western Australia

Ms Valerie Gould, Executive Officer, Association of Independent Schools of Western Australia

APPENDIX 2

SUPPORTING DOCUMENTS

APPENDIX 2

SUPPORTING DOCUMENTS

MEMORANDUM OF UNDERSTANDING

FOR A NATIONAL EXCHANGE OF CRIMINAL HISTORY INFORMATION

FOR PEOPLE WORKING WITH CHILDREN

Date: 26 November 2009

Parties: The Commonwealth of Australia ("Commonwealth")
The State of New South Wales ("NSW")
The State of Victoria ("Victoria")
The State of Queensland ("Queensland")
The State of Western Australia ("Western Australia")
The State of South Australia ("South Australia")
The State of Tasmania ("Tasmania")
The Northern Territory of Australia ("Northern Territory")
The Australian Capital Territory ("ACT")

Recitals:

A. Safeguarding children from sexual, physical and other harm is a key social responsibility and priority of Australian governments. Assessing the criminal history of people working with children or seeking to work with children is an important component of the overall strategy for protecting the safety and wellbeing of children.

B. The criminal history information considered by Australian child-related employment screening units is typically extensive when sourced intrajurisdictionally but limited when sourced from other jurisdictions. Virtually only unspent convictions are shared routinely between jurisdictions for child related employment screening. Given the population's increasing mobility across state and territory borders, this inconsistency has the potential to compromise the integrity of child related employment screening.

C. On 29 November 2008, the Council of Australian Governments (**"COAG"**) agreed to establish an inter-jurisdictional exchange of criminal history information for people working with children (**"the exchange"**), to better protect children. COAG also endorsed a set of implementation actions, the establishment of a project implementation committee (which is chaired by Queensland's Department of the Premier and Cabinet) and an implementation plan. This followed COAG's agreement in principle on 13 April 2007 to a framework for such an exchange.

D. First Ministers agreed to remove any legislative and administrative restrictions (such as spent convictions legislation) to the routine and formal sharing of the following information interjurisdictionally:

   (a) an expanded range of criminal history information, extending beyond the convictions currently shared, to:
      (i) spent convictions;
      (ii) pending charges; and
      (iii) except for Victoria, non-conviction charges, including acquittals and withdrawn charges; and

   (b) if requested by an interstate child related employment screening unit, further information held by a police service about to clarify the circumstances of the offence or alleged offence, such as whether the offence involved a child.

E. Providing the expanded range of criminal history information and the follow-up circumstances information interjurisdictionally will benefit child related employment screening units by better informing their decisions about the risk of harm to children.

F. COAG acknowledges the sensitive nature of criminal history information and the potential of its provision to affect adversely individuals' rights to rehabilitation, privacy, paid employment and the freedom to participate in their community as volunteers. The rights implications are particularly acute when the criminal history information is an acquittal, or untested information, such as pending or withdrawn charges, or relates to offences allegedly committed by the person when they were a juvenile.

G. Accordingly, COAG has stipulated that, in order to participate in the exchange, child related employment screening units must conform with strict conditions on the receipt and use of the expanded range of criminal history shared information. These participation requirements are referred to in clause 4.11 of this memorandum.

H. Jurisdictions nominating child related employment screening units to participate in the exchange from its commencement have documented how the screening units comply with the participation requirements, and have provided these compliance checklists with other jurisdictions' representatives on the project implementation committee for consideration.

I. Currently, child-related employment screening varies between jurisdictions, both in relation to the scope and type of information taken into account when screening, and the types of employment for which screening is required. Further, New South Wales, Victoria, Queensland, Western Australia and the Northern Territory have statutory schemes for the centralised screening of persons who work with, or seek to work with children. South Australia, Tasmania and the Australian Capital Territory use administrative schemes or policies to undertake child-related employment screening and are moving towards statutory schemes.

J. The exchange will increase the range of criminal history information shared between jurisdictions but does not require uniformity in jurisdictions' approaches to criminal history screening for child related employment.

K. Nor is the exchange intended to displace the existing arrangements that apply to police services' provision of criminal history information for employment screening, conducted through CrimTrac's National Police Check Service.

Operative provisions:

The Parties agree as follows:

1. Objective

1.1. This memorandum sets out arrangements for the commencement period of a national exchange of criminal history information for people working with children, to better protect children from sexual, physical and emotional harm.

2. Definitions

2.1. In this memorandum of understanding, unless a contrary intention appears:

"Child" means a person less than 18 years of age.

"Child related employment screening" means using information about a person in a way that is authorised or required under a law or administrative scheme or policy of a jurisdiction that relates to assessing whether a person poses a risk of harm to children.

"Commencement period" of the exchange means the period covering:

(a) the first twelve months of operation of the exchange from the date of the commencement of the exchange (**"the exchange's initial 12 months"**); and

(b) the time in which the project implementation committee prepares the evaluation report; and

(c) the additional time in which the parties prepare and sign the proposed intergovernmental agreement on permanent arrangements for the exchange referred to in Part 10.

"Conviction" means any recorded or un-recorded conviction or finding of guilt for a criminal offence or acceptance of a plea of guilty by a court (whether the person was dealt with as an adult or a child). A conviction includes a conviction for which a pardon has been granted. Depending on context, conviction can also include an outcome of a mental health proceeding in relation to a criminal offence.

"Criminal offence" means an offence punishable by law as defined in each jurisdiction.

"CrimTrac" means the CrimTrac Agency, an Executive Agency established under section 65 of the *Public Service Act 1999* (Cth) (ABN 171 93 904 699).

"Exchange" as a verb means exchange interjurisdictionally.

"Held" by jurisdictions' police services includes held by CrimTrac on behalf of jurisdictions' police services.

"Interstate" means "interjurisdictional".

"Jurisdiction" means the Government jurisdiction of any of the parties, State, Territory or Commonwealth.

"National Names Index" is the central index of information supplied by police services and maintained by CrimTrac that identifies whether a particular individual is recorded in the relevant police records of any jurisdiction as a person of interest. While the primary purpose of the Index is to assist policing, the Index is also the database against which National Police Check Service checks are run.

"Non-conviction charge" means, whether a person was charged as an adult or a child, a charge: that has been withdrawn; that has been the subject of a nolle prosequi, a no true bill or a submission of no evidence to offer; that led to a conviction that was quashed on appeal; or upon which a person was acquitted or disposed of by a court otherwise than by way of conviction.

"Pending charge" means a current charge for a criminal offence that has not yet been finalised (whether the person is being dealt with as an adult or a child).

"Police service" of a jurisdiction includes the Australian Federal Police for the Australian Capital Territory.

"Project implementation committee" means the COAG working group, consisting of representatives of First Ministers' departments or their nominees from police services or child related employment screening units, established by COAG on 29 November 2008 to prepare for the exchange, oversee and evaluate the operation of the exchange during its commencement period, and provide a report to COAG on its evaluation.

"Spent conviction" means a conviction which statute deems (after a rehabilitation period) no longer part of the person's criminal history and which the person need not disclose.

"Supply":

(a) criminal history information or circumstances information (to a participating interstate screening unit) means using best endeavours to locate, retrieve and provide the information; and

(b) criminal history information (to a participating interstate screening unit) includes supply of the criminal history information to that unit via CrimTrac or the police service of that unit's jurisdiction.

"Working", with children, includes volunteering.

Other terms are defined in the body of the memorandum.

3. Interpretation

3.1. This memorandum:

3.1.1. is not legally binding; and

3.1.2. records the intentions of the parties, and their police services and participating screening units, and CrimTrac, to abide by the arrangements set out in the memorandum.

3.2. This memorandum does not require or permit something that is not lawfully permitted.

3.3. No provision of the memorandum requires the production of a criminal history record in any particular instance.

3.4. Use, or non-use, of any particular information received under this exchange is at the discretion of the recipient, in line with applicable legislation and policies.

3.5. Unless a contrary intention appears, the parties do not intend this memorandum to displace existing arrangements relating to the National Police Check Service referred to in clause 4.14.

Victoria and non-conviction charges

3.6. The parties acknowledge that Victoria will not exchange non-conviction charges or information relating to Victorian non-conviction charges under the exchange. Accordingly:

3.6.1. Victoria, need not remove any barriers to its police service supplying non-conviction charges under the exchange;

3.6.2. Victoria's police service need not supply Victorian non-conviction charges or information relating to Victorian non-conviction charges interjurisdictionally under the exchange; and

3.6.3. other police services need not, but may, supply non-conviction charges to Victoria. (Victoria advises its police service will vet interstate criminal history information to remove interstate non-conviction charges before the information is forwarded to Victoria's participating screening units).

4. The exchange

4.1. The parties agree to establish a national exchange of criminal history information for people working with children (**"the exchange"**).

The information to be exchanged

4.2. The parties agree that they will continue to exchange convictions held by jurisdictions' police services.

4.3. The parties agree that they will also exchange the following criminal history information held by jurisdictions' police services (**"the expanded criminal**

history information"):

4.3.1. spent convictions;

4.3.2. pending charges; and

4.3.3. except for Victoria (see clause 3.6), non-conviction charges.

4.4. The parties agree that they will exchange, if available, further information (**"circumstances information"**) held by jurisdictions' police services— typically in prosecution briefs or statements of material facts— about the circumstances of an offence or alleged offence that might not be clear from the bare record of the offence or alleged offence, such as:

4.4.1. when the offence was committed or was alleged to have been committed;

4.4.2. the age of the offender or alleged offender;

4.4.3. the age of the victim of the offence or alleged offence;

4.4.4. whether the offence or alleged offence involved, might have involved or was intended to involve a child or children;

4.4.5. the relationship, if any, between the offender or alleged offender and any child involved in the offence or alleged offence;

4.4.6. the circumstances and nature of the behaviours constituting or involved with the offence or alleged offence; and

4.4.7. other factors relevant to a decision about whether a person poses a risk of harm to children.

4.5. This memorandum does not:

4.5.1. displace existing processes for obtaining information for child-related employment screening; or

4.5.2. subject existing processes for obtaining information for child-related employment screening to the new fees to be charged under clause 4.15.5 and Schedule 4.

The expanded criminal history information and the National Names Index

4.6. Parties note that not all police services upload all categories of the expanded criminal history information to the National Names Index.

4.7. The parties:

4.7.1. note that it is desirable to the integrity of child related employment screening undertaken pursuant to the exchange that all police services upload all categories of the expanded criminal history information; and

4.7.2. encourage police services, except the Victorian police service in relation to non-conviction charges, to use their best endeavours, if it is not prohibitively expensive to do so, to upload all categories of the expanded criminal history information to the National Names Index, and do so in a timely manner.

Legislative and administrative arrangements

4.8. The parties have made or agree to make the legislative and administrative changes necessary to facilitate the supply of information under the exchange.

4.9. The parties have made or agree to make the legislative and administrative changes necessary to facilitate the receipt of information under the exchange.

4.10. The parties have made or agree to make the legislative and administrative changes necessary to ensure their participating screening units comply with the participation requirements.

Participating screening units

4.11. Given the sensitivity of the expanded criminal history information, parties:

4.11.1. agree that, to participate in the exchange, child related employment screening units should meet the conditions on the receipt, use, storage and destruction of the expanded criminal history information contained in Schedule 1 to the memorandum (the **"participation requirements"**); and

4.11.2. affirm that each child related employment screening unit they have nominated for inclusion in Schedule 2 meets the participation requirements or will meet the participation requirements before the unit makes its first request for criminal history information under the exchange.

4.12. The child related employment screening units listed in Schedule 2 to the memorandum and child related employment screening units added to Schedule 2 in the future under Part 7 (the **"participating screening units"**):

4.12.1. are authorised by the parties to participate in the exchange;

4.12.2. may request and receive the expanded criminal history information and circumstances information under the exchange; and

4.12.3. will continue to comply with the participation requirements for the duration of the memorandum or until the participating screening unit notifies CrimTrac and police services of any decision under clause 8.7 to no longer participate in the exchange.

4.13. The requirements in this memorandum on a party to supply information apply regardless of whether the party has a child related employment screening participating in the exchange.

How the information is to be exchanged

Existing arrangements - National Police Check Service

4.14. Currently:

4.14.1. police services and CrimTrac provide a National Police Check Service (**"NPCS"**) to a range of entities, including the participating screening units and police services acting on participating screening units' behalf;

4.14.2. entities, including participating screening units, have entered into contractual arrangements with CrimTrac to access NPCS or have entered into other arrangements with police services or CrimTrac to access NPCS;

4.14.3. the contractual or other arrangements with CrimTrac and police services—and participating screening units' existing legislative and administrative arrangements—variously require or provide for participating screening units to do various things, such as ensuring the unit:

(i) has collected sufficient details to establish the identity of the applicant before the unit makes a request of CrimTrac for a NPCS check ("NPCS check");

(ii) has obtained appropriate consent from the applicant to the NPCS check and to disclosure of criminal history information to the unit or other organisations as applicable;

(iii) makes the request of CrimTrac or its jurisdiction's police service for a NPCS check by specifying the purpose of the check; and

(iv) pays the applicable CrimTrac charge and any police service charge for a NPCS check;

(v) complies with any relevant Commonwealth, State and Territory legislation, including privacy, freedom of information or human rights legislation;

(vi) manages and protects the criminal history information and confidential information appropriately, and

(vii) where applicable, complies with police service and CrimTrac monitoring and auditing arrangements and reports security breaches to the relevant police services and CrimTrac;

4.14.4. when a participating screening unit makes a request of CrimTrac or its jurisdiction's police service for a NPCS check, police services supply criminal history information to the participating screening unit, subject to the spent convictions or other non-disclosure legislation and information release policies of the jurisdiction of the supplying police service; and

4.14.5. typically, this means that the criminal history information supplied to participating screening units is extensive when provided from within the unit's jurisdiction (and will commonly include convictions, spent convictions, pending charges and non-conviction charges from within

the jurisdiction) but is limited to conviction information when provided from outside the unit's jurisdiction.

The proposed arrangements

4.15. Under the exchange:

4.15.1. the arrangements set out in clause 4.14 will continue to apply;

4.15.2. when a participating screening unit makes a request of CrimTrac or of its jurisdiction's police service for a check, police services, including police services outside the unit's jurisdiction, will supply the expanded criminal history information to the unit;

4.15.3. a participating screening unit will treat the expanded criminal history information received from police services outside the unit's jurisdiction (**"interstate expanded criminal history information"**) in accordance with the participation requirements;

4.15.4. a participating screening unit that has received an interstate conviction or interstate expanded criminal history information may ask the police service of another jurisdiction (an **"interstate police service"**) for circumstances information relating to the conviction or to the expanded criminal history information;

4.15.5. a request made by a participating screening unit of an interstate police service for circumstances information:

(i) will be in a form, agreed to by the unit and the police service (including any form agreed nationally between police services and participating screening units), that indicates the purpose of the request and provides sufficient information identifying the person and their relevant charge or conviction;

(ii) will, upon receipt of the information, be the subject of the fee for the service set out in Part 1 of Schedule 4 to the memorandum (even if the police service, despite its best endeavours, is unable to locate, retrieve or supply the circumstances information), unless the fee is waived by the police service or replaced by an alternative fee agreed to by the unit and the police service; and

(iii) will be the subject of the billing guidelines set out in Part 2 of Schedule 4 to the memorandum or other billing arrangements agreed by the unit and the police service; and

4.15.6. when a participating screening unit makes a request for circumstances information to an interstate police service, the police service will supply the circumstances information, if available, to the unit in a form agreed to by the unit and the police service.

Collecting information to assist the evaluation of the exchange under Part 9

4.16. From the start of the fourth month of the exchange until the end of the exchange's initial 12 months, each participating screening unit will collect standard statistical and other information pertaining to the scope, efficacy and cost of the exchange.

4.17. Before the start of the fourth month of the exchange, the project implementation committee (in liaison with participating screening units) will provide participating screening units with the list of the standard information to be collected, including, if the committee considers it desirable, a standardised template to support consistent collection of the information,

5. Avoiding duplication of criminal history screening within jurisdictions and within particular screening units

Avoiding duplication within jurisdictions

5.1. This Part is intended to avoid unnecessary duplication and cost in criminal history screening within screening units or across a jurisdiction's screening units (for example, by avoiding the making of requests for criminal history information that does not exist) arising because of the exchange.

5.2. For this Part, **"third party government entity"** means a government department, agency or statutory body that is permitted or required to screen the criminal history of a person that has been the subject of criminal history screening by a participating screening unit previously. (For example, the third party government entity is permitted or required to screen the person in relation to the person's general employment suitability or probity, whereas the participating screening unit screened the person initially in relation to the specific consideration of whether the person posed a risk of harm to children.)

5.3. With the consent of the person involved, nothing in this memorandum, including the restrictions on the use and disclosure of interstate expanded criminal history information contained in the participation requirements, prohibits a participating screening unit from:

5.3.1. indicating to a third party government entity whether criminal history information exists in relation to a person, provided:

(i) the participating screening unit does not disclose the person's actual criminal history; and

(ii) the participating screening unit advises the third party government entity that no adverse inference about the person's criminal history or suitability for employment should be drawn from an indication that a person has or may have a criminal history; or

5.3.2. forwarding to a third party government entity a person's criminal history information, provided:

(i) the participating screening unit has contractual arrangements with

CrimTrac, or other arrangements with CrimTrac and police services, for forwarding the information to the third party government entity; and

(ii) the criminal history that is forwarded does not include interstate expanded criminal history information.

Dual function participating screening units

5.4. The parties note that participation requirement (e) of Schedule 1 to this memorandum prohibits participating screening units that undertake screening with a general employment suitability or probity screening element as well as a child safety screening element (such as the participating teacher registration and accreditation authorities; **"dual function participating screening units"**) from using interstate expanded criminal history information for general employment suitability or probity screening.

Identifying expanded criminal history information

5.5. The parties acknowledge that a participating screening unit that has contractual arrangements with CrimTrac, or other arrangements with CrimTrac and police services, for forwarding criminal history information to a third party government entity (see clause 5.3.2) needs to be able to identify whether interstate criminal history information is interstate expanded criminal history information, to ensure the unit does not forward interstate expanded criminal history information.

5.6. The parties acknowledge that a dual function participating screening unit (see clause 5.4) also needs to be able to identify whether interstate criminal history information is interstate expanded criminal history information, to ensure the unit does not use interstate expanded criminal history information for general employment suitability or probity screening.

5.7. However, a participating screening unit will be unable to identify whether criminal history information supplied under the exchange (in particular, an interstate conviction) is interstate expanded criminal history information (in particular, a spent conviction) unless the police service supplying the information provides it or marks it in a way that identifies to the screening unit that the information is expanded criminal history information.

5.8. Accordingly, the parties consider it desirable that police services provide, and CrimTrac facilitate the provision of, criminal history information to the participating screening units referred to in clauses 5.5 and 5.6 in a manner that identifies whether interstate criminal history information (in particular, convictions) is interstate expanded criminal history information (in particular, spent convictions) as soon as possible or within two months of the exchange's commencement.

6. Funding arrangements

6.1. Jurisdictions or their participating screening units will fund any costs arising from the participation of the screening units in the exchange.

6.2. Jurisdictions or their police services will fund any costs arising from the provision by the police services of the expanded criminal history information under the exchange.

6.3. Police services will supply circumstances information under the exchange subject to the fee for service provided for in clause 4.15.5 and Schedule 4 of the memorandum.

7. Future participating screening units

7.1. A party may nominate a child related employment screening unit of the jurisdiction to be a participating screening unit.

7.2. If a party wishes to do so during the commencement period of the exchange, the party may do so by advising the project implementation committee in writing of its nomination, demonstrating how the screening units meets, or will meet, the participation requirements and providing any further information in support of its nomination that the committee reasonably requests.

7.3. If it receives such a nomination, the project implementation committee will provide the nomination and the committee's consideration of it, to COAG Senior Officials, at the next available meeting of COAG Senior Officials if practicable, for Senior Officials' consideration.

7.4. If COAG Senior Officials agree to the party's nomination, the following things will happen as soon as possible:

7.4.1. the unit will be added to Schedule 2 to the memorandum as a participating screening unit;

7.4.2. the party will take whatever legislative and administrative action is necessary to remove any barriers to the unit receiving the expanded criminal history information and circumstances information from interstate police services;

7.4.3. the party will take whatever legislative and administrative action is necessary for the unit to comply with the participation requirements;

7.4.4. all other parties will take whatever legislative and administrative action is necessary to remove any barriers to their jurisdictions' police services supplying the expanded criminal history information and circumstances information to the unit;

7.4.5. when the unit considers it is in a position to participate in the exchange, the unit will advise CrimTrac and interstate police services in writing of its readiness; and

7.4.6. subsequently, interstate police services will supply the expanded

criminal history information and circumstances information to the unit.

7.5. The parties agree that the proposed intergovernmental agreement on permanent arrangements for the exchange referred to in Part 10 will set out revised provisions for how parties will agree to nominations of future participating screening units on a permanent basis.

8. General

Commencement

8.1. This memorandum commences when executed by all parties.

8.2. The exchange commences on Monday, 30 November 2009, provided that the memorandum has been executed by all parties.

8.3. However, if upon commencement a jurisdiction has not yet commenced legislation intended to remove any barriers to its police service supplying information under the exchange, or if the jurisdiction's police service considers it is not yet in a position administratively to supply the information:

8.3.1. the jurisdiction's police service will not supply the information; and

8.3.2. interstate police services need not supply the expanded criminal history information or circumstances information to the jurisdiction's participating screening units.

8.4. Also, if upon commencement a jurisdiction has not commenced legislation that is intended to remove any barriers to a participating screening unit receiving information under the exchange or meeting the participation requirements, or if a participating screening unit considers it is not yet in a position administratively to receive the expanded criminal history information or circumstances information:

8.4.1. the jurisdiction's participating screening unit:

(i) upon commencement, will notify CrimTrac and interstate police services in writing that it is not yet in a position to receive the expanded criminal history information;

(ii) will not purport to make a request for information under the exchange;

(iii) will use its best endeavours to be in a position to receive the expanded criminal history information as soon as possible; and

(iv) when it is in a position to receive the expanded criminal history information, will notify CrimTrac and interstate police services in writing of that fact; and

8.4.2. interstate police services will not supply the expanded criminal history information or circumstances information to the unit until the unit notifies CrimTrac and interstate police services it is in a position to receive the information.

Variation or amendments

8.5. This memorandum may be varied, amended or terminated with the written consent of all parties.

Withdrawal

8.6. A party may withdraw from this memorandum by giving at least two month's notice in writing to the other parties stating the date on which the withdrawal will be effective.

8.7. A participating screening unit, after consulting its relevant party, may decide at any time that the screening unit will no longer participate in the exchange and, if so, the screening unit will notify CrimTrac and police services in writing of the decision, and its relevant party will notify the other parties in writing of the decision.

8.8. If a party withdraws from this memorandum, the memorandum will continue in force in relation to the remaining parties.

Duration

8.9. The memorandum and the exchange will be in effect for the duration of the commencement period.

Monitoring and dispute resolution

8.10. During the commencement period:

8.10.1. the project implementation committee will monitor and facilitate the operation of the exchange generally, and, specifically, as it relates to participating screening units; and

8.10.2. the National Police Check Service Operations Advisory Committee (**"NOAC"**), consisting of the heads of police services' criminal history information units, will monitor and facilitate the operation of the exchange as it relates to police services.

8.11. Where an issue arises among or between participating screening units or police services or CrimTrac (together, **"agencies"** for this clause) in relation to any matter covered in the memorandum, the agencies involved will discuss and attempt to resolve the issue. Where the agencies are unable to resolve the issue, one of the agencies involved may refer the issue to the project implementation committee. Where the project implementation committee is unable to resolve the issue, and if the committee considers it appropriate, it may refer the issue to COAG Senior Officials and, ultimately, COAG for resolution.

8.12. The parties agree that it is desirable that the proposed intergovernmental agreement on permanent arrangements for the exchange referred to in Part 10 should set out revised provisions for monitoring and facilitating the operation of the exchange and dispute resolution.

9. Evaluation

9.1. Within three months of the conclusion of the exchange's initial 12 months, the project implementation committee will:

9.1.1. evaluate the scope, efficacy and cost of the exchange during the exchange's initial 12 months; and

9.1.2. prepare for COAG's consideration a report on the project implementation committee's evaluation.

9.2. In undertaking the evaluation and preparing the report, the project implementation will consider such matters as:

9.2.1. the extent to which participating screening units requested criminal history information;

9.2.2. in response to the requests, the extent to which the various categories of expanded criminal history information is estimated to have been supplied from interstate police services in response, and the utility of the information to participation screening unit's decision making about whether a person poses a risk of harm to children;

9.2.3. the extent to which participating screening units requested circumstances information and, to the extent the data is available, the reasons for the requests;

9.2.4. in response to the requests, the extent to which circumstances information relating to the various categories of expanded criminal history information was supplied from interstate police services, and the utility of the information to participation screening unit's decision making about whether a person poses a risk of harm to children;

9.2.5. the costs of the exchange to police services supplying, and participating screening units receiving, the expanded criminal history information and circumstances information;

9.2.6. the appropriateness of the system of fees for circumstances information and whether alternative, more equitable and efficient funding arrangements for the provision of circumstances information interjurisdictionally exist;

9.2.7. how any other aspects of the exchange's operation could be improved;

9.2.8. permanent arrangements for governance, monitoring the operation of the exchange and dispute resolution;

9.2.9. the appropriateness of continued ministerial oversight of the exchange by COAG and whether alternative ministerial oversight options are preferable;

9.2.10. specifically, the statistical and other information collected by participating screening units under clause 4.16, and any statistical and other information received in responses to requests of CrimTrac and police services for information relating to the operation of the exchange or to the operation of employment screening generally; and

9.2.11. any other matter:

(i) suggested by the contents of this memorandum;

(ii) suggested by the contents of the October 2008 Scoping Study and Implementation Plan prepared for COAG by the COAG working group on the exchange; or

(iii) that the project implementation committee considers relevant.

9.3. The report will either:

9.3.1. be accompanied by a draft of the proposed intergovernmental agreement on permanent arrangements for the exchange referred to in Part 10; or

9.3.2. make recommendations about desirable content of the proposed intergovernmental agreement, and be written in a manner that would inform the preparation of the proposed intergovernmental agreement.

10. Proposed intergovernmental agreement on permanent arrangements

10.1. It is the intention of the parties that upon receipt of the evaluation report the parties will prepare an intergovernmental agreement, for signature of First Ministers at COAG, that will replace this memorandum and provide for arrangements for the operation of the exchange on a permanent basis (the **"proposed intergovernmental agreement on permanent arrangements for the exchange"**).

Schedule 1

The participation requirements

The requirements with which participating screening units must comply to participate in the exchange are as follows.

(a.) The participating screening unit has a legislative basis for screening of persons working or seeking to work with children, which specifically enables consideration of information available through the exchange.

(b.) The participating screening unit must use the expanded interstate criminal history information only for the purposes of child-related employment screening.

(c.) The participating screening unit is prohibited from—and, where appropriate, subject to penalty for—disclosing the interstate expanded criminal history information beyond the screening unit or to persons not performing functions relevant to criminal record employment screening for child related work. However, disclosure of the expanded criminal history information to tribunals, courts or authorities undertaking reviews of decisions of the participating screening unit for the purpose of facilitating a review is an acceptable disclosure.

(d.) Notwithstanding participation requirements (b) and (c) above, it is acknowledged that, in exceptional circumstances, the participating screening unit may be under statutory obligations to use or disclose the interstate expanded criminal history information for the protection of a particular child or class of children, as part of a legislated child protection function. Such statutory obligations and disclosure pursuant to them are consistent with this memorandum.

(e.) If a participating screening unit undertakes screening with both (i) a child safety screening element and (ii) a general employment suitability or probity screening element (many teacher registration and accreditation authorities fit this category), there is appropriate legislation or business rules in place to ensure that the interstate expanded criminal history information is used only to screen risks to the safety of children, and not for general employment suitability or probity screening.

(f.) The participating screening unit has a risk assessment and decision-making framework pertaining to child-related employment screening that is:
(i) evidence-based, to the extent possible in light of the requirements of the governing legislation; and (ii) documented, and supported by business rules and tools.

(g.) The participating screening unit has appropriately skilled staff to make assessments about risks to children's safety suggested by applicants' criminal histories. "Appropriately skilled" includes having appropriate qualifications, experience or standing to make the assessment.

(h.) The participating screening unit obtains the written consent of the individual which records that the individual understands that the employment screening will involve the provision of the expanded criminal history information, including information from other jurisdictions and information about the circumstances of the convictions or charges. For this purpose, the project implementation committee has settled the model principles that participating screening units' consent forms will reflect. The model principles are contained in Schedule 3 to the memorandum.

(i.) The participating screening unit has a scheme that reflects the principles of natural justice. In particular, where there is an intention to make an adverse decision about an individual on the basis of criminal history information received through the exchange, the screening unit, tribunal or authority is required by legislation or policy to:

- disclose the criminal history information to the individual;
- allow the individual a reasonable opportunity to be heard; and
- consider the individual's response before finalising the decision.

However, where a jurisdiction has determined that certain information will result in an individual's automatic exclusion from child-related employment, the right to be heard may be limited to a challenge to the accuracy of the records.

(j.) The participating screening unit must comply with Commonwealth, State and Territory privacy* and human rights legislation where relevant.

(k.) The participating screening unit must comply with records management legislation within their jurisdictions that determines information management, storage, retention and destruction requirements.

* The Information Privacy Principles under the Commonwealth's *Privacy Act 1988* cover: the manner and purpose of collection of personal information (Principle 1); solicitation of personal information from individual concerned or generally (2 and 3); storage and security of personal information (4); information relating to records kept by record-keeper (5); access to records containing personal information (6); alteration of records containing personal information (7); record-keeper to check accuracy etc of personal information before use (8); personal information to be used only for relevant purposes (9); limits on use of personal information (10); and limits on disclosure of personal information (11). Other jurisdictions' privacy schemes replicate or reflect these principles.

Schedule 2

Participating screening units

The child related employment screening units† that will participate in the exchange are:

(a) the Commission for Children and Young People constituted by the *Commission for Children and Young People Act 1998* (NSW);

(b) an approved screening agency under the *Commission for Children and Young People Act 1998* (NSW);

(c) the Secretary to the Department of Justice as mentioned in the *Working with Children Act 2005* (Vic);

(e) the chief executive officer as mentioned in the *Working with Children (Criminal Record Checking) Act 2004* (WA);

(f) the Screening Authority established under the *Care and Protection of Children Act* (NT), section 196;

(g) the Commission for Children and Young People and Child Guardian constituted by the *Commission for Children and Young People and Child Guardian Act 2000* (Qld);

(h) the Queensland College of Teachers as mentioned in the *Education (Queensland College of Teachers) Act 2005* (Qld); and

(i) any child related employment screening units that the parties, under Part 7 of this memorandum, agree may participate in the exchange in the future and that the parties add to this schedule.

† For the purposes of this memorandum, a mere change in the name of a unit listed above does not affect the unit's continued participation in the exchange.

Schedule 3

Model consent principles

The following model consent principles were agreed by the project implementation committee in September 2009 as the model principles that participating screening units' consent forms will reflect. Participating screening units may tailor the wording as appropriate to their situation.

The following principles must be included in the consent model:

1. A declaration that the name provided is true and correct;
2. All names and aliases have been disclosed;
3. The applicant has read the contents of any instructions and/or guidelines associated with the application;
4. The applicant provides consent to the screening unit to obtain from the police, courts, prosecuting authority or other authorised agency and for the police, courts, prosecuting authority or other authorised agency to disclose to the screening units ANY information for the purposes of assessing the applicants' suitability to work with children;
5. A description of the type of information which may be obtained;

The following model consent is provided as a guide to wording that suitably captures the above principles:

I.....*(Full Name of Applicant)*.....declare:

- I am the applicant named in this form. All information and identification documents provided for this application are true and correct;
- I have not omitted any names or aliases that I use or have used in the past;
- I have read the contents of this form, and any application guidelines/instructions provided;
- I understand that providing false or misleading information may be an offence / or may result in a decision to reject my application;
- I consent to *(insert name of screening authority)* obtaining ANY information from any police, court, prosecuting authority or other authorised agency and for the police, courts, prosecuting authority or other authorised agency to disclose ANY information, for the purposes of assessing my suitability to work with children;
- The information obtained includes but is not limited to details of convictions and pending or non conviction charges or circumstances information relating to offences committed or allegedly committed by me, regardless of when and where the offence or alleged offence occurred.

The following is provided as a guide to the wording of additional clauses which are optional if relevant to the particular screening agency:

- I acknowledge that any information obtained as part of the check may be used by Australian police agencies for law enforcement purposes; including the investigation of any outstanding criminal offences where the sharing of information is permissible within the laws of that State/Territory;
- In consideration of carrying out my request, I hereby release and agree to fully indemnify officers of the CrimTrac Agency, all Australian police agencies and the

Commonwealth, States and Territories of Australia, its servants and agents against all actions, suits, proceedings, causes of actions, costs, claims and demands whatsoever which may be brought or made against it or them by me or by any body or person by reason of or arising out of the release of such Information;

- I hereby consent to ongoing checks of the records held by the police, courts, prosecuting authorities and other authorised agencies relative to me from time to time whilst my Working with Children Check remains in force. While I understand that I am at liberty to withdraw my consent for ongoing checking at any time I also understand that I will not be able to continue in my working with children role as a result of withdrawal of this consent.

Schedule 4

Circumstances information - Fees payable and billing guidelines

Schedule 4, Part 1 – Fees payable for circumstances information

Police services have assessed their costs of locating, retrieving and sending circumstances information and, based on those costs, have set the fees for supplying circumstances information to participating screening units (only payable by interstate participating screening units) as follows:

- $37 if the information is held by the AFP (in relation to Australian Capital Territory or Commonwealth offences or alleged offences);
- $30 if the information is held by NSW police;
- $42 if held by Victoria police;
- $36 if held by Western Australian police;
- $25 if held by South Australian police;
- $28 if held by Northern Territory police, higher if retrieval takes more than 30 minutes;
- $36 if held by Tasmanian police; and
- in relation to circumstances information held by Queensland police, the fee for an interstate participating screening unit is the same as the fee set by the screening unit's respective police service for the interstate supply of circumstances information.

Police services advise that GST is not applicable to the fees.

Schedule 4, Part 2 – Billing guidelines for circumstances information

Unless the relevant participating screening unit and interstate police service agree to alternative arrangements or agree to modify these guidelines, the following three guidelines apply to police services billing of participating screening units for supplying circumstances information:

A. The supplying police service will invoice the requesting interstate participating screening unit for circumstances information, if any, supplied during the previous calendar month.

B. The fee will apply to circumstances information relating to each offence or alleged offence, unless the relevant police prosecution brief covers more than one offence or alleged offence for which circumstances information is sought, in which case one fee will apply.

C. Disputes about charging or billing will be settled between the supplying police service and the requesting interstate participating screening unit.

The Parties have confirmed their commitment to this agreement as follows:

Signed for and on behalf of the Commonwealth of Australia by

Mr Terry Moran
Secretary
Department of the Prime Minister and Cabinet
26 November 2009

Signed for and on behalf of the State of *New South Wales by*

Mr John Lee
Director General
Department of Premier and Cabinet (NSW)
26 November 2009

Signed for and on behalf of the State of Queensland by

Mr Ken Smith
Director General
Department of the Premier and Cabinet (Qld)
26 November 2009

Signed for and on behalf of the State of South Australia by

Mr Chris Eccles
Chief Executive
Department of the Premier and Cabinet (SA)
26 November 2009

Signed for and on behalf of the Australian Capital Territory by

Mr Andrew Cappie-Wood
Chief Executive
Chief Minister's Department
26 November 2009

Signed for and on behalf of the State of Victoria by

Ms Helen Silver
Secretary
Department of Premier and Cabinet (Vic)
26 November 2009

Signed for and on behalf of the State of Western Australia by

Mr Peter Conran
Director General
Department of the Premier and Cabinet (WA)
26 November 2009

Signed for and on behalf of the State of Tasmania by

Mr Rhys Edwards
Secretary
Department of Premier and Cabinet (Tas)
26 November 2009

Signed for and on behalf of the State of Northern Territory by

Mr Mike Burgess
Chief Executive
Department of the Chief Minister
26 November 2009

Extract from
COUNCIL OF AUSTRALIAN GOVERNMENTS MEETING

CANBERRA

29 November 2008

COMMUNIQUE

Preamble

The Council of Australian Governments (COAG) held its 24th meeting today in Canberra. The Prime Minister, Premiers, Chief Ministers and the President of the Australian Local Government Association, were again joined by Commonwealth, State and Territory Treasurers. The meeting was held against the backdrop of great uncertainty concerning the global economy and continuing turbulence in financial markets. Leaders and Treasurers resolved to meet the challenges of the global financial crisis head on. COAG agreed to press forward with reforms necessary for Australia to weather the impact of the current international economic and financial difficulties, and to meet the longer term imperative for the nation of boosting productivity and workforce participation, and improving the delivery of services to the community. Many of the reforms that Leaders and Treasurers agreed upon today are about improving health and education and training outcomes. Significant additional resources have been allocated to these areas. As well, a new era in federal financial relations was inaugurated with major reforms to specific purpose payments arrangements in particular. The Intergovernmental Agreement (IGA) and other documents giving effect to these new arrangements are to be finalised by COAG Senior Officials no later than 12 December 2008.

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Inter-Jurisdictional Exchange of Criminal History Information for People working with Children

Leaders agreed in principle at the April 2007 COAG meeting to a framework to improve access to inter-jurisdictional criminal history information by child-related employment screening schemes.

COAG at this meeting affirmed the importance of an inter-jurisdictional exchange being put in place as soon as possible, and endorsed a set of implementation actions, the establishment of a project implementation committee under the auspices of COAG and an implementation plan. The implementation plan includes that jurisdictions will prepare, introduce and seek passage of legislative amendments within nine months, to enable the information exchange to commence in 12 months. COAG noted that all jurisdictions, with the exception of Victoria and the Australian Capital Territory, would exchange information on non-conviction charges for screening of people working with children.

APPENDIX 3

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

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FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. **Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?**
2. **Is the Bill consistent with principles of natural justice?**
3. **Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons? Sections 44(8)(c) and (d) of the *Interpretation Act 1984*. The matters to be dealt with by regulation should not contain matters that should be in the Act not subsidiary legislation.**
4. **Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?**
5. **Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?**
6. **Does the Bill provide appropriate protection against self-incrimination?**
7. **Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?**
8. **Does the Bill confer immunity from proceeding or prosecution without adequate justification?**
9. **Does the Bill provide for the compulsory acquisition of property only with fair compensation?**
10. **Does the Bill have sufficient regard to Aboriginal tradition and Island custom?**
11. **Is the Bill unambiguous and drafted in a sufficiently clear and precise way?**

Does the Bill have sufficient regard to the institution of Parliament?

12. **Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?**
13. **Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?**
14. **Does the Bill allow or authorise the amendment of an Act only by another Act?**
15. **Does the Bill affect parliamentary privilege in any manner?**
16. **In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?**

APPENDIX 4

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 5

SUMMARY OF CONSULTATION

APPENDIX 5

SUMMARY OF CONSULTATION

Extract from letter dared 15 February 2010 from Mr Terry Murphy, Director General, Department of Child Protection

Consultation

A summary of the consultation about the terms of the Bill is as follows:

- Amendments to expand criminal history information to be received and compliance measures are supported by WA Police, Department of the Attorney General, Department of Corrective Services, Department of the Premier and Cabinet;

- Amendments to expand information that can be provided where it is in the public interest are supported by those regulated to receive this information including WA Police, WA College of Teachers, Departments of Communities, Health and others;

- Amendments to the provisions regarding review by the State Administrative Tribunal are supported by the President of the State Administrative Tribunal;

- Amendments to the provisions regarding education providers were supported in a workshop with various universities, colleges, the Department of Education and Training and others, including the Small Business Development Corporation; and

- Department of Treasury and Finance has examined and considered this Bill to be satisfactory

APPENDIX 6

GUIDELINES APPLICABLE TO CONSIDERING CLASS 3 OFFENCES

APPENDIX 6

GUIDELINES APPLICABLE TO CONSIDERING CLASS 3 OFFENCES

Non-scheduled Offences

The Act enables the consideration of other offences not listed as Class 1 or Class 2 offences (Non-scheduled offences). The Act however requires that only convictions for Non-scheduled offences impact on the final assessment outcome of a Working with Children Check.

This group of offences is broad and varied involving behaviours that may or may not indicate a likelihood of harm to children. Included in this group may be offences that whilst not targeting children directly indicate a pattern of behaviour that raises concern for the safety of children and hence warrant close consideration in the overall assessment of a person's suitability to engage in child related work.

It is critical for this group of offences that the relevance to child related work is established during the assessment process. In general Non-scheduled convictions requiring close consideration will entail one or more of the following factors:

- Involvement or targeting of children either directly or indirectly
- Violence and/or coercion
- Elements of sexual activity or deviance
- Elements of deprivation of liberty or disabling behaviour
- Behavioural patterns of concern to the safety of children. This is particularly important where elements of "grooming behaviour" are identified in the person's interactions with children.
- Dealing in illegal substances, where children may be involved directly or indirectly.

A list of Non-scheduled convictions requiring particular consideration in a Working with Children Check is found in appendix 2. It should be noted that this list is not exhaustive and should be used as an "alert" only.

DEFAULT POSITION 9
The applicant has a conviction for a Non-scheduled offence committed either as an adult or juvenile.

s12(5)
If the CEO is aware of an offence (other than a Class 1 offence or a Class 2 offence) of which the applicant has been convicted, the CEO is to issue an assessment notice to the applicant unless the CEO is satisfied that, because of the particular circumstances of the case, a negative notice should be issued to the applicant.

Under section 12(5) of the Act, the CEO **must** issue an Assessment Notice to an applicant who has been convicted of a Non-scheduled offence **unless** the CEO is satisfied that **particular circumstances exist** that when taken into consideration justify the denial of an Assessment Notice to the applicant and the issue of a Negative Notice. The CEO must consider the best interests of children as paramount in the determination of this outcome.

Non-scheduled offences encompass a broad range of behaviours that may or may not indicate a likelihood of harm to children. Included in this group may be offences that whilst not targeting children directly indicate a pattern of behaviour that raises concern and warrant close consideration in the overall assessment for the a Working with Children Check. It is therefore important that Non-scheduled convictions are assessed for the existence of particular circumstances that make the offence relevant to the safety of children. A list of Non-scheduled offences tagged as "alerts" for particular consideration is included in appendix 2.

Where the CEO determines that particular circumstances exist, the CEO must advise the applicant that it is proposed to issue a Negative Notice. The applicant will be given details of the offences that impact on this decision, the reasons for the proposed decision and be invited to submit a submission containing any information he or she feels the CEO should consider in making a final assessment determination of the application. Information contained in the applicant's submission and information received from other sources must be considered by the CEO is making the final assessment determination. .

If the CEO is proposing to issue of a Negative Notice, consideration needs to be given to whether an Interim Negative Notice is required to be issued. This will be dependent on the information the CEO has available and whether this clearly indicates that the safety of children would be at immediate risk should the applicant continue or commence in child related work. Given the nature of Non-scheduled offences, the issue of Interim Negative Notices in these circumstances would not be a common occurrence.

If the final decision is to issue a Negative Notice, the CEO must advise the applicant, in writing, of this decision and reasons for it. The applicant must also be advised of the right to have this decision reviewed by the State Administrative Tribunal and to be provided with details of the review process. The CEO must also advise and provide a copy of the Negative Notice to the applicant's employer where applicable.

Where the final decision is for the issue of an Assessment Notice, the CEO must advise the applicant in writing and issue the applicant with an Assessment Notice in the form of a Criminal History Evaluation Card. The CEO must also provide a copy of the Assessment Notice to the applicant's employer if applicable.

The CEO must inform the applicant and the applicant's employer (if applicable) of their obligations regarding advising the CEO of any relevant changes to the applicant's criminal history during the lifespan of the Assessment Notice.

APPENDIX 2

"ALERT" NON-SCHEDULED OFFENCES

Legislation	Offence
Criminal Code 1914 (WA)	S.204A Showing offensive material children under 16. S292 Disabling in order to commit indictable offence s.293 Stupefying in order to commit indictable offence s294 Acts intended to cause grievous bodily harm or prevent arrest. s.301(1) Unlawfully wounding another s. 301(2) Unlawfully, with intent to injure or annoy, causes poison or other noxious thing to be administered s. 329(7)(8) Lineal relatives 18 or over who engage in consensual sexual penetration. S333 Deprivation of liberty s.338 Stalking s562 Accessory after the fact to indictable offence (if indictable offence means murder or wilful murder)
Misuse of Drugs Act 1981	s.6(1) Offences concerned with prohibited drugs s.7 Offences concerned with prohibited plants generally
Prostitution Act 2000 (WA)	s.9 Promoting employment in prostitution industry s.15 Acting as a prostitute for a child s.19 Child not to seek services of prostitute s.20 Prostitution at place where child is present s.21 Allowing child to be at place involving prostitution
Animal Welfare Act 2002 (WA)	s.19 Cruelty to animals

APPENDIX 7

CLAUSE 9, PROPOSED SECTION 17 OF THE WORKING WITH CHILDREN (CRIMINAL RECORD CHECKING) AMENDMENT BILL 2009

APPENDIX 7

CLAUSE 9, PROPOSED SECTION 17

9. Section 17 replaced

Delete section 17 and insert:

17. CEO may require certain people to apply for assessment notice

(1) If the Commissioner reasonably believes that a person charged with or convicted of an offence —

(a) is a person in respect of whom the CEO may ask for information under section 34; or

(b) carries out child-related work,

and the Commissioner reasonably believes that the charge or conviction makes it inappropriate for the person to continue to carry out child-related work or have an assessment notice, the Commissioner may give the CEO notice of —

(c) the person's name and address; and

(d) the person's date of birth; and

(e) the offence with which the person has been charged or of which the person has been convicted; and

(f) the details of the offence; and

(g) the date of the charge or conviction.

(2) The Commissioner may give notice under subsection (1) despite another Act or law.

(3) If the CEO is satisfied that there are reasonable grounds for believing that a person in respect of whom the CEO has been given notice under subsection (1) or information under section 34 —

(a) carries out child-related work or has a current assessment notice; and

(b) has been charged with or convicted of an offence, being a charge or conviction of which the CEO was not previously aware and the charge or conviction makes it inappropriate for the person to continue to carry out child-related work or have an assessment notice,

the CEO may —

(c) if the person does not have a current assessment notice, give the person a written notice requiring the person to apply, within 10 days after the date of the notice, for an assessment notice; or

(d) if the person has a current assessment notice, make a decision under section 12 as if —

(i) an application had been made by the person under section 9 or 10, as the case requires; and

(ii) a reference in section 12 to issuing an assessment notice were a reference to issuing an assessment notice or a further assessment notice.

(4) A person must comply with a notice given to the person under subsection (3)(c) within the period referred to in that paragraph.

Penalty: a fine of $1 000.

(5) It is a defence to a charge of an offence under subsection (4) to prove that, at the time the offence is alleged to have been committed, the person was not carrying out child-related work.