GOVERNMENT OF
WESTERN AUSTRALIA

**Minister for Child Protection; Community Services;
Seniors and Volunteering; Women's Interests**

Our Ref: 36-03993

The Honourable Adele Farina MLC
Chairperson
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council Committee Office
18 – 32 Parliament Place
WEST PERTH WA 6000

Dear Ms Farina

Re: Report 45 – *Working with Children (Criminal Record Checking) Bill 2009*

I refer to the above report by the Standing Committee on Uniform Legislation and Statutes Review ("the Committee").

I provide the following responses to the Committee's recommendations:

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

As a result of the proposed amendments contained in the *Working with Children (Criminal Record Checking) Bill 2009* (the Bill), it is anticipated that some amendments will be required to the *Working with Children (Criminal Record Checking) Regulations*. Regulation 11A of these regulations may require amending to be consistent with the proposed amendments to section 11 of the *Working with Children (Criminal Record Checking) Act 2004* (the WWC Act) contained in Clause 6 of the Bill.

The proposed amendments to the *Spent Convictions Act 1988* will require regulations prescribing persons entitled to receive spent conviction information from Western Australia. I understand that the responsibility for administering the *Spent Convictions Act 1988* rests with the Attorney General, and not me. It will be necessary for officers within the Department of the Attorney General to draft suitable regulations, in consultation with officers from the Department for Child Protection (the Department) and the Department of the Premier and Cabinet.

It is for this reason that it is considered necessary for the Bill to be drafted without specifying a date for proclamation.

Level 10, London House, 216 St Georges Terrace, Perth WA 6000
Phone: 9222 8950 Fax: 9222 8951 Email: minister.mcsweeney@dpc.wa.gov.au

Other than the necessary time required to make required regulations and to make the necessary administrative changes to work processes within the Working with Children Screening Unit, Department for Child Protection, there is currently no intention to delaying the proclamation of the Bill.

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 s. 203 of the *Criminal Code* (contrary to the case law which states a narrow definition should be applied).**

The amendments proposed in Clause 7 that are contained in item 7 of the table are considered to be of considerable importance to the effective administration of the Act, and to advance child protection by preventing people who are an unacceptable risk of harming a child, physically or sexually, from carrying out work that provides contact with children, and the opportunity to develop relationships of trust with children through their work.

It operates in conjunction with several other pieces of legislation, all aimed at better protecting children from harm. The *Children and Community Services Act 2004* strives to protect children from harm in a domestic / familial setting. The *Community Protection (Offenders Reporting) Act 2004* requires the ongoing monitoring of child sex offenders in the community.

The WWC Act requires mandatory criminal record checking of people who seek to work in a specified range of work that has been identified as placing people in regular contact with children. The criminal record check requires a consideration of certain charges that did not result in a conviction and all convictions (including convictions as a child and spent convictions). Because of this, convictions dating back many decades are required to be considered (although appropriate weighting of the passing of time since the offence was committed is required). Offences dealing with unlawful behaviour of a sexual nature have undergone several major amendments since the early 1980s.

A few actual examples have been encountered by the Department's officers responsible for administering the WWC Act, in which a person is convicted of an offence (such as common assault) not readily identifiable as an offence of a sexual nature, but in committing the offence the applicant has behaved in a way that indicates the applicant has sexually harmed a child. In these cases the protection of children will be better achieved through applying a higher test. A Negative Notice will be issued unless there are *exceptional circumstances* instead of the current situation, where a Working with Children Card is issued unless there are particular circumstances requiring a Negative Notice.

It is not possible to prescribe these offences as Class 1 or Class 2 offences, because in the vast majority of cases for these other offences such as common assault, a person has not

harmed a child in committing these offences. Prescribing these offences to be Class 1 or Class 2 offences would put a substantial number of people in a situation where they can only receive a Working with Children Card if there are exceptional circumstances, when most of these cases do not indicate that a person has harmed a child.
It is not necessary to statutorily define the term "indecency". This approach is consistent with other statutes in force in Western Australia, notably the *Criminal Code*.

The proposed amendments have been drafted in such a way as to intend to capture behaviour that is an affront to sexual modesty or an act that provides sexual gratification. Although the Queensland case provided in the Committee's report is helpful, the relevant law in force in Western Australia for defining the term "indecent dealing" is the case of *Drago v The Queen* (1992) 8 WAR 488. In order for conduct to amount to an indecent dealing, the conduct must involve the human body, bodily actions, or bodily functions in a sexual way and that it is not intended to target conduct which is simply outrageous or offensive to common propriety.

Further to this, the wording of the proposed amendment requires that an applicant has "performed an indecent **act**". It is understood that an "act" requires a physical act. In this regard, the interpretation proposed to be taken by those who administer the WWC Act will be consistent with the definition contained in the Queensland case suggested by the Committee.

Further, the *Criminal Code* would suggest that the act, as well as being indecent, must be committed in the presence of another person, or viewed by another person (section 319 (1) of the *Criminal Code*).

A finding that an applicant performed an indecent act is not the end of the assessment process for determining a person's suitability to be allowed to carry out child-related work. The nature of the offence needs to be considered, particularly in the context of its relevance to child-related work. It is anticipated that there will be cases involving indecent behaviour that have no relevance to a person's suitability to be in child-related work.

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**

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

The Court of Appeal has considered the WWC Act (in the case of *Chief Executive Officer, Department for Child Protection v Grindrod (No 2)* [2008] 36 WAR 39). The Court has

stressed that the WWC Act does not require the finding of certain facts, either to the criminal standard of proof beyond reasonable doubt or to the civil standard on the balance of probabilities. The Court has set the law that the WWC Act requires a consideration of the material properly before the officers administering the WWC Act to determine whether an applicant **might** cause harm, sexually or physically, to a child if the Applicant is permitted to carry out child-related work. The Court has further held that the Chief Executive Officer (CEO) or his delegates are entitled to act partly on facts and partly on reasonable suspicions.

If material indicates that an Applicant is a "low risk profile", then the CEO is to consider this and balance it with the effect to a child, if the person were to offend in a similar way in the future.

Other relevant factors that the CEO must consider are the Applicant's age at the time of committing an offence, the amount of time that has passed since the offence was committed and the nature of the offence and relevance of the offence to child-related work.

All factors listed in s. 12 (8) of the WWC Act must be considered, and properly weighted.

The Committee may wish to take into account recent findings by the Corruption and Crime Commission, in it's report *Sexual Contact with Children by Persons In Authority in the Department of Education and Training of Western Australia* (16 October 2006). The Commission criticised the approach taken by conducting investigatory proceedings seeking to reach a conclusion as to whether or not the allegations occurred.

The Court of Appeal has made it clear that in administering the WWC Act, and considering allegations made against an applicant, no finding of fact even on the balance of probabilities is required.

However, the Court of Appeal has held that there needs to be a thorough consideration of the reasons why a prosecution was discontinued and a determination of the apparent strength or weakness of the prosecution case.

The Department employs officers who have skills and experience in criminal law, and the Department has access to extensive materials to do with the prosecution of a criminal charge (prosecution witness statements, admissions by an accused, and court transcripts of the trial process). I am advised that the following steps (not an exclusive list) are considered in the cases of non-conviction charges:

(a) Consideration of the reasons made public as to why a prosecution was discontinued.

In cases where a prosecution was discontinued because there are no reasonable prospects of conviction, this can include the fact that an informed judgement has been made by prosecuting authorities that the evidence of the victim could not be accepted as credible. In these cases, the conclusion would be made that the prosecution case was extremely weak, and it would be inappropriate to take any adverse action against an applicant arising from these allegations.

(b) Consideration of the presence of any motive to fabricate a false complaint.

There have been cases where child sex allegations are only made following a separation between a child's parents, in the context of Family Court proceedings regarding contact to the child, and at the instigation of one of the child's parents. Careful attention is given to these cases.

(c) Multiple allegations.

Where more than one person comes forward with similar allegations against an Applicant, the relationship between the multiple accusers and their ability to have colluded together to make false allegations is considered and weighted.

(d) Corroboration.

The materials are examined for a consideration of any evidence capable of corroborating parts of an allegation made against an applicant. Cases that rely solely on the uncorroborated evidence of an alleged victim and where the applicant denies the allegations are treated extremely cautiously.

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).**

I am informed that the Western Australia Police Service (WA Police) have received a request to deal with this query, and that they will be providing the Committee with information shortly. I can confirm that contact has been made at an officer level between the Department and the WA Police to assist the Committee further.

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 21A(2) rather than proceeding to complete that assessment and, if required, issue a Negative Notice.

Natural justice is respected in the WWC Act. Currently, all applicants have a right to withdraw their application at any time until a final decision is made. If an application is withdrawn, the applicant is required to remove themselves from child-related work. Such an applicant is currently entitled to seek to commence other child-related work subsequent to this, but must apply for a Working with Children Card.

The discretion granted by proposed section 21A(2) to cancel an Assessment Notice without proceeding to the issuing of a Negative Notice is consistent with these existing natural justice provisions.

The cost of a WWC Card is subsidised by Government. In cases where proposed section 21A(2) applies, written notice has been received from a person that they have ceased child-related work. Substantial resources would be required to fully assess the application before a final decision is made (which is either the issuing of a WWC Card or a Negative Notice). In cases where a Negative Notice is issued, further substantial resources may be required if the applicant chooses to seek administrative or judicial review of the decision. Granted that the person is no longer in child-related work, and cannot commence child-related work in the future without being assessed, these resources can be better spent in other areas increasing child protection.

The WWC Act aims to prevent people with certain criminal charges or convictions from working with children, and this can be achieved when such persons cease carrying out child-related work.

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 WWC Act, which would allow an assessment to be made.

Similar to the response to Recommendation 5, in this situation the person has ceased to do child related work, thereby achieving the aim of the WWC Act. Resources required for intensive assessment will contribute more to the protection of children where used in situations where persons are proposing to work with children.

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

iii) **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**

iv) **all matters found in Schedule 1 of the Memorandum of Understanding for a national Exchange of Criminal history information for People Working with Children.**

While the administration of the *Spent Conviction Act* is not my responsibility, contact has been made at an officer level between the Department and the Department of the Attorney General.
I understand that both the Department of the Attorney General and Parliamentary Counsel have advised against amending Clause 27 to give force of law to the Memorandum of Understanding (MOU). The MOU has been entered into by all States and Territories of Australia. Such an amendment suggested by the Committee could make it impossible to amend the MOU in the future, as there is a risk of being held in contempt of Parliament. Further, the MOU is a temporary agreement, until an Inter Governmental Agreement can be entered into.

The intention of this Clause is clearly described in the Explanatory Memoranda to the Bill.

Recommendation 8:
The Committee recommends that the Working with Children (Criminal Record Checking) 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.

The Department of the Attorney General have suggested that in order to have maximum effectiveness, the review and report to the Legislative Council should occur within three years of the commencement date of the Bill.

Thank you for brining this matter to my attention.

Yours sincerely

26 MAR 2010

R McSweeney

Robyn McSweeney MLC
MINISTER FOR CHILD PROTECTION; COMMUNITY SERVICES; SENIORS AND VOLUNTEERING; WOMEN'S INTERESTS