NATIONAL DISABILITY INSURANCE SCHEME (WORKER SCREENING) BILL 2020

EXPLANATORY MEMORANDUM

Overview

The National Disability Insurance Scheme (Worker Screening) Bill 2020 (the Bill) is the Bill for an Act to provide for the screening of workers in connection with the operation of the National Disability Insurance Scheme (NDIS). The Department of Communities is the department with responsibility for assisting the Minister for Disability Services in the administration of the Act. Accordingly, the CEO of Communities has key responsibilities under the Act.

In March 2013, the Commonwealth's *National Disability Insurance Scheme Act 2013* (NDIS Act) was passed. The National Disability Insurance Agency (NDIA) was established and is responsible for delivering the National Disability Insurance Scheme (NDIS). The NDIS provides support to people with disability, their families and carers.

In December 2016, the Council of Australian Governments Disability Reform Council endorsed the NDIS Quality and Safeguarding Framework (Framework). The NDIS Quality and Safeguards Commission (NDIS Commission) was established to implement the Commonwealth's obligations under the Framework. The Framework sets out a nationally consistent approach to regulation of services and supports delivered under the NDIS and a key element of this includes worker screening to minimise the risk of harm to people with disability who receive NDIS supports and services.

In June 2019, the Premier signed the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme* (IGA) which sets out the national policy for worker screening. Under the IGA, each State and Territory has responsibilities which include the introduction of legislation to establish a scheme for the screening of NDIS workers, consistent with the IGA.

The implementation of nationally consistent NDIS worker screening will result in NDIS worker screening decisions being portable across jurisdictions and employers within the NDIS.

Western Australia, like other jurisdictions, will be responsible for conducting worker screening checks and undertaking ongoing monitoring, by reference to national criminal records and other information, of all workers cleared under NDIS worker screening across Australia.

The intention of the Bill is to introduce a high standard of screening for persons who engage in NDIS work. Ensuring, as far as is possible, that those working with people with disability are safe to do so requires a range of strategies. Worker screening is an important component of these strategies.

This legislation for worker screening in Western Australia aims to contribute to the protection of people with disability from harm by:

- deterring individuals who pose a risk of harm to people with disability from applying to work in the sector;
- reducing the potential for providers to employ workers who pose an unacceptable risk of harm to people with disability; and
- establishing consistent standards for worker screening.

The Bill also includes provisions to allow for the investigation and prosecution of offences contained in the Bill.

The Bill proposes amendments to the *Working with Children (Criminal Record Checking) Act 2004* as people engaged in certain roles under the NDIS will also require an assessment

notice (also known as a WWC Card), if they are carrying out child-related work. The amendments seek to achieve efficiencies and minimise costs and resources required in information sharing between the two systems where possible.

The Bill also proposes amendments to the *Spent Convictions Act 1988* to enable the sharing of spent convictions information as intended and envisaged in the IGA.

Provisions in the Bill

Part 1 Preliminary

Clause 1 Short title

Provides for the Bill to be cited as the *National Disability Insurance Scheme (Worker Screening) Act 2020* (the Act).

Clause 2 Commencement

Part 1 of the Bill will come into operation on the day that the Bill receives Royal Assent and the rest of the Bill on a day fixed by proclamation and allows for different dates to be set for different provisions.

The provision allowing different dates to be set for different provisions is necessary as regulations will be required to be made pursuant to provisions in the Bill and one provision is subject to amendments to other legislation being introduced (e.g. clause 23 is subject to the introduction of amendments to the *Working with Children (Criminal Record Checking) Act 2004* to extend the duration of a WWC Card).

Following the recommendation of the Standing Committee on Uniform Legislation and Statutes Review in its Report 130, the Bill will provide that if no day is fixed for the rest of the Bill to come into operation at the end of 10 years following the Act receiving Royal Assent, then the Act is repealed the day after the expiry of that period. However, if a provision of the Bill has not come into operation before the end of 10 years from the date of Royal Assent, that provision is repealed the day after the expiry of that 10 year period.

Clause 3 Act binds Crown

This clause provides that the Act binds the State, which means that all departments and state agencies are subject to the provisions of the Act.

Clause 4 Paramount consideration

Provides the paramount consideration of the CEO and the State Administrative Tribunal, in performing functions under the Bill, must be the safety and wellbeing of people with disability and, in particular, their right to live free from abuse, violence, neglect and exploitation.

Clause 5 Terms used

Clause 5 defines terms and expressions used throughout the Bill. These terms have been defined to ensure the provisions of the Bill are interpreted and applied in the manner intended. Of particular note are the following terms:

"corresponding law" – This provides for legislation in other States and Territories substantially corresponding with this Bill to be prescribed in the regulations.

"criminal record" – This will capture every conviction (including spent and juvenile convictions) and every charge (including pending and non-conviction) made against a person for an offence in Western Australia or another jurisdiction.

"designated person" – This definition captures any person who has:

- applied for a clearance under this Act or a corresponding law;

- a clearance under this Act or a corresponding law;
- applied for cancellation of an NDIS worker check exclusion certificate under this Act or a corresponding law; or
- applied for internal review or external review under this Act or a corresponding law.

The term is used for the purposes of notices being given to the CEO under clauses 35 and 36.

"engage" includes to engage or act in any of the following capacities:

- as a paid or unpaid employee;
- as a self-employed person or as a contractor;
- as a volunteer.

This captures a person who is employed or engaged in any capacity.

"exclusion" – This definition captures any decision upon which an NDIS worker check exclusion certificate is issued.

"harm" - This definition provides that harm includes but is not limited to any detrimental effect on a person's physical, sexual, psychological, emotional or financial wellbeing.

"interstate screening agency" – This definition will capture equivalent worker screening agencies in another jurisdiction that administer a corresponding law and exercise functions that substantially correspond with the functions of the CEO under this Act.

"NDIS Commission" – This is the NDIS Quality and Safeguards Commission established under the NDIS Act.

"NDIS purpose" – This provides guidance to the CEO in executing powers and duties under this Act and includes any purpose that is for, or connected with, the operation or administration of, or compliance with, this Act, the NDIS Act or a corresponding law.

"NDIS work" – This term is concerned with all work comprising, or connected with, the provision of supports or services to people with disability under the NDIS. It includes work that requires an NDIS worker check clearance under that Scheme or for which an NDIS worker check clearance is otherwise appropriate or necessary in the opinion of the CEO. This also captures those delegated with powers or duties under this Bill. There is also a power to prescribe exemptions in regulations.

"NDIS worker check clearance or **clearance" –** This definition captures any decision to grant a clearance under this Act or a corresponding law;

"NDIS worker check clearance certificate" – This is the certificate that is issued on the granting of a clearance. However, a "certificate" may be in any form, or represented in any manner, determined by the CEO.

"NDIS worker check exclusion certificate" – This is the certificate that is issued where an application for a clearance is refused, or where an existing clearance is cancelled because the person holding the clearance becomes a disqualified person or it is determined by the CEO on a risk assessment that there is an unacceptable risk that a person may cause harm to people with disability in the course of carrying out NDIS work. A "certificate" may be in any form, or represented in any manner, determined by the CEO.

"non-conviction charge" – This definition refers to any criminal charge that does not result in a conviction. This captures:

- charges that result in an acquittal after a trial;
- charges that are dismissed by a court or otherwise discontinued or withdrawn; and

- references to expunged convictions as defined in the *Historical Homosexual Convictions Expungement Act 2018*.

"notifiable person" – This definition includes any employer or proposed employer of an applicant or clearance holder in NDIS work or any other person prescribed by the regulations. This term has been used for the purposes of enabling the CEO to give notice of outcomes to a person who engages or proposes to engage a person in NDIS work and is a protective measure.

"relevant information" – This definition captures the different types of information that may be relevant to functions under the Bill. The term is essential to the information gathering and sharing provisions in the Bill.

"relevant risk of harm" – This definition means risk of harm to people with disability for which the NDIS Act, this Act or a corresponding law is concerned.

"unacceptable risk" – This definition captures the threshold for the risk of harm to people with disability, that makes it unacceptable for a person who may cause harm to people with disability to be engaged or employed in NDIS work.

"vulnerable person" – This definition captures any adult who is, or may be, unable to care for themselves, or unable to protect themselves from harm or exploitation, due to age, illness or disability. It is not intended to capture children. This term is used for the purposes of offence categorisation.

Clause 6 Class 1 offence and Class 2 offence

This clause establishes two classes of criminal offences – a 'Class 1 offence' and a 'Class 2 offence'.

Clauses 6(1)(a) and 6(2)(a) provide that criminal offences committed in Western Australia that are considered Class 1 or Class 2 offences are listed in Schedule 1 and Schedule 2 of this Bill respectively, subject to any conditions specified in those schedules or prescribed in regulations. Clauses 6(1)(a) and 6(2)(a) are Henry VIII clauses as they empower the Executive, by regulation, to qualify the operation of the Act under which they are made.

The conditions currently applied to the offences listed in Schedules 1 and 2 of the Bill have been agreed to nationally. The national policy for NDIS worker screening will continue to develop as legislation across jurisdictions is implemented. Clauses 6(1)(a) and 6(2)(a) provide the necessary flexibility to allow Western Australia to respond quickly and appropriately to introduce new or amended conditions to offences listed in Schedules 1 and 2 by regulation. This will assist in achieving and maintaining national consistency in the decision-making framework applied across jurisdictions.

Whether a person has been charged with, or convicted of, a Class 1 offence or Class 2 offence has significant consequences throughout the Bill. In particular, the existence of Class 1 offences and Class 2 offences are fundamental to:

- The determination as to whether a person is a 'disqualified person' or 'presumptively disqualified person' under Part 1 of the Bill;
- Whether a person is entitled to apply for a clearance under Part 2 Division 1 of the Bill or to cancel an exclusion under Part 2 Division 5 of the Bill;
- The CEO's decision on whether or not to grant a clearance to an applicant under Part 2 Division 1 of the Bill;
- Whether there is a presumption that the person is an unacceptable risk to people with disability when conducting a risk assessment under Part 2 Division 2 of the Bill.

Clauses 6(1)(b) and 6(2)(b) provide that a Class 1 offence or Class 2 offence includes offences under the law of other jurisdictions, where the elements of the offence would constitute an

offence under Class 1 or Class 2 (respectively) if the offence had occurred in Western Australia. This captures similar offences prosecuted interstate or overseas.

Clauses 6(1)(c) and 6(2)(c) enable the addition of Class 1 and Class 2 offences through regulations. Clauses 6(1)(c) and 6(2)(c) are Henry VIII clauses as they empower the Executive, by regulation, to expand the operation of the Act under which they are made.

Legislation in other jurisdictions may amend existing or introduce new criminal offences which should appropriately be captured as Class 1 or Class 2 offences. The necessity to reflect such new criminal offences by amendment to the Act resulting from the Bill may produce significant delays, resulting in inconsistencies in the application of the decision-making framework across jurisdictions and may result in workers with criminal records which include offences of concern remaining in NDIS work, without the appropriate level of scrutiny. Western Australia may more rapidly and appropriately respond to such legislative changes in other jurisdictions by the making of regulations to achieve and maintain national consistency in the decision-making framework applied across jurisdictions.

When changes are made to Western Australian laws which relate to offence provisions, relevant consequential amendments should be made to the Schedules of this Act. However, clauses 6(1)(c) and 6(2)(c) provide the necessary flexibility for Western Australia to make appropriate and necessary regulations to capture Western Australian offences in circumstances where consequential amendments have not been made. This will ensure this Act continues to achieve and maintain national consistency in the decision-making framework applied across jurisdictions.

Clauses 6(1)(d) and 6(2)(d) provide that offences of a kind referred to under Schedules 1 and 2, committed before the commencement of the legislation, are to be treated as a Class 1 or Class 2 offence, as appropriate. These clauses capture repealed offences under Western Australian laws or the laws of another jurisdiction which are of a kind to the offences referred to in subclause (1) and (2) respectively.

Clauses 6(1)(e) and 6(2)(e) provide that the offences of attempting, or of conspiracy or incitement to commit a Class 1 or Class 2 offence will themselves be considered a Class 1 or Class 2 offence respectively.

Clause 6(3) provide that an offence ceases to be a Class 1 or Class 2 offence if a pardon is granted in relation to that offence. In such circumstances, a risk assessment would be conducted.

Some offences listed in the Schedules have been included as Class 1 only if a condition is satisfied that they do not fall within the ambit of clause 6(4). If those offences do fall within the ambit of clause 6(4) then they are to be treated as Class 2 offences. This was done in recognition of the fact that some sexual offences may be committed by a young adult against a child where both parties would give consent if legally able (e.g. an 18 year old and 15 year old). Clause 6(4) sets out that if the victim of the offence is a child who has reached the age of 14 and the age difference between the victim and the offender does not exceed 5 years then the offence is considered to fall within the ambit of that clause.

Clause 7 **Conviction**

A reference to a conviction under this Bill is a reference to:

- a court making a formal finding of guilt in relation to the offence;
- a court convicting a person of an offence, where there has been no formal finding of guilt before conviction;
- a court accepting a guilty plea in relation to an offence;

- an acquittal following a finding under s.27 of the *Criminal Code* (or an equivalent provision in another jurisdiction) that the person is not guilty of the offence on account of unsoundness of mind;
- a conviction that is a spent conviction under a law of any jurisdiction;

but does not include a conviction that is subsequently quashed or set aside by a court.

Under clause 7(3), a conviction becomes a spent conviction for the purposes of this Bill if, under any law in any jurisdiction, the person concerned is permitted not to disclose the fact that he or she was convicted or found guilty of the offence.

Clause 8: Disqualified person and presumptively disqualified person

Clause 8(1) defines a disqualified person as a person who has recorded on their criminal record a conviction for a Class 1 offence committed by the person when an adult.

Clause 8(2) defines a presumptively disqualified person as a person with:

- a pending charge against the person for a Class 1 or Class 2 offence allegedly committed when an adult;
- a conviction for a Class 2 offence committed by the person when an adult;
- a conviction for a Class 3 offence:
    - committed by the person when an adult; and
    - the offence was committed against, towards, or in the presence of a child or vulnerable person; and
    - the CEO reasonably believes that in the course of committing the offence the person committed an indecent act.

Clause 9: Conduct, circumstances and criminal matters before commencement of Act

Clause 9(1) provides that a person's conduct or circumstances that have occurred prior to the commencement date are captured by the Bill.

Clause 9(2) indicates that any reference in the Bill to convictions or charges extends to those that occurred when a person was a child and prior to the commencement of the Act.

Part 2 NDIS worker check clearances and exclusions

Division 1 Applications for clearance

Clause 10 Making an application

Clause 10 provides that a person may apply to the CEO for a clearance if they are engaged, or proposed to be engaged in NDIS work and:

- they reside, or intend to reside, in Western Australia; or
- undertake, or intend to undertake, NDIS work in Western Australia.

This provision enables a person to apply for an NDIS worker check clearance if they are engaged, or proposed to be engaged:

- in a risk-assessed role for a registered NDIS provider including if self-employed;
- in a risk-assessed role for a subcontractor contracted by a registered NDIS provider;
- in any role to carry out NDIS work, by an unregistered NDIS provider including if self-employed.

- in work that the CEO is satisfied is work in respect of which it is otherwise necessary or convenient for a person to have a clearance.

This reflects the requirements of the IGA and the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (Cth).

Clause 10(3) and (4) require the application to be in the approved form, which is to include provision for identifying information about the applicant and information about an employer or proposed employer engaging or proposing to engage them in NDIS work and accompanied by the fee prescribed in the regulations.

The approved form is also to provide for the consent or authorisation of the applicant for the CEO to obtain all information relevant for the proper consideration of the application including for the purpose of ongoing monitoring for the duration of an NDIS worker check clearance certificate.

Clause 10(9) permits the CEO to ask an applicant to provide, within a reasonable specified time, any further information or documents that the CEO reasonably needs for the proper consideration of the application.

Additional requirements in relation to the application and other matters, may be prescribed in regulations.

Clause 11 Certain persons not entitled to apply

This clause sets out that a person cannot apply for a clearance if they:

- are a disqualified person who was refused a clearance or had a clearance cancelled under this Bill or a corresponding law;
- have a current pending application under this Bill or a corresponding law;
- currently have a clearance under this Bill or a corresponding law unless the application is made no more than 3 months before the expiry or the clearance or as approved for applying earlier under cl 23(1)(c); or
- are subject to a 5-year ban on applying for a clearance following the refusal or cancellation of a clearance.

A person who has had a clearance refused or cancelled in Western Australia or another jurisdiction is not entitled to apply for 5 years following that decision. This restriction does not apply in relation to a cancellation that was made at the request of the person or by the CEO under sections 25(2) or 38(2) or an equivalent provision under a corresponding law.

Clause 12 Determination of application

Before a determination can be made on an application for a clearance, the CEO must:

- carry out a criminal record check; and
- consider any information provided by the NDIS Commission.

However, the information on which a decision may be made is not confined to criminal history information or information provided by the NDIS Commission. The CEO is not limited to the inquiries that may be undertaken or any other process that may be required to assess an application. For example, it may be necessary to request court records to categorise an offence.

If a risk assessment is to be undertaken, all matters that go to assessing the relevant risk may be considered; whether or not those matters relate to the triggering information (e.g. criminal history, disciplinary or misconduct outcome). All relevant information, including information that is not related to an applicant's criminal, disciplinary or misconduct record, may be considered and assessed. This includes all information going to the identification of potential risk and the mitigation of the identified risk.

An application for a clearance must be refused by the CEO if:

- the applicant is a disqualified person (a risk assessment will not be conducted); or
- a risk assessment is conducted, and the CEO determines that there is an unacceptable risk that the applicant may cause harm to people with disability in the course of carrying out NDIS work.

Clause 13 Interim bar

Clause 13(1) gives the CEO the power to impose an interim bar on an applicant if the CEO is of the opinion that there is a reasonable likelihood that a risk assessment will determine that there is an unacceptable risk that the applicant may cause harm to people with disability in the course of carrying out NDIS work or on any other ground determined by the CEO to be appropriate.

Clause 13(2) provides that an interim bar must be imposed by the CEO if:

- the applicant is a disqualified person or a presumptively disqualified person;
- the applicant has been issued with an NDIS worker check exclusion certificate on the last occasion that they applied for a clearance or held a clearance under a corresponding law; or
- the applicant is the subject of a risk assessment under a corresponding law.

An interim bar is imposed by giving written notice of the interim bar to the applicant.

Clause 13(4) provides that the CEO may also give written notice of an interim bar to:

- any person the CEO reasonably believes to be a notifiable person;
- the NDIS Commission; and
- any person or body exercising functions in the operation or administration of a relevant law (such as an interstate screening agency).

Interim bars are to remain in place until the application to which the interim bar relates is granted or refused. However, the CEO may, if the CEO considers it appropriate to do so, revoke an interim bar.

Anyone who received a written notice under clause 13(4) must also receive a written notice under clause 13(7) if the interim bar is later revoked or otherwise ceases to have effect.

Clause 14 Notice of proposed refusal of application

Clause 14(1) requires the CEO, if proposing to refuse to grant a clearance to an applicant, to give the applicant written notice of that proposal and provide the applicant with an opportunity to make a submission to the CEO within a period of at least 28 days.

If a submission is made by the applicant, then the CEO must consider such submission before a final decision is made. If the submission is made outside of the specified time period, then the CEO has discretion as to whether the information provided is to be considered.

Clause 14(3) provides that if the applicant is a disqualified person, the only submission that the applicant may make is that their criminal record does not include a conviction for a Class 1 offence committed when an adult. This may arise because:

- of mistaken identity (e.g. it relates to another person with the same name);
- the offence on their criminal record does not constitute a “Class 1 offence” as defined under this Bill.

This ensures that a person may raise an issue of mistaken identity or their criminal record is incorrect to enable appropriate enquiries to be made at the earliest opportunity.

Clause 15 **Notice of final decision**

The CEO must decide an application for a clearance under this Bill by granting a clearance or refusing to grant a clearance to the applicant.

In the event of a decision to grant a clearance, the CEO must provide the applicant with written notice and that notice must be accompanied by an NDIS worker check clearance certificate. An NDIS worker check clearance certificate can be in any form, or represented in any manner, determined by the CEO.

In the event of a decision to refuse to grant a clearance, the CEO must provide the applicant with written notice that must:

- set out the reasons for the CEO's decision;
- set out the time and manner in which an application for internal review of the CEO's decision can be made; and
- be accompanied by an NDIS worker check exclusion certificate.

An NDIS worker check exclusion certificate can be in any form, or represented in any manner, determined by the CEO.

Clause 15(6) permits the CEO to give notice of a decision on an application to any person the CEO reasonably believes to be a notifiable person, the NDIS Commission or a person or body exercising functions in the operation or administration of a relevant law.

Clause 16 **Withdrawal of application**

An application for a clearance can be withdrawn at any point unless:

- the applicant has been issued with an interim bar; or
- the CEO has notified the applicant of a proposal to refuse to grant a clearance; or
- the withdrawal would be contrary to any provision made in the regulations.

In addition, an application for a clearance will be deemed withdrawn if the CEO has given the applicant a written notice that the application is taken to be withdrawn in the following circumstances:

- the applicant has failed to provide to the CEO any information or documents requested under clause 10;
- the employer or proposed employer identified by the applicant fails, within a reasonable period, to verify that they engage or propose to engage the applicant in NDIS work; or
- the applicant has been issued with an NDIS worker check exclusion certificate in another jurisdiction after the application for a clearance was made in Western Australia.

The fact of withdrawal of an application may be disclosed to any person the CEO reasonably believes to be a notifiable person, the NDIS Commission or a person or body exercising functions in the operation or administration of a relevant law.

Division 2 Risk assessment

Clause 17 **Nature of risk assessment**

A risk assessment is an assessment and determination by the CEO as to whether there is an unacceptable risk that a person may cause harm to people with disability in the course of carrying out NDIS work.

Clause 17(2) sets out the principles that are relevant to determining whether a risk is an unacceptable risk to people with disability:

- the risk may arise from conduct that is intended or otherwise. Intention to commit harm is not required for conduct to constitute a risk of harm;

- the risk may arise from conduct that is attributable to a single act, omission or circumstance or a series or combination of acts, omissions or circumstances (whether actual or alleged). It is possible that risk can be identified as a result of a pattern of behaviour or from a single act, depending on the nature of the conduct;
- the risk does not need to arise from recent events;
- the risk may arise whether or not harm has been shown to have resulted from any past or alleged conduct. The focus of a risk assessment is on the potential for harm attendant on conduct rather than the actual extent of harm caused;
- the risk does not need to be based on an assessment as to whether any conduct is likely to reoccur. The focus must remain on future risk of harm and not risk of the particular conduct reoccurring;
- the risk does not need to be likely. The nature of the risk itself must be given weight and even if the person is considered a low risk of reoffending for release into the community, the seriousness of the risk may be of a nature that makes it unacceptable to take that risk.

Clause 17(3) sets out matters that are to be considered irrelevant to determining whether a risk of harm is unacceptable:

- whether any alleged conduct has not been proved beyond reasonable doubt or on the balance of probabilities. These standards of proof are developed for punitive and disciplinary reasons and are relevant to guilt rather than risk;
- the adverse impact on a person of a decision that will prevent them from holding, or continuing to hold, a clearance;
- any potential benefit that will result from a person holding, or continuing to hold, a clearance.

Clause 18 **Circumstances in which risk assessment will occur**

Clause 18(1) sets out that a risk assessment must be undertaken by the CEO when:

- the CEO is aware of a pending charge against the applicant in respect of a Class 1 offence or a Class 2 offence; or
- the CEO is aware that the applicant has a non-conviction charge in respect of a Class 1 offence or a Class 2 offence; or
- the CEO is aware that the applicant has been convicted of a Class 1 offence or a Class 2 offence for which a pardon has been granted; or
- the CEO is aware of a Class 2 offence or a Class 3 offence for which the applicant has been convicted; or
- the CEO is aware of a pending charge against the applicant in respect of a Class 3 offence and the CEO has reason to believe that an indecent act was performed by the applicant in the course of allegedly committing the offence or that the applicant engaged in conduct that was of a threatening or violent nature in the course of allegedly committing the offence; or
- the CEO is aware of a Class 1 offence for which the applicant has been convicted, committed by the applicant when a child; or
- the applicant has previously had a clearance refused or cancelled under this Act or a corresponding law; or
- the CEO is in possession of other specified information in subclause (3) that leads the CEO to consider that it is necessary or appropriate to conduct a risk assessment; or
- any circumstance prescribed by the regulations applies.

Clause 18(2) is providing the power for the CEO to reassess the holder of an NDIS worker check clearance certificate. A risk assessment of the holder of an NDIS worker check clearance certificate may therefore be undertaken by the CEO, if the CEO considers it necessary or appropriate to do so following receipt of any of the information set out in clause 18(3):

- information received from the applicant or holder of an NDIS worker check clearance certificate;
- information received from the NDIS Commission;
- information received from an interstate screening agency;
- information received from a criminal records agency;
- information received from a relevant official under section 35;
- information received from a prescribed authority under section 36;
- information prescribed by the regulations.

Clause 19 Risk assessment of presumptively disqualified person

When conducting a risk assessment for a presumptively disqualified person, the outcome must always be that an NDIS worker exclusion certificate is issued unless, because of the exceptional circumstances of the case, a clearance should be granted.

The term 'exceptional circumstances' describe a circumstance which is out of the ordinary course, or unusual or special or uncommon such that it is capable of creating an exception to the presumed outcome. It need not be unique or very rare, but it cannot be a circumstance that is normally or routinely encountered.

Clause 20 Matters to be considered in risk assessment

Clause 20 sets out the factors which must be considered for the purposes of a risk assessment:

- the safety and wellbeing of people with disability and, in particular, their right to live free from abuse, violence, neglect and exploitation, as the paramount consideration;
- the person's criminal, disciplinary, misconduct or other relevant history;
- the nature, gravity and circumstances of any criminal offending, misconduct or other action, circumstance or event relating to the person that is revealed by or referred to in any information in the possession of the CEO, and how it is relevant to NDIS work;
- any inferences or conclusions that may be drawn from 1 or more matters being considered by the CEO;
- the length of time that has passed since any relevant offending, misconduct or other action, circumstance or event occurred;
- the vulnerability of any victim of any relevant offending, misconduct or other action, circumstance or event at the time of its occurrence and the person's relationship to the victim or position of authority over the victim at that time;
- the person's conduct since any relevant offending, misconduct or other action, circumstance or event;
- anything else that the CEO reasonably considers relevant to the assessment.

The principles that are set out in clause 17 have been set out to help guide the application of the factors listed in clause 20 to a risk assessment.

Division 3 Duration and renewal of clearances

Clause 21 Duration of clearances

Clause 21(1) provides that a clearance remains in force for 5 years. This is subject to provisions in the Bill where an NDIS worker check clearance certificate may be cancelled.

Clause 21(2) allows the CEO to specify a date from which a clearance will take effect. This subclause has been included to ensure that clearance holders who apply for a further clearance before their initial clearance expires, are able to utilise their initial clearance for the full 5 years before their further clearance takes effect.

Clause 22 Application for further clearance

Clause 22(1) enables persons whose clearance has expired, or will expire within 3 months, to apply for a further clearance.

Clause 22(2) provides that an application for a further clearance is to be dealt with as if it were an application for an initial clearance.

Clause 23 Alignment with working with children checks

This clause facilitates an alignment between the period for which a clearance is granted to a person and the period for which a WWC Card is issued to a person under the *Working with Children (Criminal Record Checking) Act 2004.* This includes shortening the duration of a clearance and allowing a person to apply for a further clearance earlier than 3 months before the expiry of the clearance.

Relevant fees may be reduced or refunded as approved by the CEO.

Division 4 Suspension and cancellation of NDIS worker check clearance certificates

Clause 24 Suspension of NDIS worker check clearance certificates

Clause 24(1) sets out when the CEO may suspend a clearance:

- if the CEO has received information that leads the CEO to believe that it is necessary or appropriate to suspend the clearance pending a risk assessment;
- the holder of the clearance has applied for another clearance under a corresponding law and the CEO has been advised that an interim bar has been imposed in relation to the holder of the clearance under that corresponding law. This clause was introduced to allow the CEO to appropriately address the situation where clearance holders apply for a further clearance in another State or Territory within the final 3 months of the currency of the clearance issued in Western Australia and information has been identified in another jurisdiction which warrants their removal from NDIS work while their application is assessed. To ensure the intent of the national policy is implemented, it is essential to ensure such a person is unable to work in any jurisdiction while they are being assessed;
- on any other ground the CEO determines to be appropriate in the circumstances.

Clause 24(2) provides that the CEO must suspend an NDIS worker check clearance certificate if the CEO has received information which indicates that the holder of the clearance has become a disqualified or presumptively disqualified person since the clearance certificate was issued.

Clause 24(3) states that if the CEO issues an interim bar to the holder of a clearance, then the clearance is taken to be suspended while the interim bar is in place. This clause was included to ensure that people who are applying for a new clearance before their current clearance has expired are not permitted to continue to use their current clearance to remain in NDIS work despite being issued an interim bar on their reapplication.

Clause 24(4) provides for the CEO to give written notice of a suspension to:

- any person the CEO reasonably believes to be a notifiable person;

- the NDIS Commission;
- any person or body exercising functions in the operation or administration of a relevant law.

Clause 24(5) gives the CEO the power, if the CEO considers it appropriate to do so, to revoke a suspension.

Clause 24(6) sets out that, unless revoked sooner, a suspension ceases to have effect when:

- the clearance is cancelled; or
- the clearance expires; or
- in a case where an interim bar was imposed on reapplication, the interim bar ceases to have effect.

Anyone who received a written notice under clause 24(4) must also receive a written notice under clause 24(7) if the suspension is later revoked or otherwise ceases to have effect.

Clause 24(8) is to accommodate situations where a person applies for a further clearance within 3 months of the expiry of their current clearance. They may be issued with a new NDIS worker check clearance certificate which will only commence on the expiry of the current clearance certificate. Clause 24(8) enables the CEO to suspend a new clearance certificate that is yet to commence. This is needed for those situations where a reassessment is required, which will not be completed prior to the expiry of the current clearance certificate (which may also be suspended), and the commencement of the new clearance certificate.

Clause 25 Cancellation of NDIS worker check clearance certificates

Clause 25(1) provides that the CEO must cancel a clearance if:

- the CEO becomes aware that the person holding the clearance certificate is a disqualified person; or
- the CEO determines on a risk assessment that there is an unacceptable risk that the person holding the clearance certificate may cause harm to people with disability in the course of carrying out NDIS work.

Clause 25(2) sets out when the CEO may cancel a clearance:

- the CEO is not satisfied that the person is or will be engaged to do NDIS work;
- the clearance was granted pursuant to an application that was not valid;
- the person holds a clearance certificate under a corresponding law and that certificate is cancelled under the corresponding law (this is to address circumstances that may arise in reapplications to avoid the conducting of two assessments with review rights in two jurisdictions);
- on a ground prescribed in the regulations.

Clause 25(3) states that the CEO must have carried out a criminal record check and considered any relevant information from the NDIS Commission before cancelling a clearance under clause 25(1).

Clause 25(4) clarifies that clause 25(3) does not limit any other step, inquiry, process or requirement under this Bill in relation to reassessment.

Similar to clause 12, the information on which a decision to cancel a clearance certificate may be made is not confined to criminal history information or information provided by the NDIS Commission. The CEO is not limited as to the inquiries that may be undertaken or any other process that may be required to reassess the holder of an NDIS worker check clearance certificate. For example, it may be necessary to request court records to categorise an offence.

If a risk assessment is to be undertaken, all matters that go to assessing the relevant risk may be considered; whether or not those matters relate to the triggering information (e.g. criminal history, disciplinary or misconduct outcome). All relevant information, including information that is not related to clearance holder's criminal, disciplinary or misconduct record, may be considered and assessed. This includes all information going to the identification of potential risk and the mitigation of the identified risk.

Clause 25(5) requires the CEO, if proposing to cancel a clearance under clause 25(1), to give written notice of that proposal and provide the holder of the clearance with an opportunity to make a submission to the CEO within the period specified in the notice, being a period of at least 28 days.

Clause 25(6) provides that if a submission is made by the holder of a clearance, then the CEO must consider the submission before a final decision is made. If the submission is made outside of the period specified in the notice, then the CEO has discretion as to whether the information provided is to be considered.

Clause 25(7) provides that if the clearance holder is a disqualified person, the only submission they may make is that their criminal record does not include a conviction for a Class 1 offence committed when an adult. This may arise because:

- of mistaken identity (e.g. it relates to another person with the same name);
- the offence on their criminal record does not constitute a "Class 1 offence" as defined under this Bill.

This ensures that the holder of a clearance may raise an issue of mistaken identity or their criminal record is incorrect to enable appropriate enquiries to be made at the earliest opportunity.

Clause 25(8) sets out that the CEO may suspend a clearance pending the outcome of the processes set out in subclauses (3) to (6).

Clause 25(9) was included to clarify that clause 25(8) dos not limit the operation of clause 24.

Clause 25(10) requires the CEO to give a clearance holder notice of a decision to cancel a clearance and the reasons for the cancellation.

Clause 25(11) further provides that if the NDIS worker check clearance certificate is cancelled because the person is a disqualified person or following a risk assessment which determines there is an unacceptable risk of harm, the notice must:

- set out the time and manner in which an application for internal review of the CEO's decision can be made; and
- be accompanied by an NDIS worker check exclusion certificate. The certificate can be in any form, or represented in any matter, determined by the CEO.

Clause 25(13) sets out that the CEO may also give written notice of a cancellation to:

- any person the CEO reasonably believes to be a notifiable person;
- the NDIS Commission; and
- any person or body exercising functions in the operation or administration of a relevant law.

Under clause 25(14), if the term of a clearance expires while the CEO is considering whether to cancel, the CEO may, as the CEO thinks fit:

- determine not to take any further steps;
- determine to complete any process that has been commenced and, if appropriate to do so, issue an NDIS worker check exclusion certificate.

This clause has been included to allow the CEO some flexibility in determining whether it is appropriate in the circumstances to proceed with making a final decision, despite the clearance having expired, or to simply discontinue the assessment. This decision will turn on whether the information that has triggered the reassessment is of such a nature that it may be appropriate to issue an exclusion certificate to ensure that the person is excluded from NDIS work.

Clause 25(15) provides that the CEO may cancel a clearance certificate that has yet to come into operation. This accommodates those situations where a person applies for a further clearance within 3 months of the expiry of their current clearance, the application is granted and a reassessment is required prior to the commencement of the further clearance. If the reassessment is completed and the decision is made as a result of that reassessment to cancel the current clearance, the further clearance must not come into operation in such situations.

Clause 26 **Cancellation at request of holder**

Clause 26(1) allows the holder of a clearance to request that the clearance certificate be cancelled at any time.

Clause 26(2) requires that such requests be made in an approved manner.

Clause 26(3) requires the CEO to cancel a clearance if such a request is made by the clearance holder unless:

- the clearance certificate is suspended;
- the clearance holder has applied for a further clearance and is subject to an interim bar; or
- the CEO is undertaking or is proposing to undertake a risk assessment of the holder of the clearance.

Clause 26(4) stipulates that the CEO must give written notice to the clearance holder when a clearance is cancelled. Clause 26(5) adds that the CEO may also give notice to any person the CEO reasonably believes to be a notifiable person in relation to the clearance holder.

Division 5 Exclusions

Clause 27 **Duration of exclusion**

This clause provides that an NDIS worker check exclusion certificate remains in force indefinitely. This is subject to provisions in the Bill where an exclusion certificate may be cancelled.

Clause 28 **Cancellation of NDIS worker check exclusion certificate**

Clause 28(1) allows a person who has been issued with an indefinite NDIS worker check exclusion certificate in Western Australia to apply to the CEO for the certificate to be cancelled. A person cannot apply in Western Australia to cancel an exclusion certificate if:

- the person is a disqualified person; or
- the certificate was issued in another State or Territory (such an application would need to be made in the State or Territory that issued the certificate).

Clause 28(2) stipulates that an application to cancel an exclusion cannot be made sooner than 5 years after the date on which either the exclusion certificate was issued, or the most recent previous application was determined.

Clause 28(3) allows a person to apply sooner than 5 years if:

- the decision was based on a pending charge for an offence set out in clause 28(4) which was later disposed of by a court otherwise than by way of a conviction;

- the decision was based on a conviction for an offence and that conviction was later quashed or set aside by a court;
- the decision was based on a conviction for a Class 1 or Class 2 offence and a pardon was later granted;
- the decision was based on a finding which is later quashed or set aside or otherwise expressly or impliedly ceases to have effect;
- there is any other significant or exceptional change of circumstances or other factor that the CEO considers should result in the person being able to apply.

Clause 28(4) lists the types of pending charges that clause 28(3) may apply to, being:

- Class 1 offences;
- Class 2 offences;
- Class 3 offences where the CEO has reason to believe that:
    - an indecent act was performed by the person in the course of allegedly committing the offence; or
    - the person engaged in conduct that was of a threatening or violent nature in the course of allegedly committing the offence.

Similar to an application made under clause 10, clause 28(5) requires an application to cancel an NDIS worker check exclusion certificate to be in the approved form and accompanied by the fee prescribed in regulations.

Clause 28(6) sets out the relevant clauses in Part 2 of the Bill that are to apply to an application to cancel an NDIS worker check exclusion certificate. These include:

- information required for an application;
- how the application is to be determined;
- if proposing to refuse the application to cancel the exclusion, the requirement to advise of that proposal and invite a submission;
- when notice of a final decision is to be sent and to whom;
- when an application to cancel can be withdrawn; and
- how and when a risk assessment is to be undertaken.

Clause 28(7) provides that if the CEO grants an application to cancel the exclusion, then the CEO must cancel the NDIS worker check exclusion certificate, grant a clearance and provide written notice to the applicant.

Clause 28(8) provides that if the CEO refuses an application to cancel an exclusion, then the CEO must give the applicant written notice that includes the reasons for the CEO's decision and sets out how and when an application for internal review of the decision can be made.

Under clause 28(9), if a person has been issued with an exclusion certificate in Western Australia and subsequently, after a period of 5 years, applies for, and is granted, a clearance in another jurisdiction, then the CEO must cancel the exclusion certificate. As a clearance has been granted in another jurisdiction, the CEO is not required to grant a clearance.

Division 6 Change in criminal record or other information

<u>Clause 29</u> Meaning of relevant change in criminal record and requirement to give notice of that change

Clause 29(1) provides that a relevant change in a person's criminal record occurs when the person is charged with or convicted of a Class 1 offence or a Class 2 offence.

Clause 29(2) provides that a person who is required to give notice of a relevant change is not required to give any information other than that the change has occurred.

Clause 30 Applicant must notify CEO of relevant change in criminal record

Clause 30 sets out that a person who has a pending application, either for a clearance or to cancel an exclusion certificate, must notify the CEO in writing of any relevant change to their criminal record as soon as is practicable after the change occurs. Failure to comply with this requirement is an offence under the Bill, for which the penalty is imprisonment for 5 years and a fine of $60,000.

Clause 31 Person holding clearance must notify CEO of relevant change in criminal record

Clause 31 sets out that a person who holds a clearance must notify the CEO in writing of any relevant change to their criminal record as soon as is practicable after the change occurs. Failure to comply with this requirement is an offence under the Bill, for which the penalty is imprisonment for 5 years and a fine of $60,000.

If the CEO receives such a notification, then the CEO may advise the person's NDIS employer and any person who is proposing to engage the person in NDIS work of the relevant change disclosed in the notice.

Clause 32 Change in particulars

Clauses 32(1) and (2) set out that any person who:

- has a pending application for a clearance;
- is the holder of a clearance certificate; or
- has a pending application to cancel an exclusion certificate

must notify the CEO in writing of any relevant change in particulars. Failure to comply with this requirement is an offence under the Bill, for which the penalty is a fine of $5,000.

Clause 32(3) sets out that a relevant change in particulars is any of:

- a change in the person's name, residential address or contact details;
- a change in the person's NDIS employer; or
- a change prescribed by the regulations.

This is to ensure the CEO has the most up to date information regarding a person's contact and other details and employer details to support the protective purposes of the Bill.

Part 3 Information gathering and sharing

Division 1 Criminal record checks

Clause 33 CEO may carry out criminal record checks

This clause permits the CEO to access information about a person's criminal record.

Clause 33(1) specifies the persons about whom the CEO may seek information under this clause. This is limited to persons:

- who have applied for a clearance under this Act or a corresponding law;
- who have given notice of a relevant change in their criminal record;
- who have a clearance under this Act or a corresponding law;
- who have applied to cancel an NDIS worker check exclusion certificate under this Act or a corresponding law; or
- who have applied for internal review or external review under this Bill.

Under clause 33(2) the CEO may ask a criminal records agency for information or access to records to determine whether a person has a criminal record and, if so, to obtain details of the criminal record.

Where the criminal record check conducted under clause 33(2) reveals that a person has a criminal record, the CEO is permitted under clause 33(3) to ask the criminal records agency or the Office of the Director of Public Prosecutions (which includes equivalent offices in another jurisdiction) for any information relating to the person that is in its possession and is connected with, or otherwise related to, a conviction or charge mentioned in the criminal record.

Division 2 General power to obtain, provide and use information

Clause 34 General power to obtain, provide and use information

This clause permits the CEO to obtain, provide or use relevant information in relation to an application or decision, for certain purposes.

Clause 34(1) permits the CEO to request relevant information for an NDIS purpose from:

- an authorised person;
- a public authority;
- an interstate screening agency;
- a government agency established or constituted under a law of another jurisdiction;
- an employer or health professional; or
- any other person or body that, in the opinion of the CEO, may possess relevant information.

Clause 34(2) authorises any person or body to whom a request is made under clause 34(1) to disclose relevant information to the CEO for an NDIS purpose.

Clause 34(3) allows the CEO to use any relevant information received for an NDIS purpose.

Clauses 34(4) and (5) set out the bases on which the CEO can disclose relevant information to a government agency or to a person or body prescribed in the regulations, being:

- for an NDIS purpose; or
- for a purpose relating to the administration or enforcement of the *Working with Children (Criminal Record Checking) Act 2004* or an equivalent law in another jurisdiction.

The CEO may disclose relevant information to only a government agency, for a purpose relating to the administration or enforcement of a law that is relevant to the screening of people who work with people with disability and that law has been prescribed in regulations.

Clause 34(6) has been included to specifically exclude any information received by exercise of the compulsion power set out in clause 39, from being released for a purpose relating to the administration or enforcement of the *Working with Children (Criminal Record Checking) Act 2004* (or an equivalent law in another jurisdiction) without the approval of the CEO (Justice); being the CEO responsible for the administration of the *Sentence Administration Act 2003 Part 8*.

Division 3 Provision of specific information

Clause 35 Provision of information by police and other officials or bodies

Clause 35(2) permits the Commissioner of Police or a person or body prescribed by the regulations (relevant official) to inform the CEO of certain information in relation to a person charged with or convicted of an offence. This applies if the relevant official:

- knows or reasonably believes the person charged with or convicted of an offence:

- is a designated person; or
- carries out NDIS work

and

- reasonably believes that the charge or conviction:
  - indicates that it is, or may be, inappropriate for the person to hold an NDIS worker check clearance certificate under this Act or a corresponding law, or to carry out NDIS work; or
  - is otherwise relevant to the performance of a function by the CEO under this Act.

Clause 35(3) sets out the information that a relevant official can provide to the CEO in relation to the person and the relevant charge or conviction. Clause 35(4) has been included to make it clear that clause 35 does not limit the ability of the CEO to use relevant information obtained from any source for an NDIS purpose.

Clause 36 Provision of information by registration and regulatory authorities

A prescribed authority means any of the following prescribed in regulations:

- a registration, licensing or other regulatory authority;
- a professional or other body that supervises the conduct of a particular group or class of persons;
- a person or body with the authority to make findings or determinations that are relevant to the conduct of any person; or
- any other person, authority or body.

A prescribed authority is permitted to inform the CEO of certain information in relation to a finding made by or on behalf of the prescribed authority. This applies if the prescribed authority:

- knows or reasonably believes that a finding made by or on behalf of the prescribed authority or otherwise connected with a performance of a function of the prescribed authority, relates to:
  - a designated person; or
  - any person who carries out NDIS work

and

- reasonably believes that the finding:
  - indicates that it is, or may be, inappropriate for the person to hold a clearance under this Bill or a corresponding law, or to carry out NDIS work; or
  - is otherwise relevant to the performance of a function by the CEO under this Bill.

Clause 36(3) sets out the information that a prescribed authority can provide to the CEO in relation to the person and the finding.

Clause 36(4) allows a prescribed authority to provide the CEO with further notice if the finding is later varied, substituted, cancelled or set aside.

Clause 36(5) adds that regulations may require the prescribed authority to:

- provide the CEO with particulars of any conduct or finding of a prescribed kind, or any other relevant information; and
- keep records of information that may be relevant.

Clause 36(6) allows the CEO to request further information from a prescribed authority if notice of a finding is received. Clause 36(7) sets out that the prescribed authority may provide said information if the CEO requests it.

Clause 36(8) reinforces that any reference in clause 36 to a finding can include a finding that relates to events that occurred when the person was a child.

Division 4 Information sharing for national register or database

Clause 37 Information sharing for national register or database

Clause 37 allows the CEO to share any information received or created by the CEO in the administration of the Act for entry in a national register or database established under the NDIS Act.

Division 5 Ability to require the provision of information

Clause 38 Power to require information from clearance holder

Clause 38 allows the CEO to request relevant information from a clearance holder for an NDIS purpose and to cancel a person's clearance if they fail to provide the requested information within a specified period of time (being a period of at least 28 days).

Clause 39 Power to require reports from CEO (Justice)

Clause 39 provides the CEO with the power to compel, by written notice, the CEO (Justice) to provide the CEO with certain prescribed reports.

The CEO (Justice) must comply with the notice within a reasonable period after the notice is received.

Division 6 Related provisions

Clause 40 Access to police information

Clause 40(1) allows the Commissioner of Police in Western Australia to disclose the following information for an NDIS purpose:

- information relating to any matter that may cause a person to be a disqualified person or require a risk assessment;
- information relating to a person's criminal record; or
- information that is connected with, or otherwise related to, a conviction or charge mentioned in the person's criminal record, or the investigation or circumstances of any conduct or alleged conduct.

Clause 40(2) stipulates the information listed in clause 40(1) can be disclosed to:

- the CEO;
- an interstate screening agency;
- the Commissioner of the Australian Federal Police;
- the Commissioner of Police in another State, Territory or country;
- a person or body that is established or constituted under the law of another State or Territory or the Commonwealth and prescribed by the regulations.

Clause 40(3) allows any person to whom information is disclosed under clause 40(2) to disclose that information to the NDIS Commission or an interstate screening agency for an NDIS purpose.

Clauses 40(4) and (5) clarify that clause 40 does not limit any power to disclose information under another provision or limit to whom, or the circumstances in which, information may be disclosed.

Clause 41 **Access to other information**

Clause 41(1) provides a definition for the term 'prescribed authority' being:

- a public authority; or
- any other person or body that is prescribed in regulations for the purpose of this definition.

Clause 41(2) allows a prescribed authority to disclose any information in its possession or control for an NDIS purpose as it thinks fit.

Clause 41(3) states that such a disclosure can only be made to the following entities:

- an interstate screening agency; or
- a person or body that is established or constituted under the law of another State or Territory or the Commonwealth and is prescribed by regulations.

Clause 41(4) allows any person to whom information is disclosed under clause 41(3) to disclose that information to the NDIS Commission.

Clause 42 **Provision of information to NDIS employers**

Clause 42 allows the CEO to disclose the following information to NDIS employers:

- information relevant to verification of the identity of a person;
- information about the outcome of any application for a clearance by, or risk assessment of, a person;
- such information as prescribed in regulations.

Clause 43 **Provision of information to certain bodies**

Clause 43 allows the CEO to provide notice of the following information in relation to a particular person, to a public authority prescribed by regulations if the CEO considers it is in the public interest to do so:

- that an application for a clearance has been received and a decision has yet to be made;
- that a clearance has been granted;
- that an application for a clearance has been withdrawn;
- that an interim bar has been imposed;
- that an NDIS worker check exclusion certificate has been issued;
- that a clearance has been suspended or cancelled;
- that a person does not have a current clearance.

The CEO must also give a further notice if:

- the initial notice related to the imposition of an interim bar or NDIS worker check exclusion certificate that is later revoked or cancelled;
- a clearance is issued after the initial notice is given; or
- the initial notice related to the suspension of a clearance and that suspension is revoked or ceases to have effect.

Clause 44 **Disclosure of information to prevent harm**

Clause 44 allows the CEO to disclose information to an authorised person, a public authority or any other person or body prescribed in the regulations if there are reasonable grounds to suspect that there is a risk to the wellbeing of a person with disability, a child or a vulnerable person and the disclosure is reasonably necessary to prevent or address that risk.

This clause does not limit or derogate from any other legislation or law relating to the disclosure of information for the protection of children or other persons.

Part 4 Review

Division 1 Internal review

Clause 45 Terms used

The term **"designated decision"** is defined to mean any of the following decisions made by the CEO:

- imposing an interim bar;
- refusing to grant a clearance;
- suspending an NDIS worker check clearance certificate;
- cancelling an NDIS worker check clearance certificate; or
- refusing to cancel an NDIS worker check exclusion certificate.

Clause 46 Application for internal review

Clause 46(1) provides that a person can apply to the CEO for a review of any designated decision.

Clause 46(2) requires that any application for internal review be made in the approved form and accompanied by the fee prescribed in regulations.

Clause 46(3)(a) provides that a person can only apply for internal review of a decision to impose an interim bar or suspension once a period of six months has elapsed since the CEO provided the applicant with written notice of the decision.

Clause 46(3)(b) provides that, for any other designated decision, an application for internal review must be made within 28 days of the CEO providing the applicant with written notice.

Clause 46(4) provides that if the person seeking internal review is a disqualified person, the only ground on which a review can be sought is that the person's criminal record does not include a conviction for a Class 1 offence committed when an adult.

Clause 47 Extension of time to apply for internal review

Clause 47 provides that the CEO may, if requested by the applicant or on the CEO's own initiative, extend the time for making an application for internal review.

An application for extension of time for internal review must be in the approved form and accompanied by the fee prescribed in regulations.

If the CEO refuses such a request, then the CEO must give the applicant written notice that includes the reasons for the CEO's decision and sets out how and when an application for external review of the decision can be made.

Clause 48 Consideration of application for internal review

Clause 48(1) sets out that in dealing with an application for review, the CEO:

- must give the applicant a reasonable opportunity to make a submission;
- may consider new material, whether or not it existed at the time of the designated decision;
- may exercise any power of the CEO under the Bill that was able to be exercised at the time of the designated decision; and
- subject to the regulations, may adopt such other procedures and processes as the CEO thinks fit (taking into account procedural fairness).

Clause 48(2) restricts the issues that the CEO can review, when a disqualified person makes an application for internal review, to whether or not their criminal record includes a conviction for a Class 1 offence committed by the person when an adult.

As a result of an internal review, the CEO can:

- confirm or vary a designated decision; or
- set aside a designated decision, and either:
    - substitute the designated decision for another decision; or
    - take steps for the matter to be reconsidered.

In the case of a decision that is adverse to the applicant, the CEO must give the applicant written notice that includes the reasons for the CEO's decision and sets out how and when an application for external review of the decision can be made.

Clause 49 Withdrawal of application

The applicant may withdraw an application for internal review at any time.

Division 2 External Review

Clause 50 Terms used

The term **"reviewable decision"** is defined to mean a decision made by the CEO at internal review.

Clause 51 Application for external review

This clause permits a person to apply to the State Administrative Tribunal within 28 days for the review of a reviewable decision.

Under clause 51(3), a reviewable decision continues to have effect pending the outcome of any review and the State Administrative Tribunal may not make an order, or grant an injunction, staying the operation of the CEO's decision.

If an applicant is a disqualified person, the only ground on which they can apply for external review is that their criminal record does not include a conviction for a Class 1 offence committed by the applicant when an adult. The State Administrative Tribunal can either affirm the decision of the CEO or send the matter back for re-assessment.

Under clause 51(6), if the State Administrative Tribunal makes a decision to set aside or vary a reviewable decision, then that decision has effect from the date that it was delivered by the State Administrative Tribunal.

Clause 51(7) includes a requirement that any information that might enable the identity of an applicant not be published as a result of a decision of the State Administrative Tribunal. However, clause 51(8) stipulates that this does not affect the CEO's ability to provide such information to:

- the NDIS Commission;
- an interstate screening agency;
- any other person or body engaged in the administration of this Act or a corresponding law; and
- the CEO under the *Working with Children (Criminal Record Screening) Act 2004*.

Part 5 Authorised officers and enforcement

Division 1 Preliminary

Clause 52 Terms used

Of particular note are the following terms:

“investigation” – this term means an investigation of a suspected offence under this Bill;

“relevant record” – this term means a record or document that contains information that is or may be relevant to an offence under this Bill.

Division 2 – Authorised officers

Clause 53 Designation of authorised officers

This clause gives the CEO the power to designate officers to be authorised officers.

Clause 54 Identity cards

The CEO must issue identity cards to all authorised officers which must be worn whenever an authorised officer deals with a person.

Division 3 – Powers of investigation

Clause 55 Entry to places

Clause 55(1) gives authorised officers the power to enter a place if they have the informed consent of the occupier or are authorised by an entry warrant.

Clause 55(2) sets out that an occupier is only deemed to have given informed consent after being informed by an authorised officer:

- about the powers that the officer wants to exercise; and
- why the officer wants to exercise those powers; and
- that the occupier can refuse to consent.

Clause 56 Powers after entering place

Clause 56 sets out what an authorised officer can do when they enter a place under clause 55.

Clause 57 Directions to provide information or documents

Clause 57(1) gives authorised officers the power to direct a person to give information, answer a question, produce a record or document or make a copy of a record or document.

A person directed by an authorised officer is not excused from complying on the grounds that they may incriminate themselves, however any information or answer given under direction is not admissible in evidence against the individual in any criminal or civil proceedings other than for perjury or for an offence under clause 69 of this Bill.

Clause 58 Additional powers for relevant records

Clause 58 sets out additional powers that an authorised officer has in relation to obtaining information or records for the purposes of an investigation.

Clause 59 Contravention of directions

Clause 59 makes it an offence for a person to fail to comply with a direction given by an authorised officer, the penalty for which is imprisonment for 12 months and a fine of $12,000.

Clause 60 Exercise of powers may be recorded

Clause 60 allows an authorised officer to record the exercise of any power under this Division, including by audio-visual recording.

Clause 61 Assistance and use of force to exercise power

Clause 61 allows an authorised officer to authorise other people to assist them in the exercise of their powers and allows both the authorised officer, and anyone assisting them, to use reasonable force in the exercise of their powers.

Clause 62 **Procedure of seizing things**

If an authorised officer seizes anything under this Division, then the authorised officer must:

- Give the person a receipt for it in the approved form.
- Allow the person reasonable access to it.
- Take reasonable steps to prevent it being concealed, lost, damaged or destroyed.
- Do whatever is reasonably necessary to secure it and notify people that it is under seizure, if the seized thing cannot be moved.

Clause 62(5) makes it an offence for a person to interfere or deal with any thing that the person knows, or ought reasonably to know, has been seized by an authorised officer, the penalty for which is imprisonment for 12 months and a fine of $12,000.

Clause 63 **Application of *Criminal and Found Property Disposal Act 2006***

Clause 63 states that the *Criminal and Found Property Disposal Act 2006* applies to anything seized by an authorised officer and that the Department of Communities is a prescribed agency for the purposes of that Act.

Division 4 – Entry warrants

Clause 64 **Application for entry warrant**

Clause 64(1) provides that an authorised officer may apply to a Magistrate for an entry warrant.

Clause 64(2) sets out the requirements for such an application, including that it must contain the information prescribed by the regulations.

Clauses 64(3) ensures that the Magistrate retains discretion as to whether to allow an application for an entry warrant to be made remotely.

Clause 64(4) provides further administrative requirements for an entry warrant that has been applied for remotely.

Clause 65 **Issue and content of entry warrant**

Clause 65 sets out the information that must be contained in an entry warrant and the form it must take.

Clause 66 **Refusal of entry warrant**

If an entry warrant is refused, then the reasons for refusal must be recorded on the application.

Clause 67 **Effect of entry warrant**

Clause 67 confirms that an entry warrant comes into force when it is issued and that it can be executed according to its terms.

If the entry warrant has been applied for remotely, any evidence obtained under it will not be admissible in proceedings in a court or tribunal, unless the applicant as soon as practicable after the issue of the warrant has sent the Magistrate:

- an affidavit verifying the application and information given in support of it; and
- in some circumstances, completed a form of warrant with the information required in the warrant.

Part 6 General

Clause 68 Offence to work without clearance, without having applied for a clearance or if subject to an exclusion

Clause 68(1) states that it is an offence to start or continue NDIS work in a risk assessed role with a registered NDIS provider without a clearance (that has not been suspended) or pending application (that is not subject to an interim bar).

Clause 68(2) states that it is an offence to start or continue NDIS work with a registered NDIS provider in a risk assessed role if issued with an NDIS worker check exclusion certificate.

Both offences carry a penalty of 5 years imprisonment and a fine of $60,000.

Clause 69 Offence to give false or misleading information

Clause 69 states that it is an offence to give information to the CEO for the purposes of this Bill that is known to be false or misleading.

The offence carries a penalty of 2 years imprisonment and a fine of $24,000.

Clause 70 Service of documents

This clause sets out when a document is to be deemed served under this Bill.

Clause 71 Offence to use or disclose information obtained

Under this clause, a person who is or has been engaged in the performance of functions under this Bill is prohibited from directly or indirectly disclosing or making use of information obtained while performing those functions.

A number of exemptions from this prohibition are also provided for, where information is disclosed or made use of:

- for the purpose of, or in connection with, performing functions under the Bill;
- for the purpose of investigating a suspected offence under the Bill or the conduct of proceedings against a person for such an offence;
- as required or allowed by the Bill or another written law;
- for the purpose of providing reports to the NDIS Commission, or otherwise in connection with the operation of the NDIS;
- for the provision of statistical or other information or data that could not reasonably be expected to identify a specific person;
- for the purpose of referring a matter to a law enforcement agency, or to an agency exercising functions relating to the care or protection of children or people with disability;
- as authorised in the regulations; or
- with the written consent of the Minister or the person to whom the information relates.

Offences against this clause carry a penalty of 2 years imprisonment and a fine of $24,000.

Clause 72 Ability to provide information and protection from liability

Clause 72(1) sets out a definition of the term law for the purpose of this clause and indicates that it includes both the common law and any rules of equity.

Clauses 72(2) and (3) provide protection from liability in relation to information disclosed:

- to the CEO for the purpose of, or in connection with, any provision of this Act;
- in connection with the administration or enforcement of this Act;
- by the CEO to the NDIS Commission or any other person or body in connection with the operation of the National Disability Insurance Scheme;

- by the CEO to a law enforcement agency or to an agency exercising functions relating to the care or protection of children or people with disability;
- as authorised or required under any provision of this Act; or
- as authorised by the regulations.

Any such information may be disclosed despite any enactment, law or agreement that prohibits or restricts its disclosure.

Clause 72(4) states that clause 72 does not derogate from the operation of clause 34(6), precluding the on-sharing of information received under clause 39 without the approval of the CEO (Justice).

Subclause (5) of clause 72 indicates that subclauses (2) and (3) extends to information that relates to either:

- spent convictions; or
- children.

If any of the information referred to in clause 72 is disclosed by a person in good faith, then the person:

- does not incur any civil or criminal liability;
- is not taken to have breached any duty of confidentiality or secrecy imposed by law; and
- is not taken to have breached any professional ethics or standards or any principles of conduct applicable to the person's employment or to have engaged in unprofessional conduct.

This does not apply to the disclosure of information by a government agency established or constituted under a law of another jurisdiction.

Clause 73 Protection from personal liability

Clause 73(1) sets out that a person does not incur any civil liability for anything that the person has done in good faith in the performance or purported performance of a function under this Bill.

Clause 73(2) relieves the State of any liability that it might otherwise have had for a person having done anything as described in clause 73(1).

Clause 74 Failure to give notice of decision

Clause 74 stipulates that the failure to give notice of a decision or act of the CEO does not, of itself, affect the validity or effect of the decision or act under this Bill.

Clause 75 Protection of legal professional privilege

Clause 75 stipulates that nothing in this Bill requires a person to disclose information that is the subject of legal professional privilege.

Clause 76 Effect of Act on other rights and procedures

Clause 76 stipulates that nothing in this Bill affects any statutory right that an employee may have in relation to employment or the termination of employment, however any court or tribunal exercising jurisdiction with respect to any such right must have regard to the results of a determination or risk assessment conducted under this Act and the welfare of people with disability as the paramount consideration in that determination or assessment.

Despite a provision of any other Act or law, no court or tribunal will be taken to have jurisdiction to order a payment of damages or compensation for any removal from employment of a person in connection with the operation of this Bill. This is not intended to displace a court or tribunal's ability to make any other order including, but not limited to, a finding of unfair dismissal.

Clause 77 **Evidentiary matters**

Clause 77 allows the CEO to issue a certificate that states, on any specific date or period:

- a specified person was or was not the holder of a clearance;
- a specified person had or had not made an application for a clearance;
- a clearance held by a specified person was or was not suspended;
- a specified person was or was not subject to an interim bar;
- a specified person was or was not subject to an exclusion;
- a clearance held by a specified person was or was not cancelled.

Certificates given under this clause are admissible as evidence in legal proceedings of the matters stated in the certificate and this section is in addition to, and does not affect the operation of, the *Evidence Act 1906*.

Clause 78 **Delegation by CEO**

The CEO is permitted to delegate any powers or duties under this Bill to a public sector employee, as defined under the *Public Sector Management Act 1994*, without requiring any further approval. The CEO must have Ministerial approval to delegate powers or duties to any person not considered an employee under the *Public Sector Management Act 1994*.

Under clause 78(3), any delegation must be in writing and signed by the CEO.

Under clause 78(4), a delegation may expressly authorise the delegate to further delegate the power or duty.

Under clause 78(5), where a person exercises a power or performs a duty delegated to them under this clause, they will be taken to have done so in accordance with the terms of the delegation unless the contrary is shown.

Clause 79 **Delegation by prescribed authorities**

The CEO of any prescribed authority is permitted to delegate any powers or duties under this Bill to an officer or employee of the prescribed authority, or any other person approved by the Minister.

Under clause 79(3), any delegation must be in writing and signed by the CEO of the prescribed authority.

Under clause 79(4), the delegation may expressly authorise the delegate to further delegate the power or duty.

Under clause 79(5), where a person exercises a power or performs a duty delegated to them under this clause, they will be taken to have done so in accordance with the terms of the delegation unless the contrary is shown.

Clause 80 **Commencement of proceedings**

Proceedings under this Bill for an offence or in respect of any other matter may be commenced in the name of the CEO either by the CEO or by a person authorised to do so by the CEO.

In any proceedings no proof is required of:

- the appointment of the CEO; or
- the authorisation of a person.

This is taken to be proven unless the contrary is proved.

Clause 81 **Regulations**

Clause 81(1) contains the general regulation-making power under the Bill, under which the Governor is permitted to make regulations that are:

- required or permitted to be prescribed under the Bill; or
- necessary or convenient to be prescribed, for giving effect to the purposes of the Bill.

Clause 81(2) further provides that, without limiting the regulation-making power under clause 81(1), regulations may be made in respect of the following matters:

- the receipt and storage of information relating to a person's criminal record and the restriction of access to such information;
- the procedures and processes associated with the review of decisions of the CEO under this Bill; and
- the creation of offences, and provision for penalties not exceeding $6,000 in relation to such offences.

Clause 82 **Transitional Regulations**

A transitional matter means a matter or issue of a transitional nature that arises as a result of the enactment of this Bill and includes a saving or application matter.

Clause 82(2) provides that if there is not sufficient provision in the Bill for dealing with a transitional matter, regulations may prescribe anything required, necessary or convenient.

Clause 82(3) allows transitional regulations to apply, or not apply, to any specified matter in the Bill and to place specified modifications to, or in relation to, any matter.

Clause 82(3) contains a Henry VIII clause as it permits the modification of the operation of primary legislation by regulation. This clause will facilitate an orderly and appropriate transition of existing NDIS workers into NDIS worker screening. Otherwise, clause 68 of the Bill would apply to those workers from the commencement date. This clause is required to provide flexibility in the making of regulations.

The arrangements for the transition of existing NDIS workers are intended to be captured in the regulations to be made under this section, and also in the relevant Commonwealth subsidiary legislation governing transitional arrangements for registered NDIS providers. The transitional arrangements under the Commonwealth subsidiary legislation are yet to be finalised. The arrangements under this Bill and the relevant Commonwealth legislation must be as consistent as possible, which is why the specific transitional arrangements are not included in this Bill.

Clause 82(4) allows transitional regulations to provide that a state of affairs is taken to have existed or not to have existed earlier than the publication day of the transitional regulations, but not earlier than the day on which the section comes into operation.

Clause 82(4) operate so as not to prejudicially affect the rights of any person before publication day or impose any liabilities on that person in respect of anything done or omitted to be done before publication day.

Clause 83 **Review of Act**

This clause requires the Minister responsible for the administration of this Bill to carry out a review of the operation and effectiveness of the Bill as soon as practicable after the fifth anniversary of the day on which this section comes into operation. The Minister is also required to prepare a report based on the review and cause it to be laid before each House of Parliament as soon as practicable after its completion.

If a House of Parliament will not sit during the period of 21 days after finalisation of the report, then the Minister must send the report to the Clerk of the House and, in doing so, it is taken

to have been laid before the House. This must be noted on the first sitting day of the House after the report is received.

Part 7 Consequential amendments to other Acts

Division 1 Spent Convictions Act 1988 amended

Clause 84 Act amended

Clause 84 identifies that consequential amendments are required to the *Spent Convictions Act 1988*.

Clause 85 Section 28 amended

Clause 85 amends section 28(2)(a) of the *Spent Convictions Act 1988* to replace the term 'a child' with 'a child or a person with disability'.

Clause 86 Schedule 3 amended

Clause 86(1) amends the table in clause 2(6) of Schedule 3 of the *Spent Convictions Act 1988* by inserting after item 2 a reference to a person disclosing information where proposed new section 39A of the *Working with Children (Criminal Record Checking) Act 2004* applies.

Clause 86(2) inserts a new subsection (8) into Schedule 3 of the *Spent Convictions Act 1988* that sets out that the CEO under this Bill is exempted from an offence under section 28(1) of the *Spent Convictions Act 1988* if the CEO shares information under clause 34 with the CEO under the *Working with Children (Criminal Record Checking) Act 2004* or a corresponding authority as defined under that Act and that agency is a person prescribed under s 28(2).

Clause 86(3) inserts a new clause and table into Schedule 3 of the *Spent Convictions Act 1988* which sets out when and to whom exceptions to sections 27 and 28 of that Act are to apply in relation to the disclosure of spent conviction information under the Bill. This includes the disclosure of information by the CEO under the *Working with Children (Criminal Record Checking) Act 2004* to the CEO under the Bill or an interstate screening agency under the Bill.

Division 2 Working with Children (Criminal Record Checking) Act 2004 amended

Clause 87 Act amended

Clause 87 provides for consequential amendments to the *Working with Children (Criminal Record Checking) Act 2004.*

Clause 88 Section 4 amended

Clause 88 inserts a definition of 'CEO (Justice)' into section 4 of the *Working with Children (Criminal Record Checking) Act 2004.* That definition mirrors the definition set out in clause 5 of this Bill.

Clause 88 also inserts a definition of 'corresponding law' into section 4 of the *Working with Children (Criminal Record Checking) Act 2004.* That definition describes a corresponding law as a law of another State of Territory that contains provisions that substantially correspond with the provisions of that Act and which is prescribed by the regulations under that Act.

Clause 89 Section 37A inserted

Clause 89 inserts a new section into the *Working with Children (Criminal Record Checking) Act 2004* to facilitate the exchange of information between the Working with Children screening system and the NDIS worker screening system.

Subsection (1) of the proposed section 37A of the *Working with Children (Criminal Record Checking) Act 2004* inserts a definition of the term prescribed report. That definition mirrors the definition set out in clause 39 of this Bill.

Subsection (2) of the proposed section 37A of the *Working with Children (Criminal Record Checking) Act 2004* is to allow the CEO under that Act to disclose information to the CEO

under this Bill or an interstate screening agency, that has been obtained or created under that Act and which relates to a person's criminal record, or to an application made by, or a notice issued to, a person under that Act.

Subsection (3) of the proposed section 37A of the *Working with Children (Criminal Record Checking) Act 2004* is to allow the CEO under that Act to request the CEO under this Bill or an interstate screening agency, to disclose information obtained or created that corresponds to the information referred to in subsection (2) and that relates to a person who has made an application, or has been issued with a notice, under that Act.

Subsection (4) of the proposed section 37A of the *Working with Children (Criminal Record Checking) Act 2004* states that a prescribed report obtained from the CEO (Justice) cannot be disclosed under subsection (2) without the approval of the CEO (Justice).

Clause 90 Section 39A inserted

Clause 90 inserts a new section into the *Working with Children (Criminal Record Checking) Act 2004* to provide the ability to provide information and affording protection from liability.

Subsection (1) of the proposed section 39A of the *Working with Children (Criminal Record Checking) Act 2004* defines an external government agency to include interstate government departments or other interstate bodies performing a statutory function on behalf of a government.

Subsection (2) of the proposed section 39A of the *Working with Children (Criminal Record Checking) Act 2004* provides that the section is to apply to information disclosed to the CEO under the *Working with Children (Criminal Record Checking) Act 2004* in connection with any provision under that Act or by the CEO under that Act to the CEO under this Bill or to the NDIS Commission, or as otherwise authorised or required under that Act or its regulations

Subsection (3) of the proposed section 39A of the *Working with Children (Criminal Record Checking) Act 2004* indicates that where subsection (2) applies, information may be disclosed despite any other enactment, law or agreement that prohibits or restricts its disclosure.

Subsection (4) of the proposed section 39A of the *Working with Children (Criminal Record Checking) Act 2004* provides that subsection (3) does not derogate from the operation of section 37A(4) of that Act or clause 34(6) of this Bill.

Subsection (5) of the proposed section 39A of the *Working with Children (Criminal Record Checking) Act 2004* indicates that subsection (2) and (3) extends to information that relates to either:

- spent convictions; or
- children.

Subsection (6) of the proposed section 39A of the *Working with Children (Criminal Record Checking) Act 2004* indicates that if a person discloses information in good faith where subsection (2) applies then that person:

- does not incur any civil or criminal liability;
- is not taken to have breached any duty of confidentiality or secrecy imposed by law; and
- is not to be taken to have breached any professional ethics or standards or any principles of conduct applicable to the person's employment or to have engaged in unprofessional conduct.

Subsection (7) of the proposed section 39A of the *Working with Children (Criminal Record Checking) Act 2004* indicates that subsection (6) does not apply to the disclosure of information by an external government agency.

Schedule 1 Class 1 offences

Schedule 1 contains a list of offences in Western Australia which constitute "Class 1 offences" under the Bill. Where the person has a conviction for such an offence, committed when an adult, that person is a "disqualified person". The CEO must:

- issue an interim bar under clause 13(2)(a) or suspend the NDIS worker check clearance certificate under clause 24(2);
- invite a submission from the applicant or clearance holder, which may only be made on the basis their criminal record does not include that conviction; and
- if not so satisfied, either refuse the application for a clearance or cancel the NDIS worker check clearance certificate (as the case may be) and issue an NDIS worker check exclusion certificate.

This will result in the person being indefinitely excluded.

Such convictions are considered to demonstrate an unacceptable risk that a person may cause harm to people with disability in the course of carrying out NDIS work such that no further assessment is required. The only basis upon which review of the CEO's decision to refuse to grant the application for a clearance (or cancel the current clearance) can occur in relation to such an offence is that the applicant reasonably believes that their criminal record does not include that conviction.

Where the person has a pending charge for such an offence, allegedly committed when an adult, that person is a "presumptively disqualified person". The CEO must issue an interim bar under clause 13(2)(a) or suspend the NDIS worker check clearance certificate under clause 24(2) and conduct a risk assessment that must result in a decision to refuse to grant a clearance or cancel a current clearance unless satisfied there are exceptional circumstances.

Where the person has a charge or conviction for a Class 1 offence committed or allegedly committed when a child, the CEO is to conduct a risk assessment.

Where the person has a non-conviction charge for a Class 1 offence, the CEO is to conduct a risk assessment.

Some of the offences listed in Schedule 1 require that certain conditions are met in order for them to be considered Class 1 offences, including that:

- The victim is a child or vulnerable person.
- The offence relates to child exploitation material.
- The conditions set out in clause 6(4) do not apply.
- There is an intent to cause death or grievous bodily harm.
- The offence was not committed by a family member.

Schedule 2 Class 2 offences

Schedule 2 contains a list of offences in Western Australia which constitute "Class 2 offences" under the Act. Where the person has a conviction or pending charge for such an offence, committed or allegedly committed when an adult, that person is a "presumptively disqualified person". The CEO must issue an interim bar under clause 13(2)(a) or suspend the NDIS worker check clearance certificate under clause 24(2) and conduct a risk assessment that must result in a decision to refuse to grant a clearance or cancel an NDIS worker check clearance certificate unless satisfied there are exceptional circumstances.

Where the person has a conviction or charge for a Class 2 offence committed or allegedly committed when a child, the CEO is to conduct a risk assessment.

Where the person has a non-conviction charge for a Class 2 offence, the CEO is to conduct a risk assessment.

Some of the offences listed in Schedule 2 require that certain conditions are met in order for them to be considered as Class 2 offences, including the:

- Victim is a person other than a child or vulnerable person.
- Act constituting the offence endangered the life, health or safety of a child or vulnerable person;
- Offence relates to child exploitation material;
- Victim is a child or vulnerable person and the offender is a carer (excluding family members) for that person;
- Offence causes death or grievous bodily harm without an intent to do so;
- Conditions set out in clause 6(4) apply.