

2020

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**WORKING WITH VULNERABLE PEOPLE (BACKGROUND CHECKING)
AMENDMENT BILL 2020**

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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MINISTER FOR COMMUNITY SERVICES AND FACILITIES**

WORKING WITH VULNERABLE PEOPLE (BACKGROUND CHECKING) AMENDMENT BILL 2020

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

BACKGROUND

The *Working with Vulnerable People (Background Checking) Act 2011* (WWVP Act) aims to reduce the risk of harm or neglect to vulnerable people in the ACT.

A person is defined as being vulnerable if they are a child under the age of 18 years or an adult who is experiencing vulnerability and accesses a regulated activity or service related to the vulnerability.

All employees and volunteers in the ACT who work or volunteer with vulnerable people in a regulated activity are required to hold a current Working with Vulnerable People registration.

A background check and risk assessment is conducted prior to registration and requires applicants to provide information on their criminal history, all non-conviction information and any other relevant information.

Three types of registration are currently issued:

- *general registration* allows individuals to move between all regulated activities for up to three years without the need to reapply (length of registration will become five years from 1 November 2020);
- *conditional registration* imposes specific conditions on an individual's registration; for example, not being able to transport vulnerable people; and
- *role-based registration* restricts individuals to engaging in specified regulated activities with a stated employer, meaning that they cannot move freely between regulated activities.

In 2019, amendments were made to the WWVP Act that:

- enabled the background screening of workers for National Disability Insurance Scheme (NDIS) purposes;
- introduced disqualifying offences for NDIS workers;
- introduced continuous monitoring for background screening;
- enabled interjurisdictional information sharing; and
- implemented several recommendations of the *2017 Working with Vulnerable People (Background Checking) Act 2011 Legislative Review*.

The 2019 amendments commence on 1 November 2020.

OVERVIEW OF THE BILL

The Working with Vulnerable People (Background Checking) Amendment Bill 2020 (Bill):

- builds on legislative amendments made in 2019 by extending the application of disqualifying offences for NDIS workers to individuals intending to engage in regulated activities involving children;
- refines the classification of offences to align with the NDIS worker screening framework and achieve national consistency;
- establishes a process for assessing kinship carers so that they are not automatically excluded from working with children or an NDIS activity;
- resolves any unintended consequences of related provisions; and
- gives effect to the National Standards for Working with Children Checks (National Standards) and implements Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) recommendations related to working with children.

The purpose of this Bill is to strengthen the framework for making decisions about whether a person with certain types of charges or convictions should be registered to work with children. The framework sets out a hierarchy according to the type of offence; for example, whether it is a class A or class B conviction, a pending or 'non-conviction' charge, or any other relevant offence.

Specifically, a person will be automatically excluded from participating in a regulated activity involving children or an NDIS activity if they have committed a class A disqualifying offence. Class A includes offences such as murder, culpable driving causing death, and sexual offences against vulnerable people.

In addition, a person will be excluded unless they have exceptional circumstances that justify their registration, if they have an outstanding class A offence, or a conviction or finding of guilt of a class B offence. Class B includes offences such as manslaughter, neglect of a child, and robbery offences.

However, if the person with a class A disqualifying offence is (or is proposing to be) a kinship carer, the person is not automatically excluded from working with children. In this circumstance, the person is treated as though they have a class B disqualifying offence.

The Bill aligns disqualifying offences with the National Standards and the NDIS worker screening framework and completes all but two recommendations of the *2017 Working with Vulnerable People (Background Checking) Act 2011 Legislative Review* (Legislative Review).

CONSULTATION ON THE PROPOSED APPROACH

In 2017, extensive consultation was undertaken with the community sector and agencies to develop and deliver the Legislative Review. The Legislative Review made

26 recommendations to improve the legislation and operation of the Working with Vulnerable People (WWVP) scheme.

Following the release of the Legislative Review in 2017, the ACT Government accepted all the recommendations of the *Working with Children Checks Report 2015* from the *Royal Commission into Institutional Responses to Child Sexual Abuse*, which recommended states and territories work to achieve national consistency and introduce disqualifying offences.

In 2019, the ACT Government became party to the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme*, which established the NDIS Quality and Safeguarding Framework and required the introduction of disqualifying offences.

Finally, the ACT Government worked with states and territories to finalise the National Standards. The amendments in this Bill will give effect to the National Standards, enable the ACT to participate in national background checking activities and work with other jurisdictions to ensure the protection of children across all jurisdictions in Australia.

Access Canberra, the regulatory body that implements the WWVP scheme, and the Community Services Directorate, which provides the ACT interface with the NDIS, worked closely to develop the Bill to achieve its policy intent and reduce any unintended consequences.

CONSISTENCY WITH HUMAN RIGHTS

The Bill has been carefully considered in the context of the *Human Rights Act 2004*, with particular consideration of the rights of children and young people, in alignment with the objects described in section 7 of the *Children and Young People Act 2008*.

Specific attention has been given to the overarching objective to protect the safety, welfare and wellbeing of children and young people and balancing their rights and interests with people who seek to work or volunteer in child-related work in the ACT.

The amendments build on and support the analysis of human rights implications outlined in the *Working with Vulnerable People (Background Checking) Amendment Act 2019*.

Rights engaged

The Bill engages the following rights:

- Right to protection of family and children (s.11);
- Right to prevention from degrading treatment (s.10);
- Right to privacy and reputation (s.12);
- Right to equality before the law (s.8);
- Right to a fair trial (s.21);

- Right to the presumption of innocence (s.22); and
- Right not to be tried or punished more than once (s.24).

These rights are principally engaged through the amendments to apply disqualifying offences to applicants who intend to engage in regulated activities involving children.

Several rights will be limited to give effect to the purpose and intent of the Bill and the WWVP scheme. The ACT Government acknowledges that the amendments in the Bill engage and limit the human rights of a section of the ACT community – individuals considered to be an unacceptable risk of harm to children, young people and other vulnerable people, as a result of their criminal history.

These rights have been carefully considered with respect to section 28 of the Human Rights Act (human rights may be limited) to determine whether the limitation is proportionate and can be demonstrably justified, and whether it employs the least restrictive means available to achieve the purpose of protecting the rights of children, young people and other vulnerable people in the ACT community.

Rights Promoted

The Bill promotes the following rights:

- Right to protection of family and children (s 11); and
- Right to prevention from torture and cruel, inhumane or degrading treatment (s 10).

Protection of family and children (s 11)

Section 11 of the Human Rights Act establishes that:

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The Bill engages the right to family and children as it strengthens safeguards to protect children by applying stronger risk assessments and disqualifying offences to applicants who intend to engage in regulated activities involving children.

The Bill also seeks to embody international human rights standards for children and young people, such as the *Convention on the Rights of the Child*. For example, the Convention requires states to act in the best interests of the child (article 3) and provide special protection when a child cannot remain in their immediate family environment (with birth parents) (article 20).

The Bill protects the family unit by ensuring that kinship carers are not automatically excluded from caring for children or working in the NDIS and can continue to care for their own family. This process further protects the rights and interests of children by ensuring children who cannot be cared for by their parents remain connected to their family, community and cultural identity.

By not automatically excluding kinship carers from caring for children or working in the NDIS, the Bill promotes the cultural rights of Aboriginal and Torres Strait Islander children and young people in the ACT (section 27). This reflects the important role that kinship carers play in supporting Aboriginal and Torres Strait Islander children and young people to maintain connection to family, culture and community.

The different treatment for kinship carers is not extended to foster carers. This further protects the rights and interests of children by ensuring their carer is appropriately suitable to care for the most vulnerable children in the ACT.

However, a limited number of foster carers will be affected by the introduction of disqualifying offences. This situation means that the rights of children to family could be arbitrarily limited (i.e. a child may be automatically removed from their foster family).

To address this issue, a 'grandfathering' clause has been incorporated to accommodate foster carers who are currently caring for children in care. This means that these current foster carers can be risk assessed instead of being automatically deregistered, effectively being treated as class B offences.

Prevention against torture and cruel, inhumane or degrading treatment (s.10)

Section 10 of the Human Rights Act establishes that:

- (1) No one may be:
 - (a) tortured; or
 - (b) treated or punished in a cruel, inhuman or degrading way.
- (2) No one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

The Bill promotes section 10 of the Human Rights Act as it will exclude individuals who pose an unacceptable risk of harm to vulnerable people. The Bill will strengthen this absolute right by imposing disqualifying offences that preclude people with relevant criminal histories, pending charges or convictions from eligibility to undertake regulated activities. In addition, the Bill inserts an objects clause that makes clear that the protection of vulnerable people is the paramount consideration under the WWVP Act.

The Bill seeks to reflect the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* by ensuring the government has sufficient legislation and regulation to ensure vulnerable people, including children, are not treated in a cruel, inhuman or degrading way by preventing the registration of individuals that pose an unacceptable risk of harm.

The Bill does not limit this right because it works to reduce the likelihood of preventable harm for vulnerable people and children and seeks to protect the rights and dignity of vulnerable people by limiting their exposure to people who pose a risk to their safety, welfare and wellbeing.

Rights Limited

Several rights are limited by the provisions contained in this Amendment Bill. These are:

- Right to privacy and reputation (s.12);
- Right to equality before the law (s.8);
- Right not to be tried or punished more than once (s. 24);
- Right to a fair trial (s. 21);
- Right to presumption of innocence (s. 22); and
- Right to protection of family and children (s. 11).

Right to privacy and reputation (s 12)

Under section 12 of the Human Rights Act:

Everyone has the right—

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily, and

(b) not to have his or her reputation unlawfully attacked.

Nature of the right and the limitation (s 28 (a) and (c))

Section 12 recognises that a person must not have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

This means that when information is shared about a person's criminal history or the outcome of an application for registration, there should be no risk of the information contained within those documents being used in such a way as to compromise a person's privacy and reputation. However, the right to privacy and reputation is limited to the extent that it is necessary for information to be shared when it is in interest of better protecting the rights, best interests and freedoms of vulnerable people.

The Bill limits the right to privacy and reputation because in extending disqualifying offences more information will be collected and shared. This information will include information relating to convictions, non-convictions and disqualifying offences and will be shared between agencies and jurisdictions to make decisions about the suitability of an applicant to engage in regulated activities involving children or under the NDIS. This means that individuals who have been identified as posing a higher risk of harm due to their past behaviours will experience a greater impact on their privacy than other applicants.

Legitimate purpose (s 28 (b))

The Bill establishes that that the paramount consideration in the administration, operation and enforcement of the WWVP Act is the best interests of children and vulnerable people in the ACT. In forming a view about the best interests of vulnerable people, a person making a decision under the WWVP Act must take into consideration the safety, welfare and protection of vulnerable people.

The purpose of the Bill is to improve safeguards to the rights and freedoms of vulnerable people. To achieve this outcome, the Bill includes measures to:

- extend disqualifying offences to applicants intending to engage in regulated activities involving children; and
- refine the classification of disqualifying offences and increase the volume of offences within class B, which will require individuals to have exceptional circumstances that justify their registration.

As a result, greater numbers of applicants will be subject to wider collection and sharing of relevant information relating to the potential risk of harm to a vulnerable person. The measure ultimately enhances the protection of individuals who require greater protections under the law, including children and other vulnerable people. This will be achieved by ensuring that information collected under the WWVP Act can only be exchanged for certain purposes, or with the consent of the person. The limitation will also ensure that only information crucial to determining the suitability and risk of harm of applicants will be shared.

Rational connection between the limitation and the purpose (s28(d))

The National Standards for Working with Children Checks were developed with reference to the Royal Commission's recommendations, existing best practice and the expertise of officials from the Australian, state and territory governments. The National Standards describe the disqualifying offences that should prevent a person in any jurisdiction from working with children and also align with the disqualifying offences in the NDIS Quality and Safeguarding Framework.

Implementing the National Standards in the ACT's WWVP scheme requires introducing disqualifying offences for people intending to work with children, which requires limitations to these applicants' right to privacy and reputation. However, it is also intended that early identification and exclusion of those who pose a risk to children should lead to a cumulative reduction in the incidence of abuse, violence and exploitation over time.

The collection of relevant information relating to a person's charges and convictions of disqualifying offences and the sharing of that information with other jurisdictions is necessary to ensure the success of a nationally consistent approach and maintain protections for children across jurisdictional borders.

Proportionality (s28 (e))

Measures requiring greater collection, use and sharing of relevant information to determine suitability is a reasonable interference with privacy and reputation because the measure is reasonable and proportional to the purpose, and is necessary in the circumstances.

The collection, use and sharing of relevant information is necessary for the safety and protection of children and other vulnerable people. This is demonstrated through the premise underpinning the scheme, that past behaviour of a person can provide

an indication of possible future behaviour of that person. How information is used is governed by prescribed requirements of the risk assessment process. For example, the Commissioner must consider the relevance of the information, as well as any submission made by the person in relation to the information collected.

Further safeguards have been incorporated into the Bill to ensure the protection of information and the person's privacy and reputation. For example, the on-sharing of information to employers is prohibited unless with the consent of the person. More generally, the Commissioner may only share information in limited circumstances and only to particular entities.

There is no less restrictive approach available that ensures the ACT Government is aligned with National Standards and continues to protect the safety of children and vulnerable people in the ACT.

Right to equality before the law (s 8)

Right to not be tried or punished more than once (s 24)

Section 8 of the Human Rights Act establishes that:

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The right to recognition as a person before the law (s 8(1)) is an absolute right and the Bill does not interfere with this right.

Section 24 of the Human Rights Act establishes that:

No one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

Nature of the right and the limitation (s 28 (a) and (c))

The Bill limits the rights of certain individuals to equality before the law and natural justice (ss 8 and 24 of the Human Rights Act) because:

- certain individuals will be excluded from child-related work and the NDIS as a direct result of their criminal history;
- individuals excluded from child-related work and the NDIS as a result of class A offences will have no right of appeal; and
- the introduction of disqualifying offences will apply to every person currently registered (the measure will apply retrospectively).

As a result of these measures, certain individuals will be treated differently due to their criminal history. The Bill also engages the principles of natural justice because some individuals will not have the opportunity to appeal the decision through the

ACT Civil and Administrative Tribunal. It also limits this right because people who are already registered may be de-registered.

Legitimate purpose (s 28 (b))

With respect to each right limited by the Bill, the protection of children and other vulnerable people is the paramount consideration and is prioritised over the rights of others involved in the WWVP scheme, including applicants. It is therefore necessary to treat certain people differently to best protect the rights and freedoms of vulnerable people.

To achieve the purpose and intent of the Bill through the above measures, certain people will be considered an unacceptable risk of harm and must be excluded from working with children or in the NDIS. The measures ultimately enhance the protection of individuals who require greater protections under the law, including children and other vulnerable people, by strengthening the Commissioner's risk assessment powers and placing limits on a person's ability to appeal the Commissioner's decision.

This purpose will be achieved by ensuring that very few individuals will be subject to these limitations. Further, individuals who cannot be registered to work with children or in the NDIS may still apply for a conditional or role-based registration to work in other areas, such as drug and alcohol counselling for adults.

Rational connection between the limitation and the purpose (s28(d))

While the operation of disqualifying offences limits the rights to equality before the law and natural justice, the measures outlined above are necessary to maintain protections for children and vulnerable people and successfully implement a nationally consistent approach to background screening.

This approach is supported by the recommendations made by the Royal Commission and subsequent national agreements resulting in the National Standards and the NDIS Worker Screening Framework.

To achieve national consistency and ensure the safety of Australia's most vulnerable, it is inappropriate for people convicted of certain serious criminal offences to be able to appeal against a decision to refuse or cancel a registration to work with children or in the NDIS. Further, it is inappropriate for people already registered to continue to hold registration as changes are made to the threshold of risk assessed. The assumption is that a person convicted of a serious offence against children will continue to pose an unacceptable risk to vulnerable people.

As the purpose is for the protection of individuals from people who present the greatest risk of harm, the limitation is an important component of achieving the objective of preventing harm to vulnerable people across Australian jurisdictions.

Proportionality (s28 (e))

This is the least restrictive way of reasonably achieving the protection of vulnerable people, including children, because it sets clear parameters for the exclusion of

people who have demonstrable history of undertaking behaviours that present a high risk for children and vulnerable people.

To ensure the measures are proportionate to the purpose of the Bill (and the WWVP scheme), the disqualifying offence provisions apply to a small cohort of people who have been convicted or charged with a listed offence in the ACT. These people will not be able to work or volunteer with children, or work with NDIS providers. However, these individuals may still seek a conditional or role-based registration as long as they do not work with children or in the NDIS.

Sufficient checks and balances exist to reduce the limitation of these rights. For example, disqualifying offences only apply if the person was over the age of 18 at the time of the offence. Further, a person who is excluded from the scheme due to a class B disqualifying offence, or as a result of the risk assessment process may re-apply after a period of 5 years or if their circumstances change (e.g. their conviction is quashed).

The introduction of disqualifying offences is necessarily strict to prioritise the rights and freedoms of vulnerable people so that they can be safe from harm and fully connect and contribute to society. Any less restrictive measures would compromise the intent and objectives of the WWVP scheme and increase the unacceptable risk that a person may pose to a vulnerable person.

It is expected that the limitation of these rights will be confined to a small group of people in the ACT and will not prevent this group from seeking employment in other sectors.

Right to a fair trial (s 21)

Right to presumption of innocence (s 22)

Section 21 of the Human Rights Act establishes that:

(1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(3) Each judgment in a criminal or civil proceeding must be made public unless the public interest requires that the judgment not be made public.

Section 22 of the Human Rights Act establishes that:

(1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Nature of the right and the limitation (s 28 (a) and (c))

The right to a fair and public hearing means that people with disqualifying offences have the right to be given a fair opportunity to be involved in matters that affect them. To this extent, section 21(1) and section 21(3) of the Human Rights Act are relevant to the operation of the Bill.

The Bill places certain limits on these rights by introducing a list of offences that disqualify an individual from general registration under the WWVP scheme (disqualifying offences). Principally, these rights are limited in two ways:

- An administrative decision made on the basis of a disqualifying offence or unacceptable risk of harm is not a decision made by an independent and impartial tribunal; and
- A disqualified person will be denied an opportunity to appeal their disqualification, unless there is a case of mistaken identity.

The Bill also limits the right to a fair trial outlined in section 22 (1) of the Human Rights Act as it allows for a person who has been charged of a disqualifying offence (not just convicted) to be denied WWVP registration.

Legitimate purpose (s 28 (b))

The Bill establishes that the paramount consideration in the administration, operation and enforcement of the WWVP Act is the best interests of children and vulnerable people in the ACT.

To give effect to this purpose, the Commissioner is delegated the power to make decisions about whether a person can be granted registration under the WWVP scheme through considering relevant information about an applicant's criminal history, including charges and convictions of disqualifying offences. This is based on the rationale that an individual's past behaviour provides an indication of future behaviour and that a person who has been convicted of a serious offence will continue to pose an unacceptable level of risk to children.

For example, this means that in the case of an individual who has been charged with, but not yet convicted of, a disqualifying offence, the Commissioner will not grant WWVP registration to that person to work with children or in the NDIS, prioritising the right of children to be safe from potential harm.

While this Bill does not involve determinations of guilt or innocence under criminal law, it allows the Commissioner to take a firmer risk-based approach to ensure that children and vulnerable people are protected.

Rational connection between the limitation and the purpose (s28(d))

The Bill increases the safeguards for children and vulnerable people by implementing more robust assessment to mitigate the risk that certain individuals may pose to children and vulnerable people. The limitation on appeal rights enables the Commissioner to make timely decisions to protect children.

As noted above, people who have been denied registration to work with children or in the NDIS because of being charged or convicted of a class A disqualifying offence will not have the right to appeal this decision, which limits their right to a fair trial.

The introduction of disqualifying offences adds to the existing suite of protections that aim to keep children and vulnerable people free from exploitation and abuse,

and also seek to make organisations more child-safe. Providing someone who has been charged with a serious offence with registration to work with children fails to provide sufficient protections for children, particularly given the risk that the person may be found guilty of the offence.

Proportionality (s28 (e))

The Bill seeks to limit the rights of people who have been charged or convicted with serious criminal offences through the least restrictive means possible, to achieve the policy intent of protecting children and vulnerable people from abuse.

To ensure the measures are proportionate, the disqualifying offence provisions only apply to a small cohort of people in the ACT who have been convicted or charged with a disqualifying offence. These people will not be able to work or volunteer with children, or work with NDIS providers. However, these people will still be able to seek a conditional registration (for example, people with lived experience who wish to work in drug and alcohol counselling) as long as they do not work with children or in the NDIS.

However, the Bill also allows for people who were excluded from the WWVP scheme due to a Class B disqualifying offence to reapply after five years. Further, any applicant who was disqualified may reapply if their circumstances change (for example, if they are found to be not guilty of the offence). In addition, individuals who cannot be registered to work with children or in the NDIS may still apply for a conditional or role-based registration to work in other areas, such as drug and alcohol counselling for adults.

Protection of family and children (s 11)

Section 11 of the Human Rights Act establishes that:

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

The Bill promotes and strengthens this right, particularly for children in out of home care. However, there is a small likelihood that the Bill limits the right to family for some children in foster care.

Nature of the right and the limitation (s 28 (a) and (c))

The Bill may limit the protection of family and children in the unlikely scenario that a current foster carer is de-registered due to a negative risk assessment as a result of the introduction of disqualifying offences. This is the same for kinship carers. However, foster carers will otherwise be treated differently to kinship carers.

Kinship care occurs as a result of a child needing a placement, often at a time of family crisis, rather than due to a general interest in caring. Foster carers extend

their caring role to children outside their family and are therefore required to undergo recruitment, assessment and training processes, including background checks.

The Bill establishes that the process for current foster carers is different to prospective foster carers. People who intend to be a foster carer will be subject to the same exclusions as other applicants who have been disqualified as a result of a risk assessment process or a class A disqualifying offence.

As a result of the introduction of disqualifying offences, the rights of a child in foster care may be affected if they are currently living with a foster carer whose registration is cancelled as a result of a negative risk assessment following the introduction of disqualifying offences.

Legitimate purpose (s 28 (b))

The Bill establishes that the paramount consideration in the administration, operation and enforcement of the WWVP Act is the best interests of children and vulnerable people in the ACT.

To give effect to this purpose, the government considers a child's right to safety and protection from harm as paramount to the right to the preservation of family with a foster carer who may be deregistered from engaging in a regulated activity involving children as a result of a negative risk assessment.

This is based on the rationale that an individual's past behaviour provides an indication of future behaviour and that a person who has been convicted of a serious offence continues to pose an unacceptable level of risk to children. This promotes the safety of children in the care of foster carers while ensuring that safe and stable foster care arrangements can continue with the appropriate assessment and monitoring.

The Bill rectifies any inadequacies of previous risk assessments for prospective foster carers. The proposed changes work to ensure a robust framework that protects children and promotes their best interests.

Rational connection between the limitation and the purpose (s28(d))

The limitation of the right to family of children currently in foster care is necessary to effectively limit the unacceptable level of risk posed by current foster carers who receive a negative risk assessment following the introduction of disqualifying offences.

The Royal Commission made clear that child sexual abuse often happens in secret, in circumstances with limited transparency and oversight, and is more likely to remain undetected over a long period of time.

This means that foster carers should be subject to greater scrutiny than kinship carers. There is no other activity where the government will allow a child to live with a stranger without constant supervision.

As the purpose of the Bill is for the protection of children from people who present the greatest risk of harm, the limitation is an important component of achieving

national consistency and improving safeguards within Working with Children Checks schemes across Australian jurisdictions.

As a result, thresholds for acceptable levels of risk to a child will increase with the introduction of disqualifying offences across Working with Children Checks schemes. This means that following a risk assessment, some individuals who may have previously satisfied risk thresholds may now be considered to pose an unacceptable risk of harm to a child.

Proportionality (s28 (e))

Mitigating the risk of children being abused by a person who has committed certain serious offences requires applying a strict threshold for any person who seeks to work with children, regardless of whether they currently care for children.

To achieve proportionality, the Bill establishes that current foster carers with class A disqualifying offences will not be automatically deregistered. Instead, the Bill establishes that their class A offences be treated as a class B offence. This is the least restrictive way of reasonably achieving the protection of children in foster care and ensuring that safe and stable foster care arrangements can continue.

Further, it is expected that very few children will be affected by the change in eligibility of a foster carer and it will strengthen protections for children who will be placed with foster carers in the future. This protects the rights and interests of children by ensuring their carer is appropriately suitable to care for the most vulnerable children in the ACT.

On balance, the limitation is not arbitrary because the overriding consideration of the Bill is the protection and best interests of children to live in a safe home and family. Further, the position of trust and responsibility held by foster carers necessitates a greater level of scrutiny to protect children who may have already been abused or neglected.

Working with Vulnerable People (Background Checking) Amendment Bill 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Working with Vulnerable People (Background Checking) Amendment Bill 2020**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This is a technical clause that sets out the name of the Act as the *Working with Vulnerable People (Background Checking) Amendment Act 2020*.

Clause 2 Commencement

This clause states that the Act will commence following the commencement of the *Working with Vulnerable People (Background Checking) Amendment Act 2019*, section 3 (1 November 2020); or the day after the Act's notification day, whichever is later.

Clause 3 Legislation amended

This clause provides that the Act amends the *Working with Vulnerable People (Background Checking) Act 2011*.

Clause 4 New section 6A

This clause establishes that the best interests, safety, welfare and protection of vulnerable people is the paramount consideration when making a decision under the Act.

Clause 5 When is a person *engaged* in a regulated activity, section 9 (b) (ii), example 11

This clause amends the example list under section 9(b)(ii) to remove 'member of a management committee of an unincorporated body or association' as an example of 'capacity in which engaged in activity'.

Clause 6 What is *contact* with a vulnerable person? Section 10, definition of *contact*, paragraph (c) (i) examples and note

This clause removes the examples of 'same place' that sit under the definition of contact.

Clause 7 New sections 11A and 11B

This clause inserts a new section 11A, which amends the definition of relevant offence to include a disqualifying offence.

This clause also inserts a new section 11B that defines 'disqualifying offence' and introduces the term 'kinship care activity', which is now defined in the dictionary.

These provisions have been relocated from section 26A, which was inserted in *Working with Vulnerable People (Background Checking) Amendment Act 2019*.

**Clause 8 When is a person required to be registered?
Section 12 (1)**

This clause inserts an additional criteria to be eligible to engage in a regulated activity prior to the completion of a person's registration. This section states that a person must be registered to engage in a regulated activity, or the person is a one of the key personnel of a registered NDIS provider.

Clause 9 Section 12 (4), definition of *close relative*, paragraph (b) and note

This clause changes the wording of section 12(4)(b) that the term 'close relative' does not include a kinship carer of the vulnerable person. Kinship carer is now defined in the dictionary and this is reflected in the new note.

**Clause 10 Offences—person engage in regulated activity for which person
not registered
Section 13 (1), note 1**

This clause updates note 1 to include the appropriate cross-references regarding interim conditions.

Clause 11 Section 13 (5), note 2

This clause amends note 2 to include the appropriate cross reference to the criminal code.

**Clause 12 Offences—employer engage person in regulated activity for which
person not registered
Section 14 (1), note 1**

This clause amends note 1 to update the cross reference to include interim conditions.

Clause 13 Section 14 (5), note 2

This clause amends note 2 to update the cross reference to the criminal code.

Clause 14 Section 15A heading

This clause amends the heading of section 15A to make it clear that it relates to imposing an Interim bar on supervised employment.

Clause 15 Section 15A (1) and note

This clause amends section 15A (1) to make it clear that it relates to imposing an Interim bar on an unregistered person to stop them from engaging in a regulated activity involving children or an NDIS activity. An interim bar may be imposed if the Commissioner reasonably believes the person poses an unacceptable risk of harm to a vulnerable person.

**Clause 16 When unregistered person may be engaged in regulated activity—
kinship carer
Section 16 (1)**

This clause remakes section 16(1) to make clear that it applies to an unregistered person who is a kinship carer and they are required to be registered to engage in the activity.

Clause 17 Section 16 (3), definition of *kinship carer*

This clause removes the definition of kinship carer because it is now defined in the dictionary.

**Clause 18 Application for registration
Section 17 (1) and note**

This clause remakes section 17(1) to make clear that a person who has been convicted or found guilty of a class A disqualifying offence cannot be registered to engage in a regulated activity involving children or an NDIS activity.

Clause 19 Section 17 (4), note

This clause removes the note under section 17 (4).

Clause 20 Section 21 heading

This clause renames section 21 to be clear that it is an offence for an applicant to fail to disclose charge, conviction or finding of guilt for a relevant offence.

Clause 21 Section 21 (1) (c) and (2) (c)

This clause removes reference to ‘disqualifying offence’ because this term is now incorporated into the definition of ‘relevant offence’.

**Clause 22 Restriction on reapplying for registration
Section 22 (2A)**

This clause inserts a new section 22 (2A). The new section establishes that a person subject to a negative notice, or otherwise had their registration cancelled because of a class A disqualifying offence, may apply for registration only if there has been a change in relevant information. For example, the person has been acquitted of a previously pending charge, or the person’s conviction has been quashed.

Clause 23 Section 24 and 26A

This clause amends sections 24 and 25 that were changed in the 2019 Amendment Act.

This clause removes sections 26 and 26A, which were introduced in the 2019 Amendment Act. These clauses defined ‘relevant offence’ and ‘disqualifying offence’. These sections have been remade as sections 11A and 11B.

Clause 24 Risk assessment guidelines—content
Section 28 (2) (a), note

This clause amends the note to update the appropriate cross reference to the section 29 (risk assessment guidelines – criminal history).

Clause 25 Section 28 (2) (b), note

This clause simplifies the note about non-conviction information and removes references to disqualifying offences, as this is now incorporated into relevant offences.

Clause 26 Section 29

This clause amends section 29 to require the risk assessment to consider disqualifying offences in relation to a person seeking to engage in a regulated activity involving children, as well as a person seeking to engage in an NDIS activity.

It also requires the risk assessment to consider whether an applicant with a class B disqualifying offence has exceptional circumstances that justify being registered to engage in a regulated activity involving children or an NDIS activity. For example, the person is a kinship carer.

Clause 27 Risk assessment guidelines—non-conviction information
Section 30

This clause amends section 30 to remove references to disqualifying offence as this is now incorporated into relevant offence.

Clause 28 New section 30 (2)

This clause inserts a new subsection 30(2) to require the risk assessment to consider whether an applicant with an outstanding charge for a disqualifying offence has exceptional circumstances that justify being registered to engage in a regulated activity involving children or an NDIS activity.

Clause 29 Risk assessments
New section 32 (3)

This clause inserts a new subsection 32(3) that allows the Commissioner to stop its risk assessment of a person who has applied to engage in a regulated activity involving children or an NDIS activity and the Commissioner becomes aware that the person is not eligible or stops being eligible under section 17(1A) (conviction or finding of guilt for a class A disqualifying offence).

This clause provides for the circumstance where a person is convicted of a class A disqualifying offence after making an application but before the application is decided.

Clause 30 independent advisors—appointment
Section 34 (1), note 1

This clause omits note 1.

**Clause 31 Proposed negative notices
Section 37 (4)**

This clause enables the Commissioner to tell an employer the reasons for a condition with the person's consent.

**Clause 32 Negative notices
New Section 40 (1) (aa)**

This clause inserts a new paragraph that requires the Commissioner to refuse to register a person if the Commissioner becomes aware that the person is not eligible or stops being eligible under section 17(1A). This clause also inserts a note to explain that a person is not eligible or stops being eligible if they are convicted or found guilty of a class A disqualifying offence.

Clause 33 Section 40 (2) (a), notes

This clause omits the notes that appear under paragraph (a).

Clause 34 Section 40 (3) and note

This clause omits section 40 (3) and the associated note.

Clause 35 Section 40 (4), new note

This clause inserts a new note to make clear that an unregistered person who is given a negative notice commits an offence if they continue to engage in a regulated activity.

Clause 36 New section 40 (5)

This clause inserts a new section 40 (5), which enables the Commissioner to tell an employer the reasons for a negative notice with the person's consent.

**Clause 37 Registration
Section 41 (2)**

This clause makes section 41 (2) to require the Commissioner to notify a person that their registration is conditional under s 42A because the processes in sections 43, 44 and 45 do not apply.

**Clause 38 Conditional Registration
Section 42 (2) to (4)**

This clause removes section 42(2) to 42(4) because these have been remade as section 42B.

Clause 39 New sections 42A to 42C

This clause inserts three new sections. Section 42A establishes that a person who has a class A disqualifying offence is registered, they must not engage in a regulated activity involving children or an NDIS activity.

This clause also inserts a new note to make clear that for a kinship carer, a class A disqualifying offence is treated as if it were a class B disqualifying offence (see section 11B).

Section 42B remakes section 42(2) to 42(4) and provides that a person may be registered with a role-based registration that is subject to conditions that the person only engage in stated activities, or with a specified employer, or both.

Section 42C allows the Commissioner to register a person with a disqualifying offence a role-based registration on the condition that the person must not engage in a regulated activity involving children or an NDIS activity.

**Clause 40 Proposed conditional registration
Section 43 (1)**

This clause is a consequential amendment as a result of inserting the new section 42A.

Clause 41 Section 43 (3)

This clause enables the Commissioner to tell an employer the reasons for a proposed conditional registration notice with the person's consent.

**Clause 42 Notice of conditional registration
Section 46 (2)**

This clause revises section 46 (2) to align with s 41 (2), to ensure a person is notified of relevant information.

**Clause 43 Interim conditional registration
Section 54A (6)**

This clause enables the Commissioner to tell an employer the reasons for an interim conditional registration with the person's consent.

Clause 44 Section 55 heading

This clause changes the heading of section 55 to remove reference to disqualifying offence, as this is now incorporated into relevant offence.

Clause 45 Section 55 (1) (b) and (2) (b)

This clause removes reference to disqualifying offence, as this is now incorporated into relevant offence.

Clause 46 Section 56 heading

This clause changes the heading of section 56 from 'Offence –fail to notify change of name or address' to 'Offence –fail to notify change of name'.

Clause 47 New section 56A

This clause inserts the new section 56A, which establishes the automatic cancellation of a registration to engage in a regulated activity involving children or an NDIS activity if the person is convicted or found guilty of a class A disqualifying offence.

The Commissioner must tell the person and their employer, in writing, that the person's registration has been cancelled.

**Clause 48 Notice of proposed suspension or cancellation of registration
Section 58 (1), except note**

This clause requires the Commissioner to give written notice to a person if the Commissioner intends to suspend or cancel their registration.

**Clause 49 Suspension or cancellation of registration
Section 59 (3)**

This clause enables the Commissioner to tell an employer the reasons for a suspension or cancellation of a person's registration with the person's consent.

**Clause 50 Commissioner may give information to employers
Section 63C (2)**

This clause amends section 63C to enable the Commissioner to tell an employer the conditions of their employee's registration. It is intended that the employer also has an obligation to inform the Commissioner if the nature of the employment changes.

This clause also introduces the requirement that the Commissioner must not tell the employer the reasons for a condition without the person's consent.

Clause 51 Section 63C (as amended)

This clause moves section 63C to Part 7A of the WWVP Act.

Clause 52 New part 9

A limited number of foster carers will be affected by the introduction of disqualifying offences. This situation means that the rights of children to family could be arbitrarily limited (i.e. a child may be automatically removed from their foster family).

To address this issue, this clause inserts a new part to accommodate foster carers who are currently caring for children in care. This means that these current foster carers can be risk assessed instead of being automatically deregistered, effectively being treated as class B offences.

**Clause 53 Reviewable decisions
Schedule 2, item 1A**

This clause updates the reviewable decision to reflect that s15A (1) has changed to include not engaging in regulated activity involving children.

Clause 54 Schedule 2, item 3

This clause updates the reviewable decision in item 3 and item 3A to reflect updates to section 40.

Clause 55 Schedule 3

This clause updates the list and classification of disqualifying offences as they apply to engaging in a regulated activity with children and an NDIS activity.

Clause 56 Dictionary, definition of *adult conviction or finding of guilt*

This clause defines ‘adult conviction or finding of guilt’ to make clear that an offence is disqualifying if the offence was committed when the person was an adult.

Clause 57 Dictionary, definitions of *class A disqualifying offence* etc

This clause cross-references the definitions of class A disqualifying offence and class B disqualifying offence with their relevant section (11B).

Clause 58 Dictionary, new definition of *Drugs of Dependence Act*

This clause inserts the definition of *Drugs of Dependence Act*.

Clause 59 Dictionary, definition of *interim bar*

This clause omits the definition of interim bar as it is no longer required.

Clause 60 Dictionary, new definitions

This clause inserts the definitions of kinship care activity and kinship carer to give effect to how kinship carers will be treated in relation to class A disqualifying offences.

Clause 61 Dictionary, definition of *relevant offence*

This clause cross-references the definition of relevant offence with the relevant section (11A).

Clause 62 Dictionary, new definition of *Road Transport (Safety and Traffic Management Act)*

This clause defines the *Road Transport (Safety and Traffic Management) Act* for the purpose of schedule 3.

Clause 63 Dictionary, definition of *role-based registration*

This clause cross-references the definition of role-based registration with the relevant section (42B).

Clause 64 Dictionary, new definition of *young adult relationship*

This clause cross-references the definition of young adult relationship with the relevant section of the schedule (schedule 3, section 3.1).

Schedule 1 Consequential amendments

Part 1.1 ACT Teacher Quality Institute Act 2010

1.1 Section 32 (1) (d)

This clause amends section 32 (1) (d) of the *ACT Teacher Quality Institute Act 2010* to include the term ‘working with vulnerable people registration’ so that it captures all teachers.

1.2 Section 33 (1) (c)

This clause amends section 33 (1) (c) of the *ACT Teacher Quality Institute Act 2010* to include the term ‘working with vulnerable people registration’ so that it captures all teachers.

1.3 Section 35 (1) (b)

This clause amends section 35 (1) (b) of the *ACT Teacher Quality Institute Act 2010* to include the term ‘working with vulnerable people registration’ so that it captures all teachers.

1.4 Section 38 (1) (c)

This clause amends section 38 (1) (c) of the *ACT Teacher Quality Institute Act 2010* to include the term ‘working with vulnerable people registration’ so that it captures all teachers.

1.5 Section 38 (1) (d) (ii)

This clause amends section 38 (1) (d) (ii) of the *ACT Teacher Quality Institute Act 2010* to update the terminology to reflect the changes in the WWVP Act.

1.6 Section 51 (5) (d)

This clause amends section 51 (5) (d) of the *ACT Teacher Quality Institute Act 2010* to include the term ‘working with vulnerable people registration’ so that it captures all teachers.

1.7 Section 53 (5) (d)

This clause amends section 53 (5) (d) of the *ACT Teacher Quality Institute Act 2010* to include the term ‘working with vulnerable people registration’ so that it captures all teachers.

1.8 Section 67 (c)

This clause amends section 38 (1) (c) of the *ACT Teacher Quality Institute Act 2010* to update the terminology to reflect the changes in the WWVP Act.

1.9 Section 70G (5) (b) (ii)

This clause amends section 70G (5) (b) (ii) of the *ACT Teacher Quality Institute Act 2010* to reflect that a registration can be made subject to a condition that the person not engage in a regulated activity involving children.

1.10 Section 70M (1) (b)

This clause amends section 70M (1) (b) of the *ACT Teacher Quality Institute Act 2010* to reflect that a registration can be made subject to a condition that the person not engage in a regulated activity involving children.

1.11 Section 70M (2) (b)

This clause amends section 70M (2) (b) of the *ACT Teacher Quality Institute Act 2010* to reflect that a registration can be made subject to a condition that the person not engage in a regulated activity involving children.

1.12 Dictionary, definition of *working with vulnerable people registration*

This clause amends the definition of working with vulnerable people registration to specify that a teacher must have a registration that allows them to work with children. It also ensures that the requirement to be registered captures all relevant teachers.

Part 1.2 Children and Young People Act 2008

1.13 Section 514B (3) (a)

This clause amends s 514B to ensure that the registration must be appropriate registration to engage in a regulated activity.

1.14 Section 514E (1) and (2)

This clause extends carer approvals from three years to five years to align with working with vulnerable people registration.

1.15 Section 856A (1)

This clause is a consequential amendment to update references to the WWVP Act.

1.16 Section 856B (1)

This clause is a consequential amendment to update references to the WWVP Act.

1.17 Section 875 (2), examples

This clause is a consequential amendment to update references to the WWVP Act.

Part 1.3 Magistrates Court (Working with Vulnerable People Infringement Notices) Regulation 2012

1.18 Schedule 1, new item 9A

This clause inserts a new penalty and infringement to correspond with section 55A (1), which creates an offence for an applicant to fail to disclose change in relevant information. The offence results in 50 penalty units and an infringement penalty of 500.

Part 1.4 Mental Health (Secure Facilities) Act 2016

1.19 Section 69 (3) (c)

This clause amends section 69 (3) (c) of the *Mental Health (Secure Facilities) Act 2016* to reflect that a registration can be made subject to a condition that the person not engage in a regulated activity involving children.

Part 1.5 Working with Vulnerable People (Background Checking) Regulation 2012

1.20 Section 5, heading

This clause changes the heading of section 5.

1.21 Section 5 (2) (c)

This clause removes subsection 5 (2) (c) to streamline requirements that must be satisfied to employ a person with a conditional registration while maintaining the necessary safeguards to protect vulnerable people.

This fulfils recommendation 17 of the Legislative Review.

1.22 Section 5 (2) (g) and (h)

This clause removes subsection 5 (2) (g) and (h) to streamline requirements that must be satisfied to employ a person with a conditional registration while maintaining the necessary safeguards to protect vulnerable people.

This fulfils recommendation 17 of the Legislative Review.

1.23 Section 6 (2) (b)

This clause updates references to conditional registration because the relevant provisions have been remade as section 42B.

1.24 Dictionary, note 3

This clause updates references to role-based registration because the relevant provisions have been remade as section 42B (1).