

**2023**

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

**BACKGROUND CHECKING LEGISLATION AMENDMENT BILL 2022**

**SUPPLEMENTARY EXPLANATORY STATEMENT**

**Presented by  
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# **BACKGROUND CHECKING LEGISLATION AMENDMENT BILL 2022**

## **Government Amendments**

### **Outline of Government Amendments**

This supplementary explanatory statement relates to Government amendments to the Background Checking Legislation Amendment Bill 2022 (Bill) as presented to the Legislative Assembly.

This supplementary explanatory statement relates to Government amendments to the Bill as presented to the Legislative Assembly. It has been prepared to assist the reader of the Government amendments and help inform relevant debate. It does not form part of the Bill and has not been endorsed by the Legislative Assembly. A more detailed explanation of the purposes and intended operation of the Bill are set out in the Explanatory Statement for the Bill.

The Government amendments will adjust:

1. the treatment of the offence of incest (child under the age of 16) within the scheme of disqualifying offences in Schedules 2 and 3 of the *Working with Vulnerable People (Background Checking) Act 2011* (WWVP Act);
2. the extension of the scheme of disqualifying offences to capture not only interstate offences but also Commonwealth offences and foreign offences.

### **Consistency with Human Rights**

The Government amendments are not considered to alter the way in which the rights under the *Human Rights Act 2004* (HRA) are engaged or limited by the Bill.

The Government amendments are not “significant”. 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 HRA.

## Disqualifying Offences

As noted in the Explanatory Statement to the Bill, the Working with Vulnerable People (WWVP) Scheme accommodates two national initiatives relating to children and people with disability:

- National approach for National Disability Insurance Scheme Worker Screening Check (NDISWC) under the NDIS Quality and Safeguarding Framework; and
- National Standards for Working with Children Checks (WWCC) as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse;

Those initiatives are accommodated, in part, by a scheme of disqualifying offences. A person who has a conviction or finding of guilt these offences is treated differently to a person who has a conviction or finding of guilt for any other “relevant offence”.

The disqualifying offences fall into two classes—Class A and Class B—which reflect the relative seriousness of the offence and degree of risk which is associated with it.

A conviction or finding of guilt for a disqualifying offence gives to consequences:

- *Class A disqualifying offences*: the person is automatically disqualified from registration and will have any existing registration automatically cancelled;
- *Class B disqualifying offences*: the person is only eligible to be registered or to keep their registration by discretion in certain exceptional circumstances.

## Interstate offences

The current lists of disqualifying offences—Class A and Class B—are drawn from Territory laws such as the *Crimes Act 1900* (ACT) and *Criminal Code 2002* (ACT).

The Bill allows for those lists to be extended to include any interstate offences which correspond, or substantially correspond, to the offences drawn from Territory law.

The Government amendments clarify that the lists may also be extended to include offences under a Commonwealth law, or foreign law, that have this correspondence.

As the Explanatory Statement to the Bill notes, “correspondence” is a broad concept.

An offence may be a “corresponding offence” under a “corresponding law” if it contains the same physical and mental elements (for example in a code jurisdiction) or it has the same gist or gravamen (for example in a non-code jurisdiction). It may also be a corresponding offence if it is “of the same kind” or “of the same character”.

This reflects an established body of law. Generally, a law of one jurisdiction will “correspond” to a law of another jurisdiction where it deals with the same subject matter in a manner, or with a result, that is similar. Laws may correspond in object or

purpose even though they use different machinery and the provisions need not be identical but they must harmonise with each other.<sup>1</sup> In considering the meaning of “corresponding provision”, a court may have regard to the fact that in a federal system there may be a general commonality of regulation of a subject matter, which each legislature may execute with differences of detail and machinery but regard as a set of corresponding laws.<sup>2</sup> A court maker will be confined by the ordinary rules of statutory construction, including the need to respect the text and purpose of the legislation, and may not artificially strain the concept to supplement any deficiencies.

The breadth of this concept is key to the operation of the Government amendments.

In the first place, while there is considerable overlap in the criminal laws of the States and Territories, there is less between those laws and the laws of the Commonwealth. The relevant offences in Commonwealth law tend to be framed by reference to their connection with specific heads of legislative power, for example in relation to matters which occur in a foreign jurisdiction, matters which relate to international obligations and matters which are connected to the regulation of customs and postal services.

In the second place, while there may be overlap between the laws of the States and Territories and the laws of a foreign jurisdiction, there may be considerable diversity in the particular gist or gravamen of the offences and in the drafting of those laws.

The intention is that the lists of disqualifying offences be capable of extension to allow all of these offences to be captured if they meet this test of correspondence.

## **Incest**

One offence in the lists of disqualifying offences is that of incest, where the person against whom it is committed is under the age of 16 years (Crimes Act, s 62(2)).

The WWVP Act imposes a further set of conditions which, if met, cause a conviction or finding of guilt to fall into Class A or Class B according to the age of the victim:

- *Class A disqualifying offence*: where the offence is committed against a person who is under the age of 13 years;
- *Class B disqualifying offence*: where the offence is committed against a person who is over the age of 13 years and under the age of 16 years.

The Bill removes the second condition (age of the victim) from the Class A offence, with the intention that any conviction or finding of guilt for incest will fall into Class A.

The Government amendments introduce a new Class A offence, incest (16 years or older) with a new condition, where the offence is committed against a vulnerable person, including a person under 16 years.

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<sup>1</sup> *Samarkos v Commissioner for Corporate Affairs* (1988) 90 FLR 299; *Fortbacon Pty Ltd v Dickie and another* (1995) 127 FLR 69, *R v DF* (2010) 238 FLR 348; and *R v Hoang* [2015] ACTSC 17.

<sup>2</sup> *Fortbacon* at 74; *Macleod v ASIC* (2002) 211 CLR 287 at [78]-[86]; *DF* at [274].

## **Background Checking Legislation Amendment Bill 2022**

### **Detail**

#### **Government Amendment 1**

##### **Clause 5**

##### **Proposed new section 11B (2) (a) (i)**

##### **Page 6, line 4—**

This amendment confirms the intention to allow the existing scheme for disqualifying offences to include all offences, local or overseas, which correspond to the Territory offences in the lists of disqualifying offences in Schedules 2 and 3 of the WWVP Act.

This will allow the Minister, through the corresponding provision arrangements, to extend the meaning of “disqualifying offence” to include a relevant offence under a corresponding law of the Commonwealth, another State or a foreign country.

Under the *Legislation Act 2001*, a “State” is defined to include the Northern Territory.

#### **Government Amendment 2**

##### **Proposed new clause 16A**

##### **Page 10, line 22—**

This amendment introduces a new item to the list of Class A disqualifying offences.

The offence is the offence of incest against a person who is of or above the age of 16 years, with the condition that it must be committed against a vulnerable person.

A “vulnerable person” is defined to mean a child or an adult who is disadvantaged and who is accessing a “regulated activity” in relation to that disadvantage (s 7).

#### **Government Amendment 3**

##### **Clause 18**

##### **Page 11, line 1—**

This amendment removes the offence of incest against a person who is under the age of 16 years (and related condition) from the list of Class B disqualifying offences.