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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**WORKING WITH VULNERABLE PEOPLE (BACKGROUND CHECKING)
BILL 2010**

**REVISED
EXPLANATORY STATEMENT**

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Working with Vulnerable People (Background Checking) Bill 2010
Explanatory Statement

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Working With Vulnerable People (Background Checking) Bill 2010

Overview of the Bill

The Working with Vulnerable People (Background Checking) Bill 2010 (the Bill), once enacted, will become the primary law in the ACT which provides for background checking as part of a risk assessment of people working with, or wanting to work with, children or vulnerable adults in the ACT.

The exclusion of people with a known history of certain behaviour is a fundamental part of creating safe environments for vulnerable people.

The aim of the Bill is to reduce the incidence of sexual, physical, emotional or financial harm or neglect of vulnerable people in the ACT.

The Bill introduces a requirement for people who have contact with vulnerable people in the course of engaging in certain regulated activities or services to be registered with a statutory screening unit to be established in the Office of Regulatory Services, Department of Justice and Community Safety.

On commencement of the Working with Vulnerable People (Background Checking) Act 2010, the Commissioner for Fair Trading (the commissioner) will be the commissioner responsible for administering the Act.

The commissioner will conduct a background check and risk assessment before registering suitable applicants for a maximum period of three years. People who are not registered or who are deemed to present an unacceptable risk of harm will be prohibited from working with vulnerable people in the ACT.

The Bill complements and builds on existing legislation and will replace current checking requirements across a range of regulated activities.

Who are vulnerable people?

For the purpose of the Bill, vulnerable people are defined as children under the age of eighteen years and adults who are experiencing disadvantage and, as a result of disadvantage, are accessing a regulated activity or services. For further information, see the discussion in clause 6 of this explanatory statement.

What is a regulated activity?

Regulated activities are detailed in Schedule 1 of the Bill and are the activities or services that will attract background checking of employers, employees and volunteers under the Bill. For further information, see the discussion in clause 7, page 14 of this explanatory statement.

Who will the Bill affect?

The Bill will apply to people having contact with children and vulnerable people accessing a regulated activity or service as detailed in Schedule 1. Certain people will require background checking in order to be registered to work or volunteer with vulnerable people. For further information, see the discussion in clauses 7 and 8 (pages 14 /15) of this explanatory statement.

Who is an employer?

An employer is an agency, organisation or individual who engages an employee or volunteer in a regulated activity or service which causes that employee or volunteer to have contact with vulnerable people. For further information, see the discussion in clause 10, page 16 of this explanatory statement.

What information will be used for background checking?

A person applying for registration will be required to voluntarily provide their criminal history, all non-conviction information, and any other information that they believe will assist the commissioner to reach a decision. Other information can include information from an employer regarding policies or procedure that mitigate risk and employee or volunteer may pose to vulnerable people accessing the services or activities provided by the organisation or agency. For further information, see the discussion in part 4, page 21 of this explanatory statement.

Rationale

In line with obligations under the *National Framework for Creating Child Safe Environments – Organisations, Employees and Volunteers*, checking systems for people working with children have been established or are being developed in all Australian jurisdictions.

The protection of the rights of children and vulnerable adults in the ACT is a legitimate objective and pressing social need. The ACT Government considers that the creation of a checking system for people who work with, or want to work with, vulnerable people, with appropriate safeguards, is a proportionate response under Section 28 of the *Human Rights Act 2004* (ACT).

The basic premise of background checking is that the past behaviour of an individual provides an indication of the possible future behaviour of that individual¹. Examples or patterns of abusive or inappropriate behaviour can sometimes be evident in information available for assessment, which includes an individual's criminal record or employment history.

There have been documented cases in which a person with a history of abusive behaviour has gained access to vulnerable people because their previous history was not known to their employer or other vetting agency². In the worst cases, these people have gone on to commit further abuse or neglect.

Evidence suggests that around half of sex offenders gain access to their victims through children's organisations.³

¹ Creating Safe Environments for Children – Organisations, Employees and Volunteers National Framework. Schedule: An Evidence Based Guide for Risk Assessment and Decision-Making when Undertaking Background Checking, June 2006, p2

² Birchard, M. (2004). *Birchard Inquiry*. London: Home Office.

³ Statistics from the Victorian Child Exploitation Squad indicate that between 1988-1996, 43% of offenders gained access to child victims through children's organisations. Petratis, V and O'Connor, C, *Rockspider: The Danger of Paedophiles – Untold Stories*, Hybrid Publishers, Ormand, Victoria, 1999

Targeted ACT legislation exists for the protection of vulnerable members of the ACT community while they receive services in the community and in the home. This legislation includes the *Discrimination Act 1991* (ACT), *Disability Services Act 1991* (ACT), *Children and Young People Act 2008* (ACT), and the *Health Practitioner Regulation National Law Act 2010* (ACT). There is also similar Commonwealth Act and Regulations. however, these legal frameworks are limited.

While vulnerable members of the ACT community are awarded some protections under these legal frameworks, these Acts do not regulate background checking. Therefore, the practices and processes used by organisations and agencies when undertaking background checking and risk assessment of prospective employees and volunteers are not consistent or centralised and the background information received is limited to a person's criminal history only.

The background checking and risk assessment process detailed in the Bill provides for the centralising of background checking and risk assessment. The Bill also provides for a broader basis on which to conduct background checking which includes a person's criminal history, non-conviction information, relevant offences and other information.

A rigorous and transparent background check and risk assessment process will enable appropriate and defensible decision making. Background checking and risk assessment will complement an organisation's recruitment practices and other policies to create safe working places for clients, employers, employees and volunteers.

The Bill provides protective measures for current and future employees and volunteers through ensuring an individual's career and/or volunteer opportunities are not unduly influenced by non-relevant criminal information, such as, parking infringements.

The ACT also has obligations to protect children and vulnerable people under the *Human Rights Act 2004* (ACT), in particular:

- Recognition and equality before the law (section 8),
- Right to life (section 9),
- Protection from torture and cruel, inhuman or degrading treatment (section 10);and
- the Protection of Children in the criminal process (section 20).

The ACT has obligations under international Conventions. The Bill complements relevant Articles found in International Conventions; in particular:

Article 19.1 and 23.2 of the *Convention on the Rights of the Child*:

“...to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse...”(Article 19.1), and “...recognise that a mentally or physically disabled child should enjoy a full and decent life...: (Article 23.2);

Article 16 of the *Convention on the Rights of Persons with Disabilities*

- Freedom from exploitation, violence and abuse (Article 16); and

Article 6.1, 7 and 26 of the *Covenant on Civil and Political Rights*

- Every human being has the inherent right to life (Article 6.1);
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7);
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law (Article 26).

A priority for the ACT Government, as announced in the *Canberra Plan 2008 – Towards Our Second Century*, is to establish a centralised background checking and risk assessment system for people working with vulnerable people to reduce the risk of sexual, physical, emotional or financial harm or neglect.

Implementation of background checking in the ACT has been recommended in:

- Community Services and Social Equity Standing Committee, Report No 3 ‘*The Rights, Interests and Wellbeing of Children and Young People*’ 2003;
- *The Territory as Parent* and *The Territory’s Children Report*, ACT Government, 2004;
- Children and Young People Commissioner Position Paper, DHCS, 2004; and
- Issues Paper, ACT Children’s Services Council, 2005.

Between August and October 2009, key stakeholders (ACT government and non-government organisations and agencies) and other interested individuals were invited to comment on the discussion paper *A Working with Vulnerable People Checking System for the ACT*. Thirty-eight formal submissions were received and approximately twenty comments were made via email or the web forum.

The Bill has been informed by evidence based research, existing legislation, international conventions, obligations arising through cross jurisdictional agreements, technical considerations and views expressed by government and non-government service providers, as well as interested and potentially effected individuals.

The ACT will be the first Australian jurisdiction to establish a checking system that applies to individual’s working with, or wanting to work with, children and/or vulnerable adults.

Checks in other jurisdictions

Other Australian States and Territories have established or are in the process of developing centralised checking systems for people working with children.

Operational systems have been established in New South Wales, Queensland, Western Australia, South Australia and Victoria. A centralised checking system has also been introduced in the United Kingdom.

In South Australia, the background screening of each applicant occurs in a centralised unit. Final decisions regarding the suitability of the applicant to work with children and vulnerable adults rests with the requesting organisation and are based on the assessment and recommendations made by the screening unit.

The screening of applicant's who work with vulnerable adults is not covered by South Australian legislation

Background screening of criminal and employment history will be commencing in the Northern Territory in March 2011.

There are two types of systems in operation in Australia and the United Kingdom, registration-based systems and position-based systems:

- Registration-based systems, in operation in Queensland, Western Australia, Victoria and the United Kingdom, assess the suitability of an applicant to work in child related employment more broadly. Successful applicants are registered with the checking unit and may change positions or employers without being rechecked during the period of registration; and
- Position-based systems, employed in New South Wales, assess the suitability of an applicant for a specific child-related position. The risk assessment process considers information concerning the history of the applicant as well as the specific risks inherent in a particular position. Applicants may only be approved to work in the specific position against which the assessment has taken place and must generally reapply for a check if moving to a new position or employer.

There is no mutual recognition of checking outcomes across jurisdictions.

While there are similarities across all checking systems, there are also fundamental differences relating to the definition of child related work, scope of people subject to checking, range of information considered as part of the assessment process, duration of approval notices, and the level of fees charged to undertake an assessment.

If a person is excluded from "child related employment/volunteering in one State or Territory or particular organisations within a jurisdiction"⁴ they may go to another jurisdiction or agency with less stringent screening processes. Consideration of checking requirements in other Australian jurisdictions has occurred in the development of working with vulnerable people checking system for the ACT.

⁴ CSMAC Agenda paper Item 2.2, 7 October 2004. p2

The Bill introduces two levels of registration.

- “Registration” – If the commissioner conducts a risk assessment or a revised risk assessment for a person; and is satisfied that the person poses no risk or an acceptable risk of harm to a vulnerable person, the person is awarded “Registration” (subclause 36(1)(a) and (b)).
- “Conditional registration – This form of registration allows a registered person to undertake activities, with conditions imposed, when working with vulnerable people. This could, for example, include the conditionally registered person not being permitted to drive a motor vehicle if a vulnerable person is a passenger however, the conditionally registered person and vulnerable person could both be passengers in a vehicle driven by another registered person who has general registration (subclause 36(1)).

Conditional registration includes “role-based” registration. “Role-based” registration provides the commissioner with the authority to register a person subject to the conditions that the person may engage only in stated regulated activities for a stated employer (subsection 37(2))

What checks are currently in place in the ACT?

Specific legislation for mandating checks for certain occupational categories includes:

- ACT Government employees - *Public Sector Management Act 1994* (section 68(2)(c)(ii)); and
- ACT drivers of public motor vehicles – *Road Transport (Driver Licensing) Act 1999* (section 28(m)).

Some organisations have policies in place to assess employees who work with vulnerable people, with particular attention to the risk of harm they may pose to vulnerable people. Categories of employment groups subject to this type of checking include:

- Teachers;
- Childcare workers;
- Child protection workers;
- Health care workers; and
- People involved in the delivery of community services.

Government contracts with non-government organisations/agencies generally ensure that all people engaged by the organisations/agencies to work with vulnerable people do not pose a risk to the vulnerable person. Organisations/agencies are currently required to obtain a police check and personal references when engaging employees, volunteers or contractors who will have contact with vulnerable people.

Many individual organisations in the ACT community also recognise that background checking of employees or volunteers who are in contact with vulnerable people is an important part of creating a safe working environment. As checks are not mandatory, individual policies vary in terms of who is checked, what is checked, how often checks are conducted and what information will lead to an exclusionary decision. Any costs incurred to undertake background checks are either borne by the organisation or passed to the employee or volunteer. Organisations are also subject to the costs and liabilities that may arise from their individual checking decisions.

The checking system introduced to the ACT through the Bill is aimed at having a minimal impact on the financial capacity of individuals or organisations/agencies. Volunteers will be registered at no cost to the individual or organisation.

While the overall aim of the checking system will be to reduce the risk of harm to vulnerable people, this is to be achieved without discouraging individuals or organisations from providing services to vulnerable people in the ACT community.

The Bill's compatibility with the Human Rights Act 2004 (ACT)

The *Human Rights Act 2004* (ACT) applies equally to vulnerable people and people working in, or wanting to work in, a regulated activity; and employers responsible for employees and volunteers working in a regulated activity.

The Bill holds the protection of vulnerable people in the ACT community as paramount and supports all vulnerable peoples' rights as provided in the *Human Rights Act 2004* (ACT). In particular the Bill support vulnerable peoples' right to:

- Recognition and equality before the law (section 8),
- to life (section 9),
- "...be treated or punished in a cruel, inhuman or degrading way." (subsection 10(1)(b));
- "...the protection needed by the child because of being a child, without distinction or discrimination of any kind." (subsection 11(2);
- Humane treatment when deprived of liberty (section 19); and
- protection of Children in the criminal process (section 20).

Generally, decisions arising from *A v United Kingdom* (1999) 27 EHRR 611; *Z v United Kingdom* (2002) 34 EHRR 3; and *DP and JC v United Kingdom* (2003) 36 EHRR 14, provide:

- i) *These measures should provide effective protection, in particular children and other vulnerable person and include reasonable steps to prevent illtreatment of which the authorities had or ought to have knowledge.*

Similar considerations may arise in respect of the right of a child to protection (section 11(2) of the *Human Rights Act 2004* (ACT), in light of similar positive duties under the *International Covenant on Civil and Political Rights* (Human Rights Committee, *General Comment No. 17 [35]* at [2] and [3]) and *Convention on the Rights of the Child* (Committee on the Rights of the Child, *General Comment no. 5(2003)* at [1]).

The ACT Government would be knowingly negligent in its duty of care towards vulnerable people if it did not impose penalties for a person engaging in a regulated activity without appropriate registration or have a statutory risk assessment framework in place for the purpose of screening applicants working with, or wanting to work with, vulnerable people.

The Bill also safeguards the rights (as provided in the *Human Rights Act 2004* (ACT)) of people working with, or wanting to work with, vulnerable people, in particular:

- Recognition and equality before the law (subsections 8(1) and 8(3) of the *Human Rights Act 2004* (ACT));
- Privacy and reputation (section 12 of the *Human Rights Act 2004* (ACT));
- Taking part in public life (subsection 17(c) of the *Human Rights Act 2004* (ACT)); and
- Right to fair trial (subsection 21 (1) of the *Human Rights Act 2004*(ACT)).

Limits on an application of human rights

The Bill protects vulnerable people by establishing that employees and volunteers working in a regulated activity or service have undergone rigorous background screening and risk assessment and are appropriately registered.

Section 28 of the *Human Rights Act 2004* (ACT) provides that an individual's or a group's rights may be subject to reasonable limits if those limits are demonstrably justified.

Although the Bill supports subsections 8(1), 8(3), 17(c), 21(1) and section 12 of the *Human Rights Act 2004* (ACT), the exchange of criminal history information between the commissioner and an entity and the process of employment screening also limit, in varying degrees, these same rights.

A current or potential employee or volunteer's right to privacy and reputation (section 12 of the *Human Rights Act 2004* (ACT)) is the primary human right limited by the Bill.

To assess the impact of the Bill on an applicant's rights, the rights of vulnerable people must be weighed against the right to employment of people working with, or wanting to work with, vulnerable people in a regulated service or activity.

In deciding whether a limit is reasonable, relevant factors must be considered including the nature of the right affected; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

In *The matter of an application for bail by Isa Islam [2010] ACTSA 147* the Supreme Court summarised the tests which need to be applied (adopting the terminology of the *Human Rights Act 2004* (ACT) where relevant), as follows:

- Is the purpose of the limitation of sufficient importance to warrant overriding the recognised human right?
- Is the challenged provision rationally connected to its purpose? That is, does it achieve the relevant purpose without having an arbitrary or unfair operation and without relying on irrational considerations?
- Does the challenged provision limit the human right concerned no more than is reasonably necessary?
- Is the limit imposed on the human right proportional to the importance of the purpose?

Detail on the clauses of the Bill which limit an employee's or volunteer's right to recognition and equality before the law; privacy and reputation; taking part in public life; and right to fair trial (subsections 8(1) and 8(3); section 12; and subsections 17(c) and 21(1) respectively (as provided in the *Human Rights Act 2004* (ACT)), are included in **Attachment 1** to this explanatory statement.

Attachment 1 also provides the safeguards throughout the Bill that protect the above mentioned employees and volunteers human rights.

Subsection 22(1) of the *Human Rights Act 2004* (ACT)

Subsection 22(1) of the *Human Rights Act 2004* (ACT) may be perceived as being restricted by the Bill. This is because there is a potential for an applicant to feel aggrieved and subject to further punishment if denied registration or receiving a conditional registration.

Subsection 22(1) of the *Human Rights Act 2004* (ACT) provides:

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

Subsection 22(1) is based on, and is identical to, Article 17(2) of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory.

It could be argued that any legislation which allows for the exchange of between the commissioner and entities of a person's criminal information falling short of a conviction, and which allows the commissioner to use such information as a basis for denying employment, would be contrary to the presumption of innocence in section 22(1) of the *Human Rights Act 2004* (ACT). The proponents of such an argument would suggest that, in treating a person adversely or prejudicially on the basis of such an allegation, there would be an implicit assumption in the decision making process that the person was guilty, or had engaged in some wrongdoing, even though the allegation would never have been proved in a court. In other words, in allowing information falling short of conviction to be exchanged with the view to denying the applicant employment, as is the case in clause 28 of the Bill, the presumption would be that those allegations may be true and that vulnerable people need to be protected from that person.

Such an argument misunderstands the nature and the scope of the presumption of innocence. As discussed below, the right contained in subsection 21(1) of the *Human*

Rights Act 2004 (ACT) is a procedural right which is only applicable during criminal proceedings, and, as a general rule, has no application to the commissioner in the course of the administrative decisions he/she makes.

The presumption of innocence, as captured in subsection 21(1), only applies to criminal and not civil proceedings: *International Transport Roth v Secretary of State for the Home Department* [2002] EWCA Civ 158. It is limited to courts and tribunals determining the guilt of persons charged with criminal offences: *Re Application under the Criminal Code* [2004] 2 S.C.R. 332. It relates to proceedings which may ultimately result in the loss of liberty, or the imposition of some other penalty, to a person charged with an offence: *R v Werhun* (1991), 62 C.C.C. (3d) 440 (Man. C.A.).

It is necessary to establish whether any process or procedures designed to screen people who would work with children or vulnerable people are civil or criminal in nature. As a general rule, proceedings will only be criminal where they are conducted with a view to the imposition of a penalty. In order for an order or an outcome of a public authority or a court to be considered a penalty, it will usually have to be intended to punish or deter: *Bendenoun v France* [1994] EHRR 54. Procedures which are designed to prevent future offending or protect public safety, even though they might involve an imposition on a person, are generally not considered to be a penalty: *Raimondo v Italy* [1994] 18 EHRR 237.

The Canadian Supreme Court in *R v Wigglesworth* [1987] 2 S.C.R. 541, considered the application of section 11 of the *Canadian Charter of Rights and Freedoms*, which includes the presumption of innocence. The Court concluded that:

There is...a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity, and proceedings undertaken to determine fitness to obtain or maintain a licence. Where qualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 22 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable.

The purpose of the Bill is to protect vulnerable people and to prevent the future commission of offences by people who might pose a risk of offending.

The purpose of the Bill is not intended to deter people from the commission of offences (although that may occur as a result of enacting the resulting Working with Vulnerable People (Background Checking) Act 2010).

Neither has the Bill been designed to achieve a punitive or retributive purpose. As such, the exchange between the commissioner and entities of a person's criminal information falling short of a conviction, could not be said to amount to a penalty, and therefore does not constitute a proceeding of a criminal nature.

Detail of the Bill

Wherever the phrases ‘employee’ and ‘working with vulnerable people’ appears in this explanatory statement it is taken to include people who have contact with vulnerable people in a volunteering capacity.

The Bill is structured with eight Parts and two Schedules.

Part 1 Preliminary

Clause 1 – Name of the Act

This clause names the Act as the Working with Vulnerable People (Background Checking) Act 2010.

Clause 2 – Commencement

This clause notes the Act will commence on a day fixed by the Minister by written notice. If the Act is not commenced within twelve months beginning on the notification day, the Act automatically commences on the first day after that period. The twelve month period for commencement to occur is to enable sufficient time to implement systems to support the Act.

Clause 3 – Dictionary

This clause explains that the dictionary is found at the end of the Act and is part of the substantive provisions.

Clause 4 - Notes

This clause makes it clear that the notes in the Act are explanatory only and do not form part of the substantive provisions of the Act. By contrast, an example included in the Act is part of the substantive provisions of the Act having regard to section 132 of the *Legislation Act 2001* (ACT).

Clause 5 – Offences against Act – application of the Criminal Code etc

This clause makes it clear that other legislation applies in relation to offences against the Act. The *Criminal Code 2002* (ACT) (sections 11 to 12) applies to all offences against the Act. The *Legislation Act 2001* (ACT) (sections 133 to 134) provides the meaning of offence penalties which are expressed in penalty units and imprisonment.

Part 2 Important Concepts

Clause 6 – Who is a vulnerable person?

This clause establishes the definition of a vulnerable person which applies across the Bill. A vulnerable person encompasses both ‘children’ and ‘adults’.

To promote consistency across ACT Legislation, the vulnerable person definition in the Bill refers to “Child, if age rather than descendency is relevant, means an individual who is under 18 years old” and adult: “...an individual who is at least 18 years old” (*Legislation Act 2001* (ACT) Dictionary, Part 1).

Children due to their age are necessarily considered a vulnerable. An adult is considered to be a vulnerable people when they are experiencing disadvantage. and, as a result of the disadvantage, are accessing a regulated activity or service related to the disadvantage. This definition has the advantage of establishing a basis for the determination of the types of services or activities that might attract background checking. The definition also recognises people's changing circumstances as people will not be considered vulnerable at all times. Rather, they are considered vulnerable at the time of receiving a service provided as part of a regulated activity.

Many adults who may be considered by the community as being vulnerable, such as adults living with a disability or adults experiencing financial hardship do not consider themselves to be vulnerable and that it is the need for assistance that renders a person as vulnerable⁵.

Clause 7 – What is a *regulated activity*?

This clause establishes that regulated activities or services are those listed in Schedule 1 of the Bill or otherwise prescribed by regulation as a regulated activity.

Clause 7(2) enables the Minister to declare, via a disallowable instrument, that a stated activity or service is not a regulated activity.

Determining what is a regulated activity is the first step towards determining whether or not an individual is subjected to screening. The identified activities and services for people working with, or wanting to work with, vulnerable people promotes national consistency with activities and services currently attracting checking in other Australian jurisdictions.

The ACT Chief Minister's Department' summary report on the project: *Addressing Disadvantage in the ACT – Mapping of ACT Government Funded Services for the Disadvantaged (2003)* and the supporting ACT Council of Social Services report (which identified non government organisations that provided services for disadvantaged people and do not receive ACT Government funding) provided the primary basis for the development of the list of regulated activities for people working with, or wanting to work with, vulnerable people. These reports identified and categorised government, government funded and non government services provided to disadvantaged people in the ACT during 2001 and 2002.

The list of regulated activities and services were further refined as a result of consultations with key stakeholders and community members.

Some service categories have not been included in Schedule 1 as consultations indicated their inclusion could be reasonably perceived as compromising specific human rights. For example, some services provided for Aboriginal and Torres Strait Islander people have not been included

Schedule 1 of the Bill contains three separate parts detailing regulated activities or services for children, vulnerable adults and other activities or services for vulnerable people.

⁵ Key stakeholder comment provided during consultation on the discussion paper *A Working with Vulnerable People Checking System for the ACT*.

Clause 8 – When is a person engaged in a regulated activity

This clause establishes that an employee or volunteer providing a service to a vulnerable person, who is accessing a regulated activity or service, is considered to be engaging in a regulated activity. Regulated activities and services are defined in Schedule 1 of the Bill.

There are two main groups of people who work with vulnerable people in the ACT – employees and volunteers.

Determining whether an individual is engaging in a regulated activity and is required to be registered to undertake that activity is based on engagement type and contact type (for further information on the meaning of “contact”, see the discussion in clause 9 below).

When is a person not engaged in a regulated activity or service (example)

A parent who is volunteering to coach their child’s basketball team only while each child’s parent is present, is under the Bill a volunteer who is engaged in an informal arrangement or unregulated activity.

Similarly, a seventeen year old babysitter hired by a family on an irregular basis and paid on each occasion, is under the Bill engaged in an informal arrangement and an unregulated service.

Both of these people do not require registration as they are engaged in an unregulated activity or service on an informal basis.

When is a person engaged in a regulated activity or service (example)

If the parent and babysitter were in caring situations that were different in certain ways, their caring activity or service would fall under the purview of the Bill and they would be required to be registered to engage in that regulated activity or service.

For example, the parent would be engaging in the regulated activity of coaching and would be required to be registered to engage in that regulated activity if the parent:

- coaches their child’s basketball team; and
- their usual function at team activities is to coach the team; and
- the parent is employed by a commercial entity to provide that coaching (Schedule 1, clause 1.20),

Similarly, the seventeen year old babysitter would be engaging in the regulated activity of childcare and would be required to be registered to engage in that regulated activity if he/she –

- was employed by a childcare service or another commercial service that provides childcare (Schedule 1, clause 1.2).

Individuals and/or service providers can apply for an exemption from registration in certain circumstances provided by part 3, clause 11 of the Bill. For further discussion on exemptions, see part 3, clause 11, page 19 of this explanatory statement.

Clause 9 – What is *contact* with a vulnerable person?

This clause defines the meaning of contact for the purposes of the Bill through addressing the type and duration of contact a person can have with vulnerable person before they must be registered as engaging in a regulated activity. For

example, a person would require registration if the contact occurs as part of their usual activity, such as a teacher and a student.

Not all persons having contact with a vulnerable person require registration. For example, people under the age of 16 years and people who undertake regulated activities in the ACT on no more than three days in any twenty-eight day period and up to a maximum of seven days in any twelve month period are an example of people who are not required to be registered to engage in a regulated activity under the Bill.

The definition of “contact” is necessarily broad to encompass the various situations in which people may have an opportunity to harm a vulnerable person either directly through the misuse of information or via a power imbalance.

Clause 10 – Who is an employer?

This clause details that an employer is an entity who engages a person in a regulated activity or service which leads that person to have contact with vulnerable people.

Part 3 Requirement for registration

The purpose of Part 3 of the Bill is to minimise risk to vulnerable people.

Clauses 11 to 14 outline when a person is required to be registered to engage in a regulated activity; that a person commits an offence against the Act if they engage in a regulated activity without being appropriately registered; that an employer commits an offence against the Act if they engage a person in a regulated activity for which they are not appropriately registered; and when an unregistered person may be engaged in regulated activity.

To be registered to engage in a regulated activity the applicant must voluntarily disclose conviction and non-conviction information and any other information to the commissioner to enable registration and the commissioner will advise the applicant’s nominated employer of the background screening decision. These activities limit the applicant’s right to privacy and reputation, as provided in subsection 12 of the *Human Rights Act 2004* (ACT).

Subsection 12 relevantly provides:

Everyone has the right:

- a) *Not to have his or her privacy...interfered with unlawfully or arbitrarily; and*
- b) *Not to have his or her reputation unlawfully attacked.*

The critical issue, with respect to the reasonable limits test or compatibility is that the disclosure of non-conviction information (s16(2a) of the Bill) must be in accordance with the law. Clear and precise statutory provisions, with appropriate legal safeguards and which are not arbitrary or lacking in reasonableness or foreseeability in respect of their application, are provided in Part 5 of the Bill.

The need to protect vulnerable people against harm is a legitimate objective for the purposes of the reasonable limits, or proportionality, test in section 28 of the *Human Rights Act 2004*(ACT). Governments have a duty of to take positive steps to protect vulnerable people against foreseeable harm that arises in advance of any consideration of reasonable limits or proportionality.

Generally, decisions arising from *A v United Kingdom* (1999) 27 EHRR 611; *Z v United Kingdom* (2002) 34 EHRR 3; and *DP and JC v United Kingdom* (2003) 36 EHRR 14, provide:

- ii) *These measures should provide effective protection, in particular children and other vulnerable person and include reasonable steps to prevent illtreatment of which the authorities had or ought to have knowledge.*

Similar considerations arise in respect of the right of a child to protection (section 11(2), in light of similar positive duties under the *International Covenant on Civil and Political Rights* (Human Rights Committee, *General Comment No. 17* [35] at [2] and [3]) and *Convention on the Rights of the Child* (Committee on the Rights of the Child, *General Comment no. 5*(2003) at [1]).

The ACT Government would be knowingly negligent in its duty of care towards vulnerable people if it did not impose penalties for a person engaging in a regulated activity without appropriate registration.

On balance, the requirement for a person to be registered to engage in a regulated activity and the provision of conviction, non-conviction, and other information to the commissioner to facilitate that applicant's registration is reasonable and proportional.

The establishing of statutory Risk Assessment Guidelines which guide the process of background checking and risk assessment is the least restrictive means able to minimise perceived risks for vulnerable people when they are accessing regulated activities or services. The alternative would be a continuation of the current practice of individual employers conducting background checks and risk assessments. Under this scenario, personal employee and volunteer information concerning individuals is duplicated and held by a plethora of individual employers; risk assessment procedures are informal and inconsistent; there are no safeguards for current and potential employees and volunteers; and there are no formal avenues for reviewing decisions reached by employers.

In *R v Chief Constable of the North Wales Police; Ex parte Thorpe* [2008] EWHC 1870, the United Kingdom High Court (Queens Bench Division) dealt with an employment screening process that was not provided for in legislation. The court held that there was a general presumption against disclosure of criminal history information unless justified in the circumstances of each case.

Any disclosure also had to meet a general duty to accord procedural fairness.

Following *Thorpe*, although not necessarily because of it, the United Kingdom Parliament passed legislation to formalise the employment screening process. Part V of the *Police Act 1997* (United Kingdom) permits the disclosure of convictions, spent convictions and information falling short of conviction.

Part V of the *Police Act 1997* has since been considered in a number of cases. The presumption against disclosure and duty to accord procedural fairness were upheld by the High Court (*X v Chief Constable of the West Midlands Police* [2004] 2 All ER 1) but subsequently overturned by the Court of Appeal (*R (X) v Chief Constable of the West Midlands Police* [2005] 1 WLR 1).

In the latter case, the court held that a duty to disclose relevant non-conviction information to an employer in the context of child related employment is compatible with the right to privacy in Article 8 of the European Convention on the basis that it “would be ‘in accordance with the law’ and ‘necessary in a democratic society’, in the interests of public safety and for the prevention of crime and for the protection of the rights and freedoms of others” (Article 8.20).

The key issue is the duty to be satisfied as to the relevance of the information.

The court held that the duty to disclose arose wherever a chief constable had formed the view that information was capable of being relevant to a position. He or she was “under a duty to disclose if the information might be relevant, unless there was some good reason for not making such a disclosure”. Although it was noted that there may be situations in which disclosure was incompatible, where “the information might be as to some trifling matter; it may be that the evidence made it so unlikely that the information was correct” (Article 8.36).

In this context, the court doubted whether any procedural fairness duty arose. Even if such a duty did arise, it was unlikely to affect the ultimate decision.

These conclusions were confirmed in *R (L) v Commissioner for Police of the Metropolis* [2008] 1 WLR 681 and in the later cases of *R (B) v Secretary of State for the Home Department* [2006] EWHC 579 and *R (Pinnington) v Chief Constable of the Thames Valley Police* [2008] EWHC 1870 further guidance was given on the proper test for being satisfied that information was relevant.

These latter cases held that the test of satisfaction was no greater than that which would ordinarily apply to a decision made under public laws principles. It was sufficient that the relevant chief constable had an honest opinion that the information was relevant and the opinion was reasonable open to the facts.

Strict liability offences

Strict liability offences are evident in Part 3 (subclause 12(1), 12(3)(c), and 13(3)(c)); Part 4 (clause 19); and Part 5 (subclause 42(1) and 42(3)(a) and clauses 44, 46, 49 and 50) of the Bill.

The use of strict liability offences in the Bill impacts on a person’s right to fair trial (subsection 21(1) of the *Human Rights Act 2004* (ACT), which relevantly provides:

Fair trial

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

Although this right is engaged, strict liability is not prohibited by the *Human Rights Act 2004* (ACT), however, it is important that strict liability offences are reasonable within the specific context of the offence and are justifiable.

The increasing prevalence of regulatory legislation, some of which contain strict liability offences, is determined by community expectations of what activities should

be regulated. As new research emerges concerning factors that may indicate a preventable risk of harm to vulnerable people, governments are increasingly aiming to ensure that minimum safeguards, at least, are in place to address these risks. It is generally accepted that the exclusion of people with a known history of behaviours which may place a vulnerable person at risk of harm, is a fundamental part of creating safe environments for the provision of services to vulnerable people.

The use of strict liability offences for the registration of people working with vulnerable people in a regulated activity or service can be justified on the basis that offences will apply to people who choose to engage in a regulated activity and are on notice that they are operating in a regulated context. It is on this basis that the use of strict liability offences in the Bill is relevant to the policy objectives of minimising the risk of harm to vulnerable people. The use of strict liability offences as a deterrent is demonstrably justifiable and reasonable.

A strict liability offence under section 23 of the *Criminal Code 2002* means that there are no fault elements for the physical elements of the offence to which strict liability applies. This means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences will have a specific defence of mistake of fact. Subclause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

Strict liability offences do not have a mental element or *mens rea* however, the *actus rea*, the physical actions, do have a mental element of their own, for example, voluntariness. For this reason the general common law defences of insanity and automatism still apply as they go towards whether a person has done something voluntarily, as well as whether they intended to do the act.

Clause 11 – When is a person required to be registered?

Clause 11 details that a person is required to be registered to engage in a regulated activity and, in certain circumstances, a person can apply for an exemption from registration. Clause 8, page 15 provides examples of when a person is required to be registered.

There are a range of exemptions specified for circumstances in which registration would be ineffective, inappropriate, unduly burdensome, or result in duplication of checking. These include a person under the age of 16 years of age; a person engaging in irregular contact with vulnerable persons; a close relative of the vulnerable person taking part in the activity; a person registered under another jurisdiction's corresponding law or another corresponding law (i.e. Police Officer); and a person undertaking similar activities to that which they received registration for in another jurisdiction and they are not engaged in a regulated activity for more than twenty-eight days in a twelve month period.

Applying checks to these categories of people was unlikely to decrease the risk to vulnerable people. For example, close relatives of the vulnerable person will often have access to the vulnerable person outside of the period of service provision that can be regulated. Although research indicates that sexual assault is often perpetrated by people known to and trusted by the victim, including family members, checks applied to close relatives would not decrease this risk.

In some circumstances a child aged between 17 and 18 years, who are themselves identified in the Bill as vulnerable people, may be required to be registered if they are to have contact with vulnerable people who participate in a regulated activity and this contact is unsupervised, for example, if the child is employed by a childcare centre.

It is not the intention of the Bill to require students aged between 17 and 18 years to be registered to participate in any school and college initiated work placement where they will be having contact with vulnerable people.

The Commissioner may declare that certain persons are not required to be registered for an activity via a notifiable instrument.

Clause 12 – Offences - person engage in regulated activity for which person not registered

This clause outlines the strict liability offence for a person who engages in a regulated activity or service; is required to be registered to engage in the activity or service, and does not have a registration allowing them to engage in that activity or service.

The strict liability offences in this clause provide a maximum penalty of 200 penalty points, imprisonment for 6 months, or both. The impact of strict liability offences on the rights of people working with vulnerable people in regulated activities or services is discussed in part three, pages 18 / 19 of this explanatory statement.

Clause 12 does not apply if the person is not registered but is engaged in a regulated activity as provided in clause 14 of the Bill.

Clause 13 – Offences - employer engage person in regulated activity for which person not registered

This clause outlines the offence for an employer who engages as person in a regulated activity for which that person is not registered.

To be registered to engage in a regulated activity the applicant must voluntarily disclose conviction and non-conviction information and any other information to the commissioner to enable registration. The commissioner will advise the applicant's nominated employer of the background screening decision. The acts of applicant disclosure and the commissioner advising the employer of the level of a person's registration impacts on the applicant's right to privacy (subsection 12(a) of the *Human Rights Act 2004 (ACT)*).

Employers have a duty of care to protect vulnerable people to whom they provide services or activities and have an important role in creating and maintaining safe environments. Employers generally have responsibility for selecting people who will provide services or activities on behalf of the employer and it is appropriate that an offence is established for knowingly allowing contact between vulnerable people and people who have a history of behaviours that may place a vulnerable person at risk or people who have not been registered.

Strict liability offences in this clause provide a maximum penalty of 50 penalty points, imprisonment for 6 months, or both. The impact of strict liability offences is discussed in part three, pages 18 / 19 of this explanatory statement.

Clause 14 – When unregistered person may be engaged in regulated activity

This clause establishes that an unregistered person may be employed in a regulated activity pending the outcome of an application to the commissioner under certain conditions.

The purpose of this clause is to enable service providers to engage essential staff promptly if the potential risk to their vulnerable clients is demonstrably mitigated such as, the person has not previously been given a negative notice under the section 35 of the Bill (Negative notices) or a corresponding law and an appropriately registered person is present at all times. Clause 9, paragraphs 153 and 154 of this explanatory statement provide further discussion on people who are permitted, under the Bill, to be engaged in regulated activities or services and have contact with vulnerable people in that regulated activity or service, without being registered.

Part 4 Applying for registration

The purpose of Part 4 of the Bill is to minimise risk to vulnerable people.

Clauses 15 to 20 outline that the steps a person must take when applying to the Commissioner for Fair Trading (the commissioner) for registration to work in a regulated activity under the Bill.

Section 28 of the *Human Rights Act 2004 (ACT)* – limitations

To assess the impact of the Bill on an applicant's rights (as provided in the *Human Rights Act 2004 (ACT)*), the rights of vulnerable people must be weighed against the right to employment of people working with, or wanting to work with, vulnerable people in a regulated service or activity.

International jurisprudence argues for 'enhanced disclosure' and recognises the need to balance the interests of protecting vulnerable members of our community against the need to respect an individual's privacy and reputation.

In response to growing demands in the United Kingdom on the machinery for 'enhanced disclosures' and documented failures in the murders of Jessica Chapman and Holly Wells,⁶ a new process was created in the *Safeguarding Vulnerable Groups Act 2006*. This legislation is based on screening and registration, not disclosure. Potential and existing employees within regulated areas ("regulated activities") must apply to an independent statutory body ("independent barring board"). It is an offence to employ a person who is not approved (a "barred person"). A duty is imposed on a range of bodies to disclose information to the "independent barring board", but such information is not disclosed to the employer or prospective employer. For information of the "non-conviction charges" kind, disclosures are made where the board "thinks"

⁶ House of Commons. Bichard Inquiry Report, HMSO, 2004.

that a person “may” harm a child or put a child at risk. There are restrictions on the duty to accord procedural fairness however a decision on registration may be challenged before an administrative tribunal.

The Bill ensures any disclosure or use of information about a person’s criminal history does not occur in any arbitrary manner and that it only occurs where there is a high degree of natural justice and procedural fairness afforded to the subject of the information.

The requirement of the applicant to provide the commissioner with their criminal history and non-conviction information (subclause 16(2) of the Bill), and additional information (subclause 17(1) of the Bill) to assist the commissioner in deciding their suitability to work with vulnerable people in a regulated activity or service, impacts on the applicant’s right to:

- privacy and reputation (subsection 12 of the *Human Rights Act 2004* (ACT));
- recognition and equality before the law (subsection 8(1) and 8(3) of the *Human Rights Act 2004* (ACT));
- taking part in public life (subsection 17(c) of the *Human Rights Act 2004* (ACT)); and
- right to fair trial (subsection 21(1) of the *Human Rights Act 2004* (ACT)).

As discussed elsewhere in this explanatory statement, the requirement for a person to be registered (clause 11, page 19) and to provide conviction, non-conviction and other information is reasonable and proportional if the commissioner is to make a decision based on factual information which does not misrepresent the impact, or lack thereof, of a person’s past behaviours.

Clause 15 – Application for registration

Clause 15 details that a person may apply to the commissioner for registration under the Working with Vulnerable People (Background Checking) Act 2010.

This clause is subject to clause 20 which permits a person to reapply for registration three years after the commissioner issues them a negative notice or cancel’s the person’s registration, or when a change in information has occurred.

Clause 16 – Application for registration - contents

This clause details that applying for registration requires the applicant to voluntarily provide the screening unit with information regarding their criminal history, non-conviction information and any other information they believe will assist the commissioner to determine their suitability for registration to work with vulnerable people in a regulated activity (clause 7, page 14).

Clause 17– Application for registration – additional information

This clause empowers the commissioner to seek additional information from an applicant, where necessary, to decide an application. This may arise due to the applicant providing incomplete or inaccurate information or if supplementary information is required for clarification purposes. The commissioner may also seek information where court orders have been awarded in care and protection matters.

To ensure that applications are not considered active indefinitely, the commissioner may refuse to consider an application further if the applicant does not comply with a written request for further information.

The requesting and gathering of information to determine an applicant's suitability to undertake a regulated activity does not involve a determination of innocence or guilt.

Clause 18 - Application for registration - withdrawal

This clause allows a person to withdraw an application at any time by written notice to the commissioner. To guard against fraudulent activity, the commissioner must tell the named employer (if any) of the withdrawal and the need to take no further action on the application.

Clause 19 – Offences – applicant fail to disclose charge, conviction or finding of guilt for relevant offence

This clause outlines strict liability offences in relation to an applicant whose registration is in process or they have not been given a negative notice, and they fail to disclose to the commissioner new charges, convictions, or findings of guilt for a relevant offence within fourteen days.

As discussed in this explanatory statement's introduction (page 16) to part 3 of the Bill, the use of strict liability offences for the registration of people working with vulnerable people can be justified on the basis that offences will apply to people who choose to engage in regulated activity and are on notice that they are operating in a regulated context. It is on this basis that the Government believes that the use of strict liability offences contained in this Bill is relevant to the policy objectives of minimising the risk of harm to vulnerable people, which is justifiable and reasonable.

Section 23 of the *Criminal Code 2002* (ACT) defines a strict liability offences as one which has no fault elements for the physical elements of the offence to which strict liability applies. Essentially, this means that conduct alone is sufficient to make the defendant culpable. However, under the Criminal Code, all strict liability offences have a specific defence of mistake of fact. Subclause 23(3) of the Criminal Code makes it clear that other defences may still be available for use in strict liability offences.

The maximum penalty for this provision is currently 50 penalty units, imprisonment for 6 months or both.

Youth Convictions

When considering the application of a strict liability offence under clause 19 of the Bill, the commissioner must be mindful while undertaking a risk assessment of a juvenile criminal history, including spent convictions, of the age of applicant at the time of conviction and the time that has elapsed between conviction and the application under subsections 27(c)(d) and 28(c)(d) of the Bill.

As a general rule, information relating to a person's juvenile criminal history should be afforded a higher degree of privacy than would apply in respect of an adult's criminal history.

The nature and scope of the right to privacy needs to be interpreted in light of the relevant United Nations treaties and conventions to which Australia is a party.

Of particular relevance in interpreting sections 12, 20(4) and 22(3) of the *Human Rights Act 2004* (ACT) is the *United Nations Convention on the Rights of the Child*

and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (also known as the Beijing Rules).

Article 40(2)(vii) of the *UN Convention on the Rights of the Child* provides that states are obliged to ensure that the privacy of children is fully respected at all stages of criminal proceedings. Rule 8 of the Beijing Rules expands on this. It provides that:

- iii) *8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.*
- iv) *8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.*

Rule 21.1 goes further, providing that:

- v) *Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorised persons.*

The commentary of the *United Nations Committee on the Rights of the Child*, which is also relevant to interpreting the rights contained in the *Human Rights Act 2004* (ACT), explains that:

Rule 8 stresses the importance of the protection of the juvenile's right to privacy and adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). Young persons are particularly susceptible to stigmatisation. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent.

The interest of the individual should be protected and upheld, at least in principle

It is of note that a number of superior foreign courts have upheld the importance of suppressing the release of information about juvenile proceedings and convictions. In *Re Southam Inc. and The Queen* (1986), 53 O.R. (2d) 663 (C.A), the Ontario Court of Appeal considered an argument that the right to free speech in section 2(b) of the *Canadian Charter of Rights and Freedoms* outweighs the need to protect the privacy of and rehabilitation of juveniles convicted of offences. The Court held that it did not, and the need to protect children and thereby prevent the press from disclosing details of such convictions was a reasonable limitation on the right to free speech.

In *F.N. (Re)* [2001] 1 S.C.R. 880, the Canadian Supreme Court considered an appeal in which a declaration was sought that the practice of the Newfoundland Youth Court in releasing the details of juveniles charged with offences to local school boards was unlawful. The Supreme Court found this practice to be unlawful, and relied, *inter alia*, in the Rule 8.1 of the Beijing Rules when it held that:

- vi) *Stigmatisation or premature “labelling” of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatised as a lawbreaker may, unless given help and redirections, render the stigma a self fulfilling prophecy. In the long run, society is best protected by preventing recurrence. Lamer C.J., in Dagenais v Canadian Broadcasting Corp. [1994] 3 S.C.R. 835, pointed out in another context that non-publication is designed to “maximise the chances or rehabilitation for ‘young offenders’” (p.883).*

Also of note are the comments made by Justice Renquist of the United States Supreme Court in *Smith, Judge v Daily Mail Publishing Co.*, 443 U.S. 97 (1979), when he observed that:

- i) *This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and “bury them in the graveyard of the forgotten past”...The prohibition of publication of a juvenile’s name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State...Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths’ prospects for adjustment in society and acceptance by the public.*

In light of the foregoing UN convention provisions and international jurisprudence, it follows that, as a general rule, the conviction of a juvenile should never be released. This general rule would, of course, be subject to certain exceptions which are reasonable and proportionate.

As practical consequence of section 12, 20(4) and 22(3) of the *Human Rights Act 2004* (ACT), a juvenile conviction or other criminal history information should not be considered unless it rationally and objectively bears on their ability to undertake the inherent requirements of the job. This would mean, for example, that information about a person’s conviction when they were sixteen for joy riding in a stolen car (assuming they did not have a long history of similar offences in their later years) would not be relevant if they applied to be a teacher when they were aged twenty six. On the other hand, if a 20 year old person was applying for a job as a childcare minder, and they had convictions for acts of sexual indecency when they were aged seventeen, this would be relevant and a matter that could be considered by the commissioner in determining whether they are suitable to work in such a position.

Clause 20 – Restriction on reapplying for registration

This clause prohibits a person from applying for registration if the person has been given a negative notice or has had his or her registration cancelled. The clause is intended to give finality to the registration process and to discourage frivolous applications that might otherwise impact on the commissioner's capacity to consider other applications.

In recognition that circumstances may change over time, the prohibition on making a further application is not permanent and applicants may reapply three years after a negative notice or cancellation of registration, or sooner if information on which a decision was made has changed.

Part 5 Risk Assessment

Division 5.1

Clause 21 – Meaning of *risk assessment*

This clause establishes the definition for the use of the term risk assessment elsewhere in the Bill. The risk assessment provides the process for considering all available information relating to the previous behaviour of the applicant; determining the likelihood of certain behaviour continuing into the future; and whether this ongoing behaviour would place a vulnerable people accessing a regulated activity or service at risk of harm. The process of risk assessment does not involve a determination of innocence or guilt.

The risk assessment guidelines will be contained in a notifiable instrument to provide public transparency and accountability concerning the manner in which risk assessments are to be conducted.

Clause 22– Meaning of criminal history

This clause details the meaning of criminal history for the purposes of the Bill.

Criminal history about a person means any conviction of, or finding of guilt against, the person for a relevant offence. The meaning of a 'relevant offence' is provided in clause 24 of the Bill.

Section 19(1)(a) of the *Spent Convictions Act 2000* (ACT) establishes exemptions from the disclosure provision (section 16 of the *Spent Convictions Act 2000*) for people working with certain vulnerable people in the ACT including children, people with disability, and older persons. This exemption is an acknowledgement of the importance of considering all available information when vetting people working with, or wanting to work with, vulnerable people in the ACT community.

Clause 23 – Meaning of non-conviction information

This clause details the meaning of non-conviction information for the purposes of the Bill.

Non-conviction information, about a person, means a person has been charged with an offence or acquitted of an alleged offence, had a conviction for the alleged offence quashed or set aside, served with an infringement notice for the alleged offence, or has a spent conviction for the offence. (see paragraph 28 regarding non-conviction information to be taken into account).

Clause 24 – Meaning of relevant offence

This clause specifies the meaning of relevant offences for the purpose of the Bill. This clause specifically the limits the commissioner's consideration of information to only that information which relates to the inherent requirements of working with vulnerable people, for example, a sexual offence.

This clause also specifies that a reference to an offence includes a reference to a related ancillary offence, for example, an attempt to commit a sexual offence.

Division 5.2 Risk Assessment Guidelines

Clauses 25 to 29

These clauses provide the commissioner with the power to develop guidelines on how risk assessments are to be conducted under the Working with Vulnerable People (Background Checking) Act 2010.

The commissioner's power to make risk assessment guidelines will be a central tenet of ensuring that discretionary risk assessment decisions are based on accurate information in accordance with a logical and systematic process (*National Framework for Creating Child Safe Schedule 2*, p2).

The purpose of collecting personal information is to facilitate the risk assessment process. This process inherently relies on the availability of information upon which to make a determination about the risk of harm posed by a particular applicant⁷. This is of particular importance when making decisions that may affect the safety of vulnerable people as well as the livelihood of applicants.

As discussed in Part 3, page 17 of the explanatory statement, the critical issue, with respect to the proportionality test provided by section 28 of the *Human Rights Act 2004* (ACT) is that the powers for the commissioner's request for, and consideration of, non-conviction information (clause 26(2)(b) of the Bill) must be clear and precise and accompanied by statutory safeguards that are oriented against the powers being used unreasonably.

⁷ Key stakeholder and community members indicated that better decisions can be made in light of a greater range of information (Community consultations on the discussion paper *A Working with Vulnerable People Checking System for the ACT*).

Clause 25 – Risk Assessment Guidelines

This clause provides the commissioner with the power to develop guidelines on how risk assessments are to be conducted under the Act. The purpose of the guidelines is to ensure that risk assessments are conducted with rigorous consistency. The guidelines will be contained in a notifiable instrument to provide public transparency and accountability concerning the manner in which risk assessments are to be conducted. To allow the guidelines to incorporate an external document without needing to reproduce the external document, the guideline may apply, adopt, or incorporate an instrument as in force from time to time.

Clause 26 – Risk Assessment Guidelines – content

This clause stipulates that the risk assessment guidelines must state the matters that the commissioner must take into account and how those matters must be taken into account. The Risk Assessment Guidelines must provide for a person's criminal history, non-conviction information, whether the person has previously been issued a negative notice under the Working with Vulnerable People (Background Checking) Act 2010 or a corresponding law, whether a person has previously been registered under the Act and had their registration cancelled or suspended, and any other information the commissioner believes on reasonable grounds is or may be relevant in deciding whether, in engaging in the activity, that applicant poses a risk of harm to vulnerable people

To ensure that risk assessments are fair and defensible, the commissioner must not take into account any information unless satisfied on reasonable grounds that the information is accurate.

To guard against divergence from the intended purpose of the guidelines, the Bill enshrines certain high level principles concerning the minimum content of risk assessment guidelines.

Clause 27 – Risk Assessment Guidelines – criminal history

This clause specifies that matters that the commissioner must take into account when considering an applicant's criminal history, including spent conviction information.

Spent conviction information made available to the screening unit for use in the risk assessment process will not be disclosed to individual employers or the public (as provided in section 21(2) of the *Human Rights Act 2004* (ACT)).

The consideration of non-conviction information, including spent convictions, is subject to additional scrutiny as outlined in clause 26 of the Bill.

Clause 28 – Risk Assessment Guidelines – non-conviction information

This clause specifies the matters that the Commissioner must take into account when considering an applicant's non-conviction information and how the veracity of the information or the lack thereof, must be considered because it was not tested in court.

The Bill and associated risk assessment guidelines, which will be made as a notifiable instrument (clause 25 of the Bill), constitute a statutory framework with appropriate legal safeguards under which non conviction information may be disclosed. The Bill provides for a high degree of natural justice and procedural fairness through the inclusion of specific safeguards that require consent from the applicant, provide for a relevance test for information collected, make the risk assessment guidelines publically available, allow the applicant to provide additional information in support of their application, require that reasons for decisions be communicated to applicants and enshrine the rights of reply, review and appeal of decisions (see **Attachment A** to this explanatory statement for details on limitations to human rights and safeguards provided in the Bill for applicants).

While non-conviction information cannot be considered to have the same weight as conviction information, it can be nonetheless useful in establishing likely patterns of behaviour and contributing to a considered risk assessment. For instance, it might be reasonable to conclude that a person who has been convicted of a single minor sexual offence may in fact be a greater risk if the person has also been charged on separate occasions with more serious sexual offences that have resulted in acquittals.

Clause 29 – Risk Assessment Guidelines – other information

This clause specifies that the commissioner must take into account the source, relevance, and reliability of any other information available for consideration as part of a risk assessment. The commissioner must not take into account any information unless satisfied on reasonable grounds that the information is accurate.

Division 5.3 Conducting Risk Assessments

Clauses 30 to 31

Clauses 30 to 31 provide for the conducting of risk assessments. These clauses encourage robustness and consistency of the risk assessment process. The holding of protected information received from applicant is subject to the protections of the *Privacy Act 1988* (Commonwealth). Penalties apply for persons who misuse this information (clause 58 of the Bill).

This limits an applicant's right to recognition and equality before the law; right to privacy and reputation; right to take part in public life; and right to fair trial (subsections 8 (1), 8(3), section 12, and subsection 17(c) and 21(1) respectively of the *Human Rights Act 2004* (ACT)).

The Bill includes specific safeguards to limit the impact on the rights of applicants as provided in section 8 (1), 8(3), 12, 17(c) and 21(1) of the *Human Rights Act 2004* (ACT). See **Attachment A** to this explanatory statement for details on limitations to human rights and safeguards provided in the Bill.

In the United Kingdom, a right to fair trial is said to be satisfied in relation to an administrative decision if it is capable of being subject to judicial review, provided the decision is guided by statutory criteria, is made by a qualified decision maker or tribunal, and would be justiciable by a judicial review court.

In the absence of these criteria, the right has been said to require merits review (see generally *R (Alconbury Developments Ltd and Ors) v Secretary of State* [2001] 2 All ER 929; *Begum (Runa) v Tower Hamlets LBC* [2003] UKHL 5.)

The right to privacy is contained in subsection 12(a) of the *Human Rights Act 2004* (ACT). Subsection 12(a) is based on, and is substantially similar to, Article 17(1) of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory. The key to subsection 12(a) is the concept of arbitrariness.

General Comment 16[32] of the Human Rights Committee states:

- ii) “[A]rbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

It also describes a general obligation to ensure ‘legislation must specify in detail the precise circumstances in which such interferences may be permitted’

A similar analysis, in respect of certainty and arbitrariness, or proportionality, applies to the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Handyside v United Kingdom* (1979) 1 EHRR 737; *Silver v United Kingdom* (1983) 5 EHRR; *Malone v United Kingdom* (1985) 7 EHRR 14).

As a general principle, reasonable expectations of privacy may be low in some settings compared to others (*R v Grayson and Taylor* [1997] 1 NZLR 399). With regard to applicants working with, or wanting to work with, vulnerable people in regulated activities/services, reasonable expectations of privacy must be low in relation to disclosure to convictions and a range of non-conviction information. The critical issue, with respect to reasonable limits test is that disclosure of convictions and non-conviction information must be “in accordance with the law”, or authorised by clear and precise statutory provisions with appropriate procedural safeguards, and must not be “arbitrary”, or lacking in reasonableness or foreseeability in respect of its application. Where there is discretion to provide information, its scope must be clear from the statute.

The commissioner must, at all times, have regard for the risk assessment guidelines when deciding an applicant’s suitability to work with vulnerable people in a regulated activity or service.

The primary type of information that will be sought by the commissioner will be a National Criminal History Report. Based on advice from the Australian Federal Police, it is expected that around 85% of applicants will have no relevant criminal history. In the majority of these cases it is likely that the information held by the Commissioner will be the identifying information supplied on the application form.

If a person wanting to work with vulnerable people in a regulated activity or service does not apply for registration, due to the limitation on their right to privacy or a belief that they will not be treated fairly, they will not be subject to the law as provided in the *Working with Vulnerable People (Background Checking) Act 2010*.

Information held by the commissioner will be held in accordance with the *Privacy Act 1988* (Commonwealth).

Clause 30 – Risk Assessments

This clause compels the commissioner to conduct a risk assessment in accordance with the risk assessment guidelines, for any person who makes an application for registration (as provided in clause 16 of the Bill).

The importance of establishing robust risk assessment guidelines are outlined in the *National Framework for Creating Child Safe Environments* which contains Schedule 2: *An Evidence-based Guide for Risk Assessment and Decision-making when Undertaking Background Checking*. The schedule states:

- i) *Responsible risk assessment seeks to ensure decision-making that is ethical, evidence-based and defensible. This requires following a logical and systematic process (p2).*

To avoid unlawful discrimination and/or abuse of power on the part of the risk commissioner, the commissioner (as per clause 26 of the Bill) will be guided by the Risk Assessment Guidelines for the purpose of determining the applicant's suitability to work in a regulated activity or service.

The commissioner will undertake a case-by-case assessment of a person's particular criminal record; the requirement of the particular regulated activity or service; and the tight correlation between the criminal record and the inherent requirement of the particular regulated activity or service.

When conducting a risk assessment the commissioner must:

- observe that in assessing a person's particular criminal record, the mere fact of a criminal record does not determine a person's character and that, rather, the passage of time, among other factors, can make amends for past wrongdoing for the purposes of deeming the person suitable (*Aavelaid v Dental Board of Victoria* [1999] VSC 255 at [28] per Coldrey J; *Z v Director General, Department of Transport* [2002] NSWADT 67 at [30] – [32]; *Good v Medical Board of Western Australia*, unreported, Supreme Court of Western Australia, 6 December 1944 at p4 per Anderson J; *In re Davis* (1947) & CLR 409 at 416 per Latham CJ).
- Observe that an inherent requirement is something that is 'essential' to the position rather than incidental, peripheral or accidental. See for example *X v The Commonwealth* [1999] HCA 63 (2 December 1999) (X's Case), *Qantas Airways v Christie* (1998) 193 CLR 280 (Christie's Case) or *Mr Mark Hall v NSW Thoroughbred Racing Board*, HREOC Report No. 19 (Hall's Case) p32, 34.
- Observe that the burden is on the employer to determine the inherent requirements of the particular position and consider their application to the specific employee before the inherent requirements exception may be invoked (Hall's Case p36 and *Zraika v Commissioner of Police, NSW Police* (2004) NSW ADT 67).

- Observe that the inherent requirements should be determined by reference to the specific job to be done and the surrounding context of the position, including the nature of the business and the manner in which the business is conducted (X's Case, Christie's Case, Hall's Case).
- Observe that there must be a tight correlation between the inherent requirement of the particular job and an individual's criminal record. There must be more than a 'logical link' between the job and a criminal record (Hall's Case p35-36; *Commonwealth v Bradley* (1999) 95 FCR at 237 per Black CJ. See also *Wall v NT Police Services*, Anti-Discrimination Commissioner, 14 March 2005. In this case the Ant-Discrimination Commissioner found that the Northern Territory Police had not demonstrated a tight correlation between the purported inherent integrity requirement of the police service and the complaint's spent criminal record).

Clause 31 – Commissioner may seek information from entities to conduct risk assessments

This clause provides the commissioner with the authority to seek information and advice from entities to conduct risk assessments.

Information of relevance to undertaking a risk assessment may be held by various entities including government agencies, private organisations or individuals.

With the consent of the applicant (clause 16(2)(a) of the Bill), the commissioner will seek to acquire information that may assist in the process of risk assessment (including information on spent convictions and non convictions information).

It is important that the commissioner can access a broad range of information so that both 'risk factors' (behaviours or circumstances which indicate a risk) and 'mitigating factors' (behaviours or circumstances which reduce the level of identified risk) may be considered in making a balanced determination.

Division 5.4 Negative Risk Assessments

Clause 32 – Proposed negative notices

This clause compels the commissioner to inform an applicant in writing of a proposal to issue a negative notice, including the reasons for a negative risk assessment. To prevent the inappropriate disclosure of protected information concerning the applicant, the commissioner must not tell the employer of a proposed negative risk assessment.

Decisions of the commissioner will be made in accordance with the Risk Assessment Guidelines (clauses 25 to 29 of the Bill) and will be subject to judicial review. Subclause 33(1)(b) of the Bill enables an applicant to seek a review of a decision if the applicant believes that a negative risk assessment has been made because of incomplete or incorrect information.

Clause 33 – Reconsideration of negative risk assessments

This clause provides for an applicant to seek a review of the commissioner's proposal to issue a negative notice.

The commissioner is compelled to reconsider the proposed negative notice if the applicant informs the commissioner in writing of their intention to see a review within 14 days of being advised of the proposed negative notice and provides new or corrected information to the commissioner no later than one month after the day the commissioner proposes to issue the negative notice.

To minimise contact between a potentially unsuccessful applicant and vulnerable people, the applicant is compelled to act quickly to seek a review.

Clause 33(1)(b) of the Bill enables an applicant to seek a review of the commissioner's decision if the applicant believes that a negative risk assessment has been made because of incomplete or incorrect information.

Clause 34 – Extensions of period for reconsideration of negative risk assessment

This clause provides for an applicant to seek an extension of the period required for the reconsideration of a proposed negative notice. This provision is included to allow for the possibility that circumstances outside the control of the applicant that prevent the applicant from providing additional information to the commissioner within the one month timeframe imposed in subclause 33(2) of the Bill, such as, hospitalisation or requiring information from overseas (subclause 34(2) Examples).

Clause 35 – Negative notices

This clause compels the commissioner to refuse to register an applicant if, after providing an opportunity for a review of a proposed negative risk assessment notice, the commissioner continues to believe that the applicant poses an unacceptable risk of harm to vulnerable people. Preventing contact between vulnerable people and people who have a history of behaviours which may place a vulnerable person at risk is the primary aim of the Act. A person who receives a negative notice must immediately stop engaging in a regulated activity for which the person is required to be registered (clause 12 of the Bill).

Subclause 32(4) of the Bill prohibits the commissioner from disclosing to a employer the analysis behind the issuing of a negative notice.

A person in receipt of a negative notice may ask the commissioner to review the decision to issue a negative notice (subclause 32(3)(b) of the Bill) and if they are not satisfied with the outcome of the review, the applicant can seek a merit review through the ACT Civil and Administrative Tribunal (clause 56 of the Bill).

See **Attachment A** to this explanatory statement for details on limitations to human rights and safeguards provided in the Bill for applicants.

Part 6 Registration

Division 6.1 Registration

Clause 36 – Registration

This clause compels the commissioner to register an applicant if a risk assessment or revised risk assessment indicates that the person poses no risk, or an acceptable risk, of harm to vulnerable people. The commissioner must inform the applicant in writing and must also tell the nominated employer (if any) that the person has been registered.

The commissioner, following the completion of a risk assessment and any reviews sought by the applicant, will issue an applicant either a general or conditional registration.

The issuing of a conditional registration limits a person's right to take part in public life (subsection 17(c) of the *Human Rights Act 2004* (ACT)). However, the purpose of conditional registration is to provide a level of flexibility while imposing the least possible level of restriction on the range of regulated activities in which a particular applicant may be engaged.

General registration

- Allows lower risk applicants to move between all regulated activities without the need to be rechecked.

Conditional registration

- Allows the commissioner to register higher risk applicants by imposing specific conditions addressing any specific risks posed by a particular applicant.
- In some cases the commissioner issue a role-based registration which restricts a person to engaging in specified regulated activities with a stated employer.

If a person who works in, or wants to work, in a regulated activity/service does not agree with their conditional registration requirements the Bill provides for the applicant to request a review be undertaken by the commissioner of the risk assessment decision. If the applicant is not satisfied with the findings of the commissioner's reviewed decision, the Bill provides for the applicant to request a merits review be undertaken by the ACT Civil and Administrative Tribunal. Reviewable decisions are detailed in Schedule 2 of the Bill.

This clause establishes that registrations must be for not longer than three years. Registrations cannot be indefinite because risk assessments are conducted as a point-in-time exercise that must be periodically updated if the registered person's circumstances change.

See **Attachment A** to this explanatory statement for details on limitations to human rights and safeguards provided in the Bill for applicants.

Clause 37 – Conditional registration

This clause empowers the commissioner to impose conditions on registrations. The commissioner must inform the applicant in writing of the condition, and the reason for the condition, and must also tell the nominated employer (if any) that the condition is applicable to the registration.

Conditions are available to the commissioner as a means of addressing any specific risks of harm that a particular applicant may present. For example, if an applicant has a significant history of dangerous driving, a condition may be imposed that prohibits the registered person from driving a motor vehicle if a vulnerable person is a passenger.

If an applicant has a significant criminal history and the commissioner is satisfied that the applicant's nominated employer has sufficient strategies in place to mitigate the risks present, the commissioner may issue a position-based registration which imposes conditions that the person may work only in a particular activity and only with a particular employer.

The availability of conditional registrations will enable the registration of some applicants who would otherwise represent an unacceptable risk of harm to vulnerable people if allowed to move freely between all types of registered activities.

Clause 38 – Proposed conditional registration

This clause compels the commissioner to inform an applicant in writing of a proposed conditional registration, including the reasons for the condition and that the applicant may seek a reconsideration of the proposal (clause 37 of the Bill).

To prevent the inappropriate disclosure of an applicant's protected information, the commissioner must not tell the employer of the proposed conditional registration (subclause 38(2) of the Bill).

Clause 39 – Reconsideration of proposed conditional registration

This clause provides for an applicant to seek a review of the commissioner's proposal to issue a conditional registration. The commissioner must reconsider the proposal if the applicant informs the commissioner in writing of an intention to seek a review within 14 days and provides new or corrected information to the commissioner not later than one month after receiving notice of proposed conditional registration.

The clause also compels the commissioner to consider any new or corrected information provided by the applicant and either uphold the original decision or register the person unconditionally.

If the applicant is not satisfied with the commissioner's final decision, the applicant may apply to the ACT Civil and Administrative Tribunal for review of the commissioner's decision to leave an applicant's registration subject to one or more specific conditions.

Clause 40 – Extensions of period for reconsideration of proposed conditional registration

This clause establishes a mechanism for an applicant to extend the period of time to seek a reconsideration of the proposed conditional registration. This provision is included to allow for the possibility that circumstances outside the control of the applicant that prevent the applicant from providing additional information to the

commissioner within the timeframes imposed in subclause 39(2) of the Bill, such as, hospitalisation or requiring information from overseas (subclause 40(2) Examples).

Clause 41 – Notice of conditional registration

This clause compels the commissioner to register the person conditionally if the commissioner has given the person an opportunity to have the condition(s) reconsidered but the person has failed to indicate to the commissioner (within 14 days of receipt of the notice) that they wish the commissioner to reconsider the proposed conditional registration and/or provide new or corrected information to the commissioner not later than one month after receiving the notice of proposed conditional registration.

The commissioner must tell the applicant that the person is registered conditionally, what the condition is, and the reasons for the condition. The commissioner must also give the person a reviewable decision notice, which allows the person to ask *ACT Civil and Administrative Tribunal* to review the commissioner's decision (subsection 40(3)(b) of the Bill).

Clause 42 – Offences – registered person contravene condition of registration

Conditions are available to the commissioner as a means of addressing any specific risks of harm that a particular applicant may present. Any breach of the condition imposed by the commissioner may represent a risk of harm to vulnerable people.

Clause 42 outlines the strict liability offence for a person not complying with a condition of registration.

While subclause 42(1) is a strict liability offence under the Act, the maximum penalty is lower than in subclause 42(3) due to the reverse onus of proof and lower evidentiary burden associated with the strict liability offence as established at subclause 42(2). The maximum penalty for clause 42(1) is 50 penalty units, 6 months imprisonment or both.

Subclause 42(3) establishes a strict liability offence for a person who knowingly or recklessly contravenes a condition of their registration. This offence would apply, for example, to a person who is informed of a condition that they cannot drive a motor vehicle in which a vulnerable person is present, but continues to do so as part of engaging in a regulated activity. This offence currently carries a maximum penalty of 200 penalty points, 2 years imprisonment or both.

See pages 18 / 19 of this explanatory statement for discussion on the use of strict liability offences in the Bill.

Division 6.2 Registration cards

Clause 43 – Registration cards

This clause requires the commissioner to issue a card to registered people as evidence that registration has taken place. This clause also stipulates the minimum information that the card must contain. Additional information may be prescribed by via regulation.

Clause 44 – Offence – fail to produce registration card

This clause requires that a registered person engaging in a regulated activity must produce their registration card for inspection by a police officer or a person authorised by the commissioner. A strict liability offence with a maximum penalty of 10 penalty units applies if the registered person does not produce their card for inspection. The purpose of this clause is to protect the integrity of the checking system by establishing a mechanism for the discovery of unregistered people who are working with vulnerable people.

Clause 44 establishes a strict liability offence for a person who fails to produce their registration card when asked by a police officer or a person authorised by the commissioner. This offence carries a maximum penalty of 10 penalty units.

Clause 45 – Lost, stolen or damaged registration card

Clause 45 details the process for the replacement of registration cards that have been lost, stolen or damaged.

The person must provide a statutory declaration advising of the circumstances surrounding the losing of the card. The commissioner can either replace the card if satisfied the person held a registration card and the card has been lost, stolen or damaged, or refuse to replace the card. If the commissioner refuses to replace the card, the commissioner must give the person a reviewable decision notice.

Clause 46 – Offence – fail to return registration card

This clause requires a person whose registration card has been cancelled or suspended to return the card to the commissioner within 14 days. It is inappropriate for a person who poses an unacceptable risk of harm to vulnerable people to hold a card that purports to be valid and it is necessary to seek the return of registration cards in this circumstance to limit the potential for a person to use the card in seeking access to vulnerable people.

A strict liability offence under this provision currently carries a maximum penalty of 50 penalty units and/or six months imprisonment in recognition of the importance of ensuring the return of cards from persons who may pose a risk of harm to vulnerable people.

This clause does not apply to a person if the person's card has been lost, stolen or destroyed by someone other than the person.

See pages 18 /19 of this explanatory statement for discussion on the use of strict liability offences in the Bill.

Division 6.3 Monitoring Registered People

Clause 47 – Commissioner may seek information from entities about registered people

The clause empowers the commissioner to seek information or advice from any entity for the purpose of deciding whether a person continues to pose no risk or an acceptable risk to a vulnerable person. This clause is included in recognition that the more information available to the commissioner, the greater likelihood that the commissioner can exercise reasonable judgement in assessing the connection between any new information and whether or not a person poses an unacceptable risk of harm to vulnerable people.

To assist the commissioner in accessing information from external entities, the clause enables affected entities to provide requested information to the commissioner without contravening a duty of confidentiality that would otherwise apply. While subclause 47(1) of the Bill enables the commissioner to request information from any entity, subclause 47(2) does not compel entities to provide information in response to such a request.

Clause 48 – Additional risk assessments

This clause compels the commissioner to conduct an additional risk assessment on a registered person if the commissioner believes on reasonable grounds that other information concerning the registered person has become available. For example, a person may have been convicted of a relevant offence. The risk assessment guidelines provide for what constitutes other information (clause 29 of the Bill). The clause compels the commissioner to inform the registered person in writing that a new revised risk assessment is being conducted.

After conducting an additional risk assessment, the commissioner may leave a person's registration unchanged or make a person's registration subject to conditions (subsection 48(3)).

If the commissioner decides to conduct an additional risk assessment for a person, the commissioner may suspend the person's registration while the assessment is conducted (subsection 48(2) Note).

Clause 49 – Offences – registered person fail to disclose charge, conviction or finding of guilt for relevant offence

This clause establishes a strict liability offence for a registered person failing to inform the commissioner of a new charge, conviction or finding of guilt for a relevant offence within 14 days.

The strict liability offences in this clause provide a maximum penalty of 50 penalty points, imprisonment for two years, or both in recognition of the importance of protecting the integrity and currency of assessment decisions as well as public confidence in the checking system.

Obtaining information from external entities for use in a risk assessment, for example, a criminal history report) is a point in time activity. If the commissioner is not informed of new information concerning relevant offences, any risk assessment for a particular applicant may be based on incorrect or incomplete information. Registration of unsuitable applicants may exacerbate the risk of harm to vulnerable people who rely on the integrity of the checking process.

See pages 18 /19 of this explanatory statement for discussion on the use of strict liability offences in the Bill.

Clause 50 – Offence –fail to notify change of name or address

This clause requires registered people to keep the commissioner informed of current personal and contact information. It is important that all personal information concerning a registered person remains up-to-date so that the commissioner can make a connection between any new information and the registered person and can contact the registered person as necessary.

A maximum penalty of 10 penalty units is attached to this offence to encourage compliance with the provision.

Division 6.4 Suspending or cancelling registration

Clause 51 – Grounds for suspension or cancellation of registration

This clause empowers the commissioner to cancel or suspend a registration under certain conditions, including if a person does not comply with a condition of registration or if new information indicates that the person may pose an unacceptable risk to vulnerable people. If the commissioner decides to conduct an additional risk assessment for a person, the commissioner may suspend the person's registration (subclause 51(2) of the Bill).

The purpose of this provision is to ensure that registrations are not maintained by people who may pose an unacceptable risk of harm to vulnerable people.

Clause 52 – Notice of proposed suspension or cancellation of registration

This clause compels the commissioner to inform a person in writing of an intention to suspend or cancel their registration, including the ground for the suspension or cancellation. The commissioner must also state that the person may give reasons to the commissioner why the registration should not be suspended or cancelled.

Suspensions and cancellations will not occur without first considering any additional information provided by the registered person.

Clause 53 – Suspension or cancellation of registration

This clause compels the commissioner to cancel the registration if, after the consideration of any additional information provided by a registered person, the commissioner is satisfied that the ground for suspension or cancellation exists. Preventing contact between vulnerable people and people with a history of behaviours which may place a vulnerable person at risk is the primary aim of the Bill.

A person who receives a cancellation or suspension notice is considered unregistered and must stop engaging in any regulated activity for which the person is required to be registered.

The commissioner must inform the applicant in writing of the cancellation or suspension, including the ground for the cancellation or suspension in order to ensure that people who receive a cancellation or suspension notice do not continue to participate in regulated activities.

Part 7 Notification and review of decisions

Clause 54 – Meaning of reviewable decision – Part 7

This clause defines the meaning of reviewable decision for the purposes of Part 4 of the Bill. All decisions listed in Schedule 2, column 3 of this Bill are decisions which are reviewable for the purposes of the *ACT Civil and Administrative Tribunal Act 2008*.

Clause 55 – Reviewable decision notices

This clause empowers the commissioner to give a reviewable decision notices (as defined sections 9 to 12 of the *ACT Civil and Administrative Tribunal Act 2008*) to the applicant (Schedule 2, column 4 of the Bill), in relation to a reviewable decision that has been made.

Clause 56 – Applications for review

This clause establishes that a person receiving a reviewable decision notice can make an application to the *ACT Civil and Administrative Tribunal* for review of a listed reviewable decision. The requirements for a reviewable decision notice are prescribed under sections 9 to 12 of the *ACT Civil and Administrative Tribunal Act 2008*.

Part 8 Miscellaneous

Clause 57 – Protection from liability

This clause provides limited protection from liability for officials exercising functions under the Working with Vulnerable People (Background Checking) Act 2010. An official means: the commissioner; or a person authorised under the Act by the commissioner to do or not to do a thing.

Clause 58 - Offences - use or divulge protected information

This clause places limitations on the use or disclosure of protected information (including sensitive information) obtained in exercising functions under the Act. Protected information is information about a person that is disclosed to, or obtained by, a person to whom this provision applies because of the exercise of a function under the Act by the person or someone else.

The collection and sharing of personal information about vulnerable people engages human rights law, in particular, subsection 11(2) (protection of the child) and section 12 (privacy) of the *Human Rights Act 2004* (ACT).

Information obtained about a person for the purpose of conducting a risk assessment will generally be protected personal information that in some cases will not have been proven in a court or other decision making body. Inappropriate disclosure may have consequences for the person in terms of their privacy, reputation, right to presumption of innocence, right to a fair trial and subsequently, their employment prospects or standing in the community.

In recognition of the importance of protecting protected personal information, strict liability offences are established for inappropriate use or disclosure of information with a maximum penalty of 50 penalty units and/or 6 months imprisonment. The offences do not apply in some circumstances including when the information is divulged with the person's consent or in a court proceeding.

Clause 59 – Evidentiary certificates

This clause empowers the commissioner to give a signed certificate that a person was a registered person at a particular time and whether their registration is general or conditional.

Clause 60 – Disqualification orders

This clause empowers a court to make an order disqualifying a person from applying for a registration for a stated period, or until a stated thing happens, if the court finds the person guilty of an offence against the Working with Vulnerable (Background Checking) Act 2010. This clause is intended to prevent people with a history of violating the Act, or who demonstrate contempt for the Act, from seeking registration until such time as compliance is reasonably likely.

Clause 61 – Determination of fees

This clause gives the Minister power to determine fees for the Act as provided for in section 56 of the *Legislation Act 2001*. The determination of fees is a disallowable instrument.

Volunteers are exempt from fees when applying for registration to work with vulnerable people.

Clause 62 – Approved forms

This clause empowers the commissioner to approve forms for any purpose under the Working with Vulnerable (Background Checking) Act 2010. An approved form is a notifiable instrument.

Clause 63 – Review of Act

This clause compels the Minister to review the Act after five years of operation and present a report to the ACT Legislative Assembly. This clause is intended as a mechanism for establishing whether operations are meeting the requirements of the Act and for the discovery and reporting of any omissions, anomalies or unintended consequences.

Clause 64 – Regulation-making power

This clause empowers the Executive to make regulations for the Act. In particular, regulations can be made concerning the obligations of employers before and after engaging people in regulated activities.

Clause 65 – Fair Trading (Consumer Affairs) Act 1973, definition of *fair trading legislation*, new paragraph (f)

This clause extends certain provisions of the Fair Trading Act 1973 to apply to this Act. These provisions relate to commissioner's powers to investigate and delegate.

SCHEDULE 1 Regulated activities

Part 1.1 - Activities or services for children

Clauses 1.1 to 1.6 provide the regulated activities or services for children.

Part 1.2 - Activities or services for vulnerable people

Clauses 1.7 to 1.18 provide the regulated activities or services for vulnerable people.

Part 1.3 – Other activities or services for vulnerable people

Clauses 1.19 to 1.23 provide other regulated activities or services for vulnerable children and vulnerable people which are not included in clauses Part 1 and 2.

SCHEDULE 2 Reviewable decisions

Schedule 2 reflects the meaning of a reviewable decision and the entity the commissioner must only give a reviewable decision notice to.

Schedule 2 also advises which entity may apply to the *ACT Civil and Administrative Tribunal* for review of a decision.

DICTIONARY

The dictionary includes the meaning of terms used throughout the Bill. The dictionary also refers to the *Legislation Act 2001* which contains definitions and other provisions relevant to this Bill.

Outline of the Bill

Clause 1 – Name of the Act

This clause names the Act as the Working with Vulnerable People (Background Checking) Act 2010.

Clause 2 – Commencement

This clause notes the Act will commence on a day fixed by the Minister by written notice. If the Act is not commenced within twelve months beginning on the notification day, the Act automatically commences on the first day after that period. The twelve month period for commencement to occur is to enable sufficient time to implement systems to support the Act.

Clause 3 – Dictionary

This clause explains that the dictionary is found at the end of the Act and is part of the substantive provisions.

Clause 4 - Notes

This clause clarifies that the notes in the Act are explanatory only and do not form part of the substantive provisions of the Act. By contrast, an example included in the Act is part of the substantive provisions of the Act having regard to section 132 of the *Legislation Act 2001*.

Clause 5 – Offences against Act – application of the Criminal Code etc

This clause clarifies that other legislation applies in relation to offences against the Act. The *Criminal Code 2002* (ACT) (sections 11 to 12) applies to all offences against the Act. The *Legislation Act 2001* (ACT) (sections 133 to 134) provides the meaning of offence penalties which are expressed in penalty units and imprisonment.

Part 2 Important Concepts

Clauses 6 to 10

For the purpose of the Bill, these clauses provide a definition of: vulnerable person, regulated activity, engaging in a regulated activity, contact with a vulnerable person, and who an employer is.

Clause 6 – Who is a *vulnerable person*?

This clause establishes the definition of a vulnerable person which applies across the Bill. A vulnerable person encompasses both ‘children’ and ‘adults’.

To promote consistency across ACT Legislation, the vulnerable person definition in the Bill refers to “Child, if age rather than descendency is relevant, means an individual who is under 18 years old” and adult: “...an individual who is at least 18 years old” (*Legislation Act 2001* (ACT) Dictionary, Part 1).

Children due to their age are necessarily considered vulnerable. An adult is considered to be a vulnerable people when they are experiencing disadvantage. and, as a result of the disadvantage, are accessing a regulated activity or service related to the disadvantage. This definition has the advantage of establishing a basis for the determination of the types of services or activities that might attract background checking. The definition also recognises people's changing circumstances as people will not be considered vulnerable at all times. Rather, they are considered vulnerable at the time of receiving a service provided as part of a regulated activity.

Clause 7 – What is a *regulated activity*?

This clause establishes that regulated activities or services are those listed in Schedule 1 of the Bill or otherwise prescribed by regulation as a regulated activity.

Clause 7(2) enables the Minister to declare, via a disallowable instrument, that a stated activity or service is not a regulated activity.

Clause 8 – When is a person *engaged* in a regulated activity

This clause establishes that an employee or volunteer providing a service to a vulnerable person, who is accessing a regulated activity or service, is considered to be engaging in a regulated activity. Regulated activities and services are defined in Schedule 1 of the Bill.

Clause 9 – What is *contact* with a vulnerable person?

This clause defines the meaning of contact for the purposes of the Bill through addressing the type and duration of contact a person can have with vulnerable person before they must be registered as engaging in a regulated activity. For example, a person would require registration if the contact occurs as part of their usual activity, such as a teacher and a student.

The definition of “contact” is necessarily broad to encompass the various situations in which people may have an opportunity to harm a vulnerable person either directly through the misuse of information or via a power imbalance.

Clause 10 – Who is an employer?

This clause details that an employer is an entity who engages a person in a regulated activity or service which leads that person to have contact with vulnerable people.

Part 3 Requirement for registration

Clause 11 – When is a person required to be registered?

Clause 11 details that a person is required to be registered to engage in a regulated activity and, in certain circumstances, a person can apply for an exemption from registration. There are a range of exemptions specified for circumstances in which registration would be ineffective, inappropriate, unduly burdensome, or result in duplication of checking.

The commissioner may declare that certain persons are not required to be registered for an activity via a notifiable instrument.

Clause 12 – Offences - person engage in regulated activity for which person not registered

This clause outlines the strict liability offence for a person who engages in a regulated activity or service; is required to be registered to engage in the activity or service, and does not have a registration allowing them to engage in that activity or service.

Clause 12 does not apply if the person is not registered but is engaged in a regulated activity as provided in clause 14 of the Bill.

Clause 13 – Offences - employer engage person in regulated activity for which person not registered

This clause outlines the offence for an employer who engages as person in a regulated activity for which that person is not registered.

Clause 14 – When unregistered person may be engaged in regulated activity

This clause establishes that an unregistered person may be employed in a regulated activity pending the outcome of an application to the commissioner under certain conditions.

Part 4 Applying for registration

Clause 15 – Application for registration

Clause 15 details that a person may apply to the commissioner for registration under the Working with Vulnerable People (Background Checking) Act 2010.

This clause is subject to clause 20 which permits a person to reapply for registration three years after the commissioner issues them a negative notice or cancel's the person's registration, or when a change in information has occurred.

Clause 16 – Application for registration - contents

This clause details that applying for registration requires the applicant to voluntarily provide the screening unit with information regarding their criminal history, non-conviction information and any other information they believe will assist the commissioner to determine their suitability for registration to work with vulnerable people in a regulated activity (clause 16).

Clause 17– Application for registration – additional information

This clause empowers the commissioner to seek additional information from an applicant, where necessary, to decide an application. This may arise due to the applicant providing incomplete or inaccurate information, or if supplementary information is required for clarification purposes. The commissioner may also seek information where court orders have been awarded in care and protection matters.

Clause 18 - Application for registration - withdrawal

This clause allows a person to withdraw an application at any time by written notice to the commissioner.

Clause 19 – Offences – applicant fail to disclose charge, conviction or finding of guilt for relevant offence

This clause outlines strict liability offences in relation to an applicant whose registration is in process or they have not been given a negative notice, and they fail to disclose to the commissioner new charges, convictions, or findings of guilt for a relevant offence within fourteen days.

Clause 20 – Restriction on reapplying for registration

This clause prohibits a person from applying for registration if the person has been given a negative notice or has had his or her registration cancelled. The clause is intended to give finality to the registration process and to discourage frivolous applications that might otherwise impact on the commissioner's capacity to consider other applications.

In recognition that circumstances may change over time, the prohibition on making a further application is not permanent and applicants may reapply three years after a negative notice or cancellation of registration, or sooner if information on which a decision was made has changed.

Part 5 Risk Assessment

Division 5.1

Clause 21 – Meaning of *risk assessment*

This is a technical clause establishing the definition for the use of the term risk assessment elsewhere in the Bill.

Clause 22– Meaning of criminal history

This clause details the meaning of criminal history for the purposes of the Bill.

Clause 23 – Meaning of non-conviction information

This clause details the meaning of non-conviction information for the purposes of the Bill.

Clause 24 – Meaning of relevant offence

This clause specifies the meaning of relevant offences for the purpose of the Bill.

Division 5.2 Risk Assessment Guidelines

Clause 25 – Risk Assessment Guidelines

This clause provides the commissioner with the power to develop guidelines on how risk assessments are to be conducted under the Act.

The guidelines will be contained in a notifiable instrument To allow the guidelines to incorporate an external document without needing to reproduce the external document, the guideline may apply, adopt, or incorporate an instrument as in force from time to time.

Clause 26 – Risk Assessment Guidelines – content

This clause stipulates that the risk assessment guidelines must state the matters that the commissioner must take into account when conducting a risk assessment and how those matters must be taken into account.

Clause 27 – Risk Assessment Guidelines – criminal history

This clause specifies that matters that the commissioner must take into account when considering and applicant's criminal history.

Clause 28 – Risk Assessment Guidelines – non-conviction information

This clause specifies the matters that the Commissioner must take into account when considering an applicant's non-conviction information

Clause 29 – Risk Assessment Guidelines – other information

This clause specifies that the commissioner must take into account the source, relevance, and reliability of any other information available for consideration as part of a risk assessment. The commissioner must not take into account any information unless satisfied on reasonable grounds that the information is accurate.

Division 5.3 Conducting Risk Assessments

Clause 30 – Risk Assessments

This clause compels the commissioner to conduct a risk assessment in accordance with the risk assessment guidelines, for any person who makes an application for registration (as provided in clause 16 of the Bill).

Clause 31 – Commissioner may seek information from entities to conduct risk assessments

This clause provides the commissioner with the authority to seek information and advice from entities to conduct risk assessments.

Division 5.4 Negative Risk Assessments

Clause 32 – Proposed negative notices

This clause compels the commissioner to inform an applicant in writing of a proposal to issue a negative notice, including the reasons for a negative risk assessment.

To prevent the inappropriate disclosure of protected information concerning the applicant, the commissioner must not tell the employer of a proposed negative risk assessment.

Decisions of the commissioner will be made in accordance with the Risk Assessment Guidelines (clauses 25 to 29 of the Bill) and, if necessary, will be subject to judicial review.

Clause 33 – Reconsideration of negative risk assessments

This clause provides for an applicant to seek a review of the commissioner's proposal to issue a negative notice if the applicant believes the commissioner's decision has been made on the grounds of incomplete or incorrect information.

Clause 34 – Extensions of period for reconsideration of negative risk assessment

This clause provides for an applicant to seek an extension of the period required for the reconsideration of a proposed negative notice.

Clause 35 – Negative notices

This clause compels the commissioner to refuse to register an applicant if, after providing an opportunity for a review of a proposed negative risk assessment notice, the commissioner continues to believe that the applicant poses an unacceptable risk of harm to vulnerable people.

Part 6 Registration

Division 6.1 Registration

Clause 36 – Registration

This clause compels the commissioner to register an applicant if a risk assessment or revised risk assessment indicates that the person poses no risk, or an acceptable risk, of harm to vulnerable people.

Clause 37 – Conditional registration

This clause empowers the commissioner to impose conditions on registrations. The commissioner must inform the applicant in writing of the condition, and the reason for the condition, and must also tell the nominated employer (if any) that the condition is applicable to the registration.

Clause 38 – Proposed conditional registration

This clause compels the commissioner to inform an applicant in writing of a proposed conditional registration, including the reasons for the condition.

The applicant may seek a reconsideration of the proposal.

To prevent the inappropriate disclosure of an applicant's protected information, the commissioner must not tell the person's employer of the proposed conditional registration.

Clause 39 – Reconsideration of proposed conditional registration

This clause provides for an applicant to seek a review of the commissioner's proposal to issue a conditional registration. The commissioner must reconsider the proposal if the applicant informs the commissioner in writing of an intention to seek a review within 14 days and provides new or corrected information to the commissioner no later than one month after receiving notice of proposed conditional registration.

Clause 40 – Extensions of period for reconsideration of proposed conditional registration

This clause clarifies that the commissioner may extend the imposed timeframes for an applicant to seek a reconsideration of the proposed conditional registration.

This provision is included to allow for the possibility that circumstances outside the control of the applicant may prevent the applicant from providing additional information to the commissioner within the timeframes imposed.

Clause 41 – Notice of conditional registration

This clause compels the commissioner to register the person conditionally if the commissioner has given the person an opportunity to have the condition(s) reconsidered but the person has failed to indicate to the commissioner (within 14 days of receipt of the notice) that they wish the commissioner to reconsider the proposed conditional registration and/or provide new or corrected information to the commissioner not later than one month after receiving the notice of proposed conditional registration.

The commissioner must tell the applicant that the person is registered conditionally, what the condition is, and the reasons for the condition.

Clause 42 – Offences – registered person contravene condition of registration

This clause provides the strict liability offence for a person not complying with a condition of registration.

Division 6.2 Registration cards

Clause 43 – Registration cards

This clause requires the commissioner to issue a card to registered people as evidence that registration has taken place. This clause also stipulates the minimum information that the card must contain. Additional information may be prescribed by via regulation.

Clause 44 – Offence – fail to produce registration card

This clause requires that a registered person engaging in a regulated activity must produce their registration card for inspection by a police officer or a person authorised by the commissioner. A strict liability offence under this provision applies.

Clause 45 – Lost, stolen or damaged registration card

This clause details the process for the replacement of registration cards that have been lost, stolen or damaged.

Clause 46 – Offence – fail to return registration card

This clause requires a person whose registration card has been cancelled or suspended to return the card to the commissioner within 14 days. A strict liability offence under this provision applies. This clause does not apply to a person if the person's card has been lost, stolen or destroyed by someone other than the person.

Division 6.3 Monitoring Registered People

Clause 47 – Commissioner may seek information from entities about registered people

The clause empowers the commissioner to seek information or advice from any entity for the purpose of deciding whether a person continues to pose no risk or an acceptable risk to a vulnerable person.

Clause 48 – Additional risk assessments

This clause compels the commissioner to conduct an additional risk assessment on a registered person if the commissioner believes on reasonable grounds that other information concerning the registered person has become available.

Clause 49 – Offences – registered person fail to disclose charge, conviction or finding of guilt for relevant offence

This clause establishes a strict liability offence for a registered person failing to inform the commissioner of a new charge, conviction or finding of guilt for a relevant offence within 14 days.

Clause 50 – Offence –fail to notify change of name or address

This clause requires registered people to keep the commissioner informed of current personal and contact information.

Division 6.4 Suspending or cancelling registration

Clause 51 – Grounds for suspension or cancellation of registration

This clause empowers the commissioner to cancel or suspend a registration under certain conditions, including if a person does not comply with a condition of registration or if new information indicates that the person may pose an unacceptable risk to vulnerable people. If the commissioner decides to conduct an additional risk assessment for a person, the commissioner may suspend the person's registration (subclause 51(2) of the Bill).

Clause 52 – Notice of proposed suspension or cancellation of registration

This clause compels the commissioner to inform a person in writing of an intention to suspend or cancel their registration, including the ground for the suspension or cancellation. The commissioner must also state that the person may give reasons to the commissioner why the registration should not be suspended or cancelled.

Suspensions and cancellations will not occur without first considering any additional information provided by the registered person.

Clause 53 – Suspension or cancellation of registration

This clause compels the commissioner to cancel the registration if, after the consideration of any additional information provided by a registered person, the commissioner is satisfied that the ground for suspension or cancellation exists. The commissioner must inform the applicant in writing of the cancellation or suspension, including the ground for the cancellation or suspension.

Part 7 Notification and review of decisions

Clause 54 – Meaning of reviewable decision

This clause defines the meaning of reviewable decision for the purposes of Part 4 of the Bill. All decisions listed in Schedule 2, column 3 of this Bill are decisions which are reviewable for the purposes of the *ACT Civil and Administrative Tribunal Act 2008*.

Clause 55 – Reviewable decision notices

This clause empowers the commissioner to give a reviewable decision notices (as defined sections 9 to 12 of the *ACT Civil and Administrative Tribunal Act 2008*) to the applicant (Schedule 2, column 4 of the Bill), in relation to a reviewable decision that has been made.

Clause 56 – Applications for review

This clause establishes that a person receiving a reviewable decision notice can make an application to the *ACT Civil and Administrative Tribunal* for review of a listed reviewable decision. The requirements for a reviewable decision notice are prescribed under sections 9 to 12 of the *ACT Civil and Administrative Tribunal Act 2008*.

Part 8 Miscellaneous

Clause 57 – Protection from liability

This clause provides limited protection from liability for officials exercising functions under the Working with Vulnerable People (background Checking) Act 2010. An official means: the commissioner; or a person authorised under the Act by the commissioner to do or not to do a thing.

Clause 58 - Offences - use or divulge protected information

This clause places limitations on the use or disclosure of protected information obtained in exercising functions under the Act. Protected information is information about a person that is disclosed to, or obtained by, a person to whom this provision applies because of the exercise of a function under the Act by the person or someone else.

Clause 59 – Evidentiary certificates

This clause empowers the commissioner to give a signed certificate that a person was a registered person at a particular time and whether their registration is general or conditional.

Clause 60 – Disqualification orders

This clause empowers a court to make an order disqualifying a person from applying for a registration for a stated period, or until a stated thing happens, if the court finds the person guilty of an offence against the Working with Vulnerable (Background Checking) Act 2010.

Clause 61 – Determination of fees

This clause gives the Minister power to determine fees for the purposes of the Act as provided for in section 56 of the *Legislation Act 2001*. The determination of fees is a disallowable instrument.

Volunteers are exempt from fees when applying for registration to work with vulnerable people.

Clause 62 – Approved forms

This clause empowers the commissioner to approve forms for any purpose under the Working with Vulnerable (Background Checking) Act 2010. An approved form is a notifiable instrument.

Clause 63 – Review of Act

This clause compels the Minister to review the Act after five years of operation and present a report to the ACT Legislative Assembly.

Clause 64 – Regulation-making power

This clause empowers the Executive to make regulations for the Act.

Clause 65 – Fair Trading (Consumer Affairs) Act 1973, definition of *fair trading legislation*, new paragraph (f)

This clause extends certain provisions of the Fair Trading Act 1973 to apply to Working with Vulnerable (Background Checking) Act 2010.

SCHEDULE 1 Regulated activities

Part 1.1 - Activities or services for children

Clauses 1.1 to 1.6 provide the regulated activities or services for children.

Part 1.2 - Activities or services for vulnerable people

Clauses 1.7 to 1.18 provide the regulated activities or services for vulnerable people.

Part 1.3 – Other activities or services for vulnerable people

Clauses 1.19 to 1.23 provide other regulated activities or services for vulnerable children and vulnerable people which are not included in clauses Part 1 and 2.

SCHEDULE 2 Reviewable decisions

Schedule 2 reflects the meaning of a reviewable decision and the entity the commissioner must only give a reviewable decision notice to.

Schedule 2 also advises which entity may apply to the *ACT Civil and Administrative Tribunal* for review of a decision.

DICTIONARY

The dictionary includes the meaning of terms used throughout the Bill. The dictionary also refers to the *Legislation Act 2001* which contains definitions and other provisions relevant to this Bill.

**Statutory Instruments under the Working with Vulnerable People
(Background Checking) Bill 2010**

Clause No	Clause Heading	Instrument	Instrument Type	Who can make it
7	What is a regulated activity?	Regulated activities or services are defined in the Act. The Minister may declare that an activity or service is not a regulated activity.	Disallowable	Minister
11	When is a person required to be registered?	The commissioner may declare that a person involved in a Territory or national event is not required to be registered for the activity.	Notifiable	Commissioner
23	Risk assessment guidelines	The commissioner must make risk assessment guidelines about how risk assessments are to be conducted under the Act.	Notifiable	Commissioner
61	Determination of fees	The Minister may determine fees for this Act	Disallowable	Minister
62	Approved forms	The Commissioner may approve forms for this Act	Notifiable	Commissioner
64	Regulation-making power	The Executive may make regulations for this Act.	Notifiable	Executive

ATTACHMENT 1

Section of the <i>Human Rights Act 2004 (ACT)</i>	Supported section/subsection of the <i>Human Rights Act 2004 (ACT)</i>	How a person's human rights are safeguarded by specific clauses in the Bill
2) Section 8 3) Recognition and equality before the law	4) Everyone has the right to recognition as a person before the law (8(1)). 5) 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 (8(3)).	6) Background checking requires the consent of the applicant (clauses 16(2)(a) and 16(3) of the Bill) 7) Information will only be considered as part of a risk assessment (clause 21 of the Bill) if it meets a relevance offence test (clause 24 of the Bill). In the case of information which has not been tested in a court or similar institution, additional scrutiny will be applied to assess the accuracy and reliability of the information in the context in which it has been recorded (clause 29). 8) Background checking and risk assessment must be conducted within statutory Risk Assessment Guidelines (clause 26) 9) General and conditional (including role-based) registration is determined on the information provided by the applicant and, when required, other validated information sources (clauses 16 and 17). 10) The use of statutory Risk Assessment Guidelines (clause 26) minimises the risk of assessor subjectivity when determining an applicant's suitability to work with vulnerable people.

<p>11) Section 12 12) Privacy and Reputation:</p>	<p>13) Everyone has the right: 14) Not to have his or her privacy...interfered with unlawfully or arbitrarily (12(a)); and 15) Not to have his or her reputation unlawfully attacked (12(b)).</p>	<p>16) The applicant's consent is required for background checking and risk assessment to occur and (subclause 16(2)(a)). 17) Protected information will not be disclosed to employers or organisations (clauses 57 and 58 of the Bill). 18) The screening unit, where background checking and risk assessments processes occur, will be required to comply with a statutory Risk Assessment Guidelines (clauses 30 and 31) and all registration decisions must be justifiable and defensible. 19) The commissioner will not inform the applicant's employer of a proposed negative notice or the analysis behind this decision (subclause 32(4)), the employer will be advised of the applicant's level of registration only. 20) An applicant's personal information is protected (subclauses 58(1)(2))</p>
<p>21) Section 17 22) Taking part in public life</p>	<p>23) Every citizen has the right, and is to have the opportunity, to: 24) Have access, on general terms of equality, for appointment to the public service and public office (17(c)).</p>	<p>25) The applicant's consent is required for background checking and risk assessment to occur and (subclause 16(2)(a)). 26) Determination of an applicant's suitability to work with vulnerable people will be determined through a risk assessment process which will be guided by statutory Risk Assessment Guidelines (clauses 30 and 31). 27) Applicant's can choose to apply for general or conditional registration, which includes role-based registration. If potential applicants are concerned that the impact of their 'lived experiences'⁸ will affect their suitability for general registration, an applicant can apply for conditional registration. 28) If the commissioner is proposing to issue a conditional registration notice or a negative risk assessment notice, the commissioner is compelled to advise the</p>

⁸ Key stakeholders raised concerns during consultations that a person whose 'lived experiences' are essential for them to be able to fulfil their role in specific organisations may be unwilling to apply for registration due to their history of convictions and spent convictions. These concerns were particularly relevant to alcohol, drug and mental health rehabilitation and support services. Case studies from concerned industries were tested against draft risk assessment guidelines. All case studies presented were eligible for general registration.

		<p>applicant he/she intends issuing the notice (subclauses 32(2) and 38(1)).</p> <p>29) The applicant can ask the commissioner to review the proposed conditional registration or negative risk assessment if he/she believes the decision has been made because of incomplete or incorrect information (subclauses 32(3)(b) and 38(2)(b)).</p> <p>30) The applicant can ask the Civil and Administrative Appeals Tribunal to undertake a further review of the commissioner's decision (clause 56).</p>
<p>31) Section 21</p> <p>32) Right to fair trial</p>	<p>33) Everyone has the right to have...rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal...(21(1)).</p>	<p>34) The applicant can ask the commissioner to review a proposed conditional registration or negative risk assessment if he/she believes the decision has been made because of incomplete or incorrect information (subclauses 32(3)(b) and 38(2)(b)).</p> <p>35) The applicant can ask the <i>ACT Civil and Administrative Appeals Tribunal</i> to undertake a further review of the commissioner's decision (clause 56).</p> <p>36) On written application by a person, the Commissioner may extend the period for reconsideration of a proposed negative risk assessment (section 34) or a proposed conditional registration (section 40).</p>