

**2010**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

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

**EXPLANATORY STATEMENT**

**Circulated by authority of  
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## **Working With Vulnerable People (Background Checking) Bill 2010**

### **Explanatory Statement**

This explanatory statement relates to the Working with Vulnerable People (Background Checking) Bill 2010 as introduced in the ACT Legislative Assembly.

### **Overview of Bill**

The *Working with Vulnerable People (Background Checking) Bill 2010* 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 children or vulnerable adults in the Australian Capital Territory. The object of the Bill is to reduce the risk of harm to vulnerable people by preventing contact with people who have a history of inappropriate behaviour or who have not been assessed.

The Bill introduces a new requirement for people who have contact with vulnerable people in the course of engaging in certain regulated activities to be registered with a statutory screening unit to be established in the Office of Regulatory Services, Department of Justice and Community Safety. The Commissioner for Fair Trading will conduct a background check and risk assessment before registering suitable applicants for a 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 will replace current checking requirements across a range of regulated activities.

Registered people will be eligible to transfer between organisations or positions within the ACT without being re-checked. To ensure the integrity of the registration system, affected organisations will be required to validate the registration status of employees or volunteers prior to engagement.

The development of this Bill has been influenced by a number of factors including previous reports, current best practice and inter-jurisdictional obligations for the ACT. Extensive community consultation undertaken between 2008 and 2010 centred around a detailed discussion paper.

Background checking and risk assessment engages a number of rights protected under various statutes including the *Human Rights Act 2004*, *Discrimination Act 1991* and the *Privacy Act 1998* (Cwth) as it applies in the ACT. Most rights are not absolute and proportional limitations may be permitted where demonstrably justified in a free and democratic society. In deciding whether a limit is reasonable, all relevant factors must be considered as specified in s28 of the *Human Rights Act 2004*. While it is important to be mindful of the rights of vulnerable people to life, protection, liberty, security and humane treatment, it is equally important to protect the rights of applicants to privacy, reputation, discrimination, presumption of innocence, fair trial, natural justice and recognition and equality before the law.

Given the strong public interest in ensuring that public authorities are able to protect the most vulnerable people in society, the Bill seeks to balance the rights of vulnerable people against the rights of applicants through the establishment of a screening authority underpinned by a rigorous statutory framework that observes the rights of all parties.

Background checking will require the informed consent of the applicant and sensitive personal information will not be disclosed to employers or organisations. Information will only be considered as part of a risk assessment if it meets a relevance test. 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.

Applicants will have access to the information on which decisions are made and will have an opportunity to correct any information believed to be false or inaccurate. Applicants may also make their own submissions raising any additional information they believe is relevant.

Risk assessments will be conducted in accordance with the general principles enshrined in the Bill and specific guidelines contained in a publicly available notifiable instrument. Risk assessment involves considering all available relevant information relating to the previous behaviour of an individual and determining the likelihood of certain behaviour occurring in the future. A decision based on a risk assessment does not equate to a finding of guilt or innocence.

Registrations may be general, conditional or position-based. General registrations will allow lower risk applicants to move between all regulated activities without the need to be rechecked. Conditional registrations allow 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 may issue a position-based registration that will restrict a person to engaging in specified regulated activities with a stated employer. The availability of general, conditional and position-based registration provides a level of flexibility while imposing the least possible level of restriction on the range of activities in which a particular applicant may be engaged.

The decisions of the commissioner will be communicated to applicants in writing and, in the case of negative decisions, reasons for the decision will be included. Information will be provided to applicants concerning avenues for merit review in the ACT Civil and Administrative Tribunal or judicial review in the Supreme Court. Prohibition decisions will not be permanent and unsuccessful applicants may re-apply after three years, or sooner if there has been a material change in the information upon which a decision was made.

A review of the checking system will be conducted as soon as practicable after the end of the 5<sup>th</sup> year of operation and a report of the review will be presented to the Legislative Assembly.

### **Strict Liability Offences**

A number of the offences in the Bill are strict liability offences. 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. Essentially, 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 reus, 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.

In respect of the use of strict liability offences in the Bill, a number of rights contained in the *Human Rights Act 2004* are engaged. These are the right to a fair trial which states that “[e]veryone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing”, and the “right to be presumed innocent until proved guilty according to law”.

Strict liability offences intersect with the right to fair trial under section 21 of the Human Rights Act. Although the right is engaged, strict liability is not prohibited by the Human Rights Act, however, it is important that the strict liability offence is reasonable within the specific context of the offence, and demonstrably justifiable in a free and democratic society.

Strict liability also engages the presumption of innocence under section 22 of the Human Rights Act, because these types of offences can be interpreted as using reverse onus of proof. The Government acknowledges that while strict liability offences engage the presumption of innocence, strict liability offences are not inherently incompatible with human rights.

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 demonstrably justifiable and reasonable.

The inclusion of strict liability clauses for lesser offences in the Bill will support the application of an infringement notice scheme. Infringement notice schemes minimise the cost of litigation for the Territory while offering registrants a choice concerning whether to accept a lesser penalty without admitting the offence or to remain liable to prosecution. A maximum penalty of 50 penalty units or 6 months imprisonment is applicable to strict liability offences under the Act that relate to engaging in regulated activities without a valid registration or not disclosing new relevant criminal history information. The maximum penalty is set at a level that a person will regard as a sanction rather than a mere expense for breaching the provision.

The increasing prevalence of regulatory legislation, some of which contain strict liability offences, is also 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 expected 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 inappropriate behaviour is a fundamental part of creating safe environments for the provision of services to vulnerable people.

## **Working With Vulnerable People (Background Checking) Bill 2010**

### **Outline of Provisions**

#### **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 that the Act will commence on a day fixed by the Minister by written notice. If the Act is not commenced within 12 months beginning on notification day, it automatically commences on the first day after that period. The 12 month period for commencement to occur is to enable sufficient time to implement systems to support this Act.

##### **Clause 3 – Dictionary**

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

##### **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*.

**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* applies to all offences against the Act and the *Legislation Act 2001* deals with the meaning of offence penalties that are expressed in penalty units.

**PART 2 Important concepts****Clause 6 – Who is a Vulnerable Person?**

This clause establishes that the term vulnerable person encompasses both children and certain vulnerable adults. While a child is considered vulnerable at all times, adults are considered vulnerable only when disadvantaged and only at the time of accessing a regulated activity in relation to the disadvantage. For example, an adult accessing a disability service is considered vulnerable at the time of receiving the service but not at other times.

**Clause 7 – Meaning of Regulated Activity**

This clause establishes that regulated activities are those listed in Schedule 1 or otherwise prescribed by regulation as a regulated activity for this Act. The Minister may 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 limits application of the Act to situations in which a person has contact with a vulnerable person as part of engaging in a regulated activity in any capacity.

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

This clause defines the meaning of contact for the purposes of the Bill. The definition 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. Situations where contact is incidental or would not reasonably be expected as part of the engaging in a regulated activity are excluded.

**Clause 10 – Who is an employer?**

This clause defines the meaning of employer for the purposes of the Bill.

**PART 3 Requirement for Registration****Clause 11 – When is a person *required* to be registered?**

This clause establishes that a person is required to be registered to engage in a regulated activity. There are a range of exemptions specified for circumstances in which registration would be ineffective, inappropriate, overly burdensome or result in duplication of checking. For example, registration is not necessarily required for people who are registered under a corresponding law or who are engaged in an activity as a police officer, registered health professional, lawyer or a financial services licensee.

Additional exemptions may be prescribed by regulation.

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

This clause establishes that it is an offence for a person to engage in a regulated activity for which a person is not registered. The primary object of the Act is to reduce the risk of harm to vulnerable people by preventing contact with people who have a history of inappropriate behaviour or who have not been assessed.

Sub-clause (1) establishes an offence for a person who engages in a regulated activity for which the person is required to be registered and does not have a registration allowing the person to engage in the activity. The maximum penalty established under this offence is 50 penalty units and/or 6 months imprisonment. While this offence is a primary offence under the Act, the maximum penalty is lower than in Sub-clause (3) due to the reverse onus of proof and lower evidentiary burden associated with the strict liability offence as established in Sub-clause (2).

Sub-clause (3) establishes an offence for a person who knowingly (or recklessly) engages in a regulated activity for which the person is required to be registered and does not have a registration allowing the person to engage in the activity. This offence would apply, for example, to a person who has received a negative notice and has not withdrawn from continued engagement in a regulated activity. In recognition that this is the primary offence under the Act, the offence carries a maximum penalty of 200 penalty units and/or 2 years imprisonment.

The offences do not apply if a person is engaged in a regulated activity under clause 14.

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

This clause establishes that it is an offence for an employer to engage a person in a regulated activity who does not have the required registration to engage in the regulated activity.

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 appropriate that an offence is established for allowing contact between vulnerable people and people who have a history of inappropriate behaviour or who have not been assessed.

Sub-clause (1) establishes an offence for an employer who engages a person in a regulated activity for which the person is required to be registered and does not have a registration allowing the person to engage in the activity. The maximum penalty established under this offence is 50 penalty units and/or 6 months imprisonment. While this offence is a primary offence under the Act, the maximum penalty is lower than in Sub-clause (3) due to the reverse onus of proof and lower evidentiary burden associated with the strict liability offence as established at Sub-clause (2).

Sub-clause (3) establishes an offence for an employer who knowingly (or recklessly) engages a person in a regulated activity for which the person is required to be registered and does not have a registration allowing the person to engage in the activity. This offence would apply, for example, to an employer who has been advised by the commissioner that a particular employee has received a negative notice and the employer has not prevented the employee from continuing to engage in a regulated activity. In recognition that this is the primary offence under the Act, the offence carries a maximum penalty of 200 penalty units and/or 2 years imprisonment.

The offences do not apply if a person is engaged in a regulated activity under clause 14.

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

This clause establishes that an unregistered person may work in a regulated activity pending the outcome of an application to the commissioner under certain conditions, including that the person is not disqualified and a registered person is present at all times. The purpose of the clause is to enable service providers to engage essential staff promptly if certain safeguards are in place.

### **PART 4                      Applying for registration**

#### **Clause 15 – Application for registration**

This clause establishes that an applicant may apply to the commissioner for registration. This clause is subject to clause 20 which restricts the circumstances in which a person may reapply. The commissioner referenced in this clause is the Commissioner for Fair Trading.

#### **Clause 16 – Application for registration - contents**

This clause specifies the information that must be supplied as part of the application to enable the screening unit to progress the registration. Information is required to establish the applicant's identity, enable the screening unit to contact the applicant as required and to collect information concerning the purpose for which applications are being made.



Applicants must also provide consent for checking to take place and for the screening unit to contact their employer under certain circumstances. Applications must be accompanied by a statutory declaration concerning whether the applicant has been convicted or found guilty of relevant offences outside of Australia.

The commissioner is required to provide certain information to applicants concerning their rights and obligations under the Act, the risk assessment guidelines and the types of information that an applicant may supply in support of their application.

A provision is included to prescribe additional information requirements via regulation.

#### **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 supply of incomplete or inaccurate information, or if supplementary information is required for clarification purposes.

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

#### **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 will tell the named employer (if any) of the withdrawal and need 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 establishes strict liability offences for a person who has applied for registration to fail to inform the commissioner of a new charge, conviction or finding of guilt for a relevant offence within 14 days.

Obtaining information from external entities for use in a risk assessment (e.g. a criminal history report) is a point in time activity. If the commissioner is not informed of a 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.

A maximum penalty of 50 penalty units and/or 6 months imprisonment applies to these offences in recognition of the importance of protecting the integrity and currency of assessment decisions as well as public confidence in the checking system.

**Clause 20 – Restriction on applying 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, or sooner if relevant information on which a decision was made has changed.

**PART 5                      Risk assessments****DIVISION 5.1            Important concepts****Clause 21 – Meaning of *risk assessment***

This is a technical clause establishing a definition for the use of the term risk assessment elsewhere in the Bill. The purpose of conducting a risk assessment is to determine whether or not a person poses an unacceptable risk of harm to vulnerable people.

**Clause 22 – Meaning of *criminal history***

This clause defines the term criminal history for the purposes of the Bill.

**Clause 23 – Meaning of *non-conviction information***

This clause defines the term non-conviction information for the purposes of the Bill. Research has demonstrated that the majority of abusers remain unconvicted. Like other Australian jurisdictions, the Act will consider non-conviction information as part of the risk assessment process to assist in determining whether or not a person poses an unacceptable risk of harm to vulnerable people. The consideration of such information is subject to additional scrutiny as outlined in clause 26.

**Clause 24 – Meaning of *relevant offence***

This clause defines the term relevant offence for the purposes of the Bill. Relevant offence types are specified to limit the consideration of available information to that which relates to the inherent requirements of working with vulnerable people.

## **DIVISION 5.2 Risk assessment guidelines**

### **Clause 25 – Risk assessment guidelines**

This clause directs that the commissioner must make guidelines about 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 instil a level of 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, a 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 primary matters that must be included in the guidelines are outlined, including that applicants may make submissions to the commissioner concerning any information about the applicant. 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.

### **Clause 27 – Risk assessment guidelines – criminal history**

This clause specifies the matters that the commissioner must take into account when considering an 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. This provision recognises that a higher degree of scrutiny must be applied to information which has not previously been proven in a court or other decision making body.

### **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. As provided for in clause 24, 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.

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

The clause empowers the commissioner to seek relevant information or advice from any entity for the purpose of conducting a risk assessment. 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 the information and whether or not a person poses an unacceptable risk of harm to vulnerable people. Examples include information relating to child protection information, apprehended violence orders or official disciplinary hearings concerning a person's previous employment.

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. The clause does not compel entities to provide requested information.

**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 and that the applicant may seek a reconsideration of the proposal under clause 33.

To prevent the inappropriate disclosure of sensitive personal information concerning the applicant, the commissioner must not tell the employer of the proposal.

**Clause 33 – Reconsideration of proposed negative risk assessments**

This clause establishes a mechanism for an applicant to seek a review of the commissioner's proposal to issue a negative notice. 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 the day the commissioner proposes to issue the negative notice. Applicants must inform the commissioner of an intention to seek a review relatively quickly so that the commissioner may otherwise issue a negative notice and resolve matters to minimise ongoing contact between unsuccessful applicants and vulnerable people.

### **Clause 34 – Extensions of period for reconsideration of proposed negative risk assessment**

This clause establishes a mechanism for an applicant to extend the period to seek a reconsideration of a proposed negative notice. This provision is included to allow for the possibility that circumstances outside of the control of the applicant may prevent the applicant from providing additional information to the commissioner within one month. Examples may include sudden hospitalisation or reasonable time required to acquire relevant information from a third party.

### **Clause 35 – Negative notices**

This clause compels the commissioner to refuse to register an applicant if, after providing an opportunity for a revised risk assessment, the commissioner continues to believe that the applicant poses an unacceptable risk of harm to vulnerable people. Preventing contact between vulnerable people and people with a history of inappropriate behaviour is the primary aim of the Act. A person who receives a negative notice must stop engaging in any regulated activity for which the person is required to be registered as per clause 12.

In accordance with the principles of natural justice, the commissioner must tell the applicant that the commissioner refuses to register the applicant and the reasons why. The commissioner must also give the person a reviewable decision notice, which allows the person to ask the ACT Civil and Administrative Tribunal to review the commissioner's decision.

In order to ensure that people who receive a negative notice do not continue to participate in regulated activities, the commissioner must also tell the nominated employer (if any) that the person has been refused registration. To prevent the inappropriate disclosure of sensitive personal information concerning the applicant, the commissioner must not tell the employer of the reasons for the negative notice.

## **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 clause also 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.

**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 but the commissioner is satisfied that a particular proposed employer has sufficient risk management strategies in place, the commissioner may issue a position-based registration that 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. Conditional registrations provide a mechanism for applicants to be approved to work in the broadest range of regulated activities to which they are suited.

**Clause 38 – Proposed conditional registration**

This clause compels the commissioner to inform an applicant in writing of a proposal to register a person conditionally, including the reasons for the condition and that the applicant may seek a reconsideration of the proposal under clause 39.

To prevent the inappropriate disclosure of sensitive personal information concerning the applicant, the commissioner must not tell the employer of the proposal.

**Clause 39 – Reconsideration of conditions**

This clause establishes a mechanism 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.

The clause 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.

Applicants may apply to the ACT Civil and Administrative Tribunal for review of a decision to leave a person's registration subject to a condition.

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

This clause establishes a mechanism for an applicant to extend the period to seek a reconsideration of a proposed conditional registration. This provision is included to allow for the possibility that circumstances outside of the control of the applicant may prevent the applicant from providing additional information to the commissioner within one month. Examples may include sudden hospitalisation or reasonable time required to acquire relevant information from a third party.

**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 ask the commissioner to reconsider in the allotted time

In accordance with the principles of natural justice, 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.

The commissioner must also tell the nominated employer (if any) that the person's registration is subject to the condition and what the condition is. To prevent inappropriate disclosure of sensitive personal information concerning the applicant, the commissioner must not tell the employer of the reasons for the condition.

**Clause 42 – Offences – registered person contravene condition of registration**

This clause establishes that it is an offence for a person not to comply with a 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 a condition imposed by the commissioner may represent a risk of harm to vulnerable people.

Sub-clause (1) establishes an offence for a person who contravenes a condition of their registration. The maximum penalty established under this offence is 50 penalty units and/or 6 months imprisonment. While this offence is a primary offence under the Act, the maximum penalty is lower than in Sub-clause (3) due to the reverse onus of proof and lower evidentiary burden associated with the strict liability offence as established at Sub-clause (2).

Sub-clause (3) establishes an 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. In recognition that this is the primary offence under the Act, the offence carries a maximum penalty of 200 penalty units and/or 2 years imprisonment. Sub-clause (3) (a) makes it clear that strict liability applies concerning whether or not a person's registration is subject to a condition.

## **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. The clause also stipulates the minimum information that the card must contain. Additional information may be prescribed 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 45 – Lost, stolen or damaged registration cards**

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

A decision by the commissioner not to replace a card is a reviewable decision that may be appealed to the ACT Civil and Administrative Tribunal.

### **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.

An offence is established for failing to return a registration card with 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. The 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 relevant 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 relevant 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. The clause does not compel entities to provide requested information.

### **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 new relevant information concerning the registered person has become available. For example, a person may have been convicted of a relevant offence. The risk assessment guidelines may provide for what constitutes new relevant information. 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, make the registration conditional or cancel the registration (Section 6.5).

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

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

Obtaining information from external entities for use in a risk assessment (e.g. a criminal history report) is a point in time activity. If the commissioner is not informed of a 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.

A maximum penalty of 50 penalty units and/or 6 months imprisonment applies to these offences in recognition of the importance of protecting the integrity and currency of assessment decisions as well as public confidence in the checking system.

**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. 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.

The purpose of this provision is to ensure that the registered person is informed of developments affecting their registration and is given an opportunity to provide additional information that the person believes is relevant to the commissioner's decision. Cancellations or suspensions 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 inappropriate behaviour is the primary aim of the Act. 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, the commissioner must also tell the nominated employer (if any) that the person's registration has been cancelled or suspended. To prevent the inappropriate disclosure of sensitive personal information concerning the applicant, the commissioner must not tell the employer of the ground for the cancellation or suspension.

Applicants may apply to the ACT Civil and Administrative Tribunal for review of a decision to cancel or suspend a person's registration

## **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 Act. All decisions listed in Schedule 2, column 3 under a provision of this Act mentioned in column 2 are decisions which are reviewable for the purposes of the *ACT Civil and Administrative Tribunal Act 2008*.

### **Clause 55 – Reviewable decision notices**

This clause requires the commissioner to give a reviewable decision notice (as defined in the *ACT Civil and Administrative Tribunal Act 2008*) to the applicant, 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.

## **PART 8 Miscellaneous**

### **Clause 57 – Protection from liability**

This clause provides limited protection from liability for officials exercising functions under the Act.

### **Clause 58 - Offences - use or divulge protected information**

This clause places limitations on the use or disclosure of information obtained in exercising functions under the Act.

Information obtained about a person for the purpose of conducting a risk assessment will generally be sensitive 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 sensitive personal information, 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, including the details of the registration.

#### **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 Act. 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.

#### **Clause 62 – Approved forms**

This clause empowers the commissioner to approve forms for any purpose under the Act which must be used for that purpose.

#### **Clause 63 – Review of Act**

This clause establishes that the Minister must review the Act after the 5<sup>th</sup> year of operation and present a report to the 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**

Schedule 1 specifies the activities or services covered by the Act.

### **PART 1.1                      Activities or services for children**

#### **Clause 1.1 – Child protection services**

This clause specifies that activities conducted, or services provided, under the *Children and Young People Act 2008* are regulated activities for the purpose of the Act.

#### **Clause 1.2 – Child care services**

This clause specifies that childcare services, including commercial services that provide child care, are regulated activities for the purpose of the Act.

#### **Clause 1.3 – Child education services**

This clause specifies that child education services, including schools and school crossing services, are regulated activities for the purpose of the Act.

#### **Clause 1.4 – Child accommodation services**

This clause specifies that child accommodation services are regulated activities for the purpose of the Act.

#### **Clause 1.5 – Counselling and support services**

This clause specifies that counselling and support services for children are regulated activities for the purpose of the Act.

#### **Clause 1.6 – Commercial services**

This clause specifies that certain commercial services that are provided specifically for children are regulated activities for the purpose of the Act, including entertainment and party services, gym or play facilities, photography services, and talent and beauty competitions.

### **PART 1.2                      Activities or services for vulnerable people**

#### **Clause 1.7 – Mental health**

This clause specifies that mental health services are regulated activities for the purpose of the Act.

#### **Clause 1.8 – Migrants, refugees and asylum seekers**

This clause specifies that services provided to support migrants, refugees, asylum seekers or people who cannot communicate, or who have difficulty communicating, in English, are regulated activities for the purpose of the Act.

#### **Clause 1.9 – Homeless people**

This clause specifies that services provided to support people who are homeless are regulated activities for the purpose of the Act.

**Clause 1.10 – Housing and accommodation**

This clause specifies that services or activities in which the usual functions of the service or activity include providing public or community housing or accommodation to people suffering social or financial hardship are regulated activities for the purpose of the Act.

**Clause 1.11 – Justice facilities**

This clause specifies that an activity or service usually carried out in a justice facility or because of a sentence, detention, probation, parole or other order that could be made by a court is a regulated activity for the purpose of the Act.

**Clause 1.12 – Prevention of crime**

This clause specifies that services provided to a person to reduce the likelihood of the person committing a criminal offence are regulated activities for the purpose of the Act.

**Clause 1.13 – Victims of crime**

This clause specifies that an activity or service provided to assist or support victims of crime is a regulated activity for the purpose of the Act.

**Clause 1.14 – Services for addictions**

This clause specifies that services providing treatment, care, rehabilitation or protection to people who are addicted to substances or activities are regulated activities for the purpose of the Act.

**Clause 1.15 – Community services**

This clause specifies that activities or services provided to people and families suffering social or financial hardship, or who need support to live independently are regulated activities for the purpose of the Act.

**Clause 1.16 – Disability services**

This clause specifies that disability services are regulated activities for the purpose of the Act.

**Clause 1.17 – Respite care services**

This clause specifies that respite care services are regulated activities for the purpose of the Act.

**Clause 1.18 – Emergency services personnel**

This clause specifies that an activity or service is a regulated activity for the purpose of the Act if provided by an emergency service or a person acting on behalf of an emergency service.

## **PART 1.3                      Other Activities or services for vulnerable people**

### **Clause 1.19 – Transport**

This clause specifies that transport services are regulated activities for the purpose of the Act if specifically provided for, or mainly used by, children or specifically for people accessing a regulated activity mentioned in part 1.2.

### **Clause 1.20 – Coaching and tuition**

This clause specifies that coaching and tuition services are regulated activities for the purpose of the Act if provided specifically for children or people accessing a regulated activity mentioned in part 1.2.

### **Clause 1.21 – Vocational and educational training**

This clause specifies that vocational education and training services are regulated activities for the purpose of the Act if provided specifically for children or people accessing a regulated activity mentioned in part 1.2.

### **Clause 1.22 – Religious organisations**

This clause specifies that religious services are regulated activities for the purpose of the Act if provided specifically for children or people accessing a regulated activity mentioned in part 1.2.

### **Clause 1.23 – Clubs, associations and movements**

This clause specifies that services or activities provided by clubs, associations or movements are regulated activities for the purpose of the Act if the club, association or movement has significant membership or involvement by children or people accessing a regulated activity mentioned in part 1.2.

## **SCHEDULE 2                      Reviewable decisions**

Schedule 2 comprises a summary of decisions under the Act which are reviewable for the purposes of the *ACT Civil and Administrative Tribunal Act 2008*.

### **Dictionary**

The dictionary defines terms used in the Act and is part of the substantive provisions of the Act.

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

<b>Clause No</b>	<b>Clause Heading</b>	<b>Instrument</b>	<b>Instrument Type</b>	<b>Who can make it</b>
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