



# Working with Children (Criminal Record Checking) Amendment Act 2022

## Frequently Asked Questions – December 2022

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## 1. Introduction

- The Working with Children (Criminal Record Checking) Amendment Bill 2022 (the Bill) was introduced into the Western Australian (WA) Parliament on 17 August 2022. It passed through both Houses of Parliament on 30 November 2022 and received Royal Assent on 7 December 2022 to become the *Working with Children (Criminal Record Checking) Amendment Act 2022* (Amendment Act).
- The Amendment Act addresses key recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in its 2015 Working with Children Checks Report (WWCC Report) and the 2012 Statutory Review of the *Working with Children (Criminal Record Checking) Act 2004* (the Statutory Review), and key recommendations from the Auditor General.
- The amendments are proposed to improve protections for children in WA and strengthen the effectiveness of the *Working with Children (Criminal Record Checking) Act 2004* (the Act).
- The substantive provisions of the Amendment Act, and its associated regulations, are currently expected to commence on 1 July 2023 (commencement day).

## 2. Why are changes required?

- The Act provides WA's legislative framework for the screening and ongoing monitoring of persons who carry out, or propose to carry out, "child-related work" as defined in the Act and applies throughout WA and in the Christmas and Cocos (Keeling) Islands.
- The Act's paramount consideration is the best interests of children. The intention of the Act is to prevent a person from engaging in, or remove a person from, child-related work, where there is an unacceptable risk that the person may harm children.
- The Working with Children (WWC) Check is a critical strategy to increase child safety and contribute to the range of safety strategies required to create child safe organisations in WA.
- The Government is implementing reforms to respond to successive key reviews and reports.

### 2.1 Royal Commission's Working with Children Checks Report

- In its WWCC Report, the Royal Commission made 36 recommendations to strengthen protections for children provided by WWC schemes in all jurisdictions. In 2018, the State Government accepted, or accepted in principle, all 35 recommendations relevant to WA. Nineteen of these recommendations require, or are associated with, some legislative change in WA. The remainder require no legislative change, as they address reporting and process issues only, or the Act already meets the requirements of those recommendations.
- National Standards for WWC Checks (National Standards) were developed collaboratively by all jurisdictions in response to the WWCC Report and published in 2019. State and Territory Ministers responsible for WWC schemes in all jurisdictions broadly endorsed the National Standards, thereby committing to work towards their implementation.
- The Amendment Act addresses 12 of the 19 WWCC Report recommendations and associated National Standards requiring, or associated with, legislative change in WA.

### 2.2 Recommendations from the Office of the Auditor General

- In 2019 the Office of the Auditor General released its *Working with Children Checks – Follow-up* report which reiterated concerns raised in its 2014 *Working with Children Checks* report.
- Key recommendations regarding the issuing of Interim Negative Notices (INNs) under the Act; the monitoring and enforcement of compliance; and information sharing between WA Police and the Department of Communities were included in the report.

### 2.3 Statutory Review of the WWC Act

- The Statutory Review, tabled in the WA Parliament in 2012, made 23 recommendations of which 15 required legislative change and eight were administrative.
- The legislative recommendations chiefly overlap and accord with those of the Royal Commission's WWCC Report or seek to strengthen the information gathering and sharing provisions in the Act.
- The Amendment Act addresses eight of the 15 legislative recommendations of the Statutory Review.

## 3. Why are changes progressing in Phases?

- The release of successive key reviews and reports requiring legislative change means that the required reforms to the Act are complex and far-reaching.
- A staged approach to the reforms in WA, will assist stakeholders to understand and implement the changes - and ensure that some key reforms can progress in a more-timely manner.
- Specifically, the Amendment Act addresses recommendations of the WWCC Report which can be implemented without further Commonwealth action, national collaboration between States and Territories, or additional stakeholder consultation to inform their design.
- The remaining recommendations of the WWCC Report and the Statutory Review, and other matters of importance to the WWC Scheme which require legislative change, are intended to progress as part of future phases of reform.
- Those future phases are reliant on extensive stakeholder consultation and/or are dependent on substantial negotiations with, and action by, other States and Territories and the Commonwealth. For example, the Royal Commission's:
  - recommended changes to the categories of child-related work and the exemptions to those categories, and
  - recommendations for national recognition and portability of WWC outcomes across jurisdictions, and for ongoing monitoring of WWC Cardholders and applicants' national criminal records.

## 4. What consultation was undertaken?

- Extensive stakeholder consultation was undertaken by the Royal Commission. Its WWCC Report reflected input from experts and stakeholders familiar with the operation of WWC schemes; information from private sessions, written accounts, public hearings, and case studies; and research and other information on WWC Checks.
- The Statutory Review also undertook extensive consultation, receiving written submissions from government, non-government and private sector stakeholders which were reflected in its recommendations. It was conducted by the Public Sector Commission with assistance from a Legislative Review Reference Group, comprising representatives from the WA Sports Federation, Department of Education, Aboriginal Health, WA Police Child Abuse Squad, and the then Department of Child Protection and Family Support.
- The Bill was subject to extensive collaboration with key Government agencies impacted by its information gathering and sharing, and other administrative provisions.

## 5. What is changing?

### 5.1 Pending Charges for Class 1 offences committed when an adult - automatic bar

#### What is changing?

- Section 12 of the Act currently provides the decision-making framework to automatically issue a Negative Notice (NN) if a person has a conviction for a Class 1 offence, committed when they were an adult.
- The Amendment Act amends section 12 to also require the issue of an automatic NN, if a person has a **pending** charge for a Class 1 offence, allegedly committed when an adult. Under the Act, a pending charge means a charge of an offence, that has not yet been disposed of by a court.
- These changes mean that a person who has a pending charge for a Class 1 offence allegedly committed when an adult, cannot work in child-related work on a pending application for a WWC Card; cannot access the 5-day defence against the offence of carrying out child-related work without having a WWC Card; must remove themselves from child-related work; and will require them to return their WWC Card.
- This also means that persons with convictions or pending charges for Class 1 offences committed or allegedly committed when an adult, will only be able to seek external review of their NN on the basis that their criminal record does not include that conviction or pending charge.

#### What happens if I am not found guilty of the offence?

- The Act currently provides for people with a NN to apply to have their NN cancelled three years after it was issued. If a person was issued an NN with a pending charge, and their pending charges were dismissed by a court, they can apply to cancel their NN earlier than three years after the NN was issued. This will not change.

### 5.2 Conduct Review Findings or Outcomes – trigger an assessment

#### What is changing?

- The Amendment Act amends the Act to allow certain entities (known as conduct review authorities) to notify the CEO of certain conduct review findings or outcomes.
- A notified conduct review finding or outcome may then trigger an assessment or reassessment of a WWC applicant or Cardholder.

#### What kinds of findings or outcomes may trigger an assessment or reassessment?

- It is initially intended to prescribe the Teacher Registration Board of WA and certain outcomes under the *Teacher Registration Act 2012* and the Ombudsman WA and certain relevant reportable conduct under WA's forthcoming Reportable Conduct Scheme.
- Conduct review findings or outcomes will include relevant disciplinary and/or misconduct matters that relate to criminal offending, or other behaviour of concern, against children.
- This will allow relevant findings or outcomes to trigger an assessment or re-assessment of a WWC Cardholder or applicant, even if the WWC Cardholder or applicant does not have any charges or convictions on their criminal record.

### 5.3 Provisions for improved capacities for online applications and processing

#### What is changing?

- The Amendment Act inserts new provisions into the Act to improve capacities for electronic applications and their online processing.
- This provides for improved capabilities for initial applications to be made online; and for online verification by an employer or education provider of a person's employment or proposed employment in child-related work.

#### What if I can't easily access the online application system?

- A paper-based application form will still be available for those who need it.

### 5.4 Requirement to advise of relevant changes in details or circumstances

#### What is changing?

- The Amendment Act introduces an obligation on WWC Cardholders and applicants to notify the CEO of relevant changes in their details or circumstances including a change in their name, residential address or contact details, and when they cease or commence working in child-related work.

#### How do I notify the CEO of relevant changes?

- Notification of changes can be made online, in writing or by email to the Working with Children Screening Unit - Customer Support Team.

### 5.5 Issue of Interim Negative Notice

#### What is changing?

- An INN prohibits a WWC applicant or Cardholder from engaging in child-related work during an assessment or reassessment until a final decision is made.
- Currently, an INN can only be issued, after an assessment of available information has been completed, with a letter proposing to issue a NN and inviting a submission. Also, an INN must automatically be issued if a WWC applicant or Cardholder has a conviction for a Class 1 offence committed when an adult.
- The Amendment Act amends the Act to:
  - allow the issuing of an INN independently of a proposal to issue a NN, if at any stage of conducting the assessment or reassessment, a decision is made that there is a reasonable likelihood that a NN will be issued to the person
  - also require the automatic issue of an INN to a person with a pending charge for a Class 1 offence allegedly committed when an adult, and
  - provide that an INN is not required to be automatically issued to a person with a conviction for a Class 1 offence committed when an adult, if a pardon has been granted for that offence.

#### How long does an INN remain in place?

- The Act provides an INN is cancelled when either a WWC Card or a NN is issued. This will not change.

### 5.6 Narrowing access to the exemptions from child-related work

#### What is changing?

- The Amendment Act amends the Act so, under the Regulations, certain people cannot access certain exemptions from child-related work.
- It is initially intended to prohibit children and persons with a current INN or NN from accessing the child volunteer exemption (CVE), or the parent volunteer exemptions (PVE).
- This means that after the changes commence, it will be an offence:
  - for a person who has a current INN or NN, to commence or continue working in a volunteer role, despite being the parent of a child or a child themselves (where the CVE or PVE would otherwise apply). The maximum penalty is a fine of up to \$60,000 and 5 years' imprisonment; and
  - if an employer is aware that a person with a current INN or NN has commenced or is continuing to work in a volunteer role, despite that person being a parent of a child or a child themselves (where the CVE or PVE would otherwise apply). The maximum penalty is a fine of up to \$60,000 and 5 years' imprisonment.

#### What obligation will employers have to check if volunteers have an INN or NN?

- Because persons accessing the PVE or the CVE are exempt under the Act, they are not considered to be in child-related work and so do not have to apply for a WWC Check to undertake their volunteer role.
- After this reform commences, it will be important for employers to have practices and procedures in place to ensure, as best they can, that any person they are using, or intending to use, as a parent or child volunteer, is eligible for a PVE or CVE, if the person does not otherwise already have a WWC Card. The employer must maintain records to reflect this.
- Once a person is issued with an INN or NN, they cannot commence or continue to carry out child-related work. It is the responsibility of the individual not to do so.

### 5.7 Compliance and enforcement

#### What is changing?

- The Amendment Act introduces contemporary powers for investigation and monitoring compliance with the Act, to bring the Act into line with provisions in other WA statutes.
- Among other things, these will allow authorised officers to request and action entry warrants from a magistrate, to investigate suspected offences under the Act or determine compliance. This includes a broader capacity to direct persons to provide information or documents.

### 5.8 Information Gathering and Sharing

#### What is changing?

- The Amendment Act introduces various new and strengthened information gathering and sharing provisions, and to authorise the provision of relevant information to the CEO and to other parties as appropriate.
- For example:
  - Other WA Government agencies and other persons or bodies prescribed by regulation, may notify the CEO of a charge or conviction. Other amendments will enable the CEO to act on that notice, and on information received from police of another jurisdiction.

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- This means that an assessment or reassessment of a person may be triggered by notice or information of a change in the criminal record of a WWC Cardholder or applicant, from entities other than WA Police.
- Provision of express broad powers to the CEO to request from various third parties, and authorise disclosure of information or documents relevant to the assessment or reassessment of a person, for evidence based decision making.

### 5.9 Provisions for new system for ongoing monitoring and improved information sharing with WA Police

#### What is changing?

- The Amendment Act introduces new provisions to support a new system for ongoing monitoring of WWC Cardholders' and applicants' WA criminal records, and improved information sharing by WA Police.
  - The new process will ensure the WA Police Commissioner can disclose details of charges and convictions to the CEO as they occur, in real time.
  - The WA Police may share appropriate information, for a WWC purpose or for a purpose connected with the operation of a corresponding WWC law in another jurisdiction.

#### What will this mean for WWC Cardholders and applicants?

- The CEO will be advised of changes in WWC Cardholders' and applicants' criminal records, faster than may currently occur.

### 5.10 Offence Categorisations - and transitional arrangements

- People who commit the most serious, sexual or violent offences against children, or are an unacceptable risk to children, will be issued a NN and not be able to undertake child related work.
- Schedules 1 and 2 of the Act set out offences categorised as either Class 1 or Class 2, respectively.
- Where a WWC Cardholder or applicant has a conviction for any offence listed as Class 1, committed when an adult, they must be issued a NN.
- Where a WWC Cardholder or applicant has a conviction or pending charge for a Class 2 offence (or a Class 1 offence committed or allegedly committed when a child), they must be issued a NN unless the CEO is satisfied that, because of the exceptional circumstances of the case, a WWC Card should be issued.

#### What is changing?

- The Amendment Act makes substantial changes to offence categorisations under the Act, to broaden the number and type of criminal offences which are Class 1 or Class 2.
  - The proposed new Class 1 offences include all sexual offences against children, and the most serious of violent offences against children that involve an element of intent to kill or cause life-threatening harm to a child.
  - The proposed new Class 2 offences include a range of serious offences, including sexual offences against adults, and serious physical harm against adults, or where there is no element of intent to cause life-threatening or permanent injury.
- Certain sexual offences which occur in the context of young adolescence will be considered as Class 2 offences, not Class 1 (otherwise termed a 'Carve out' from Class 1 offences). This recognises that young people in similar age groups sometimes engage in sexualised behaviour (for example "sexting"). Because of their ages, such behaviour may not necessarily result in that

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young person representing an unacceptable risk to children in the future. Applicants and Cardholders will still be subject to an assessment in order to identify if there are exceptional circumstances before a WWC Card can be issued.

- The Amendment Act provides that if a pardon has been granted for a conviction for a Class 1 offence committed when an adult, it will not result in an automatic NN, but rather an assessment must be undertaken. A NN will generally be issued unless there are exceptional circumstances of the case.
- These changes mean:
  - that people will receive an automatic NN for a broader range of offences, and
  - that people will be subject to an assessment with a presumption that a NN be issued, for a broader range of offences.

### Is there a full list of offences for Class 1 and Class 2 and what is new?

- The full list of WA offences proposed as Class 1 and Class 2 are provided in the Amendment Act, which contains the replacement Schedules 1 and 2 to the Act.

### Once the changes commence, what will an automatic negative notice be issued for?

- An automatic NN will be issued for:
  - convictions for the expanded range of Class 1 offences, if committed when an adult, unless a pardon has been granted or the 'Carve out' applies, and
  - pending charges for the expanded range of Class 1 offences, if allegedly committed when an adult, unless the 'Carve out' applies.

### What happens if a person has offences they committed as children?

- Currently, convictions and pending charges for Class 1 and Class 2 offences, committed or allegedly committed when a child are assessed, with the presumption that a NN will be issued unless the CEO is satisfied that there are exceptional circumstances. This will not change.
- Currently, non-conviction charges for Class 1 or Class 2 offences, allegedly committed when a child are assessed, with the presumption that a WWC Card will be issued unless the CEO is satisfied that there are particular circumstances. This will also not change.
  - **Note:** A non-conviction charge includes a charge which is withdrawn or where the person was acquitted.

### Once the changes commence, will I lose my WWC Card if I have previously been convicted of an offence which will become a Class 1 offence?

- The transitional provisions proposed in the Bill were amended during the Committee of the Whole House stage in the Legislative Council.
- Under the amended transitional provisions in the Amendment Act, a WWC Cardholder will remain subject to the old offence categorisations **for the duration of their WWC Card**, but only if that Card was current on commencement day, or issued after commencement day in response to:
  - an application for a Card, or a reassessment, which was pending on commencement day;
  - an application to cancel a Negative Notice, which was pending on commencement day; or
  - a review or appeal proceeding on foot on commencement day, or commenced after commencement day if the person is otherwise covered by the transitional arrangements.

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- Once that Card ceases to have effect, or an application for a further Card is made, **the person will be subject to the new offence provisions.**
- In addition:
  - If an assessment is commenced after commencement day for any reason, be it a new application or a re-assessment due to some other trigger, the new offence provisions will apply to the person for the purposes of that assessment. If any person who is covered by the transitional arrangements is newly charged with or convicted of a Class 1 or Class 2 offence on or after commencement day, the person will immediately be subject to the new offence categorisations, including for the purposes of any pending assessment or reassessment, or any review or appeal proceeding, on foot.

### **What if I have a current Negative Notice or have an application on foot to cancel my Negative Notice when the changes commence?**

- The old offence categorisations apply to a person who has a current NN on commencement day, until they exhaust their review and appeal rights.
- This includes where a review or appeal is commenced after commencement day, following the State Administrative Tribunal or a court granting an extension of time.
- A person who has a pending application to cancel a NN on commencement day, who is successful in having their NN cancelled and is issued a Card after commencement day, will remain subject to the old offence provisions only for the duration of that Card.
- If the NN is not cancelled in response to that application, they will remain subject to the old offence provisions until they exhaust their review and appeal rights in relation to that decision.
- If the review or appeal results in the issue of a Card, they will remain subject to the old offence provisions only for the duration of that Card.
- Importantly:
  - If an assessment is commenced after commencement day for any reason, be it a new application or a re-assessment due to some other trigger, the new offence provisions will apply to the person for the purposes of that assessment.
  - If any person who is covered by the transitional arrangements is newly charged with or convicted of a Class 1 or Class 2 offence on or after commencement day, the person will immediately be subject to the new offence categorisations, including for the purposes of any pending assessment or reassessment, or any review or appeal proceeding, on foot.

### **What happens if I apply to cancel my Negative Notice after the changes come into effect?**

- If any person applies to cancel their NN after the commencement day, irrespective of when the NN was issued:
  - their review and appeal rights are taken to be exhausted, and
  - the new offence categorisations apply to the assessment of their application to cancel the NN.

## **5.11 Other reforms to improve the administrative effectiveness of the Act**

### **What is changing?**

- The Amendment Act includes various other amendments to increase the administrative efficiency and effectiveness of the Act. For example:
  - clarifying the decision date, from which orders of the State Administrative Tribunal (SAT) take effect

- providing the CEO an express power to commence a prosecution for an offence against the Act in the name of the CEO, and to authorise other persons to commence such prosecutions
- increasing the timeframe within which prosecutions may be commenced, from the date of the offence, to 5 years for all offences which carry penalties of a fine of \$60,000, including those where a term of imprisonment for 5 years applies; and to 2 years for all other offences, and
- changing the title of the Act to the *Working with Children (Screening) Act 2004* to reflect the screening role more accurately, beyond criminal records.

## 6. Where can I find further information on the Amendment Act?

- The Amendment Act can be viewed on the Western Australian Legislation website via the following link: [Working with Children \(Criminal Record Checking\) Amendment Act 2022 - \[00-00-00\].pdf \(legislation.wa.gov.au\)](#)
- The Bill, its Second Reading Speech and Explanatory Memorandum, and a marked-up version of the Act which shows the Bill's proposed changes, may be viewed on the WA Parliament website via the following link: [Progress of Bills \(parliament.wa.gov.au\)](#).
  - **Please note** that changes to the Bill's transitional provisions were made in the Legislative Council and these are not reflected in the Blue Bill.
- Additional resources are available on the [Working with Children Check website](#).
- For any further enquiries in relation to the Amendment Act, please contact [WWCReforms@communities.wa.gov.au](mailto:WWCReforms@communities.wa.gov.au)