

EXPLANATORY STATEMENT

Select Legislative Instrument No. 14, 2014

Subject - *Crimes Act 1914*

Crimes Amendment (Prescribed Law) Regulation 2014

Under section 91 of the *Crimes Act 1914* (the Act), the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

This Regulation amends regulation 7A of the *Crimes Regulations 1990* (the Crimes Regulations) to update the list of prescribed persons or bodies and prescribed law to reflect current screening agency arrangements for working with children checks in each State and Territory.

Part VIIC of the Act governs the disclosure and non-disclosure of pardoned, quashed and spent Commonwealth convictions (otherwise known as expanded criminal history information). Subdivision A of Division 6 of Part VIIC of the Act allows information about this expanded criminal history information to be disclosed to, and taken into account by, prescribed persons or bodies for the purpose of assessing whether a person is suitable for work with children. This serves as an exception to the general rule that such information is not to be disclosed or taken into account.

Regulation 7A of the Crimes Regulations provides a list of prescribed persons or bodies, and the prescribed law for each, who may receive expanded criminal history information. The Regulation amends Regulation 7A to include the following agencies as prescribed bodies:

- the New South Wales Office of the Children's Guardian;
- the Australian Capital Territory Office of Regulatory Services Background Screening Unit; and
- the South Australian Department for Communities and Social Inclusion Screening Unit.

These amendments reflect the recent changes to relevant legislation and screening agency arrangements in New South Wales with responsibility for undertaking Working With Children Checks transferred solely to the Office of the Children's Guardian in accordance with the *Child Protection (Working with Children) Act 2012* (NSW). In addition, in 2013 South Australia established the South Australian Department for Communities and Social Inclusion Screening Unit and the Australian Capital Territory established the Australian Capital Territory Office of Regulatory Services Background Screening Unit as the prescribed bodies to perform Working With Children Checks.

Before an agency can be added to the list in regulation 7A, and therefore receive expanded Commonwealth criminal history information, section 85ZZGE of the Act requires the Minister to be satisfied that the prescribed person or body:

- is required or permitted by or under a Commonwealth or state law to obtain and deal with information about persons who work, or seek to work, with children;
- complies with applicable Commonwealth or state law relating to privacy, human rights and records management;
- complies with the principles of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

The Minister is satisfied that the New South Wales Office of the Children's Guardian, the Australian Capital Territory Office of Regulatory Services Background Screening Unit, and the South Australian Department for Communities and Social Inclusion Screening Unit satisfy the criteria in section 85ZZGE of the Act. The prescribed state legislation appropriately restricts the use of expanded criminal history to the specific purpose of conducting Working with Children Checks, and prescribes safeguards to ensure the privacy and protection of this information is upheld.

Further detail on the Regulation is contained in the Attachment.

This Regulation was developed by the Attorney-General's Department in consultation with the South Australian Department for Communities and Social Inclusion Screening Unit, the New South Wales Office of the Children's Guardian and the Australian Capital Territory Office of Regulatory Services Background Screening.

The Office of Best Practice Regulation was consulted in the drafting of the Regulation and advised that no Regulation Impact Statement was required.

This Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Authority: Section 91 of the *Crimes Act 1914*

Statement of Compatibility with Human Rights

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

This Regulation updates the list of prescribed persons or bodies who may receive expanded criminal history information (including pardoned, quashed and spent Commonwealth convictions) for the purposes of assessing whether a person is suitable for work with children.

There are currently nine prescribed screening agencies in Regulation 7A of the Crimes Regulations. Schedule 1 of the Regulation removes the following prescribed agencies in New South Wales from Regulation 7A:

- Commission for Children and Young People;
- Department of Education and Communities;
- Department of Health; and
- Catholic Commission for Employment Relations.

The New South Wales Office of the Children's Guardian is inserted into Regulation 7A to reflect that this agency is now solely responsible for Working With Children Checks in accordance with the *Child Protection (Working with Children) Act 2012* (NSW). In addition, the South Australian Department for Communities and Social Inclusion Screening Unit and the Australian Capital Territory Office of Regulatory Services Background Screening Unit are inserted as the prescribed bodies to perform Working With Children Checks in their respective jurisdiction.

This amendment engages:

- the right to protection against arbitrary and unlawful interferences with privacy (Article 17 International Covenant on Civil and Political Rights (ICCPR)); and
- children's rights, including:
 - the best interests of the child (Article 3 of the Convention on the Rights of the Child (CRC));
 - protection from all forms of violence or abuse (Article 19 of the CRC); and
 - the protection from sexual exploitation and abuse (Article 34 of the CRC).

Human rights implications

Children's rights - Articles 3, 19 and 34 of the CRC

Regulation 7A promotes the rights of the child as protected by the CRC. Article 3 of the Convention provides that the best interests of the child must be a primary consideration in all actions concerning children and that States Parties must undertake to ensure the

child such protection and care as is necessary for his or her wellbeing, and, to this end, shall take all appropriate legislative and administrative measures.

Article 19 of the CRC requires State Parties to provide measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

Article 34 provides that State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate measures to prevent: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitive use of children in prostitution or other unlawful sexual practices; or the exploitative use of children in pornographic performances and materials.

Regulation 7A permits specified agencies to obtain expanded criminal history information, which includes details of pardoned, quashed and spent convictions that previously could not be taken into account when conducting background checks and were not routinely shared across state borders. The purpose of allowing disclosure of such information is to protect children from sexual, physical and emotional harm by allowing screening agencies to access all information relevant to determining the risk that an individual may pose to children. In accordance with section 85ZZGE of the Act, before an agency can be authorised to receive expanded Commonwealth criminal history information, the Minister is required to be satisfied that the agency:

- is required or permitted by or under a Commonwealth or state law to obtain and deal with information about persons who work, or seek to work, with children; and
- complies with applicable Commonwealth or state law relating to privacy, human rights and records management; and
- complies with the principles of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

The provision of expanded criminal history information to agencies when undertaking Working With Children Checks will assist in mitigating against the hiring of an individual who may pose a risk to the safety and wellbeing of the children with whom they are working. By granting agencies access to expanded criminal history information they will be able to make more accurate assessments about an individual's suitability for work with children, thus protecting the rights of the child to be free from all forms of abuse or exploitation.

The right to privacy - Article 17 of the ICCPR

Article 17 of the ICCPR protects against unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. In order for an interference with the right not to be 'arbitrary', the interference must be for a reason consistent with the relevant Convention, be based on reasonable and objective criteria, be proportional to the end sought and necessary in the circumstances of any given case. The collection, security, use, disclosure or publication of personal information will engage the right to protection against unlawful and arbitrary interferences with privacy.

The disclosure of an individual's expanded criminal history information to prescribed persons or bodies amounts to the release of personal information that would otherwise not be permitted to be disclosed. In accordance with Article 17 this amounts to a limitation on the individual's right to privacy. However, Division 6 of the Act serves to provide a list of exclusions to the disclosure and use provisions in Divisions 2 and 3 in order to protect children from sexual, physical and emotional harm.

Regulation 7A protects against arbitrary interferences with an individual's privacy rights by prescribing a list of screening agencies authorised to collect and use expanded criminal history information for a specified purpose. It clearly stipulates the prescribed agencies established under State and Territory legislation authorised to obtain such information, and the specific purpose for which such information may be used, namely to conduct checks on people who propose to work with children. As a safeguard, before an agency can be added to the list in Regulation 7A, section 85ZZGE(c) of the Act requires the Minister to be satisfied that the prescribed person or body complies with applicable Commonwealth or state law relating to privacy. The October 2013 Review of the operation of Subdivision A of Division 6 of Part VIIC of the *Crimes Act 1914* confirmed that the disclosure of expanded criminal history information for Working with Children Checks is being used appropriately to assess the risk that individuals may pose and that screening agencies are adhering to safeguards in place to ensure the privacy and protection of information and individual rights.

Limiting the right of the individual to privacy in this way is necessary to ensure that the rights of children are protected. Allowing an individual's full criminal history to be taken into account when being assessed for a Working With Children Check is a reasonable and proportionate curtailment of an individual's right to privacy as it is a necessary safeguard for the protection of children in accordance with the CRC.

Conclusion

This regulation is compatible with human rights because it promotes the protection of human rights, and to the extent that it limits human rights, those limitations are reasonable, necessary and proportionate.

ATTACHMENT

Details of the proposed *Crimes Amendment (Prescribed Law) Regulation 2014*

Section 1 – Name of Regulation

This clause provides that the name of the Regulation is the *Crimes Amendment (Prescribed Law) Regulation 2014*.

Section 2 – Commencement

This clause provides that the Regulation is to commence on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

This is a formal clause that outlines that the Regulation is being made under the *Crimes Act 1914* (the Crimes Act). Section 91 of the Crimes Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Crimes Act.

Section 4 – Schedule(s)

This is a formal clause that identifies that the Regulation amends the *Crime Regulations 1990* (the Crimes Regulations), which is the instrument specified in Schedule 1.

Schedule 1 – Amendments

This schedule contains amendments to the Crimes Regulations.

Item [1] – Regulation 7A (table)

Regulation 7A prescribes the persons and bodies authorised under Part VIIC Division 6 Subdivision A of the Act to receive expanded criminal history information. These are State and Territory agencies which perform working with children checks to assess whether a person is suitable to work with children.

Since Regulation 7A was last amended, amendments have been made to legislation and screening agency arrangements in New South Wales. The Australian Capital Territory and South Australia have also established screening agencies.

This item repeals the current list of prescribed persons, bodies and laws and inserts the following updated list, reflecting the current screening agency arrangements in each State and Territory. This has also corrected the minor error in the prescribed law for the Northern Territory Screening Authority.

Prescribed persons, bodies and laws		
Item	Prescribed person or body	Prescribed law
1	Office of the Children's Guardian	<i>Child Protection (Working with Children) Act 2012</i> (NSW)
2	Secretary to the Department of Justice	<i>Working with Children Act 2005</i> (Vic.)

3	Commissioner for Children and Young People and Child Guardian	<i>Commission for Children and Young People and Child Guardian Act 2000 (Qld)</i>
4	Queensland College of Teachers	<i>Education (Queensland College of Teachers) Act 2005 (Qld)</i>
5	Chief executive officer of the Department for Child Protection	<i>Working with Children (Criminal Record Checking) Act 2004 (WA)</i>
6	Department for Communities and Social Inclusion Screening Unit	<i>Children's Protection Regulations 2010 (SA)</i>
7	Australian Capital Territory Office of Regulatory Services Background Screening Unit	<i>Working with Vulnerable People (Background Checking) Act 2011 (ACT)</i>
8	Screening Authority	<i>Care and Protection of Children Act 2007 (NT)</i>

Compliance with criteria

Section 85ZZGE establishes criteria of which the Minister must be satisfied before a person or body can be prescribed under Regulation 7A. The Minister must be satisfied that the person or body:

- is required or permitted by or under a Commonwealth or state law to obtain and deal with information about persons who work or seek to work with children;
- complies with applicable Commonwealth or state law relating to privacy, human rights and records management;
- complies with the principles of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

The Minister is satisfied that these criteria are met in relation to the New South Wales Office of the Children's Guardian, the Australian Capital Territory Office of Regulatory Services Background Screening Unit and the South Australian Department for Communities and Social Inclusion Screening Unit.