

EXPLANATORY STATEMENT

Select Legislative Instrument No. 86, 2014

Subject - *Crimes Act 1914*

Crimes Amendment (Disclosure of Information) 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 (expanded criminal history information). Subdivision A of Division 6 of Part VIIC of the Act allows information about 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 as prescribed persons or bodies:

- the Registrar appointed under the *Registration to Work With Vulnerable People Act 2013* (Tas), and
- the chief executive officer of the Public Safety Business Agency referred to in the *Working With Children (Risk Management and Screening) Act 2000* (Qld).

These amendments reflect recent changes to relevant legislation and screening agency arrangements in Tasmania and Queensland. The Regulation also amends Regulation 7A to remove the Commissioner for Children and Young People and Child Guardian as a prescribed body for Queensland and the *Commission for Children and Young People and Child Guardian Act 2000* (Qld) as its prescribed law, as after 30 June 2014 these will cease to exist.

Before a person or body 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 Registrar appointed under the *Registration to Work With Vulnerable People Act 2013* (Tas) satisfies the criteria in section 85ZZGE of the Act.

The Minister is not required to consider whether the chief executive officer of the Public Safety Business Agency satisfies the requirements in s 85ZZGE, because Queensland's Public Safety Business Agency is the same body with the same responsibilities and functions as the Commissioner for Children and Young People and Child Guardian (but with a new name). The Commissioner for Children and Young People and Child Guardian satisfied privacy requirements in 2010 prior to it being listed as a prescribed body in Regulation 7A. Queensland's prescribed law will not change in substance when the relevant amending provisions come into force on 1 July 2014.

Further detail on the Regulation is contained in the Attachment.

This Regulation was developed by the Attorney-General's Department in consultation with Tasmania and Queensland.

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 inclusion of the Tasmanian screening agency should commence on the later of: (a) the start of the day after this regulation is registered; and (b) the commencement of Part 2 of the *Registration to Work with Vulnerable People Act 2013* (Tas). However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.

The amendments to the names of Queensland's screening agency and authorising legislation should commence on the later of: (a) the start of the day after this regulation is registered; and (b) the commencement of Part 4 of the *Child Protection Reform Amendment Act 2014* (Qld).

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

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.

Part VIIC of the Act governs the disclosure and non-disclosure of pardoned, quashed and spent Commonwealth convictions (expanded criminal history information). Subdivision A of Division 6 of Part VIIC of the Act allows information about 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.

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.

There are currently eight prescribed persons or bodies in Regulation 7A of the Crimes Regulations.

Schedule 1 of the Regulation inserts into Regulation 7A the Registrar appointed under the *Registration to Work with Vulnerable People Act 2013* (Tas) (the Registrar) as the prescribed person to perform Working With Children Checks in Tasmania.

In addition, Queensland will change the name of one of its current screening agencies and that agency's authorising legislation on 1 July 2014. Part 4 of the *Child Protection Reform Amendment Act 2014* (Qld) will commence on 1 July 2014 and on that date will change the name of the agency from the Commissioner for Children and Young People and Child Guardian to the Public Safety Business Agency and rename the authorising legislation from the *Commission for Children and Young People and Child Guardian Act 2000* (Qld) to the *Working with Children (Risk Management and Screening) Act 2000* (Qld). To reflect these changes, the Regulation inserts the chief executive officer of the Public Safety Business Agency as a prescribed person for Queensland and the *Working with Children (Risk Management and Screening) Act 2000* (Qld) as its prescribed law.

Human rights implications

These amendments engage:

- the right to protection against arbitrary and unlawful interferences with privacy (Article 17 of the 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).

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 CRC 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 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 law, State law or Territory 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 provision of expanded criminal history information to prescribed persons or bodies 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 prescribed persons or bodies 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 and promoting the rights of the child in the CRC.

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, Subdivision A of Division 6 of Part VIIC of the Act serves to provide a list of exclusions to the disclosure and use provisions in Divisions 2 and 3 of Part VIIC 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 prescribed persons or bodies authorised to collect and use expanded criminal history information for a specified purpose. It clearly stipulates the prescribed persons or bodies 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 a person or agency can be added to the list in Regulation 7A, paragraph 85ZZGE(d) of the Act requires the Minister to be satisfied that the prescribed person or body complies with certain criteria. These criteria, and the manner in which the Registrar fulfils them, are as follows:

1. Paragraph 85ZZGE(c) of the Act requires the Minister to be satisfied that the prescribed person 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. Section 29 of the *Registration to Work with Vulnerable People Act 2013* (Tas) (RWVP Act) allows the Registrar to request and obtain information from the following entities to assist him or her in conducting a risk assessment as to whether the person poses no risk, an acceptable risk or an unacceptable risk of harm to vulnerable persons (including children):
 - (a) any entity
 - (b) any other jurisdiction's public authority
 - (c) any other government agency, or part of such a government agency
 - (d) any body, corporate or unincorporated, established by or under the statute law of a jurisdiction other than Tasmania or another jurisdiction.
2. Paragraph 85ZZGE(d) of the Act requires the Minister to be satisfied that the prescribed person complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management.

Section 54 of the RWVP Act provides that it is an offence to use or divulge protected information, and that the offences it creates will not apply if information is used or divulged under the RWVP Act or another Act or a corresponding law, or in other listed circumstances. The Registrar is also required to comply with relevant legislation and directive documents including Commonwealth anti-discrimination legislation, the *Anti-Discrimination Act 1998* (Tas) and the *Archives Act 1983* (Tas). Section 57 of the RWVP Act provides that the *Right to Information Act 2009* (Tas) does not apply to information in the possession of an official for the purposes of the RWVP Act and that the *Personal Information Protection Act 2004* (Tas) does not apply to the obtaining or possession of information by an official for the purposes of the RWVP Act.

3. Paragraph 85ZZGE(e) of the Act requires the Minister to be satisfied that the prescribed person or body complies with the principles of natural justice. Division 4 of Part 5 of the RWVP Act provides that if the Registrar appointed under the Act conducts a risk assessment of a person and is satisfied that that person proposes an unacceptable risk of harm to vulnerable persons generally, the Registrar is to notify the person, in writing, that the Registrar intends to refuse to register the person. The notice must state the reasons for the negative risk assessment, and that the person may respond within 20 working days of receiving the notice, requesting that the Registrar reconsider the negative risk assessment.

A person aggrieved by a reviewable decision of the Registrar may also apply to the Magistrates Court of Tasmania (Administrative Appeals Division) for a review of the reviewable decision. The Act defines *reviewable decision* to mean: the refusal to register a person; the registration of a person subject to a condition; the refusal to amend the registration of a person; the adding of a condition to, or the amendment of a condition of, the registration of a person; the suspension or cancellation of a person's registration; or the refusal to extend the period of 20 working days during which a person may respond to a notice from the Registrar.

The Magistrates Court (Administrative Appeals Division) review may be held in private to protect the information that has led to the decision of the Registrar. Should a Magistrate determine that natural justice has not been afforded, the *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas) provides that the Magistrate may request that the assessment process begin again or replace the decision with another decision on the basis of the Magistrate's assessment of the evidence.

4. Paragraph 85ZZGE(f) of the Act requires the Minister to be satisfied that the prescribed person or body has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety. Section 28 of the RWVP Act provides that on receipt of an application for registration to work with children, the Registrar must conduct a risk assessment to determine whether the applicant poses a risk to vulnerable people. Section 26 of the RWVP Act provides the Minister for Justice with the power to make risk assessment orders in relation to matters that the Registrar must or may take into account when conducting risk assessments. Section 60 of the RWVP Act provides that the Registrar may refer the conduct and determination of a risk assessment of a person to independent advisors, appointed under regulations, for advice.

As Queensland's Public Safety Business Agency is the same body as the Commissioner for Children and Young People and Child Guardian (but with a new name), as its prescribed law will not change in substance when the relevant amending provisions come into force on 1 July 2014, and as it satisfied privacy requirements under its current name in 2010 prior to it being listed as a prescribed body in Regulation 7A, the Minister is not required to consider whether the chief executive officer of the Public Safety Business Agency satisfies the requirements in s 85ZZGE.

The October 2013 Review of the operation of Subdivision A of Division 6 of Part VIIC of the Act 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 the prescribed persons or bodies 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 (Disclosure of Information) Regulation 2014*

Section 1 – Name of Regulation

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

Section 2 – Commencement

This clause provides that the inclusion of the Tasmanian screening agency should commence on the later of: (a) the start of the day after this regulation is registered; and (b) the commencement of Part 2 of the *Registration to Work with Vulnerable People Act 2013* (Tas). However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.

The amendments to the names of Queensland's screening agency and authorising legislation should commence on the later of: (a) the start of the day after this regulation is registered; and (b) the commencement of Part 4 of the *Child Protection Reform Amendment Act 2014* (Qld).

Section 3 – Authority

This is a formal clause that outlines that the proposed Regulation is being made under the *Crimes Act 1914* (the Act). Section 91 of the 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 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 item 3)

Since Regulation 7A was last amended, Queensland has passed legislation to change the name of one of its screening agencies and that agency's authorising legislation on 1 July 2014. Part 4 of the *Child Protection Reform Amendment Act 2014* (Qld) will commence on 1 July 2014 and on that date will change the name of the agency from the Commissioner for Children and Young People and Child Guardian to the Public Safety Business Agency and rename the authorising legislation from the *Commission for Children and Young People and Child Guardian Act 2000* (Qld) to the *Working with Children (Risk Management and Screening) Act 2000* (Qld). To reflect these changes, the Regulation inserts the chief executive officer of the Public Safety Business Agency as a prescribed person for Queensland and the *Working with Children (Risk Management and Screening) Act 2000* (Qld) as its prescribed law.

This item will repeal item 3 from the current list of prescribed persons, bodies and laws and insert the following updated item, reflecting the screening agency arrangements in Queensland as at 1 July 2014.

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| 3 | Chief executive officer of the Public Safety Business Agency | <i>Working with Children (Risk Management and Screening) Act 2000 (Qld)</i> |
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Item [2] – Regulation 7A (after table item 6)

Since Regulation 7A was last amended, Tasmania is preparing for screening arrangements to commence on 1 July 2014 and has nominated the Registrar appointed under the *Registration to Work with Vulnerable People Act 2013 (Tas)* as the prescribed person to perform Working With Children Checks.

This item will insert item 6A into the current list of prescribed persons, bodies and laws, reflecting the screening agency arrangements in Tasmania as at 1 July 2014.

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| 6A | The Registrar | <i>Registration to Work With Vulnerable People Act 2013 (Tas)</i> |
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Compliance with criteria in s 85ZZGE of the Act

Section 85ZZGE of the Act 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 Registrar appointed under the *Registration to Work With Vulnerable People Act 2013 (Tas)*.

The Minister is not required to consider whether the chief executive officer of the Public Safety Business Agency satisfies the requirements in s 85ZZGE, because Queensland’s Public Safety Business Agency is the same body with the same responsibilities and functions as the Commissioner for Children and Young People and Child Guardian (but with a new name). The Commissioner for Children and Young People and Child Guardian satisfied privacy requirements in 2010 prior to it being listed as a prescribed body in Regulation 7A. Queensland’s prescribed law will not change in substance when the relevant amending provisions come into force on 1 July 2014.

Compliance of Registrar appointed under the *Registration to Work with Vulnerable People Act 2013 (Tas)* with the criteria in section 85ZZGE of the *Crimes Act 1914 (Cth)*

| Criteria | Compliance of Registrar appointed under the <i>Registration to Work with Vulnerable People Act 2013 (Tas)</i> |
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| <p>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.</p> | <p>The <i>Registration to Work with Vulnerable People Act 2013 (Tas)</i> (RWVP Act) allows the Registrar to request and obtain information from the following entities to assist him or her in conducting a risk assessment as to whether the person poses no risk, an acceptable risk or an unacceptable risk of harm to vulnerable persons (including children):</p> <ul style="list-style-type: none"> (a) any entity (b) any other jurisdiction’s public authority (c) any other government agency, or part of such a government agency (d) any body, corporate or unincorporated, established by or under the statute law of a jurisdiction other than Tasmania or another jurisdiction. |
| <p>The person or body complies with applicable Commonwealth or state law relating to privacy, human rights and records management.</p> | <p>The RWVP Act provides that it is an offence to use or divulge protected information, and that the offences it creates will not apply if information is used or divulged under the RWVP Act or another Act or a corresponding law, or in other listed circumstances.</p> <p>The Registrar will comply with relevant legislation and directive documents including:</p> <ul style="list-style-type: none"> - Commonwealth anti-discrimination legislation - the <i>Anti-Discrimination Act 1998 (Tas)</i>, and - the <i>Archives Act 1983 (Tas)</i>. <p>The RWVP Act provides that the <i>Right to Information Act 2009 (Tas)</i> does not apply to information in the possession of an official for the purposes of the RWVP Act and that the <i>Personal Information Protection Act 2004 (Tas)</i> does not apply to the obtaining or possession of information by an official for the purposes of the RWVP Act.</p> |

| Criteria | Compliance of Registrar appointed under the <i>Registration to Work with Vulnerable People Act 2013 (Tas)</i> |
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| <p>The person or body complies with the principles of natural justice.</p> | <p>The RWVP Act provides that if the Registrar appointed under the RWVP Act conducts a risk assessment of a person and is satisfied that that person proposes an unacceptable risk of harm to vulnerable persons generally, the Registrar is to notify the person, in writing, that the Registrar intends to refuse to register the person. The notice must state the reasons for the negative risk assessment, and that the person may respond within 20 working days of receiving the notice, requesting that the Registrar reconsider the negative risk assessment.</p> <p>A person aggrieved by a reviewable decision of the Registrar may also apply to the Magistrates Court of Tasmania (Administrative Appeals Division) for a review of the reviewable decision. The RWVP Act defines <i>reviewable decision</i> to mean: the refusal to register a person; the registration of a person subject to a condition; the refusal to amend the registration of a person; the adding of a condition to, or the amendment of a condition of, the registration of a person; the suspension or cancellation of a person’s registration; or the refusal to extend the period of 20 working days during which a person may respond to a notice from the Registrar.</p> <p>The Magistrates Court (Administrative Appeals Division) review may be held in private to protect the information that has led to the decision of the Registrar. Should a Magistrate determine that natural justice has not been afforded, the <i>Magistrates Court (Administrative Appeals Division) Act 2001 (Tas)</i> provides that the Magistrate may request that the assessment process begin again or replace the decision with another decision on the basis of the Magistrate’s assessment of the evidence.</p> |

| Criteria | Compliance of Registrar appointed under the <i>Registration to Work with Vulnerable People Act 2013 (Tas)</i> |
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| <p>The person or body has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.</p> | <p>The RWVP Act provides that the Registrar must conduct a risk assessment to determine whether the applicant poses a risk to vulnerable people.</p> <p>The RWVP Act provides the Minister for Justice with the power to make risk assessment orders in relation to matters that the Registrar must or may take into account when conducting risk assessments.</p> <p>The Registrar may refer the conduct and determination of a risk assessment of a person to independent advisors, appointed under regulations, for advice.</p> |