

Submission response
from
Youth Affairs Network of Queensland (YANQ)

Draft Commission for Children and Young People Bill 2000
Draft Children Services Tribunal Bill

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ABOUT THE YOUTH AFFAIRS NETWORK OF QUEENSLAND

The Youth Affairs Network of Queensland (YANQ) Inc. is the peak community youth affairs organisation in Queensland. Representing approximately 400 individuals and organizations from Queensland's youth sector, we promote the interests and well being of young people across the State. YANQ advocates for and with young people, especially disadvantaged young people, to government and the community. Further, YANQ encourages and participates in the development of policies, programs, projects and research that are responsive to the needs of young people.

YANQ also supports and promotes cultural diversity in Queensland. In doing so, YANQ in partnership and collaboration with the Non-English Speaking Background Youth Issues Network (NESBYIN), which consists of 140 members, has continued to sustain the NESB Policy and Network Officer position for the last four years.

INTRODUCTION

YANQ welcomes the opportunity to respond to the *Draft Commission for Children and Young People Bill 2000* and *Draft Children Services Tribunal Bill 2000*.

In preparation for this response YANQ has consulted broadly with the membership and to this end held a formal consultation with members to seek input. The consultation provided an opportunity for members to highlight their key concerns with regard to the Bills and for YANQ staff to consolidate information regarding the issues identified to that point from more informal processes, such as discussions at a number of youth interagencies/networks across Queensland.

As noted in our response, YANQ believes that a number of consequences resulting from implementation of the above legislation will have detrimental effects on the youth sector, i.e. young people and those who work with them.

OUR RESPONSE

This response is not a detailed critique of the legislation; it is more a response to issues identified as a result of the above Bills becoming law. A number of our members have commented from the point of having read the information papers *Employment Screening for Child-related Employment* and *Responding to Children and Young People in Need*. Many of the issues that our membership wished to highlight relate specifically to employment screening.

A number of our concerns relate directly to the issue of **human rights** as reflected in the Universal Declaration of Human Rights (UDHR) and the two treaties which were developed from the UDHR – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three instruments together known as the International Bill of Rights, enshrine different types of human rights and it is our belief that a number of principles relating to these instruments have been disregarded.

Employment Screening

The Purpose of Employment Screening s.90

We concur with the spirit of the purpose of employment screening in that it is to ensure *that only suitable persons are employed in certain child related employment*, however

- 1) We are not convinced that this Bill adequately enables the Commissioner to be able to determine which persons are **suitable**.
- 2) The purpose should also reflect the object as stated in the NSW Commission for Children and Young People Act 1998, that is, *the object of this Part is to protect children by means of employment screening for child-related employment ...*, clearly stating that employment screening seeks to protect children and young people from harm.

Safety and wellbeing of children to be paramount consideration s.91

We agree that **protection from harm** must be stated, particularly to ensure some consistency with the Child Protection Act 1999, however we also believe that the bottom line regarding the welfare of children should be made explicit in this legislation and that it should be stated that *the paramount consideration in employment screening should be that children and young people should be protected from harm, in particular protection from child abuse*.

By including a statement regarding child abuse we then need to include child abuse in the definitions for Part 7. The Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde Inquiry) examined whether there had been any abuse, mistreatment or neglect of children in Queensland institutions. The report poses the question, *How can we as a society ensure that such violations never again occur to children whose care we have entrusted to the State?* This applies equally to children and young people in the care of organisations and workers working with them, irrespective of whether those young people fall under the jurisdiction of a State department or a non-government organisation. In addressing employment screening for child related employment, as falls under the jurisdiction of the Commission for Children and Young People Bill, we need to be mindful of and maintain some consistency with, components of

the Forde Inquiry Report. The definition of child abuse could be taken from this Report as outlined on page 11 which defines the different forms of abuse – emotional, sexual, physical, neglect and systems abuse.

The NSW legislation includes a definition of child abuse, which could also be looked at. It states that, *child abuse means:*

- a) *Assault (including sexual assault) of a child, or*
- b) *Ill-treatment or neglect of a child, or*
- c) *Exposing or subjecting a child to behaviour that psychologically harms the child, whether or not in any case, with the consent of the child.*

Criminal History and Charges

Other definitions that must be reviewed include the issue of criminal record or history. The NSW Act states that,

***Relevant criminal record** means ...the criminal record of a person with respect to an offence involving sexual activity, acts of indecency, child abuse or child pornography,*

The stressor with regard to criminal record in this case is **relevant**. The issue of relevance has been lost in the Queensland Bill, of note with the definition of "serious offence". A person may have committed a serious offence as outlined in the schedule to the *Penalties and Sentences Act 1992* or an offence against a provision of the Criminal Code mentioned in schedule 2 of the Bill, however, the particular offence may not have any relevance to the issue of the regulated employment concerned. Many of the offences listed on the schedules concerned have no **relevance** to child related employment and any schedule attached to this legislation must more clearly reflect offences of relevance.

The Bill states that criminal history, of a person, includes

- b) *Every **charge** made against the person for an offence in Queensland or elsewhere, and whether before or after commencement of this definition.*

Civil and political rights as mentioned in our introduction seek to restrain the state from infringing on individuals' liberties. They include the right to a fair trial, and equality before the law. We believe that the draft *Commission for Children and Young People Bill 2000* infringes on these rights.

Judges are often regarded as protectors of the individual's interests. Judges have developed procedural safeguards for defendants in criminal trials. They have also developed principles of natural justice in administrative law for individuals adversely affected by bureaucratic decisions. The "rights" provisions in the Commonwealth Constitution include s.80 – trial by jury.

Over the past two decades Australia and Queensland have seen an increasing amount of legislation protecting individual rights. Queensland, and the Commonwealth, also protects individuals' rights and liberties through statutory requirements that legislation – when it is developed – be drafted so that it does not unnecessarily infringe certain individual rights. In Queensland, this occurs via the *Legislative Standards Act 1992*, which enshrines the so-called fundamental legislative principles (FLP's). FLP's require that legislation has sufficient regard to

the rights and liberties of individuals and the institution of parliament. These matters include, amongst others whether the legislation:

- Is consistent with principles of natural justice
- Does not reverse the onus of proof in criminal proceedings without adequate justification;
- Provides appropriate protection against self-incrimination ;and
- Has sufficient regard to Aboriginal tradition and Island custom

We believe that the *Commission for Children and Young People Bill 2000* does not have sufficient regard to individual rights and liberties including those listed above.

If charged with an offence an individual has the right:

- To be presumed innocent until proven guilty according to law
- To be tried with a reasonable time
- To be given a fair and public hearing by an impartial court
- To trial by jury
- The free assistance of an interpreter at the hearing
- To have the principles of due process applied

We are concerned that by accessing charges relating to a potential employee, for the purpose of assessing a suitability notice, rights regarding due process are being infringed, as well as principles of natural justice. Charges are unproven and an individual is innocent until proven guilty. Under this legislation the Commission may consider charges, regardless of findings of guilt.

Whilst we recognise that this does not necessarily mean that a person will always be judged unsuitable, it is possible that a person may be prevented from employment based on an assumption of guilt. A prospective employee may simply decide that they do not wish this part of their life to be revisited.

This section, in interfacing with Police Powers confers upon the police enormous powers, which may interfere in the current and future employment of innocent people either accidentally or intentionally.

Given the interface with the *Juvenile Justice Act 1992*, and diversionary practices such as community conferencing being promoted under the umbrella of restorative justice, what message does a Bill such as this send regarding our confidence in this system. A system where the "defendant" must admit guilt before they have access to the mechanism and where the incident will be included in their criminal history.

Given the overrepresentation of Aboriginal and Torres Strait Islander young people in the juvenile justice system and adult corrections system we also have concerns regarding indirect discrimination of Aboriginal and Torres Strait Islander peoples accessing employment relating to this Bill.

Whether a charge or a conviction, the prospective employee may not wish to go through the process of applying for a position where they know that their entire criminal history will be explored and that they may be required to appeal regarding an irrelevant offence that now has no relevance to their current situation, to possibly gain employment.

The exact problem is the broad net that is cast relating to a "serious offence" as outlined in the Bill –

- a) *An offence against a provision mentioned in the schedule to the Penalties and Sentences Act 1992; or*
- b) *An offence against a provision of the Criminal Code mentioned in schedule 2*

There are many offences outlined in these schedules that have no relevance to child related employment. A schedule should be drafted that lists only relevant offences to child related employment, in consultation with the community youth sector, and included in the legislation.

Appeals

If this Bill were to become law the volume of applications to process will be enormous. We are concerned that the wheels of bureaucracy are not able to deal efficiently with the quantity that we envisage would result.

Are significant resources being allocated to the processing of suitability notices?

We are concerned about the length of time it may take to process an application. Should the Commissioner have doubts regarding the suitability of a prospective employee, that employee has at least seven days to respond to the Commissioner's concerns. Should the Commissioner deem the person unsuitable, that person has 30 days to appeal this decision. What about employers who are keen to employ post haste? If an appeal process is embarked upon does the employer have to wait until the outcome before making a decision to employ? Some employers may not wish to wait. Given also that a question mark now hangs over the prospective employee, the employer may choose to bypass the employee who is appealing. **An irrelevant "criminal history" may taint an employees future employment prospects.**

This is particularly relevant in the community youth sector where we have many talented workers who have "colourful" histories; sometimes their youth work careers having resulted from their period of rehabilitation or a desire to ensure social change as a result of their own experiences of marginalisation. Few have "relevant" criminal histories, some have criminal histories, and more may have been charged.

What does this Bill say about confidence in the system of rehabilitation?

How does the Bill interface with the Criminal Law (Rehabilitation of Offenders) Act 1986?

Parents

Implicit in the Bill is a focus on paedophilia.

In many ways this focus, with its emphasis on sexual abuse, has been detrimental to the public's perception and understanding of the complexities and harmful effects of other forms of child abuse and neglect. This issue is further obscured by the tendency of some commentators to use the term paedophilia interchangeably with child sexual abuse. It is very important to understand that not all child sex offenders are paedophiles – rather paedophiles are a sub-set of child sex offenders. (James, M., p 2).....
.....the main issues involved when dealing with child abuse and neglect are generally intra-familial.

Schedule 1 of the Bill states:

- (2) However, employment mentioned in subsection (1) is not regulated employment if –
- a) The employment is unpaid; and
 - b) The employee is a parent of a child who receives the services, or participates in the activities, to which the employment relates.

If employment checks are going to be conducted why would we not check parents and siblings?

Is this purely logistical?

Minimum length of Employment

Why would we only check employees who will be engaged for longer than one month?

One-off three day camps etc. provide opportunities for unsuitable employees to access children and young people.

Similarly, what does this legislation mean for student placements e.g. students from TAFE's, Universities, on placements that may range from 10 days to 4 months? Some are full-time, some part-time. Would the onus be on the teaching institution to ensure that they are placing "suitable" students or on the supervising workplace?

Suitability Notices

If the Commission deems a person suitable, a notice will only be provided to the employer. If the employee were also able to obtain a copy of the suitability notice, they could use it perhaps for a designated period of time in seeking further employment. For example, if a prospective employee is working as a locum for short periods of time they could present the suitability notice to future employers.

Costs

YANQ believes that the cost of \$40 is too high for criminal history checks and that given the under-resourcing in the community youth sector that the fee should be nominal. We are also concerned that the cost for the checks may be passed on to applicants. Cost could be minimised if applicants were able to access suitability notices and future notices were checked from the date of the most recent "suitability" application.

The community youth sector must be resourced by government to apply for suitability checks, as this is a process that is being imposed by government.

Other Issues

Age of a Child

The age of a child is not defined within the Bill. Although the example (1) in Section 7 implies that the age of a child is under 18 years and the Acts Interpretation Act defines a child as under 18, this Bill also relates to young people under Juvenile Justice orders where the age of a child is

under 17 years. It may be wise to include the definition of a child in the dictionary at Schedule 4. The Bill should also include responding to complaints where young people were dealt with as a child under the relevant Acts. This will ensure that those who wish to make a complaint about an event which took place after they turned 18 years and while still under the influence of the Juvenile Justice Orders.

Definition of Parents

If parents are going to be singled out for special consideration then a definition of parents that reflects the diversity of families in the year 2000 needs to be drafted, incorporating same sex partnered families and the diversity of families from culturally and linguistically diverse backgrounds including indigenous families.

Private and Other Providers

Is there legislation that covers private providers, for example private child care providers?

When will **all** Government Departments be covered by similar legislation?

In Conclusion

While we agree with the spirit of the legislation, particularly regarding employment screening, in attempting to prevent unsuitable employees working in child related employment, we believe that considerable work needs to be undertaken in looking at best practice in other jurisdictions. As previously mentioned NSW has current legislation. This provides Queensland with an ideal opportunity to study how this legislation has been implemented, subsequent policy and administrative issues and considerations that we could look at to ensure that we have the best legislation possible.

The NSW program extends to both government and non-government child-related employment. This kind of consistency may be an option for Queensland to explore.

We are concerned regarding the resources that will be required to administer the employment screening process and believe that resources such as this need to be diverted to resource diversionary programs, rehabilitation programs, early intervention and prevention programs for young people.

We understand that this legislation does not sit in isolation, that employers and the community sector generally need to be vigilant with regard to employing suitable staff. It is essential that government in partnership, supports the community sector with information and resources to this end.

Finally, it is our belief that the employment screening process as outlined in the Draft Commission for Children and Young People Bill 2000 does not have sufficient regard to rights and liberties of individuals as is required of legislation by the *Legislative Standards Act 1992*.

Bibliography

Forde, Leneen 1999, *Commission of Inquiry into Abuse of Children in Queensland Institutions*, Go Print, Brisbane

James, Marianne 2000, *Child Abuse and Neglect: Part 1 Redefining the Issues* in Trends and Issues in Crime and Criminal Justice, No 146, Australian Institute of Criminology, Canberra.

Legal, Constitutional and Administrative Review Committee, September 1997, *The Preservation and Enhancement of Individuals' Rights and Freedoms: Should Queensland Adopt a Bill Of Rights?*, Issues Paper No. 3, Go Print, Brisbane.

