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LIBERTY VICTORIA COMMENTS ON

WORKING WITH CHILDREN AMENDMENT BILL 2016

I. Introduction

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development of Australia's laws and systems of government. Further information may be found at www.libertyvictoria.org.au.

Thank you for the opportunity to provide feedback to your office on the Working with Children Amendment Bill 2016. Liberty Victoria has grave concerns about the Bill.

Due to the short time frame we will not be in a position to provide detailed feedback on the Bill, but please find our comments below.

II. Working with Children Amendment Bill 2016

This Bill seeks to amend the *Working with Children Act 2005* (Vic) (**"the Act"**). We recognise that the amendments in this Bill arise in part out of the Royal Commission into Institutional Responses to Child Sexual Abuse, and that the protection of children is paramount in consideration of the implementation of this Bill. However, it is our view that

the Bill goes beyond the limits of what is reasonable and practicable in balancing the interests of children with the rights of people to be involved in the lives of children.

In brief, our concerns include:

1. The Bill expands the definition of “child related work”. Child related work is defined as including the types of work listed in s.9(3) of the Act, as well as work that "that usually involves direct contact with a child and that contact is not directly supervised by another person." Direct contact is defined as physical contact or face to face oral communication. The Bill would expand direct contact to include:

    i. Contact by post or other written communication

    ii. Contact by telephone or other oral communication

    iii. Contact by email or other electronic communication.

    Further, the Bill amends the definition to merely require that the work "usually involves direct contact with a child" removing the exception for work under direct supervision.

    The change appears to be broadening the scope of “direct contact” to cover opportunities that might exist for ‘grooming’ or other untoward contact with children. The practical effect of this change is to drastically expand the occupations for which a Working with Children Check would be required. For example, a person may need an Assessment Notice to work:

    - in an inbound call centre if persons under the age of 18 call the centre;

- in a customer service centre for an online retailer that responds to orders (even by email or post) that include those from persons under the age of 18; and

- responding to complaints or queries on behalf of any company or organisation if persons under the age of 18 make such complaints or inquiries.

The expansion of the definition of "child related work" seems to be a spectacular overreach, and is an unjustified interference with the right to work without attendant benefit to the safety of children. In fact, it would appear from the expansion of the definition of "child related work" that *any conversation or communication whatsoever with a child in a work environment, even if directly supervised, would constitute child-related work, and would require an assessment notice.*

The lack of clarity in the definition is itself a problem. Under the Act it is an offence to work or apply for "child-related" work without a notice of assessment (ss.33 – 34) or to employ a person without a notice of assessment (ss.35 – 36). As a result there are likely to be numerous consequences in the expansion of and lack of clarity in the definition of "child-related" work. Out of an abundance of caution, many employers may opt to require Working with Children Checks even when the work does not fall within the definition of child related work. As a result of the lack of clarity the scope of employment options open to people with prior criminal history (or even a previous charge that was withdrawn, struck out or dismissed – see below) may be narrowed further than Parliament intends.

While the interests of children are paramount, there are also human rights concerns attaching to people seeking assessment notices under the Act. In *ZZ v Secretary to the Department of Justice & Anor* [2013] VSC 267, Bell J observed that the consideration of children's human rights needs to be balanced against a

consideration of the applicant's right to work. The right to work is recognised in article 23(1) of the Universal Declaration of Human Rights and article 6(1) of the International Covenant on Economic, Social and Cultural Rights. Justice Bell also found that the right to privacy in article 17 of the International Covenant on Civil and Political rights and s13(a) of the *Charter of Human Rights and Responsibilities Act 2006* can be engaged by restriction on the right to work. As Justice Bell stated at [77]:

> Work is not just an expedience or a way of earning a material living. It has great personal and social importance to individuals. An underlying rationale of human rights is enhancing respect for human dignity. Work is an aspect of human dignity. There is a close relationship between private life and work. Therefore, it can readily be appreciated why the right to work is a human right, why it incorporates freedom of choice of work and why it is intimately connected with other human rights.

While the protection of children is in the public interest the significance of the incursion into privacy and the right to work should be borne in mind when contemplating further restrictions.

Liberty Victoria is of the view that the expansion of the definition and the lack of clarity is too restrictive. A necessary incident of the digital economy is that child-related work may, in fact, shift online. It is appropriate that Parliament ensures the Working with Children Check applies to online work. To avoid unintended consequences it would be more appropriate for the Bill to articulate those circumstances in which online contact with children *would* pose a risk.

Alternatively, the introduction of different 'grades' of Assessment Notices could go some way to alleviating the concerns of the community over the protection of children. At present, there is only one 'level' of assessment notice, and even if a person seeks and obtains a Notice for a particular purpose (say, pursuit of a hobby or recreational activity that does not involve any direct involvement with children),

that person is given clearance that would allow them to work in a childcare centre. This is a concern that arises frequently during application of the Act. Rather than exponentially expanding the categories of work that require an Assessment Notice, perhaps the better and more efficient course would be to implement a 'grading' of Assessment Notices that permitted the holder to engage in certain limited types of work according to the 'clearance' they are given under that Notice.

2. Clauses 28 & 29 are a significant incursion upon the presumption of innocence, expanding the net of a Category C application and/or a reassessment to certain *charges*, where those charges were dealt with other than by a conviction or a finding of guilt. This includes (according to s61(1) of the Act) where the charge is withdrawn, or dismissed by a court, or where the person is discharged by a court following committal. The interference with a person's capacity to work where there has been no finding of guilt or proof of an offence is concerning. The simple fact of having been charged should *not* act as a barrier to obtaining an Assessment Notice.

3. The provision for unhindered exchange of information between DHHS & DOJR raises significant concerns; particularly relating to the provision of Child Protection material. Liberty Victoria notes that the quality of child protection material is often highly prejudicial, unreliable and of little probative value. This was alluded to by Magistrate Power in *DOHS v Ms B & Mr G* [2008] VChC1 (cited in *KZD v Secretary, Department of Justice* [2015] VCAT 549:

> Sometimes I make a decision without accepting all of the material that is contained in the Department's reports. Sometimes it appears wrong or irrelevant. Sometimes it is obviously wrong. Sometimes not all the contents of reports are accepted by the Court because objectively they seem improbable… It is not uncommon for Departmental reports to be written to achieve an outcome and for material which does not support that outcome to be omitted from reports.

This issue was further discussed in the recent decision of DP Lambrick in *FNI v Department of Justice and Regulation* [2016] VCAT 1786 ([26]ff):

> It is common in these types of matters for the respondent to seek access to material held by the DHHS in relation to an applicant. It is a sensible course of action. The Tribunal is required under the Act to make a determination as to whether a given applicant poses an unjustifiable risk to the safety of children. In order to make such a decision, the Tribunal needs to be equipped with all relevant information. It will sometimes be immediately clear from material received that there are real and substantive concerns about the safety and welfare of a child or children. On other occasions, the Tribunal and parties are left to grapple with less clear, disputed material.
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> Such was the state of material that was available in this case.
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> The parties spent some time addressing me on the admissibility and weight I should attach to the material.
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> Section 98 of the *Victorian Civil and Administrative Tribunal* Act *1998* makes it clear that this Tribunal is not bound by the rules of evidence, except to the extent that it adopts those rules. The Tribunal may inform itself on any matter as it sees fit.
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> The Tribunal will frequently, particularly in a protective environment, allow into evidence material, which may not have been admissible in a Court. It will then accord such weight to the material as it sees fit in the circumstances.
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> The material obtained from the DHHS was in this case potentially very relevant, making reference to at least two further allegations of sexual assault, together with other serious matters.
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> Given that FNI has never been charged with and therefore given the opportunity to defend such allegations, he was placed in a somewhat invidious position; made

> all the more problematic by virtue of the material being heavily redacted. Because of restrictions under the *Children, Youth and Families Act 2005* (the ***CYF Act***), the author(s) of the material was not disclosed, nor the identity of the reporter/notifier. Accordingly, the respondent only called very general evidence, about the manner in which the DHHS collates information and conducts investigations. Nevertheless, in the context of this Act, the paramount consideration is the protection of children, rather than FNI's personal interests.
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> FNI accordingly gave evidence in relation to the issues raised. I accept that it was trying for him to do so. He was essentially defending himself against blanket assertions contained in the DHHS material.
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> Much of the material contained demonstrable errors. Some of it was simply wrong.
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> Ultimately, in closing submissions, the respondent made it clear that the Secretary did not seek to rely on all of it. In light of FNI's evidence and the fact that no further action was taken in relation to the serious allegations, the respondent would have been hard pressed to do so. Presumably child protection workers also did not identify a need for further investigation of some of the allegations or their enquiries led nowhere.

Liberty Victoria expresses concerns about applicants under this regime more readily being made the subject of unsubstantiated and highly prejudicial allegations that are contained within Child Protection material of unknown authorship and provenance. Such material is susceptible to the notorious "cut and paste" effect; where the merest mention of a question or allegation is referred to and repeated ad infinitum, becoming proof of its own truth. There are also obvious privacy concerns with communication of information between agencies for purposes that have potential to have a major impact upon a person's life and livelihood. Such concerns are only exacerbated when the 'quality' of the information is questionable.

4. Liberty Victoria also notes that, already, many employers require an Assessment Notice prior to making an offer of employment. In this way, the regime acts as a sort of de facto or proxy police / employment check. The proposed changes would likely lead to a significant increase in the number of applications and, therefore, refusals and applications to VCAT. The Tribunal should prepare itself for an increase in reviews pursuant to s26(1) of the Act.

5. Thank you for considering these comments. If the reader has any questions with regard to these comments, or if we can provide any further information or assistance, please do not hesitate to contact Jessie Taylor, Senior Vice-President of Liberty Victoria.

Yours sincerely

George A Georgiou SC
President
Liberty Victoria