

Nadine Woodward

From: Elizabeth West
Sent: Wednesday, 8 August 2012 17:16
To: Nadine Woodward; Terry Manns; Sue Phelan
Subject: FW: operation of Working with Children Bill

FYI, Tim's advice

Liz

From: Timothy Lowe
Sent: Wednesday, 8 August 2012 17:07
To: Steve Kinmond
Cc: Elizabeth West
Subject: operation of Working with Children Bill

Steve

I have reviewed the relevant provisions of the Working with Children Bill and my view is as we discussed, for the following reasons.

In regard to a self-employed tutor, the relevant transitional provision is clause 4(2) of Part 2 of Schedule 3 to the Bill.

Clause 4(2) provides:

4 Application of Act to existing self-employed persons

(1) *This clause applies to a person:*

(a) *who was engaged in child-related work as a self-employed person immediately before the commencement of Part 2 of this Act, and*

(b) *who was, immediately before the commencement of this clause, required to hold a child-related employment certificate.*

(2) *A person to whom this clause applies who held a child-related employment certificate immediately before the commencement of this clause is not, until the expiry date of the person's certificate, required to comply with Division 2 of Part 2 of this Act in respect of child-related work undertaken by the person as a self-employed person.*

(3) *A person to whom this clause applies who did not hold a child-related employment certificate on the commencement of this clause is not required to comply with Division 2 of Part 2 of this Act in respect of child-related work undertaken by the person as a self-employed person until the day prescribed by the regulations for the purposes of this clause.*

(4) *This clause does not apply to a person who was a disqualified person on the commencement of this clause or who subsequently becomes a disqualified person.*

(5) *In this clause:*

child-related employment certificate *means a certificate issued under Part 2 of the Commission for Children and Young People Regulation 2009 to a self-employed person in which the Commission certified that the person was not a prohibited person (within the*

meaning of Part 7 of the Commission for Children and Young People Act 1998).

The power of CCYP to determine an interim bar is provided by s 17 of the Bill:

17 Interim bars

- (1) *The Commission may, at any time after receiving an application for a **working with children check clearance** or commencing an assessment of an applicant for or holder of a **clearance**, determine that the applicant or holder is subject to an interim bar on engaging in child-related work. [my emphasis]*
- (2) *The Commission may make a determination under this section if it is of the opinion that it is likely that there is a risk to the safety of children if the applicant or holder engages in child-related work pending the determination of the application or assessment.*
- (3) *The Commission must, as soon as practicable after imposing an interim bar, notify in writing the applicant or holder, and any employer or proposed employer of the applicant or holder in child-related work (if known to the Commissioner), that the applicant or holder is subject to an interim bar on engaging in child-related work.*
- (4) *An interim bar ceases to have effect:*
 - (a) *on notification in writing by the Commission to the applicant or holder that the interim bar is revoked, or*
 - (b) *in the case of an applicant for a clearance, if the applicant is granted a clearance, or*
 - (c) *12 months after the interim bar takes effect,*

whichever occurs first.

CCYP's power to determine an interim bar is subject to the conditions precedent that the CCYP (1) has received an application for a 'working with children check clearance' or (2) is commencing an assessment of an applicant for or holder of a 'clearance'.

The terms 'working with children check clearance' and 'clearance' are defined in s 5(1) of the Bill as follows:

5 Definitions

(1) *In this Act:*

...
working with children check clearance or clearance means an authorisation that is in force under this Act to engage in child-related work.

The Bill seems quite clear that, in the absence of one or the other of the above conditions precedent, CCYP has no power to determine an interim bar. Additionally, the effect of clause 4(2) is to exempt the holder of a certificate issued under the CCYP Regulation from the requirements of the Bill until such time as the person's certificate expires.

Similarly, the Bill provides for CCYP to conduct a risk assessment under s 15 if CCYP becomes aware that a person is subject to an assessment requirement under s 14.

Section 14 of the Bill provides:

14 Assessment requirements

A person is subject to an assessment requirement under this Act if any of the matters specified in Schedule 1 apply to the person.

Schedule 1 to the Bill provides:

Schedule 1 Assessment requirement triggers

1 Offences

- (1) Proceedings have been commenced against a person:
 - (a) for an offence specified in clause 1 of Schedule 2, if the offence was committed as a child (whatever the outcome of the proceedings), or
 - (b) for an offence specified in clause 1 of Schedule 2, if the offence was committed as an adult, and the person is not because of those proceedings a disqualified person.
- (2) Proceedings have been commenced against a person for any of the following offences (whatever the outcome of those proceedings):
 - (a) an offence involving intentional wounding of or causing bodily harm to a child by an adult (other than an offence specified in clause 1 of Schedule 2),
 - (b) any sexual offence committed against, with or in the presence of a child, other than an offence specified in clause 1 of Schedule 2,
 - (c) an offence under section 38 or 38A of the Crimes Act 1900 committed against a child,
 - (d) an offence under section 45 of the Crimes Act 1900 committed against a child,
 - (e) an offence under section 60E of the Crimes Act 1900,
 - (f) an offence under section 13 of the Crimes (Domestic and Personal Violence) Act 2007 committed against a child,
 - (g) an offence under section 6 of the Prevention of Cruelty to Animals Act 1979.
- (3) Proceedings have been commenced against a person for any of the following offences (other than where a person has been found not guilty of the offence concerned):
 - (a) an offence under section 43A of the Crimes Act 1900,
 - (b) an offence under section 44 of the Crimes Act 1900 committed against a child,
 - (c) an offence under section 227, 228 or 231 of the Children and Young Persons (Care and Protection) Act 1998,
 - (d) an offence under section 530 of the Crimes Act 1900,
 - (e) an offence under section 23A, 24 (1A) or (2A) or 25 (1A) of the Drug Misuse and Trafficking Act 1985,
 - (f) any other offence, whether under the law of New South Wales or elsewhere, prescribed by the regulations for the purposes of this subclause.
- (4) A person has been convicted of an offence under section 61 of the Crimes Act 1900 committed against a child.
- (5) Subclauses (1), (2), (3) and (4) apply to:
 - (a) an offence an element of which is an intention to commit an offence of a kind listed in those subclauses, and
 - (b) an offence under a law other than a law of New South Wales that is an offence similar to an offence listed in those subclauses, and
 - (c) an offence of attempting, or of conspiracy or incitement, to commit an offence listed in those subclauses, in the same way that they apply to the offences listed in those subclauses.
- (6) A person has been convicted of, or proceedings have been commenced against a person for, offences involving violence or sexual misconduct (whether or not listed in this Schedule or Schedule 2) sufficient to indicate a pattern of behaviour that warrants investigation as to whether it may cause a risk to the safety of children.
- (7) An offence is not specified for the purposes of this clause if it was an offence specified in this clause at the time of its commission and the conduct has ceased to be an offence in New South Wales.

2 Findings of misconduct involving children

A person has been the subject of a finding by a reporting body that the person engaged in the following conduct:

- (a) sexual misconduct committed against, with or in the presence of a child, including grooming of a child,
- (b) any serious physical assault of a child.

3 Application of Schedule

This Schedule applies to offences and other matters whether occurring before, on or after the commencement of this Schedule.

But, again, the requirement in s 15 is triggered only where the condition precedent in s 15(1) is present:

15 Assessment of applicants and holders

(1) The Commission must conduct a risk assessment of an applicant for a working with children check clearance, or the holder of a clearance, to determine whether the applicant or holder poses a risk to the safety of children if the Commission becomes aware that the applicant or holder is subject to an assessment requirement.

*- neither applicant
or holder.*

A self-employed tutor who has an existing certificate does not fall under s 15(1) of the Bill and would not trigger, while that certificate remains current, an assessment requirement under the Bill.

Tim

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