Crown Law
Queensland Government

Your ref: QAS Swimming Coach
Our ref: CP6/IIE115/BOK/IYN
Contact: Katharine Ghidella
Direct ph: (REDACTE
Direct fax: (07) 3239 6386

Department of
Justice and Attorney-General

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SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE

Mr Tristan Barns
A/Manager, Legal & Administrative Review Services
Corporate & Executive Services
Department of Innovation and
Information Economy, Sport and Recreation
PO Box 187
BRISBANE ALBERT STREET QLD 4002

By facsimile only: 3235 9384

Dear Tristan

***Commission for Children and Young People Act 2000* (Qld): suitability notices and regulated employment – Queensland Academy of Sport Swimming Coach**

I refer to the above matter and your facsimile dated 3 February 2003, and to our subsequent telephone conversations and emails. Due to the extreme urgency of finalising this advice for a meeting at 12 noon today, I have provided, for convenience, this short form advice, with the long advice and more detailed reasoning to follow later today.

Thank you for your comprehensive written instructions regarding the factual and legal circumstances upon which you seek my advice.

You have requested urgent legal advice on six specific questions. I will not repeat in this short form advice the comprehensive facts, which were very helpfully set out in your letter of 3 February and the attached memorandum of 29 January.

The employee under consideration will be referred to throughout this advice as "the Coach" and the Coach's employer, the Queensland Academy of Sport as the ("QAS").

State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
DX 40121 Brisbane Uptown
CDE D38
Telephone 07 3239 6703
Facsimile 07 3239 0407
ABN 13 846 673 994

Short Answers

1. **Whether the employment relationship in this situation constitutes "regulated employment";**

The term "regulated employment" is defined relevantly in clause 6 of Part 1 of Schedule 1 of the Act in the following terms:

> ***6 Private teaching, coaching or tutoring***
> *(1) Employment is regulated employment if—*
> *(a) the usual functions of the employment include or are likely to include prescribed teaching; and*
> *(b) the employee is not a registered teacher; and*
> *(c) the employer—*
> *(i) is not a government service provider; and*
> *(ii) carries on a business that includes providing prescribed teaching.*
> *(2) In this section—*
> ***"prescribed teaching"** means teaching, coaching or tutoring a child, individually, on a commercial basis.*
>
> (my emphasis)

Each of the sub-paragraphs to clause 6(1) must be satisfied before employment will be characterised as "regulated employment".

To constitute "regulated employment" the Coach's employer must not be a "government service provider" (clause 6(1)(c)(i)). Clearly, the QAS is a government service provider.

The expression "government service provider" is defined in section 9 of the Act as being "a government entity or a local government". At section 21 of the *Public Service Act 1996* (Qld) defines an entity to be a government entity if it is a department or part of a department.

Clearly, the QAS is part of the Department and therefore, in my view the employment relationship in this situation cannot fall within the definition of "regulated employment". Part 6 of the Act, which governs when an employer (such as the QAS) is entitled to apply for employment screening of an employee, will therefore, not apply.

2. **If so, whether charges laid but later abandoned fall within the definition of "criminal history".**

In short, yes, a charge laid but later abandoned falls within the definition of "criminal history".

A "charge" is defined in Schedule 4 of the Act as follows:

> ***"charge"**, of an offence, means a charge in any form, including, for example, the following—*

> *(a) a charge on an arrest;*
> *(b) a notice to appear served under the Police Powers and Responsibilities Act 2000, section 177;*
> *(c) a complaint under the Justices Act 1886;*
> *(d) a charge by a court under the Justices Act 1886, section 42(1A), or another provision of an Act;*
> *(e) an indictment.*
>
> (my emphasis)

The term "criminal history" is also defined in Schedule 4 of the Act in the Dictionary, and means:

> ***"criminal history"**, of a person, means—*
> *(a) every conviction of the person for an offence, in Queensland or elsewhere, and whether before or after the commencement of this Act; and*
> *(b) every charge made against the person for an offence, in Queensland or elsewhere, and whether before or after the commencement of this Act.*
>
> (my emphasis)

In my view, even a charge laid but later abandoned falls within the definition of "criminal history" because a charge, as defined, includes being charged on arrest whether or not that charge is later proceeded with at trial.

3. The relevant considerations attaching to the issue of whether a criminal history may render an employee unsuitable for child-related employment;

Section 102 of the Act contemplates that the Commissioner for Children must, if a person in regulated employment has been convicted or charged with a **serious offence**, take that into account when considering an application by a person for a suitability notice.

In relation to a conviction or charge, the Commissioner must have regard to the following matters:

(a) whether it is a conviction or charge;
(b) whether the offence is a **serious offence**;
(c) when the offence was committed or is alleged to have been committed;
(d) the nature of the offence and its relevance to child-related employment;
(e) anything else the commissioner reasonably considers to be relevant to the assessment of the person.

The term "serious offence" includes, for example, offences such as indecent dealing with a child under 16 years of age, Robbery and Rape (sections 210, 409 & 411, and 349 of the *Criminal Code* respectively).

Therefore, the fact that charges of the kind that were brought against the Coach were laid, are factors that the Commissioner must consider in determining whether he was suitable or unsuitable for child-related employment.

4. **The relevant considerations attaching to the issue of when an employer should apply under s.128 for a suitability notice;**

Given my answer to question 1, this question is irrelevant to the present circumstances.

Section 128(2) allows an employer to apply to the Commissioner for a suitability notice about an employee. However, s.128 only applies if sub-section (1) is satisfied.

Section 128(1) relevantly states as follows:

128 Application for suitability notice for current employee
(1) This section applies if—
*(a) on the commencement of division 3, subdivision 1, a person (the "**employer**") was employing another person (the "**employee**") in regulated employment; and*
(b) the employer knows, or reasonably suspects, the employee has a criminal history that may make the employee unsuitable for child-related employment.

(my emphasis)

As indicated in my answer to question 1, the employment of the Coach by QAS is not in regulated employment.

Accordingly s.128 does not apply, and could not apply to the facts as I understand them.

If, despite my answer to question 1 in your particular circumstances, you would still like me to generally address the issue of when an employer should apply under s.128 for a suitability notice, I am happy to do so in my long form advice.

5. **Whether the views of the Commissioner for Children and Young People should be sought in this instance**

It may be helpful to seek the views of the Commissioner in this instance, if for no other purpose than to clarify the Commissioner's approach to the granting of suitability notices to employees of government service providers. However, I would not anticipate, on my interpretation of the clear wording of the Act, that the Commissioner would take a different view of the matter.

I am aware that your discussions with the Commissioner's office indicate that suitability notices may have been sought and granted for other coaches in the employ of the QAS. As indicated in my answer to question 1, however, I do not see any legislative basis for those suitability notices to be sought and/or granted.

6. **Taking account of the factual situation set out above, whether, in your opinion, the Department should apply for a suitability notice in this instance, and if not, the course of action the department should take.**

It is not open to the Department/QAS to apply for a suitability notice in this instance.

The only avenues available to the Department, in terms of future action related to the charges, arise through the terms of engagement of the Coach under the Conditions of Employment contract (a copy of which was faxed to me yesterday).

I note that limited terms of the *Public Service Act 1996* apply to the Coach, pursuant to his contract with the QAS, especially in respect of any behaviour that is grounds for disciplinary action as defined in that Act (see clause 10(c) of the contract). Such behaviour may be grounds for termination of the contract prior to the end of employment.

Of course, whether the Department/QAS wished to take such a step is a serious matter and must involve a careful consideration of the facts, and whether the present state of the charges against the Coach present sufficient grounds for disciplinary action and termination of the contract. I would strongly recommend that further advice be sought from us on this issue, before any further action is taken in that regard.

I will expand upon this advice in the long-form version which will follow later today. In the interim, please do not hesitate to contact me if you wish to discuss the matter further.

Yours faithfully

K.M. Ghidella

Katharine Ghidella
A/Executive Legal Consultant
for **Crown Solicitor**