

Commission for Children and Young People and Child Guardian Amendment Bill 2007

Explanatory Notes

General Outline

The *Commission for Children and Young People and Child Guardian Act 2000* (“Act”) prohibits employment in regulated employment (including volunteer work) and the carrying on of a regulated business without a current prescribed positive notice. Blue cards are issued to holders of prescribed positive notices.

Regulated employment and regulated businesses are prescribed in the Act under a range of categories relating to the provision of services to children. One of the current prescribed categories is “counselling and support services”.

The Bill amends the Act to clarify the employment screening requirements for individuals and businesses providing health, counselling and support services to children.

Policy Objectives

The main objectives of the Bill are to:

- clarify the blue card screening requirements for individuals and businesses providing health, counselling and support services to children;
- validate any applications and matters relating to applications, including decisions of the Commissioner for Children and Young People and Child Guardian (“Commissioner”) and the Children Services Tribunal, which relate to revised regulated employment or revised regulated business and which were made prior to commencement of the amendments;

- allow a transitional period for compliance with the amendments to ensure that persons will not be adversely affected if they do not hold a positive notice, if they have an outstanding application at the date of commencement or make application within 3 months of commencement.

Reasons for the Bill

The Bill is required to clarify the blue card screening requirements for individuals and businesses providing health, counselling and support services to children.

Achievement of the Objectives

The proposed amendments clarify that persons whose usual functions of employment, or usual activities of their business, include or are likely to include providing one or more of the following services to a child, are required to hold a blue card under the 'health, counselling and support services' category:

- a health service that, by its nature, requires or is likely to require physical contact with the child, or that is provided or is likely to be provided where the person is physically present with the child when no-one else is present; or
- a counselling service that involves or is likely to involve providing the service where the person is physically present with the child while no-one else is present, or where the person is not physically present with the child (for example providing a counselling service over the internet or telephone); or
- a support service that involves or is likely to involve providing the service where the person is physically present with the child while no-one else is present, or where the person is not physically present with the child.

The amendments retain the existing exemptions for registered health practitioners, government service providers and licensed care services under the *Child Protection Act 1999*. Additional exemptions have been added under the regulated employment category for the following persons:

- Australian lawyers under the *Legal Profession Act 2007* to the extent they are engaging in legal practice;

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- registered teachers who provide the service as part of their duties for the school at which they are employed;
- persons who have complied with the screening requirements of the *Disability Services Act 2006*.

The amendments confirm that a person does not require a blue card merely because they employ a child in paid employment and provide help or guidance to the child as part of the child's employment.

The amendments validate applications, in respect of revised regulated employment or revised regulated businesses (and matters relating to such applications), which were made prior to commencement of the amendments.

Accordingly, an application of this nature which is outstanding as at the commencing day must be dealt with by the Commissioner on the basis that the application and all matters relating to the application are not to be considered invalid merely because they relate to revised regulated employment or a revised regulated business.

Likewise, the Children Services Tribunal must continue to deal with any review of such an application on the basis that the application and all matters relating to the application cannot be considered invalid merely because they relate to revised regulated employment or revised regulated business. Additionally, the effect of s 216 is to confirm the validity of prescribed notices issued by the Commissioner or decisions made by the Children Services Tribunal prior to commencement as far as they relate to a person engaging in revised regulated employment or carrying on a revised regulated business.

The Bill provides for a transitional period to ensure that persons engaging in activities of the type captured by the amendments will not be adversely affected. A person will be permitted to continue engaging in revised regulated employment or carrying on a revised regulated business despite not holding a positive notice if they have an outstanding application at commencement or they lodge an application for a blue card within 3 months of commencement of the amendments.

Alternatives to the Bill

As the amendments are required to clarify existing legislative provisions, there are no alternatives to the Bill.

Estimated Cost for Government Implementation

There are no significant financial implications arising from the provisions of the Bill or its implementation.

Consistency with Fundamental Legislative Principles

The Bill potentially infringes the fundamental legislative principle under s. 4(3)(g) of the *Legislative Standards Act 1992* (“LS Act”) in that the amendments might be considered to adversely affect rights and liberties of individuals, and operate retrospectively. To the extent there is an infringement it is considered necessary in the interests of creating safe service environments for children.

The Bill includes amendments which will clarify the employment screening requirements for persons providing health, counselling and support services to children. It is arguable that the provisions purport to capture a wider range of services than the current ‘counselling and support services’ category and impose additional obligations which impact on a person’s ability to seek employment in specified environments. It is envisaged that the practical implications of the amendments will be minimal, given the operational interpretation that has been applied to the ‘counselling and support services’ category by the Commission to date.

In order to limit the extent of any adverse impact on persons providing services affected by the Bill, a transitional period applies. Under the provisions relating to the transitional period, an individual can continue in regulated employment or carrying on a regulated business, without being subject to penalty, if an application for a blue card is made within three months of the commencement of the amendments or is outstanding as at the date of commencement.

The Bill also provides for the validation of applications (and matters relating to such applications, including decisions of the Commissioner and the Children Services Tribunal) made prior to the commencement of the amendments. This is considered necessary in order to provide certainty by clarifying the validity of prescribed notices issued within this period and allowing for outstanding applications and matters related to such applications to be finalised.

The proposed power to prescribe a service as a health service under a regulation, under clause 6 of the Bill, potentially infringes the fundamental legislative principle under s. 4(4)(c) of the LS Act, in that paragraph (b) in the definition of “health service” in each of the new sections 5(3) and 8(3)

might be considered to authorise the amendment of the Act otherwise than by another statute. This regulatory power is considered necessary to provide sufficient regulatory flexibility to respond to emerging issues.

Consultation

As the amendments relate to clarification of existing legislative provisions, no community consultation has been undertaken.

Notes on Provisions

Short title

Clause 1 states the short title of the Bill.

Act amended

Clause 2 states that the Bill amends the Act.

Amendment of s 97 (Employment and businesses regulated by this part)

Clause 3 amends section 97 of the Act to insert a new subsection (3) to provide that Part 6 does not apply to the paid employment of a child merely because a person is employing a child and as part of that employment is providing the child with help or guidance.

Replacement of Part 9 heading (Repeal and transitional provisions)

Clause 4 inserts a replacement heading: “Part 9 Transitional and other provisions”.

Insertion of new Part 9, Division 10 (Transitional and validation provisions)

Clause 5 inserts a new Division 10 into Part 9 of the Act to provide transitional and validation provisions in relation to the amendments.

New section 213 provides definitions for new Division 10:

- “commencing day” means the day this section commences.
- “revised regulated business”, in relation to a person, means a business carried on by the person that was not a regulated business under schedule 1, part 2, section 8, as in force immediately before the commencing day, and is a regulated business under schedule 1, part 2, section 8 as in force on the commencing day.
- “revised regulated employment”, in relation to a person, means employment of the person that was not regulated employment under schedule 1, part 1, section 5, as in force immediately before the commencing day, and is regulated employment under schedule 1, part 1, section 5, as in force on the commencing day.
- “transition period” means the period ending three months after the commencing day but also includes the period prior to commencement.

New section 214 provides a transitional period in relation to employees in revised regulated employment who do not hold a current positive notice. It provides that an employer does not commit an offence by continuing to employ such an employee until:

- where there is a current application outstanding in relation to the person on the commencing day – the day the application is withdrawn or the application is decided; or
- where an application for a prescribed notice is made in relation to the person within 3 months of the commencing day – the day the application is withdrawn or the application is decided; or
- where no application is outstanding on the commencement day and no application is made within 3 months of the commencing day – 3 months after the commencing day.

New section 214 does not apply where an employer is aware that a negative notice has been issued to an employee and is current or where the employer is notified that a person’s blue card has been suspended.

New section 215 provides a transitional period in relation to persons carrying on a revised regulated business who do not hold a prescribed notice. It provides that a person does not commit an offence by continuing to run a regulated business without a positive notice until:

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- where there is a current application outstanding in relation to the person on the commencing day – the day the application is withdrawn or the application is decided; or
- where an application for a prescribed notice is made in relation to the person within 3 months of the commencing day – the day the application is withdrawn or the application is decided; or
- where no application is outstanding on the commencement day and no application is made within 3 months of the commencing day – 3 months after the commencing day.

The section will not apply to a person who has a current negative notice or who has a positive notice which has been suspended.

New section 216 validates applications for prescribed notices which were made prior to commencement and related to employment that is revised regulated employment or carrying on a business that is a revised regulated business. In addition the provision validates any actions taken, including decisions made, in relation to such applications.

The effect of the provision is to clarify the validity of:

- any application for a prescribed notice made prior to the commencing day relating to revised regulated employment or revised regulated business;
- any decision, issue of a prescribed notice or other action of the Commissioner relating to an application for a prescribed notice made prior to the commencing day relating to revised regulated employment or revised regulated business;
- any decision or other action of the Children Services Tribunal in reviewing a reviewable decision which relates to an application for a prescribed notice made prior to the commencing day relating to revised regulated employment or revised regulated business;
- any other matter relating to an application for a prescribed notice made prior to the commencing day relating to revised regulated employment or revised regulated business.

Accordingly, an application of this nature which is outstanding as at the commencing day must be dealt with by the Commissioner on the basis that the application and all matters relating to the application are not to be considered invalid merely because they relate to revised regulated employment or a revised regulated business.

Likewise, the Children Services Tribunal must continue to deal with any review of such an application on the basis that the application and all matters relating to the application cannot be considered invalid merely because they relate to revised regulated employment or revised regulated business.

Additionally, the effect of s 216 is to confirm the validity of prescribed notices issued by the Commissioner or decisions made by the Children Services Tribunal prior to commencement as far as they relate to a person engaging in revised regulated employment or carrying on a revised regulated business.

Amendment of Schedule 1 (Regulated employment and businesses for employment screening)

Clause 6 amends Schedule 1 of the Act (Regulated employment and businesses for employment screening) by replacing sections 5 and 8.

New section 5 provides for a “health, counselling and support services” category of regulated employment.

The “health, counselling and support services” category of regulated employment is substituted for the existing “counselling and support services” category of regulated employment. The intention of the amendment is to clarify the blue card requirements for persons providing health, counselling and support services.

An application for a blue card must be made in relation to employment if the usual functions of the employment include, or are likely to include providing:

- a health service where the nature of the service requires physical contact (i.e. it is not merely incidental to the provision of the service) with children, or where a person will be physically present with a child while no-one else is present; or
- a counselling service where:
 - a person will be physically present with a child while no-one else is present; or
 - a person is not physically present with the child; or
- a support service where:
 - a person will be physically present with a child while no-one else is present; or

- a person is not physically present with the child.

The exemptions for registered health practitioners, licensed care services (as defined under the *Child Protection Act 1999*) and government service providers have been retained.

The amendments also introduce additional exemptions in the regulated employment category for Australian lawyers who are permitted to engage in legal practice under the *Legal Profession Act 2007* (to the extent they are engaging in legal practice), registered teachers (to the extent they are carrying out duties for the school they are employed with) and persons who have complied with the screening requirements of the *Disability Services Act 2006*. These additional exemptions have been inserted as a result of recent legislative developments in relation to the regulation of these professions.

New section 8 provides for a “health, counselling and support services” category of regulated businesses.

The “health, counselling and support services” category of regulated business is substituted for the existing “counselling and support services” category of regulated business. The intention of the amendment is to clarify the blue card requirements for persons providing health, counselling and support services.

An application for a blue card must be made in relation to a business where the usual functions of the business include, or are likely to include a person, other than a registered health practitioner, providing:

- a health service where the nature of the service requires physical contact (i.e. it is not merely incidental to the provision of the service) with children, or where a person will be physically present with a child while no-one else is present; or
- a counselling service where:
 - a person will be physically present with a child while no-one else is present; or
 - a person is not physically present with the child; or
- a support service where:
 - a person will be physically present with a child while no-one else is present; or
 - a person is not physically present with the child.

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Licensed care services (as defined under the *Child Protection Act 1999*) and government service providers are specifically exempted from this category of regulated business.