

General

The amendments in this bill pertaining to the fault element of a number of sexual offences will apply to offences committed after the commencement of the bill. The remaining provisions, which relate to jury directions, will apply to any trial that commences after the commencement of the bill.

In conclusion, this bill seeks to support the communicative model of consent to sexual relations and assist juries in relation to the determinations which they are required to make on the elements of the offence of rape. It is part of the much broader package of reform this government has delivered aimed at improving victims' experience of the justice system.

I commend the bill to the house.

Debate adjourned on motion of Mr CLARK (Box Hill).

Debate adjourned until Wednesday, 5 September.

15:00

WORKING WITH CHILDREN AMENDMENT BILL

Statement of compatibility

Mr HULLS (Attorney-General) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In accordance with section 28 of the Charter of Human Rights and Responsibilities, I make this statement of compatibility with respect to the Working with Children Amendment Bill 2007.

In my opinion, the Working with Children Amendment Bill 2007, as introduced to the Legislative Assembly, is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

Overview of bill

Amendments to Working with Children Act 2005

This bill amends the Working with Children Act 2005 ('the act'), which commenced operation on 3 April 2006. The purpose of the act is to assist in protecting children from sexual or physical harm by ensuring that people who work with, or care for, children have had their suitability to do so checked.

The act established a scheme, mandating a 'working-with-children check' for persons involved in child-related work. Child-related work applies to people who work or volunteer in connection with certain occupational fields and as a result of that work, have regular, direct contact with children which is not supervised.

The working-with-children check assists in preventing those who pose a risk to the physical and sexual safety of children from working with them, either in paid or voluntary work. The working-with-children check considers and assesses relevant criminal records in relation to serious sexual, violent or drug offences and relevant findings from prescribed professional bodies. The act established a minimum state-wide standard for assessing the suitability of those persons who undertake child-related work.

Under the act, in considering an application, the Secretary to the Department of Justice must take into account criminal offences listed as relevant together with relevant prescribed findings. In exercising discretion to not issue an applicant with an assessment notice the secretary must have regard to listed factors which include the nature and gravity of the offence, the period of time since the offence/s occurred, any information given by the applicant and the likelihood of future threat to the physical or sexual safety of children. Prior to a person being refused an assessment notice they are provided an opportunity to explain why they believe they should be issued with a check. Following the submission process, an applicant who has been refused a WWC check may appeal the decision to the Victorian Civil and Administrative Tribunal (VCAT).

The objective of this bill is to promote the wellbeing of children by enhancing the existing protection mechanisms contained within the act. The bill amends the act to enhance existing assessment processes within the scheme and to ensure that persons with serious criminal histories are assessed for their potential risk to the physical and sexual safety of children. This is a direct response to practical issues that have arisen during the first year of operation of the act.

The bill includes new offences which are defined as 'relevant offences', due to the correlation between the offences and the potential for harm to the physical and sexual safety of children (for example, the offence of 'stalking' where the victim is a child).

The bill also provides the secretary with a limited 'exceptional circumstances' discretion to consider persons with offences which, while the offences are not prescribed 'relevant offences', there is nevertheless a significant link between the offending behaviour and potential risk to the physical and sexual safety of children. In such cases, the presumption is that the person will be issued with an assessment notice unless it can be established that an unjustifiable risk to the safety of children exists.

The limited 'exceptional circumstances' discretion will also apply to circumstances where a person has applied and is awaiting an outcome, or where their application has been finalised. The applicant or assessment notice holder (in the case that the application is finalised) must first be informed of the intention to re-assess their application or assessment notice.

Amendment to the Children, Youth and Families Act 2005

The amendment to section 82 of the Children, Youth and Families Act 2005, ('CYFA') will incorporate carers as registered foster carers and out of home carers within the meaning of s. 82, where between December 2002 and 23 April 2007 they:

acted as a volunteer foster carer by having a child placed with them by an out of home care service; or

were employed by an out of home care service for the purpose of providing care to a child and did provide care to a child for this purpose.

This will allow for independent investigation and potential referral to the suitability panel of carers who have allegations made against them for conduct occurring within three years before the date upon which the CYFA was proclaimed.

One of the key aims of the CYFA is to strengthen the safety and quality of out-of-home care services. Accordingly, the CYFA spells out a new process for responding to allegations of physical and sexual abuse of children living in out of home care, by:

enabling independent investigations of allegations of physical and or sexual abuse of children who are in out of home care;

establishing the suitability panel to disqualify registered carers who pose an unacceptable risk to children from volunteering as a foster carer or being employed as a carer by a residential care service.

It was intended that the CYFA allow for reports to be made about allegations of physical or sexual abuse relating to conduct occurring on or after not more than three years before the date on which the CYFA received royal assent. This would allow for reports to be made regarding conduct occurring after 7 December 2002.

However, the CYFA as currently worded, significantly limits the retrospective effect of these provisions. Sections 81 and 82 specify that the allegation must relate to a person who is or was a registered foster carer or residential care employee. The concept of 'registered' carer is created by the CYFA. This limits the application of the provisions to carers who were registered carers on or after the commencement of the CYFA.

This limitation excludes carers who were engaged by an out of home care agency to provide care between 7 December 2002 and 23 April 2007, but were not registered as carers when the CYFA commenced. The objective of this amendment is to overcome this unintended consequence.

Human rights issues

1. Human rights protected by the charter that are relevant to the bill

Section 8: Recognition and equality before the law

Section 8(3) of the charter provides that every person is equal before the law and is entitled to equal protection of the law without discrimination. Discrimination, in relation to a person, means discrimination within the meaning of the Equal Opportunity Act 1995 on the basis of an attribute set out in section 6 of that act.

Clause 5 of the bill promotes recognition and equality before the law for people with an impairment by providing an exception to the existing legislative requirement that a person personally sign their working-with-children check application form.

Clauses 8 and 9 of the bill add new offences as 'relevant offences' under the act. Clause 8 adds the specific offences of 'loitering near schools etc' and 'stalking' where the victim was a child as category 2 offences under the act.

Under category 2, it is presumed that the applicant will be refused an assessment notice unless the Secretary is satisfied that doing so would not pose an unjustifiable risk to the safety of children.

Clause 9 adds 'causing injury recklessly or intentionally' and 'obscene exposure' as category 3 offences under the act. Under category 3, it is presumed that the applicant will receive an assessment notice unless it is appropriate for the secretary to refuse to give one.

The inclusion of these offences enables their consideration for the purposes of assessing the suitability of a person to engage in child-related work, and provides the secretary with the attendant discretion to take into account the particular circumstances relating to the person and the commission of the offence.

Clause 10 of the bill provides the secretary with a limited 'exceptional circumstances' discretion to consider applications with criminal records containing offences which are not currently considered, having regard to specified criteria, and where there is a significant link between the offending behaviour and risk to the physical and sexual safety of children. The presumption is that the person will receive an assessment notice; the onus is on the secretary to demonstrate that exceptional circumstances exist, and there is a significant link between the offending behaviour and the risk to the sexual and physical safety of children.

As a person's suitability to work with children is assessed on the basis of criminal record, these provisions may limit section 8 of the charter by discriminating against persons on the basis of race or impairment, which are attributes protected under the charter. Specifically, there could potentially be an indirect and disproportionate impact on groups who are more likely to have an extensive record for offending. For example, indigenous groups and people with an intellectual disability, who are over-represented in the criminal justice system, may be disproportionately affected.

Section 13: Privacy and Reputation

The charter outlines that a person has the right not to have his or her privacy, family, home, or correspondence unlawfully or arbitrarily interfered with. In addition, a person has the right not to have his or her reputation unlawfully attacked.

Amendments to the Working with Children Act 2005

The act allows for the collection and disclosure of personal and sensitive information in relation to offences that are relevant to a working-with-children check. No clause of the bill specifically provides that information is required to be provided by a person. However, the right to privacy is engaged because by expanding the relevant offences under the act and providing for an 'exceptional circumstances' discretion in relation to other offences, the bill will mean that the provisions in the act permitting the collection and disclosure of personal information in relation to relevant offences will now also apply to the new offences incorporated by virtue of this bill.

The act requires that as part of the application for an assessment notice, certain personal information is required to ascertain that person's identity for the purpose of a criminal history check.

Where that person has a relevant criminal history, that information is used in order to make an assessment of the suitability of a person to work with children, taking prescribed matters into account including the gravity of the offence, the time since the offence, the age of the victim and the offender and other relevant issues.

The act provides that the secretary may seek additional information from applicants; as well as take into account a notice given by a prescribed body; and make any other inquiries to, or seek advice or information on the application from, the director of public prosecutions.

The act also provides that copies of assessment notices, interim negative notices or negative notices (all of which contain personal information) are provided to an applicant's employer. This also applies in instances where the secretary has revoked an assessment notice and issued a negative notice following a re-assessment. Employers have specific responsibilities under the act, which provides that it is an offence to engage a person in child-related work if the person does not hold an assessment notice.

Unlawful and arbitrary interference

The bill does not limit the right in section 13 of the charter as the interferences with privacy are not unlawful or arbitrary for the reasons outlined below.

The requirement that an interference with privacy not be unlawful means that the interference must be provided for in the law and that the law must specify in detail the precise circumstances in which interferences with privacy may be permitted.

In this case, the bill introduces new offences which will be relevant for a working-with-children check. Collection and disclosure of information is only permitted under the act where a criminal history check reveals information which may pose a threat to the safety of children. The use of the personal information for this purpose is consistent with the aims and the intention of the act, namely, to protect children from physical or sexual harm.

The act sets out in detail the circumstances in which privacy may be interfered with for the purpose of ensuring that people who work with or care for children have their suitability to do so checked by a government body.

Consistent with current practice, the collection and use of information must comply with the information privacy principles and the confidentiality provisions already existing within the act. Section 40 of the act relates to confidentiality and prohibits (subject to the exceptions contained in section 40(2)) the giving to any person, whether indirectly or directly, any information acquired by the person from, or in the carrying out of, a working with children check. Section 40(1) is very broad and prohibits the giving of information that is likely to cause harm to the public interest as well as information that is not likely to do so.

As the circumstances in which personal information may be collected are set out in detail in the act and there are constraints concerning the disclosure of the information, it is considered that the interference with privacy is not unlawful.

The requirement that an interference with privacy not be arbitrary means that any interference with privacy should

occur in accordance with the provisions, aims and objectives of the charter and should be reasonable in the circumstances.

The interference with privacy is consistent with one of the important aims of the charter, to provide special protection for children. For example, section 17 of the charter provides that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

The use and disclosure of personal information is also reasonable in the circumstances, as the collection and use of the information in relation to the new offences (envisaged under clauses 8, 9 and 10 of the bill) is a proportionate response to the risk that those offences pose to the safety of children.

The new 'relevant offences' and the new limited 'exceptional circumstances' discretion require that there is a nexus between the offending behaviour and the potential risk to the sexual and physical safety of children.

The new offences to be included are:

the two offences of 'loitering near schools etc' and 'stalking', where the victim is a child as 'relevant offences' within category 2; and

the two offences of 'causing injury intentionally or recklessly' and 'obscene exposure' as 'relevant offences' within category 3.

For example, the offence of 'loitering near schools etc' is specifically aimed at predatory behaviour in relation to children. An outcome of being convicted of this offence is to be subject to reporting requirements under the Sex Offenders Registration Act 2004. To be charged with the offence, a person must:

have been charged with a specified sexual offence (all of which are currently included as 'relevant offences' under the act); and

be in or near a place frequented by children, 'without reasonable excuse'.

In relation to the offence of 'obscene exposure', trivial behaviour (such as urinating in a public place) as compared with sexual offending, will not be considered as demonstrating a clear nexus between the behaviour and potential risk to the physical and sexual safety of children. As such, information will not be able to be collected and disclosed in relation to these minor offences.

A sufficient nexus between the offender's history and the safety of children is also required in relation to the 'exceptional circumstances' discretion given to the secretary. The bill provides for a new limited discretion which will enable the secretary to refuse to give an assessment notice (or to revoke an assessment notice) if satisfied that 'exceptional circumstances' exist to justify refusal or revocation of the notice. In making this determination, the secretary must have regard to whether the person's offending behaviour indicates that there is an unjustifiable risk to the safety of children, as well as prescribed factors including the period of time between offences. The discretion can only be exercised when a clear nexus exists between the person's offending behaviour and potential risk to the physical and sexual safety of children.

Therefore, the collection of information in relation to offences that may pose a risk to children is considered to be proportionate and not arbitrary. As such, it is considered that expanding the range of offences that will be relevant to a working-with-children check does not limit the right to privacy as the interference with privacy is neither unlawful nor arbitrary.

Amendments to CYFA

The consequential amendment to section 82 of the CYFA also engages the right to privacy and reputation in section 13 of the charter.

The CYFA establishes a legal framework for investigating retrospective allegations made against a carer of children who are in the care of the state. The CYFA clearly defines the period of retrospectivity (December 2002 to the commencement of the act on 23 April 2007). With this amendment, the CYFA also clarifies the class of persons who may be disqualified from providing out of home care as a result of a previous allegation of physical or sexual abuse.

The CYFA amendment engages the right to privacy because of the type of information that will be exchanged between the secretary of DHS and the out-of-home care service in determining the status of a carer. This may include information of a personal nature and information regarding the allegation/s of physical and sexual abuse. The amendment also engages the right to privacy in relation to the subsequent information flow between the secretary of DHS and the suitability panel if proceedings are instituted regarding the allegations of physical and sexual abuse and information of a personal nature. However, privacy is not unlawfully or arbitrarily interfered with.

Unlawful interference

The report of alleged abuse by a carer regarding a child in out-of-home care can be made by any person but is confined to grounds of physical and sexual abuse and is time specified in the legislation. It is the intent of the CYFA to strengthen the safety and quality of out-of-home care services. Accordingly the CYFA spells out a new process for responding to allegations of physical and sexual abuse of children living in out of home care. As such, any interference is precise and circumscribed and in accordance with law.

Arbitrary interference

In providing clear parameters around the type of allegations, that is alleged physical and sexual abuse of children, the interference with persons' rights is limited to these matters and the amendment also ensures that any interference with a person's privacy is relevant to the alleged allegations. Any interference with privacy in relation to this amendment is therefore not arbitrary.

In addition, the CYFA spells out strict safeguards to protect the privacy and reputation of carers who are the subject of alleged abuse in care. These protections include:

limitations on the disclosure of information about investigations and hearings by the secretary;

confidentiality of information acquired by an authorised investigator;

confidentiality of proceedings of the Suitability Panel, in relation to any allegation or status of an investigation into the allegation (s. 127, 129 and 130 CYFA).

Allegations of physical or sexual abuse of a child in out of home care can be lawfully disputed by the carer. Additionally, the carer has a right of appeal from decisions made by the suitability panel to VCAT.

As such, it is considered that the right to privacy is not limited as the interference is neither unlawful nor arbitrary.

Section 17: Protection of families and children

The bill engages this human right by enhancing and promoting the safety and wellbeing of children when children are in the care of persons other than their family.

Section 26: Right not to be tried or punished more than once

The charter provides that a person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.

Section 26 is designed to protect an accused person against "double jeopardy". The rationale for this protection is to ensure fairness to the accused and finality in the system of justice by preventing repeated attempts to gain a conviction of a previously acquitted person.

The bill enables government to place restrictions regarding work on individuals with records for certain types of offences. However, the international jurisprudence suggests that this sort of consequence of conviction for certain offences does not constitute a punishment for the purposes of section 26 of the Charter. For example, the New Zealand Court of Appeal has held, in relation to a corresponding right in the Bill of Rights Act 1990 (NZ), that it would be erroneous to treat the word 'punished' in that context as "embracing punishment outside the ambit of the criminal process and its associated enforcement of the public law". *Daniels v. Thompson* [1998] 3 NZLR 22.

As such, it is considered that the bill does not engage section 26 of the charter because the 'punishment' referred to in section 26 does not include penalties imposed outside of the criminal law.

2. Consideration of reasonable limitations — section 7(2)

Recognition and equality before the law

It is considered that the limitation of this right is justifiable under section 7, as set out below.

The nature of the right being limited

The prohibition of discrimination is a fundamental human right and this is reflected in the preamble to the charter. However, the right is not absolute and can be subject to reasonable limitations in section 7 of the charter.

(a) the importance of the purpose of the limitation

A person's suitability to work with children is assessed on the basis of criminal record. This may limit the right in section 8 of the charter because of the potential for groups of people with certain attributes (e.g. impairment, race) to be

disproportionately affected as they are overrepresented in the criminal justice system (i.e. indigenous persons, people with an intellectual disability).

Assessment on the basis of criminal record is important because certain types of offending behaviour (i.e. serious sexual, violent or drug offences) are considered relevant when assessing whether a person is suitable to engage in child-related work. It is important for the secretary to consider the specific new offences, and to exercise a limited 'exceptional circumstances' discretion in determining whether a person is suitable to engage in child-related work.

(b) the nature and extent of the limitation

Indigenous groups and people with an intellectual disability, who are over-represented in the criminal justice system, may be seen to be disproportionately affected by an assessment based on criminal record.

There are a number of safeguards within the act which limit the potential discrimination as set out below:

The act currently provides for assessment of a person's suitability to engage in child-related work, on the basis of criminal record and findings from prescribed professional bodies. For the purposes of assessment, only certain serious criminal offences are considered relevant due to their particular nature and potential risk to the sexual and physical safety of children.

The act provides criteria which the secretary must take into account when exercising discretion. The criteria relate to the particular circumstances of each case, including the time since the offence was committed; the gravity of the offence; the age of the victim and offender; and the person's behaviour since the offence.

Finally, in the event that a person is assessed as unsuitable to engage in child-related work, the act provides for a full range of appeal rights to the Victorian Civil and Administrative Tribunal (apart from a person subject to reporting obligations under the Sex Offenders Registration Act 2004; or an extended supervision order under the Serious Sex Offenders Monitoring Act 2005).

These existing safeguards will not be altered by the bill.

In addition, while indigenous groups and people with an intellectual disability may be overrepresented in the criminal justice system, it is considered unlikely that the offending behaviour of individuals within these groups will fall within the range of the serious sexual, violent or drug offences which are considered "relevant offences" for the purposes of the bill.

The safeguards set out above will continue to allow for a consideration of individual circumstances.

(c) the relationship between the limitation and its purpose

An assessment on the basis of criminal record is rationally connected with the purpose that the bill seeks to achieve. The purpose of the bill is to amend the Working with Children Act 2005 to enhance the efficiency of the act, whose main purpose is to 'assist in protecting children from sexual or physical harm by ensuring that people who work with, or care for, them have their suitability to do so checked by a government body'.

(d) any less restrictive means reasonably available to achieve its purpose

There are no less restrictive means reasonably available which would not compromise the purpose of the act.

Conclusion

I consider that the bill is compatible with the Charter of Human Rights and Responsibilities because it limits human rights but those limits are reasonable and proportionate.

Rob Hulls, MP

Attorney-General

Second reading

MR HULLS (Attorney-General) — I move:

That this bill be now read a second time.

The Working with Children Amendment Bill 2007 aims to enhance the existing assessment mechanisms established under the Working with Children Act 2005.

The purpose of the Working with Children Act is to assist in the protection of children from physical or sexual harm by ensuring that people who work with, or care for, children have their suitability to do so checked by a government body.

Victorians have demonstrated their commitment to protecting children with a high number of applications for working-with-children checks. Since the commencement of the scheme, over 100 000 applications have been received. It is notable

¹ The Victorian response to the *Review of Recommendations of the Royal Commission Into Aboriginal Deaths in Custody Report*, Section 3 Statistical information on Indigenous Over Representation in the Criminal Justice System 2005 notes that:

- In 2002/03 the highest alleged offences for **both Indigenous and non Indigenous persons** apprehended by police was Assault¹.

- The next highest offence category for Indigenous persons was 'Justice Procedures (includes breaches of Court Orders) and Property damage offences.
- This data was further analysed and showed that three in five alleged Indigenous offenders (62 per cent) who were apprehended for assault were specifically charged for 'Intentionally / Recklessly Cause Injury', 'Unlawful Assault' (21 per cent) and 'Assault Police' (18 per cent)

