SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC.) INC

TO THE DEPARTMENT OF JUSTICE'S PROPOSED WORKING WITH CHILDREN BILL – DISCUSSION PAPER AND EXPOSURE DRAFT

February 2005

This submission was prepared by members of the Children and Youth Issues Working Group in consultation with individual member centres including Youthlaw, Fitzroy Legal Service and Jobwatch, on behalf of the Federation of Community Legal Centres (Vic).

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The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLC's) assist in excess of 60,000 people throughout Victoria each year by providing provide free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use Community Legal Centres are on low incomes, with most receiving some form of pension or benefit or in casual or low paid employment. Community Legal Centres see a considerable number of people who have criminal records, who are involved in criminal proceedings and who may be adversely affected by this proposal. Community Legal Centres also see children and young people who this proposal is intended to protect.

Introduction

The Federation supports the establishment of a Working with Children Check that meets the policy objectives stated, namely natural justice, privacy, encouraging volunteering and protecting children. The Federation believes that a Working with Children Check should also not unfairly discriminate against people with criminal records who are seeking employment or already in employment.

The Federation will comment on some specific aspects of the proposal as well as outlining further initiatives that we believe need to be implemented in conjunction with this proposal, to ensure that the policy imperatives are met.

The Specifics of the Proposal

1. What is 'child-related work'?

The Federation is concerned with the breadth of s.9(2)(h) "clubs, associations or movements (including of a cultural, recreational or sporting nature) with significant child membership or involvement". This category appears all-encompassing of membership based organisations that seek to involve children and young people. This may have the unintended consequence of causing confusion, unnecessary applications and prosecutions. This could be solved by narrowing the scope of the section or including in the legislation, some means of seeking clarification or a declaration that a particular organisation is required to comply with the check or not.

For example, Youthlaw, Victoria's state-wide community legal centre for young people is an incorporated "association" with a membership base that includes the community that they work with, namely children and young people under 25. The Centre practises community development principles and has as one of its strategic objectives "to promote opportunities for participation by children and young people in Youthlaw's work and strategic direction setting"[1]. Theoretically, Youthlaw's work could be classed as "child-related", depending on the definitions of "significant", although the provision of legal services does not fall under any of the types of industries that the scheme seeks to cover. For many organisations working with children and young people that follow best practise principles and seek to involve them in the organisation, the same could apply.

The Federation is also concerned that TAFE colleges and institutions have been excluded from the definition of "educational institutions for children" given in 9(2)(d). If the intention of the check is to protect children under 18, it is anomalous that TAFE is not included.

2. Who should be exempted from the Working with Children Check?

The Federation supports the broad exemption for members of a child's extended family. We suggest that steps be taken, if they have not already been done, to ensure that this definition is broad enough to cover indigenous and diverse cultural understandings of "extended family".

[1] Youthlaw Strategic Plan for 2003-2005, Objective 4.

3. Application Process

Payment of a prescribed fee

Volunteers make a substantial and significant contribution to the work of Community Legal Centres across legal, para-legal, administrative, policy and community development roles. Whilst the work of community legal centres is not included in the proposed definition of “child-related work”, the Federation supports a significantly reduced or waived fee for volunteers. The work of volunteers is invaluable to our sector and also provides a unique opportunity for skill development and learning for our volunteers. Any fee for this application would reduce the ability of some people to volunteer, particularly students and people in receipt of government benefits.

Applications and decision-making

The Federation strongly believes that in considering all categories of applications, **only criminal matters in which a court has recorded a conviction, should be taken into account**. The criminal court has already made a determination that the offence is one that is not serious enough to warrant a conviction being recorded. In making this decision, a court has taken into account matters that are not available to the “checker”. A court has access to all of the evidence and information about the offence, reasons for offending, any mitigating circumstances and the impact upon the victim. The court is best placed to make a decision about the future impact that a criminal record should have on a person’s future. Moreover the dictionary meaning of a “criminal record” is as "a written history detailing a person's past criminal **convictions**"[2]. As the proposed application process stands, there is no distinction between a conviction and finding of guilt by a Court – this should be rectified.

The Federation strongly believes that in considering all categories of applications, **pending charges should not be taken into account**. This breaches the fundamental principle of our criminal justice system, that a person is innocent until proven guilty by a Court. Employers should be held responsible to ensure appropriate policies and procedures are in place that protect children from harm inflicted by employees generally, regardless of whether they have been previously convicted by a Court of a serious sex offence.

Category 1 Applications – Mandatory refusal of an assessment notice

The Federation does not support the checker having no discretion in the decision to issue a negative assessment for applications that fall into Category 1. The checker should make a decision in each case about whether the person poses a risk to children. The applicant should be given the opportunity to present submissions including evidence of successful rehabilitation such as a lengthy period without reoffending. The checker should have to balance the effect upon the applicant of issuing a negative notice with the risk posed to children of not doing so.

[2] Butterworths Legal Dictionary

Category 2 Applications – Discretionary refusal of an assessment notice
The Federation supports the focus of the Working with Children Check on sexual and serious violent offences against children. We do not believe that the check should be expanded to cover other criminal offences. The Federation does not support the inclusion of offences under the *Drugs Poisons and Controlled Substances Act* 1981 in the working with children check (section 13(1)(b)).

The Federation supports the Working with Children Check being limited at this stage to offences committed under Victorian Criminal Law.

4. Issue of a Notice
As outlined above, the Federation does not support the checker having no discretion in the decision to issue a negative assessment for applications that fall into Category 1. This is particularly the case given that the negative notice is intended to last for life. Whilst an applicant may appeal against the issue of a negative notice, where VCAT stands in the shoes of the original decision maker, and therefore has no discretion, an appeal is fruitless and does not afford an applicant natural justice. At the very least, an appellant decision-maker should have the discretion to take into account a variety of other matters in addition to the offence that a person has previously committed, before deciding that a negative assessment is necessary to protect children.

An interim negative notice or negative notice issued to a person or agency who has employed an applicant in child-related work should be accompanied by guidelines for employers about rights and responsibilities in this area. Employers should be required to take all reasonable steps to redeploy existing staff to non-child related work within an organisation. Where this is not possible, a redundancy should be offered – this should not be a ground for lawful dismissal. The guidelines expected to be prepared by the Human Rights and Equal Opportunity Commission as a result of their current inquiry into discrimination on the basis of criminal record may provide a useful tool for employers in the regard.

An interim negative notice or negative notice issued to an applicant should be accompanied by information about appeal rights, rights against unfair dismissal and options for seeking further information and assistance, such as community legal centres.

5. Keeping an Assessment Notice current
The Federation supports proposals that keep assessment notices current, so as to reduce the administrative costs and inconvenience for applicants moving employers. However, if this proposal is implemented, and the original decision will stand for five years, then the need for the original decision to be a fair, just and correct one is far greater.

6. What offences will exist?

The offence of applying for child-related work, if one holds a negative notice, should be sufficiently narrow to exclude the situation of a person who does not engage in "child related work" but who works in an organisation that conducts "child related work" as part of its business. The policies and procedures of the organisation should give an employer the discretion to engage an applicant who has been issued with a negative notice in "non-child related work".

7. Recognition of existing employers' policies

Organisations need to be supported and adequately resourced to ensure that, in addition to the Working with Children Check, policies and procedures are in place to protect children and young people.

Further thought needs to be given to how a police check conducted by an employer may be combined with a Working with Children Check so that double fees need not be borne by the applicant. This is particularly important given the significant increase in police record checks in Victoria that already places additional burdens on employers and job applicants[3]. For example, an applicant for position as Manager of a child-care centre, may be required by an employer to agree to a criminal record check in addition to the Working with Children Check, to assess suitability to manage finances.

8. Recognition of Professional Disciplinary Proceedings

The Federation believes that if professional disciplinary proceedings are to be included, that principles of natural justice need to be strictly adhered to, including those outlined on page 35.

[3] Statistics obtained by Fitzroy Legal Service from Victoria Police under Freedom of Information laws in December 2004 reveal a significant increase in checks from 3,459 in 1992/93 to 221,236 in 2003/04.

Additional measures required

To ensure that people with criminal records are not unfairly discriminated against in an existing or future place of employment by the Working with Children Check, the Federation believes that a number of additional initiatives need to be introduced as follows:

1. The *Equal Opportunity Act* should be amended to prohibit discrimination on the basis of a criminal record. For applicants who are refused a job or are terminated as the result of a negative notice, there are no viable options for seeking reinstatement under state law. Whilst Federal discrimination legislation provides the opportunity for discrimination on the basis of a criminal record to be established, the Human Rights and Equal Opportunity Commission has no coercive powers to enforce decisions against employers.

   People facing discrimination on the basis of criminal record should have access to adequate means of redress. The *Equal Opportunity Act* should be amended to ensure that equal opportunity and anti-discrimination laws provide adequate remedies including compensation and reinstatement.

   Resources should be provided through both the relevant statutory authorities as well as to services such as community legal centres, which will be called upon to provide community education programs for both employers and people with criminal records, and to advise and assist with individuals complaints.

2. A spent convictions scheme should be enacted in Victoria. Such a scheme could exempt serious sexual offences but would reduce the stigma attached to a criminal record.

   Whilst we understand that the Standing Committee of Attorneys General is considering the development of a national uniform model for a spent conviction scheme, the Federation does not believe that the development of a Victorian scheme should be contingent upon agreement by all States and Territories to a national uniform scheme. This is particularly the case given that Victoria is one of only two states in Australia without such a scheme.

3. The Federation continues to advocate for the establishment of a Victorian Children and Young Peoples Commission, according to the model

outlined in *Are You Listening to Us?* [4]. The establishment of a Child Safety Commissioner and a Working with Children Check, whilst providing some protection for children and young from a particular type of harm, does not obviate the need for a commission. A commission would ensure the rights and well being of children and young people are protected and promoted generally and would look at wider social concerns and the impact of social policy and social justice on children, young people and families.

4. Additional measures that protect children should continue to be developed and implemented by Government. Such initiatives could include but should not be limited to education and support for children and young people about sex offending and education and prevention initiatives in the broader community.

Case study

A 21 year old male was working for a government department for less than six months. An investigator within that department seized adult and child pornography from the man's computer. The young male admitted to downloading movies and still photographs from the internet and his employment was terminated immediately. He stated that he downloaded the material in bulk and therefore was unaware that some of it featured boys under the age of 16. The man has been charged with possession and distribution of child pornography. He has no prior criminal history. If he is found guilty of the possession offence, he may be placed in the Victorian Sex Offenders' Register.[5]

Under the proposed Working with Children Check scheme, if this young man is found guilty of the possession offence, he falls into category 1, and would be unable to apply for child-related work for the rest of his life, some 40 working years. This is despite the fact that his risk to children has not been evaluated at any stage. As it currently stands, there is no adequate appeal mechanism for this decision. This case study clearly illustrates the inflexibility and unfairness of the scheme as proposed.

[4] *Are You Listening to Us? – The case for a Victorian Children and Young People's Commission*, published by the Youth Affairs Council of Victoria, June 2001, and available from **www.yacvic.org.au**.

[5] The case study has been provided by Whittlesea Community Legal Centre with the permission of their client.