

Working with Vulnerable People
(Background Checking) Bill (ACT)
...and associated documents

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Preamble...why this issue matters so broadly

CLA is a national organisation, founded and based in the ACT, which works to safeguard the liberties and rights of individuals and actively monitors the use of power by State, Territory and Federal Governments. As a national organisation, we take an interest in comparative matters in States and the Territories, and keep watch on what is happening internationally. This wider perspective which CLA offers may add usefully to the ACT Legislative Assembly determinations before the proposed new vetting regime is introduced in the Territory.

Often, CLA is asked to comment on legislation which, while important, will have minimum impact on individuals in the community: for example, draconian anti-terror laws may affect, say, 100 people directly in Australia over a decade. While important in principle, the reach is limited.

However, the proposed vetting legislation is almost the reverse: it will have enormously wide-reaching impact on just about all businesses, government departments, community groups, churches, voluntary associations, sporting bodies and the like throughout the ACT. It is not an exaggeration to say this bill will possibly affect 100,000 individuals in the ACT in coming years.

Because it will have such broad and deep impact in the community, CLA believes it should not be rushed, and global lessons should be considered before a bill and its associated regime is introduced in the ACT.

Introduction

Civil Liberties Australia (CLA) welcomes the chance to make a submission on the *Working with Vulnerable People (Background Checking) Bill (WVP Bill)*.

We understand that comments have been invited on Risk Assessment Guidelines and Application Form, Risk Management Assessment Tool, Government Amendments to the Bill, and the Regulations plus the Information Book. As a volunteer organisation, which receives no government funding, has no full-time employees and relies on the “spare” time, energy and expertise of members, we regret we have been unable to analyse the proposed regime in great detail, line by line.

Given the wide-ranging nature of the documents and proposals issued by the government, our comments will be broadly based. However, they are founded on clear, concise principles.

CLA acknowledges the importance of protecting vulnerable people. However, we believe the WVP Bill and its accompanying documents, in its current form, has not effectively balanced the need to protect the vulnerable members of the community with the need to respect the human rights and freedom of each individual member of the community, and the implied ‘freedom’ of associations, sporting bodies and the like to conduct their affairs without unnecessary and excessive government interference.

In this regard, CLA is particularly concerned that the ACT plans to implement a system largely identical to one that has been wound back in the UK because it has been found – after years of operating in practice – to be draconian and unworkable there. Because of the similarities of law, lifestyle and community in the UK and the ACT, CLA submits that the experience in the UK should be a beacon for awareness of avoiding mistakes here.

We are also deeply concerned by the degree to which the proposed system departs from best practice risk assessment and personal vetting principles.

This submission will address these chief concerns:

- The ability to gain access to personal information of volunteers and workers relating to past convictions and non-conviction information
- The lack independent review in the ‘negative notice’ process
- The risk assessment process
- The damage to the community sector by excluding particular volunteers and workers
- The chilling effect excessive and oppressive regulation will have on membership and volunteers, both existing and potential
- The lessons learned in the UK, which have caused the British Parliament to wind back – rewrite, reduce the severity of – virtually identical legislation to what is being proposed in the ACT.

Concerns:

Access to personal information

Currently, the following sections of the *WVP Bill* combine to undermine the human rights and rule of law principles outlined above:

- Sections 19, 22, 24 and 49
 - These provisions allow for the criminal record of individuals to be considered when assessing whether they can work with vulnerable people.
 - There is no link provided between the relevance of the criminal record of people who have served their time, and the suitability of persons working with vulnerable people. Individuals who have already been punished for their offences should not be discriminated against or excluded from meaningful membership of and participation in the community. Only relevant convictions should be part of the decision-making process.
- Sections 16(2), 23 and 28
 - These provisions require persons applying for registration under the *WVP Bill* to reveal non-conviction information.
 - The definition is extensive and includes spent convictions, acquittals, etc as well as statements individuals made to police about these matters.
 - This is an unjustifiable invasion into individual liberty and privacy. The state should not pry where there is no reason to do so. The provisions undermine the supremacy of the courts by imposing their own “penalties” for non-offenders: in this respect, there is an argument that they comprise a judicial function clothed in an administrative procedure.
 - The provisions undermine the rule of law, as they allow for a form of punishment (negative notice) to be issued where a person has no conviction.

Review of negative notices

Under the *WVP Bill*, the Commissioner can issue a negative notice to a person seeking registration to work in a regulation industry. Section 20 states that a person cannot apply for registration for three years after a negative notice is issued.

If a person is issued with a negative notice, the only recourse available to them in the *WVP Bill* is to request the Commissioner to reconsider the decision.¹ This limited review is only available where the person believes the basis for the negative assessment was incorrect or incomplete information.

¹ s 33, *WVP Bill 2011 (ACT)*.

Considering the substantial impact such a determination could have on an individual worker or volunteer, CLA strongly urges the Legislative Assembly to consider expressly acknowledging the right of judicial review of the decision of the Commissioner. This right should include generally accepted grounds of judicial review including relevant/ irrelevant considerations, jurisdictional error, natural justice and unreasonableness.²

Not only may procedural fairness be lacking, but there may be major concerns raised – and possibly legal action taken – over restraint of trade issues.

The risk assessment process

CLA depends on volunteers, and receives no income from any government. However, our dedicated members continue to make their expertise available. On the WVP Bill, CLA has sought the opinion of a CLA member who is senior security consultant to federal and state governments. Our member has indicated strongly that the provisions of the *WVP Bill* are unjustifiably invasive as they use an inappropriate risk assessment scheme and tools. He said:

As the ACT Government seems keen on quoting, or more accurately misusing, risk assessment to justify the intrusive background checking registration system they propose, can they indicate the actual rate of persons with significant or disqualifying criminal convictions, or even the level of complaints about unsuitability of employed persons in the sectors they wish to regulate?

I am unsure if this detail is available in the committee records, but if the 'risk treatment' of devising these intrusive background checks is not based on evidence then it smacks of a moral panic, misunderstanding and incorrectly applying risk management principles by 'shoehorning' the personnel security issue of people with criminal offences into a one-size-fits-all 'offences' matrix commonly used for organisations.

The proposed background checking concentrates on criminal convictions (even spent ones, which are only usually available on candidates for the highest national security clearance levels) and charges, while paying scant attention to common law rights, or the 'whole person' principle which is a central tenet of effective personnel security vetting. A person may have a criminal conviction but be suited to the position, or have no conviction but be quite unsuited, by reason of attitudes, values and behaviour.

The background checking approach proposed misuses the ISO31000 risk analysis process by trying to apply it to all personnel vetting cases, omitting or neglecting the individual 'whole person' principle and the relevant standard (AS4811-2006 Employment Screening; the

² See e.g. s 5, *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Commonwealth Personnel Security Policy and Guidelines and ASIS International pre employment guideline are also relevant accepted professional references). The proposal also assumes that criminal offences in certain categories will always represent absolute risk, which reflects 'zero risk bias' and a lack of understanding of the value or otherwise of personnel security vetting.

The 'Risk Management Assessment Tool' confuses potential with actual harm ('risk events'), and conflates organisational risk management practices with the conduct of personnel within the organisation. The 'risk treatments' for persons with criminal convictions are inflexible, which is inconsistent with the need to impartially evaluate each candidate with specific regard to their actual and reasonably expected attitudes, values and behaviour. Demonstrated qualities of maturity, trustworthiness, tolerance, honesty, loyalty, and willingness to comply with workplace requirements are better indicators of suitability for registration, employment or access than the presence or otherwise of a criminal conviction or charge.

The guidelines do not prominently state that assessing officers should have formal qualifications or experience in personnel security investigations/background checking, which is inconsistent with sound professional practice. The proven effective method of forming a conclusion about the suitability of a candidate for access to highly sensitive areas, assets or people is interview by a qualified personnel security practitioner, following investigation into whether the subject has provided truthful background information.

The personal information sought in the application form is needlessly intrusive and of dubious effectiveness in informing conclusions upon the suitability of the candidate. Given the highly personally sensitive nature of the information sought, the security classification and handling instructions should be prominent, as required by ACT Government policy.

The documentation published for community consultation fails to present cohesive risk based evidence that the personnel security vetting approach proposed is either required, because of the likelihood and consequences of an event causing harm due to a lack of background checking, or will be an effective risk treatment, since it is not based on professionally accepted personnel security standards.

The entire approach proposed by the ACT Government should at least be closely reviewed for compliance with the relevant professional standards and protocols applying to effective personnel security vetting.

CLA says that the question of whether officers will be formally qualified to conduct the investigations envisaged by the bill is extremely pertinent: absence or dearth of qualifications, consistent with professional practice, may leave the ACT open to litigation as the proposed regime may have considerable financial impact on individuals and organizations,

Impact on the community sector

We would like to note the importance of avoiding discrimination against rehabilitated members of the community.³ Many volunteers and workers provide a unique insight into working with vulnerable people through sharing their own experiences. This includes people who have experienced substance abuse/mental health issues and in some cases, committed criminal offences. These people have been successfully rehabilitated into the community and provide valuable insights and support for vulnerable people. We would urge the assembly to bear this in mind when reviewing this Bill.

In fact, there are a number of areas of volunteering in the community where previous exposure to relevant problems, and personal reformation, is a distinct asset (drug and alcohol addiction are the best-known examples). The regime proposed would appear to prevent the community benefiting from such volunteers. This will have impact on future sufferers, but may also impinge on the continuing rehabilitation of the current volunteers who may not get clearance to continue doing what is also helping them personally.

We are all aware of win-win situations but, for current volunteers like these, excluded from using their volunteering for their own rehabilitation also, the new regime will be lose-lose.

UK experience...real, current lessons which ACT could benefit from

CLA understands the need to protect vulnerable people, and we appreciate that there has been an extensive consultation process leading to this stage of development of the vetting regime in the ACT. However, we were not able to participate in that earlier consultation (please note our comments about funding, volunteers, and spare time/expertise/resources).

Now, with the benefit of two years of hindsight, we're concerned that the consultation was undertaken on a false foundation, which removes much of its worth and relevance. To a large extent, the vetting laws and regime in the ACT which was proposed in 2009 (and in 2010 and 2011) mirrored that in existence in the UK when the process started in 2009.

The background in the ACT, as we understand it, is:

- lengthy discussion paper was released for public consultation by

³ See e.g. s 8(3), *Human Rights Act 2004* (ACT).

Minister Gallagher in August 2009

- submissions published on line
- consultation report published in February 2010
- September 2010 new Minister Burch hosts community roundtable. Roundtable discussion published; broad agreement to the bill.

Prima facie therefore the bill is the product of extensive community consultation...but it was discussion by a self-selected group based on now-discredited legislation 'mirrored' from the UK. We note that the majority of roundtable participants, apart from officials, were primarily people and organisations working with vulnerable people, so their perspective would presumably have been protection of these people.

The one exception in the earlier consultation was the Australian Services Union, whose representative raised concerns about use of non-conviction information. The Human Rights Commission raised privacy issues.

Because groups such as CLA and most of the legal profession did not participate, the roundtable discussions do not reflect their views. Even more relevantly, because ACT consultations since 2009 ended in September 2010, they do not represent developments in the UK in late-2010 and 2011. The ACT proposals were firmly based on what had occurred in the UK under the *The Safeguarding Vulnerable Groups Act 2006* (UK). But in the UK, the very vetting laws on which the ACT's proposed regime is based have been discredited. This news item from the (London) *Daily Telegraph* of 11 February 2011 sums up how the UK scheme is being altered and improved, and why:

News item: Radical shake-up of Criminal Record Regime and Vetting and Barring Scheme (VBS) 11 February 2011

More than nine million people working or volunteering with children and vulnerable adults will no longer need to register and be monitored by the state following an overhaul of the checking regime.

The government today unveiled plans to scale back the VBS and Criminal Records Regime to common sense levels while ensuring vulnerable groups are appropriately protected.

The proposals, which come after a comprehensive review of the existing system (underline added by CLA), include:

- the merging of the Criminal Records Bureau (CRB) and Independent Safeguarding Authority (ISA) to form a streamlined new body providing a proportionate barring and criminal records checking service;
- a large reduction of the number of positions requiring checks to just those working most closely and regularly with children and vulnerable adults;
- portability of criminal records checks between jobs to cut down on needless bureaucracy;
- an end to a requirement for those working or volunteering with vulnerable groups to register with the VBS and then be continuously monitored by the ISA; and

- stopping employers who knowingly request criminal records checks on individuals who are not entitled to them.

The government will also keep the scope of CRB checks under review to ensure that they are not disincentivising people putting themselves forward for volunteering.

Deputy Prime Minister Nick Clegg said:

“The Freedoms Bill will protect millions of people from state intrusion in their private lives and mark a return to common sense government. It delivers on our commitment to restore hard-won British liberties with sweeping reforms that will end the unnecessary scrutiny of law-abiding individuals.”

“We inherited a messy criminal records regime that developed piecemeal and defied common sense. Our reviews concluded that the systems were not proportionate and needed to be less bureaucratic. They will now be scaled back to sensible levels whilst at the same time protecting vulnerable people.”

Home Office Minister Lynne Featherstone said:

“I came into this department and was immediately struck by the need to look again at the VBS and Criminal Records Regime.

“I feel the changes that are now being made strike the balance between our own personal liberties whilst ensuring vulnerable people are protected.”

Children’s Minister Tim Loughton said:

“Protecting children and keeping them safe remains our top priority, but it’s also important that well meaning adults are not put off working or volunteering with children.

“The new system will be less bureaucratic and less intimidating. It will empower organisations to ask the right questions and make all the appropriate pre-employment checks, and encourage everyone to be vigilant. This is a common sense and proportionate approach which will ensure that children are properly protected without driving a wedge between them and adults.”

Care Services Minister Paul Burstow said:

“Our plans will create a thorough system of checks that won’t over-burden people with bureaucracy. Vulnerable people and their families will be able to have confidence in the new safeguards, while the doctors, nurses, social care workers and many others who need to be checked will have a more user-friendly system.

“I look forward to working with other departments in putting the plans into action. Together we will create a better way of safeguarding some of society’s most vulnerable people.”

The proposed changes will be introduced gradually to ensure a seamless transition.

The necessary legislative changes will be included in the Protection of Freedoms Bill. Subject to parliamentary approval, the Bill is expected to become law by early 2012. The new regime would be introduced as soon as possible after this.

Registration for the first wave of workers and volunteers with the VBS was halted on 15 June pending the remodelling of the system back to common sense levels.

The VBS report makes a number of recommendations including a new streamlined body to provide a national barring system and criminal records disclosure service. The new scheme will also capitalise on technological developments to provide an online checking function for employers and applicants whilst allowing checks to be transferred easily from one company to another.

The review of the criminal records regime was carried out by the independent adviser on criminality information, Sunita Mason (emphasis added by CLA). A number of her recommendations are reflected in the Protection of Freedoms Bill.

Mrs Mason is now continuing with the second phase of her review, which deals with broader issues relating to the handling of criminal records (emphasis added by CLA). The government will make a full response to the whole review once this work is complete.

The review sought views from a range of partners and members of the public via the 'Your Freedom' website which called for portability of CRB checks from one job to another. This is one of the proposals that will be introduced under the new scheme.

The latest information can be found at

<http://www.homeoffice.gov.uk/crime/vetting-barring-scheme/>

The above UK Government website contains this statement:

What is the vetting and barring scheme?

The VBS had been created to help safeguard children and vulnerable adults, following the Bichard inquiry and was designed to check the records of those who wanted to work with vulnerable groups.

Many thought the VBS, while well intentioned, was a disproportionate response to the risk posed by a small minority of people who wished to commit harm to vulnerable people. In June 2010, ministers announced that the planned implementation of the VBS was to be halted, pending a thorough review.

The Safeguarding Vulnerable Groups Act 2006 sets out a framework for the scope and operation of the vetting and barring scheme. New primary

legislation will amend this to scale back the scheme, in particular, through the abolition of the registration and monitoring requirements and the re-definition of the range of posts to which barring arrangements apply.

A summary and further links to what is occurring in the UK can be found here:

<http://www.telegraph.co.uk/news/uknews/crime/8317150/Vetting-system-overhaul-ridiculous-CRB-checks.html>

CLA believes it is highly likely that the UK experience would be replicated here, if the currently proposed law/regime was enacted in the ACT. While slightly different, examples of the too extensive reach of a too excessive law would be similar to these from the UK, as below:

Flower arrangers

Volunteers flower arrangers at the 900-year-old Gloucester Cathedral threatened to quit after they were forced to undergo Criminal Records Bureau checks.

It is believed the checks were ordered because their flower arranging could put them into contact with young members of the choir.

Hospitals

David Jones, paediatric orthopaedic surgeon at Great Ormond Street Hospital, was asked to cover a colleague's sickness leave in Leeds over December and January last year but the CRB check had taken so long all the clinics and operations he was due to do were delayed. The Royal College of Surgeons has called for surgeons to be issued with 'passports' so their check from one NHS organisation is valid in another.

Schools

Parents at Sycamore Lanes Primary School in Warrington were told in December 2009 that they would not be allowed into the premises to see their children unless they paid the £46 (\$70 Aust) cost of an Enhanced CRB check, to find out what convictions or allegations police have recorded against them, and unless they carry photo ID.

Scouts

Scout leaders feared Jamborees could be cancelled in Britain because of the new anti-paedophile vetting rules. Organising criminal record information and other checks on thousands of foreign Scout leaders was "just not possible". Brownie Volunteers in Derby were also targeted.

Bell ringers

In 2004, the Church of England infuriated its 40,000 bell-ringers by demanding they undergo criminal record checks every three years amid child protection fears.

– from an article by [Andrew Hough](#), 7:00AM GMT 11 Feb 2011 The Telegraph (London, UK)

Recommendations:

1. CLA recommends that the Legislative Assembly amend the *WVP Bill* in accordance with following fundamental and broad, rule-of-law principles:
 - No-one may be punished a second or further time for an offence for which he or she has been convicted (and served out his/her time) or acquitted, in accordance with the law (save for specified active pedophile-type offences).⁴
 - Every person has the right to be considered innocent until proven guilty.⁵
 - The burden of proof in any criminal or quasi-criminal accusation should fall on the state in the first instance (that is, strict liability legislation is only appropriate where a desired end cannot be achieved by any other means).
2. CLA recommends that the lessons of the UK be analysed, in particular the reports of Mrs Sunita Mason, and the overall review documents which include those reports. The analysis should concentrate on what aspects of the UK legislation mirrored in Australia is now to be deleted or altered in the UK.
3. CLA recommends that, once the above is done, a new round of consultation in the ACT begins based on what will be improved, more practical legislation similar to that being introduced in the UK in late-2011 and 2012.

Conclusion

CLA believes the ACT has a fortuitous opportunity, with the expenditure of merely a little more time and effort, to learn important and significant lessons from five years of practical operation in the UK of virtually identical legislation. Similar legislation in the UK, now planned to be introduced in the ACT, has been abandoned as draconian, excessive, “bureaucratic” and “intimidating”⁶.

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⁴ s 24, *Human Rights Act 2004* (ACT).

⁵ s 22(1), *Human Rights Act 2004* (ACT).

⁶ UK Children’s Minister Tim Loughton, quoted above