

# **FAMILY SERVICES AMENDMENT BILL 1999**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **OBJECTIVES OF THE LEGISLATION**

The objective of the *Family Services Amendment Bill 1999* is to strengthen the criminal history checks applicable to employees of, and persons being considered for engagement in any capacity, within the Department of Families, Youth and Community Care (FYCC)

#### **REASONS FOR THE BILL**

Current public and media discussion around the issue of child abuse and paedophilia, together with the ongoing Forde Inquiry into the Abuse of Children within Government and Non-Government Institutions, reflects ongoing community awareness of issues surrounding child abuse and the care of children by the State.

Similar public and media discussion has arisen around the issue of abuse of persons with an intellectual disability within government and non-government institutions. This concern was highlighted in the findings of His Honour Mr Justice Stewart arising from the Criminal Justice Commission Inquiry into the Basil Stafford Centre.

Children in care and people with intellectual and other disabilities should not be subject to abuse by the criminal activities of staff who are employed to protect them. The Government has a duty of care to ensure that this does not occur.

The Bill will enhance the ability of FYCC to fulfil its duty of care to children in its care and to adult persons with an intellectual disability receiving residential care services from FYCC. This will be achieved through strengthening the ability of FYCC to access information held by the Queensland Police Service (QPS) on employees or potential employees of

FYCC in relation to charges, background of charges, and current investigations relating to serious offences.

Pursuant to the *Public Service Regulation 1997*, criminal history checks are mandatory for all persons being considered for employment in any capacity within FYCC. Offences which are normally sealed by the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1996* must also be disclosed by virtue of an exemption to that Act.

However, there are no provisions providing FYCC with access to information in relation to charges or current investigations of serious offences. Nor does any legislative mechanism exist for the Department to confirm or correct information received regarding a current employee concerning charges brought against them or their criminal history. The Department has no legislative authority to confirm with Queensland Police Service whether a prospective employee or a current employee is under investigation for a serious offence nor to obtain necessary information concerning the complaint.

On a number of occasions, FYCC has been informed that potential employees have been charged with serious offences, but this information has been unable to be legally provided to FYCC.

It is considered that the provision of this information is justified in the context of making decisions about whether vulnerable clients of FYCC such as children in care and people with intellectual disabilities are likely to be safe with a proposed employee and about the standards of care which that person could provide. There are a number of circumstances in which the presence of certain charges (even without convictions) would be a relevant factor in making employment decisions. This is particularly relevant in relation to sexual offences against children where convictions can be difficult to obtain, eg because of the need to rely upon child witnesses.

For example, a person may have been charged with sexual offences against children where the evidence is compelling but police were unable to obtain a conviction because the court considered the children too young to give reliable evidence, or where a child witness was too young to withstand the rigours of an adversarial trial. This is an example of a circumstance where relevant information about charges rather than convictions will be important in making decisions about the employment of staff working with vulnerable people.

The Bill amends the *Family Services Act 1987* to correct these deficiencies to ensure that the Chief Executive of the Department of Families, Youth and Community Care has all the relevant information required to assess a person's suitability to be, or continue to be, engaged by the Department. The Bill will enable the Department to carry out its duty of care to children in its care and people with intellectual and other disabilities receiving Departmental services by providing a more comprehensive staff screening process.

The Bill will also ensure that the standard of probity required of the Department of Families, Youth and Community Care staff is consistent with that currently required of staff employed within other sectors, such as the Education, Gaming, Child Care, and Public Transport sectors.

For the first time in Queensland, however, these type of powers will be supplemented by comprehensive new safeguards, enshrined in the legislation, to ensure that they are not used unfairly or capriciously. These safeguards include requirements that certain factors be considered, the provision of natural justice, confidentiality provisions, and a requirement that comprehensive guidelines, consistent with the legislation, be developed, publicised, and made available on request. It is considered that the inclusion of these new safeguards goes a significant way to ameliorating concerns about the impact of these new provisions on individuals.

## **ESTIMATED COST FOR GOVERNMENT IMPLEMENTATION**

The Bill will add to the administrative workload of the Department of Families, Youth and Community Care in relation to the more extensive amount of information that may be required to be sought by the Department concerning a person "engaged by the department," as well as the implementation of the guidelines required by Part 4 of the Bill, particularly in relation to the management of criminal histories and other information obtained by the Chief Executive of the Department about persons "engaged by the department".

The Bill will also add to the administrative burden of the Queensland Police Service in supplying information to the Department of Families, Youth and Community Care.

These additional costs, which will be met within current budget allocations, are considered justified in terms of the policy objectives sought by the Bill.

## **RESULTS OF CONSULTATION**

All relevant government departments have indicated their support for the proposed Bill. Although there has been no community consultation in relation to this Bill extensive consultation occurred in relation to similar provisions contained within the *Child Protection Bill 1999* relating to criminal history checks on approved care providers. In the context of that Bill there was strong support expressed for provisions that would increase the safety and security of children in care through increased probity. Public reaction to media announcements concerning the development of this Bill has been largely positive, although some concerns have been raised by civil libertarians about the impact of this Bill upon individuals.

## **CONSISTENCY WITH FUNDAMENTAL LEGISLATIVE PRINCIPLES**

The Bill may breach fundamental legislative principles of the *Legislative Standards Act 1992* in that potentially unproven or erroneous allegations or information concerning a person's criminal activities may be provided to the Department and potentially used in a way which is adverse to a person's interests. This must be must be balanced against the paramount consideration of protection of vulnerable departmental clients. These issues, together with discussion of the recognised difficulty in obtaining a conviction where child witnesses are involved, is discussed in detail above.

Given the sensitive nature of the work which occurs within the Department, and the evident and ongoing community interest in issues of child protection and the rights of people with disabilities, it is considered appropriate to implement these amendments, subject to appropriate safeguards being put in place. For this reason, the Bill enshrines comprehensive new safeguards which will minimise the impact of these new powers on individuals.

The Bill specifically provides that the information obtained under Part 4 of the Bill be used only for the purpose of determining a person's suitability for continued or prospective engagement by the department, and outlines those factors to be taken into account in assessing that information.

In addition it provides that prior to using any information obtained from the Commissioner of Police, that information must be disclosed to the person about whom the information is obtained, and a reasonable opportunity afforded to them to make representations about that information.

The Bill also incorporates a confidentiality provision to prohibit and penalise inappropriate disclosure of information gained under Part 4.

In addition the Bill requires that guidelines be produced concerning the management and use of the information obtained under Part 4, and requires that these guidelines be made known and made available to persons affected by the duty to disclose. The guidelines must ensure that the person about whom the information is obtained is afforded natural justice; that only relevant information is used; and that decisions based on the information are made consistently.

In relation to the proposal that information be provided to the Department concerning the investigation of serious offences, it should be noted that the Bill prohibits the Commissioner of Police from disclosing information about an investigation if a completed investigation has not resulted in a charge (and is reasonably unlikely to) or if it is reasonably suspected that an ongoing investigation is unlikely to lead to a charge. This provides a safeguard against the provision of possibly erroneous allegations or information concerning a person's alleged criminal activities.

## **NOTES ON CLAUSES**

### **PART 1—PRELIMINARY**

*Clause 1* states that the short title of the Act is to be the *Family Services Amendment Act 1999*.

*Clause 2* states that the Act will commence on a date to be fixed by proclamation.

## **PART 2—AMENDMENT OF FAMILY SERVICES ACT 1987**

*Clause 3* sets out the purpose of Part 2.

*Clause 4* amends Section 4 (interpretation) of the *Family Services Act 1987* to:

- insert a new definition of “approved form” which is a form approved by the Chief Executive. This relates to the requirements for disclosure referred to in proposed Section 24 being provided in the approved form.
- insert a new definition of ‘charge’ which adopts the broad definition contained in the *Acts Interpretation Act 1954* with an additional reference to a notice to appear under the *Police Powers and Responsibilities Act 1997*. This type of notice is now a very common method of charging employed by the Queensland Police Service.
- insert a new definition of “conviction” which includes a finding of guilt or the acceptance of a plea of guilt, whether or not a conviction is recorded.
- amend the existing definition of “criminal history” to include convictions in Queensland or elsewhere, or charges in Queensland or elsewhere. The definition is intended to be broad thereby compelling employees and prospective employees of the Department to provide complete information to the Chief Executive to enable an assessment to be made of the persons suitability.
- insert a new definition of “engaged by the department” by reference to new Section 18 which provides a broad definition.
- insert a new definition of “sentence” meaning any penalty or imprisonment ordered by a court after a conviction.
- insert a new definition of “serious offence” which corresponds with the definition of serious violent offences in the *Penalties and Sentences Act 1992* and in addition includes an offence under Section 9 of the *Drugs Misuse Act 1986* (Possessing dangerous drugs).

*Clause 5* inserts a new Part 4 into the *Family Services Act 1987* as follows:

The heading sets out the purpose of Part 4.

## **PART 4—CRIMINAL HISTORY OF PERSON ENGAGED BY THE DEPARTMENT**

### *Division 1—Preliminary*

Section 18 (Persons engaged by the department)

Sub Section 1 sets out the purpose of the Part.

Sub Section 2 sets out a definition of “engaged by the department” which is a broad definition encompassing public service employees in the department, honorary officers, agents appointed under a contract, volunteers and students on work experience.

Section 19 (Purpose) sets out the purpose of the Part.

Section 20 (This part applies despite the *Criminal Law (Rehabilitation of Offenders) Act 1986*) states that for the purpose of clarification the *Criminal Law (Rehabilitation of Offenders) Act 1986* has no application to this part.

Section 21 (Chief Executive to advise of duties of disclosure) imposes an obligation on the Chief Executive to advise persons affected by this part of their duties of disclosure, of the Chief Executive’s powers to obtain information in relation to their criminal history and other information held by the Queensland Police Service, and of the availability of guidelines for dealing with such information.

### *Division 2—Disclosure of Criminal History*

Section 22 (Persons seeking to be engaged by the Department must disclose criminal history) imposes an obligation on potential employees of the Department to make disclosure of their criminal history.

Section 23 (Persons engaged by the Department must disclose changes in criminal history) imposes an obligation on persons engaged by the Department to immediately disclose details of changes of their criminal history.

Section 24 (Requirements for disclosure) provides the type of information that has to be disclosed to the Department and that the information must be provided in the approved form.

Section 25 (False misleading or incomplete disclosure or failure to disclose) imposes an obligation on persons not to make disclosures to the Department in relation to their criminal history which they know to be false misleading or incomplete in a material particular or to fail to make required disclosures. A penalty applies for breach of the section. The section does not apply to persons who act in good faith by informing the Chief Executive of how the disclosure is false misleading or incomplete and attempting to provide the correct information.

***Division 3—Chief Executive may obtain information from other entities about criminal history and certain investigations***

Section 26 (Chief Executive may obtain a report from Commissioner of Police Service) relates to persons engaged by the Department or persons who have made disclosures about their criminal history to the Department when seeking to be engaged by the Department. The section gives the Chief Executive the ability to obtain information from the Commissioner of Police about the person's criminal history, of the circumstances of a conviction or charge mentioned in the person's criminal history, and any other information recorded on a central electronic database, about an investigation of a complaint made against the person in relation to the possible commission of a serious offence by the person.

It should be noted that certain exemptions exist in relation to the provision of information by the Commissioner of Police in relation to these investigations, including where the release of information would prejudice an ongoing investigation, or endanger a police officer, informant, or other person. Importantly, the Commissioner of Police must not provide information to FYCC where a completed investigation has not lead and is unlikely to lead to a charge, or where an ongoing investigation is unlikely to

lead to a charge. For example, where the Commissioner of Police believes that an allegation which is being investigated is false or malicious, and unlikely to result in a charge being laid, information concerning the investigation must not be provided to FYCC. This provides a safeguard against the provision of possibly erroneous allegations or information concerning a person's alleged criminal activities.

Section 27 (Prosecuting authority to notify Chief Executive about committal, conviction etc) requires a prosecuting authority (ie. the Police or the Director of Public Prosecutions) to advise the Chief Executive where it is aware that a person engaged by the Department has been charged with, convicted of or has appealed against a conviction for, an indictable offence. The section sets out the particulars that must be provided if the person is committed for trial, if the person is convicted of the offence, or if there is an acquittal, mistrial, entry of a nolle prosequi, or the prosecution process is terminated.

#### ***Division 4—Controls on use of information about criminal history and certain investigations***

Section 28 (Use of information obtained under this part) provides that the information given to the Chief Executive under this part cannot be used for any purpose other than assessing the person's suitability to be, or continue to be, engaged by the Department. The section sets out the matters to which the Chief Executive must have regard in making an assessment.

Section 29 (Person to be advised of information obtained) provides that before information obtained under this part by the Chief Executive from the Commissioner of Police is used to assess a person's suitability for engagement by the department, that information must be disclosed to the person about whom the information relates and an opportunity given to enable them to respond.

Section 30 (Confidentiality) imposes an obligation on departmental employees or selection panel members who have access to criminal history information or other information obtained under this part not to disclose information or give access to a document that has been obtained under this part. A penalty applies for breach of this section. The section provides for limited exceptions to this rule, ie. where disclosure of the information is

required to a particular person for the purposes of selection activities, or assessing suitability to be employed by the Department, or with the person's consent.

Section 31 (Guidelines for dealing with information) imposes an obligation on the Chief Executive to make guidelines consistent with the Bill for dealing with information obtained under the part. The guidelines must ensure natural justice is afforded to persons about whom information is obtained; only relevant information is used in assessing the person's suitability; and that decisions are made consistently. A copy of the guidelines must be provided by the Chief Executive on request.

*Clause 6* inserts a new Section 61 (Approved forms) which enables the Chief Executive to approve forms for use under the Act.

### **PART 3—AMENDMENT OF CRIMINAL LAW (REHABILITATION OF OFFENDERS) ACT 1986**

*Clause 7* sets out the purpose of this part.

*Clause 8* amends Section 9A (Disclosure of particulars in special cases) by deletion of provisions which have similar effect to amendments made by this Bill.