

**Youth Justice (Boot Camp Orders)  
and Other Legislation Amendment  
Bill 2012**

**Report No. 18**

**Legal Affairs and Community Safety Committee**

**November 2012**

## Legal Affairs and Community Safety Committee

<b>Chair</b>	Mr Ray Hopper MP, Member for Condamine
<b>Deputy Chair</b>	Mr Peter Wellington MP, Member for Nicklin
<b>Members</b>	Miss Verity Barton MP, Member for Broadwater Mr Bill Byrne MP, Member for Rockhampton Mr Sean Choat MP, Member for Ipswich West Mr Carl Judge MP, Member for Yeerongpilly Mr Trevor Watts MP, Member for Toowoomba North Mr Jason Woodforth MP, Member for Nudgee
<b>Staff</b>	Mr Brook Hastie, Research Director Mrs Sharon Hunter, Principal Research Officer Mrs Ali Jarro, Principal Research Officer Ms Kelli Longworth, Principal Research Officer Ms Erin Pasley, Principal Research Officer Mrs Gail Easton, Executive Assistant
<b>Technical Scrutiny Secretariat</b>	Ms Renée Easten, Research Director Ms Marissa Ker, Principal Research Officer Ms Tamara Vitale, Executive Assistant
<b>Contact details</b>	Legal Affairs and Community Safety Committee Parliament House George Street Brisbane Qld 4000
<b>Telephone</b>	+61 7 3406 7307
<b>Fax</b>	+61 7 3406 7070
<b>Email</b>	<a href="mailto:lacsc@parliament.qld.gov.au">lacsc@parliament.qld.gov.au</a>
<b>Web</b>	<a href="http://www.parliament.qld.gov.au/lacsc">www.parliament.qld.gov.au/lacsc</a>

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## Abbreviations

ADCQ	Anti-Discrimination Commission Queensland
Anti-Discrimination Act	<i>Anti-Discrimination Act 1991</i>
Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012
CCYPCG	Commission for Children and Young People and Child Guardian
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
Explanatory Notes	The Explanatory Notes issued with the Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012
GK v Dovedeen Litigation	This is a reference to the litigation commenced in QCAT involving “GK”, a sex worker, and The Drover’s Rest motel in Moranbah, the liquor license holder of which is Dovedeen Pty Limited. The citation for the QCAT First Instance judgment is <a href="#">GK v Dovedeen Pty Limited &amp; Anor (No 3) [2011] QCAT 509</a> . The citation for the QCAT (Internal Appeal Body) judgement is <a href="#">GK v Dovedeen Pty Limited &amp; Anor [2012] QCATA 128</a> . The matter has been appealed to the Court of Appeal of the Queensland Supreme Court.
PLA	Prostitution Licensing Authority
QCAT	Queensland Civil and Administration Tribunal
QLS	Queensland Law Society
RDA	<i>Racial Discrimination Act 1997</i> (Cth)
Youth Justice Act	<i>Youth Justice Act 1992</i>



## **Chair's foreword**

This Report presents a summary of the Legal Affairs and Community Safety Committee's (Committee) examination of the Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 (Bill).

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat and the Department of Justice and Attorney-General.

I commend this Report to the House.



Mr Ray Hopper MP

**Chair**

November 2012



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## Recommendations

**Recommendation 1** **5**

The Attorney-General and Minister for Justice limit the use of omnibus bills and ensure that substantive policy issues which are deserving of their own consideration by the Legislative Assembly be brought forward in stand-alone bills.

**Recommendation 2** **6**

The Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 be passed.

**Recommendation 3** **11**

The Attorney-General and Minister for Justice ensure that clear public policies are developed and appropriate guidance is provided to boot camp centre providers in relation to recognising the cultural needs of each child participating in a boot camp program.

**Recommendation 4** **13**

The Attorney-General and Minister for Justice in his response to the Committee's report, outline the process to be followed upon a request for access to a lawyer and how complaints about a response to the provision of access can be made by a young person.

**Recommendation 5** **15**

The Attorney-General and Minister for Justice, in his response to the Committee's report, set out for the benefit of the Legislative Assembly, details on the philosophy and empirical evidence to support the policy proposal to provide a boot camp order as an option before detention.

**Recommendation 6** **16**

The Attorney-General and Minister for Justice in his response to the Committee's report, confirm:

- (a) how the post-trial evaluation will be funded;
- (b) the evaluation method to be used and whether it conforms with the Criminal Justice Evaluation Framework: Guidelines for Evaluating Criminal Justice Programs Initiatives; and
- (c) the results of the evaluation will be provided to the Legislative Assembly.

**Recommendation 7** **16**

The Bill be amended to include appropriate sunset provisions to ensure that no further boot camp orders can be made after the expiration of the trial period, until appropriate evaluation is conducted and the results considered by the Legislative Assembly.

**Recommendation 8** **17**

The Attorney-General and Minister for Justice, in his response to the Committee's report, provide the details of any cost-benefit analysis carried out by his Department on both the direct and indirect savings that will result from removing court referred youth justice conferencing.

**Recommendation 9** **19**

That court referred youth justice be retained as an option available to the courts, and the provisions in the Bill seeking to remove court referred youth justice conferencing be removed.

**Recommendation 10** **31**

The Attorney-General and Minister for Justice, in his response to the Committee's Report, clarify the intended operation of proposed 106C and address each of the matters above under 'unintended consequences of the amendments' to allay the concerns of stakeholders that the provision will cause inadvertent mischief to persons involved in the sex industry.

**Recommendation 11** **34**

That both the Queensland Police Service and the Prostitution Licencing Authority actively monitor any increase in unlawful sexual activity in the sex industry, and the numbers of nuisance complaints arising from the public in relation to the practice of unlawful sex work occurring in public places.

**Recommendation 12** **44**

Both components of the Bill amending the *Anti-Discrimination Act 1991* relating to: accommodation used in connection with work as a sex worker; and eligibility requirements for the provision of assistance, services or support - be passed without amendment.

**Recommendation 13** **45**

The components of the Bill amending the *Fiscal Repair Amendment Act 2012* be passed without amendment.

**Recommendation 14** **48**

The Attorney-General and Minister for Justice, in his response to the Committee's Report address the matters raised by the Committee relating to consistency with the fundamental legislative principles as they apply to the amendments to the *Youth Justice Act 1992*.

## 1. Introduction

### 1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Queensland Police Service; and
- Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

The Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 (Bill) was introduced into the Legislative Assembly and referred to the Committee on 1 November 2012. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the Committee to report to the Legislative Assembly by 22 November 2012.

### 1.2 Inquiry process

On 1 November 2012, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The Committee received written advice from the Department and received 53 submissions (see **Appendix B**).

Due to the limited time available for the Committee's referral and the number of Bills that had been referred to the Committee for consideration, the Committee determined it would not hold a public hearing on the Bill.

### 1.3 Policy objectives of the Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012

The Explanatory Notes state there are three primary objectives of the Bill.<sup>2</sup> The objectives are to amend the:

(a) *Youth Justice Act 1992 (Youth Justice Act)* to:

- *introduce a Boot Camp Order as an option instead of detention for young offenders; and*
- *remove the option of court referred youth justice conferencing.*

<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

<sup>2</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 1.

(b) *Anti-Discrimination Act 1991 to introduce new exemptions in relation to:*

- *accommodation used in connection with work as a sex worker; and*
- *the imposition of eligibility requirements based on citizenship or visa status in government policies for the provision of assistance, services or support; and*

(c) *Fiscal Repair Amendment Act 2012 to bring forward the commencement date (from 1 July 2013 to 1 January 2013) of sections that transfer the powers of the Queensland Liquor and Gaming Commission and chief executive under the Gaming Machine Act 1991 and Liquor Act 1992 to a Queensland Liquor and Gaming Commissioner.*

#### **1.4 Consultation on the Bill**

Prior to the introduction of the Bill, consultation by the Department is stated to have occurred with the following government departments and agencies:

##### ***Youth Justice matters***

- Department of the Premier and Cabinet;
- Queensland Treasury;
- Queensland Police Service;
- Department of Communities, Child Safety and Disability Services;
- Queensland Health;
- Department of Education, Training and Employment;
- Department of Aboriginal and Torres Strait Islander and Multicultural Affairs; and
- Commission for Children and Young People and Child Guardian.<sup>3</sup>

The Chief Magistrate, Magistrates of the Cairns area, and the President of the Childrens Court were also provided a copy of the draft Bill for comment.<sup>4</sup>

During the Committee's budget estimates hearing the Attorney-General and Minister for Justice, the Honourable Jarrod Bleijie MP (Attorney-General) also explained that roundtable discussions had occurred with various stakeholders in relation to the Bill.

A number of submitters were displeased with the amount of time to consult with the Committee. The Aboriginal and Torres Strait Islander Legal Service (Qld) stated that *'due to time constraints (relating to the very minimal amount of time afforded within which to provide feedback), that it is entirely possible that important considerations might have gone unidentified (or insufficiently fleshed-out).'*<sup>5</sup>

The Crime and Justice Research Centre also commented on the short opportunity to review the Bill.<sup>6</sup>

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<sup>3</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 7-8.

<sup>4</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 7-8.

<sup>5</sup> Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 5, page 1.

<sup>6</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 1.

**Anti-Discrimination matters**

- Anti-Discrimination Commission Queensland; and
- Prostitution Licensing Authority.

A number of the submitters also noted the short timeframe being provided for the review of this Bill. For example, Stephen Luntz concluded in his submission:

*The timelines for this process seem to me unusually rushed. It may be that Queensland tends to process legislation more quickly than other states, but if this is not the case it is alarming that law is being made on the run for a case like this.<sup>7</sup>*

Scarlet Alliance, a peak national sex worker organisation in Australia, made the following points:

*We are also concerned by the extremely short turnaround for submissions and a lack of consultation with sex workers (the key stakeholders) about these reforms.*

...

*The Bill has been introduced to Queensland Parliament without consultation with the key stakeholders, sex workers. Consultation with the Prostitution Licensing Authority and the Queensland Anti-Discrimination Commission does not suffice or replace the need for sex worker consultation. The short one-week turn-around for submissions is inadequate to provide comprehensive feedback on the Bill.<sup>8</sup>*

A submission from a male sex worker who lives in Victoria but travels to Queensland on occasions for work, noted as follows:

*I am writing to you in exasperation and outrage. The Queensland government and Attorney General Jarrod Bleijie have felt the need to swiftly amend anti discrimination legislation ... to provide hoteliers/landlords the right the discriminate against sex workers.*

...

*Governments which hastily create legislation, without consulting those affected by it, are doomed to make mistakes. Queensland's has shown no forethought, and indeed outright ignorance.<sup>9</sup>*

In respect to the issue of lack of consultation on the Bill in relation to the proposed new section 106C (accommodation used in connection with work as sex worker), the Department responded as follows:

*The amendments are necessary to ensure clarity in this area of the law and the resolution of competing claims as soon as possible.<sup>10</sup>*

The Committee again notes that similar to previous experiences with bills earlier this year, there appears to have been little consultation with stakeholders on the policy development of the matters being addressed by the Bill. The Committee accepts that consultation with central Government agencies and relevant statutory authorities is appropriate, but considers that particularly in relation to the anti-discrimination matters relating to sex industry workers, peak bodies in that area should have been consulted.

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<sup>7</sup> Stephen Luntz, Submission 6, page 1.

<sup>8</sup> Scarlett Alliance, Submission 40, pages 1-2.

<sup>9</sup> Name Withheld, Submission 1, pages 1-2.

<sup>10</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 24.

Introduction

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Given that the Committee has only been provided with three weeks to examine this Bill in addition to other bills over a similarly short period, the Committee considers that it is vitally important for the Government to engage stakeholders early in the process.

If earlier engagement with relevant stakeholders took place, the Committee considers that many of the concerns raised in submissions may well have been identified prior to introduction of the Bill and many of the queries raised in submissions may have been addressed. This would have given stakeholders more certainty in the proposed operation of the Bill and enabled them to focus on the effect of the Bill itself when engaging in the committee process.

Further, given the lack of broad consultation and the short time-frames in which the Committee has to report (which would have been known to the Government), the Committee considers that it would have been helpful for some information to be included in the Explanatory Notes on the results of consultation, rather than simply listing the bodies with whom the Department is stated to have consulted.

## 2. Examination of the Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012

### 2.1 Omnibus nature of the Bill

The Committee has previously expressed concerns in relation to the use of omnibus bills to amend multiple items of legislation, most recently in its report on the Guardianship and Administration and Other Legislation Amendment Bill 2012.

This Bill amends three separate and unrelated Acts of Parliament with very different policy objectives i.e. youth justice, anti-discrimination issues and other unrelated matters. It also makes a number of ‘minor and consequential amendments’.

The Committee acknowledges that the Bill’s short title contains the phrase ‘and Other Legislation Amendment Bill’ which will alert the Legislative Assembly (and others) to the fact that the Bill contains amendments unrelated to the subject area stated in the title of the Bill (in this case “Youth Justice (Boot Camp Orders)”).

The Committee’s concerns with omnibus bills relate primarily to Members’ feeling their ability to vote for or against such a bill in its entirety, as limiting their actions. These issues arise when bills such as this are presented containing a number of unrelated matters and unrelated amendments of varying significance, some of which a Member may agree with and others the Member may disagree.

Arguably omnibus bills may breach the fundamental legislative principle in section 4(2)(b) of the *Legislative Standards Act 1992* because they fail to have sufficient regard to Parliament, forcing Members to vote to support or oppose a bill in its entirety when that (omnibus) bill may contain a number of significant unrelated amendments to existing Acts that would more appropriately have been presented in topic-specific stand-alone bills.

There is nothing uncontroversial about the Bill. As outlined later in this part 2, there have been many submissions provided to the Committee raising substantial issues with both the youth justice component of the Bill and also the anti-discrimination aspects. Unlike the youth justice matters which were announced much earlier in the year and have been under policy development for some time, it is apparent that the anti-discrimination components of the Bill are reactive to recent events which will be discussed in greater detail in this Report.

Setting aside the merits or otherwise of those amendments in the anti-discrimination area, the Committee considers that the issues being dealt with in this Bill, which limit the fundamental rights of a particular class of workers should not simply be appended to the back of a completely unrelated Bill dealing with youth justice issues.

The Committee considers that if the Government decides that exemptions to the application of anti-discrimination principles are warranted and are important enough to be addressed through legislative amendment, then it should progress through the Legislative Assembly for consideration in its own stand-alone bill.

#### **Recommendation 1**

The Attorney-General and Minister for Justice limit the use of omnibus bills and ensure that substantive policy issues which are deserving of their own consideration by the Legislative Assembly be brought forward in stand-alone bills.

## 2.2 Should the Bill be passed?

Notwithstanding the issues which the Committee has identified in relation to the omnibus nature of the Bill, Standing Order 132(1) requires the Committee to recommend whether or not the Bill should be passed.

After examination of the individual components of the Bill and consideration of the various policy objectives that are being pursued by the Bill, the Committee has made some recommendations for amendments to specific aspects of the Bill however on the whole, the Committee considers that the Bill ought to be passed.

### Recommendation 2

The Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012 be passed.

## 2.3 Amendments to the *Youth Justice Act 1992*

On 21 August 2012, the Attorney-General announced that \$2 million would be allocated towards a two year trial of 'boot camps' in the Cairns and Gold Coast regions.<sup>11</sup>

The trial will assess two different models of boot camps, each with their own unique objectives and features. A Sentenced Youth Boot Camp (the subject of the Bill) will be trialled in Cairns, and an Early Intervention Youth Boot Camp will be trialled in the Gold Coast.<sup>12</sup> At the time of writing this report, the Attorney-General announced the successful tenders for the trial are Safe Pathways for the Cairns based trial and Kokoda Challenge Association for the Gold Coast trial.<sup>13</sup>

To implement the Sentenced Youth Boot Camp trial, amendments to the Youth Justice Act are required to empower the courts with the option of sentencing young offenders to a boot camp order. In his introductory speech, the Attorney-General advised that the Bill fulfils the Government's pre-election commitment to introduce youth boot camps to stop the cycle of youth crime and provide young offenders with a chance of rehabilitation.<sup>14</sup>

The Bill has been introduced against the backdrop of community concern about increased youth offending and the perception that '*detention is not effective in reducing future offending or changing offending behaviour of the small number of young people who are responsible for the majority of the offences*'.<sup>15</sup>

The Bill therefore introduces a new type of order to be known as a "boot camp order" which will be an alternative to a detention order. The boot camp order will involve the young offender residing in a boot camp for one month followed by a period (ranging between two to five months) of intensive supervision in the community.

<sup>11</sup> Attorney-General and Minister for Justice, *Media Statement: 'Youth Boot Camps Announced'*, 21 August 2012.

<sup>12</sup> Department of Justice and Attorney-General, *Youth Boot Camps*, accessed from <http://www.justice.qld.gov.au/youth-justice/youth-boot-camps-general-information>.

<sup>13</sup> Attorney-General and Minister for Justice, *Media Statement: Youth boot camp winning tenders announced*, 15 November 2012.

<sup>14</sup> *Record of Proceedings*, 1 November 2012, page 2381

<sup>15</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 2.

To be eligible for a boot camp order the young offender:

- must be at least 13 years old;
- must have provided consent to participate;
- must not have committed a disqualifying offence<sup>16</sup> at any time (or have a pending charge for a disqualifying offence); and
- must not pose an unacceptable risk of harm to the boot camp centre employees and other children participating in the boot camp program.<sup>17</sup>

As noted in the Explanatory Notes:

*The key objective of the boot camp program is to instil discipline, respect and values into young people entrenched in the youth justice system to divert them from further offending and support them to make constructive life choices.*<sup>18</sup>

While the Committee does not address in this Report every aspect in relation to the youth justice amendments contained in the Bill, the Committee highlights the following matters for the attention of the Legislative Assembly to assist Members with their understanding of how the Boot Camp Orders will operate.

### **Boot Camp Orders**

The boot camp order sits above the current sentencing option of a conditional release order.<sup>19</sup> It is an option available before detention which is a maximum three month order to be served entirely in the community.

The proposed boot camp order is considered a more intensive and longer sentencing option than the current option of a conditional release order.

### **Program phases**

There are two compulsory phases in a boot camp order which includes one month in a residential boot camp centre, followed by at least two months and not more than five months of intensive supervision in the community. There is one voluntary phase which consists of voluntary mentoring following completion of the order.

The program components in the residential and community supervision phases consist of: offence focussed programs, counselling, substance abuse programs, community reparation, family support and support to re-engage with learning or employment in both the residential and community supervision phases. The residential phase also incorporates strenuous physical activities.

The Department advised that education and schooling will be provided to the child during the residential phase of the program and support will be provided to the child to continue and participate in their education during the community supervision phase.<sup>20</sup>

Live and Let Live recommended that the length of the order should be for a duration of between 6 and 12 months.<sup>21</sup>

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<sup>16</sup> "Disqualifying offences" are contained in a Schedule to the Bill and contain a number of serious violent and sexual offences.

<sup>17</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, Section 226C.

<sup>18</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, pages 3-4.

<sup>19</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 9.

<sup>20</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 10.

<sup>21</sup> Live and Let Live, Submission 52, page 4.

In response, the Department advised that the length of the order is based upon current sentencing precedent for young offenders and creates a hierarchy of orders as options before detention for the court. Given the onerous nature of the program and the requirement that a young offender spend a period of one month in a residential centre, it is not considered that expanding the length of the order would be of further therapeutic value.<sup>22</sup>

Queensland Youth Services Inc. suggested that victim impact statements should be incorporated into the one month residential period of the program.<sup>23</sup> In response, the Department advised that nothing in the Bill prevents the use of victim impact statements to encourage accountability of young offenders.<sup>24</sup> The Committee notes this is provided for in proposed section 226E which requires the chief executive to develop a program which has regard for community reparation.

### **Eligibility**

The Bill sets out a number of *eligibility criteria* for a boot camp order including that the young person:<sup>25</sup>

- has attained the age of 13 years at the time of sentence;
- usually resides in an area prescribed by Regulation. (The areas will be prescribed by the amendment to the Regulation which will commence at the same time as the relevant clauses of the Bill); and
- consents to participating in the program.

The Bill also sets out that a child is *ineligible* to participate in the program if:<sup>26</sup>

- the offence for which they are being sentenced is a disqualifying offence (listed in schedule 5 of the Bill<sup>27</sup>), been found guilty of a disqualifying offence, or a pending charge for a disqualifying offence; and
- they pose an unacceptable risk of harm to the boot camp centre employees and other children participating in the program as determined by the court.

Live and Let Live suggested that boot camp programs should provide for two tiers of offending ('petty crime' and 'serious crimes').<sup>28</sup> In response, the Department advised that the trial consists of an early intervention program, targeting children who are at risk of entering the youth justice system and the court-ordered boot camp program to divert young offenders from detention.<sup>29</sup>

The Department further explained that given the onerous nature of the boot camp program (i.e. one month in which the child must reside at a boot camp centre), it is not appropriate to require young offenders found guilty of misdemeanours to participate in the program.<sup>30</sup>

The Queensland Association of Independent Legal Services Inc. considered that the disqualifying offences provided for in the new Schedule 5 should take into account the safety of the young offenders and their peers, rather than prescribing a blanket disqualification for certain offences.<sup>31</sup>

<sup>22</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 11.

<sup>23</sup> Queensland Youth Services Inc., Submission 8, page 2.

<sup>24</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 6.

<sup>25</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, Section 226C(2).

<sup>26</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, Section 226C(3).

<sup>27</sup> The disqualifying offences are serious violent and sexual offences as prescribed under sections of the *Criminal Code*.

<sup>28</sup> Live and Let Live, Submission 52, page 3.

<sup>29</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 6.

<sup>30</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 6.

<sup>31</sup> Queensland Association of Independent Legal Services Inc., Submission 29, page 2.

The Department advised:

*While the new Schedule 5 contains a list of disqualifying offences, these offences are serious sexual or violent offences against a person which, in general, carry maximum terms of imprisonment of over 14 years. As such, the offence of indecent treatment of a child under 16 will only be disqualifying where the victim child is under the age of 12 or where the child is, to the knowledge of the offender, his or her lineal descendant.*<sup>32</sup>

The Youth Advocacy Centre Inc. also commented on the disqualifying offences contained in the Bill and considered that the offences listed in Schedule 5, in particular, incest, indecent treatment of a child under 16, unlawful carnal knowledge of a child under 16 and sexual assault may unnecessarily exclude young people from participating, and doesn't take into account that adolescence is a time of sexual experimentation and does not necessarily mean that the young person will risk the safety of others.<sup>33</sup>

The Department advised that a discretion remains with the court under the new section 226C(3)(e) 'to determine whether the child poses an unacceptable risk of physical harm to other children in the boot camp program or a boot camp provider's employees'.<sup>34</sup>

The Committee is satisfied with the Department's response in relation to the issues raised in submissions and considers that the eligibility criteria set out in the Bill is appropriate for the boot camp program.

#### **Pre-sentence report**

Under the Youth Justice Act, the court must order a pre-sentence report if the court is satisfied that a detention order is the only option. The Bill provides that when the court is considering a boot camp order, it must also request a pre-sentence report.

The report is to contain an assessment of the young offender's physical and mental health, advice on the availability of a boot camp centre, suitability of the child for release from detention on to a boot camp order, and whether the parent of the child has consented to participate in the boot camp program.

#### **Consent and understanding**

The Department advised that in order to maximise the therapeutic nature of the boot camp program the Bill provides new provisions to ensure that the child both *understands* the program and *consents* to participate.<sup>35</sup>

Specifically, proposed section 151(3A)(e) provides that the pre-sentence report must contain a statement that the details of the program have been explained to the child in a way, and to an extent, that is reasonable, having regard to the child's age and ability to understand. As stated above in relation to eligibility, proposed section 226C(2) provides that the child must consent to participating in the boot camp program.

The Queensland Law Society (QLS) recommended that a copy of the boot camp order made under proposed section 226B be provided and explained to the young person.<sup>36</sup> Clause 19 of the Bill provides that the pre-sentence report is to contain a statement that the details of the boot camp program have been explained to the child.

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<sup>32</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 8.

<sup>33</sup> Youth Advocacy Centre Inc., Submission 21, page 12.

<sup>34</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 8.

<sup>35</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 11.

<sup>36</sup> Queensland Law Society, Submission 32, page 2.

The Department further advised:

*At the time of the pre-sentence report, the chief executive must explain in a way that the child understands having regard to the child's age and ability to understand. It is the view of the Department that this should sufficiently inform the child as to the details of the boot camp program. In relation to the requirements of the order, section 158 of the Youth Justice Act 1992 provides that when making an order the court must take steps to ensure the child understands the purpose and effect of the order as well as the consequences (if any) that may ensue if the child fails to comply with the requirements. In addition, a copy of the order or decision is to be given to the child or the child's parent under section 160 of the [Act]. This section also applies when the court makes a boot camp order and the Department considers that this sufficiently meets the concerns of the Queensland Law Society. In addition the practice of the chief executive is to explain the requirements of an order at the time of sentence and/or at the time that the child first reports to the chief executive for a community based order.<sup>37</sup>*

Submitters raised concerns relating to the ability of 13 year olds to provide informed consent to participate in a boot camp program.<sup>38</sup> In response, the Department advised that the consent of a young person is a feature of all community based orders made by the court under the Youth Justice Act.<sup>39</sup>

The Committee considers that the Bill contains adequate protections to ensure that children participating in the boot camps fully understand what consenting to a boot camp order will entail. The Committee considers there is additional comfort in the advice from the Department that the requirements for consent to a boot camp order are not inconsistent with current practices for other community based orders.

### **Cultural considerations**

A number of submitters raised concerns regarding the cultural needs of Aboriginal and Torres Strait Islander children participating in boot camp programs.<sup>40</sup>

The Aboriginal and Torres Strait Islander Legal Service (Qld) considers that boot camps are not suitable for Indigenous youth, and do not incorporate adequate cultural components necessary for Indigenous participants.<sup>41</sup> The Queensland Association of Independent Legal Services Inc. also suggested that the over representation of Indigenous young people must be borne in mind when making policy decisions.<sup>42</sup>

The Committee notes that the Bill provides that the chief executive is to consider the child's cultural needs in the pre-sentence report.

The submission from the Aboriginal and Torres Strait Islander Legal Service (Qld) lists a number of successful elements of programs including, addressing behaviour, assisting young people to develop practical alternative ways of coping with stressors, and emphasising Aboriginal heritage, culture and law.<sup>43</sup>

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<sup>37</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 9-10.

<sup>38</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 8; and Live and Let Live, Submission 52.

<sup>39</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 11.

<sup>40</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 6; and Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 5.

<sup>41</sup> Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 5, page 2.

<sup>42</sup> Queensland Association of Independent Legal Services Inc., Submission 29, page 1.

<sup>43</sup> Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 4.

In response to issues raised, the Department advised that the provision that the chief executive must have regard to the child's cultural development provides sufficient flexibility to ensure that the boot camp program is tailored to meet the specific needs of a young offender. The Department indicated that this provision provides flexibility in order for these elements to be taken into account.<sup>44</sup>

The Department further advised that the over-representation of Indigenous young offenders in the youth justice system has been taken into account by developing a boot camp order which enables Indigenous young offenders to participate in a program that takes cultural needs into account.<sup>45</sup>

In its submission, the Crime and Justice Research Centre asserted that the introduction of boot camps will impact disproportionately on Indigenous youth and communities and may increase the current levels of incarceration.<sup>46</sup> In response, the Department advised that as the order will operate as an option before detention the number of Indigenous young people in detention will be reduced.<sup>47</sup>

The Committee considers that for a boot camp order to have any positive effect there must be clear guidance for boot camp centre providers on the need for cultural differences and considerations of participants to be recognised. The Committee considers this to be of vital importance to the success or otherwise of the trial.

### **Recommendation 3**

The Attorney-General and Minister for Justice ensure that clear public policies are developed and appropriate guidance is provided to boot camp centre providers in relation to recognising the cultural needs of each child participating in a boot camp program.

The Committee considers that the issue of recognition of the cultural needs of children participating in boot camps will be an important consideration in the post-trial evaluation process. The Committee considers that a specific component of the evaluation process should focus on this issue.

### ***Breaches of the order***

The Bill provides options for the court when a boot camp order is breached which can include, ordering the young person to serve the sentence of detention for which the boot camp order was made, making a new boot camp order or making a conditional release order.

A court may also permit the young person a further opportunity to complete the boot camp order. In this instance, the court can vary the requirements of the order but not the program details, thereby preventing the court from ordering a child to participate in the residential phase of the program if it has already been completed.<sup>48</sup>

### ***Boot Camp Centre Administration***

Section 282A(2) of the Bill provides that the boot camp centre provider has the appropriate experience or expertise to be a boot camp provider. The QLS suggested that section 282A(2) should provide criteria as to what constitutes 'appropriate experience or expertise'.<sup>49</sup>

In response to this proposal, the Department advised:

*The appropriate experience or expertise of the selected boot camp provider is determined by the chief executive having regard to a range of standards in the selection process. This includes Queensland Adventure Activity Standards, First Aid accreditation ... and*

<sup>44</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 4.

<sup>45</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 4.

<sup>46</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 6.

<sup>47</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 4-5.

<sup>48</sup> *Record of Proceedings*, 1 November 2012, page 2373.

<sup>49</sup> Queensland Law Society, Submission 32, page. 2.

*registration under the National Outdoor Leader Registration Scheme. There is also reference to the duty-of-care requirements under the Standards for Community Services. The inclusion of such standards and minimum qualification would be overly prescriptive.*<sup>50</sup>

The Committee is satisfied the chief executive has sufficient guidance to approve a boot camp centre provider.

### **Complaints and children subject to child protection orders and boot camp orders**

The Commission for Children and Young People and Child Guardian (CCYPCG) considers that the Bill should allow for CCYPCG's Community Visitors to visit young people attending youth boot camp fixed residential facilities.<sup>51</sup>

The Department advised that it will work with CCYPCG to develop an administrative arrangement for the implementation of the Community Visitor Program for young offenders who are participating in the residential phase of the boot camp program in accordance with the boot camp order.<sup>52</sup>

CCYPCG also considered that it should be authorised '*to deal with complaints from young people attending youth boot camp residential facilities, and during the community supervision and from young people receiving services under the early intervention youth boot camp program*'.<sup>53</sup>

The Department advised that by virtue of section 54(d) of the *Commission for Children and Young People and Child Guardian Act 2000*, the complaints procedure operated by CCYPCG is applicable to the boot camp program as it is a program established under section 302 of the Youth Justice Act.<sup>54</sup>

Other submitters have expressed concern that children subject to child protection orders and boot camp orders will not have their needs appropriately met and sought to ensure that the intersection between child protection and the youth justice system be taken into account.<sup>55</sup>

In response to the concerns raised, the Department advised that the Bill does not distinguish between children who are, and those who are not on child protection orders to ensure that children subject to dual orders are not unnecessarily exempt from the opportunity to participate in a boot camp order.<sup>56</sup>

Further, the Department advised that the Youth Justice Services practice manual and the Child Safety practice manual both contain guidelines to assist the management of children who are subject to dual orders. The Department also ensured that because the program is highly individualised, the circumstances of a child who is subject to dual orders will be taken into account in such a way as to support the child.<sup>57</sup>

The Committee notes that the Bill ensures that the boot camp centre service provider agreement includes provision for the right of entry of a child safety officer who is case managing a child who is participating in the residential phase of the boot camp program.<sup>58</sup> The Committee is satisfied with the arrangements that are in place and notes the Department has committed to continue working with CCYPCG to ensure there are adequate protections in place for participating children.

<sup>50</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 12.

<sup>51</sup> Commission for Children and Young People and Child Guardian, Submission 53, page 1.

<sup>52</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 7.

<sup>53</sup> Commission for Children and Young People and Child Guardian, Submission 53, page 1.

<sup>54</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 7.

<sup>55</sup> Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 5, page 5 and Queensland Association of Independent Legal Services Inc., Submission 29, page 1.

<sup>56</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 5-6.

<sup>57</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 5-6.

<sup>58</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 6.

**Access to a Lawyer**

Proposed section 282H provides that the boot camp centre provider must ensure that if a child participating in the residential phase of a boot camp program asks for help in gaining access to a lawyer, that the child is given the help that is reasonable in the circumstances.

In their submission, the QLS recommended that section 282H be amended to provide that the child *must* be assisted to access a lawyer and that the child's parents and/or the Community Visitor *must* be informed of their request and the attempts made to provide access. The QLS also considered that the boot camp provider should have to take mandatory actions to provide access.<sup>59</sup>

In response to this, the Department advised:

*... that the provision of assistance to a child to access a lawyer which is reasonable in the circumstances is adequate. Although the boot camp centre service provider is a private entity, it is closely monitored by both the Community Visitor program (implemented administratively and by way of the complaints procedures) and mandated monitoring of the centre by the chief executive under the new section 282B(5). The operation of the centre is also strictly guided by a service agreement between the chief executive and the boot camp centre provider. The new section 282I also provides that the lawyer is granted access to the child at all reasonable times.*<sup>60</sup>

The Committee considers that the proposed section 282H is adequate. Nonetheless, for the benefit of the Legislative Assembly, the Committee seeks that the Attorney-General outline the process to be followed upon a request for access to a lawyer and how complaints about a response to the provision of access can be made by a young person.

**Recommendation 4**

The Attorney-General and Minister for Justice in his response to the Committee's report, outline the process to be followed upon a request for access to a lawyer and how complaints about a response to the provision of access can be made by a young person.

The Committee also considers that the operation of this section and the manner in which children are provided access to legal representation while participating in a boot camp will be an important consideration in the post-trial evaluation process. The Committee considers that a specific component of the evaluation process should focus on this issue.

**Effectiveness of boot camp programs and juvenile offending**

The Attorney-General has previously stated to the Committee that approximately 32 per cent of young persons in detention have returned five times or more.<sup>61</sup> He has further stated that:

*One of the biggest issues though is not necessarily the preventative approach but what happens to the kids who are already in the system afterwards. At the moment they are going to a detention centre and they are coming out. I am very much in favour of looking at the boot camps with the preventative approach and the early intervention at the schools, but we also have to look for the kids who come out of detention and mentor them and get them out of this idea of this college of crime, because that is when they grow up.*<sup>62</sup>

<sup>59</sup> Queensland Law Society, Submission 32, page 2.

<sup>60</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 12.

<sup>61</sup> Legal Affairs and Community Safety Committee, Estimates Public Hearing, 11 October 2012, page 11.

<sup>62</sup> Legal Affairs and Community Safety Committee, Estimates Public Hearing, 11 October 2012, page 25.

The Explanatory Notes provide that ‘community concern regarding youth offending has been escalating’.<sup>63</sup> A number of submitters have raised an issue with the perception that youth offending is escalating. It has been suggested that community concern about crime does not always reflect the true rates of crime across Queensland.<sup>64</sup> Perceptions of crime can be a reaction to media reports which tend to focus on the worst of crimes (particularly if they involve young people).<sup>65</sup> Overall, the Committee notes that there is no evidence to suggest that youth crime is escalating.<sup>66</sup>

In relation to youth re-offending, the Crime and Justice Research Centre considers that there is clear evidence which suggests that boot camps do not reduce recidivism, and is concerned that the Bill will have an opposite impact to what is intended.<sup>67</sup> Other submitters have raised similar concerns that boot camp programs involving ‘strenuous physical activity’ are not effective in reducing re-offending.<sup>68</sup>

In response to issues raised, the Department advised:

*Meta-analyses of military style boot camps have demonstrated that such boot camps do not reduce the likelihood of recidivism among participants. However, the boot camp program in which a young offender will participate is not a military style boot camp program and is based on boot camp models associated with positive outcomes when evaluated. The boot camp program will have a therapeutic focus including the participation of family where possible, and aim to address the identified criminogenic needs of participants.*

...

*The levels of physical activity will be adjusted according to the capacity of the young offender to ensure that the therapeutic value of physical activity is achieved.*<sup>69</sup>

The Committee notes the evidence which suggests that boot camp programs alone are ineffective unless they include a strong therapeutic focus on education, families and psychological and behavioural change.<sup>70</sup>

The Committee also notes that the ‘boot camp’ aspect is not the sole focus of the boot camp program. The Committee is supportive of the proposal to trial boot camp programs over two years on the basis that the boot camp program incorporates therapeutic aspects.

However, the Committee wishes to advise the Legislative Assembly that a reasonable amount of cynicism and debate around the effectiveness of this type of intervention exists among the community, and notes that for an intervention to be effective in reducing recidivism, it must be based on empirical research.<sup>71</sup>

<sup>63</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 2.

<sup>64</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 7.

<sup>65</sup> Youth Advocacy Centre Inc., Submission 21, page 3.

<sup>66</sup> Youth Advocacy Centre Inc., Submission 21.

<sup>67</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 2.

<sup>68</sup> Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 5; Youth Advocacy Centre Inc., Submission 21; Youth Affairs Network Queensland, Submission 38.

<sup>69</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 3.

<sup>70</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, pages 4-5.

<sup>71</sup> Queensland Law Society, Submission 32, page 1.

**Recommendation 5**

The Attorney-General and Minister for Justice, in his response to the Committee's report, set out for the benefit of the Legislative Assembly, details on the philosophy and empirical evidence to support the policy proposal to provide a boot camp order as an option before detention.

***Trial evaluation***

The Committee notes that the Department is working closely with the Department of the Premier and Cabinet to ensure that a thorough and rigorous evaluation is undertaken to inform the success of the trial.<sup>72</sup> It is not clear from the information the Committee has received whether the \$2 million in funding provided for the trial includes its evaluation and seeks clarification on this aspect.

The Committee considers that the post-trial evaluation of the boot camps will be as important, if not more important than the conduct of the boot camp in itself. It is vital that adequate funding is also provided in order to conduct a meaningful evaluation of the trial.

The Committee notes the *Criminal Justice Evaluation Framework: Guidelines for Evaluating Criminal Justice Programs Initiatives* published on the Department of the Premier and Cabinet website outlines a number of methods for evaluating crime justice interventions.<sup>73</sup>

The Committee considers that in order for an effective evaluation to be undertaken, the evaluation needs to be conducted with clear, measureable goals from the outset. The Committee also considers that the evaluation needs to incorporate a long-term follow-up of the trial participants.

The Committee seeks to ensure that an appropriate evaluation methodology is adopted to ensure an effective evaluation is carried out. The Committee feels that it is vital for the methodology to include:

- the program's assumptions and desired outcomes (clear goals) and consider any unintended outcomes;
- valid and reliable data collection;
- stakeholder feedback;
- cost-benefit analysis; and
- a long-term follow-up on the effects of the program on participants.

The framework provides that, ideally, an evaluation should be designed at the time of project planning and form part of the on-going refining of program activities. However, in some cases this does not occur and evaluation is then undertaken as an afterthought at the end of the program.<sup>74</sup> As noted above, the Department has stated it is working closely with the Department of the Premier and Cabinet to ensure that a thorough and rigorous evaluation is undertaken to inform the success of the trial.

<sup>72</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 13.

<sup>73</sup> Department of Premier and Cabinet, *Criminal Justice Evaluation Framework*, accessed from: <http://www.premiers.qld.gov.au/publications/categories/guides/criminal-justice.aspx>.

<sup>74</sup> Department of Premier and Cabinet, *Criminal Justice Evaluation Framework*, accessed from: <http://www.premiers.qld.gov.au/publications/categories/guides/criminal-justice.aspx>, page 4.

The Committee seeks assurances that a fully informed evaluation plan will be developed prior to the commencement of the trials in January 2013.

#### **Recommendation 6**

The Attorney-General and Minister for Justice in his response to the Committee's report, confirm:

- (a) how the post-trial evaluation will be funded;
- (b) the evaluation method to be used and whether it conforms with the Criminal Justice Evaluation Framework: Guidelines for Evaluating Criminal Justice Programs Initiatives; and
- (c) the results of the evaluation will be provided to the Legislative Assembly.

#### ***Expiration of the trial***

The Committee notes that the Bill does not contain sunset provisions upon the expiration of the trial after two years. The Committee is therefore of the understanding that the provisions pertaining to boot camp orders will continue following the trial.

The Committee seeks the Attorney-General's clarification as to the status of boot camp orders after the two year trial. The Committee is of the view that boot camp orders should not continue to be made by courts until such time as the trial has been properly evaluated and its effectiveness has been measured.

As no further funding has been provided beyond the trial period, the Committee considers that until the trial has been evaluated, no further money should be expended until the results of the evaluation are known. Accordingly, the Committee considers that the Bill should contain appropriate sunset provisions which would, after the trial period, remove the option for a boot camp order from the court until such time that the evaluation of the trial has occurred and that the matter be brought back before the Legislative Assembly to determine whether making a boot camp order should remain as a permanent feature of the youth justice system in Queensland.

#### **Recommendation 7**

The Bill be amended to include appropriate sunset provisions to ensure that no further boot camp orders can be made after the expiration of the trial period, until appropriate evaluation is conducted and the results considered by the Legislative Assembly.

#### ***Removal of court referred youth justice conferencing***

Under the current provisions of the Youth Justice Act, the court may refer a matter to conference as the sentence outcome (indefinite referral) or refer to a conference prior to sentence. The Bill seeks to remove both types of court referrals. It is important to note at the outset that the Bill retains police referred youth justice conferencing as a diversionary tool.

The Bill also removes references to the redundant role of youth justice conferencing 'coordinator' and replaces responsibilities for these functions with those of the chief executive.

During his introductory speech, the Attorney-General advised that the Bill delivers a 2012 Budget decision to cease court referred youth justice conferencing.<sup>75</sup>

The Government indicated that it would achieve savings of \$5 million in 2012-13 and \$10.2 million per annum from 2013-14 from changes to court diversion programs and referrals.<sup>76</sup> It is unclear as to

<sup>75</sup> *Record of Proceedings*, 1 November 2012, page 2382.

<sup>76</sup> Budget Measures 2012-13, Budget Paper No. 4, page 52.

what percentage of that amount will be saved from the removal of court referred youth justice conferencing in itself.

The Committee considers that the cost of diversionary programs are not simply limited by the costs involved in the delivery of the programs but must be considered against the long term benefits and savings by keeping the subjects of the programs out of the custodial system. Concerns have also been raised in submissions that the removal of court referred conferencing will reflect savings in the short term, but will have adverse effects for sentencing outcomes in the long term.<sup>77</sup>

It is not clear to the Committee what analysis has been carried out in relation to the decision to remove court referred youth justice conferencing.

#### **Recommendation 8**

The Attorney-General and Minister for Justice, in his response to the Committee's report, provide the details of any cost-benefit analysis carried out by his Department on both the direct and indirect savings that will result from removing court referred youth justice conferencing.

The objective of youth justice conferences generally is to establish a youth justice conference process for a child who admits committing an offence to a police officer or after a finding of guilt for an offence is made against the child before a court. The process allows the child, a victim of the offence and other concerned persons to consider or deal with the offence in a way benefiting all concerned.<sup>78</sup>

Currently, there are two options for a court to refer a young person to conference. The first option for a court is to refer a young person to a conference after the finding of guilt and in place of sentencing (an indefinite referral). The second option is a referral after the finding of guilt and prior to sentencing. In this case, the conference outcome must be considered by the court at the time of sentencing (a conference before sentence referral).

A convenor convenes the conference between the child and other concerned persons. The offence is discussed during the conference and an agreement is made on what must be done because of the offence.<sup>79</sup> A youth justice conferencing flowchart is provided in **Appendix A**.

According to the Crime and Justice Research Centre's submission, all Australian jurisdictions except Victoria currently allow both police and courts to refer a young person to a youth justice conference.<sup>80</sup>

Victoria's system is unique whereby youth justice conferencing is used when a young person is at risk of being sentenced to a supervised order, offering diversion for young people at the severest end of the youth justice process. The Crime and Justice Research Centre's submission also notes that Victoria has consistently had the lowest rate of young people in detention in Australia.<sup>81</sup> An evaluation of Victoria's diversion program found that '*courts appreciated the additional option of the conference alternative...*'<sup>82</sup>

In 2011-12, the Youth Justice Conferencing program received 2,937 referrals (an increase of 2.8% from the previous year). There were 1,691 referrals by the courts and 1,246 referrals from police. In total 2,282 conferences were held. 95% of conferences resulted in an agreement being reached.

<sup>77</sup> Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd, Submission 5, pages 5-9; Youth Advocacy Centre Inc., Submission 21, page 14.

<sup>78</sup> *Youth Justice Act 1992*, Section 30.

<sup>79</sup> *Youth Justice Act 1992*, Section 30.

<sup>80</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 5.

<sup>81</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 5.

<sup>82</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 5.

Queensland courts made 1,328 (45.2%) indefinite and 363 (12.4%) before sentence referrals whilst 1,246 (42.4%) diversionary referrals were made by Queensland Police.<sup>83</sup>

In 2011-12, 98 per cent of youth justice conferencing participants (including victims) were satisfied of the conferencing outcome.<sup>84</sup>

The Childrens Court of Queensland stated in their 2011-12 Annual Report that, 'the Youth Justice Conferencing program provides a valuable mechanism to the police and the courts for the adoption of restorative justice principles.'<sup>85</sup>

A number of submitters were disappointed to see the removal of court referred youth justice conferencing and consider that the option to refer an offence to conference should be retained by the courts.<sup>86</sup>

There is also a concern that the removal will result in a reduction of matters referred to conferencing and will limit the judicial scrutiny of police discretionary decision making. Concerns have also been raised that if the option is taken away, there will no longer be a 'safety net' available to courts to scrutinise particular cases where police have not referred a matter to conferencing but the courts considered that it would have been appropriate to do so.<sup>87</sup>

In response to the issues raised about the removal of court referred youth justice conferencing, the Department advised:

*While the option for courts to refer an offence to youth justice conference is being removed by the Bill, the option for police to refer a child to conference remains. This will ensure that young offenders are still held accountable for their actions and will be diverted from the justice system.*

*The removal of court referred conferencing will ensure that children are not experiencing both the court system as well as a youth justice conferencing process and that children are diverted at the earliest opportunity.<sup>88</sup>*

In relation to concerns about reduced scrutiny of police practice the Department further advised:

*While the numbers of referrals to conference may initially fall, it is expected that police will adapt to the removal of court referred conferencing by increasing referrals. A periodic review of referrals to conference by the police will be managed by the Department. It is the view of the Department that while the courts provided a second opportunity to refer an offence to conference, where police did not, it is not the role of the magistracy to scrutinise or change police behaviour.<sup>89</sup>*

The Committee notes that the Government has identified budget savings in abolishing court referred youth justice conferencing in the context of repairing the State's fiscal position, however it cannot discount the evidence it has received which supports the retention of court referred youth justice conferencing.

<sup>83</sup> Childrens Court of Queensland, *Annual Report 2011-2012*, pages 7 and 9.

<sup>84</sup> 2012-13 Queensland State Budget, Service Delivery Statements, Department of Justice and Attorney-General, page 18.

<sup>85</sup> Childrens Court of Queensland, *Annual Report 2011-2012*, page 7.

<sup>86</sup> Crime and Justice Research Centre, Queensland University of Technology, Submission 36, page 2; Queensland Youth Service Inc., Submission 8, page 2 and Youth Advocacy Centre Inc., Submission 21, pages 12-15.

<sup>87</sup> Youth Affairs Network Queensland, Submission 38, page 3.

<sup>88</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 13.

<sup>89</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 15.

The Committee considers that the current benefits associated with court referred youth justice conferencing outweighs any short term savings and, based on the evidence it has received, recommends that court referred youth justice conferencing be retained by the courts.

### **Recommendation 9**

That court referred youth justice be retained as an option available to the courts, and the provisions in the Bill seeking to remove court referred youth justice conferencing be removed.

Other than the specific recommendations for amendment outlined above, the Committee recommends this component of the Bill be passed.

## **2.4 Amendments to the Anti-Discrimination Act 1991**

### **Overview to amendments**

The Bill also proposes to amend the *Anti-Discrimination Act 1991* (Anti-Discrimination Act) to introduce the following two exemptions:

- (a) accommodation used in connection with work as a sex worker; and
- (b) the imposition of eligibility requirements based on citizenship or visa status in government policies for the provision of assistance, services or support.

Each of these proposed exemptions will be discussed separately below.

## **2.5 Accommodation used by a sex worker in the course of work**

### **Overview**

Clause 50 of the Bill proposes to amend the Anti-Discrimination Act by introducing a new section 106C (Accommodation for use in connection with work as sex worker). The proposed wording of the new section 106C of the Anti-Discrimination Act is as follows:

*It is not unlawful for a person (an **accommodation provider**) to discriminate against another person (the **other person**) by—*

- (a) *refusing to supply accommodation to the other person; or*
- (b) *evicting the other person from accommodation; or*
- (c) *treating the other person unfavourably in any way in connection with accommodation;*

*if the accommodation provider reasonably believes the other person is using, or intends to use, the accommodation in connection with that person's, or another person's, work as a sex worker.*

The Explanatory Notes summarise the provision as follows:

*Section 106C provides that it is not unlawful for an accommodation provider to discriminate against another person in relation to accommodation if the accommodation provider reasonably believes that the other person is using or intends to use the accommodation in connection with that person's, or another person's, work as a sex worker. The discrimination may involve refusing to supply accommodation, eviction of the other person or unfavourable treatment of the other person.<sup>90</sup>*

<sup>90</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 22.

**Background**

The Attorney-General issued a media statement relating to this aspect of the Bill on 1 November 2012 announcing the following:

*Hotel and motel owners' rights to evict sex workers will be strengthened under proposed changes to the Anti-Discrimination Act introduced today in Parliament.*

*Attorney-General Jarrod Bleijie said the changes would give business owners the power to refuse to rent rooms to sex workers.*

*"A recent QCAT decision ruled the owners of a motel in Moranbah had breached the Anti-Discrimination Act by denying a legal sex worker a room," Mr Bleijie said.*

*"I announced at the time that I would attempt to overturn this decision given its ramifications on the accommodation industry in Queensland.*

*"This decision is being appealed by the Moranbah motel but it is necessary in the interim to change the law to give businesses certainty in controlling the use of their premises.*

*"The changes will mean business owners can refuse a sex worker accommodation or evict them if they have reason to believe they are operating a business from their premises.*

*"The Newman Government supports business owners' ability to make decisions about what does or does not occur on their premises.*

*"At the end of the day if someone is running a business out of a hotel or motel room and the operator or manager receives complaints from other patrons they should be able to do something.*

*"Under the Liquor Act, an operator can evict an unruly or rowdy patron for disturbing the peace by holding a party or playing music loudly.*

*"It is about levelling the playing field so the laws suit the majority not the minority.*

...

*"The Liquor Act states a hotel or motel owner is prohibited from allowing someone to operate a private business from their premises," he said.*

*"Now both pieces of legislation contain the same provisions to avoid future confusion."*

*The changes are effective from today.*<sup>91</sup>

The Explanatory Notes expand on the media statement, as follows:

*Recently, the Queensland Civil and Administrative Tribunal (QCAT) Internal Appeal Body, in GK v Dovedeen Pty Ltd and Anor held that a motel that refused accommodation to a sex worker who had used the accommodation to provide prostitution services had contravened the Anti-Discrimination Act 1991 (ADA). QCAT found that the conduct constituted direct discrimination on the basis of "lawful sexual activity". Under the ADA, "lawful sexual activity" is defined to mean "a person's status as a lawfully employed sex worker, whether or not self-employed".<sup>92</sup>*

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<sup>91</sup> Media Release by the Attorney-General and Minister for Justice, The Honourable Jarrod Bleijie MP, *Hotel and motel owners can refuse sex workers under proposed laws*, 1 November 2012.

<sup>92</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 4.

The following additional background information was provided in a written briefing from the Department:

*The policy intent of the Bill is to address the implications of this decision and ensure that accommodation providers have certainty in controlling the use that is made of their premises and in meeting their obligations under the ADA.<sup>93</sup>*

...

*The Bill will not allow a person to refuse to provide accommodation to someone only because of their status as a sex worker. The ADA exemption only applies where the sex worker is intending to use, or is using, the accommodation to carry out sex work.<sup>94</sup>*

### **Relevant Statutory Law**

The following Queensland laws are the main statutory authority on the issues under consideration:

- the *Anti-Discrimination Act 1991*;
- the *Criminal Code Act 1899* incorporating the Queensland Criminal Code (Criminal Code); and
- the *Prostitution Act 1999*.

#### The Anti-Discrimination Act 1991

The key provisions of relevance from the Anti-Discrimination Act are set out below:

- Section 6 (**Act's anti-discrimination purpose and how it is to be achieved**) provides:

*(1) One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.*

- Section 7 (**Discrimination on the basis of certain attributes prohibited**) provides:

*The Act prohibits discrimination on the basis of the following attributes:*

...

*(l) lawful sexual activity*

“Lawful sexual activity” is defined in the Anti-Discrimination Act as ‘a person’s status as a lawfully employed sex worker, whether or not self-employed’.

- Section 10 (**Meaning of direct discrimination**) provides:

*(1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.*

- Section 81 (**Explanatory provisions (prohibitions)**) provides:

*A person must not discriminate in the accommodation area if a prohibition in sections 82 to 85 applies.*

- Section 82 (**Discrimination in pre-accommodation area**) provides:

*A person must not discriminate against another person—*

*(a) by failing to accept an application for accommodation; or*

*(b) by failing to renew or extend the supply of accommodation; or*

<sup>93</sup> Letter from the Department of Justice and Attorney-General, 5 November 2012, page 3.

<sup>94</sup> Letter from the Department of Justice and Attorney-General, 5 November 2012, pages 3-4.

- (c) *in the way in which an application is processed; or*
- (d) *in the terms on which accommodation is offered, renewed or extended.*

- Section 83 (**Discrimination in accommodation area**) provides:

*A person must not discriminate against another person—*

- (a) *in any variation of the terms on which accommodation is supplied; or*
- (b) *in denying or limiting access to any benefit associated with the accommodation; or*
- (c) *in evicting the other person from the accommodation; or*
- (d) *by treating the other person unfavourably in any way in connection with the accommodation.*

### Criminal Code of Queensland and the *Prostitution Act 1999*

Chapter 22A contains the key provisions of relevance from the Criminal Code.

In terms of legal forms of sex work, the following summary of the legal situation in Queensland set out in a fact sheet issued by the Prostitution Licensing Authority (PLA) is of assistance:

*There are two legal forms of sex work in Queensland:*

1. *Sex work conducted in a licensed brothel, from which outcalls are prohibited. Depending on the size of the brothel, there may be up to eight sex workers on premises at any one time.*
2. *Private work (sole operator) – a sex worker that works privately from a premises, that provides outcalls, or both. It is illegal for a sole operator sex worker to operate in conjunction with any other sex worker.*

*Any other form of sex work is illegal in Queensland. This includes escort agencies, unlicensed brothels, massage parlours, street workers (publicly soliciting for prostitution is an offence), and two or more sex workers providing prostitution from a single premises (even if they work in split shifts).<sup>95</sup>*

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<sup>95</sup> Prostitution Licensing Authority, [Sex Work \(Prostitution\) and the Law in Queensland](#), Fact Sheet, page 1.

**Relevant Case Law**

It is apparent that the *GK v Dovedeen* litigation is the trigger to this proposed amendment to the Anti-Discrimination Act. The case note below summarises this litigation to date.

**The GK v Dovedeen litigation**

**Facts:** GK is a self-employed sex worker who in June 2010 stayed at The Drover's Rest in Moranbah which is a town close to a number of mining operations in Central Queensland. Dovedeen Pty Limited is the holder of a liquor license at The Drover's Rest Hotel. Upon checking out of the motel, GK was informed by the reception that she would not be permitted to stay at that hotel again because she had engaged in prostitution while staying there. GK commenced an action based on discrimination in the Queensland Civil and Administrative Tribunal (QCAT) against the motel.<sup>96</sup>

**QCAT First Instance Decision:** The matter was originally heard by a single QCAT Member, Ms Ann Fitzpatrick, who found in favour of the motel for a variety of reasons including that there was no direct discrimination as '*... GK was not treated less favourably than another person, who is not a lawfully employed sex worker, in circumstances where that person seeks a room for the purpose of engaging in prostitution*'.<sup>97</sup>

**QCAT (Internal Appeal Body) Decision:** On appeal to the QCAT Internal Appeal Body, the matter was heard by two QCAT members who found in favour of the sex worker, GK, on the basis of a number of reasons including that the actions by the motel were in contravention of sections 82 and 83 of the Anti-Discrimination Act.

Accordingly, they held that: '*... GK was the subject of direct discrimination, and to the extent that she suffered hurt, humiliation, stress, anxiety and/or economic loss, it was open to the Tribunal to determine that she ought to receive consequential compensation*'.<sup>98</sup>

**Further appeal:** The matter has now been appealed by the motel owners to the Court of Appeal of the Queensland Supreme Court.<sup>99</sup>

**Situation in other Australian Jurisdictions**

With the assistance of the Parliamentary Library, the Committee conducted a search of the legislation in Australia and in New Zealand to find comparable provisions to the proposed new section 106C into the Anti-Discrimination Act reveals that the only similar provision is section 62 of the Victorian [Equal Opportunity Act 2010 \(Vic\)](#) which provides:

**62—accommodation for commercial sexual services**

*A person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.*

In regard to the Victorian legislation, the Anti-Discrimination Commission Queensland (ADCQ) notes in its submission that:

*If Parliament is committed to giving accommodation providers a discretion as to whether they rent or let their rooms or premises to lawful sex workers, the [Anti-Discrimination]*

<sup>96</sup> There was significant press coverage of this matter, including a television report on A Current Affair titled "No Vacancy": <http://aca.ninemsn.com.au/video.aspx?vq=sex%20work&uuiid=0b36d50f-4acb-4abc-bb8e-eac2cd4eb0e7>

<sup>97</sup> [GK v Dovedeen Pty Ltd & Anor \(No 3\) \[2011\] QCAT 509](#), at [79].

<sup>98</sup> [GK v Dovedeen Pty Ltd & Anor \[2012\] QCATA 128](#), at [36].

<sup>99</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 4.

*Commission suggests adopting the Victorian approach. The Victorian legislation authorises a person to refuse to provide accommodation to another if the other intends to use the accommodation for or in connection with a lawful sexual activity on a commercial basis.<sup>100</sup>*

The situation in Tasmania is similar to the current situation in Queensland. Tasmania's [Anti-Discrimination Act 1998 \(Tas\)](#), section 16, prohibits discrimination against another person on the ground of any of the listed attributes. Among the attributes listed is 'lawful sexual activity'. However, the Act does not go on to provide any exemption in relation to accommodation providers regarding sex workers using the accommodation for their work.

### **Submissions**

Of the 53 submissions received by the Committee on the Bill, a significant number of the submissions included substantive comments about the amendment to the Anti-Discrimination Act relating to the exemption concerning accommodation and sex workers. None of the submissions relating to this part of the Bill were in total support of the proposed changes.

These submissions raised a number of general and specific concerns, a number of which are summarised below for the attention of the Legislative Assembly.

#### Discriminatory nature of the amendments

A number of submissions raised concerns about the perceived discriminatory nature of the amendments. These general concerns are encapsulated by Artemisia Green in her submission as follows:

*I fear that the new laws are based in fear, prejudice and misconception and that sex work organisations and experts on different sex work models have not been adequately consulted.*

*The whole reason we have an anti discrimination law is to protect people like me from such misconception and prejudice. Change to this law would undo years of anti-discrimination progress that can ripple out into much broader-than-intended consequences.<sup>101</sup> ...*

*I am asking that you consider the broader consequences of this law. The question is NOT whether or not you support sex work. Sex work is here and it is here to stay. It is also already legal. The question is do you stand for discrimination or anti discrimination? Do legal occupations have the right to work safely without prejudice or not?<sup>102</sup>*

Philip Ho observed as follows:

*To amend the Anti-Discrimination Act 1991 to allow very specific discrimination against a specific group of people by another group diminishes the entire concept of Anti-Discrimination. The Anti-Discrimination Act exists as a framework by which ALL people are treated fairly and equally and should not be amended on an ad-hoc basis to favour one person or group in favour of another on the basis of person opinion, judgement or morality. I can understand that moral values may play a part, but as I have previously mentioned, the Government of Queensland recognises sex work as a legal activity.<sup>103</sup>*

<sup>100</sup> Anti-Discrimination Commission Queensland, Submission 41, page 10.

<sup>101</sup> Artemisia Green, Submission 7, pages 1 and 3.

<sup>102</sup> Artemisia Green, Submission 7, page 3.

<sup>103</sup> Philip Ho, Submission 2, page 1.

In this context, the QLS noted that:

*... it is unusual for legislation to specifically permit discrimination against a single lawful occupation. This is more particularly the case when the Anti-Discrimination Act 1991 especially prohibits discrimination on the basis of 'lawful sexual activity', which is defined in that Act as being a "person's status as a lawfully employed sex worker, whether or not self-employed".*

*It is not unlawful to be a self-employed sex worker who trades outside of licensed brothels. These small business-owners, like any other business-owner, may expect to be supplied with accommodation in a fair and equal way compared to any other consumer. The Bill permits, however, direct discrimination on the basis of their work as a sex worker and this discrimination can be directed at either the sex worker or any other person as long as the accommodation provider reasonably believes the accommodation is intended to be used in connection with work as a sex worker. A client of the sex worker may therefore lawfully be discriminated against under the proposed section.<sup>104</sup>*

The Department provided:

*The only reason the new exemption (section 106C) in the ADA is necessary is because sex workers have been afforded special protection under the ADA that is not accorded to other commercial occupations or commercial activities.*

*That is, currently the ADA prohibits discrimination on the basis of "lawful sexual activity" (which is defined to mean "a person's status as a lawfully employed sex worker, whether or not self employed") but does not prohibit discrimination against someone because they engage in any other specified career or business. Sex workers continue to have special protection, not accorded to other occupations or commercial enterprises, in relation to other areas of activity covered by the ADA.*

*The exemption in the proposed section 106C provides an exemption to those prohibitions in relation to the use of accommodation for sex work.*

*It should also be noted that there is also no protection against discrimination on the basis of "lawful sexual activity" at all in most other Australian jurisdictions, apart from Tasmania and Victoria (which has an exemption for accommodation).<sup>105</sup>*

*The Department also provided in relation to the matters raised in submissions that:*

*The exemption recognises that the business interests of sex workers should not be given preferential treatment over the business interests of other commercial enterprises.*

*It is not the role of anti-discrimination legislation to create and enforce a right for one commercial enterprise or to create and enforce a right for one person to conduct their business in any premises<sup>106</sup>.*

The Department also made the point that some accommodation providers may have legitimate concerns that a perceived association with the sex industry may not be aligned with the market image or business profile they are seeking to develop and that they will suffer adverse commercial impacts or loss of trade.<sup>107</sup>

The Committee accepts the Department's position that the exemption ensures that the Anti-Discrimination Act does not unduly restrict the right of the accommodation providers, whose

<sup>104</sup> Queensland Law Society, Submission 32, page 3.

<sup>105</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 21-22.

<sup>106</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 22.

<sup>107</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 22.

business interests may be adversely affected, from making their own choice as to who they allow to use their accommodation services.

#### Premature nature of the amendments

Given that the GK v Dovedeen litigation is currently being appealed to the Supreme Court of Appeal, it has been submitted to the Committee that this Bill is therefore premature. For example, the QLS notes in its submission that:

*The substance of the issue addressed by the provision is presently before the Supreme Court in the matter of Dovedeen Pty Ltd & another v GK (7794/12), following a decision of the QCAT Appeal Tribunal in GK v Dovedeen Pty Ltd and Anor [2012] QCATA 128. It appears premature to legislate in this matter before the outcome is known. It is noted that the new provision will not affect the matter presently before the court.*<sup>108</sup>

In its response to the submissions, the Department acknowledged that the GK v Dovedeen litigation has been appealed to the Court of Appeal, but notes that:

*The purpose of the amendments is to introduce certainly into this area of the law as soon as possible.*<sup>109</sup>

The Committee considers that the amendments are timely and will ensure there is no further ambiguities in relation to the rights of accommodation providers.

#### Broad language of the new section 106C

A number of submitters commented on the broad language used in section 106C.

Scarlet Alliance made the following points under the heading “Extraordinarily wide ambit”:

*The section states that such discrimination is lawful where the accommodation provider reasonably believes the person is using or intending to use the accommodation in connection with sex work. There are three problematic elements to this section.*

##### *Reasonable belief*

*The element of reasonable belief is a subjective one that will lead to arbitrary decision-making by accommodation providers. An accommodation provider may ‘reasonably believe’ an ‘out’ or ‘known’ sex worker staying at the accommodation intends to work when they are actually on holidays with family or friends (or living short term in accommodation) and evict them. As a result, this Bill means that sex workers will experience discrimination not only on the basis of their work activities, but also in their private lives as a result of their known sex work status. This Bill permits discrimination against sex workers in both our professional and private lives.*

##### *Intention*

*Under this Bill, the person evicted, refused accommodation or treated unfavourably need not have actually sex worked from the room. The provider must only reasonably believe the person intends to use the accommodation for that purpose. An accommodation provider could evict a person even where there was no sex work taking place, but they may reasonably believe there was an intention to do so in future. This means it is lawful to discriminate against somebody because they are intending to do something legal in Queensland.*

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<sup>108</sup> Queensland Law Society, Submission 32, page 3.

<sup>109</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 21.

### Connection

*The wording covers conduct or [intended] conduct in connection with their work as a sex worker. This means a person may be evicted or treated unfavourably under this Bill for doing work emails or taking phone calls from their room, if those communications were connected with their work as a sex worker.*

### Accommodation

*The definition of 'accommodation' in the Schedule to the ADA, means that these reforms will have extraordinarily wide ambit. A person may be evicted or refused accommodation from a business premises, house, flat, hotel, motel, boarding house, hostel, caravan, caravan site, manufactured home, camping site or building construction site. There is no definition of who constitutes an 'accommodation provider' – whether it be owners, managers, staff or even landlords. Under this Bill, a sex worker could be evicted from their rental property by a landlord without evidence, recourse, and even without sex working, and be left homeless.<sup>110</sup>*

Philip Ho submitted:

*... the scope of the amendment (whether intentional or not) extends further than hotels and motels and could include any form of leased or rented accommodation. If this is the case, it grants Real Estate Agents and Lessors the same arbitrary discretionary rights listed under S.106C. This would put even more sex workers at an extreme disadvantage (bearing in mind that sex work is recognised by the Government of Queensland as a legal activity under the terms of the Prostitution Act 1999 and provisions of the Criminal Code Act 1899), not just those who utilise hotel and motel accommodation.*

*I strongly protest this amendment (s. 106C) on the grounds that it has been introduced and publicised with an implied correlation with the travel accommodation industry, but by the specific use of the term "accommodation", the definition of "accommodation" in the Anti-Discrimination Act 1991 extends the scope of the amendment to cover general forms of accommodation as listed. As far as I am aware, this has not been disclosed and requires further examination and consultation as it may have far reaching effects for many people.<sup>111</sup>*

Further, in terms of the language of proposed new section 106C, another submitter provided:

*But no provision is made for the definition of 'accommodation provider', 'accommodation', 'sex work' or what conduct constitutes a 'connection' with sex work. Thus, I have a lot of questions...*

*By these measures, sex workers may also be refused/evicted from leasing realty! Where are sex workers in Queensland expected to live? On the street?*

*What is a connection with sex work? If a sex worker is leasing a home, may they answer work calls whilst upon that property? Can they post online advertising from their home to go out and work as an escort?*

*Will hoteliers & landlords be given 24 hour access to sex workers rooms to determine what constitutes sex work?<sup>112</sup>*

<sup>110</sup> Scarlett Alliance, Submission 40, pages 2-3.

<sup>111</sup> Philip Ho, Submission 2 – Supplementary, page 2.

<sup>112</sup> Name Withheld, Submission 1, page 3.

The Department comprehensively addresses the use of terminology in its response to submissions. The Committee is not concerned that there are any issues in relation to the terms used in the section and sets out below the response from the Department in relation to the terms used:

**Accommodation:** *is defined non-exhaustively in the Schedule to the Anti-Discrimination Act 1991.*

**Sex work:** *is not a word used in section 106C. The words used are “work as a sex worker” where “sex worker” is the term used in the definition of “lawful sexual activity”. The term would be given its ordinary meaning.*

**In connection with:** *is used extensively in the ADA in imposing prohibitions on discrimination. The Department states that the courts are frequently called upon to interpret this phrase having regard to the context and the purpose of the relevant legislation.*

**Reasonable belief:** *is a well known concept at law which the Department does not consider there will be any particular difficulty in the application of the concept in the context of section 106C.<sup>113</sup>*

### **Unintended consequences of the amendments**

#### Alternative working locations

A number of submissions raised the issue of the consequences that these amendments will have in terms of the locations where sex workers can work. For example, Artemisia Green raised the following point:

*Therefore where am I left to legally work from? ... In a caravan or tent? I suspect spilling out onto the streets or being forced underground is not going to have the best results for sex workers or the community.<sup>114</sup>*

In this context, the Department provided the following comments in its written response to the submissions:

*The exemption (section 106C) does not require accommodation providers to refuse accommodation to sex workers, but ensures that, if they choose to do so in the circumstances outlined in the provision, they will not be subjected to complaints of discrimination under the ADA.*

*The proposed amendments allow the accommodation provider to decide who can rent accommodation. For some accommodation providers, sex workers may provide a strong and profitable part of their client base. These amendments will not prevent them from continuing this practice.*

*The Department notes that a number of submissions from sex workers referred to the good relationship they have enjoyed with accommodation providers. For example, the submission from a private sex worker Laurell Sands (043) expressly states “I don’t believe that the majority of motel accommodation service providers share the view that sex workers should not be allowed to work from accommodation providers such as motels and hotels. I have received feedback from moteliors in the Queensland region who have advised that they do not have any issues with sex workers utilising accommodation services from their establishments and that sex workers are welcome.”*

<sup>113</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 19-20.

<sup>114</sup> Artemisia Green, Submission 7, page 2.

*An inference may be drawn from these submissions that there is no reason to expect that accommodation will not continue to be available at a number of establishments that have been patronised by sex workers in the past.*

*If sex workers are assaulted or stalked and generally feel subject to fear or violence, they may make a complaint to the Queensland Police Service.<sup>115</sup>*

#### Higher charges or other benefits

In terms of other unintended potential consequences of the Bill, the QLS noted in its submission as follows:

*... that the proposed s106C(c) may also permit an accommodation provider to charge higher fees to a sex worker, or the client of a sex worker, than to any other guest. The Society is unsure whether this was an intended outcome of the new provision and it does not appear to have been expressed as a matter giving rise to the need for the provision.<sup>116</sup>*

Similarly, Scarlett Alliance noted the following in its submission under the heading “Open to misuse and corruption”:

*Accommodation providers may use this Bill as an excuse to repeatedly refuse known sex workers from accommodation. The amendments will lead to corruption and misuse – an accommodation provider may approach a sex worker and suggest they will not evict them if they provide a free service to the accommodation provider. This kind of corruption is regularly reported by sex workers from authorities.<sup>117</sup>*

#### Accommodation providers policing all patrons behaviour

A number of submissions noted that the new law could cause accommodation providers to make rash judgements in relation to the nature of their patrons’ business in their establishment. For example, Scarlett Alliance noted that:

*It means accommodation providers will begin policing the behaviour, work patterns and sexualities of their patrons. It opens up opportunities for accommodation providers to make arbitrary decisions based on the way a person dresses or act, assuming that they are intending to sex work from their room.<sup>118</sup>*

In this context, the QLS make the following comment in its submission:

*In parts of regional Queensland both the sex worker and fly-in / fly-out mine workers may be refused accommodation under the new provision. This may prove to be problematic if only limited accommodation facilities are available in that locality. The Society is unsure whether this was an intended outcome of the new provision.<sup>119</sup>*

#### Mistaken identity issue

Additionally, a number of submissions raised the issue of mistaken identity in the context of where women who are not sex workers may be mistaken for sex workers and denied accommodation.<sup>120</sup>

<sup>115</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 17-18.

<sup>116</sup> Queensland Law Society, Submission 32, page 4.

<sup>117</sup> Scarlett Alliance, Submission 40, page 3.

<sup>118</sup> Scarlett Alliance, Submission 40, page 3.

<sup>119</sup> Queensland Law Society, Submission 32, page 4.

<sup>120</sup> For example: see Laurell Sands, Submission 43, pages 2-3, and Peter Clooney, Submission 46, page 2.

The Committee notes a specific example of this was recently reported in the press when a Rockhampton nurse was mistaken for a prostitute in June 2011.<sup>121</sup>

In its submission, Respect Inc., a peer based sex workers' organisation based in Queensland, observed:

*In reality, if this Amendment is passed, any single person could be asked if they are intending on using the room for sex work either as a service provider or as a client. We believe that there will be little remedy for people who are mistakenly evicted or refused accommodation because of a perception by an accommodation provider.<sup>122</sup>*

#### Denying accommodation to sex workers who may just wish to stay privately

A number of submissions also raised the issue of sex workers being denied accommodation when on holidays. A specific example of this was mentioned in the submission from Di Qld:

*In one case I know of, a sex worker who is local to the Toowoomba area decided to organise a weekend in a local motel with her partner. She was denied accommodation and when she asked why she was told because we know you are a sex worker and we don't want your kind here. She had no intention of working that weekend, so the notion that accommodation providers would only deny sex workers accommodation if they reasonably believed that the sex worker was going to work is a misnomer.<sup>123</sup>*

#### Denying accommodation to individuals who may wish to engage a sex worker

A concern was raised in a number of the submissions that the language of the proposed provision is broad enough to permit accommodation providers to deny accommodation to individuals who may wish to engage a sex worker, or evict such persons once the accommodation provider formed a 'reasonable belief' that the individual intended to, or had engaged, a sex worker.<sup>124</sup>

#### Paucity of available accommodation resulting in higher levels of unsociable conduct

Another unintended potential consequence of the proposed amendment is that as there will be fewer available locations for lawful sex workers to work, it could lead to higher levels of unsociable conduct which will put additional strain on already limited police service resources. This issue is summarised in the submission from the ADCQ as follows:

*There is a strong possibility that if this proposed amendment is passed there will be a paucity of accommodation available for lawful sex workers to utilise for their business operations in remote and rural Queensland, which may result in a poorly managed sex industry with higher levels of unsociable conduct. Such an outcome is likely to lead to poorly managed and potentially unlawful sex industry that will cause nuisance to the public and extra work for the law enforcement agencies.<sup>125</sup>*

In its submission, Respect Inc., noted similar possible consequences:

*We believe that if this Amendment is passed it could lead to an increase in unlawful forms of sex work activities particularly at times of crisis caused by forced and rushed evictions or lack of appropriate accommodation options.<sup>126</sup>*

The Committee considers that the large volume of submissions that have raised possible unintended consequences arises out of the lack of consultation with the sex working industry in the development

<sup>121</sup> [Motel accuses travelling nurse of being a prostitute](#), *Brisbane News*, 21 June 2011.

<sup>122</sup> Respect Inc., Submission 49, page 6.

<sup>123</sup> Di Qld, Submission 28, page 3.

<sup>124</sup> Peter Clooney, Submission 46, page 2.

<sup>125</sup> Anti-Discrimination Commission Queensland, Submission 41, page 7.

<sup>126</sup> Respect Inc, Submission 49, page 5.

of the provisions. The Committee does not anticipate that the issues raised will eventuate as asserted, however considers that it may assist stakeholders if the Attorney-General addresses the “unintended consequences” in his response to the Committee’s Report. This will ensure that the intended application of the section is clearly recorded in the proceedings of the Legislative Assembly and may assist should these matters arise in the future.

#### **Recommendation 10**

The Attorney-General and Minister for Justice, in his response to the Committee’s Report, clarify the intended operation of proposed 106C and address each of the matters above under ‘unintended consequences of the amendments’ to allay the concerns of stakeholders that the provision will cause inadvertent mischief to persons involved in the sex industry.

#### ***Inconsistency between Liquor Act 1992 and Anti-Discrimination Act 1999***

As noted above, in his media statement, the Attorney-General said that under the proposed law “*a discrepancy between the Liquor Act and the Anti-Discrimination Act would now be corrected*”.<sup>127</sup>

An inconsistency between the Anti-Discrimination Act and the *Liquor Act 1992* in this regard was noted in the QCAT decision at first instance in the *GK v. Dovedeen* litigation, where the learned Member, Ms Ann Fitzpatrick, held as follows:

*... if it is direct discrimination not to provide a room to a person with the status of lawfully employed sex worker for the purpose of prostitution, a licensee and motel owner can never comply with the Liquor Act 1992 which prohibits the licenses permitting the conduct of a business from the rooms. That is a direct inconsistency such that the two Acts cannot be reconciled.*<sup>128</sup>

However, the QCAT (Internal Appeal Body) decided differently on this point:

*... it does not seem to us that section 152 of the Liquor Act 1992 is inconsistent with any provision of the AD Act insofar as it concerns provision of accommodation to persons [who] may or will carry on lawful sexual activity therein.*<sup>129</sup>

Scarlett Alliance, in its submission, commented that the amendments are unnecessary as ‘*there is no inconsistency between the Liquor Act 1992 and Anti Discrimination Act 1991*’. Scarlett Alliance referred to the QCAT (Internal Appeal Body) decision in the *GK v Dovedeen* litigation to support this statement.<sup>130</sup>

In relation to this issue, the Department made the following comment in its written response to the Committee regarding the submissions:

*It should also be noted that the prohibitions in Chapter 2 Part 4 of the ADA apply to a wide range of accommodation providers and are not limited to licensed hotel and motel operators who could be covered by the Liquor Act.*

*Any finding of the Court of Appeal in relation to the interaction of the Liquor Act and the ADA would not resolve the issue for all accommodation providers.*<sup>131</sup>

<sup>127</sup> Media Release by the Attorney-General and Minister for Justice, The Honourable Jarrod Bleijie, *Hotel and motel owners can refuse sex workers under proposed laws*, 1 November 2012.

<sup>128</sup> [GK v Dovedeen Pty Limited & Anor \(No 3\) \[2011\] QCAT 509](#), at [96].

<sup>129</sup> [GK v Dovedeen Pty Limited & Anor \[2012\] QCATA 128](#) at [51].

<sup>130</sup> Scarlett Alliance, Submission 40, pages 4-5.

<sup>131</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 21.

The Committee considers that regardless of the Court of Appeal's finding, the amendment is necessary to resolve any perception of a discrepancy in the two laws and put the matter beyond doubt.

***Other types of business conducted in hotels or motels***

In relation to other types of business that may be conducted from hotels or motels, in his submission, Riley Alexander made the following point:

*Accommodation providers do not seem to be objecting to other business people who work from their rented accommodation – such as Sales Consultants, Photographers who hire rooms to perform photo shoots, Politicians who run campaigns from their motel rooms when on the road and Celebrities who use motel rooms for interviews – all people who use rented accommodations for business when away from their usual place of business. But these accommodation providers object to sex workers. Is this more a moral objection than an objection from a business perspective?<sup>132</sup>*

***Against International Human Rights Principles, National Strategies and Damages Australia's Reputation***

In relation to the provision being potentially contrary to international human rights principles, in its submission, Scarlett Alliance made the following points:

*The Bill is wholly out of step with recommendation from the United Nations Secretary General, UNAIDS, UNFPA and UNDP, inconsistent with Australia's National STI and HIV Strategies, and contrary to best-practice approaches to sex work law reform, human rights and health promotion.<sup>133</sup>*

In terms of damaging Australia's international reputation for human rights, Scarlett Alliance commented, in its submission, as follows:

*The Bill effectively undoes years of anti-discrimination law reform. Anti-discrimination legislation was first introduced in Queensland because hoteliers and moteliers were refusing service to Indigenous Australians. These amendments are an enormous step backwards in terms of human rights, health promotion and anti-discrimination protection. This step will damage Australia's international reputation.<sup>134</sup>*

***Existing Laws Sufficient***

In terms of the issue of any noise or disruption that sex workers may cause, Artemisia Green also pointed out in her submission that:

*The truth is that there are already laws in place that can deal with any sex worker or any other person who behaves inappropriately while staying in a hotel or motel. Eviction can be obtained through the nuisance laws if there is actually a problem.<sup>135</sup>*

In respect to the issue of whether existing "nuisance laws" sufficiently address the concerns raised by the proposed new section 106C, the Department responded as follows:

*The new section 106C is not about strengthening nuisance laws. It is designed to overcome constraints in the ADA which provide special anti-discrimination protection for sex workers using accommodation for sex work.<sup>136</sup>*

<sup>132</sup> Riley Alexander, Submission 14, page 1.

<sup>133</sup> Scarlett Alliance, Submission 40, page 7.

<sup>134</sup> Scarlett Alliance, Submission 40, page 8.

<sup>135</sup> Artemisia Green, Submission 7, page 2.

<sup>136</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 23.

### **Alternative Solutions to the Issue**

In its submission, the QLS made the following observations in the context of possible alternative solutions to deal with the issue:

*At a principled level, it is problematic to justify that a service provider, such [as] an accommodation provider, should be entitled to refuse services to individuals for lawful purposes where no disturbance is caused.*

*With respect to licensed premises only, under s165, Liquor Act 1992, an authorised person may currently require a person who is disorderly or creates a disturbance to leave a premises. It is an offence not to leave premises when required and an authorised person can use necessary and reasonable force to remove him or her. This section would provide a licenced accommodation provider with the legitimate power to deal with complaints about the conduct of ... sex workers and, where reasonable to do so, require an individual to leave the premises.*

*Furthermore, s 76, Prostitution Act 1999 makes it an offence to cause unreasonable annoyance to another person in the vicinity of a place that is reasonably suspected of being used for prostitution and to a significant extent, is caused by the presence, or suspected presence, of prostitution at the place. This places a positive obligation upon individuals associated with prostitution to conduct themselves in a way which does not create a disturbance or generate complaints for accommodation providers. An accommodation provider also has the common law rights of an occupier of property to reasonably ask a guest to leave the premises.*

*On the basis on these existing powers there may be no need to introduce the proposed section. The Society therefore recommends that the proposed s106C be removed from the Bill and consultation be undertaken with all stakeholders to establish whether greater awareness of existing legislation and rights may be sufficient.<sup>137</sup>*

After considering the matters raised in submissions, the existing statutory law in Queensland and in other Australian jurisdictions and the two QCAT judgements issued in the GK v Dovedeen litigation, it has become clear to the Committee that this is not a minor issue that can be made without detailed consideration.

Further, the Committee considers that caution must be taken when derogating from the rights of an individual, which have been enshrined in long-standing legislation, not to be discriminated against.

The starting point in coming to a decision on this issue is best summarised by the ADCQ, which noted as follows in its submission:

*A well regulated sex industry, where all stakeholders are protected by safe working practices and are able to work in areas of demand across Queensland in a discreet and unobtrusive manner, is a good policy outcome that most Queenslanders would prefer to a sex industry that operates in a manner that causes a nuisance to the broader community, or that operates in a manner that is unsafe to the stakeholders involved in the industry.<sup>138</sup>*

Further, the Committee notes that:

*[t]he Bill will not allow a person to refuse to provide accommodation to someone only because of their status as a sex worker. The ADA exemption **only** [emphasis added]*

<sup>137</sup> Queensland Law Society, Submission 32, page 4.

<sup>138</sup> Anti-Discrimination Commission Queensland, Submission 41, page 6.

*applies where the sex worker is intending to use, or is using, the accommodation to carry out sex work.*<sup>139</sup>

The Committee considers that the concerns about any unintended consequences of the legislation can largely be addressed if clear guidance is provided on the application of the provision and also if the following recommendation suggested by the ADCQ is taken on board:

*If the amendment is passed as proposed, both the Queensland Police Service and the Prostitution Licencing Authority closely monitor any increase in unlawful sexual activity in the sex industry, and the numbers of nuisance complaints arising from the public in relation to the practice of unlawful sex work occurring in public places. The potential consequences of the amendments should be reviewed on a regular basis to avert any diminution in a well regulated lawful sex industry in Queensland.*<sup>140</sup>

Given the above, the Committee considers the best way to meet the policy objectives of the Government is to make the proposed amendment in the Bill, inserting the new section 106C into the Anti-Discrimination Act.

However, the Committee also recommends that the suggestion by the ADCQ has merit and will be necessary to monitor the application of the new section on an ongoing basis.

#### **Recommendation 11**

That both the Queensland Police Service and the Prostitution Licencing Authority actively monitor any increase in unlawful sexual activity in the sex industry, and the numbers of nuisance complaints arising from the public in relation to the practice of unlawful sex work occurring in public places.

## **2.6 Government Eligibility Policies**

### **Overview**

The second proposed exemption to the Anti-Discrimination Act relating to government eligibility policies is summarised in the Explanatory Notes as follows:

*The Bill amends the ADA to provide an exemption in relation to government eligibility policies based on citizenship or visa status, and actions taken under these policies. The exemption applies in relation to a 'prescribed eligibility provision' in a 'relevant policy' or the performance of functions in connection with a 'prescribed eligibility provision'. A 'relevant policy' is a policy of a government entity under which people are provided with financial or other assistance, services or support. The effect of the amendment will be that the ADA will not apply to a provision requiring a person to have a particular citizenship or visa status to be eligible for assistance, services or support, or a provision under which people who have a particular citizenship or visa status are treated more favourably in relation to eligibility for assistance, services or support.*<sup>141</sup>

The Department provided additional information in a letter to the Committee concerning this proposed exemption. The Committee notes, in particular, the following:

*Recent litigation against the State of Queensland has highlighted the potential for certain government policies, where eligibility for government assistance, services or support is*

<sup>139</sup> Letter from the Department of Justice and Attorney-General, 5 November 2012, page 4.

<sup>140</sup> Anti-Discrimination Commission Queensland, Submission 41, page 7.

<sup>141</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 5.

*based on citizenship or visa status, to be subject to complaints of racial discrimination under the ADA.*

*The Bill addresses this by inserting an exemption (new section 106B) in Chapter 2 Part 5 of the ADA which applies to requirements of citizenship or visa status in relevant eligibility policies.*

*The reason for this amendment is that public resources are finite and government funded assistance or support services are often expensive. The policy intent of the new exemption is to ensure the government is able to develop and implement eligibility policies based on particular citizenship or visa status for government funded assistance, services and support without the risk of being subject to a complaint of racial discrimination.*

*The amendment does not provide a “blanket exemption” for government policies in relation to any other eligibility criteria, but applies only in relation to citizenship and visa status criteria.*

*This exemption will enable the Queensland Government to discharge its responsibility to allocate resources in a way it considers most appropriate and effective – for example, through an eligibility policy for support services where priority is given to persons who are Australian citizens or are permanent residents.*

*The effect of section 106B is that the ADA will not apply to a provision in a “relevant policy” requiring a person to have a particular citizenship or visa status to be eligible for assistance, services or support, or to a provision in a “relevant policy” under which people who have a particular citizenship or visa status are treated more favourably in relation to eligibility for assistance, services or support.*

*A “relevant policy” is a policy of a government entity for financial or other assistance, services or support. The definition of “government entity” is linked to definition of an entity in section 24(1) of the Public Service Act 2008, and includes a wide range of government bodies. The definition does not, however, include a Government owned corporation (GOC), other than to the extent the GOC is directed to perform an obligation under the Government Owned Corporations Act 1993 or another Act.<sup>142</sup>*

### **Background**

As was explained by the Department, the purpose of this amendment is to give ‘certainty to government that it is acting lawfully under existing eligibility policies for government assistance and services that are linked to citizenship or visa status.’<sup>143</sup> As noted above, the Bill seeks to minimise any legal risk following ‘recent litigation’ against the State.<sup>144</sup> This potential exposure to litigation was highlighted by the Attorney-General in his introductory speech.<sup>145</sup>

With the benefit of the submissions<sup>146</sup> and the assistance of the Parliamentary Library, the Committee undertook a search of media releases in order to identify any relevant recent litigation. The Committee considered that it would be beneficial to understand the need for this certainty. The Department was unable to provide any specific information in its briefings to the Committee.

<sup>142</sup> Letter from the Department of Justice and Attorney-General, 5 November 2012, pages 4-5.

<sup>143</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 32.

<sup>144</sup> Letter from the Department, 5 November 2012, page 4; *Explanatory Notes*, page 4.

<sup>145</sup> *Record of Proceedings*, 1 November 2012, page 2382.

<sup>146</sup> David Faulkner, Submission 3; Inez Manu-Sione, Submission 26; and Vicky Va’a, Submission 50.

The following was reported in the Dominion Post (a New Zealand newspaper) on 25 October 2012:

*A DISABLED New Zealand woman denied help because of her nationality has won an out-of-court victory in Australia.*

*The Queensland Government will pay Hannah Campbell, 20, an undisclosed settlement to cover the cost of her disability care and \$17,500 for legal costs.*

*Miss Campbell was diagnosed with cerebral palsy as a baby. She cannot walk, speaks only a few words and requires full time care.*

*Her family moved to Queensland in 2006 and were automatically granted a non-protected special category visa, allowing them to permanently live and work in Australia.*

*But when the Campbells sought help to care for their daughter, the state government said she was ineligible because she was a "temporary resident".*

*The ensuing legal battle, accusing the state of discrimination, was hailed as a test case for all New Zealanders' social welfare rights in Australia. However, the settlement means Queensland's policy of excluding most New Zealanders from disability support remains.*

...

*More than 280,000 New Zealanders living permanently in Australia have the same type of non-protected special category visa as Miss Campbell, which cuts access to many social safety nets, including welfare and disability support.*

*The limits apply in all Australian states, but are most restrictive in Queensland. They have been blamed for a growing number of young New Zealanders in Australia living on the streets or being in prison.*

*Kiwi rights advocate David Faulkner, who was heavily involved in the Campbells' legal battle, said he was disappointed the case had not gone further.*

*"if the policy had been ruled unlawful, it would have enabled thousands of New Zealanders with disability to get support," he said.*

*The settlement showed the government knew its policy was discriminatory but had decided it was more cost-effective to settle complaints as they arose, he said.*

*The fight could continue, with several other families in Queensland considering similar legal action. ...<sup>147</sup>*

As noted above, the Bill was introduced into the Legislative Assembly on 1 November 2012. This led to further media attention,<sup>148</sup> including a report that the New Zealand Foreign Affairs Minister had 'asked officials to follow up with the State Government to clarify the intention of the proposed amendments.'<sup>149</sup> The Committee is unaware of the outcome of any communications between the respective governments.

<sup>147</sup> Dominion Post, *Kiwi settles Aussie disability care case*, 25 October 2012, page A5.

<sup>148</sup> Waikato Times, *Aust bill cuts Kiwi rights*, 3 November 2012, page A5; Dominion Post, *Light on Australia's 'second-class Kiwis'*, 6 November 2012, page A6; New Zealand Herald, *Aussie move to block welfare for kiwis*, 3 November 2012 available at [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10844810](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10844810); World, *Queensland bill discriminates against Kiwis*, 4 November 2012 available at <http://www.stuff.co.nz/world/australia/7905153/Queensland-bill-discriminates-against-Kiwis>.

<sup>149</sup> The Courier Mail, *NZ queries State law*, 6 November 2012, page 16.

One of the articles written after the introduction of the Bill appeared in the Waikato Times (another New Zealand newspaper), where it was reported:

*The Queensland government wants to strip protection for New Zealanders after it nearly lost a battle to refuse help for a disabled Kiwi.*

*The changes were slipped into a broader bill which passed its first reading in the Queensland Parliament on Thursday, nestled between youth boot camps and sex workers' rights.*

*If the bill passes, it will no longer be discriminatory for government agencies to deny support based on someone's residency status.*

*This would affect tens of thousands of New Zealanders "temporarily" residing in Queensland who are already refused access to welfare, public housing and disability support.*

*Without the threat of legal action, it would also be easier to expand restrictions on New Zealanders.*

*The Bill comes after New Zealander Hannah Campbell came close to successfully suing the Queensland Government for discrimination.*

*Miss Campbell has cerebral palsy but was denied disability support because she was classified as a "temporary" resident, despite living in Australia for years.*

*The Queensland Government settled with Miss Campbell last month but the tribunal that heard her complaint said there was a "strong case" of direct discrimination.*

...

*New Zealand rights advocate Vicky Va'a said the changes would enshrine existing state discrimination against New Zealanders and open the door for additional restrictions. ...<sup>150</sup>*

As noted by the Department, migration issues, including the entitlements and responsibilities attached to visas are a matter for the Commonwealth Government.<sup>151</sup> However, it is worth noting that the special category visa referred to in these articles (and also in submissions received) allows a New Zealand citizen to remain indefinitely and live, work or study in Australia lawfully as long as that person remains a New Zealand citizen. The special category visa is not a permanent visa and for those New Zealanders who were issued with this visa after 26 January 2001, most social security benefits are not available to them. For those affected individuals, access to such benefits is subject to qualifying for and being granted a formal Australian permanent visa.<sup>152</sup>

### **Submissions**

Of the 53 submissions that were received, eight included substantive comments about the amendment to the Anti-Discrimination Act relating to the exemption concerning government eligibility policies. None of the submissions relating to this part of the Bill were in support of the proposed changes. These submissions raised a number of concerns, including those discussed below.

<sup>150</sup> Waikato Times, *Aust bill cuts kiwi rights*, 3 November 2012, page A5.

<sup>151</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 32.

<sup>152</sup> *Fact Sheet 17 - New Zealanders in Australia*, Department of Immigration and Citizenship (Australian Government), available at <http://www.immi.gov.au/media/fact-sheets/17nz.htm>; *Trans-Tasman Travel Arrangement*, available at [http://en.wikipedia.org/wiki/Trans-Tasman\\_Travel\\_Arrangement](http://en.wikipedia.org/wiki/Trans-Tasman_Travel_Arrangement) and *Social Security payments for New Zealand citizens living in Australia*, National Welfare Rights Network, available at <https://www.welfarerights.org.au/factsheets/2010/6/18/social-security-payments-for-new-zealand-citizens-living-australia>.

Compliance with the Racial Discrimination Act 1975 (Cth) and international obligations

Dealing first with the issue of compliance with Commonwealth legislation, Mr Faulkner suggested that the *Racial Discrimination Act 1975 (Cth)* (RDA) prohibits discrimination against migrants and will override the proposed amendments to the Anti-Discrimination Act:

*If the Government thinks that the Amendment will enable it to racially discriminate against New Zealanders with impunity then it should think again. The State Attorney-General appears to have forgotten about the existence of federal legislation that prohibits race discrimination. The Racial Discrimination Act 1975 (Cth) (the RDA) prohibits, amongst other things, discrimination against migrants. Indirect discrimination based on national origin is also prohibited by the RDA. 2011 Census data reveals that a far greater proportion of New Zealand and Pacific Island born are being denied State services relative to those born elsewhere. In this regard I note that the Australian Human Rights Commission has previously accepted a complaint against the Queensland Government made by a New Zealander concerning discrimination based on immigration status.*

*Being Commonwealth legislation, the anti-discrimination provisions of the RDA override discriminatory state policies in any case. We will therefore simply switch to the Federal Courts in order to bypass the Amendment. Should we be successful under the RDA then the Amendment's only real effect will be to show the people of New Zealand that the State of Queensland is violating our human rights in an entirely calculated and deliberate way.<sup>153</sup>*

In response, the Department stated:

*The Department considers that the new exemption (section 106B) is not inconsistent with the RDA or Australia's obligations under international human rights laws.*

*The RDA does not prohibit discrimination on the basis of citizenship. The prohibitions on discrimination in section 9 of the RDA apply to discrimination on the basis of race, colour, descent or national or ethnic origin.*

*There is a long line of authority to establish that "national origin" refers not to a person's nationality or place from which they have come but to characteristics determined at the time of their birth, either by place of birth, the national origin of a parent or parents or by a combination of these factors.*

*The International Convention on the Elimination of Racial Discrimination (CERD) clearly contemplates, and permits, State Parties to make laws which distinguish between citizens and non-citizens. Paragraph 2 of Article 1 of the CERD provides that the convention does not apply to distinctions, exclusions, restrictions or preferences made by a state party to the convention between citizens and non-citizens.<sup>154</sup>*

Regarding any international obligations, Mr Faulkner submitted:

*The legalisation of race discrimination by the State is also a clear breach of Queensland's binding obligations under the International Covenant on Civil and Political Rights, as nationality discrimination concerning economic rights is prohibited under the right to equality before the law (art. 26).*

<sup>153</sup> David Faulkner, Submission 3, page 1. Compliance with the *Racial Discrimination Act 1975 (Cth)* was also raised in submissions from Inez Manue-Sione, Submission 26; and Vicky Va'a, Submission 50.

<sup>154</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 29-30.

*Nationality discrimination is similarly prohibited under article 2(2) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). I note that the Queensland Government is citing limited public funds as a rationale for the Amendment; however, ICESCR Article 2(3) only allows developing countries to determine to what extent they guarantee economic rights to non-nationals. As one of the richest countries in the world per capita, Australia cannot claim developing country status, and is required to treat all residents equally – particularly those lawfully residing on an open-ended basis.<sup>155</sup>*

The Department responded as follows:

*The Department does not consider Article 26 of the ICCPR to be relevant to this issue. The ICCPR relates to civil and political freedoms (eg right to freedom of conscience and religion, the right to be free from torture and the right to a fair trial) and Article 26 of the ICCPR relates to a fundamental principle of equality before the law in this context. The Department also notes that Australia made the following federal statement with regard to the ICCPR: "Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise."*

*In terms of the ICESCR, the Department notes the following ...: "On 10 December 1975, Australia agreed to be bound by the ICESCR. The ICESCR does not, however, form part of Australia's domestic law and is not scheduled to, or declared under, the AHRC Act".*

*The Department also notes that the ICESCR recognises that the rights covered by the ICESCR are not absolute and recognises the need for limitations in the accommodation of economic, social and cultural rights such as housing, employment and education.*

*The National Human Rights Consultation Report September 2009 pages 61-62 in the discussion on the ICESCR sets out clearly the rationale for these limitations. "When it comes to economic, social and cultural rights such as rights to health, housing, employment and education, the international community has acknowledged that respect for, and protection and promotion of such rights is often more complex. Governments always work with finite resources; parliaments weigh conflicting claims by a diverse range of constituents when deciding how resources should be allocated to the provision of services in areas such as health, education and housing. it is all very well to espouse a right to work, but in times of economic downturn there are limits to how far governments, even democratic ones, can go in providing assistance to unemployed people"*

*This recognition of the need for limitations on obligations is reflected in Article 4 of the ICESCR which states "limitations may be placed on these rights only if compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". (See also Article 2.1 which limits the obligation of States to take steps to the maximum of their available resources to progressively achieve these rights).<sup>156</sup>*

<sup>155</sup> David Faulkner, Submission 3, pages 1-2

<sup>156</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 30-32.

Targeted application

The Committee also heard from a number of individuals who would be affected by the proposed change, or who work with such affected individuals.<sup>157</sup> Broadly, those submissions suggested that the amendment targets New Zealanders and other nationalities that live in Queensland without permanent residency.

The ADCQ considered that the proposed amendment ‘allows for more favourable treatment of persons who have a particular citizenship or visa status in relation to eligibility’.<sup>158</sup> Referring to the Attorney-General’s introductory speech, the ADCQ stated:

*The Commission appreciates that economic requirements may in some instances justify the restriction on the provision of expensive government services to Australian citizens or to persons with particular visa status. However, if the amendments are made as proposed, the Commission is concerned that any widespread denial of certain government services to long term residents of Queensland may create a permanent second class of people. The ADCQ considers this to be detrimental to Queensland’s long term social cohesion and localised community harmony.*

*In particular, the Commission understands that there is an emergence of an economically disadvantaged group of New Zealand citizens living in Australia who do not have a clear pathway to either permanent residency or Australian citizenship.*<sup>159</sup>

Three of the submissions received provided some insight into this ‘disadvantaged group’.

In her submission, Angela Ogier stated:

*My husband and I are New Zealanders who moved to Queensland in 2011 in order to leverage our considerable experience in the international oil and gas industry to further the economy of Queensland through our contributions to the LNG mega projects being undertaken in Gladstone. As New Zealanders we entered the country on Non-Protected Special Category Visas and reside here legally as 'temporary visa' holders. We intend to reside in Queensland permanently and are able to do so with our current visas. We have both secured employment, purchased property, and employ an Australian fulltime for the care of our children. It should be noted that we pay the same tax on our employment earnings as Australian citizens.*

...

*We are investigating becoming citizens. However, in order for us to become citizens, we would require permanent residency through skills assessment or employer sponsorship. As permanent residency is not a prerequisite of our employment, employers are not incentivised to offer 457 visa assistance as they would to nationals outside the 'preferential' Australia-New Zealand Trans-Tasman Travel Arrangement (2001). Hence, New Zealanders are disadvantaged in terms of accessing pathways to permanent residency and citizenship that would be available to other nationalities.*<sup>160</sup>

Similarly, Donna Soo made the following submission:

*I have resided in Australia for nine years (and in Queensland for two years) and during this time have been continuously employed in highly paid roles. Not only have I paid a*

<sup>157</sup> Angela Ogier, Submission 13; Family Skiffington, Submission 24; Inez Manu-Sione, Submission 26; Anti-Discrimination Commission Queensland, Submission 41; Donna Soo, Submission 47; Caxton Legal Centre, Submission 48; Vicky Va’a, Submission 50.

<sup>158</sup> Anti-Discrimination Commission Queensland, Submission 41, pages 2-3.

<sup>159</sup> Anti-Discrimination Commission Queensland, Submission 41, page 3.

<sup>160</sup> Angela Ogier, Submission 13, pages 1-2.

*considerable amount of tax over the years, but I have significantly participated in the Australian economy through buying and selling two homes and contribute to the Australian superannuation pool. I believe that this proposal would unfairly discriminate against me from potentially receiving services for which I personally contribute to the funding of.*

*I have considered becoming a permanent resident since I arrived in Australia, however do not met the requirements for residence as a skilled migrant, despite the fact that I was originally recruited to a position for which my employer was unable to find an Australian to fill and I hold a Masters level tertiary qualification. It is my view that New Zealanders wishing to obtain permanent residence are disadvantaged, as the pathways are geared toward migrants from other countries and do not easily accommodate New Zealanders.<sup>161</sup>*

Vicky Va'a, on behalf of Pacific Indigenous Nations Network (Gold Coast), Pasifica Pioneers (Brisbane) and Wahine Toa (Gold Coast), provided the following information:

*By virtue of a long standing bilateral agreement between New Zealand and Australia, New Zealand citizens are entitled to reside indefinitely in Australia and vice versa. The Special Category Visa awarded at entry into Australia is not a temporary visa, or a permanent visa, it is in effect an indefinite visa, which makes their situation quite unique when compared to other migrants.*

*New Zealanders pay the same taxes and contribute to Australian society in the same manner as Australian citizens, yet are restricted from accessing social security support systems and alike based on an immigration status that pertains uniquely to their nationality. Some 60% of New Zealand migrants will never meet the criteria for Permanent Residency but are still long term, valuable and contributing members to Australian society. To use the argument that New Zealanders are treated no worse than other temporary migrants is incorrect. The Special Category Visa, afforded only to New Zealanders, is not a temporary visa with a finite period attached. New Zealanders can in fact live in Australia (lawfully) for an indefinite period of time and thousands of New Zealanders have done just that, positively contributing many years to Australian society and to the bucket of funds collected in taxes. To then deny a long term resident of Queensland necessary State support, after years of paying taxes, based solely on their (indefinite) visa status, one perhaps that they will never be able to change, is most assuredly racial discrimination and entirely unjust. Allowing discretion on this point would be most harmful and highly detrimental to arguably the largest migrant group to Australia.<sup>162</sup>*

The ADCQ considered there were also broader social issues:

*The Commission suggests the presence of many thousands of New Zealand citizen temporary residents with increasingly long-term periods of stay raises the potential for a variety of social consequences. A proportion of this group are from [culturally and linguistically diverse] backgrounds (Maori, Samoan, Tahitian or other Pacific Islander heritage). Denial of certain government services to this group may contribute to a sense of exclusion based on cultural identity. Potential long-term social impacts may lead to an over-representation in juvenile justice, underperformance in numeracy and literacy, substance abuse, homelessness and suicide - all of which ultimately cost the Queensland community.*

<sup>161</sup> Donna Soo, Submission 47.

<sup>162</sup> Vicky Va'a, Submission 50, page 2.

*A further possibility is that families of children with disabilities, who are not provided with support services, may relinquish their children into the care of the State, again increasing the social and economic costs to Queensland.*

*This is an issue that requires the attention of both the Commonwealth and State Governments to ensure that a permanent second class of people in Australia, that will ultimately impact on the well-being and social cohesion of broader Australian community, including Queensland, is not created.<sup>163</sup>*

Caxton Legal Centre, like the ADCQ, also advocated for a more socially responsible and coordinated approach:

*It is submitted that a more socially responsible approach would involve making representations to the Commonwealth Government about meeting its responsibilities to all people entitled to reside permanently in Australia.<sup>164</sup>*

One of the submissions came from a family who have had difficulty accessing specialist disability services for their daughter. This submission provides an example of the personal impact and potential consequences of this policy (both individual and State) and highlighted issues around the communication and understanding of the eligibility policy.

*We came to Australia with a job secured.*

*During this time, we have rented, bought a house, pay tax, pay rates, water, support the local community. Support costs to Rachel's day programs. Our total income goes back into the Queensland economy!*

*On seeking support for Rachel, services were not available from Service Providers as Rachel was not an Australian and not entitled as she did not come with a Disabilities Queensland "package".*

*Without support, Rachel's behavior and disability were brought to crisis point. Disabilities Queensland were advised by their own staff that this situation was not sustainable, however, services or support was not forthcoming because Rachel is a New Zealander.*

*The situation was recognized by Disabilities Queensland, however, the discrimination prevailed because she was a New Zealander and we were advised that the only way Rachel would be supported was that if either we abandoned her at a location or I was not available to take care of her. That was called "relinquishment".*

*Rachel's behavior crisis came to a head when my health collapsed and I was then no longer able to take care of Rachel at home.*

*Over the last 22 months Rachel has been receiving Time-Limited response support. This initially provided for up to 15 working days to give Disability Services an opportunity to schedule a needs assessment and to establish longer term support options.*

*To support this, we have been encouraged to*

- *Relinquish Rachel (even though "relinquishment offends human rights)*
- *Submit an application for Rachel to the local Council of "Homelessness"*
- *Engaged in looking at opportunities for long term support, after proceeding then withdrawn by QDS.*

<sup>163</sup> Anti-Discrimination Commission Queensland, Submission 41, page 5.

<sup>164</sup> Caxton Legal Centre, Submission 48, page 2.

*Also for 22 months, we have been seeking Rachel's legal status as a New Zealander with the Department of Disabilities and the Minister, Tracy Davis, however, this has not been forthcoming.*

...

*We find this confusing, having been supplied recently this document "Portfolio Policy Statement PAS003" by an independent support network.*

*This policy aims to provide clear and transparent criteria for determining eligibility for services funded or provided by Disability Services Queensland.*

*Yet we still cannot get a clear, understanding of Rachel's criteria from DQS.*

*Even though within the same policy "Portfolio Policy Statement PAS003".*

*This Policy states the roles and responsibilities for QDS. Our family sees this policy as discrimination against the nationality New Zealanders by not working within this policy.<sup>165</sup>*

Another submission highlighting social and cost consequences was received from Inez Manu-Sione on behalf of on behalf of Pasifica LIPI, Young Offenders Support Program (Inala Youth Services), Pasifica Pioneers, Qld and Voice of Samoa People Inc:

*New Zealanders pay the same taxes and contribute to Australian society in the same manner as Australian citizens, yet are restricted from accessing social security support systems based on an immigration status that is categorised by their nationality.*

*We are Polynesian and Maori professionals working in varying areas from the Juvenile Justice system, Child Safety, Tertiary institutes, Education Qld and Non-government organisations. The denial of access to services for our communities have been the triggering factor for many of the social issues that are ultimately creating a further burden on 'public resources' by way of the juvenile justice systems, Qld Police services and Child Safety. The approval of this amendment will only exacerbate that burden and remove the rights of the most vulnerable, which in Ms Campbells case, had this amendment been in effect, it would have been the removal of the rights of a disabled child to access support!!<sup>166</sup>*

The Department provided the following response:

*The exemption in section 106B does not target New Zealanders or any other particular citizenship group. The amendment gives certainty to government that it is acting lawfully under existing eligibility policies for government assistance and services that are linked to citizenship or visa status. As Government has finite resources, it must be confident it can distribute those funds as per its policies.*

*Migration, the requirements for obtaining different categories of visa, and explaining the rights, entitlements and responsibilities attached to such visas are within the Commonwealth Government's areas of responsibility, and not State responsibility.*

*A whole of government audit was undertaken to determine the extent of government policies for services and assistance that include citizenship or visa status as eligibility requirements. The results of the audit indicate that it is not unusual to limit government services and assistance to Australian citizens are certain visa holders who live in*

<sup>165</sup> Family Skiffington, Submission 24, pages 1-3.

<sup>166</sup> Inez Manu-Sione, Submission 26, page 3.

*Queensland so that permanent Queensland residents benefit from government funded services.*

*There are a range of government policies (both legislative and administrative) relating to certain education, training, housing, disability, mental health, seniors and certain investment services where a person must be either an Australian citizen or a holder of a certain visa (usually permanent residency) to receive government services and assistance for free or at a subsidized rate. Some policies for services or support are further limited to people who reside in Queensland in addition to the citizenship and visa requirements.<sup>167</sup>*

The Committee notes that this proposed change is not introducing new policy. Rather, the amendment seeks to provide certainty by making it clear that it is not unlawful to discriminate against those individuals who are ineligible, under State Government policies, for financial or other assistance, services or support where those policies have citizenship or visa status requirements.

While entitlements and responsibilities attached to visas are matters for the Commonwealth, the Committee notes the concerns raised in a number of submissions regarding apparent inequity and broader social issues, particularly for those individuals who will not qualify for permanent residency.

The Committee understands that the Bill is not inconsistent with any rights those individuals may have resulting from their visa status or with wider international obligations and recommends that the addition to the Anti-Discrimination Act be made.

#### **Recommendation 12**

Both components of the Bill amending the *Anti-Discrimination Act 1991* relating to: accommodation used in connection with work as a sex worker; and eligibility requirements for the provision of assistance, services or support - be passed without amendment.

## **2.7 Fiscal Repair Amendment Act 2012**

The Bill proposes to amend the *Fiscal Repair Amendment Act 2012* to bring forward the commencement date (from 1 July 2013 to 1 January 2013) of sections that transfer the powers of the Queensland Liquor and Gaming Commission and chief executive under the *Gaming Machine Act 1991* and *Liquor Act 1992* to a Queensland Liquor and Gaming Commissioner.<sup>168</sup> The Explanatory Notes also provided:

*The amendments were to commence on 1 July 2013. However, given the benefits to industry and government in streamlining the decision making process, it would be preferable for the amendments to commence on 1 July 2013, to maximise their effect.<sup>169</sup>*

The *Fiscal Repair Amendment Act 2012* received Royal assent on 21 September 2012, having been debated as an urgent bill and cognate with the Appropriation (Parliament) Bill 2012 and the Appropriation Bill 2012.<sup>170</sup>

<sup>167</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 32-33.

<sup>168</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 1.

<sup>169</sup> Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012, *Explanatory Notes*, page 5.

<sup>170</sup> *Transcript of Proceedings*, 11 September 2012, page 1824.

When the Fiscal Repair Amendment Bill 2012 was introduced into the Legislative Assembly, the Honourable TJ Nicholls MP, Treasurer and Minister for Trade explained:

*This Bill will also introduce two amendments to the Gaming Machine Act 1991 and the Liquor Act 1992: the creation of the Liquor and Gaming Commissioner and the removal of the requirement for employees of clubs and hotels who carry out gaming to be licensed.*

*Currently, the Queensland Liquor and Gaming Commission and the Chief Executive make decisions under the Gaming Machine Act and the Liquor Act.*

*In practice, the Commission meets monthly to consider gaming machine and liquor licence applications of significant community impact such as new club and hotel licences and extended trading hours. The process of referral from the chief executive to the Commissioner can make for a lengthy application process which can result in competitive disadvantages and serve as a disincentive to broaden business opportunities.*

*These amendments will amalgamate the roles and decision-making powers of the Commission and the Chief Executive into a new Liquor and Gaming Commissioner. It is not intended that these amendments will detract from established licensing processes under the Liquor Act and the Gaming Machine Act, but will rather streamline the decision-making process and remove unnecessary delays associated with the referral of applications to the Commission.<sup>171</sup>*

*The Fiscal Repair Amendment Bill 2012 passed through the Legislative Assembly on 14 September 2012 without opposition.<sup>172</sup>*

*Addressing matters of consultation, the Department stated:*

*In the development of amendments for the Fiscal Repair Amendment Act 2012, consultation was undertaken with key industry stakeholders including, the Queensland Hotels Association, Clubs Queensland, and casino operators. ... The Chair of the commission has been advised of the proposed new commencement date of 1 January 2013.<sup>173</sup>*

The Committee supports the amendments and considers that realising the expected benefits earlier will assist both industry and government.

### **Recommendation 13**

The components of the Bill amending the *Fiscal Repair Amendment Act 2012* be passed without amendment.

<sup>171</sup> *Transcript of Proceedings*, 11 September 2012, page 1823.

<sup>172</sup> *Transcript of Proceedings*, 14 September 2012, page 2133.

<sup>173</sup> Letter from the Department of Justice and Attorney-General, 5 November 2012, page 8.

### 3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles to the Bill and brings the following issues to the attention of the Legislative Assembly. Of particular note is that the Committee identified potential inconsistencies with fundamental legislative principles relating to the amendments to the Youth Justice Act which were not identified in the Explanatory Notes.

For ease of reading, the Committee has separated issues by each component of the Bill, rather than by the individual principles themselves.

#### 3.1 Rights and liberties of individuals

##### ***Amendment of Youth Justice Act 1992***

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

##### Rights and liberties of children generally

The Committee notes that children are generally recognised as more vulnerable than adults, especially in the context of the criminal justice system. This is reflected in the Youth Justice Act, section 3 ‘Youth justice principles’, for example, youth justice principle 4:

*Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child.*

##### Removal of court referred youth justice conferencing – proportion and relevance

Clauses 3 to 17, 20 to 21, 41, 43, 44, 45, 46 and 47 of the Bill if passed, will amend the Youth Justice Act to remove court referred youth justice conferencing.

The effect of the provisions will be that a court will no longer have the option to sentence a child by referring a matter to conference or to refer a child to a conference prior to sentence. (*See the flow chart contained in **Appendix A** to this Report for more details on Youth Justice Conferencing*).

Under the provisions which are proposed to be repealed, conferences are available as one of the options to help a court make an appropriate sentence order.<sup>174</sup> The potential repeal of section 163(4) means that it is no longer possible for a child to participate in a conference and be found guilty without a conviction being recorded.

Having a conviction recorded would be likely to have a significant adverse impact on a child’s future. Therefore it is questionable whether this amendment has sufficient regard to the rights and liberties of young people in the criminal justice system.

As noted in Part 2 of this report, the clauses removing court referred youth justice conferencing have been made ‘in the context of the 2012-2013 Budget’ and the Committee is not convinced that the amendments should be made.

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<sup>174</sup> *Youth Justice Act 1992*, section 165.

No explanation is given for the policy aim sought to be achieved by these amendments. Nor has any reason been given for the removal of court referred conferencing as a sentencing option. It has therefore not been possible to assess the proportion and relevance of this measure.

#### Boot camp orders

Clauses 18, 19, 22 – 40, 42, 45, 46, 47 and 48 of the Bill will amend the Youth Justice Act to introduce the boot camp orders.

As an alternative to detention of children, boot camp orders are a less serious limit on liberty. However, boot camp orders involve more serious limitations on liberty than conditional release orders and therefore more caution, checks and balances are likely to be required. The Committee considers this aspect of the boot camp orders should be addressed as it relates to the rights and liberties of individuals.

#### Extension of duration of boot camp orders

Clause 35 of the Bill proposes to insert a new section 246A into the Youth Justice Act.

The effect of proposed new sections 246A(7) and 246A(8) is that the length of a boot camp order can be extended beyond the intended 6 months until a proceeding under section 246A is heard and decided. Therefore, potentially a child will have to comply with the boot camp order for longer than the intended 6 months.

Section 150(1)(b) of the Youth Justice Act requires that when sentencing a child for an offence, a court must have regard to the youth justice principles. Youth justice principle 11 states as follows:

*A decision affecting a child should, if practicable, be made and implemented within a timeframe appropriate to the child's sense of time.*

It is questionable whether this ability to extend the boot camp order has sufficient regard to the rights and liberties of the children in question.

#### Reporting harm to children in boot camp

Clause 40 of the Bill inserts new part 8A into the Youth Justice Act.

Proposed new section 282F of the Youth Justice Act requires a boot camp centre employee to report harm or suspected harm to a child while participating in the residential phase of the boot camp program, unless the employee has a reasonable excuse. Proposed section 282F(4) states that *'it is a reasonable excuse that reporting the matter might tend to incriminate the employee'*.

It is assumed that boot camp centre employees will be required to be adults. Therefore, a child boot camp participant will be in a position of relatively less power and greater vulnerability in relation to the boot camp centre employee.

The potential effect of this section is that an employee who harms a child participating in the residential phase of the boot camp program, or who indirectly causes harm to a child, for example, by failing to check the ropes prior to an abseiling session, has a reasonable excuse for not reporting this harm.

This could be considered as not having sufficient regard for the rights and liberties of child boot camp participants.

The Committee acknowledged earlier in this report that the Department was working with CCYPCG in relation to the community visitor program and considers this will be an essential part of the process in protecting children in boot camp programs from harm.

Delegation of administrative power – section 4(3)(c) Legislative Standards Act 1992

Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?

Clause 46(3) of the Bill will amend schedule 2, item 5 so that Regulations may provide for standards, management, control and supervision of boot camp orders in addition to the existing types of orders (that is, probation orders, community service orders, intensive supervision orders and conditional release orders).

Boot camp orders are closer to detention than all the existing types of orders. Therefore, it is questionable whether it is appropriate for the standards, management, control and supervision of boot camp orders to be provided for in a Regulation.

The Committee considers it may be preferable for matters relating to boot camp orders to be dealt with by an Act, with the greater scrutiny and rigor that the legislative process involves.

Rights and liberties – section 4(3)(g) Legislative Standards Act 1992

Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

***Retrospectively making boot camp orders***

Clause 45 of the Bill inserts new section 357 into the Youth Justice Act. The effect of the proposed section is that a boot camp order can be made against a child for an offence committed before this section commences. Therefore this section has the potential to adversely affect rights or liberties or impose obligations retrospectively. Strong argument is required to justify a retrospective adverse effect on rights and liberties or imposition of obligations.<sup>175</sup>

The Explanatory Notes do not raise this potential issue of fundamental legislative principle or provide any justification for this retrospective provision and the Committee therefore draws this to the attention of the Legislative Assembly. It is possible this provision may even fall in the objectionable category of retrospective provisions.

As stated by the Office of the Queensland Parliamentary Counsel, '*one of the most commonly understood aspects of the rule of law in a democratic society is that laws only impose liability prospectively, because to do otherwise would be arbitrary*'<sup>176</sup>.

Given the short period in which the Committee had to examine the Bill, the Department has not been afforded the opportunity to respond to the matters identified and therefore the Committee makes the following recommendation:

**Recommendation 14**

The Attorney-General and Minister for Justice, in his response to the Committee's Report address the matters raised by the Committee relating to consistency with the fundamental legislative principles as they apply to the amendments to the *Youth Justice Act 1992*.

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<sup>175</sup> Fundamental Legislative Principles: The OQPC Notebook, Queensland Parliamentary Counsel, 2008, page 55.

<sup>176</sup> Fundamental Legislative Principles: The OQPC Notebook, Queensland Parliamentary Counsel, 2008, page, 57.

**Amendment of Anti-Discrimination Act 1991**

The Committee has set out a large amount of commentary earlier in this Report on the amendments to the Anti-Discrimination Act. The Committee brings the following issues to the attention of the Legislative Assembly for consideration in relation to the fundamental legislative principles which must be considered when proposing amendments to legislation.

**Section 4(2)(a) of the *Legislative Standards Act 1992*** requires that legislation has sufficient regard to the rights and liberties of individuals.

Section 106C is arguably inconsistent with section 7 of the Anti-Discrimination Act, which states that lawful sexual activity is a protected attribute. Lawful sexual activity is defined as meaning a person's status as a lawfully employed sex worker, whether or not self-employed. The Bill does not amend section 7.

In addition, it could be argued that section 106C creates an undue restriction on ordinary activities, that is, a sex worker conducting his or her business.

The Explanatory Notes mention a decision of the QCAT Internal Appeal Body in *GK v. Dovedeen Pty Ltd and Anor* as rationale for introduction of this section. It would usually be expected that a more compelling reason would be given for a provision of this nature.

The amendment offends against the prohibition of arbitrariness. Prohibition of arbitrariness is identified as one of the pillars of the rule of law by the European Commission for Democracy through Law ('The Venice Commission') in its Report on the Rule of Law (April 2011). The rule of law is important when assessing issues of fundamental legislative principle. As stated in the *Legislative Standards Act 1992*, section 4(1), '*fundamental legislative principles are the principles... that underlie a parliamentary democracy based on the rule of law*'.

**Rights and liberties – section 4(3)(g) *Legislative Standards Act 1992***

Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

The Committee brings the retrospective nature of the amendments to the Anti-Discrimination Act to the attention of the Legislative Assembly.

Strong argument is required to justify a retrospective adverse effect on rights and liberties or imposition of obligations. The Explanatory Notes of the Bill raise this potential issue at page 7, stating that '*these amendments are justified on the basis of clarifying areas of uncertainty in the law and address potential unintended consequences*'.

In relation to the accommodation exemption, the Explanatory Notes state:

*The new exemption in the accommodation area will provide certainty to accommodation providers in the management of their premises and clarity to enable them to meet their obligations under the ADA. Providing that complaints made on or after the introduction of the Bill are subject to the new exemption (regardless of when the conduct complained of occurred) will ensure that accommodation providers have certainty in making decisions about the use that can be made of their premises as soon as possible and protect accommodation providers from further complaints.*

In relation to the citizenship or visa requirement exemption, the Explanatory Notes state:

*The new exemption for certain government eligibility polices will ensure that the allocation of limited public resources can be effectively managed. Providing that complaints made on or after the introduction of the Bill are subject to the new exemption (regardless of when the conduct complained of occurred) will ensure the objectives of the exemption are not undermined by complainants seeking to exploit the grey "window"*

*period before the Bill receives assent and involving the government in litigation which may dilute the government resources available for the provision of services.*

Two of the submissions received also considered the retrospective nature of the amendments.

In its submission, the ADCQ considered whether adequate explanation was given to justify the departure from the fundamental legislative principles:

*The provisions further derogate rights and liberties by adversely affecting rights and liberties retrospectively. Not only would the provisions, if passed, take effect from the date of introduction (1 November 2012), the transitional provisions further derogate rights in removing the right to seek redress where a complaint had not yet been made before 1 November 2012.*

*Although laws change, rights of action for contraventions of the law that occurred before the change, continue to subsist, subject of course to any time limitation applicable to the type of action.*

*As noted in the Fundamental Legislative Principles Notebook of the Office of the Queensland Parliamentary Counsel, (OQPC) departure from the principles can only be justified on the basis of sound reasoning. The only explanation given for the retrospective effect of the changes and the removal of the right of action is to provide clarity for accommodation providers and ensure that complainants do not exploit the window period between introduction of the Bill and assent.*

*The right of action is of itself a fundamental human right. The international agreements to which Australia is a party that provide for the protection of human rights, also provide that there must be a right to seek redress.*

*The transitional provisions effectively allow accommodation providers and government entities to discriminate in reliance on the proposed exemptions from 1 November 2012, even though the Bill has not yet been enacted. Though that in itself is unacceptable under fundamental legislative principles, it is enough to achieve the claimed objective of providing clarity for the relevant service providers. The removal of the right to make a complaint for alleged discrimination which occurred before 1 November 2012 is unacceptable, particularly as there was no notice to or consultation with the public on this issue.*

*The OQPC Notebook referred to above states that strong argument is required to justify an adverse effect on rights and liabilities retrospectively. The Commission is of the view that the reasons for the departures from the fundamental legislative principles have not been sufficiently explained and justified.<sup>177</sup>*

The QLS raised similar concerns in relation to proposed section 106C (Accommodation for use in connection with work as sex worker):

*The Society is concerned that the provision proposed breaches fundamental legislative principles as provided in s 4, Legislative Standards Act 1992, in that it does not have sufficient regard to the rights and liberties of individuals as the Bill directly discriminates against one lawful occupation and their clients. This breach of fundamental legislative principle is not addressed in the Explanatory Notes for the Bill.*

*The Explanatory Notes for the Bill state that the retrospective effect of the new provision is justified as a breach of fundamental legislative principle as it will provide certainty for accommodation providers. The certainty desired would be achieved for accommodation*

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<sup>177</sup> Anti-Discrimination Queensland, Submission 41, pages 11-12.

*providers if the relevant portion of the Bill was to have effect from the royal assent and no explanation is provided of what particular and unique problem required the amendments to be retrospective.*<sup>178</sup>

One of the key aspects of the rule of law in a democratic society is that laws only impose liability prospectively, because to do otherwise would be arbitrary.

The arguments made in the Explanatory Notes arguably do not appear to be of sufficient strength to justify the accommodation exemption, which is a very broad, arbitrary exemption.

Further, this provision possibly falls in the objectionable category of retrospective provisions.

In regard to the retrospective nature of new proposed 106C, the Department responded as follows:

*The retrospective commencement of the new exemption from the day of introduction is justifiable as the purpose is to clarify an area of law that has been uncertain.*

*While QCAT (Internal Appeal Body) in GK v Dovedeen found there was no inconsistency between the Liquor Act and the ADA, the evidence is that there have been differing views regarding the interaction of these two pieces of legislation.*

*Retrospective commencement is the only way to end competing claims in a manner that is practical and fair to persons who may have relied on one view of an uncertain law to their detriment.*

*The amendments seek to strike an appropriate balance between the rights of difference section of the community by providing that complaints of discrimination that have been made before the day of introduction will be dealt with under the pre-amendment law. The post amendment laws will apply to complaints made on or after the day of introduction will be subject to the new section 106C.*<sup>179</sup>

In regard to the retrospective nature of new proposed 106B, the Department responded as follows:

*The purpose of the retrospective commencement of the new section 106B is to provide certainty in this area of law to ensure that public resources that should be used to promote the general welfare of the community through the provision of services and support are not depleted by litigation. If the new law commenced on assent, there is a real risk that litigation would commence in the window between introduction and assent.*

*The amendments seek to strike an appropriate balance between the rights of different sections of the community by providing that complaints of discrimination that have been made before the day of introduction will be dealt with under the pre-amendment law. The post amendment laws will apply to complaints made on or after the day of introduction will be subject to the new section 106B, if passed by Parliament.*<sup>180</sup>

### **3.2 Institution of Parliament**

Section 4(2)(b) of the Legislative Standards Act 1992 requires legislation to have sufficient regard to the institution of Parliament.

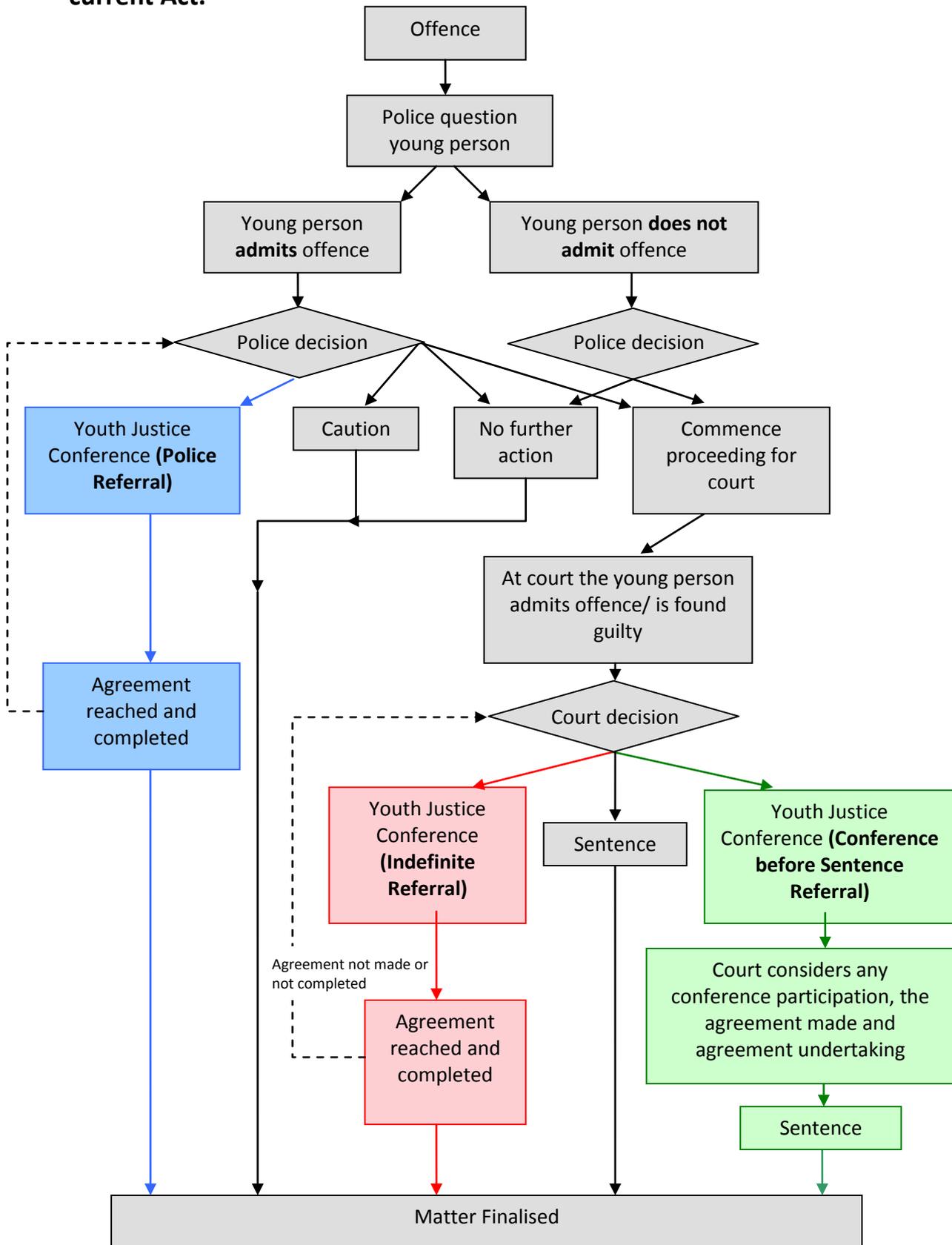
The Committee has addressed the omnibus nature of the Bill earlier in this Report.

<sup>178</sup> Queensland Law Society, Submission 32, page 3.

<sup>179</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, pages 26-27.

<sup>180</sup> Letter from the Department of Justice and Attorney-General, 13 November 2012, page 35.

**Appendix A – Flow Chart of Youth Justice Conferencing options under the current Act.**



Source: Department of Justice and Attorney-General, *Youth Justice Conferencing Queensland - Restorative Justice in Practice 2010*, <http://www.justice.qld.gov.au/youth-justice/youth-justice-conferencing> (at page 40).

**Appendix B – List of Submissions**

Sub #	Submitter
001	Name Withheld
002	Philip Ho
003	David Faulkner
004	Maryanne Purple
005	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
006	Stephen Luntz
007	Artemisia Green
008	Queensland Youth Services Inc.
009	Sandi Adams
010	Elena Jeffreys
011	Jodine
012	Anonymous
013	Angela Ogier
014	Riley Alexander
015	Jacelyn Partridge
016	Tabitha Lee
017	Lisa Williams
018	Charles Heston Te Wheoro
019	Cassie
020	Jim Baird
021	Youth Advocacy Centre
022	Somatic Sex Educators' Association of Australasia
023	Alice Enfield
024	Alan, Janet, Emma and Rachel Skiffington
025	Nikki
026	Pasifika LIPI, Pasifika Pioneers Qld, Voice of Samoa People Inc.
027	Sally-Anne Robbins
028	Di Qld

## Appendices

Sub #	Submitter
029	Queensland Association of Independent Legal Services Inc.
030	Annie Mundy
031	Anonymous
032	Queensland Law Society
033	Kylie McClunie
034	Stuart Milton
035	Tamara Cashin
036	Crime and Justice Research Centre, Faculty of Law, QUT
037	Halo Divine
038	Youth Affairs Network Queensland
039	Cameron Cox
040	Scarlett Alliance, Australian Sex Workers Association
041	Anti-Discrimination Commission Queensland
042	Evie Parker
043	Laurell Sands
044	Beau Adder-Stone
045	Northern Territory AIDS and Hepatitis Council
046	Peter Clooney
047	Donna Soo
048	Caxton Legal Centre Inc.
049	Respect Inc.
050	Pacific Indigenous Nations Network (Gold Coast), Pasifika Pioneers (Brisbane), Wahine Toa (Gold Coast)
051	Tash Jones
052	Live and Let Live
053	Commission for Children and Young People and Child Guardian