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New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

Vulnerable Children Bill

Submission to the Social Services Select Committee by the New Zealand Public Service Association: *Te Pūkenga Here Tikanga Mahi*

30 October 2013

Introduction

The New Zealand Public Service Association *Te Pūkenga Here Tikanga Mahi* (the PSA) is the largest trade union in New Zealand with over 58,000 members. We are a democratic organisation representing members in the public service, and the wider state sector (the district health boards, crown research institutes and other crown entities, state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors).

We have a particular interest in the employment issues our members face. This Bill is significant since it is estimated that it will affect 376,000 public sector workers, including many of our members whose work brings them into contact with children.

PSA submission

PSA agrees that the protection of children from abuse must be a priority in New Zealand.

Introduction

The PSA agrees that the protection of children from abuse must be a priority in New Zealand. The PSA concurs with the aim of reducing the risk of harm to children by requiring people employed or engaged in work that involves regular or overnight contact with children to be safety checked. However, the PSA does not consider that the manner in which the Bill proposes going about this will achieve that goal.

This submission emphasises the need for children's worker safety checking to be guided by a transparent process which is underpinned by fundamental employment law protections, and principles of natural justice.

This submission comments on the new standard safety checks for employees in the Government and government funded children's workforce

Scope of submission

This submission comments on the new standard safety checks for employees in the Government and government funded children's workforce. Comments are limited to Part 1, subpart 3 – Children's worker safety checking and section 5 - interpretation. We highlight below some of our salient concerns, with particular reference to the public sector where we have 58,000 union members, many of whom will be affected by the Bill. The submission underscores the necessity for a transparent system that is fairly and objectively implemented and makes recommendations to this effect.

The PSA has previously commented on the best practice screening and vetting approaches directly to government officials via the Ministry of Education on the Safer Recruitment Guidelines.

Section 21, Subpart 3: Children’s worker safety checking – purpose of subpart

The PSA agrees with the aim of reducing the risk of harm to children by requiring people employed or engaged in work that involves regular or overnight contact with children to be safety checked. However, the PSA does not consider that the manner in which the Bill proposes going about this will achieve that goal.

Children’s rights must be respected, but in a way that does not unnecessarily curtail the rights of others.

The PSA emphasises that the protection of children from abuse must be a priority in New Zealand. We appreciate that this policy goal necessarily involves a balancing of rights – on one side, the right of children to be free from abuse and for policies that involve children to be implemented in line with the “best interests of the child” principle of the United Nations Convention on the Rights of the Child, to which New Zealand is party. However, on the other side, children’s rights must also be balanced with the human rights of those in the children’s workforce. Specifically, labour rights and rights to natural justice must not be trampled upon. Children’s rights must be respected, but in a way that does not unnecessarily curtail the rights of others.

The Vulnerable Children Bill as it currently stands is imbalanced, unnecessarily restricts the rights of those in the children’s workforce, and is unlikely to fulfil its purported aim of protecting children. Child abuse is a serious problem, but can be dealt with in ways other than by undermining fundamental employment law protections.

Recommendations as to how to amend the legislation follow.

Comments regarding Section 31(2)(c), Subpart 3 – Requirements of safety checks and Section 32(c), Subpart 3 – Regulations prescribing requirements for safety checks

A risk assessment should involve a prescribed and transparent process which emphasises requirements of natural justice and fundamental employment law protections.

The PSA submits that section 32 should be amended to include the manner in which a risk assessment must be carried out and the content of the risk assessment. This is too important an issue to be left to regulations which will not be subject to public scrutiny. The manner in which a risk assessment must be carried out and the content of the risk assessment should involve a prescribed and transparent process which emphasises requirements of natural justice and fundamental employment law protections.

Recommendation

The Select Committee should state its expectation that the legislation will include a prescribed and transparent process which emphasises requirements of natural justice and fundamental employment law protections.

Unsubstantiated allegations that have not been proven do not provide a fair basis for denying that person's right to employment.

Disciplinary issues need to be acted upon at the time they arise – justice delayed is justice denied.

“Good employer obligations” under the Employment Relations Act and other legislation may be compromised by the Bill.

The legislation rather than regulations is the appropriate place to prescribe a fair and transparent process for the risk assessment.

Natural justice

Screening and vetting of prospective employees on the basis of unfounded allegations goes against principles of natural justice. Section 27 of the New Zealand Bill of Rights Act states that every person has the right to observance of the principles of natural justice by any... public authority that has the power to make a determination in respect of that person's rights. This means that allegations that have not been proven and are unsubstantiated do not provide a fair basis for denying that person's right to employment. Also, if disciplinary issues are not acted upon at the time they arise then a fair investigation may become impossible after a period of time: justice delayed is justice denied. Moreover, many disciplinary issues have nothing to do with potential child abuse. The presumption of innocence until proven guilty is a cornerstone of our justice system. Furthermore, section 5 of the Bill of Rights Act states that the rights in the Act, including the right to natural justice, may be subject only to such reasonable limits as prescribed by law and demonstrably justified. We do not think that the restriction on natural justice rights of such a large pool of employees is justified in the circumstances.

Good employer obligations

The PSA is especially concerned that the employment protections contained in the Employment Relations Act and other legislation may be diluted, and that 'good employer obligations' will be compromised by the Guidelines. The concept of 'good employer' is intricately linked with the principles of natural justice and requires employment procedures to be fair in all circumstances. This includes administrative fairness and the duty to act fairly in appointments, recruitment, promotion, redundancy, and so on. Basing decisions upon allegations and carrying out 'risk assessments' which involve a significant amount of subjectivity on the part of the assessor do not appear to support administrative fairness. Furthermore, it may expose employers to legal challenges based on personal grievance.

Good faith requirement

Furthermore, the 'good faith' requirement of the Employment Relations Act, which underpins the establishment and maintenance of employment relationships, requires that employers and employees deal with each other honestly, openly and with mutual respect. This means that the employee should have access to appropriate information when the employer is making decisions that may affect his or her job. The process needs to incorporate much more transparency for it to be fair to those who are subjected to it.

Recommendations

The PSA recommends that sections 31 and 32 be amended so that the manner in which a risk assessment must be carried out and the content of the risk assessment involve a prescribed and transparent process, laid out in the legislation rather than regulations. This process must emphasise requirements of natural justice and fundamental employment law protections. These should include good employer obligations of fairness and good faith obligations of honesty, openness and with

mutual respect. Unsubstantiated hearsay and opinion must not be allowed to form a basis for denying employment to prospective employees.

Prospective and current employees should have a right to know and to respond to negative information concerning them.

The PSA also recommends that prospective and current employees have a right to know and to respond to negative information concerning them. The PSA believes the any negative information that comes to light about the employee (or prospective employee) in the screening process should be brought to the attention of the person concerned, who should have a right of reply and an opportunity to have information corrected where appropriate. The legislation should be amended to include these rights.

Section 27 – Periodic safety checks of children’s workers

Rescreening of the existing workforce also raises issues of transparency and natural justice. The point made above regarding past disciplinary issues that have not yet been acted upon applies here. Furthermore, seeking supervisor or managerial opinion regarding the continuing suitability of the candidate to work with children opens the door for dismissals on the basis of unsubstantiated opinion. This would purport to supersede the basic substantive and procedural protections of the Employment Relations Act. The process needs to incorporate far more evidence based practice for it to be fair and transparent and compliant with existing employment law.

Rescreening of the existing workforce needs a fair and transparent process as well.

Recommendation

Section 27 should be amended to include a prescribed and transparent process which emphasises requirements of natural justice and fundamental employment law protections along the lines of that recommended for sections 31 and 32.

Section 24 – Specified organisation: Scope of screening and vetting

The scope of application of the screening and vetting is unclear. The PSA is concerned about how broad it will be, especially when applied to the wider children’s workforce whose interaction with children may only be occasional. An example to illustrate how this could become problematic is a Department of Conservation ranger who supervises groups of children staying overnight in a Department of Conservation hut.

The potentially broad scope of the Bill’s application is problematic.

Recommendation

Section 24 should be amended to make clear to both employers and employees who exactly is caught by the legislation. As it currently stands, the section is too broad and insufficiently clear.

‘Key agency’ needs to be defined for the purposes of seeking an exemption for workers convicted of a specified offence.

Section 34 – exemption for workers convicted of specified offence

This section states that a ‘key agency’ has the power to grant this exemption but does not define what a key agency is.

Recommendation

Section 5 – interpretation – should be amended to include a definition of ‘key agency’, ensuring a transparent process.

The cost of screening appears to have been underestimated and will disproportionately impact the NGO sector and certain employees.

Cost

The cost of screening appears to have been under estimated. The PSA is concerned about the cost of initial screening in addition to regular re-screening. In the case of conflicts of interest, small employers will be obliged to pay for external screeners, which is a significant compliance cost. The PSA is particularly concerned about the burden of cost on non-governmental organisations. In an already underfunded sector, this additional cost is simply not able to be borne by such organisations. Also, it will be important to ensure that the cost of this process is not passed on to employees. This could disadvantage women, for example those who work caring for children.

Recommendation

The PSA recommends that the cost of compliance with screening and vetting should be borne by the government, and not passed on to the third sector, or on to current or prospective employees, many of whom will be less able to bear the burden of this cost.

For further information about this submission contact

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