



# Education and Care Services Bill 2013

**Report No. 20**  
**Education and Innovation Committee**  
**August 2013**

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## Education and Innovation Committee

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## Acknowledgements

The committee thanks those who briefed the committee, made submissions and participated in its inquiry. In particular the committee acknowledges the assistance provided by the Department of Education, Training and Employment.

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## Abbreviations and definitions

ACCS	Australian Community Children's Services Qld
BBF	Budget Based Funded
ECTA	Early Childhood Teachers Association
QEC services	Queensland education and care services
The committee	Education and Innovation Committee
The department	Department of Education, Training and Employment

## Chair's foreword

This report presents a summary of the committee's examination of the Education and Care Services Bill 2013.

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, whether it has sufficient regard to rights and liberties of individuals and to the institution of Parliament. A number of potential issues were identified and examined during the course of our inquiry.

The public examination process allows the Parliament to hear from the public and other stakeholders they may not have otherwise heard from, which should make for better policy and legislation in Queensland. Although the committee notes the number and type of provisions included in regulation rather than in the Bill throughout the report, the extensive consultation undertaken by the department is to be commended.

On behalf of the committee I thank those organisations who lodged written submissions, and others who have informed the committee's deliberations, including the committee's secretariat, officials from the Department of Education, Training and Employment, the Queensland Parliamentary Library and Research Service and the Technical Scrutiny of Legislation secretariat.

I commend the report to the House.



Rosemary Menkens MP  
**Chair**

August 2013

## Recommendations

### Recommendation 1

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The committee recommends that the Education and Care Services Bill 2013 be passed.

## 1. Introduction

### 1.1 Role of the committee

The Education and Innovation Committee (the committee) was established by resolution of the Legislative Assembly on 18 May 2012, consisting of government and non-government members.

The Education Legislation Amendment Bill 2013 (the Bill) was referred to the committee on 5 June 2013, and the committee is required to report to the Legislative Assembly by 12 August 2013.

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

### 1.2 Inquiry process

The committee was briefed by the Department of Training, Education and Employment (the department) on 13 June 2013 (see Appendix C). It wrote to stakeholders and advertised the inquiry on its webpage calling for submissions on 12 June 2013. Three submissions were received from stakeholders by the closing date of 12 July 2013 (see Appendix B). The transcript of the briefing and submissions received and accepted by the committee are published on the committee's webpage at [www.parliament.qld.gov.au/committees](http://www.parliament.qld.gov.au/committees).

### 1.3 Policy objectives of the Bill

The objectives of the Bill are to:

- establish a new regulatory framework for services currently regulated under the *Child Care Act 2002* that aligns with the *Education and Care Services National Law (Queensland) Act 2011* whilst retaining some elements of the *Child Care Act 2002*;
- repeal the *Child Care Act 2002*; and
- make consequential amendments to other legislation.<sup>1</sup>

### 1.4 Background

Since January 2012 the vast majority (98%) of education and care services for children in Queensland have been regulated through nationally consistent legislation – the Education and Care Services National Law (the National Law). The remaining two percent of services continue to be regulated under Queensland's *Child Care Act 2002*. These include limited hours care services, some services that cater specifically for children with a disability (such as children with autism); and occasional care services, along with some that are fully Commonwealth funded and operate in Indigenous communities. They all tend to be small-scale services operating in regional and remote areas.

Another category of child care service is a 'stand-alone service'. These are services that are not registered under either this or the National Law, and provide services to no more than six children, aged under 13, at the same time. While the majority of the Bill, for example staff qualifications, would not apply to stand-alone services because they are not registered QEC services, there are some sections of the Bill which would allow action to be taken if care was not of an adequate standard. Such standards include that a child cannot be a carer in these services; and that a 'disqualified person' not also be an occupant of the house in which the service is being provided. These services are discussed further from page 9.

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<sup>1</sup> Explanatory notes, Education and Care Services Bill 2013, p1



In the context of these services remaining under Queensland law after the National Law commenced covering the vast majority of services in Queensland and after consulting with all of the affected services about the best way to regulate them to ensure high quality care into the future, the government decided to adopt a model which keeps elements of the *Child Care Act 2002* where appropriate (recognising the differences between these services and those regulated under the National Law) but is also consistent with the National Law, where that is appropriate.

The reasons for this include:

- Reduction of red tape, through adopting the perpetual approval system in line with the National Law;
- Reduced compliance burden for care providers who also operate services regulated under the National Law; and
- Reduced complexity for department officials, who regulate services operating under both regulatory frameworks, by adopting similar processes and terminology to the National Law.

The main elements of the National Law that are not considered appropriate to apply to the two percent of Queensland services not covered by it are:

- the staffing requirements and levels of qualifications required for staff, and
- the system of rating and assessing services against national standards.

Given the nature of these services, the compliance costs outweigh the benefits.

## 1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed.

After examination of the Bill, consideration of evidence provided at the public briefing from the department, submissions and the further information provided from the department, the committee is satisfied the Bill should be passed.

### **Recommendation 1**

The committee recommends that the Education and Care Services Bill 2013 be passed.

## 2. Examination of the Education and Care Services Bill 2013

### 2.1 Policy issues

#### Perpetual approval system

A key feature of the Bill is the introduction of a system whereby services are no longer required to apply to renew their license every three years and pay a fee at that time. The explanatory notes advise that services are required to obtain the relevant approvals once and then pay an annual fee to maintain the service approval. This is referred to as a 'perpetual approval system'.

The Australian Community Children's Services Qld (ACCS) is concerned that the Bill is not clear on how perpetually approved services will be "... benchmarked for quality of education and care, as provided by the system of rating and assessment of the National Quality Standard that is part of the national law".<sup>2</sup>

The Bill provides for a minimum of three yearly inspections of services by authorised officers to ensure "... quality of services and compliance with the legislation ...".<sup>3</sup> This provision aligns with the assessment that currently takes place under the *Child Care Act 2002*. The department notes that authorised officers will work closely with services to support them in providing high quality services and that a range of measures are available if an issue arises regarding compliance with legislation.<sup>4</sup> These include, for example, requiring that services report serious incidents and complaints to the chief executive, or suspension or cancellation of a provider approval or service approval.

Ultimately, the department points out, the goal is to ensure quality childcare is available.

#### Committee comment

The introduction of a system of perpetual service approval as a way to reduce the administrative burden on services and potentially reduce fees is supported by the committee. The committee appreciates the issue raised by the ACCS, who sought clarification on how the quality of perpetually approved services will be benchmarked.

The committee is satisfied that the department will work closely with these services to assist them in providing high quality education and care services. The role that parents play in monitoring the quality of services provided to their children are also noted as important in this regard. In addition, the schedule of three yearly inspections of these services will further ensure compliance with legislation and the quality of service provided. The committee notes that this arrangement (three yearly inspections) is the same as that currently required by the *Child Care Act 2002*.

#### Exceptional circumstances service approvals

The Bill introduces a process for the approval of services in exceptional circumstances, such as when services are affected by natural disasters such as flood. This new provision is not included in the *Child Care Act 2002* or the National Law. A streamlined process is provided by the Bill that allows "... a service affected by natural disaster to obtain a quick approval to relocate and continue providing the service from alternative premises".<sup>5</sup> At the public briefing the department explained why these provisions are required:

... in Queensland we have had two recent occurrences of fairly significant flood affected services across the state. Under the national law there is no real way, specifically, to

<sup>2</sup> Submission 3, Australian Community Children's Services Qld, p1

<sup>3</sup> Explanatory Notes, Education and Care Services Bill 2012, p3

<sup>4</sup> Department of Education, Training and Employment, Response to submissions, p1

<sup>5</sup> Explanatory Notes, Education and Care Services Bill 2012, p3

*respond to those kinds of incidences where services have had to close down but there is still a need and a demand for care to be provided for those children who used to use those services. To enable services to more easily relocate, for example, to a hall in the community that has not been damaged, we have built into this particular bill the ability to enable emergency care to be approved.*<sup>6</sup>

With regard to the safety of children being cared for under these circumstances, the department confirmed that an authorised officer would be required to assess the safety, suitability and appropriateness of the services.<sup>7</sup>

The ACCS commends these provisions as it recognises that “... professionals in the sector have the knowledge and capability to provide safe and high quality care in a temporary location in the event of a disaster occurring in order to support the families in need at this time ...”.<sup>8</sup>

## Waivers

The Bill provides for Queensland education and care (QEC) services to seek temporary service waivers. This excuses services from complying with certain requirements in the Bill or regulation if they cannot meet them for a period of time. For example, if a service cannot meet minimum outdoor space requirements due to renovations being undertaken, they can apply for a temporary waiver which would enable them to continue operating without having to reduce the number of children being given care.<sup>9</sup> The ACCS supports these provisions as they provide continuity of care for children and families.

These provisions are consistent with the National Law.

### Committee comment

The committee commends the introduction of exceptional circumstances service approvals. These provisions will greatly assist families experiencing natural disasters, allowing their children to continue to be safely cared for while they address the many other challenges confronted at such a time. Given the number of natural disasters in Queensland in recent years, the committee considers exceptional circumstances service approvals are an essential, valuable and unique component of our education and care system.

Similarly, the committee considers that service waivers are a common sense approach that will allow continuity of care for children.

## Staffing requirements and qualifications

### Qualifications

Staffing requirements for those services regulated by the Bill are different from those required by the National Law and the *Child Care Act 2002*. The key difference is that there is a slight reduction in staffing requirements, for example staff qualifications. Instead of requiring a director with an advanced diploma, a supervisor will be required, with a two year diploma qualification.

The department noted that the nature of the services to be regulated by this Bill justifies the slight reduction in staffing requirements. It also noted that services in rural areas have difficulty obtaining staff with an advanced diploma qualification, and added that the:

*... Advanced Diploma in Children’s Services is recommended to no longer exist. The national training body that makes that decision is meeting at the end of this month to make a*

<sup>6</sup> Hansard transcript, Department of Education, Training and Employment, 13 June 2013, p4

<sup>7</sup> Ibid

<sup>8</sup> Submission 3, Australian Community Children’s Services Qld, p2

<sup>9</sup> Explanatory Notes, Education and Care Services Bill 2012, p4

*decision going forward on that particular qualification. It would have been somewhat foolhardy to continue to require a qualification in the new Bill going forward that is no longer required in the national law and will no longer exist as it does currently ... these services have demonstrated through their responses to the ECEC [Early Childhood Education and Care census] census that they actually are not in a position to meet that requirement. So we would be perpetuating a threshold when they are simply not able to find a training organisation to provide that qualification or staff that can meet that need.<sup>10</sup>*

ACCS supports the removal of the advanced diploma qualification if it is no longer recognised or required by the sector, however, is concerned that the Bill does not recognise the importance of early childhood teachers in designing and delivering programs for services regulated by the Bill.<sup>11</sup> The department notes that QEC approved services are required to appoint a supervisor qualified with an approved diploma, who is at least 18 years of age and consents to the appointment. The diploma qualification will be prescribed by the proposed regulation. The Bill does not prevent services from employing an early childhood education teacher.<sup>12</sup>

The Early Childhood Teachers Association (ECTA) recommended that individuals should be required to have a full qualification to be deemed a suitable person when applying for a 'provider approval'.<sup>13</sup> The department has advised that this issue will be addressed through regulations. The proposed regulation will include further detail about the nature of qualifications and the age of people working in a QEC service.<sup>14</sup>

#### **Committee comment**

The committee notes the changed staffing requirements, such as qualifications, for services regulated by the Bill. Given the advanced diploma qualification currently required by the regulation is recommended to no longer exist; the qualification is not required by the national law; the challenges in recruiting suitably qualified staff in rural areas and the nature of services regulated by the Bill (compared to those regulated by the National Law), the committee considers the changed staffing requirements included in the Bill as justified.

Although the staffing requirements have changed from an advanced diploma qualified director to a diploma qualified supervisor, the committee notes that QEC services are not prohibited from employing someone with a higher qualification. This includes an early childhood education teacher if practicable.

#### Age

##### *Provider approval*

A provider approval is given to a person who proposes to operate a QEC service. When assessing an application for a provider approval, a key consideration is the suitability of the person to operate an education and care service. Once a person obtains provider approval, they can then apply for and be granted service approval, which approves a particular premises for the delivery of a service.<sup>15</sup>

With regard to determining whether an applicant for a provider approval is a suitable person to operate a QEC service, the ECTA considers the Bill should stipulate a minimum age of 18 years.<sup>16</sup> The Bill has no age requirement in this regard. Nor does the National Law or *Child Care Act 2002*. These pieces of legislation have a range of factors that must be considered in determining whether a

<sup>10</sup> Hansard transcript, Department of Education, Training and Employment, 13 June 2013, p3

<sup>11</sup> Submission 3, Australian Community Children's Services Qld, p2

<sup>12</sup> Department of Education, Training and Employment, Response to submissions, p2

<sup>13</sup> Submission 2, Early Childhood Teachers Association, p2

<sup>14</sup> Department of Education, Training and Employment, Response to submissions, p8

<sup>15</sup> Explanatory Notes, Education and Care Services Bill 2013, p3

<sup>16</sup> Submission 2, Early Childhood Teachers Association, p2

provider should be approved to operate child care services, including matters like financial circumstances, medical conditions, criminal history, and other relevant employment history.

In addition, the department notes that the chief executive can consider any matter it deems appropriate when considering an application for a service approval and “... can cancel a provider approval if they believe there is an unacceptable risk to the safety, health or wellbeing of a child being educated and cared for by the approved provider.”<sup>17</sup>

#### **Committee comment**

The committee acknowledges the concerns raised by the ECTA regarding the absence of a minimum age being required for a person to obtain provider approval. The range of factors required to be considered by the chief executive when determining the suitability of a person to operate an education and care service are noted by the committee. Although the chief executive is not required by the Bill to consider the age of the applicant, the chief executive can consider any matter they deem appropriate, including age.

The committee considers that the Bill provides adequate safeguards to ensure that a provider approval would only be provided to an appropriate person. The committee notes that this provision is consistent with the National Law.

#### *Adult staff members and supervisors*

The Bill would require that at least two adult staff members be present at all times, except for school age care services. Adult staff members are defined as a qualified supervisor, or a person aged at least 17 years and a qualified assistant.<sup>18</sup>

The ECTA believes that adult staff members of QEC approved services should be required to be at least 18 years of age as well as fully qualified. The National Law requires supervisors to be aged at least 18 years of age but is silent on age limits for other staff members.<sup>19</sup>

These age provisions continue those of the *Child Care Act 2002* for the two percent of services not covered by the National Law. The department advised that a (secondary) policy intent of the Bill is to “... continue to provide employment opportunities for 17 year olds who hold or are actively working towards an approved qualification.”<sup>20</sup>

#### **Committee comment**

The committee notes the requirement for the presence of two staff members at a QEC service, who may be a supervisor, or be aged at least 17 years and be a qualified assistant. The committee considers this a fair provision given the difficulty many of the relevant services have in recruiting staff. Many of the services regulated by the Bill are located in regional and remote areas with limited child care capacity. The committee considers it desirable that the Bill does not reduce the availability of child care services, or employment opportunities for young people.

The requirement for the nominee and supervisor to be at least 18 years of age, and the many other safeguards provided by the Bill, offer a level of assurance that children being cared for by a QEC service will receive an appropriate standard of care. The committee also notes that this provision is consistent with the current Act.

Some significant provisions about staffing requirements will be included in regulation, rather than the Bill. This includes, for example, requirements about the presence of suitably qualified staff at a

<sup>17</sup> Department of Education, Training and Employment, Response to submissions, p7

<sup>18</sup> Education and Care Services Bill 2013, clause 116 (4)

<sup>19</sup> National Law, s106 (2)

<sup>20</sup> Department of Education, Training and Employment, Response to submissions, p2

QEC service. While the committee recognises there are times when this is necessary, the committee highlights its preference for key information to be included in Bills wherever possible.

#### *Staff members generally*

The Bill would provide that in some circumstances as prescribed in a regulation, a person without a qualification can be taken to be a person with a qualification (such as a certificate or diploma level qualification, depending on the position), if they are an adult and in the position for less than the prescribed time (which can be up to 6 months), or are studying towards the relevant qualification.<sup>21</sup> Potentially this could mean a person aged under 18 who was studying towards the qualification was in the role of a qualified person for the longer term.

The ECTA is concerned about this potential, pointing out that even the age limit of 17 years could result in a situation where there is very little age difference between the carer, and the child being cared for, notably in a school aged service which provides care for children aged up to 13 years.<sup>22</sup>

With regard to the ECTA's concern about the minimum age of staff members being 17 years, the department notes that these provisions were supported during consultation, and that requiring at least two adult staff members to be present at all times is an important safeguard.<sup>23</sup>

These provisions relate to approved QEC services. Such approval means that they have met and are required to continue to meet a range of other conditions which act as safeguards. Stand-alone services have fewer safeguards and the Bill does provide that a child can neither operate, nor be employed in, a stand-alone service (that is, a service that is not a formally approved QEC service).

#### **Committee comment**

While the committee notes the concerns raised by the ECTA, given the reasons provided in the previous sections about the age and qualifications of staff at QEC services, the committee considers the current provisions are justified. There are safeguards in place, such as the qualifications of staff, prescribed hours and the requirement for two staff to be present, that ensure the quality of services provided. The committee also notes the important role parents play in noticing the quality of services and reporting any concerns to the department.

#### Prescribed hours

The Bill would require providers to ensure that a supervisor is in attendance at a QEC service for prescribed hours at services that have over 30 places. It does not prescribe minimum hours of supervisor attendance for services that have 30 or less places, or for school age care services. The Bill allows for services to apply for a condition in their service approval to allow for one or more rest periods of no more than two hours in total, during which the standard requirements, including the supervisor's presence, may be relaxed.

ACCS recommended that supervisors should be in attendance at all peak periods:

*As the Bill notes that the supervisor will be responsible for the provision of education and care by the service, then we trust that the prescribed hours are those when the majority of children are attendance and surely the supervisor must be required in all services during these periods - including in services with less than 30 places. This will ensure that children attending all services, including those up to 29 places, will benefit from the presence of a supervisor.<sup>24</sup>*

The department advised that the times supervisors will be required to be present at a service will be prescribed under regulation. The proposed regulation provides that for services that have more than

<sup>21</sup> Education and Care Services Bill 2013, s117

<sup>22</sup> Submission 2, Early Childhood Teachers Association, p3

<sup>23</sup> Department of Education, Training and Employment, Response to submissions, p8

<sup>24</sup> Submission 3, Australian Community Children's Services Qld, p2

30 children or do not provide school age care services the supervisor will be required to be present for at least:

- 75% of the normal operating hours and for most of the peak period at services that operate for 10 hours or less per day.
- 7.5 hours per day and so far as possible during the peak operating period at services that operate for more than 10 hours.

For the remaining services, that is, those that provide school age care services or services with 30 or less places, there are no prescribed times for a supervisor to be present. The department noted that this recognises the limited hours of operation of these services. For example, school age care services generally operate in the morning and afternoon, while services with less than 30 places are generally limited hours care services which operate for up to 20 hours a week.

These provisions are a continuation of those under the *Child Care Act 2002*.<sup>25</sup>

#### Committee comment

The committee acknowledges that while it might appear the requirements are slightly lower for services regulated by this Bill than for services regulated under the National Law, the geographic context of many of these services means that it would not be viable to operate services if all of the standards for larger, often metropolitan, providers had to be met.

While the committee supports the provision in the proposed regulation that will require the supervisor to be in attendance during peak periods, the committee is concerned that this important information is not included in the Bill.

#### Stand-alone services

Stand-alone services are those that are not QEC approved services, or approved under the National Law. They provide care at home or another place for no more than six children, of whom no more than four can be not yet school aged.<sup>26</sup>

The explanatory notes advise that the regulation of stand-alone services under the Bill takes the same approach as that provided in the *Child Care Act 2002*.

Concern was expressed by ACCS about the lower level of regulation of stand-alone services and that the regulatory requirements are not improved nor the standards strengthened by the Bill. ACCS considers that stand-alone services operate similarly to "... individual educators under FDC [Family Day Care] schemes currently covered by National Law", however, they are not licensed and have minimal regulatory requirements.<sup>27</sup>

The department told the committee the regulation of stand-alone services proposed by the Bill continues those set out in the *Child Care Act 2002* and were supported during consultation.<sup>28</sup> The department acknowledged that there is less regulation for these services, which have minimum standards such as insurance and blue card requirements, and are monitored on a complaints basis only. These services are generally a private arrangement between parents and individual carers:

*So it is less regulated, of course, than a limited hours care service or an occasional care service in that sense. And that is a policy decision that was taken some time ago in relation to those services. However, the community or parents, if they have a concern about the operation of a stand-alone care service, are able to make a complaint to the regulatory*

<sup>25</sup> Department of Education, Training and Employment, Response to submissions, p4

<sup>26</sup> Education and Care Services Bill 2013, clauses 9 and 134

<sup>27</sup> Submission 3, Australian Community Children's Services Qld, p3

<sup>28</sup> Department of Education, Training and Employment, Response to submissions, p5

*authority [the department] in that regard and the regulatory authority has the ability to go and investigate what is going on in that stand-alone care service.*<sup>29</sup>

The department also takes the perspective that use of stand-alone services is a decision made by parents and families, often as a private arrangement. If there is concern about the quality of services being received, parents are also free to move their children to a different service.

#### **Committee comment**

Although stand-alone services are subject to a lower level of regulation, the committee considers the existing provisions appropriate given the different nature of these services. The committee notes that the stand-alone service provisions continue those in the current Act.

#### Definition

The ECTA considers that tighter regulation of stand-alone care is required with regard to the age of children included in the definition provided by the Bill.<sup>30</sup>

The definition of stand-alone services in the Bill provides that stand-alone services are QEC services that (a) are not QEC approved services and (b) are not services in which education and care is regularly provided to more than six children under the age of 13 at the same time.<sup>31</sup> Later in the Bill (clause 134), it is noted that there must not be more than four children being cared for in a stand-alone service who are not yet school aged.

The department considers the definition and clause 134 provide adequate parameters for the age of children permitted in stand-alone care services.<sup>32</sup>

#### **Committee comment**

The committee notes the concerns raised by the ECTA with regard to the ages of children cared for in stand-alone services. Including a restriction on the number of children who are not yet school aged is supported by the committee, as it is these children that are the most vulnerable and in need to the most care. Given this restriction, and the nature of these services, tighter regulation on the age of children being cared for is not supported by the committee.

#### **Transitional provisions**

The new legislation provides for services licensed under the *Child Care Act 2002* to transition to approval under the Bill without needing to re-apply.

ACCS supports the transitional provisions, noting the importance of monitoring the provisions regularly “... to ensure services have the capacity and available resources required to meet the specific requirements in this regard, and to ensure the intended ‘seamless’ transition”.<sup>33</sup>

#### **Committee comment**

These provisions are supported by the committee as they place minimal impost on providers and do not increase the risk to children being cared for by a QEC service.

<sup>29</sup> Hansard transcript, Department of Education, Training and Employment, 13 June 2013, p4

<sup>30</sup> Submission 2, Early Childhood Teachers Association, p2

<sup>31</sup> Education and Care Services Bill 2013, clause 9

<sup>32</sup> Department of Education, Training and Employment, Response to submissions, p6

<sup>33</sup> Submission 3, Australian Community Children’s Services Qld, p3



## Other issues

### Services covered by the Bill

The ACCS sought clarification on how limited hours care services that are not funded by the Queensland Government will be regulated and why Budget Based Funded (BBF) services (ie those that are fully Commonwealth funded and located in Indigenous communities) are not mentioned in the Bill. The department advised that limited hours care services are regulated under the *Education and Care Services National Law (Queensland) Act 2011* and that BBF services will be captured by the broad definition at clause 8 in the Bill.<sup>34</sup>

### Purpose of QEC programs

The ECTA suggests that QEC programs “... support the direction learning is taking now and in the future (technological age)” and recognise a child as competent and an individual; and that these principles be explicitly recognised as objectives of the Bill.<sup>35</sup> The department advised the following:

*The Bill supports the learning program, based upon an approved learning framework, to be implemented in a way that takes into consideration the individual development needs, interests and experiences of each child. Services can use technology in implementing their learning programs to provide children with a range of learning experiences ... The use of technology and recognition of the child as an individual, creative and competent learner is reflected in the guiding principles of the Bill and the approved learning frameworks.*<sup>36</sup>

### **Committee comment**

The committee supports the use of technology in whatever learning frameworks are developed, and is satisfied that the Bill does not need to explicitly recognise the use of technology in learning programs.

Similarly, the committee considers that the Bill does not need to specifically recognise the child as competent and an individual as this principle is reflected in the guiding principles of the Bill - for example, clause 5(1)(a) which requires that care services are provided that are in the best interests of a child.

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<sup>34</sup> Department of Education, Training and Employment, Response to submissions, p1

<sup>35</sup> Submission 3, Australian Community Children’s Services Qld, p4

<sup>36</sup> Department of Education, Training and Employment, Response to submissions, p10

### 3. Fundamental legislative principles

As well as considering the policy to be given effect by the legislation, portfolio committees are required to review Bills in respect of their lawfulness, and advise the Legislative Assembly on whether fundamental legislative principles have been given appropriate regard.

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 fundamental legislative principles to the Bill and identified the following issues.

#### 3.1 Rights and liberties of individuals

##### Suitable person

The chief executive will have to consider a number of things when deciding whether a person is suitable to operate a QEC service.<sup>37</sup> This includes whether the person has breached the (future) Act (*Education and Care Services Act 2013*), the repealed *Child Care Act 2002* or the National Law, whether or not the breach was considered an offence.<sup>38</sup> There is a similar requirement in the current Act<sup>39</sup> and under the National Law.<sup>40</sup>

Since issues other than criminal history or offences under the Act are taken into account when deciding whether a person is suitable to operate a service, the rights and liberties of individuals may be impacted. The explanatory notes do not explain why these additional matters need to be considered.

To ensure that less serious matters, such as a one-off lapse in record keeping, would not result in a person being considered unsuitable, the committee sought the department’s advice on the issue. The department considers it appropriate that a person’s compliance history is taken into account when deciding their suitability to operate a QEC service, even though this may impact their rights and liberties:

*... it is justifiable given the approval will result in the person being approved to operate a QEC service. This provision is in line with the object of the Bill under clause 4 to ensure the safety, health and wellbeing of children attending a QEC service. It is important that the chief executive has all relevant information before him or her when making a decision whether a person is suitable.*<sup>41</sup>

In addition, the chief executive has discretion to determine the weight given to any compliance issue. The chief executive “... would need to take into account the nature of the non-compliance and the individual circumstances surrounding the contravention. This would need to be done on a case-by-case basis”.<sup>42</sup> With regard to the example of record keeping, the department notes that if a provider missed only one week of accurate record keeping:

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<sup>37</sup> Education and Care Services Bill 2013, clause 15

<sup>38</sup> Ibid, clause 15(4)(a)

<sup>39</sup> *Child Care Act 2002*, section 26(4)(a)

<sup>40</sup> *Education and Care Services National Law Act 2010 (Victoria)*, Schedule ‘Education and Care Services National Law’, s12

<sup>41</sup> Department of Education, Training and Employment, response to FLP issues, p1

<sup>42</sup> Ibid, p2

*... is likely that little weight would be given to this contravention. However, if a provider had a history of incomplete records in relation to the arrival and departure of children, resulting in compliance action being taken by the regulatory authority, then this will be given more weight.*<sup>43</sup>

#### **Committee comment**

The committee considers that it is essential that the chief executive has all the information needed to make an informed decision, and this includes taking into account a person's full compliance history. The committee notes that this is consistent with the current Act and National Legislation, and considers the provisions appropriate.

#### Seizing evidence

The Bill provides that an authorised officer of the department can enter certain places, including a QEC service (but not a home) when services are being provided, without consent or a warrant and seize evidence.<sup>44</sup> The officer may seize items if they reasonably believe the items are evidence of an offence against the (future) Act.

The *Legislative Standards Act 1992* requires that consideration be given to whether there is sufficient justification where legislation allows for property to be interfered with or seized.<sup>45</sup> However, the explanatory notes for this Bill do not explain why these provisions, which are a potential breach of the fundamental legislative principle about the rights and liberties of individuals, are required.

The department has subsequently advised that the provisions are necessary to minimise risks to children and to allow authorised officers to obtain relevant information. Authorised officers can only enter places without consent or a warrant in limited circumstances and can seize items only when the officer reasonably believes the items are evidence of an offence against the Act. Safeguards noted by the department include providing:

*... a receipt and an information notice about the decision to seize it to the owner or person in control of the thing before it was seized and to allow the owner access to the thing... return of the seized thing if it has some intrinsic value and is not forfeited or transferred under the Act.*<sup>46</sup>

#### **Committee comment**

The committee acknowledges that entering a place without a warrant or consent and seizing items that may be evidence of an offence against the Act is a potential breach of an individual's rights and liberties. However, as a means to minimise risks to children being cared for by a QEC service, and given the safeguards in put place by the Bill, the committee considers the potential breach is justified.

#### Extended liability

The Bill provides that an employer could be found responsible for an action of an employee.<sup>47</sup> This is known as extended liability. When a person can be found liable for the actions of another person, the rights and liberties of the person can be impacted. The Office of the Queensland Parliamentary Council (OQPC) notes that "[l]egislation should not ordinarily make a person responsible for actions or omissions over which the person may have no control".<sup>48</sup> Therefore, justification is required for

<sup>43</sup> Department of Education, Training and Employment, response to FLP issues, p2

<sup>44</sup> Education and Care Services Bill 2013, clause 160

<sup>45</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, 2008, p45

<sup>46</sup> Department of Education, Training and Employment, response to FLP issues, p5

<sup>47</sup> Education and Care Services Bill 2013, clauses 231-233

<sup>48</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, 2008, p117

imposing extended liability. The explanatory notes do not explain why the extended liability is being imposed.

The department advised that these provisions are considered necessary to ensure an appropriate level of accountability by providers, to protect children from harm and to maintain public confidence in services provided under the Bill.<sup>49</sup>

#### **Committee comment**

The committee would have liked to see additional explanation in the explanatory notes for potential breaches of this fundamental legislative principle, however, accepts the justification provided by the department.

#### Offence provisions

There is a high number of penalty provisions in the Bill, which range from 1 (\$110) to 200 (\$22,000) penalty units. A comparison of five clauses from the Education and Care Services Bill 2013 with the most comparable sections in the National Law in respect of the penalties imposed is set out in the table at Appendix A. It shows that the penalties in this Bill are different, although comparable, to those of the National Law. The National Law applies to 98% of services in Queensland.

#### **Committee comment**

The offence provisions in the Bill, and how they compare to those in the National Law, are noted by the committee. Although the penalties are generally lower for services regulated by the Bill, the committee considers this appropriate given the different nature of these services and the small number of services they represent.

## **3.2 Institution of Parliament**

### Level of detail to be contained in regulations

#### *Definition of QEC service*

The Bill defines the term 'Queensland education and care service' and inserts a list of things that are not within the meaning of that term, including 'a service prescribed under a regulation'<sup>50</sup>. In effect, that means the definition of 'Queensland education and care service' can be expanded by regulation, rather than by an amendment to the Act. 'Queensland education and care service' is an important concept in the Bill. The explanatory notes do not explain the justification for enabling amendment by legislation that is subordinate to the Act itself (also known as a 'Henry VIII' clause).

As well, as a general principle it is preferable for provisions containing important terms to be framed 'in completely objective terms, without any capacity to extend the definition by regulation'<sup>51</sup>.

The department subsequently noted that this provision is a continuation of the approach adopted to define services in the *Child Care Act 2002*<sup>52</sup> and the National Law<sup>53</sup> and it would enable the department to respond quickly to an unforeseen service type that may place children at risk.

#### *Definition of serious incident*

Clause 127 defines 'serious incident'. It also details what a provider has to report to the chief executive with regard to serious incidents, complaints and other matters, and when this has to be

<sup>49</sup> Department of Education, Training and Employment, response to FLP issues, p5

<sup>50</sup> Education and Care Services Bill 2013, clause 8(1)(h)

<sup>51</sup> Alert Digest No. 3 of 2004, page 18, comments on the *Petroleum and Gas (Production and Safety) Bill 2004*

<sup>52</sup> s5(1)(g)

<sup>53</sup> s5(h)

reported.<sup>54</sup> The Bill provides that the definition of ‘serious incident’ will be prescribed under regulation, as well as what other matters a provider has to give notice to the chief executive. There is concern that the provision as a whole relies strongly on the regulations, to the point of being ambiguous.

#### *Other provisions included in regulations*

Throughout the Bill there are a number of other key provisions that will be included in regulation, rather than detailed by the Bill. These include, for example:

- Staffing requirements<sup>55</sup>;
- The times a supervisor must be present at a service<sup>56</sup>; and
- Circumstances in which an unqualified person may be taken to be a qualified person, for the purposes of the Bill<sup>57</sup>

The former Scrutiny of Legislation Committee of the Queensland Parliament gave consideration to the issue of creation of offences by subordinate legislation and adopted a formal policy on this issue. This included, in part “... where possible, the types of regulations to be made under such provisions, which are foreseeable at the time of drafting the Bill, should be specified in the Bill” and “... the principal means of creating offences should always be through Acts of Parliament rather than delegated legislation”.<sup>58</sup>

The department subsequently advised that clause 127 is modeled on the National Law<sup>59</sup>, which defines ‘serious incident’ in the National Regulation.<sup>60</sup> Since the Queensland definition will be based on that in the National Regulation, the current provision enables the department to respond quickly to any changes made under the National Regulation.<sup>61</sup> The department also noted that “... the mechanism enables a quick response to an unforeseen type of serious incident or matter to be notified that places children at risk.”<sup>62</sup>

#### **Committee comment**

The committee has noted in this report its preference for key information to be included in a Bill, rather than in regulations. This particularly applies to key definitions that are pivotal to interpretation of a Bill, such as ‘QEC service’ and ‘serious incident’, and any matter that would constitute an offence.

We note that significant aspects of the Bill will be implemented by regulation *before* the committee has a chance to consider it. The committee cannot effectively examine the policy to be given effect by legislation when key elements of the policy are not provided at the time the Bill is being considered.

The committee understand the reasons why it is necessary to include provisions in regulation rather than a Bill in certain circumstances, such as when changes are required to be made quickly or in response to changes in the National Law. However, the number of provisions that will be detailed by regulation in this Bill are extensive.

<sup>54</sup> Education and Care Services Bill 2013, clause 127

<sup>55</sup> Ibid, clause 110

<sup>56</sup> Ibid, clause 113

<sup>57</sup> Ibid, clause 117

<sup>58</sup> Alert Digest No. 4 of 1996, pp7-8

<sup>59</sup> s174

<sup>60</sup> s12

<sup>61</sup> Department of Education, Training and Employment, response to FLP issues, pp7-8

<sup>62</sup> Ibid, p8

To ensure the committee adequately fulfils its functions with regard to examining the policy to be given effect by the Bill it will request a briefing on the proposed regulations from the department.

#### Use and disclosure of URL data

The term URL data is defined in the Bill.<sup>63</sup> In addition to some detailed provisions, the definition includes a broad provision that captures ‘other information’ about a child or a staff member that is included in a regulation.<sup>64</sup> As described above, it is preferable for important terms to be defined in full in a Bill. The explanatory notes do not explain why the broad provisions are considered necessary.

The committee sought a response from the department on this question, who advised that “[c]lause 220 of the Bill is modelled on section 170A of the Child Care Act 2002 and section 32 of the Education and Care Services National Law (Queensland) Act 2011”.<sup>65</sup>

The department noted that the provision enables it to respond quickly in the event that additional information is required to be collected to meet reporting requirements under the National Information Agreement on Early Childhood Education and Care. This includes information that is required to be provided to the Australian Bureau of Statistics and Australian Institute of Health and Welfare, as provided for by the Bill. The protection of a person’s URL data under the Bill was also noted by the department.<sup>66</sup>

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<sup>63</sup> Education and Care Services Bill 2013, clause 220

<sup>64</sup> Ibid, clause 220(a)(viii) and clause 220(b)(vi)

<sup>65</sup> Department of Education, Training and Employment, response to FLP issues, p8

<sup>66</sup> Ibid, p8

## Appendix A – Comparison of select clauses of proposed Education and Care Services legislation in Qld with the National Law

Item	Education and Care Services Bill	National Law (98% of services)
Clause /section no.	19	19
Clause/section title	Conditions on provider approval	Conditions on provider approval
Penalty	\$11,000	\$10,000 for an individual \$50,000 for any other case

Item	Education and Care Services Bill	National Law (98% of services)
Clause/section no.	107	103
Clause/section title	Person must not provide an education and care service without service approval	Offence to provide an education and care service without service approval
Penalty	First offence- \$11,000 Second or later offence - \$22,000	\$20,000 for an individual \$100,000 for any other case

Item	Education and Care Services Bill	National Law (98% of services)
Clause/section no.	125	173 (2) (f)
Clause/section title	Failure to notify chief executive of intention to transfer service approval	Offence to fail to notify certain circumstances to Regulatory Authority Subsection (f) an intention to transfer a service approval, as required under section 59
Penalty	\$5,500	\$4,000 for an individual \$20,000 for any other case

Item	Education and Care Services Bill	National Law (98% of services)
Clause/section no.	132** 133**	165 (3)**
Clause/section title	(132) Person involved in conduct of, or provision of care for, stand-alone service must be an adult (2) A person must not engage a child as a carer in a stand-alone service  (133) Suitability of other persons in home where stand-alone	Offence to inadequately supervise children Subsection (3) A family day care educator must ensure that any child being educated and cared for by the educator as a part of a family day care service is

	service operates (2)A person conducting a stand-alone service must take all reasonable steps to ensure that each carer in the service complies with subsection 1 [ i.e., carer not to be disqualified/prohibited person]	adequately supervised.
Penalty	132 (2) \$5,5000 133 (2) \$11,000	\$10,000

\*\* Although not identical, Clauses 132 and 133 relates to stand-alone services, and section 165 relates to family day services. Both clauses relate to supervision in these services.

Item	Education and Care Services Bill	National Law (98% of services)
Clause/section no.	202 (4)	188
Clause/section title	Person must not contravene prohibition notice under this Act Subsection 4 Person must not provide education and care; be engaged as a supervisor, educator, contractor or other staff, or other other activity [While subject to prohibition notice]	Offence to engage person to whom prohibition notice applies Must not engage a person as supervisor, educator, family day care educator, staff or volunteer [if prohibition notice in force]
Penalty	Maximum \$11,000	\$20,000 for an individual \$100,000 for any other case



## Appendix B – List of submissions

<b>Sub #</b>	<b>Submitter</b>
1	Commissioner for Children and Young People and Child Guardian
2	Early Childhood Teachers Association (ECTA)
3	Australian Community Children’s Services Qld (ACCS)

## Appendix C – Witnesses at public briefing – 13 June 2013

Witnesses
<p><b>Department of Education, Training and Employment</b></p> <p>Ms Annette Whitehead, Deputy Director-General, Policy and Programs</p> <p>Ms Catherine O’Malley, Executive Director, Regulation, Assessment and Service Quality</p> <p>Ms Yvonne Ries, Principal Program Officer, Regulation, Assessment and Strategic Initiatives</p> <p>Mr Christopher Roney, Principal Adviser, Legislative Services</p>

