

Submission
No 50

INQUIRY INTO IMPACT OF COMMONWEALTH WORKCHOICES LEGISLATION

Organisation: Country Children's Services Association of New South Wales Inc.
Name: Miss Romola Hollywood
Position: Project Officer
Telephone:
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Theme:

Summary



**COUNTRY CHILDREN'S
SERVICES ASSOCIATION
OF NSW INC**

**Submission to NSW Legislative
Council Inquiry**

**The impact of Commonwealth WorkChoices
legislation**

Email to socialissues@parliament.nsw.gov.au

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Executive Director: Judy Kynaston

Contact person: Romola Hollywood, Project Officer

Country Children's Services Association of NSW Inc
PO Box 118 Katoomba NSW 2780
Ph: 02 4782 1470
Fax: 02 4782 4425
Email: office@ccsa-nsw.asn.au
Website: www.ccsa-nsw.asn.au
ABN 68 194 454 514

About CCSA

Country Children's Services Association of NSW Inc (CCSA) is a not-for-profit, non-government, membership-based organisation that supports the management of early childhood services across NSW.

CCSA has been operating for more than 35 years and represents more than 575 children's services in NSW. CCSA's members are primarily small stand-alone, not-for-profit, community-based children's services located in rural and regional NSW.

CCSA's day-to-day work involves helping the management of these children's services understand and meet their legal obligations. The management of not-for-profit children's services is made up of volunteer committee members (often parent-users of the service) who undertake the responsibility of the employer and licensee of the service. We provide information to our members as employers on employment obligations, award interpretation and changes to industrial legislation.

Summary of the submissions

Our submission to the inquiry focuses on the following area:

(f) impact on employers and especially small business.

Specifically, we wish to outline the impact of the WorkChoices legislation on not-for-profit children's services.

Our key concern is that not-for-profit children's services do not know whether they are captured by the WorkChoices legislation or remain within the State industrial relations system.

This confusion stems from the fact that the WorkChoices legislation does not contain any clear legal definition to enable not-for-profit organisations to determine whether they are a constitutional corporation.

In the absence of any clear legal definition under WorkChoices, not-for-profit children's services are being forced to get independent legal advice. This is an unfair burden on not-for-profit children's services that have limited resources and limited access to appropriate legal expertise.

The introduction of WorkChoices has placed volunteer management committees in an unacceptable position of making employment decisions based on legal opinion that could still be challenged by another party (union, ATO or other Government department) in the High Court of Australia.

WorkChoices has created significant uncertainty for the not-for-profit children's services sector.

Background

The introduction of WorkChoices is based on the Australian Government using its corporations powers under the Australian constitution. This means that the Australian Government's 'single national industrial relations system', according to its own estimates will only have about 85% coverage. The literature explains that WorkChoices will apply to:

- trading, financial and foreign corporations (constitutional corporations)
- employers in territories (the ACT and NT) and Christmas and Cocos Islands
- Australian government, including its authorities
- waterside, maritime and flight crew employers
- Victorian employers.

While these definitions may be relatively straight-forward for most businesses, they are not straight-forward for not-for-profit children's services.

This is because not-for-profit organisations are established for purposes other than banking, buying or selling. For example, a not-for-profit, community-based children's service is established to provide education and care for children in the community. In fact, under the NSW Associations Incorporations Act 1987, it appears that trading organisations are excluded from being incorporated under it. (The majority of not-for-profit children's services in NSW are incorporated under the NSW Associations Incorporations Act 1987.)

In spite of this, there is also legal precedent for certain not-for-profit organisations to be deemed trading organisations and therefore constitutional corporations because trading (selling a service) has become a significant or substantial part of the organisation's activities.

Researching the application of WorkChoices to not-for-profit children's services

In December 2005, CCSA undertook preliminary research on behalf of our members to determine if they were likely to be constitutional corporations. We contacted the WorkChoices hotline, the Office of Employment Advocate and the Office of Fair Trading for guidelines. None of these government departments had any information on whether not-for-profit children's services are constitutional corporations. In fact, the Office of the Employment Advocate website stated:

"The question of whether an incorporated body is a trading or financial corporation is a complex question of law."

It is clear that decisions are ultimately made by the High Court of Australia.

In March 2006, CCSA approached the Public Interest Advocacy Centre (PIAC) for further help. Through the Public Interest Law Clearing House (PILCH), we were referred to solicitors who provided pro bono legal advice. We met with the solicitor and outlined:

- the type of work that children's services undertake
- how income is gained through:
 - fees charged to families
 - government funding (there are differing arrangements for different services types: some are funded by state government and others by the Commonwealth)
 - other activities such as fundraising and donations.

We also provided samples of income and expenditure statements and Rules of Incorporation/Articles of Association from several member services.

Based on the information provided, we were advised that most children's services would be deemed to be constitutional corporations and therefore would be captured by WorkChoices. The legal advice was:

"Organisations which are incorporated" (either as companies limited by guarantee, associations or co-operatives) *and* "have as their core activity the provision of children's services in exchange for a fee (albeit the fee charged may not cover all of the cost of providing these services) will be covered by WorkChoices."

This advice indicated that, even though not-for-profit children's services may be established for a charitable purpose, they will be deemed to be a trading corporation because the provision of services in exchange for a fee represents a substantial or significant proportion of the budget and activities of the organisation. In the main, children's services charge fees and this income often represents between 50-75% of the overall revenue of the organisation.

The only exception may be children's services that operate fully through government grants and do not charge fees in exchange for services. This might include some mobile and some indigenous children's services.

However, in May 2006, CCSA became aware that unions covering the children's services sector, the NSW Office of Industrial Relations and Industrial Relations Commission of NSW were taking the view that all not-for-profit children's services remain in the State system and are not captured by WorkChoices.

The Independent Education Union made their claims in their newsletter, *Newsmonth*. The NSW Office of Industrial Relations put their views forward in an industrial relations seminar and the NSW Industrial Relations Commission continued to hear claims lodged by employees from not-for-profit children's services.

These differing opinions have created significant confusion for not-for-profit management committees who are now unclear which industrial relations system applies to them.

To date, there is no clear answer, only a series of differing opinions. And no one really knows whose opinion is right. The only way to find out for sure is through the courts: the Industrial Court, the Court of Appeals and, ultimately, up to the High Court.

The concern for CCSA and its members is that not-for-profit children's services do not have the capacity to pursue a legal decision in the High Court. Furthermore, each not-for-profit children's service would need to get their own legal decision. This situation is untenable.

The current situation for employers of not-for-profit children's services

Since the introduction of WorkChoices, not-for-profit children's services have essentially been working from a risk-management perspective. Services are considering the consequences of being found to be in breach of either the Federal or State industrial relations system.

For example, when addressing unsatisfactory work performance, even though not-for-profit service may be captured by WorkChoices, and exempt from unfair dismissal, it still needs to consider the risk of an unfair dismissal claim being lodged and heard in the Industrial Relations Commission of NSW. If a claim was lodged, it appears that the onus would be on the employer to prove that they are a constitutional corporation. Small, stand-alone not-for-profit children's services based in rural and regional NSW certainly do not have the resources or capacity to take a case to the High Court of Australia.

WorkChoices has created an unsatisfactory situation for volunteer management committees of not-for-profit children's services. The impact of WorkChoices means that these services have no clear idea which industrial relations system – state or federal – applies to them and their employees.

This implications of this lack of clarity are only going to increase as management committees of not-for-profit children's services face questions such as:

- whether pay rises gained through the recent State Wage Case Decision apply to their employees or not
- whether SuperChoice must be offered to their employees or not
- when the NAPSAs expire in up to three years, whether employers must move employees on to the comparable federal award or an AWA or not.