Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

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Committee Secretary

Community Support and Services Committee

Parliament House

George Street

Brisbane Q4000

By email: CSSC@parliament.qld.gov.au

29th September 2021

Dear Chair,

RE: THE CHILD PROTECTION REFORM AND OTHER LEGISLATION AMENDMENT BILL 2021

We welcome and appreciate the opportunity to comment on the proposed Bill. We especially note and welcome the strengthening of the Child Placement Principles by the provisions contained in Part 3 of the Bill. We also welcome the changing the wording of the 'partnership' element of the Aboriginal and Torres Strait Islander Child Placement Principle to more clearly reflect, and clarify the department's commitment to partnering with Aboriginal and Torres Strait Islander peoples, community representatives and organisations in policy and program development, and service design

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland.

The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is are informed by nearly five decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

COMMENT

We note that the *Child Protection Reform and Other Legislation Amendment Bill* 2021 *contains* a number of important provisions designed to recognise and reinforce the rights of the child and to recognise cultural connection and kinship in accordance with Aboriginal tradition and Island custom of the Torres Strait.

PART 3 AMENDMENT OF THE CHILD PROTECTION ACT 1999

We welcome and note the clarification of the definition of "kin" in Schedule 3 of the *Child Protection Act* 1999 to recognise Aboriginal family structures and Torres Strait Islander family structures, and in so doing, ensuring that for Aboriginal or Torres Strait Islander children, it takes into account kinship relationships for the child according to Aboriginal tradition or Island custom as well as the cultural connection between the person identified as kin and the child.

Thus the definition of kin in Schedule 3 is amended so that:

kin, in relation to a child, means the following persons—

(a) a member of the child's family group who is a person of significance to the child;

(b) if the child is an Aboriginal child—a person who, under Aboriginal tradition, is regarded

as kin of the child;

(c) if the child is a Torres Strait Islander child—a person who, under Island custom, is regarded as kin of the child;

(d) another person—

(i) who is recognised by the child, or the child's family group, as a person of significance to the child; and

(ii) if the child is an Aboriginal or Torres Strait Islander child—with whom the child has a cultural connection.

We welcome the amendment that provides for families to consent to the involvement of an independent entity in child protection matters and clarifying the role of the independent entity.

We welcome the strengthening of the Child Placement Principles by the provisions contained in Part 3 of the Bill, namely:

- the prevention principle (a child has the right to be brought up within the child's own family and community)
- the partnership principle (Aboriginal or Torres Strait Islander persons have the right to participate in significant decisions under this Act about Aboriginal or Torres Strait Islander children)
- the placement principle (if a child is to be placed in care, the child has a right to be placed with a member of the child's family group)
- the participation principle (a child and the child's parents and family members have a right to participate, and be enabled to participate, in an administrative or judicial process for making a significant decision about the child)
- the connection principle (a child has a right to be supported to develop and maintain a connection with the child's family, community, culture, traditions and language, particularly when the child is in the care of a person who is not an Aboriginal or Torres Strait Islander person).

We also note and welcome the changing the wording of the 'partnership' element of the Aboriginal and Torres Strait Islander Child Placement Principle to more clearly reflect, and clarify the Department's commitment to partnering with Aboriginal and Torres Strait Islander peoples, community representatives and organisations in policy and program development, service design

We also support the recognition of children's rights in accordance with the United Nations Convention on the Rights of the Child and the provisions to reinforce those rights.

PART 6 Amendments to the Working with Children (Risk Management and Screening Act 2000

The Bill contains provisions to amend the *Working with Children (Risk Management and Screening Act* 2000 (WWC Act). The amendments seek to provide a legislative basis for the Chief Executive (working with children) to request domestic violence information from the Queensland Police Commissioner for the purposes of a Blue Card assessment.

The aforementioned request can only be made where the Chief Executive (working with children) reasonably believes a domestic violence order may have been made against the person. If there is domestic violence information about a person, the Police Commissioner may provide the Chief Executive (working with children) with a brief description of the surrounding circumstances.

We note the proposed amendments to section 228(2) of the WWC Act which would then provide:

> *(2) The chief executive **must** (emphasis added) have regard to the following matters in relation to the information— (a) if the chief executive is aware of domestic violence information about the person—the circumstances of a domestic violence order or police protection notice mentioned in the information, including the conditions imposed on the person by the order or notice;*

Background to recommendation 39

The provisions have their genesis in Recommendation 39 from the QFCC's report, *Keeping Queensland's children more than safe: Review of the blue card system* (QFCC's blue card report),

It recommended amendments to the WWC Act to allow Blue Card Services (BCS) to obtain domestic violence information about blue card applicants.

> *It is recommended that the Attorney-General and Minister for Justice and Minister for Training and Skills proposes amendments to the WWC Act to allow BCS to obtain applications for domestic violence orders and all documents related to orders made where the applicant for a blue card is named as a respondent, and the applicant has a charge or conviction related to a breach of a domestic violence order or another domestic violence offence as defined under the Criminal Code (emphasis added)*

The QFCC recommendation recommended consideration of information about the existence of domestic violence, particularly where more than one domestic violence order has been issued and there are different complainants, is relevant to a Blue Card assessment.

The QFCC acknowledged that considering civil domestic and family violence information as part of a blue card assessment is complex but that accessing this information where there is other criminal history will strengthen the blue card system by enabling a holistic risk assessment.

The QFCC went on to discuss how the complexity of the use of this information as part of a WWCC check could be managed. They noted that civil domestic and family violence information can help to assess risk, but specialist officers must do the assessment.

> *[The specialist officers] need to understand the unique nature and dynamics of domestic violence and associated court processes. For example, parties may consent to an order, which means a court has not found that domestic violence has occurred. This means it would not be accurate to infer that because a court has made an order, there is risk to children.*

At the centre of the QFCC proposal is a desire to be able to add context to criminal charges which might otherwise appear minor but which occur against the backdrop of a more serious history.

In our view the pre-existence of criminal charges is central to the QFCC recommendation and we would strongly urge that domestic violence material only be taken into account as an adjunct to criminal charges, to give context to them. The problem with doing otherwise is that unlike criminal charges which are brought only after review by police to consider whether the allegations are sustainable and that a charge is made out to an appropriate standard of proof. The charges are then further scrutinised in a court of law with defence representation being made possible following the High Court decision of *Dietrich*.

In contrast, in the unique nature and dynamics of domestic violence *applications* and associated court processes, a respondent may not even be in court when the protection order is made, and the named applicant may not even agree with the entirety of the contents of the allegations. Many respondents while disputing the contents of an application may either not be in court at all or else may elect to agree to a protection order without making any admissions. It is extremely unsafe to rely upon assertions contained in a domestic violence order application which have not been subjected to the same rigorous process that criminal charges are. We deduce that the reasoning behind the QFCC recommendation is that there should first be a criminal charge before reliance is made on a domestic violence order.

This assumption is born out by the explanation that the QFCC gave under recommendation 39 where they made it clear that the use of the domestic violence order was to give context to criminal charges.

> *BCS should be able to obtain information about civil applications if there has been a breach of a domestic and family violence order or there have been other criminal offences involving domestic and family violence. This information will give context to the related criminal offence or breaches. This is useful when an applicant has only technical breaches recorded on their criminal history, but information in the application for a domestic violence order shows a pattern of ongoing violent behaviour.*

Further as noted by QFCC at the time of the report, no Australian state or territory considers all applicants' civil domestic and family violence history as part of WWCCs. Some currently gather that information if they know or suspect it exists, as it gives context to an applicant's criminal history.

Approximately 150,000 applications for domestic violence orders have been made in the Queensland Courts in the last five years,[1] The ease of obtaining a Domestic Violence Order is clearly founded in the public policy of the desirability of quickly and easily invoking supervision by the courts, the corollary of that is that there may be considerable variations in the quality of the assertions contained in them.

The recommendation from the QFCC is for domestic violence material to be used as context to criminal charges and we would urge that they be used only for that purpose. We would further recommend that the language of the bill be amended so that the chief executive may (rather than must) have regard to that material.

Regard to Interstate suspension or cancellation.

We note the sense of provisions to enable the chief executive (working with children) to have regard to adverse decisions in other jurisdictions as part of a Blue Card assessment; however with respect to the provisions concerning suspension or cancellation of interstate authority, we would urge consideration that the Chief Executive 'may', not 'must' take action. The reasons for the need for some flexibility in decision-making arises from the variation between jurisdictions in adverse decision making. An automatic and unreviewable decision is capable of producing anomalies and absurd results. There should always be an ability to afford fairness to applicants and this would be best achieved by maintaining a discretion for the decision-maker.

We thank you for the opportunity to comment upon the Bill.

Yours faithfully,

Graham White
Acting Chief Executive Officer

[1] Queensland Courts' domestic and family violence (DFV) statistics, available at https://www.courts.qld.gov.au/court-users/researchers-and-public/stats, accessed 28 September 2021

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1 October 2021

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Q4000

By email: CSSC@parliament.qld.gov.au

Dear Chair,

RE: THE CHILD PROTECTION REFORM AND OTHER LEGISLATION AMENDMENT BILL 2021
ADDENDUM TO ATSILS SUBMISSION of 30 September 2021

As an addendum to our submission dated 29 September 2021, we wish to add the following submissions.

Aboriginal and Torres Strait Islander children continue to be overrepresented in the child protection system with Queensland Aboriginal and Torres Strait Islander children over 8 times as likely to be placed in out-of-home care compared with non-Indigenous children.[1]

Clause 12 - Active efforts

Although we support the amendment in clause 12, which requires *active efforts* to apply the Aboriginal and Torres Strait Islander child placement principle, we are of the view that the

[1] Queensland Department of Children, Youth Justice and Multicultural Affairs, 'Placement of Aboriginal and Torres Strait Islander Children, https://www.cyjma.qld.gov.au/about-us/performance-evaluations/our-performance/representation-aboriginal-torres-strait-islander-children/placement-aboriginal-torres-strait-islander-children.

definition of *active efforts* does not go far enough in detailing the steps that need to be taken to ensure this is adequately embedded into the policies and procedures that guide the chief executive, litigation director and authorised officers' and their practices in dealing with Aboriginal and Torres Strait Islander children.

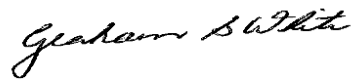
We also encourage the involvement of family and community at all levels of decision-making in regard to what is in the best interests of the child or children.

Clause 24 – Review of plan

We do not support clause 24, which proposes to amend section 51V of the *Child Protection Act 1999* (Qld). The amendment proposes that the chief executive be allowed to decide not to review a child's case plan, despite a request to review it, if it is satisfied the child's circumstances have not changed significantly since the plan was finalised or for another reason, it would not be appropriate in all the circumstances.

We are of the view that a child's case plan is a significant part of a child's care arrangements that not only allows for their views and wishes to be heard, but it gives provides a plan for contact, placement and care that can add great stability to a child's time in out-of-home care. We are of the view that if requested by a child, it will have been requested for a reason and it would be important that a review of the case plan be done in order to address any concerns the child may have.

Yours faithfully,



Graham White

Acting Chief Executive Officer