

Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024

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**SUBMISSION TO THE EDUCATION, EMPLOYMENT, TRAINING AND SKILLS COMMITTEE
ON THE WORKING WITH CHILDREN AMENDMENT BILL 2024**

Thank you for the opportunity to provide feedback on the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024*.

In the course of a study I am undertaking on the use of the *Human Rights Act 2019* (Qld) in legal proceedings, I have made some incidental findings in relation to Blue Card decisions.

The research is unpublished at this stage. However, I would like to take this opportunity to inform the committee about some of these findings.

The ‘Human Rights Case Law’ study

I run the [UQ/Caxton Human Rights Case Law Project](#).¹ We read and analyse all published cases that mention the *Human Rights Act 2019* (Qld). We have recently finished writing up the first three years of our data.

We found that Blue Card cases made up a significant proportion of cases within our dataset. Indeed, 21.3% of cases (n=87) that mentioned the *Human Rights Act 2019* (Qld) between 2019 and 2022 were Blue Card cases. All of these cases were heard by the Queensland Civil and Administrative Tribunal (QCAT).

This indicates that QCAT is applying the *Human Rights Act 2019* (Qld) in its determination of Blue Card matters. This is important because QCAT is acting in its administrative capacity when reviewing decisions on whether an exceptional case exists in relation to a person where the chief executive has issued the person with a negative notice, or has refused to cancel a negative notice, under the *Working with Children (Risk Management and Screening) Act 2000* (Qld) (‘WWC Act’). The *Human Rights Act 2019* (Qld) applies to every such review decision that is made by QCAT.

(Of course, the chief executive is also subject to the *Human Rights Act 2019* (Qld) when making the initial decision.)

Section 58 of the *Human Rights Act 2019* (Qld) requires decision makers to:

- give proper consideration to human rights that are relevant to the decision; and
- act and make decisions in a way that is compatible with human rights.

¹ With Bridget Burton, Caxton Legal Centre Inc.

The *Human Rights Act 2019* (Qld) should therefore be considered and applied in every Blue Card case.

The Blue Card cases we analysed involved a range of important and complex human rights issues, and these issues were discussed at length in some cases. This is encouraging because the *Human Rights Act 2019* (Qld) enhances the quality of legal reasoning by bringing renewed ‘analytic rigour’ to decision-making.² However, we cannot be sure that human rights are being considered in all Blue Card cases.

I recommend the addition of another matter for consideration in (proposed) s 234: (ia) any human rights that are relevant under the Human Rights Act 2019 (Qld). This would bring the WWC Act into line with the *Human Rights Act 2019* (Qld) and would ensure that section 58 of the *Human Rights Act 2019* (Qld) is applied in every case.

Improving decision-making in Blue Card cases

What concerned us about the Blue Card cases we analysed was the wide discretion afforded to decision makers, and the inconsistencies in case outcomes that resulted.

Tribunal members differed markedly in their approach to Blue Card reviews, particularly in cases concerning past drug use and domestic violence. On one hand, some tribunal members concluded that past drug use ‘detract[ed] from the applicant’s ability to provide a protective environment for children’.³ However, in other cases, members recognised that the applicant had ‘turned [their] life around’⁴ and would be a ‘positive influence’ on those seeking to ‘overcome addiction and criminality’.⁵ In some cases, women who had been victims of domestic violence were denied blue cards because they were deemed to have failed to protect their children, even though they were in need of protection themselves.⁶ Others were applauded for their resilience and the importance of them obtaining paid employment was recognised.⁷ There was no consistency in terms of outcomes, or the decision-making process; some tribunal members accept the evidence of expert witnesses, whilst others dismiss it, often with little justification.

I welcome, therefore:

- **the new statutory threshold for assessments, requiring the chief executive to be satisfied that an applicant presents a ‘real and appreciable’ risk to the safety of children (clause 37, new s18D);**
- **the introduction of a ‘reasonable person test’ (clause 56, new s 233);**

² See also Kent Blore, ‘The riddle of s 5(2)(a) of the *Human Rights Act 2019* (Qld): when are courts and tribunals required to apply human rights directly?’ (2021) 102 *AIAL Forum* 71-78, 78.

³ *Sheraton v Director-General, Department of Justice and Attorney-General* [2020] QCAT 431 [22], [60].

⁴ *BE v Director-General, Department of Justice and Attorney-General* [2020] QCAT 498 [24]; *AB v Director-General, Department of Justice and Attorney-General* [2022] QCAT 413 [60].

⁵ *AB v Director-General, Department of Justice and Attorney-General* [2022] QCAT 413 [60-63].

⁶ Eg. *TJS v Director-General, Department of Justice and Attorney-General* [2022] QCAT 214 [89], [106]; *JR v Director-General, Department of Justice and Attorney-General* [2020] QCAT 332 [32-33]; *GEE v Director-General, Department of Justice and Attorney-General* [2022] QCAT 260 [38], [92].

⁷ Eg. *LO v Director-General, Department of Justice and Attorney-General* [2022] QCAT 16.

- **the new list of ‘matters to consider in relation to particular conduct’ (clause 56, new s 234).**

These new provisions have the potential to lead to improved decision-making and provide much-needed guidance to decision-makers.

I also welcome the changes to screening requirements for schools (clause 122). In one of the cases in our dataset, a Blue Card was denied to a young man who was an air conditioning apprentice. He required a Blue Card because the company he worked for serviced schools and hospitals.⁸ In the circumstances, this seemed unduly risk averse.

In relation to the **‘Risk assessment guidelines’** (proposed s 246E), I would emphasise the **importance of these guidelines being published** to ensure transparency and accountability.

Protecting applicants’ rights to privacy and reputation

Having said this, I have some outstanding concerns regarding the review process at QCAT. It is my belief that the review process itself raises important human rights concerns. Applicants are required to disclose detailed personal information about their childhood, any experiences of abuse or trauma, domestic violence, drug use, and mental illness. Being required to provide such information may amount to an unreasonable and unjustifiable breach of applicants’ privacy under the *Human Rights Act 2019* (Qld) particularly considering this information is invariably included in the published reasons.⁹ Whilst individuals’ names are generally removed from the reasons, the information they include is detailed enough to render applicants, as well as their family members and significant others, potentially identifiable.

Consideration should be given to how this might be addressed.

Ensuring Aboriginal and/or Torres Strait Islander children have access to kinship carers

In our study, we came across decisions where Blue Cards were denied to potential kinship carers.¹⁰ We were concerned that the cultural rights of Aboriginal and/or Torres Strait Islander children and carers were often not considered in these cases. The outcomes were not protective of vulnerable children who are subject to child protection orders.

I welcome the removal of ‘approved kinship carers’ from the definition of ‘regulated employment’ under Sch 1 s 14. This will remove a significant barrier to ensuring that Aboriginal and/or Torres Strait Islander children can be cared for by family and members of their own community.

⁸ *YM v Director-General, Department of Justice and Attorney-General* [2021] QCAT 224.

⁹ *Human Rights Act 2019* (Qld) s 25.

¹⁰ See *LO v Director-General, Department of Justice and Attorney-General* [2022] QCAT 16; *NGV v Director General, Department of Justice and Attorney-General* [2020] QCAT 319.

Self-disclosure requirements

I am concerned that the proposed changes to the self-disclosure requirements may unfairly expose individuals to criminal sanctions.

The Bill (at clause 42, new s186(1)(e)) requires a person to self-disclose ‘another matter relevant to whether the person poses a risk to the safety of children prescribed by regulation.’ Our case analysis suggests that Blue Card decisions can be made based on information that an individual may not realise is relevant to whether they pose a risk to the safety of children. The bases upon which decision-makers make their determination are not always intuitive or predictable. **I recommend that the list in section 186(1) of disclosable matters be prescriptive enough that a person will know if a matter requires self-disclosure.**

Please do not hesitate to contact me with any queries.

Yours sincerely,



Tamara Walsh
July 2024