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

IN RESPONSE TO THE
Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024

Submission prepared by LawRight | Court and Tribunal Services

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

1. Background

LawRight welcomes the opportunity to provide a submission in response to the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024* (**the Bill**).

LawRight is a not-for-profit, community-based legal organisation, that coordinates the provision of pro bono legal services to disadvantaged Queenslanders. LawRight undertakes law reform, policy work, legal education, and improves the lives of vulnerable people by increasing access to justice through strategic partnerships with pro bono lawyers. In 2022-23, LawRight's 30 member law firms and barristers delivered 16,000 pro bono hours to help vulnerable Queenslanders resolve complex legal issues.

LawRight's Court and Tribunal Services (**CTS**) offers a statewide service that assists individuals, primarily self-represented litigants, with proceedings in the District Court, Supreme Court, the Court of Appeal, the Federal Court and Federal Circuit and Family Court of Australia, and the Queensland Civil and Administrative Tribunal (**QCAT**). Established in 2007, CTS utilises a scalable pro bono partnership model that tailors discrete legal assistance services to individual clients based on their vulnerability, circumstances, and specific legal problem. We scale the impact of our client work, by advocating for better laws, processes, and policies.

In 2022-23, CTS:

- Operated three public offices at Brisbane courts and registries, the Queen Elizabeth II Courts of Law Building, the Harry Gibbs Commonwealth Law Building Brisbane; and QCAT;
- Partnered with 22 private law firms, offering three dedicated timeslots each week in each office for client appointments;
- Assisted 646 clients through 1,500 legal advices and 371 legal tasks such as drafting court documents and legal correspondence; and
- Referred 63 clients for pro bono legal representation, which included full representation or discrete representation at a mediation or hearing.

LawRight's Court and Tribunal Services | QCAT Office

LawRight opened the QCAT office of our Court and Tribunal Services in 2010. Our QCAT office sees clients on-site at the Brisbane registry and provides remote services to clients from across the state.

Depending on the client's circumstances, legal problem, and the available pro bono resources, LawRight's QCAT service can:

- Provide online legal information, resources or other education materials to promote understanding of the legal system and relevant procedures;
- Help the client to self-represent to the best of their abilities;
- Provide legal advice and assistance to prepare tribunal documents and legal correspondence;
- Suggest other options to resolve court proceedings;
- In limited cases, represent a client in proceedings before QCAT; and/or
- In limited cases, connect clients with a private lawyer or barrister for pro bono representation.

In 2022-23, in partnership with 14 of our member law firms, our QCAT office assisted 285 clients, provided 718 legal advices and assisted with 178 legal tasks.

In 2022-23, the QCAT office client base had the following demographic information:

- 35% disclosed a disability or mental illness;
- 13% older people;
- 22% lived in a regional, rural or remote area; and
- 9% identified as Aboriginal or Torres Strait Islander.

Approximately 40% of our clients are seeking assistance with Blue Card matters and over 60% of legal assistance services delivered by this office are provided to clients with Blue Card matters. These figures do not include clients seeking advice on a potential appeal of a QCAT decision related to a Blue Card review.

From available data for the 2023-24 financial year, our clients seeking assistance with Blue Card matters have the following demographic information:

- 33% disclosed a disability or mental illness;
- 7% were over 65 years of age;
- 28% lived in a regional, rural or remote area;
- 22% identified as Aboriginal or Torres Strait Islander;
- 33% disclosed that they were from a Culturally and Linguistically Diverse Background; and
- 48% disclosed that they had experienced domestic violence.

Based on data provided by QCAT, we understand that LawRight assists with approximately one-third of all applications to QCAT to review a Blue Card decision.

Blue Card research project

In 2021, in response to concerns relating to decision-making, delay, and systemic issues impacting vulnerable clients arising from our casework about the Blue Card Framework in Queensland, LawRight commenced a research project to collect more detailed client data from our casework. The purpose of this project was to gather and collate data available to us to assist in future law reform submissions and advocacy on this topic.

From 2022, LawRight partnered on this research project with HopgoodGanim Lawyers, who provided significant pro bono support, including a secondment to assist us to collect this data and present it in a usable way.

The current dataset uses deidentified client data from 1 July 2018 to 30 June 2023, which represents 378 detailed files of clients who received legal assistance services from LawRight with Blue Card matters before QCAT. Any data or statistics used in this submission have been drawn from this data set unless otherwise stated. LawRight has continued to collect data for the 2023-2024 financial year; however, this has not been added to the data set at the time of drafting.

Past submissions

In response to previous consultations on the Blue Card Framework in Queensland, we have given evidence at various public hearings and also made the following submissions on the following previous amendment bills:

- *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018* (**Appendix 2**);
- *Child Protection Reform and Other Legislation Amendment Bill 2021* (**Appendix 3**); and
- *Working with Children (Indigenous Communities) Legislation Amendment Bill 2021* (**Appendix 4**).

We have attached a copy of these submissions and will refer to our previous submissions throughout this document.

As noted in the explanatory notes for the Bill, a targeted consultation on a draft Bill occurred in April 2024. LawRight participated in this consultation process and provided a detailed submission at the time. Although we have not attached a copy of that submission to our current submission and do not intend to refer to the previous submission, we have replicated some sections from that submission in our current submission to the extent they remain relevant.

We want to acknowledge and express our support for the consultation process undertaken. We welcome the additional changes and adjustments made to the final Bill following the stakeholder consultation.

Timing of this submission

Although we are grateful for the opportunity to provide a submission in response to the Bill, we note that it is extremely challenging to only have 2.5 weeks in which to make a submission. The proximity to Queensland and New South Wales school holidays also significantly reduced our capacity and ability to rely on pro bono support. As a result, our submission is limited by our capacity, with one impact being that more time is spent raising matters for consideration rather than offering recommendations for reform. Nonetheless we reiterate our willingness to work collaboratively with government and to propose solutions where possible.

Acknowledgement of limitations

In preparing this submission, we want to caveat, and also acknowledge the limitations of any comments LawRight, as an organisation, can make about the experience of, or recommendations relating to Aboriginal and Torres Strait Islander peoples. Throughout this submission, we have made comments or recommendations about the cultural context of decision-making, appropriate advisory committees and other matters that specifically relate to the involvement of Aboriginal and Torres Strait Islander peoples in the Blue Card framework and associated regulatory systems.

These recommendations are based on our experience working with, and advising Aboriginal and Torres Strait Islander peoples on various legal issues, not limited to the Blue Card system. However, LawRight is not an Aboriginal and Torres Strait Islander led organisation and we do not want to suggest that we have specific expertise or knowledge in this area above other purpose-built organisations. Any comments we make in this submission should not be considered in isolation and appropriate feedback and consultation processes should take place with Aboriginal and Torres Strait Islander led organisations, Elders, and the broader First Nations community.

2. Concerns not covered in Bill

We wish to highlight three major issues in the existing process that are unlikely to be resolved by the current law reform process. These issues are the current delays in the Blue Card and QCAT processes, the complexity of the QCAT process and the interaction of interstate adverse information and decisions.

Delays in the decision-making process

The current process, as set out in **Appendix 1**, has three distinct parts:

- Part 1: the initial application to Blue Card Services;
- Part 2: the assessment phase, where Blue Card Services considers relevant information and proposes to issue a negative notice; and
- Part 3: the current QCAT process.

In our submission in response to the Legal Affairs and Safety Committee's Inquiry into the *Working with Children (Indigenous Communities) Amendment Bill 2021* (**Appendix 4**) we highlighted the delays associated with the Blue Card process in Parts 2 and 3. These delays continue to be a concern and we consider this Bill is a missed opportunity to legislate a time limit for the Chief Executive, Blue Card Services to decide an application.

LawRight research indicates that where a QCAT review is involved, the total process can take over two years and that this is a widespread problem that impacts vulnerable people across Queensland.

Throughout this section of our submission, we will refer to data we have collected in relation to delays in the Blue Card process. We note that our data returned a different conclusion about response timeframes, compared with the data provided in the DJAG *Response to the Legal Affairs and Safety Committee Working with Children (Indigenous Communities) Amendment Bill 2021*. In this response, DJAG noted that the timeframes to assess applications for individuals who return assessable information can vary depending on the nature and complexity of the information. DJAG's response provides the following information from the 2021-22 financial year:

- 94% of online blue card applications and 86% of paper applications where assessable information was returned, were finalised within four months.
- applications involving less complex police information are processed within four months.
- complex applications can take longer; however, the response does not provide an average timeframe.

We believe that our client group skews towards more vulnerable individuals and more complex cases, and this is why our data (which we will cover in more detail below) shows such long delays.

Delays in Part 2

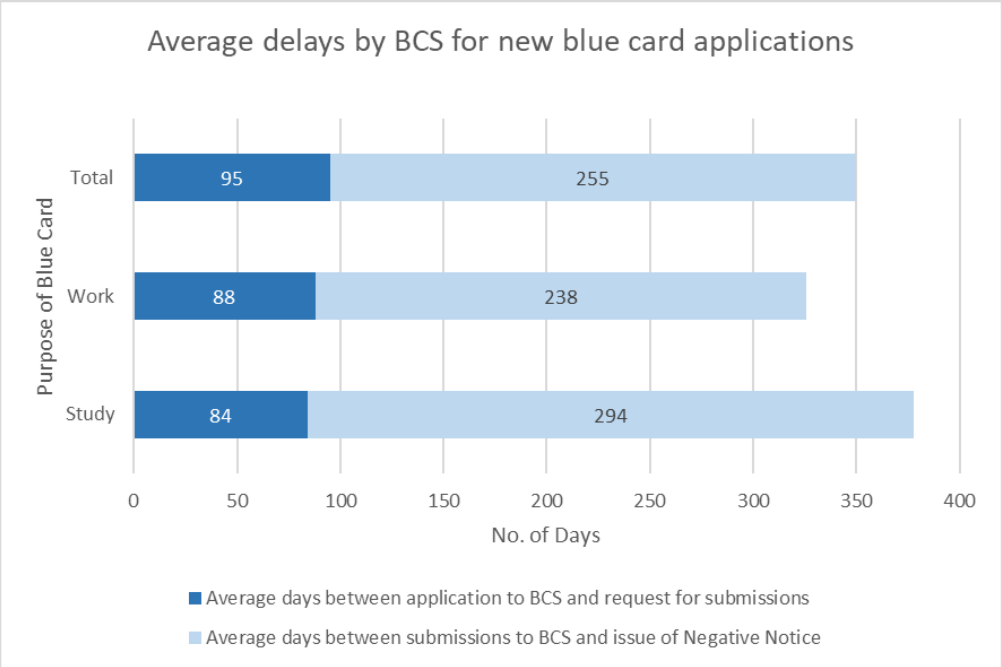
The first phase in which a delay occurs is the time taken by the Blue Card Services to issue a positive or negative notice. We understand that where there is no 'relevant information'[1] concerning an applicant, a Blue Card is usually issued within 2 to 28 business days.[2]

[1] Relevant information under the current Act includes police Information, disciplinary information, investigative information, domestic violence information and other information that that the chief executive believes is relevant to deciding whether it would be in the best interests of children to issue a working with children clearance.
[2] DJAG Response to Indigenous Communities Amendment Bill.

Where Blue Card Services has relevant information about the applicant, and they propose to issue a negative notice, they are required to invite submissions from the applicant on this information[3] (**section 229 submissions**), and this consideration of section 229 submissions frequently leads to major delays. We note that the Bill proposes a similar process.[4]

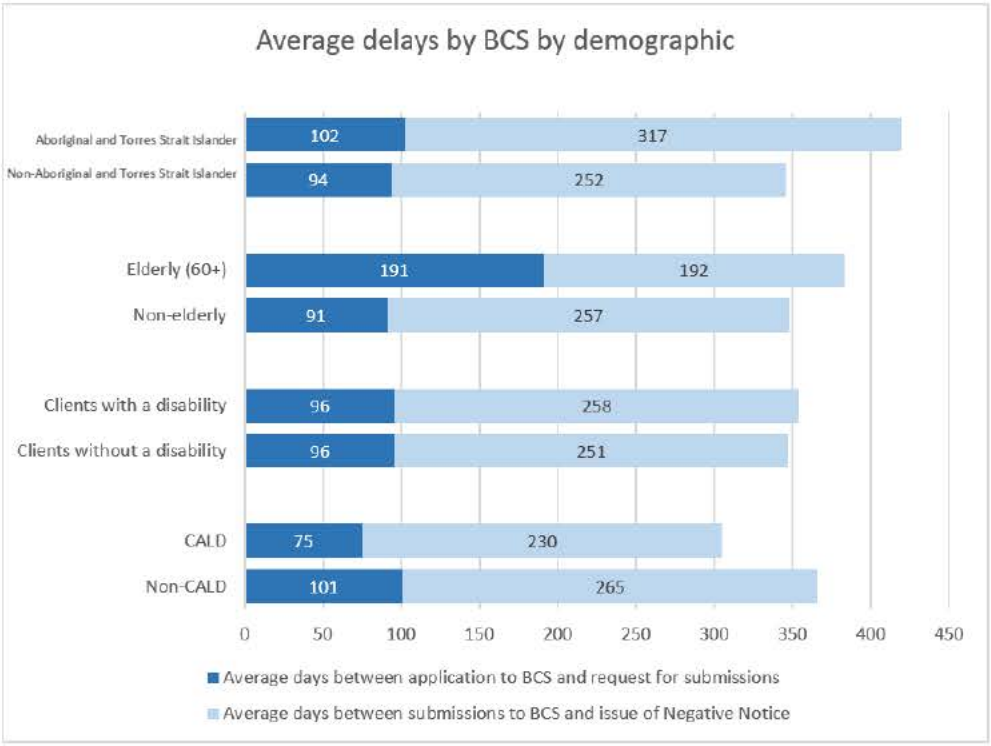
A review of our casework files from 2018-2023 shows that, where relevant information exists about an applicant, it takes on average 350 days from the date of the initial application for a Blue Card until Blue Card Services issues a negative notice.[5]

The graph below demonstrates this delay, with a breakdown of the relevant delays where the purpose of a blue card application was for work or study purposes.



The below graph demonstrates the average delay (according to our casework) depending on a client's demographic information. As the data shows, Aboriginal and Torres Strait Islander peoples, elderly clients and clients with a disability tend to experience longer delays. In our experience, this increased delay is likely caused by difficulties accessing legal assistance services and/or engaging in the regulatory framework.

[3] Section 229 current Act.
[4] Section 235 of the Bill.
[5] As we primarily assist people with applications to QCAT, our data and the data we have focused on in this submission is from applicants who have been issued a negative notice.



In some cases, there is an additional delay between the application for a Blue Card and the request for section 229 submissions, as was the case for our client Patricia[6] who was not invited to make submissions for over seven months. As shown in the data above, on average this request typically takes around 95 days.

The process of requesting section 229 submissions is to provide applicants with procedural fairness. However, we find that even though it can take Blue Card Services several months to request the submissions, they only allow the applicant a comparatively short time to respond. For example, take the case of Janice:[7]

Days between application for blue card and request for submissions	Days given to provide submission	Days between submission provided and negative notice issued	Total days from application to negative notice received
65 days	21 days	228 days	314 days

The time provided to applicants is disproportionately short in comparison to the time Blue Card Services allows themselves to assess the information. In that time, not all applicants are able to gather the information required or are able to seek the legal advice that would allow them to provide a fully informed submission.

Sometimes more than one submission is requested, for example in the case of Dawn[8] illustrated by the table below:

[6] Patricia's story is Case Study 1 Appendix 4, page 5.
[7] Name has been changed.
[8] Name has been changed.

Days between application for blue card and first request for submissions	Days given to provide first submission	Days between first submission provided and second submissions requested	Days given to provide second submission	Days between submission provided and negative notice issued	Total days from application to negative notice received
78 days	29 days	269 days	18 days	265 days	659 days

We understand that Blue Card Services have been given additional funding to assist with the backlog of complex cases,[9] but we consider that more timely decisions would be made if there was a legislated timeframe.

Janice only had one criminal offence on her record whereas Dawn had multiple. The time for processing is almost double between that of Janice and Dawn. A legislated timeframe would aim to achieve consistency across all applications.

In the current Act under section 229, the timeframe stipulated for requesting submissions "*must be reasonable and, in any case, at least 7 days after the chief executive gives the notice to the person*".[10]The timeframe proposed by the Bill under the equivalent provision "*must be a period of at least 7 days after the chief executive gives the person the notice*".[11]

Given the timeframes we have outlined above, we are concerned about the removal of "*the stated time must be reasonable*" because even though that requirement is in the current Act, the timeframes have been unreasonable, we are therefore concerned that these timeframes may become even shorter. We discuss the process of requesting information from the applicant further and offer suggestions for improvement on pages 17 to 18.

Delays in Part 3

The complexities of the QCAT process are outlined in more detail below on pages 10 to 12. A review of LawRight's casework found that the QCAT phase takes on average 12-18 months from the initial date of the application to QCAT before a Tribunal Member decides to either confirm the negative notice or set it aside.[12]

A delay of 12-18 months may be considered quick in comparison to other legal proceedings, but when the applicant has already waited 12 months to get an outcome from Blue Card Services, the prospects of waiting a further 12-18 months will often deter an applicant from commencing proceedings. This is particularly concerning when a significant proportion of Blue Card decisions are set aside by QCAT. Our data shows that 63% of matters finalised at the QCAT stage were either set aside by the Tribunal or were reconsidered by BCS during the QCAT process.[13] Our calculations of delays in Parts 2 and 3 indicate that the minimum timeframe for the finalisation of a Blue Card decision, where Blue Card issues a negative notice, is at least two years.

[9] DJAG Response to Indigenous Communities Bill, page 4.
[10] Section 229(3) of the current Act.
[11] Proposed section 236(1)(d) of the Bill.
[12] We wish to acknowledge that QCAT actively engages with stakeholders about these delays and other access issues and has implemented a number of measures aimed at reducing processing times; however, the biggest limiting factor remains the under sourcing of QCAT.
[13] Out of 98 files, 55 decisions were set aside, 7 decisions were reconsidered while 36 were confirmed by the Tribunal.

Impacts of delays

Given that an application for a Blue Card is generally motivated by an opportunity to pursue employment, training or volunteering, a two-year wait will almost always prevent that opportunity from being realised. Once offers of employment or study are withdrawn, this leads to ongoing and significant personal and financial disadvantage. In 2020, LawRight conducted a survey of 83 current and former Blue Card clients. Every client surveyed reported that they lost employment opportunities, could not advance their tertiary education, or could otherwise not fully participate in their communities due to this delay. A significant number also reported substantial negative impacts on their mental health while waiting for a decision.

The problems with timeliness are only exacerbated by the "no card, no start" policy. The policy is well-intentioned, but the processing delays of both Blue Card Services and QCAT cause significant harm and disadvantage to not only Aboriginal and Torres Strait Islander Peoples, but also to people living with disability, culturally and linguistically diverse people, and people caught in complex cycles of disadvantage who seek to re-establish their life after a period of addiction, petty crime or incarceration.

Impact of the new decision-making framework on delays

Based on interstate data, modifying the statutory threshold is likely to reduce the number of individuals that receive negative notices, which may consequently reduce the number of matters at QCAT and consequently the delays during Part 3. However, the proposed reforms also introduce additional categories of individuals that require a Blue Card, which means that any expected decrease will likely be balanced against any increase from a widening of the total pool. We also do not consider that the new framework will reduce the delays at Part 2 of the process, as a change in the test does not reduce the number of individuals that might need to be considered against this test.

The explanatory notes on page 15 state that the costs associated with giving effect to the amendments will be met from existing budget allocations. Given the significant delays that already exist, we consider the current budget is inadequate and call on the government to provide additional funding.

Complexity of the QCAT process

In June 2022, the QCAT President, the Honourable Justice Mellifont issued Practice Direction 5 of 2022 (**the PD**) in accordance with the Strategic Administrative Review Transition (**START**) project, which aimed to streamline the review process at QCAT. The PD removed the requirement for applicants to file a Life Story and for the parties to attend a Compulsory Conference, a change which LawRight enthusiastically supported. The PD requires that the parties attend a Directions Hearing within eight or so weeks of the commencement of a proceeding, where directions are made for the conduct of the proceeding up until the final hearing.

While lawyers are familiar with the purpose and benefit of directions, we are finding that without legal assistance, our clients still struggle to understand what is required of them. It is not uncommon for a client to approach LawRight for assistance after the time for compliance with a large portion of the directions has passed and the client has either not complied or has not complied properly with the directions. This results in clients having to file an interlocutory application seeking to amend the directions or for an extension of time. Where an extension is required to comply with one direction, it often affects the remaining directions and results in the entire timeline being delayed. QCAT outlined in the 2022-2023 Annual

Report that there was an increase in interlocutory applications in the Civil Administrative and Disciplinary (**CAD**) division of 31%[14] from the previous financial year.

As part of the review process, either party may apply to QCAT under section 63(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (**QCAT Act**) for the Tribunal to make an order requiring a third party to produce documents, things or information to the Tribunal (**Notice to Produce**). In our experience, Blue Card Services (hereafter referred to in this section as the **Respondent**) make these applications seeking information about the applicant from various other government bodies. The most common we see are:

- Department of Transport and Main Roads, seeking the applicant's traffic infringement history;
- Department of Child Safety, Seniors and Disability Services, seeking any information that Child Safety may possess about the applicant and children currently or previously in their care;
- Various courts, seeking any information in relation to offences that have been dealt with in the courts or copies of *Domestic Violence Protection Orders* made by the court;
- Queensland Police Service, seeking further information about a person's criminal history or further 'domestic violence' information; and
- Queensland Corrective Services, seeking information about a person's period of probation.

In the event an applicant discloses mental health or substance abuse issues, the Respondent may also seek the applicant's medical records or records from their engagement in counselling and rehabilitation programs.

It is not unusual for the total of these documents produced by these third parties in a case to exceed 500 pages.

In the current QCAT process, as set out in the PD,[15] the directions for filing material are:

- The applicant files any material they seek to rely upon at the hearing (3-4 months after the first directions hearing)
- The Respondent files any further material, which generally includes the documents obtained under the Notice to Produce (approximately 5 months after the date of the first directions hearing)
- If the applicant can file any further material in response to the above (the date 4 weeks after the compliance date for the above).

The issue with this order of directions, is that the applicant files the majority of their evidence before the Notice to Produce material is filed and served. The Respondent then relies heavily on the additional material produced to further justify their decision. The smaller time period to file evidence in response to what can often be hundreds of pages of material is resulting in a significant portion of our clients seeking an extension of time to comply. These documents can sometimes contain information that the applicant was unaware of or has forgotten due to the impact of trauma or the passage of time. This means there can be inconsistencies between the applicant's initial evidence and the information contained in these documents. These inconsistencies are then tested under cross-examination in the hearing.

[14] Queensland Civil and Administrative Tribunal 2022-2023 Annual Report (**QCAT 22-23 Annual Report**) <https://documents.parliament.qld.gov.au/tp/2024/5724T47-B2B4.pdf>, page 11.
[15] Annexure A to QCAT Practice Direction 5 of 2022 https://www.qcat.qld.gov.au/__data/assets/pdf_file/0003/721866/JAG-6815780-v1-QCAT_Practice_Direction_5_of_2022_updated_19_September_2023_-_Signed_GBD_Acting_President.PDF.

We have clients who have begun reading the documents but have not been able to continue due to the contents, which can involve descriptions of traumatic incidents such as where they have been the victim of domestic violence. Due to the large volume of material, it takes our lawyers a substantial amount of time to read and advise the applicant on the contents and to seek instructions and assist with preparing a response.

The next phase of the QCAT process is for the Respondent to file submissions as to why they maintain the negative notice or to advise that it has changed their decision. It is worth noting that since the introduction of the PD, we have only had one client who has had the decision changed at this point.

The applicant may file a response to these submissions, but we find that the due date is so close to the final hearing that that our clients prefer to make oral submission on the day rather than file a written response. It is also beyond the capabilities of most clients to draft legal written submissions.

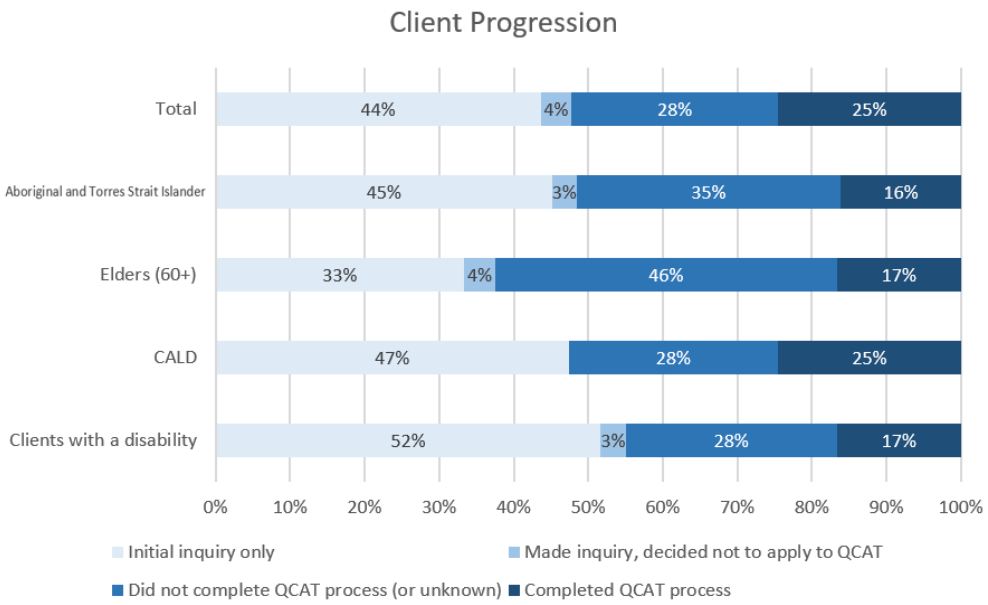
We propose the following change to the order of directions, which would allow applicants to know the full case against them before filing their evidence and may result in less interlocutory applications for an extension of time:

- Respondent files any material the Respondent proposes to rely on at the hearing not already filed pursuant to section 21(2) of the QCAT Act, including documents obtained under a Notice to Produce [2-4 months after the first directions hearing].
- The applicant files all material they seek to rely upon and written submissions [3-4 months after the material above is filed and served].
- The Respondent files written submissions outlining the reason why they maintain the negative notice or advise it has changed its decision [6 weeks after compliance with the above].

If the Respondent considers the proposed order of directions above would further streamline the QCAT process, we would be happy to attend a joint meeting with QCAT to discuss an amendment to the PD.

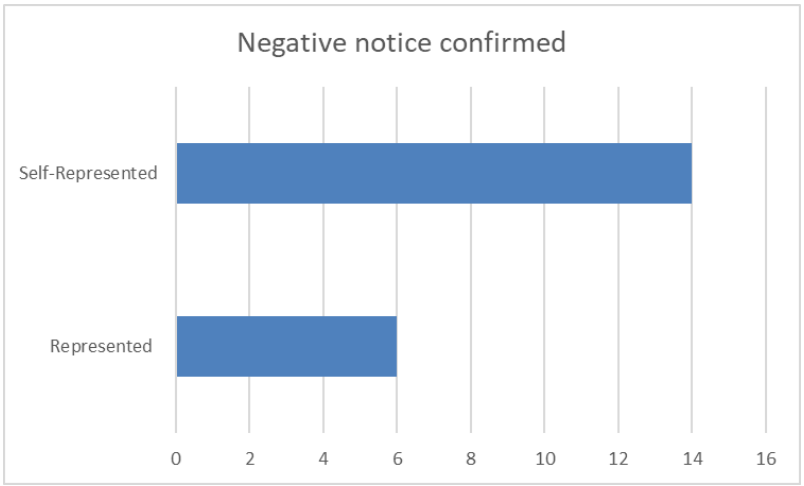
In addition to the process being generally complex, the final hearing involves a gruelling process of cross-examination. Many clients report feeling like they “are on trial” and being traumatised by the hearing and report ‘breaking down’ in the middle of the hearing.

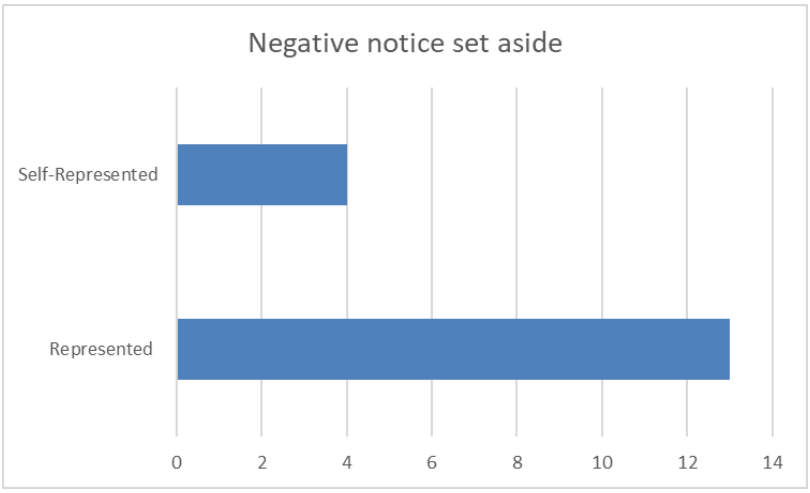
While the Tribunal is designed for parties to represent themselves, the complexity as well as the personal and traumatic nature of the content that is considered, makes it very difficult for self-represented parties to put their best case forward at the final hearing. The graph below shows the number of clients who withdraw from the QCAT process, broken down by client demographic. A significant number of clients choose not to complete the QCAT process or otherwise stop engaging with LawRight and QCAT.



We receive many applications for assistance with blue card matters each year. Although we provide help to self-represent, we do not have the capacity to represent all of our clients at their hearings. In the past financial year, we represented one client with pro bono counsel and referred three to a pro bono firm and counsel, while the remainder were forced to represent themselves. Even though we can prepare a client to present their best case through our self-representation model, the effectiveness of this assistance decreases once a matter gets to the final hearing, and we know that individuals with multiple layers of vulnerability would have better outcomes at trial if they received more intensive legal assistance services or were represented.

The graphs below show a sample of 39 recent published decisions of QCAT, demonstrating that negative notices are confirmed more often in cases where individuals self-represent and are set aside more often when individuals have representation.





While we note that there are other factors that may influence this data, including that clients with stronger prospects of success are more likely to be able to obtain legal assistance, this finding aligns with our own qualitative assessment from our casework, which is that clients with representation are better able to put forward their case and advocate for their position before the Tribunal.

Our limited resources mean that we have to carefully select which clients we offer representation to based on their vulnerabilities and their prospects of success. A significant portion of our clients are vulnerable and have prospects, but we simply do not have the resources to provide representation to every client.

Legislate an internal review phase

QCAT can only go so far towards simplifying the process while complying with its statutory instruments. In the absence of, or in addition to further funding for legal services to provide representation to clients in these matters, we suggest that an internal review mechanism similar to that in the *Disability Services Act 2006* (**DSA**) and the *Victims of Crime Assistance Act 2009* (**VOCA**) be legislated, which may result in fewer applications being filed in QCAT and allow the applicant to engage in a less complicated review system. This was also recommended in the QFCC Report.[16]

We understand that there are significantly fewer review applications being decided in QCAT relating to decisions under the DSA and the VOCA. While we acknowledge the total number of VOCA applications per annum[17] is lower than Blue Card applications, there is nonetheless a much smaller proportion of VOCA decisions reviewed in QCAT.

Applicants who seek an internal review of a decision under the VOCA are appointed a case manager who becomes the contact point for that applicant. The applicant provides their supporting evidence directly to that case manager. These case managers are not the decision makers but are instead concerned with making sure that the correct information is provided by the applicant and is done so in a timely way.

[16] Recommendation 47 QFCC Report, page 17.
[17] In 2022-2023, the Victims Assist Queensland (VAQ) received 7,621 applications for assistance (DJAG letter to Community Support and Services Committee), we do not have a figure for applications for clearances under the *Disability Services Act 2006* but know that 81,162 clearances were issued in 2022-2023 (page 21 of Department of Child Safety, Seniors and Disability Services Annual Report 2022-23).

We have observed that the request for information under the DSA when internally reviewing a decision to issue an exclusion notice includes more guidance on the specific information Disability Services are seeking in order to assist them to make their decision.

We consider an internal review process similar to the VOCA or DSA would enable applicants to provide the information necessary to decide their application without proceeding to QCAT. Many clients express to us that apart from it taking a long time for a decision to be made, there is little update as to the status of the application being provided, there is also little guidance about what information is needed to get their application over the line. We consider an internal review process where each person is assigned a case manager would alleviate some of the stress associated with this process and in turn lead to less external reviews.

Interaction of interstate adverse information and decisions

We understand and acknowledge the importance of considering adverse interstate information, including an adverse decision; however, the current operation of section 201(1) creates a scenario where individuals are 'locked out' of applying for a Blue Card in any state. It also creates a scenario where applicants need to go through multiple WWC reviews to obtain a clearance in Queensland.

Other jurisdictions such as Victoria and New South Wales categorise adverse interstate decisions (such as those made in Queensland) as assessable information in their WWC Acts. Section 201(1) of the current Queensland Act states that the chief executive must withdraw an application if they become aware that the applicant has an adverse interstate WWC decision which is in effect. This creates a difficult scenario if an individual has negative decisions in multiple states: under the Queensland legislation, such an individual is effectively barred from making an application for a Blue Card in Queensland. There are a few ways this could occur; however, we have seen more complicated scenarios where an individual's interstate Blue Card is cancelled, only because they received a negative notice in Queensland. Logically, the individual should appropriately challenge this negative notice in Queensland; however, due to the operation of section 201(1), the individual is effectively barred from making this application in Queensland due to their negative interstate notices.

An additional issue occurs, in South Australia by virtue of section 15(b) of the *Child Safety (Prohibited Persons) Act 2016* (SA), which is the Working with Children Act in South Australia, which prohibits persons with an adverse interstate decision from obtaining a South Australian clearance. The operation of this Act and the current Act and Bill are silent on the process applicable to applicants who hold adverse decision in both jurisdictions. This creates a cycle where it is impossible to obtain a clearance in either Queensland of South Australia as there is no "lead" or "original" state for the purposes of challenging the adverse decision.

As a related point, neither the current Act or Bill specify how QCAT should proceed with an application in circumstances where an individual receives a negative interstate WWC subsequent to being issued a negative notice in Queensland.

Section 201(1) also creates a very costly and time-consuming process for individuals who have negative interstate WWC decisions, as they must first challenge the interstate decision before then applying under the Queensland legislation. This is particularly difficult where individuals have moved interstate and may then be ineligible for pro bono legal assistance in their previous state of residence.

We recommend that section 201(1) is abolished entirely to remove this unintended consequence; however, we support the continued inclusion of adverse interstate decisions and adverse interstate information being assessable information for the purposes of any application.

3. Amendments to the *Child Protection Act 1999*

We welcome the amendments to section 135 of the *Child Protection Act 1999* that would remove the requirement for kinship carers to hold a blue card.

We made detailed submissions on this in response to the *Legal Affairs and Safety Committee's Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021* (**Appendix 4**) and repeat and rely on those submissions in support of this amendment.

4. New decision-making framework

Decision-making framework generally

The Bill effectively creates four different scenarios that must be considered by the chief executive when determining an application:

- No assessable information (section 227);
- Current disqualified person (section 228);
- Former disqualified person or person convicted of a serious offence (exceptional case) (section 229); and
- Any other situation (general assessment of risk posed) (section 230).

For considerations under section 229 or section 230, there is then a test to cover exceptions which uses inverse wording. In the case of a former disqualified person or a person convicted of a serious offence, the chief executive must refuse the application; however, they can approve the application if they are satisfied that the individual *would not pose a risk to the safety of children*. In the 'any other situation' scenario, (which is presumably where there is relevant assessable information), the chief executive must approve the application unless the chief executive is satisfied the individual *poses a risk to the safety of children*.

Practical operation of the inverse test

Although this has not been made clear in the Bill or explanatory notes, we interpret the intention of drafting these sections with inverse wording was to reverse the onus depending on the situation. For example:

- If an individual falls under the section 229 category, there is a presumption their application should be refused; however, the onus is on the individual to demonstrate that they would not pose a risk to the safety of children; and
- If an individual falls under the section 230 category, there is a presumption their application should be approved; however, the onus is on the chief executive to make a finding that the individual poses a risk to the safety of children.

This reverse onus would then logically follow through to any QCAT process, with the individual or the chief executive needing to prove the relevant principle depending on the situation.

We support the logic and thought process behind having a different framing or starting position for each type of scenario as it will change the way in which individuals engage in the process and in the way that the decision maker will look at the matter. However, we have concerns that in practice, both scenarios of individuals will ultimately be required to demonstrate that they would not pose a risk to the safety of children.

Although the pathway to get to this point under the Bill is slightly confusing, if an individual falls under the section 229 category; and the chief executive is deciding whether that individual would not pose a risk to the safety of children; then the chief executive must conduct a risk assessment. As part of the risk assessment, under section 232(d) the chief executive must decide whether the person poses a risk to the safety of children. The subsequent sections then also use the same language. This means that in practice, for both section 229 and section 230 decisions, the chief executive will need to make the same determination, being whether the individual poses a risk to the safety of children.

As this consideration will then be made regardless of the scenario, we believe that in practice section 229 and section 230 individuals will be treated in the same way practically before the Department and ultimately before QCAT. In practice, this means that the positive

inference that a section 229 individual should be granted a Blue Card will disappear very quickly and the individual will be forced to justify why they do not pose a risk to the safety of children. We note that in practice this is how the current act is being applied with the use of the exceptional case test which has a detrimental impact on applicants. In the time available, we do not have a specific drafting recommendation to remedy this concern as it is more of a statutory point; however, as presently drafted the legislation undermines the intention of having an initial positive presumption for section 230 applicants.

Potential lack of information in section 236 notice

Under section 235, if the chief executive is proposing to decide that a person poses a risk to the safety of children, they must give the person a written notice of the matters set out in section 236. Relevantly, s236(1) requires that the notice:

> *(a) include the assessable information about the person of which the chief executive is aware; and*
> *(b) state that the chief executive proposes to refuse the application and issue a negative notice….*

We are concerned that the notice does not require the chief executive to explain why they are proposing to decide that a person poses a risk to the safety of children, merely that they propose to make the decision. The notice also does not require the chief executive to demonstrate the link between the assessable information and the relevant concern that they have. In the explanatory speech for the introduction of the Bill, it was noted that the new framework will require a decision maker to issue a negative notice that demonstrates *a clear nexus between a person's conduct, or alleged conduct, and the risk of harm to children*; however, this nexus requirement is missing from the section 236 notice process.

In practice, this means that unless the chief executive provides further unprompted guidance in the notice, any individual that receives a section 236 notice is required to infer or guess what aspect of their assessable information has raised a concern or otherwise provide a submission that covers all possible assessable information. Although there are other areas of law that use this flipping of the onus (i.e. once X position is demonstrated, the other party must then show Y), in these cases the individual knows what element has been proven or demonstrated by the other party. In this situation, the individual is left with very little guidance as to what specifically they need to address. In the case of section 230 individuals, without specific comments by the chief executive, providing a response to the section 236 notice is also likely to be a very time-consuming, broad, and nebulous process.

If an internal review phase is not being contemplated as suggested above, we would recommend that the section 236 notice process operate closer to a question/answer situation, not dissimilar to a request for particulars. This would allow the chief executive to point to specific facts, ask the individual for further details about particular events and then ask the individual specific questions to assist them in rebutting the position of the chief executive. Alternatively, the requirements under section 236 should be expanded to include what specific information has raised a concern; why this information raises a concern; and how this concern otherwise means that the chief executive believes the individual poses a risk to children.

Timing of responding to a section 236 notice

Under section 236(d), a section 236 notice must state the period in which an individual can make a submission, which must be at least 7 days. While we appreciate that this is a minimum period, and the chief executive may in practice provide for a longer period, 7 days is too short. For the reasons explained above at pages 8 and 9, and the broader comments made in this submission about the vulnerability of our client group and the complexity of this

process, 7 days is too short a time period to review the relevant notice, obtain legal advice if required, and otherwise prepare a considered response. We recommend that the minimum time limit be extended to at least 28 days.

The acceptance of oral submissions

Under section 237(b), a person invited to make submissions in response to a section 236 notice may provide oral submissions if the chief executive considers it reasonable to do so. We are generally supportive of the ability for oral submissions to be provided to accommodate individuals that may struggle to provide written submissions; however, we have concerns that the seriousness and complexity of these submissions will not be obvious to any individuals that pursue this option. The issue highlighted above, about the lack of specificity in the relevant section 236 notice, will only compound this problem.

Under the current framework, Blue Card Services already take information from individuals orally, and many of our clients report that they were not aware of the importance of what they were being asked or that they weren't provided with a clear outline of what would be discussed on the phone call, which led to them giving incomplete responses. Ultimately, the information provided on these calls is then considered in any subsequent decision and can weigh heavily against an individual. While we support the option of oral submissions, we recommend that the legislation be amended to note that before oral submissions are obtained, the individual be clearly advised about the purpose of the oral submissions and be offered the ability to obtain legal advice.

'Reasonable Person' test

LawRight supports a new test that would see applications assessed in a manner that is less risk averse and relates the decision-making process to an employment context.

The 'reasonable person' test is featured in the *Child Protection (Working with Children) Act 2012* (**NSW**) and the *Working with Children Act 2005* (**Vic**). We know that significantly less negative notices (referred to the in the table as exclusions) are issued in New South Wales and Victoria, compared with Queensland:[18]

	2018-2019		2019-2020		2020-2021	
	Applications	Exclusions	Applications	Exclusions	Applications	Exclusions
Queensland (population 5.185 million*	366,151	3,606	419,659	3,586	329,253	3,552
New South Wales (population 8.166)	480,485	614	345,541	570	400,855	516
Victoria (population 6.681 million)	411,000	662	348, 000	606	319,000	526

**Population statistics from 2020*

[18] Nathan Stormont, 'Not Child-Related: Unnecessary Working with Children Checks as Irrelevant Criminal Records Discrimination' (2022) 48(2) *Monash University Law Review*, 162, 165.

Based on the above data, we anticipate that the change in the test may result in fewer negative notices, which in turn should reduce delays and the number of applicants who lodge an application with QCAT. However, given our concerns below about existing Departmental decision-making norms, it may take time for attitudes to shift.

We also consider that the new test may alleviate some of our concerns highlighted in previous submissions about the test in the *Working with Children (Risk Management and Screening) Act 2000* (**current Act**), in particular:

- The fact that criminal offending that is not directly related to children is being given significant weight by Blue Card Services;
- The consideration of factors in determining best interests goes beyond safety in the employment context, bringing in other considerations such as whether the applicant is a is a good 'role model' for children or whether they would likely be a suitable kinship or foster carer;
- Blue Card Services are generally dismissive of 'protective factors' including behavioural improvements and the passage of time since an offence occurred; and
- Interpretation of 'domestic violence information' has meant that being a victim of domestic violence is considered a risk factor.

Criminal offending not directly child related

Our data shows that the majority of crimes our clients have convictions or charges for are drug-related and the most common drug involved in those charges and convictions is cannabis.

Minor drug offences are usually finalised by the Courts with a fine and no recorded conviction. It seems disproportionate for an applicant who has been convicted of a minor drug offence to (without other factors) be given a negative notice, which typically has a far more detrimental impact than a non-recorded conviction.

Given the issues with overcompliance outlined on page 31, having a negative notice is also more detrimental than it should be, particularly as it relates to tertiary education.[19] Obtaining an education and subsequent employment is often considered an integral part of an offender's rehabilitation. A negative notice barring an applicant from further study or employment thus creates a cycle of disadvantage.[20]

We consider that the 'reasonable person' test would allow the decision-maker to consider current societal attitudes to drug use (in particular cannabis) and rehabilitation.

Consideration of factors goes beyond safety in the employment context

We are particularly supportive of the proposed inclusion of section 233(1)(b), which links the suitability test to an employment context. We have consistently seen applicants for a Blue Card scrutinised as if they are applying to be a foster or kinship carer for a child, rather than seeking to be engaged in employment that more tangentially relates to children. While having a Blue Card would technically allow a person to apply to be a foster or kinship carer, that individual must undergo further suitability assessments regulated by the *Child Protection Act 1991* (**CPA**), it is therefore inappropriate for every individual seeking a Blue Card to be assessed this way when the department responsible for administering the CPA also

[19] In our experience most tertiary education providers have a blanket rule that students must hold a blue card to complete a placement, regardless of whether the placement requires contact with children.
[20] Our observations about the impact of delays on page 20 are also relevant here.

conducts a suitability assessment[21] and they are the best placed department to consider suitability in that instance.

We have witnessed Blue Card Services in their 'reasons for a negative notice' and in submissions before the Tribunal interpreting the current "best interests of children" test to mean that the applicant should not present a risk to children but also must be a 'role model'. In our view, this creep in the scope of the test goes further than was intended by the original drafters of the legislation. We have concerns that as the principles for administering the act in section 6, still include the wording "the welfare and best interests of a child are paramount" we may see a similar creep under the new Act.

Whether or not somebody is a 'role model' for children is a separate issue to their safety in an employment context, and the Blue Card process should not be the gatekeeper for whether an individual has a net positive impact on a child or whether they would be a good role model. This determination should be at the discretion of an employer when hiring for a particular role. Although the test for deciding an application will change, leaving the paramount consideration as presently drafted may undermine this change and the goal of negative notices only being issued where there is a nexus between an individual's conduct and the risk of harm to children. We recommend that section 5 and 6 of the current Act be further reviewed to better align with the principles of the new test.

Chief Executive is generally dismissive of 'protective factors'

We welcome the inclusion of the proposed section 234 *'Matters to consider in relation to conduct'* which will legislate matters that are to be considered beyond the considerations in sections 225-229 of the current Act.

We note that mechanisms already exist for an applicant's conduct, such as behavioural improvements since offending to be considered when deciding an application, but in our experience, Blue Card Services risk-averse approach to decision-making sees them given little weight. We also have concerns that a large number of offences that are unrelated to children or child safety are being flagged as 'exceptional cases' and are being subject to unnecessary Departmental scrutiny. We submit that these issues arise out of internal Departmental decision-making norms and practices and may take more than legislative change to be addressed.

In our previous submission in response to the *Legal Affairs and Safety Committee's Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021* (**Appendix 4**) we noted that while 'behavioural improvements' are not one of the mandatory considerations under the current Act, recognising behavioural improvements is already within Blue Card Services' discretion when deciding an application for a positive notice.[22] An applicant's section 229 submissions[23] generally include information about that person's behavioural improvements, as well as networks of family, community and professional support – these are what QCAT has termed 'protective factors'.

We went on to note in that submission that, in our experience Blue Card Services rarely makes use of this discretion to consider positive behavioural improvements and other protective factors. Our typical observation was that any favourable evidence of an applicant's improved behaviour appeared to be discounted, while heavy reliance was placed on criminal offences. We noted that even though the test in section 221 of the current Act is a positive

[21] Noting there are also instances where the department responsible for administering the CPA have determined an individual to be a suitable kinship carer but they cannot fulfil this role without a Blue Card, as was the case for Peter and Tiana, case studies 2 and 3 in Appendix 4.
[22] Section 229(4) *Working with Children (Risk Management and Screening Act 2000* (**Current Act**).
[23] Submissions requested under section 229 of the current Act.

presumption test, the reasons listed in the decision to issue a negative notice often give the impression that this is a negative presumption that the applicant must overcome, frequently emphasising the applicant's 'risk factors', with little consideration of the protective factors. This issue creates the same "criminalisation" of the process where an applicant is forced to defend or stand trial as to whether they are a risk to children, which is an inherently negative starting position. This is similar to the concerns we raised above in relation to the practical implications of section 230 of the Bill.

A review of the language used in the 'reasons for a negative notice' of a number of our client files, shows that in the last 12 or so months, that there has been greater consideration given to these 'protective factors' and we welcome the move towards providing more detailed reasons; however, the result in these cases is still a negative notice.

If an applicant applies to QCAT for a review of the decision, the Tribunal Member, in making their decision weighs up both the risk factors and protective factors. A review of our client files where the applicant was ultimately successful in having Blue Card Services' decision set aside by QCAT concluded that QCAT was more likely to consider the contextual nature of an applicant's offending and the rehabilitative steps they have taken. This is despite the same or similar information being available to Blue Card Services at the time of their original decision, and the both the Tribunal Member and Blue Card Services being subject to the same legislative framework.

Interpretation of 'domestic violence information'

In September 2017, the Queensland Family and Child Commission (**QFCC**) released a report '*Keeping Queensland's children more than safe: Review of the blue card system*'. This report detailed that stakeholders strongly supported considering civil domestic violence history to help assess risk.[24] Following the inclusion of 'domestic violence information' in section 221 of the current Act, the Department of Justice and Attorney General (**DJAG**) responded to a 'Request for Information' dated 26 September 2022.[25] In this response, DJAG noted that access to domestic violence information allows for a more informed decision to be made about a person's eligibility to engage with children and is critical in ensuring that any risks a person may pose to children are identified.

Though arguably relevant information, we do have some concerns with how 'domestic violence information' is interpreted by Blue Card Services and relied upon to issue negative notices and we are not confident that the proposed amendments will change this. For example, we know that applicants have been issued with a negative notice in circumstances where they are themselves victim-survivors of domestic violence but did not take adequate steps to protect children who may have been present or witnessed domestic violence against them.

We are aware that perpetrators of violence often engage in systems abuse by making protection order applications or cross applications against an aggrieved and this 'domestic violence information' is relied upon to issue a negative notice without proper consideration. In these circumstances, we recommend Blue Card Services staff undertake comprehensive domestic and family violence training particularly as it relates and intersects with Working with Children assessments.

[24] Queensland Family and Child Commission *Keeping Queensland's Children more than safe: review of the Blue Card system* report, July 2017 (**QFCC Report**), page 69.
[25] Department of Justice and Attorney General, *Response to the Legal Affairs and Safety Committee Working with Children (Indigenous Communities) Amendment Bill 2021* (**DJAG response to Indigenous Communities Bill**).

We previously raised our concerns[26] about the definition of 'domestic violence information' in Schedule 7 of the current Act "domestic violence information about a person, means information about the history of domestic violence orders made, or police protection notices issued, against the person under the *Domestic and Family Violence Protection Act 2012*."

Blue Card Services can seek "domestic violence information" as defined by Schedule 7 from the Police Commissioner under section 315A of the current Act, however, practically the only information that can come from the Police Commissioner are Police Applications for a Domestic Violence Order or a Police Protection Notice, neither of which are final orders made by the Magistrates Court.

We do not believe that this information gives the full picture as it does not consider whether the applicant has been listed as the aggrieved in a cross order resulting from the same incident or consider that the applicant may have been a victim of a pattern of domestic violence for a number of years and has been misidentified as the perpetrator. These applications may also end up being dismissed by the Magistrates Court.

We continue to hold concerns about this information, which has not been tested by a court, being used in an initial assessment, and the way in which victim survivors are treated during a Tribunal proceeding where the representative of Blue Card Services takes the interpretation of 'domestic violence information' even further to include incidents of domestic violence in which the applicant is the victim. See page 25 for further discussion on victim survivors of domestic violence.

Other jurisdictions

No other jurisdictions specifically include 'domestic violence information' as a relevant consideration in their 'Working with Children' statutory regimes,[27] so we cannot directly compare the interpretation of this phrase in other jurisdictions.

That said, we do know that domestic violence history is often uncovered and considered during a Working with Children check in other jurisdictions. We are also aware that applicants with domestic violence histories, including convictions for domestic violence offences, have received favourable assessments and been granted Working with Children clearances.[28]

Cultural context

As outlined at the start of this submission, LawRight's comments in relation to this aspect of the Bill are based on direct insight from our casework into the experiences of marginalised members of society applying for Blue Cards and accessing the QCAT review process. We again reiterate and recommend that meaningful consultation processes should take place with Aboriginal and Torres Strait Islander led organisations, Elders, and the broader First Nations community.

LawRight is in favour generally of amendments that make the Blue Card System more accessible for Aboriginal and Torres Strait Islander peoples, though we recommend that

[26] LawRight Submission in response to the *Child Protection and Other Legislation Amendment Bill 2021* (**Appendix 3**).
[27] *Working with Children Act 2005* (Vic) s 11(1); *Child Protection (Working with Children) Act 2012* (NSW) s 15(4); *Registration to Work with Vulnerable People Act 2013* (Tas) s 28(1A); *Care and Protection of Children Act 2007* (NT) s 191(3); *Working with Children (Screening) Act 2004* (WA) s 12(3); *Working with Children Check Guidelines* (SA) part 10; *Working with Vulnerable People (Background Checking) Act 2011* (ACT) ss 28-31.
[28] See for example EOV v Children's Guardian [2021] NSWCATAD 369 and TKM v Secretary to the Department of Justice (Review and Regulation) [2012] VCAT 1905.

these considerations should be extended to people from CALD backgrounds, victim-survivors of domestic violence, and people with disabilities including mental health conditions.

Aboriginal and Torres Strait Islander peoples

LawRight supports the inclusion of a statutory factor that the decision-maker must have regard to in assessing applications made by Aboriginal and Torres Islander applicants. We have previously recommended that Blue Card Services consider cultural factors for Aboriginal and Torres Strait Islander applicants at first instance, and welcome this inclusion in the Bill, provided it is implemented effectively.

The Bill defines these cultural considerations in section 234(2)(g) as:

- *If the person is an Aboriginal or Torres Strait Islander Person or – the effect of – (i) systematic disadvantage and intergenerational trauma; and (ii) the historical context and limitations on access to justice*

We support the inclusion of these considerations and welcome the specific acknowledgment of the impact of systemic disadvantage and intergenerational trauma on Aboriginal and Torres Strait Islander peoples as a consideration. We are also pleased to see this consideration implemented without requiring a decision maker to consider the impact these factors have had on the relevant individual or creating an obligation on the individual to justify their personal experience of these issues.

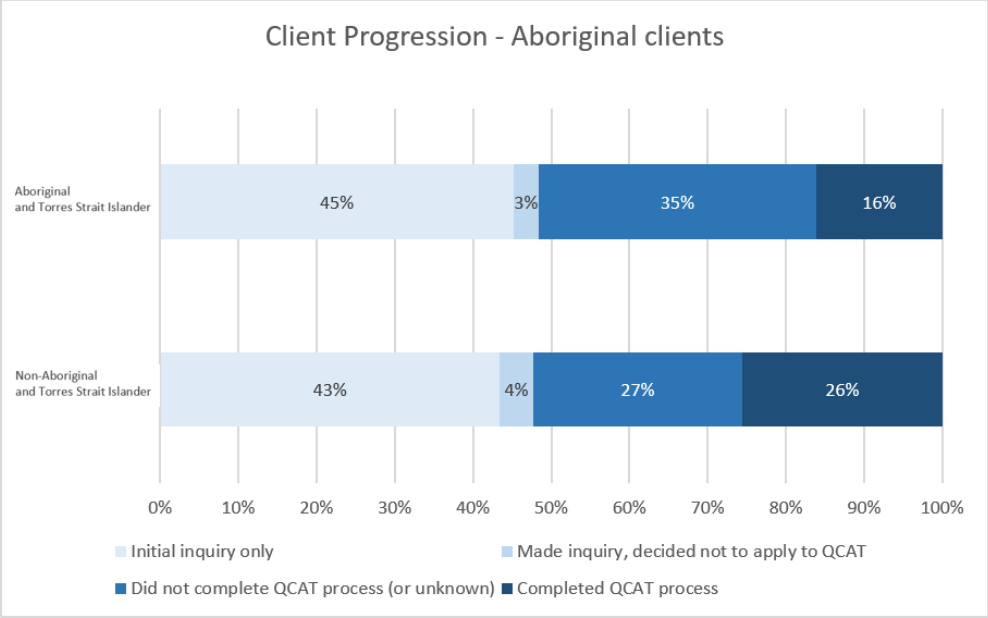
We also support the amendment of the definition of 'wellbeing' in section 6 (Principles for administering the Act) to include that 'wellbeing' for an Aboriginal child or Torres Strait Islander child includes recognising the importance of connection with the child's family, community, culture, traditions and language.

Further, we support the inclusion of considerations made about the historical context and limitations on access to justice faced by Aboriginal and Torres Strait Islander peoples. We consider that this will be beneficial to applicants in making full and frank submissions on their criminal history. It is also reflective of the systemic issues in Australian society that result in greater assessable information for Blue Card purposes for Aboriginal and Torres Strait Islander peoples, such as over-policing and overrepresentation in the prison, criminal and child safety systems.

Need for additional independent legal support services

In our casework, we have observed a clear need for culturally appropriate legal assistance services, purpose built for Aboriginal and Torres Strait Islander peoples. The graph below demonstrates that that Aboriginal and Torres Strait Islander peoples are less likely to apply to QCAT and then also less likely to go on to complete the QCAT process than our broader client demographic.[29] There are many reasons for this to occur; however, the primary reasons are the complexity of the process, the lack of cultural appropriateness of legal frameworks (including the requirement for written submissions), delays, and the lack of sufficient resourcing for legal assistance services. Due to limitations on our funding and capacity, we are only able to offer representation for a limited number of individuals and must make difficult decisions about which clients receive this assistance.

[29] This is also consistent with the data in the DJAG Response Indigenous Communities Bill, which notes on page 12 that Aboriginal and Torres Strait Islander Peoples are less likely to respond to a section 229 request for submissions.



Legal assistance services should also be specifically funded to allow the hiring of identified positions to meet with and assist Aboriginal and Torres Strait Islander clients. This is particularly needed in rural and remote areas and communities.

Victim-Survivors of Domestic Violence

There is also a need for additional support and consideration of the impact for victim-survivors of domestic violence and the systemic barriers for seeking support in cases of domestic violence. Any cultural considerations made by Blue Card Services should give careful consideration to the intersectional obstacles encountered by women in these cases, particularly for Aboriginal and Torres Strait Islander peoples and CALD communities.

We would recommend the inclusion of a specific clause requiring that consideration be given to the impact that domestic violence has on victims-survivors generally and that this clause avoids placing an onus on an individual to retraumatise themselves repeatedly while attempting to obtain a Blue Card. We note that the current system already retraumatises applicants, particularly through reading negative notices, section 21 documents,[30] Notice to Produce materials[31] and the cross-examination process.

Culturally and Linguistically Diverse (CALD) communities

We would also recommend an inclusion of cultural context as a mandatory consideration as it relates to the broader CALD community. We regularly witness clients from CALD backgrounds disadvantaged by the Blue Card process because of cultural and linguistic barriers at the police and judicial level.

An example is one of our clients, Luisa.[32] Luisa is a woman who had arrived recently in Australia and was seeking protection. Luisa experienced systematic discrimination and harassment as a woman in her home country before coming to Australia. When she arrived in Australia, she entered into a de facto relationship with an Australian man. The relationship

[30] Documents filed in a Queensland Civil and Administrative Tribunal (**QCAT**) proceeding under section 21(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (**QCAT Act**).
[31] Documents provided to QCAT in a proceeding under section 63(1) of the QCAT Act.
[32] Name has been changed.

became characterised by domestic violence, including physical abuse by Luisa's partner; however, when the police were called, Luisa was made the subject of the domestic violence order. This is because English is a second language for Luisa and she was unable to effectively convey her version of events to police. In the end, police drafted a brief relying on her partner's account of events. This domestic violence information, and the fact that the domestic violence occurred in front of Luisa's child, was then considered by Blue Card services and Luisa ultimately received a negative notice. Luisa was then required to defend and respond to this factor in her QCAT proceedings. Luisa's matter remains ongoing at QCAT.

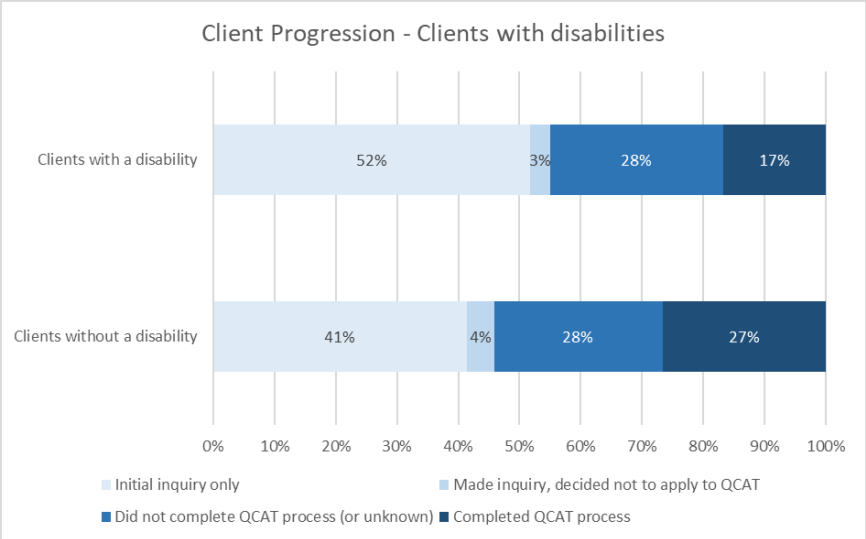
Clients from CALD communities have repeatedly reported to LawRight that they were confused by interactions with the police, the criminal process, and discussions with Blue Card Services. In our experience, clients from these communities are less likely to understand the nature of their charges or explain their protective factors to Blue Card Services at the internal stage. This means that under the current system these individuals require additional legal support to not be further disadvantaged when compared to an English-speaking, white Australian applicant. We believe that this barrier could be alleviated by Blue Card Services having regard to cultural considerations for all CALD applicants, supported by appropriate information and advice from people from those communities.

People with disabilities

We also recommend the Bill include an obligation for Blue Card Services to consider the context of applicants with disabilities or any mental health diagnosis, applying for Blue Cards. Disabled people face additional systemic barriers in Australian society that lead to the creation of additional assessable information for Blue Card purposes, particularly in the case of people with mental health issues.

We submit that an additional mandatory consideration should be introduced so that any assessable information is considered in the context of an individual's disability, with a focus on their risk profile moving forward rather than relying on historical information.

The graph below shows that clients who indicate they have a disability in our intake process are less likely to engage LawRight's services after making an initial enquiry and then also less likely to complete the QCAT process. The primary reason given by many of these clients is the difficulty in self-representing in these proceedings, which could be alleviated with additional funding to enable legal assistance services to be more inclusive and client-centred.



Advisory Committees

LawRight welcomes the introduction of an Advisory Committee as outlined in the Bill if it assists to address the inequalities that are systemically faced by Aboriginal and Torres Strait Islander peoples, people from CALD backgrounds, victim/survivors and people with disabilities. We note that the Bill and explanatory notes provides some guidance on what the role of the committee will be. We note that Recommendation 42 of the QFCC Review into the Blue Card System[33] recommended the implementation of a multi-disciplinary structure, which would include identified positions for Aboriginal and Torres Strait Islander people and peoples experienced with working with CALD communities. We are supportive of a committee that includes these positions and works to address the barriers experienced by the marginalised groups that we have identified above.

As discussed above, our current client group, including the groups identified above experience significant delays at the department and QCAT level.[34] Any committee that is created should operate in such a way that it does not prejudice these timeframes.

We also note in the Bill that there is no guidance as to when the chief executive may refer an application to an Advisory Committee for advice.

We would support the implementation of a provision which outlines a non-exhaustive list of factors for matters which should be referred to the proposed advisory committee. This non-exhaustive list could include whether the applicant has a CALD background, disabilities, domestic violence information, and whether an applicant is Aboriginal or Torres Strait Islander. This non-exhaustive list combined with the above Recommendation 42 of the QFCC Review would better assist in addressing inequalities faced by numerous applicants.

We note that under section 232(1)(b) of the Bill the chief executive would be permitted to refer matters to an advisory committee and consider their advice or recommendations in applying the reasonable person test under section 233 in their risk assessment. We support the inclusion of this advisory committee, particularly if it includes identified positions as discussed above if the purpose of the committee is to address concerns of the chief executive. We would not support a structure that would in effect place an additional hurdle on applicants referred to the advisory committee. To this end, we recommend that the Bill is amended to specify that matters cannot be prejudiced by a recommendation by the advisory committee.

In making this recommendation, we would like to highlight the reality that Aboriginal and Torres Strait Islander peoples, CALD peoples and victim-survivors of domestic violence are not able to speak on behalf of all individuals from those communities. Even with the inclusion of identified positions and employees with lived experience, applicants will have specific experiences and vulnerabilities.

[33] QFCC Report, page 16.
[34] Represented as Part 2 and Part 3 of the chart in **Appendix 1**.

5. Removal of eligibility declaration process

LawRight does not wish to make further submissions about the removal of the eligibility declaration process but want to briefly acknowledge and support the proposed reforms to include an age qualifier for an offence to be considered a disqualifying offence, and specifically the inclusion that an offence is not a disqualifying offence if it was committed by a person when that person was a child. LawRight regularly works with young people and with young adults with historical charges when they were under the age of 18 and we support the steps taken to recognise the impact of youth offender rehabilitation and otherwise acknowledge the context of juvenile offences.

6. Changes to QCAT review jurisdiction

We support the change to QCAT's review jurisdiction via section 354B(1) in so far as it will allow the presiding QCAT Member to order that a Blue Card is issued after the decision of Blue Card Services to issue a negative notice is set aside.

The Tribunal does not have the power to order the issue of a Blue Card under the current Act and this creates a scenario where QCAT sets aside the decision but the applicant still needs to make an application to Blue Card Services in order to be issued with a Blue Card. In our experience, Blue Card Services process the application quickly, however, having to apply for a Blue Card after QCAT sets the decision to issue a negative notice aside, is an additional administrative step which adds further delay to an already drawn-out process.

There are other factors that contribute to the delay after a QCAT hearing. In our experience, it is rare for the Tribunal Member to give their decision on the day of hearing. Most decisions are reserved, and despite QCAT's reserved decision policy stating that *"QCAT decision makers endeavour to deliver decisions (with reasons) within three (3) months of each decision being reserved*"[35] we are aware of multiple cases where the decision is reserved for more than six (6) months, and in rare cases, even longer. Once an applicant receives their decision, if the Tribunal decides in the applicant's favour, it could still be a few more months before they are issued with their physical Blue Card.

Section 354A(2)(a) of the current Act states that QCAT's decision to set aside a negative notice does not take effect until after the "*end of the period within which an appeal against QCAT's decision may be started*". Under the QCAT Act the time limit for an appeal is 28 days from the '*relevant day'*. The relevant day is either:

- The day the person receives notice of the decision; or
- If the reasons are applied for within 14 days of the decision comes into effect[36], the day the reasons are received.

Section 122(3) of the QCAT Act states that the Tribunal must deliver the reasons within 45 days or an extended period at the Presidents discretion. In our experience it is not unusual for reasons to take longer than 45 days to be provided.

There is also a scenario where the Tribunal Member delivers oral reasons for their decision. If no written reasons are to follow, the parties must wait for a transcript of the Member's oral reasons, or a recording to be provided through QTranscripts (which is a complicated and slow process in itself) to satisfy the requirement for the reasons to be provided.

The issues above are best illustrated by the example of our client Janice. Janice attended a Tribunal hearing where the Member decided to reserve their decision. Luckily for Janice, the Member set a date to deliver their decision and oral reasons one week from the date of the hearing. On the return date, the Member set aside Blue Card Services' decision to issue Janice a negative notice and provided oral reasons. Whilst Janice got a relatively quick decision from QCAT, she did not receive her physical Blue Card for a further three months after the decision. Even though the Member gave oral reasons, Blue Card Services were not able to issue Janice with a Blue Card until the written transcript of the oral reasons was provided, the appeal time frame lapsed and then Janice completed a new application for a Blue Card. A further three-month delay on top of a delayed decision-making process adds further stress and hardship.

[35] QCAT Reserved Decision Policy <https://www.qcat.qld.gov.au/__data/assets/pdf_file/0004/588487/QCAT-Reserved-Decisions-Policy-2023.pdf>.
[36] Section 122(2) QCAT Act.

We welcome any change that would result in a quicker issue of a Blue Card after a positive QCAT decision, however we consider the Tribunal's current inability to issue a Blue Card is only a minor contributor to the delay between a hearing and the issuance of a Blue Card with the more significant delays being caused by the delivery of decisions, the delivery of reasons and the process of obtaining a transcript.

We understand that QCAT is currently under significant pressure as outlined in the 2022-2023 QCAT Annual Report where QCAT President, Her Honour, Justice Mellifont stated that QCAT is "*stretched well beyond capacity.*"[37]

We therefore recommend that alongside the proposed reforms, there be an equivalent increase in the funding for QCAT, so that the Tribunal is able to deliver their decisions and reasons within a timely manner.

[37] QCAT 22-23 Annual Report, page 5.

7. Additional categories of regulated employment

We note that the additional categories created of individuals that are required to hold a Blue Card is likely to create additional work for Blue Card Services, QCAT, and legal assistance service providers; however, we will discuss this in more detail at the end of this submission. Although we do not intend to make further comment in this submission about the new categories, we wish to address difficulties related to overcompliance and the transitional provisions.

Although we are addressing these two points in this section, we note that our comments relate to any of the newly created categories, including in relation to overnight camps, justice and detention services, screening within schools, and the removal of the exemption for lawyers.

Concerns about overcompliance

We understand that in Victoria overcompliance continues to be a problem with many individuals asked by their employers to pass the relevant working with children check despite not being engaged in child-related employment. We understand that interstate tribunals are regularly asked to hear matters involving applications unable to find or keep non-child-related employment because they cannot fulfil these requirements, including in occupations such as "*cleaners, hospitality workers, plumbers, maintenance workers, and air conditioner and refrigeration repairers, electricians and construction workers, gardeners and landscapers, personal trainers…security… aged care workers, IT professionals and computer or laboratory technicians, surgical theatre technicians, those providing disability services or drug and alcohol counselling to adults, and those providing adults with education and training in the tertiary or vocational sectors. Many universities or education providers also require students to obtain WWC clearance to complete non-child-related work placements"*.[38]

We consider that overcompliance is likely to be a widespread issue particularly in large businesses where a blanket approach is preferred; tertiary industries undergoing placement; those businesses that operate in already risk adverse industries; and in those businesses where the cost of obtaining legal advice or the cost of potential non-compliance with regulatory frameworks is likely to be prohibitive.

Without additional protections in place, many employees will be forced to rely on anti-discrimination laws or employment law principles to avoid being excluded from employment which are potentially ineffective mechanisms for relief. We also know from our casework that individuals with additional disadvantages or vulnerability factors are more likely to choose not to engage in the dispute rather than undertake individual advocacy or litigation to protect their position. At the time of writing, we have been unable to sufficiently research this issue to provide more concrete recommendations; however, we recommend that consideration be given to including additional protections against overcompliance, including consideration of:

- Significant resources being invested into education and awareness for employers and employers, including the provision of legal assistance services (discussed further below);
- A legislative mechanism for employers to obtain a declaration from Blue Card Services about the requirement for their employees to hold a Blue Card as well as a mechanism for employees to obtain a similar individualised declaration about their employment; and/or

[38] Nathan Stormont, 'Not Child-Related: Unnecessary Working with Children Checks as Irrelevant Criminal Records Discrimination' (2022) 48(2) *Monash University Law Review*, 160, 171-172.

- The introduction of penalty provisions for overcompliance.

Transitional provisions

In relation to any of the new categories of individuals that are required to hold a Blue Card, we consider that a 6-month grace period is likely to be too short. We have outlined above the delays that already exist in the Blue Card process. If these delays continue, then a 6-month or 12-month grace period is inappropriate, particularly in light of a sudden increase in demand for Blue Cards and will likely result in many individuals losing their employment while they wait for a decision.

As with the introduction of any new legal framework, there will need to be a required period of normal legislative processes, planning by the regulatory body and provision of information to the public. Depending on the effectiveness of these stages, the required grace period may change significantly; however, based on current operations, 6 months is a wholly inadequate period of time for employers/employees to find out about the relevant changes, seek advice about the impact of the changes on their position, apply for a Blue Card and then ultimately have it assessed by Blue Card services. This is especially the case for more complex cases or for cases involving clients with additional levels of vulnerability.

We recommend that the grace period is made uniform across all regulated employment categories, to assist employers in implementing the change and allow employees further time to apply for and obtain their blue card. We would suggest that the uniform grace period be at least 12-months, though preferably 18-months, to allow employees sufficient time to comply. We note that many of the newly added regulated employee categories are not highly paid professional roles, and employees are more likely to have assessable information and difficulty self-representing through QCAT.

Regulated employment/ Business Category	Applicable grace period
Legal Support	12-months
Child accommodation services	6-months
Gyms and Play facilities	6-months
Employment at Amusement parks	12-months
Entertainment, beauty and photographer	6-months

8. New discretionary suspension power

We are supportive of the inclusion of section 295(a), which establishes the chief executive's power to suspend an individual's Blue Card pending the determination of an assessment of a person's eligibility to hold a Blue Card where there has been a change in assessable information which indicates a likely risk to the safety of children. We consider a suspension is preferable to having the card cancelled in the first instance.

However, given our observations surrounding delays in the Blue Card process, we are concerned whether it will be possible for the information establishing grounds for the suspension of a Blue Card to be considered and dealt with in a timely manner. We note that Clause 63 of the Bill proposes the inclusion of section 300A, which allows a person to apply to the chief executive to end the suspension of their Blue Card after at least six months has passed. We do not consider that this will be an effective enough mechanism to relieve the social and economic impacts on cardholders faced with delays, particularly in circumstances where the chief executive will not be required to decide a person's application pursuant to section 300(4). In order to prevent additional delays imposed on cardholders, we consider that the amendment should:

1. Legislate a time limit of not more than three months for the chief executive to investigate and make a decision to either end the suspension of or cancel a person's Blue Card; or
2. Legislate a requirement similar to the *Education (Queensland College of Teachers) Act 2005*, where if a teacher's registration is suspended, the continuation of the suspension is reviewed by QCAT.[39]

We consider that the above mechanisms would also then encourage self-disclosure of changes in assessable information (outlined below) as is contemplated by the Bill as applicants would have an idea of the timeframes associated with a possible suspension.

[39] Section 53, *Education (Queensland College of Teachers) Act 2005.*

9. New self-disclosure requirements

We are in favour of any amendment that would result in more efficient processing of Blue Card matters. We are supportive of the inclusion of the new section 186, which outlines the meaning of a disclosable matter for the purposes of the self-disclosure requirements.

Specifically, we welcome the particularisation of matters that relate to "a domestic violence order made, or police protection notice issued, against a person under the *Domestic and Family Violence Protection Act 2012*" insofar as it seeks to minimise the disproportionate impact on victim-survivors of domestic and family violence from having to disclose other matters relevant to domestic violence information. However, we continue to hold concerns about the self-disclosure system being abused by perpetrators of domestic and family violence in order to impact an applicant's or cardholder's ability to hold a Blue Card. We note that there is a prevalence of domestic violence orders or police protection notices being erroneously made against victim-survivors of domestic and family violence as often perpetrators make protection order applications or cross applications against an aggrieved to gain power and control over them.[40] Additionally, we have found that there is a trend of police identifying victim-survivors as perpetrators when responding to incidents of domestic and family violence and deciding to make an application for a protection order.[41]

Time limit

The Bill proposes a time limit of seven days to notify Blue Card Services of any change to a disclosable matter in relation to the person under section 328B. We understand the necessity to impose a time limit to assist Blue Card Services with efficient application processing however we do not consider this to be an appropriate time frame for individuals to comply with. Particularly, victim-survivors who are experiencing family, social and or housing issues around the time in which an incident of domestic violence has resulted in the application of a police protection notice or where a temporary or final domestic violence order has been issued against them.

In our casework statistics, of the clients who disclosed an experience of domestic and family violence, 89% have an annual household income under $52,000 and are often single parents. Given the previously discussed barriers to disclosing domestic and family violence information and the small window of time in which to disclose such information, we consider the additional penalties for a cardholder failing to notify Blue Card Services creates a disproportionate financial disadvantage on victim-survivors of domestic and family violence. We consider it appropriate to extend the proposed disclosure time limitation of seven days to at least 28 days.

[40] Heather Douglas and Robin Fitzgerald, 'Legal processes and gendered violence: Cross-applications for domestic violence protection orders' (2013) 36(1) *UNSW Law Journal* 56, 58.
[41] Heather Nancarrow et al, 'Accurately identifying the "person most in need of protection in domestic and family violence law' (Research Report, No 23, Australia's National Research Organisation For Women's Safety, November 2020) 59-60.

10. Transitional arrangements

Current and Pending Applications

The proposed transitional provisions for the amended Act are outlined in the table below.

	Scenario	Which Act applies	Affected by Change to sit out period?
A	Applicant has negative notice issued before the commencement – no application to cancel/review application made (section 610)	Application to cancel to be determined under amended Act	No – 2 years still applies
B	Applicant has negative notice– application to cancel pending before the commencement (section 609)	Application to cancel to be determined under amended Act	No – 2 years still applies
C	Applicant has negative notice issued before the commencement – QCAT review proceeding on foot (section 625)	Application will be determined by QCAT under the current Act. However, applicant likely has the option to withdraw their current QCAT proceeding and reapply to Blue Card to cancel the negative notice and have their application assessed under the amended Act.	Yes – if application to review is unsuccessful, applicant will have to 'sit out' for 3 years from the date the decision is confirmed by QCAT before applying to cancel
D	Applicant has negative notice issued before the commencement – QCAT review not commenced and limitation period under QCAT Act has not lapsed (section 626)	Applicant may apply to Blue Card to have the application redetermined under amended Act within 2 months	Yes – 3 year sit out will apply, however, the applicant will have the opportunity to apply to QCAT under the amended Act for a review.

We consider that the transitional provisions relating to scenarios A, B and D above are fair and will not disadvantage applicants who find themselves in those positions. However, we hold serious concerns for applicants in scenario C. The majority of our clients are in this category.

Given the delays and timeframes outlined throughout this submission, it is likely that anyone in scenario C has been engaged in the process for a considerable period of time. These applicants will have the option to:

1. Continue with their QCAT application having their case decided under the current, stricter Act; or
2. Withdraw their QCAT application and apply to Blue Card Services to have their application redetermined under the amended Act.

An applicant who takes option 2 runs the risk of being unsuccessful in the redetermination and may end up having to reapply to QCAT again in the future for a review.

An applicant who takes option 1 and continues with their QCAT application under the current Act, runs the risk of having the decision confirmed by QCAT and being subject to proposed section 304G(4) which would mean they could not apply to have the negative notice cancelled under the amended Act until three years have passed from when QCAT confirms the decision.

Therefore, there is no quick or easy option for those in scenario C with the transitional provisions as currently drafted; however, on balance the new Act is likely to result in better outcomes for individuals. We therefore recommend the proposed section 625 is amended so that the review is determined by QCAT under the amended Act.

These individuals will be significantly disadvantaged having their application decided under the stricter current Act as opposed to the amendments when the only difference in their circumstances is the timing of their application.

LawRight has 64 clients with current proceedings before QCAT who would be affected by the amendments. In the 2022-2023 QCAT Annual Report, it was noted that there are 317 Blue Card cases pending before the Tribunal as of 30 June 2023. The transitional arrangements should be drafted in a way that would have the least impact on those who have already been waiting for a significant amount of time for an outcome.

Increase to the 'sit out' period and insertion of section 304G(4)

Clause 67 of the Bill seeks to amend the current Act by increasing the 'sit-out' period from two years to three years. The Explanatory Memorandum notes that this increase is to match the period for which a Blue Card is valid and to limit the number of applications to cancel a negative notice.

We understand that there are scenarios where a person can have their application dismissed by QCAT, and because of the delays (outlined at pages 6 to 10) they are close to or at the stage where they can apply to Blue Card Services to have their negative notice cancelled. This results in the person starting the entire process all over again straight after the decision has been confirmed by QCAT. Adding an additional year to the 'sit out' period is likely to prevent some applicants from engaging in this cycle.

We are strongly opposed to the proposed insertion of section 304G(4), which would mean that where a person proceeds through QCAT and the negative notice is confirmed, that the 'sit out' period would commence from when the Tribunal confirms the decision, not from when the negative notice was first issued. We note that this was the position under the Act prior to the 2019 amendments. No rationale has been provided for reverting to this position. Given the delays we have outlined throughout this paper, imposing a longer sit-out period for those who have undergone a QCAT review will place these individuals at a significant disadvantage.

We submit that the increase to the sit out period will be enough to prevent the cycle of applications outlined above and the insertion of section 304G(4) will be a punitive measure for anyone who seeks to exercise their review rights. An applicant may choose not to proceed with a meritorious review because the risk of being unsuccessful will be far more detrimental if section 304G(4) is inserted into the Act.

Given the very limited availability of free legal assistance with these matters, we hold concerns for those who proceed through QCAT without legal assistance and have their decision confirmed. It is not the case that every applicant who is unsuccessful at QCAT has poor prospects. As we have outlined at pages 13-14, being represented increases an applicant's prospects of success. These individuals, who may have received their negative notice more than three years ago, will now have to wait a further 3 years to apply to cancel it.

11. Funding for legal assistance services

Our submission has focused on improving our laws, systems, and legal frameworks. However, for those legal frameworks to be efficient and effective, they must be appropriately resourced. This extends to government departments; courts and tribunals; and community legal centres and other legal assistance services.

As has been discussed throughout our submissions, the proposed reforms to the Blue Card framework are likely to increase workload for both QCAT and Blue Card Services as a result of the increased categories of individuals that require a Blue Card, changes to QCAT's review jurisdiction, and any other increased processing or support resourcing created by the new decision-making framework and associated advisory committees. We assume that Blue Card Services and QCAT will be consulted separately on the impact these changes will have on their workload, so we do not propose to discuss this further in our submission; however, we want to address the need for further funding or resourcing for legal assistance services.

Given the *current* landscape of legal assistance services for Blue Card matters and the *changing* landscape as a result of the proposed reforms, there are three key issues that need to be addressed:

1. There is insufficient funding for legal assistance services for individuals with matters currently before Blue Card Services or matters before QCAT;
2. An increase to the total number of individuals that will require a Blue Card will increase the number of individuals subsequently seeking legal assistance services; and
3. The proposed reforms will dramatically increase the demand for legal help from individuals seeking advice about their obligations under the new reforms, whether or not they currently hold a Blue Card or may be required to hold one in future.

LawRight is the only community legal centre in Queensland operating a model focused on helping self-represented litigants in QCAT. In addition to our government funding, we subsidise our services by approximately 30% with our own fundraising to meet the operational demands of this client work. We already cannot meet the demand and we could not accommodate an increase in demand for assistance without an increase in funding.

There are a number of different situations in the existing regulatory framework that prompt people to seek legal help. The proposed reforms to the Blue Card framework will also create the following *new* situations where individuals may require legal assistance:

- Individuals who were previously exempt or not required to hold a Blue Card, now being required to obtain a Blue Card, seeking advice or assistance in relation to:
    - Whether they are required to hold a Blue Card;
    - What process they need to follow to obtain or apply for a Blue Card;
    - Completing the application for a Blue Card;
    - Responding to any request for submissions from Blue Card Services;
    - Their potential appeal or review rights through QCAT; and
    - Ongoing assistance with any review through QCAT.

- Individuals who currently hold a Blue Card, seeking advice on their rights and obligations under the new legislation;
- Individuals who received a negative notice under the previous legislation seeking advice on their rights under the new legislation;
- Employees of organisations or businesses that may now require their staff to hold a Blue Card in order to be employed or remain employed, seeking advice in relation to potential overcompliance by their employer or where the additional requirement of holding a Blue Card involves elements of discrimination (for example in relation to criminal offences) or is otherwise not a reasonable requirement of the work; and
- Individuals with current matters before Blue Card or QCAT seeking advice on how the new laws will impact their application or legal proceeding.

The list above is not exhaustive and we note that for some of the new areas of legal need we have identified, it may be possible to reduce this need with the provision of legal information or purpose-built legal frameworks; however, this cannot remove all demand. We also know that ensuring adequate availability of legal assistance services is not just a key part of access to justice; legal assistance services also reduce the cost of legal frameworks, including for courts, tribunals and government regulatory bodies.

LawRight's Court and Tribunal Services model has been independently evaluated by BDO as having a cost benefit ratio of 2:1, that is for every dollar invested, our model saves the court or tribunal we are operating in, two dollars. This evaluation was only based on the actual court or tribunal costs and did not factor in any cost savings of other government-funded support services or the legal costs of the other side to a dispute, which in the entire Blue Card process will always be a government-funded entity. This cost saving included reduced court appearances, reduced adjournments, fewer registry appearances and the number of matters diverted from the court system.

Access to independent legal assistance services is an integral part of any functioning framework in our justice and regulatory system. In summary:

- If there are changes in legal frameworks that lead to an increased demand for services, there should be an increase in funding to legal assistance services, proportionate to the demand created.
- If there is an increase in funding or resourcing for government departments, courts or tribunals, to process legal matters, there should also be a proportionate increase in funding for legal assistance services.

We have not covered our model in detail in this submission, and given the time available, we have not prepared a detailed submission outlining our recommendation for a specific model or proposal for broader legal assistance services. However, LawRight would be very happy to put forward such a proposal or otherwise be consulted on possible legal assistance frameworks. These would include culturally appropriate services, outreach services for regional areas, and a range of legal assistance services including discrete task based and representation. Our model has been adapted or is currently in use across Australia and in other international jurisdictions and we have a long history of providing tailored and client-appropriate legal assistance services. We also note that due to the way we leverage pro bono, our model (and community legal centres more generally) are consistently proven to be more cost-effective than government integrated legal assistance services in regulatory bodies or than other types of legal assistance services.

12. Contacting us

We appreciate the opportunity to provide a submission for consideration in response to the Bill.

Please contact us on [redacted] if you have any questions about this submission.

Yours faithfully

[redacted]

Ben Tuckett
Director
Court and Tribunal Services

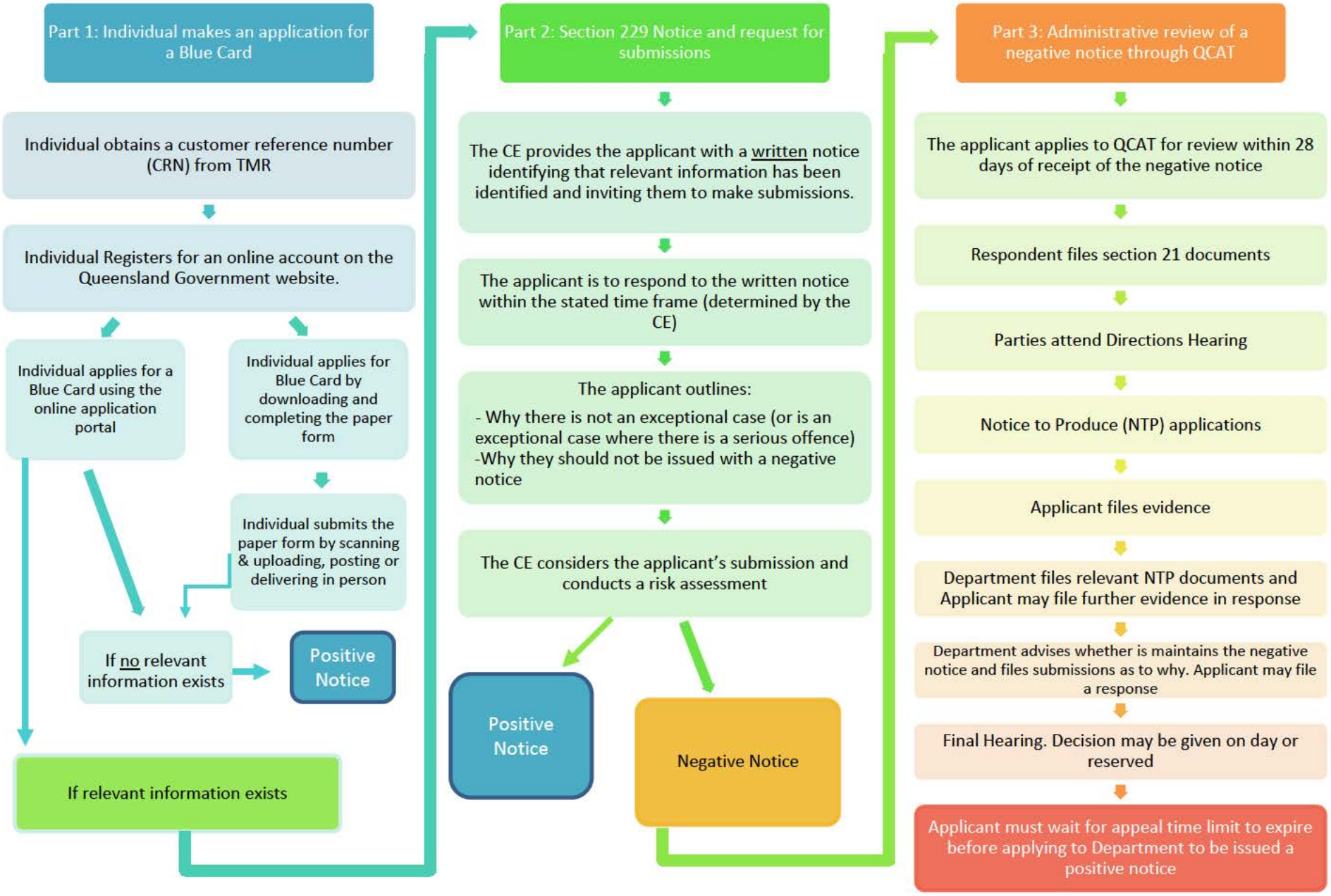
[redacted]

Nikki Hancock
Assistant Director
Court and Tribunal Services

13. Appendices

1. Blue Card Application Process Flowchart.
2. LawRight's Submission in response to the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018*.
3. LawRight's Submission in response to the *Child Protection Reform and Other Legislation Amendment Bill 2021*.
4. LawRight's Submission in response to the Legal Affairs and Safety Committee's Inquiry into the *Working with Children (Indigenous Communities) Amendment Bill 2021.*

Appendix 1: Blue Card Application Process Flowchart



Appendix 2: LawRight's Submission in response to the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018*

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10 December 2018

Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
BRISBANE QLD 4000

By email only: eesbc@parliament.qld.gov.au

Dear Committee

Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018 (Government Bill)

We value the opportunity to make a submission to the Education, Employment and Small Business Committee in response to the Working with Children Bills. This submission is in response to the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018 (**Government Bill**).

About LawRight

LawRight is an independent community legal centre and the leading facilitator of pro bono legal services in Queensland, directing the resources of the private legal profession to increase access to justice.

LawRight identifies vulnerable people with unaddressed legal need and how we can connect with them. We collaborate with the civic, community and health organisations that our clients engage with and form strategic partnerships with pro bono legal professionals at these connection points. This enables LawRight to increase access to the justice system, improve health and well-being and increase access to housing, income and legal rights.

With over 40 member law firms and 100 volunteer barristers, we deliver over 25,000 hours of pro bono assistance annually through our:

- **Self Representation Services** in the Supreme, District Court and Magistrates Court, Federal Court and Queensland Civil and Administrative Tribunal (**QCAT**);
- **Outreach Legal Services** at homeless, health and refugee organisations;
- **Health Justice Partnerships** at the Mater Young Adults Health Centre and Wuchopperen Health Service – a community controlled service in Cairns;
- **Advocacy and Duty Lawyer Services** at the Mental Health Review Tribunal and QCAT;

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- **Pro Bono Connect** –assessment and referrals for pro representation for vulnerable clients and matters in the public interest; and,
- **Student clinics** partnering with six Queensland law schools to host over 70 students annually in clinical legal education placements and a further 70 law students as volunteers.

About the QCAT Self Representative and Duty Law Service

LawRight operates a Self Representative Service and Duty Law Service at QCAT, which helps people who are involved in, or who are considering commencing legal proceedings in certain QCAT areas. In the 2017/2018 financial year, we assisted 39 clients with QCAT Reviews of decisions made by Blue Card Services (BCS).

'No card, no start' policy

A key change proposed under the amendments is a departure from the existing principle that sufficient regard be given to the rights and liberties of individuals to employment and to conduct business, as implied in section 4(2)(a) *Legislative Standards Act 1992*.

The possibility that vulnerable employees may have their employment ended on this basis is of significant concern, especially as the renewal process can be lengthy and at times, complex. The reassurance proposed under the amendments to minimise this impact is " *a suite of initiatives to streamline the blue card application process and reduce processing timeframes"* but no guarantees are provided that these initiatives will be adequate for vulnerable people who may already be in tenous employment and do not find it easy to navigate "self-help' and 'stream-lined" systems. Our BCS clients include people who struggle with literacy, may not speak English as a first language, or have other impairments which reduce their capabilty to engage with government services.

Finality of QCAT proceedings

The current situation provides that, where QCAT overturns a decision of the Chief Executive, the Chief Executive may seek a 'stay' of the decision, or QCAT may order a 'stay' on its own initiative (section 145 of the *Queensland Civil and Administrative Tribunal Act 2009*). The effect of the 'stay' is that the person will be prevented from commencing regulated employment until the appeal is finalised.

The Government Bill seeks to amend the stay provisions by stating that where QCAT overturns a decision by the Chief Executive, there will be an automatic stay on the QCAT decision until the appeal period has expired or an appeal is finalised (clause 58 of the Government Bill). The impact of this amendment on our clients will be that, after navigating a lengthy and stressful QCAT process, which can in some cases take up to 12 months, they will be further prevented from commencing regulated employment notwithstanding that QCAT have made a decision in their favour. Many of the people impacted by this amendment will be those from marginalised and vulnerable backgrounds, who will have to rely on social security benefits while awaiting the outcome from their QCAT decision.

Recommendation

We submit that the current framework is sufficient to ensure the principles of the Act are upheld, and therefore the proposed amendments are unnecessary. Furthermore, our position is that the amendment has the potential to undermine the authority of QCAT's decision.

We appreciate the opportunity to provide feedback on this important draft legislation. If you have any questions about this submission or require further information, please do not hesitate to contact [redacted]

Yours faithfully

[redacted]

Sue Garlick
Joint Director

Linda Macpherson
Joint Director

Appendix 3: LawRight's Submission in response to the *Child Protection Reform and Other Legislation Amendment Bill 2021*

1 October 2021

LawRight
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Committee Secretary
Community Support and Services Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Dear Committee Secretary

Child Protection Reform and other Legislation Amendment Bill 2021

Thank you for the opportunity to provide this submission to the Community Support and Services Committee in response to the *Child Protection Reform and other Legislation Amendment Bill 2021* (**Bill**).

Background

LawRight is a not-for-profit, community-based legal organisation, which coordinates the provision of pro bono legal services to disadvantaged Queenslanders.

LawRight's Court and Tribunal Services (**CTS**) assist clients who apply (or intend to apply) to the Queensland Civil and Administrative Tribunal (**QCAT**) for a merits review of certain government decisions. The two most common reviews we assist with are reviewable decisions made under the *Child Protection Act 1999* (**CPA**) and the *Working with Children (Risk Management and Screening) Act 2000* (**WWCA**).

In the last three financial years we have assisted 253 people with reviews under the WWCA and 24 under the CPA. A significant number of these clients experience financial hardship, live with disability or experience other forms of disadvantage.

LawRight Submission

In the first instance we voice our concern about the short and disconnected consultation period provided for the Bill. The *Working with Children (Indigenous Communities) Amendment Bill 2021* (**Indigenous Communities Bill**), recently introduced, has a much longer consultation period and the amendments it proposes intersect with matters raised under the Bill. Accordingly, a consultation phase that allowed stakeholders to provide holistic submissions on the totality of the amendments proposed would have been preferable.

Given the constraints mentioned above, this submission is limited and suffers accordingly. We intend to make more substantive submissions in response to the Indigenous Communities Bill.

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Amendments to the Child Protection Act 1999

We are generally in favour of strengthening the Aboriginal and Torres Strait Islander Child Placement Principle and any framework that allows Aboriginal and Torres Strait Islander children to remain with their kin and stay connected with culture. We note however, that it is a requirement of section 135 of the current CPA that an approved foster or kinship carer must have a blue card.

Our Aboriginal and Torres Strait Islander clients experience multiple barriers when accessing the blue card system, including when making the initial application and during the submission and external review phases. The Department of Justice and Attorney General recently acknowledged this in their *Safe Children and Strong Communities* publication.[1]

While it appears that the Indigenous Communities Bill seeks to address some of these barriers, any changes to the CPA that aim to improve outcomes for Aboriginal and Torres Strait Islander Peoples will be meaningless without major changes to the blue card system. We will comment further on this in our submission on the Indigenous Communities Bill.

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

The inclusion of "domestic violence" information as relevant information in section 221

We support the inclusion of "domestic violence" information in the sense that this will allow the Chief Executive to have a copy of a Police Protection Notice (**PPN**) or Application for a Domestic Violence Order (**Application**) made by the Police before making a decision to issue a negative or positive notice. However, we hesitate to fully support the inclusion as allegations contained in a PPN or an Application will not have been tested by a Court, and so may not always represent the full circumstances of any particular case. We note well-documented abuses of the DVO system used by perpetrators of violence as well as limitations in training or resources for police which may lead to inappropriate applications. For this reason, we submit that the Chief Executive should exercise caution when using this information to decide on an application.

Participation in the WWC NRS

[1] Department of Justice and Attorney General, *Safe Children and Strong Communities: A strategy and action plan for Aboriginal and Torres Strait Islander peoples and organisations accessing the blue card system 2021-2025*, 2021

We do not support the insertion of the proposed section 303A, which would allow the Chief Executive to cancel a person's positive notice if they become aware of 'an adverse interstate WWC decision'. In particular, we do not support that power being exercised without a right of review.

Information sharing between states on matters of child safety is to be encouraged and we agree that an adverse interstate decision could be a relevant factor that should be considered by the Chief Executive. However, and in particular for applicants who already experience a range of capability and structural challenges, the limitations of the Queensland blue card framework demonstrate the need for review mechanisms. Some of these limitations, include:

- a person can be issued with a negative notice without the full merits of their position having been considered (eg insufficient information provided by the applicant due to literacy or resource constraints).
- a person's means, or a change in their circumstances (such as a decision to move interstate), may lead them to let a negative notice stand.
- not everyone who receives a negative notice is capable of or decides to apply for a review.
- adverse decisions made by Chief Executives can be flawed.

Unfortunately, these limitations are frequently experienced by LawRight clients. In research currently being conducted by LawRight, which we will comment on further in response to the Indigenous Communities Bill, early data indicates that of 39 clients who applied for a QCAT review of their negative notice, eleven had the decision overturned, a process that mostly took two years or more. Nine elected not to continue with a review (for a range of reasons including lack of understanding or feeling overwhelmed by the process) and 16 are currently awaiting a decision. Only three had the decision of the Chief Executive affirmed. It is logical to assume that that processes and decisions in other states may be similarly limited.

As a matter of procedural fairness and despite the obvious time and cost-cutting benefits, the Queensland executive should afford applicants a right of review if their positive notice is cancelled in another state, unless a disqualifying offence is involved. We note that in Queensland, the only other circumstance where a person does not have a right of review under the WWC in relation to having their negative notice cancelled is when they are convicted of a disqualifying offence.

Amendments to the Adoption Act 2009

We have no comments on the proposed changes in this Bill to the *Adoption Act 2009* (**AA**) but note that this Bill is a missed opportunity to amend an anomaly that exists in the current AA.

When assessing the suitability of a prospective adoptive parent under the AA, the Chief Executive must be '*satisfied that the person has good health to provide stable, high level care for a child into adulthood*'.[2] It goes on to state that the person does not have good health if they have a 'disqualifying condition'[3] which is then defined as 'a condition prescribed under a regulation to be a disqualifying condition for this section'.[4]

There is no reference in the *Adoption Regulation 2009* (**the Regulation**) to 'disqualifying condition', therefore it appears that there is no legislated definition of a 'disqualifying condition' for the purpose of the AA.

This leaves applicants (and their legal advisors) with uncertainty about whether their diagnosed health conditions will automatically prevent them from being considered eligible to adopt. We recommend 'disqualifying condition' be defined in the regulation.

Contacting us

We appreciate the opportunity to provide feedback on this important Bill.

Please contact us on [redacted] if you have any questions about this letter.

Yours faithfully

[redacted]

Nikki Hancock
Senior Lawyer
Court and Tribunal Services| QCAT Office

[2] Section 122 (1) *Adoption Act 2009*
[3] Section 122 (2), Ibid
[4] Section 122 (4), Ibid

LawRight Submission

22 November 2021

Submission in response to the Legal Affairs and Safety Committee's Inquiry into the *Working with Children (Indigenous Communities) Amendment Bill 2021*

About LawRight

LawRight is an independent community legal centre and the leading facilitator of pro bono legal services in Queensland, directing the resources of the private legal profession to increase access to justice.

Relevance of LawRight submissions

LawRight's Court and Tribunal Services (**CTS**) assist clients who apply (or intend to apply) to the Queensland Civil and Administrative Tribunal (**QCAT**) for a merits review of certain government decisions. The most common reviews we assist with are reviewable decisions made under the *Working with Children (Risk Management and Screening) Act 2000* (**WWCA**).

In 2019-20, LawRight assisted with approximately one third of all Blue Card reviews at QCAT, and in the last three financial years we provided 253 people with advice or assistance when reviewing a negative notice decision under the WWCA. The vast majority of our clients experience financial hardship, have an Aboriginal or Torres Strait Islander background, live with disability or other forms of current or historic disadvantage in the legal system. All of our clients struggle with the formal and administrative requirements of the application process, including those aspects of the process prior to QCAT.

Although LawRight only assists clients once they are considering or have commenced QCAT proceedings, this year LawRight commenced research into our clients' experience at all stages of the Blue Card application process. Emerging data from that research is included in this submission. A flowchart of the Blue Card application and review process created by our research team is included as **Annexure A**. This offers as a visual reference to support details of our submission.

All our submissions on the *Working with Children (Indigenous Communities)* Amendment Bill 2021 (**the Bill**) are based on our direct insight into marginalised people's experiences of applying for a Blue Card, and of having their decisions reviewed by the Tribunal. Some of their stories and experiences are highlighted throughout.

Summary of submissions

We are in favour of any amendment that would make the Blue Card system more accessible for Aboriginal and Torres Strait Islander people, and a system that would empower remote communities to decide who in that community should be issued a clearance.

We have concerns about the practical limitations of the Bill and submit that the significant issues with the Blue Card system identified in the Explanatory Notes impact all Queenslanders. Wider reforms would achieve the desired purpose of the Bill and we make the following recommendations:

1. Legislate a time limit for the Chief Executive to decide all applications
2. Review and provide where necessary additional directions, resourcing and support to Blue Card Services and QCAT to more effectively administer Blue Card applications and reviews
3. Review the Chief Executive's decision-making process for determining an 'exceptional case'
4. Legislate an internal review mechanism similar to the *Disability Services Act 2006 or the Victims of Crime Assistance Act 2009*, *that would compel a more senior member of the Department to review a negative notice internally, rather than* requiring vulnerable applicants seeking review to pursue complex QCAT proceedings
5. Implement measures which would support applicants to overcome the complexities of the QCAT process, including additional resourcing for accessible, culturally-appropriate legal assistance services of the relevant Community Justice Group and take cultural considerations into account when making the initial decision regarding a Blue Card application
6. Amend the WWCA to compel the Chief Executive to consider the views of the relevant Community Justice Group and take cultural considerations into account when making the initial decision regarding a Blue Card application
7. Increase the number of Identified positions within Blue Card Services to enhance the Department's responsiveness to Indigenous communities
8. That either the *Child Protection Act 1999* (**CPA**) be amended to include a 'restricted working with children clearance' in sections 133 (d) and 135(1)(b)(iv) or that those sections requiring a Blue Card to be a kinship carer be removed from the CPA entirely
9. Provide further resourcing and guidance to Community Justice Groups, so that they can appropriately advise community members and engage effectively with the Blue Card system

Submissions

1. Timeframes and delays

The Explanatory Notes for the Bill highlight that there is currently no legislated timeframe to issue a Blue Card in Queensland. LawRight research indicates that where a QCAT review is involved the total process takes over two years and that this is a widespread problem which impacts vulnerable people in all Queensland communities.

1.1 First delay [12 months]

The first phase in which a delay occurs is the time taken by the Chief Executive of Blue Card Services (**BCS**) to issue a positive or negative notice.

Where the Chief Executive has relevant information about the applicant, they are required to invite submissions from the applicant on this information[1] (**s 229 submissions**), and this consideration of s229 submissions frequently leads to the first major delay in the application process. The steps in the review process are illustrated in Annexure A.

A review of all our current and former casework files from 2018-2021 shows that, where relevant information[2] exists about an applicant, it takes on average 12 months from the date of the initial application to BCS until the Chief Executive issues a positive or negative notice.

In some cases there is an additional delay between the application and the request for s 229 submissions, as was the case for our client in Case Study 1 who was not invited to make submissions for over seven months.

Our more detailed review of ten recent client files showed that the wait time between the date of the request for s 229 submissions until the date the applicant was issued a negative notice was on average 240 days, with the shortest delay being 92 days and the longest being 437 days. All ten of those clients went on to have that decision reviewed in QCAT and ultimately had the negative notice set aside.

1.2 Second delay [12-18 months]

The second major delay can occur once the applicant is issued a negative notice and applies to QCAT to review the decision. The review process is frequently lengthy and complicated, requiring the submission of complex documents and attendance at multiple tribunal hearings without the representation of a lawyer. The steps in the review process are illustrated in Annexure A.

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[1] Section 229, WWCA.

[2] Relevant information under the *Working with Children (Risk Management and Screening) Act 2000* (WWCA) includes police Information, disciplinary information, investigative information and other information that that the Chief Executive believes is relevant to deciding whether it would be in the best interests of children to issue a working with children clearance.

A review of LawRight's casework found that the QCAT phase takes on average 12-18 months from the initial date of the application to QCAT before a Tribunal Member decides to either confirm the negative notice or set it aside.

A delay of 12-18 months may be considered quick in comparison to other legal proceedings, but when the applicant has already waited 12 months to get an outcome from Blue Card Services the prospects of waiting a further 12-18 months will often deter an applicant from commencing proceedings. This is particularly concerning when a significant proportion of Blue Card decisions are set aside by QCAT. Our data shows that two thirds of our clients' Blue Card decisions that went to hearing were eventually overturned.

Our calculations of delays in these two phases indicate that the minimum timeframe for the finalisation of a Blue Card decision, where the Chief Executive raises concerns, is at least two years.

1.3 Impacts of delays

Given that an application for a Blue Card is generally motivated by an opportunity to pursue employment, training or volunteering, a two-year wait will almost always prevent that opportunity from being realised. Once offers of employment or study are withdrawn, this leads to ongoing and significant personal and financial disadvantage. LawRight's survey of 83 current and former clients found that every client surveyed lost employment opportunities, could not advance their tertiary education, or could otherwise not fully participate in their communities due to this delay. A significant number also reported substantial negative impacts on their mental health whilst waiting for a decision.

The problems with timeliness are only exacerbated by the "no card, no start" policy. The policy is well-intentioned, but the processing delays of both the Department and QCAT cause significant harm and disadvantage to not only Aboriginal and Torres Strait Islander People, but also to people living with disability, culturally and linguistically diverse people, and people caught in complex cycles of disadvantage who seek to establish themselves after a period of addiction, petty crime or even incarceration.

The proposed amendment will place a time limit of 21 days on the Chief Executive to make a decision if a community area application is made. We support a legislated timeframe which would give certainty to all Blue Card applicants, not just for those making community area applications.

> ***Recommendation 1:*** *Legislate a time limit for the Chief Executive to decide all applications*

> ***Recommendation 2:*** *Review and provide where necessary additional directions, resourcing and support to Blue Card Services and QCAT to more effectively administer Blue Card applications and reviews*

Case Study 1: Patricia – Juvenile record prevents issue of blue card
Patricia, a young Indigenous woman, grew up in the foster care system. The lack of support she received while in state care, together with the lack of employment and training opportunities in her community, made her more vulnerable to maladaptive social settings. Consequently in her early teens she "fell in with the wrong crowd" and began to engage in minor criminal offending. Her history includes non-recorded convictions for stealing, drug possession (cannabis) and public nuisance. All of these offences were committed before age 18.

Patricia developed the insight that these behaviours were destructive and sought help from a youth worker, who assisted her to access stable housing and commence tertiary studies. Patricia was inspired by her youth worker and wanted to follow in her footsteps and work with disadvantaged Indigenous youth.

At age 21, Patricia was offered a traineeship with a community organisation to commence a certificate in youth work. In order to commence the traineeship and complete the practical units of her certificate, she applied for a Blue Card. The organisation put her traineeship on hold awaiting the outcome of her application. After seven months, Patricia received a notice requesting s 229 submissions about her criminal history. Patricia outlined how far she had come since the offences and outlined her insight into the triggers for her juvenile offending. A further nine months then passed before she was issued the negative notice.

Patricia commenced review proceedings in QCAT but failed to comply with a direction to file a "Life Story". When asked why she did not comply with the directions, she stated "I am not good at writing things down. I thought I could come to the Tribunal and tell my story".

Even with the assistance of LawRight, Patricia was overwhelmed by the process and decided to withdraw her proceedings. She felt that the process was invasive and forced her to reflect on past trauma that she had worked so hard to overcome. This meant that she lost the employment and tertiary education opportunity and remained on unemployment benefits.

2. Exceptional cases and assessing risk to children

The Explanatory Notes to the Bill identify that in the current system "*no mechanism exists that recognises behavioural improvements"* of the applicant. The Bill attempts to remedy this by proposing a system where the Community Justice Group (**CJG**) in an applicant's community can consider this information in deciding a community area application.

While 'behavioural improvements' are not one of the mandatory considerations under the WWCA, recognising behavioural improvements is already within the Chief Executive's discretion when deciding an application for a positive notice.[3] An applicant's s 229 submissions generally include information about that person's behavioural improvements, as

[3] Section 229 (4) *WWCA*

well as networks of family, community and professional support – these are what the Tribunal has termed 'protective factors. '

In our experience the Chief Executive rarely makes use of this discretion to consider positive behavioural improvements and other protective factors. Any favourable evidence of an applicant's improved behaviour appears to be discounted, while heavy reliance is placed on criminal offences, which are rarely related to child safety and are often many years old.

Section 221 of the WWCA is cast as a positive presumption test. It provides that where an applicant has been convicted of an offence, other than a serious offence, the Chief Executive must issue a positive notice, unless it is an 'exceptional case' where it would not be in the best interest of children for the applicant to be issued with a positive notice[4]. However, the reasons listed in the decision to issue a negative notice often give the impression that this is a negative presumption that the applicant must overcome, frequently emphasising the applicant's 'risk factors', with little consideration of the protective factors.

If an applicant applies to QCAT for a review of the decision, the Tribunal in making their decision weighs up both the risk factors and protective factors. A review of our client files where the applicant was ultimately successful in having the Chief Executive's decision set aside by QCAT concluded that QCAT was more likely to consider the contextual nature of an applicant's offending and the rehabilitative steps they have taken. This is despite the same or similar information being available to the Chief Executive at the time of their original decision, and the both the Tribunal Member and the Chief Executive being subject to the same legislative framework.

Mechanisms already exist for behavioural improvements to be considered when deciding an application, but the Chief Executive's risk-adverse approach to decision-making sees them given little weight. We also have concerns that a large number of offences which are unrelated to children or child safety are being flagged as 'exceptional cases', and being subject to unnecessary Departmental scrutiny. We submit that these issues arise out of internal Departmental culture and practices and cannot be directly resolved through legislative change.

> ***Recommendation 3:*** *Review the Chief Executive's decision-making process for determining an 'exceptional case'*

3. QCAT requirements and accessibility

The framework proposed by the Bill aims to reduce the number of applicants to QCAT by allowing for the application of a restricted clearance, however many Aboriginal and Torres Strait Islander applicants will still require unrestricted blue cards. This is of particular

[4] Section 221(2), *WWCA*

significance in applications to become kinship carers[5], where applicants will have no recourse but to have their decision reviewed by the Tribunal. As discussed above, QCAT reviews are complicated processes, which require the filing of complex documents and attendance at multiple conferences and hearings, largely without legal representation.

In 2019-20, LawRight assisted with approximately one-third of all Blue Card reviews at QCAT. All our clients struggled with the formal and administrative requirements of the process.

The QCAT review process assumes that an applicant has sufficient literacy, personal resources and legal capability to navigate the system effectively. As outlined in **Annexure A**, an applicant is required to attend a number hearings and conferences throughout the review process, and to file multiple complex documents including a comprehensive 'Life Story'. In addition to the significant literacy requirements, this obligation to file a written Life Story is inconsistent with the oral traditions of many Aboriginal and Torres Strait Islander cultures and communities.

Case Study 2: Peter – Torres Strait Islander family unable to navigate system without significant support

Peter lives with a physical disability in a remote community, where he participates in traditional cultural groups and practices. English is Peter's third language. Peter applied for a Blue Card to assist his wife (who lives with multiple disabilities) with kinship care arrangements for her two grandchildren. Peter was assisted in his application by a support worker, due to the complexity of the application process.

The Chief Executive did not issue Peter with a negative notice until 441 days after his initial application. Grounds for the negative notice included Peter's criminal history (which was unrelated to child safety), and BCS's assessment that he lacked insight into his criminal offending.

Peter sought review through QCAT of the Department's decision and was assisted with every step in the procedure by LawRight. We provided representation to Peter through our staff lawyers and Counsel acting on a pro bono basis. Peter did not have the resources or capability to achieve any of these steps without specialist assistance. The Department's decision was ultimately set aside by QCAT more than two years after Peter's initial application.

An additional learning from this case study is that during these two years, Peter could not live in the house with his wife and her grandchildren. The extent of this disruption to families and care arrangements is particularly damaging to Aboriginal and Torres Strait Islander families and communities and will not be resolved by the proposed frameworks.

In the case study above our client did not have an email address, and relied on support from his kinship care support agency to receive correspondence on his behalf from BCS and from QCAT. LawRight's survey of current and former clients found that over a third of clients either failed to complete the QCAT process or chose not to commence proceedings. The reasons

[5] Further concerns about the application of the proposed framework to kinship care are explored at point 5 of this submission.

given were that they found the QCAT process to be overwhelming or invasive, or because they simply did not understand what was required of them by the Tribunal.

Even where a QCAT review eventually sets aside a negative notice, this will frequently come at significant personal cost and difficulty on the part of applicant. In our experience even applicants whose review has merit will often be deterred from applying, or will eventually withdraw their application due to the time and complexity of the QCAT review process.

Other departments and agencies whose decisions are reviewable by QCAT (such as the Yellow Card and Victim Assist Queensland schemes) appear to resolve most applications internally, as it is comparatively rare for applicants to these agencies to seek review of their decision by QCAT. LawRight supports improved decision-making processes in the first instance by the Chief Executive when deciding Blue Card applications, so that fewer applicants are required to undergo the complex and time-consuming Tribunal review process.

> ***Recommendation 4:*** *Legislate an internal review mechanism similar to the Disability Services Act 2006 or the Victims of Crime Assistance Act 2009, that would compel a more senior member of the Department to review a negative notice internally, rather than requiring vulnerable applicants seeking review to pursue complex QCAT proceedings*

> ***Recommendation 5:*** *Implement measures which would support applicants to overcome the complexities of the QCAT process, including additional resourcing for accessible, culturally-appropriate legal assistance services*

4. Empowering Indigenous communities

LawRight strongly supports the position that every Indigenous community in Queensland should be empowered to help decide who in that community should be issued with a Blue Card. The proposed framework allows a person receiving a negative notice to apply for a 'community area application'. However it would be more efficient and effective for the Chief Executive, where they have concerns, to consider cultural factors and the views of the relevant CJG when assessing an application for a Blue Card in the first instance.

To properly address the specific needs of Aboriginal and Torres Strait Islander communities, it is essential that the Department's culture and practices thoroughly engage with, are informed by, and become appropriate to the cultural and material needs of those communities. The *Safe Children, Strong Communities*[6] action plan for 2021-25 emphasises the importance of culturally-appropriate resourcing and decision-making, and calls for the recruitment of more Identified positions within the Department. LawRight endorses any measures which would

[6] *Safe Children and Strong Communities: A strategy and action plan for Aboriginal and Torres Strait Islander peoples and organisations accessing the blue card system 2021-2025*

effectively implement these policies, all of which are necessary to address the current negative impacts of the system on Indigenous communities.

> ***Recommendation 6:*** *Amend the WWCA to compel the Chief Executive to consider the views of the relevant Community Justice Group and take cultural considerations into account when making the initial decision regarding a Blue Card application*

> ***Recommendation 7:*** *Increase the number of Identified positions within Blue Card Services to enhance the Department's responsiveness to Indigenous communities*

5. Limitations of the Bill

5.1. Kinship Care

A 'restricted working with children clearance' or 'interim restricted working with children clearance' would only allow a successful applicant to undertake regulated employment or carry on a regulated business in that community area. We assume that 'regulated employment' and 'regulated business' take their meanings from the existing WWCA, so would also include volunteering, however we ask that this be clarified in the final drafting.

While the explicit scope of the Bill is to address unemployment in Indigenous Communities, in our view the Bill should also entitle the holder of a restricted working with children clearance to be a kinship carer. This would require an amendment to sections 133(d) and 135(1)(b)(iv) of the *Child Protection Act 1999* (**CPA**) to either include 'restricted working with children clearance' or 'interim restricted working with children clearance' in the section, or by removing sections 133(d) and 135(1)(b)(iv) altogether.

Either of these options would not expose children in kin care arrangements to an unacceptable risk of harm. A restricted clearance could be considered adequate if the local community supported it. However, the removal of the requirement altogether is also safe, practical and appropriate, because the Department of Children, Youth Justice and Multicultural Affairs (**Child Safety**) already thoroughly and holistically assess potential kinship carers' suitability, including their criminal history. It is an unnecessary duplication and leads to significant community disruption to make the assessment by Child Safety contingent on a further assessment by BCS.

Case Study 3: Tiana – delays for a kinship carer leads to family separation

Tiana applied for a Blue Card so that she could become a kinship carer for her grandchildren. At the time her grandchildren were in the care of one of their aunts after a disrupted and unstable childhood, and Tiana hoped to provide them with long-term care, support, and stability

Initially Blue Card Services issued Tiana a negative notice, due to a combination of her criminal history (which contained no child-related offences) and material provided by the Child Safety relating to past allegations that she had exposed her own children to domestic violence. This information had already been considered by Child Safety when assessing Tiana's application to be a kinship carer, and Child Safety found that Tiana was suitable.

When QCAT reviewed this decision, they noted that BCS had issued a negative notice to Tiana because they had taken the material provided by Child Safety as established fact. This was despite the specific allegations on the file being made anonymously, and Tiana's strong denial of much of this information. The Tribunal also noted that Blue Card Services had misread or misinterpreted some of Child Safety's notes.

Ultimately, QCAT set aside the Department's decision to issue Tiana a negative notice, more than 18 months from the date of Tiana's initial application. Blue Card Services' reliance on complaint information which has not been tested in the courts leads to negative notices being issued in inappropriate circumstances, and in contradiction of the determinations being made by other departments. In Tiana's case, this decision led to further disruption and instability in the lives of her vulnerable grandchildren.

In both case studies 2 and 3, the applicants were deemed suitable by Child Safety to fulfil the roles of kinship carers, but denied access to their young family members for years due to their initial negative notices from Blue Card Services – decisions which were both ultimately reversed at the Tribunal.

Recent and proposed legislative changes recognise the importance of kinship care for Aboriginal and Torres Strait Islander People in Queensland. The *Human Rights Act 2019* legislated the cultural rights of Aboriginal People and Torres Strait Islander people, including section 28 (2) (c) which recognises the specific right of Aboriginal and Torres Strait Islander People "to enjoy, maintain, control, protect and develop their kinship ties". The recent *Child Protection and Other Legislation Amendment Bill 2021* sought amendments to strengthen the Aboriginal and Torres strait Islander Placement Principle, and to streamline kinship care application processes. Research confirms that kinship care arrangements in Aboriginal communities help to foster connectedness to language and culture.[7]

[7] University of Melbourne (2011) *Family Links: Kinship Care and Family Contact* report #2, https://healthsciences.unimelb.edu.au/__data/assets/pdf_file/0012/2586639/Report-2-Family-Links-Aboriginal-kinship-care.pdf

LawRight supports additional amendments which would remove the requirement for a kinship carer to hold a Blue Card, allowing more Aboriginal and Torres Strait Islander children in the child protection system to remain with their kin and stay connected to their cultures.

> ***Recommendation 8:*** *That either the CPA be amended to include a 'restricted working with children clearance' in sections 133 (d) and 135(1)(b)(iv) or that those sections requiring a Blue Card to be a kinship carer be removed from the CPA entirely*

5.2. Resourcing of Community Justice Groups

While CJGs have proven to be effective in reducing incarceration rates in Indigenous communities, it has been noted that they frequently face limitations due to inadequate resourcing and community infrastructure.[8] The proposed scheme would place additional strain on CJGs to engage with the Blue Card system, which in many regions may be practically and administratively burdensome.

We also note that not all communities with high Aboriginal or Torres Strait Islander populations have access to a CJG, and that the effectiveness and resourcing of any given CJG varies. As many Indigenous communities are small, remote or isolated, there may also be concerns with the implementation of the proposed framework relating to information privacy, shame and cultural sensitivity (particularly if the CJG will be given access to material relating to criminal offending or criminal victimisation).

These practical and administrative considerations must be addressed if the proposed framework is to be effectively implemented.

> ***Recommendation 9:*** *Provide further resourcing and guidance to Community Justice Groups, so that they can appropriately advise community members and engage effectively with the Blue Card system*

[8] *To our knowledge there have been no recent, published evaluations of the Community Justice Groups program, but the financial and structural limitations of the program are well-established in literature. See for example: https://archive.sclqld.org.au/judgepub/2006/forde060406.pdf, https://www.justice.qld.gov.au/__data/assets/pdf_file/0003/88905/evaluation-of-the-community-justice-group-program.pdf https://www.researchgate.net/publication/239534696*

Thank you for the opportunity to make these submissions, which should be read alongside and in the context of submissions prepared by LawRight in response to the *Child Protection Reform and other Legislation Amendment Bill 2021*.

Submissions made on 22 November 2021 to:

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Annexure A: Blue Card application process