

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

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

Submission to Education, Employment, Training
and Skills Committee

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Table of contents

Table of contents	1
Introduction	2
Kinship care	3
Applications for blue cards	4
Risk assessment	4
Negative notice processes.....	6
Advisory committees	9
Risk assessment guidelines	10
Suspension of blue cards	11
Information sharing with BCLOs.....	12
Transparency of data for research.....	13

Introduction

1. Thank you for the opportunity to provide submissions on the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (**the Bill**). The Bill makes amendments to the blue card system as set out in the *Working with Children (Risk Management and Screening) Act 2000* (**WWC Act**), including amendments that address some of the barriers disproportionately impacting First Nations applicants.
2. The Queensland Human Rights Commission (**the Commission**) is an independent statutory body established under the *Anti-Discrimination Act 1991*, with functions under that Act and the *Human Rights Act 2019* (**Human Rights Act**) to promote an understanding, acceptance and public discussion of human rights in Queensland.
3. In this submission, the Commission recommends:
 - All members of a kinship care household be excepted from holding a blue card.
 - In relation to blue card applications:
 - Risk assessment guidelines support the proper application of the reasonable person test and avoid an unnecessarily cautious approach.
 - Negative notice show cause processes be improved so that applicants have a reasonable opportunity to present their case.
 - Regulation and policy concerning advisory committees have regard to the cultural safety and capability of committees reviewing applications made by Aboriginal peoples and Torres Strait Islander peoples, and the cultural rights of First Nations applicants and First Nations committee members.
 - The legislation clarifies how risk assessment guidelines, which are statutory instruments but not subordinate legislation, are subject to human rights scrutiny.
 - Expansion of blue card suspension powers are subject to additional safeguards, such as prescribed timeframes within which to commence negative notice processes, and opportunities for blue card holders to end the suspension as early as possible.
 - Sharing information about a person by Blue Card Services with Blue Card Liaison Officers is subject to the consent of the person.
 - The chief executive has discretion to share non de-identified data for genuine research purposes, provided sufficient protections for personal privacy are in place.

Kinship care

All members of a kinship care household should be excepted from holding a blue card

4. Clauses 3 to 11 of the Bill amends the *Child Protection Act 1999* to remove the requirement for kinship carers to hold a blue card. The Explanatory Notes to the Bill specify that the amendments in relation to kinship care will commence on a date to be fixed by proclamation to provide sufficient time for Department of Child Safety, Seniors and Disability Services (**DCSSDS**) to consult on a new fit for purpose screening framework for kinship carers, to ensure children in kinship care remain safe.¹
5. The Commission supports these amendments, but submits they do not go far enough. To properly address the blue card system's contribution to the ongoing removal of Aboriginal and Torres Strait Islander children from their families, the exceptions to blue cards requirements must extend to all members of the household and not just to approved kinship carers.
6. The *Child Protection Act 1999* embeds the Aboriginal and Torres Strait Islander Child Placement Principle, designed to reduce the over-representation of Aboriginal and Torres Strait Islander children in the child protection system.² The principle sets out the rights of a child in care to be placed with a member of the child's family, to be brought up within the child's own family and community, and to be supported to develop and maintain connection with the child's family, community, culture, traditions and language.
7. The Legal Affairs and Safety Committee outlined some of the difficulties in adhering to the child placement principle posed by the blue card system.³ This included overcrowded households, the pattern of over-criminalisation of First Nations people, and lengthy delay in processing blue card applications. An example was given of a kinship carer being forced to choose between the kinship care of her baby cousin, and allowing her 18 year old child to be bailed to the family home. These issues will not be alleviated by only excepting kinship carers from blue card requirements but not excepting household members.
8. Under the *United Nations Convention on the Rights of the Child*, in all actions concerning children, whether undertaken by public or private entities, the best interests of the child shall be the primary consideration. Notably, the best interests of the child is not just an assessment of whether there are risks to the safety of the child, but may require the weighing of other factors that may also be

¹ Explanatory Notes, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) 15.

² *Child Protection Act 1999* (Qld) s 5C.

³ Queensland Parliament Legal Affairs and Safety Committee, *Examination of the Working with Children (Indigenous Communities) Amendment Bill 2021* (Report No 38, 57th Parliament, October 2022) 24 -26.

in the child's best interests. Such has been the approach in relation to parent volunteers, who are exempted from blue card requirements despite potential risk for reasons including:

- (a) participating in activities for their children is intrinsic to being a parent and should be encouraged;
 - (b) requiring parent volunteers to get blue cards would intrude unnecessarily to children's development and family life, and prove overly burdensome.⁴
9. Unfortunately, although the current test under the WWC Act considers the 'best interests of children', it has not been possible to take this nuanced approach to blue cards for kinship care as the decision-maker 'must take into account all possible work situations open to the applicant, not just the purpose for which a blue card is presently sought'.⁵
10. The blue card system is part of a broader framework for keeping children safe in our community. But holding a blue card is no guarantee of safety and is not necessary to create a child safe environment. The screening framework applied by the DCSSDS under the child protection framework will ensure the safety of First Nations children are not compromised by the absence of blue cards for kinship care household members. Additionally, screening under the child protection framework is able to be more culturally appropriate given the child placement principle, and can be adapted to ensure decisions are compatible with the rights of the specific child to protection that is in their best interests.

Applications for blue cards

Risk assessment

11. Under the current WWC Act, in cases where there is police or disciplinary information, Blue Card Services (**BCS**) assess whether issuing a blue card is in the 'best interests of children'. Under the Bill, the test becomes whether the applicant 'poses a risk to the safety of children', defined to mean 'a real and appreciable risk to the safety of children'⁶. Further guidance on how this assessment is conducted is given in proposed section 232(2):

For the chief executive to decide that a person poses a risk to the safety of children, the chief executive –

⁴ Explanatory Notes, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) 8 – 9; Statement of Compatibility, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) 9 – 11.

⁵ See eg *RD v Director-General, Department of Justice and Attorney-General* [2021] QCAT 253 [60].

⁶ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 37 (new section 18D).

- (a) must be satisfied there is a real possibility that the person will pose a risk to the safety of children; and
- (b) does not need to be satisfied that it is likely the person will pose a risk to the safety of children.

Additional guidance for reasonable person test needed

12. Under the Bill, BCS can decide a person does not pose a risk to the safety of children *only if* satisfied that

...a reasonable person would allow their child to have direct contact with the person –

- (a) whether supervised or unsupervised by another person; and
- (b) while the person is engaged in regulated employment or carries on a regulated business.⁷

13. The Explanatory Notes⁸ states the test is adopted from NSW and Victorian legislation. It cites the following underlined passage from *VQB v Secretary to the Department of Justice* [2013] VCAT 789, which has been set out in full for context:

36. This sub-clause and its companion sub-section in the *Working With Children Act* requires the application of an objective standard based upon the views of a reasonable person. The reasonable person would, in reaching his or her conclusions, acquaint himself or herself with all of the matters that have been placed before me, giving an applicant for a positive assessment a right to be heard, as well as considering the material gathered by the Secretary. A reasonable person would not approach the task with a closed mind, thinking that once a person has offended, he or she can never be redeemed. The reasonable person, however, would not put aside all scepticism and reasonable caution in this most difficult area in some over-optimistic attempt to facilitate rehabilitation.

37. VQB was eloquent in arguing his case. He was refreshingly candid, avoiding any attempt to gloss over or make light of the seriousness of the events in his past. Nevertheless, the overall caution which the whole of Section 13 of the Working With Children Act requires in making these determinations as reinforced by the new provisions added with effect from 31 December 2012, lead me to the view that striking a proper balance between society's interest in taking a cautious approach for the protection of children and young people against the legitimate interest of persons who have encountered brushes with the law to re-establish themselves fully in good standing in society leads to the affirmation of the Secretary's negative assessment.

⁷ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 233).

⁸ Explanatory Notes, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) 5.

14. This test has been endorsed in a number of cases in both NSW and Victoria. It assumes the reasonable person is acquainted with all the relevant facts of which the Tribunal is aware.⁹
15. A recent VCAT case further provides: ‘This is called the ‘reasonable parent test’ because it relates to whether a reasonable person would allow the applicant for the clearance to have direct contact with *their own* child. It creates a higher ‘rail’ than if the test referred to hypothetical other children because, as is recognised in the cases, as a matter of human nature people are more cautious and concerned about their own children.’¹⁰
16. Despite this higher threshold, following a brief review of the case law within the time available, the Commission was unable to identify any cases in which an assessment of the applicant’s risk and the reasonable person test led to different conclusions.
17. The reasonable person test proposed by the Bill has the potential to lead to an overly cautious approach to blue card risk assessments – an issue that the Bill is trying to address. It is not part of the criteria for assessing risk in the National Standards.¹¹
18. On the other hand, proper application of the test ensures focus on the paramountcy principle, in line with the rights of the child.
19. The Commission submits that the risk assessment guidelines prepared by the chief executive under new section 246E must assist decision-makers to properly apply the reasonable person test and avoid an unnecessarily cautious approach, having regard to existing case law of other jurisdictions. Following *VQB*, this would include that the test is to be objectively applied, gives the applicant an opportunity to be heard, and has regard to all the relevant facts before the decision maker.

Negative notice processes

20. Under the Bill, where BCS is minded to issue a negative notice, they must first give the applicant an opportunity to make submissions (**show cause process**).¹²
21. A negative notice means that an applicant may be:
 - (a) restricted from work opportunities, limiting the capacity to develop and establish meaningful social relations and to experience a private life,

⁹ See eg *CHB v Children’s Guardian* [2016] NSWCATAD214 [127].

¹⁰ *Secretary to the Department of Government Services (Review and Regulation)* [2024] VCAT 90 [85].

¹¹ Criteria for assessing risk is set out in paragraphs 22 and 23 of the *National Standards for Working with Children Checks* (November 2009).

¹² Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new sections 235 - 237).

protected by the right to privacy. The right to have access to the public service and to public office could also be engaged;

- (b) prevented from living in a kinship care household, limiting rights to family and children;
 - (c) prevented from fulfilling culturally significant roles, limiting cultural rights generally and cultural rights of Aboriginal peoples and Torres Strait Islander peoples.
22. Once a negative notice is issued, the applicant is prevented from making a further application for a blue card until the notice is cancelled.¹³ Generally, a person can only apply to cancel a negative notice after 3 years.¹⁴ This is an increase from 2 years under the WWC Act.¹⁵ While a right of appeal to QCAT exists, appeal processes can be complex and can take some time.
23. Given the potentially significant restrictions on rights for applicants, the Commission submits that the current show cause processes should be strengthened to provide applicants with a reasonable opportunity to present their case by knowing the case made against them.

Notices should include the information upon which BCS makes its decision

24. A notice inviting submissions under new section 236 must include the 'assessable information' of which BCS is aware, the legal test BCS is to apply in deciding the application, and invite the applicant to make submissions.
25. Assessable information is defined as: police information, domestic violence information, disciplinary information; adverse interstate WWC information; and other information about the person that the chief executive reasonably believes is relevant to deciding whether the person poses a risk to the safety of children.¹⁶
26. If there is no assessable information, then BCS must approve an application for a blue card.¹⁷ Where there is assessable information, generally, the BCS conducts a risk assessment.¹⁸

¹³ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 238).

¹⁴ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 240) and *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 304G (amended by cl 73).

¹⁵ *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 304G.

¹⁶ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 220).

¹⁷ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 227).

¹⁸ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new sections 228 to 229).

27. The information BCS considers in conducting a risk assessment does not expressly refer to 'assessable information' and may be broader than 'assessable information'. Under new section 232, BCS must consider: information it has obtained for the purpose of dealing with the application, any advice or recommendations of an advisory committee, and any advice of an appointed expert advisor.¹⁹ This could mean that providing applicants with the 'assessable information' of which BCS is aware in a show cause notice is not comprehensive of all the information BCS has considered in making its decision. For example, it may not include the advice of an advisory committee or expert advisor.
28. The Commission submits that notices inviting an applicant to make submissions under section 236 include all the information upon which the chief executive relies in proposing to issue a negative notice.

Notices should include provisional reasons

29. BCS is not required to provide the applicant with provisional reasons as to why it proposes to refuse the application, although ultimately, a negative notice must include reasons for a decision.²⁰
30. It is not enough, in the Commission's view, to know only the information being considered by BCS to make their decision without BCS's analysis of the information. Providing provisional reasons at this stage should not significantly increase the work of BCS given that reasons must be provided with a negative notice. Provisional reasons may facilitate a more thorough examination of the issues, improving the quality of decision making and hopefully reducing appeals to QCAT.
31. For these reasons, the Commission submits that a notices to the applicant under section 236 include provisional reasons of why BCS considers the person poses a risk to the safety of children.

Minimum timeframes for submissions should be longer than 7 days

32. The show cause notice must state the period within which a person may make submissions, of at least 7 days.²¹ While a minimum time frame only, 7 days would be insufficient for people living in rural and remote areas who rely on postal services for communication to comply with. It may also be difficult for people with literacy or language difficulties, or who require advocacy assistance, to comply with.

¹⁹ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 232).

²⁰ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 cl 56 (new section 246H(b)).

²¹ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 236(1)(d)).

33. There is no explanation for the 7 day timeframe in the Explanatory Notes or Statement of Compatibility. One reason may be to enable expeditious cancellation of blue cards under Part 5A of the WWC Act. However, given increased powers to suspend blue cards under the Bill, it is unclear why a short timeframe might still be justified.
34. The timeframe is ameliorated to an extent by the ability of an applicant to provide their submissions orally.²²
35. However, having regard to the significant impacts a negative notice can have on a person's human rights set out above, the Commission recommends extending the minimum timeframe in which applicants may make submissions in relation to a proposed negative notice. Alternatively, the Bill could adopt the wording of section 229(3) of the WWC Act which provides 'The stated time must be reasonable and, in any case, at least 7 days after the chief executive gives the notice to the person'.

Advisory committees

Regulations and policy on advisory committees must consider cultural safety

36. The Bill provides for the establishment of advisory committees and the appointment of expert advisors.²³ In assessing risk, BCS considers the advice or recommendations of the advisory committee, or advice of the expert advisor.²⁴
37. Advisory committees will be critical to properly assessing 'the effective of systemic disadvantage and intergenerational trauma' and the 'historical context and limitations on access to justice' for Aboriginal and Torres Strait Islander applicants, which are mandatory considerations in assessing risk under new section 234(2)(g).
38. The membership and operation of advisory committees may be dealt with in regulation.²⁵ The regulation, and any other policy on advisory committees, will need to ensure the cultural safety and capability of committees reviewing applications made by Aboriginal and Torres Strait Islander applicants, having regard to the cultural rights of Aboriginal people and Torres Strait Islander people protected by section 28 of the Human Rights Act.

²² Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 237(b)).

²³ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new sections 241 to 246D).

²⁴ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 232).

²⁵ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 56 (new section 246A).

Risk assessment guidelines

Risk assessment guidelines must be subject to human rights scrutiny

39. Under new section 246E, the chief executive must make guidelines about how a risk assessment is conducted. The guidelines are statutory instruments within the meaning of the *Statutory Instruments Act 1992* but are not subordinate legislation. The guidelines will have a significant role in ensuring that the policy objectives of the Bill are met and that implementation is compatible with human rights.
40. As it is not subordinate legislation, there is no requirement for the Minister to prepare a human rights certificate under section 41 of the Human Rights Act.
41. As a statutory instrument, the guidelines would fall subject to section 48 of the Human Rights Act and must be interpreted, to the extent possible that is consistent with their purpose, in a way that is compatible with human rights.²⁶
42. However, the guidelines may arguably be considered of a legislative character and therefore outside the scope of the chief executive's obligations as a public entity under section 58(1) of the Human Rights Act.²⁷ If that is the case, the guidelines will bypass scrutiny mechanisms established by the Human Rights Act in relation to parliamentary processes and public entity conduct.
43. Additionally, section 58(2) of the Human Rights Act provides an exception to public entity obligations if the entity could not reasonably have acted differently or made a different decision because of a 'statutory provision'. It follows that where the guideline does not allow for discretion, decision-makers acting in accordance with the guideline will not have obligations under section 58(1) of the Human Rights Act to act compatibly with human rights or give proper consideration to human rights when making decisions.
44. A similar situation arose in relation to public health directions made by the Chief Health Officer under emergency provisions of the *Public Health Act 2005* in response to the COVID-19 pandemic. This issue was ultimately addressed by amending the *Public Health Act 2005* to require publication of a justification statement for public health directions, akin to a statement of compatibility, and providing for parliamentary scrutiny of public health directions, including the power to disallow the direction.²⁸
45. The Commission recommends that the legislation clarify how risk assessment guidelines are subject to human rights scrutiny, for example, by making the guidelines subject to parliamentary processes or expressly confirming that the

²⁶ *Human Rights Act 2019* (Qld) Schedule 1 (definition of 'statutory provision').

²⁷ See *Kerrison v Melbourne City Council* [2014] FCAFC 130.

²⁸ *Public Health and Other Legislation (COVID-19 Management) Amendment Act 2022* (Qld) s 9 (new sections 142H and 142L).

making of guidelines is subject to obligations under section 58(1) of the Human Rights Act.

Suspension of blue cards

Expansion of suspension powers should be subject to additional safeguards

46. BCS may currently suspend a blue card where a person is charged with a serious or disqualifying offence, a teacher's registration is suspended, or an interstate blue card has been suspended or an interim bar imposed.²⁹
47. The Bill expands these categories to include where BCS becomes aware of new assessable information about a person holding a blue card that warrants a reassessment of their risk, and BCS considers that allowing the person to hold a blue card while a risk assessment is pending they would pose a risk to the safety of children.³⁰ Currently, upon receiving new information, BCS can only cancel a blue card and issue a negative notice after show cause processes have been followed. The blue card holder maintains the blue card during this period.³¹
48. Suspension of a blue card can mean the loss of income, affect families, or interfere with cultural practice. Reputational damage could also occur. Under the Bill, a person may apply to end the suspension after 6 months, however, there is otherwise no other timeframe imposed upon BCS upon which to make a decision on the suspension.³² Suspension of a blue card can therefore have significant ramifications for individuals without having had the opportunity to be heard and with limited options for review to QCAT.³³
49. The purpose of the amendments is to 'increase protections for children by enabling the chief executive to take swift and decisive action to remove a cardholder from child related activities, if necessary.'³⁴ The amendments take 'a precautionary approach in recognition of the vulnerability of children and to ensure children are safe from harm'³⁵

²⁹ *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 295.

³⁰ *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024* (Qld) cl 60.

³¹ *Working with Children (Risk Management and Screening) Act 2000* (Qld) ss 304 and 304A.

³² *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024* (Qld) cl 64 (new section 300A).

³³ A suspension decision is only reviewable if a person has applied to end the suspension and the chief executive has decided to continue the suspension, and the person claims they are not the subject of the offence, action or other information that has triggered the suspension: cl 106 (new section 353).

³⁴ Explanatory Notes, *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024* (Qld) 6.

³⁵ Explanatory Notes, *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024* (Qld) 23.

50. The Statement of Compatibility considers this approach is less restrictive than moving immediately to cancel the blue card, while still mitigating risks to children. It notes in particular that the suspension power can only be exercised if the chief executive considers, based on the new information, there is a risk to the safety of children if the person was permitted to engage in child-related activities while the reassessment is conducted³⁶
51. The amendments provide BCS with time to assess risk and comply with negative notice processes, while managing any real and appreciable risks to children in light of new information. The Commission submits that additional safeguards are needed to justify the significant limitation of rights that could result from the expansion of the suspension powers. Some of examples of this could be:
- (a) By only allowing suspension where negative notice processes have been or will be commenced within a prescribed timeframe.
 - (b) Having mechanisms to allow persons to challenge the information upon which the suspension is based as wrong or incomplete as soon as possible.
 - (c) Reducing the 6 month waiting period to apply to end the suspension.

Information sharing with BCLOs

Sharing of information with BCLOs should be subject to consent

52. Amendments to section 344A of the WWC Act allows BCS to share information about a person with Blue Card Liaison Officers (**BCLOs**). This can include information about a blue card application made by the person or a blue card or negative notice held by the person.³⁷
53. According to the Explanatory Notes, BCLOs are individuals in First Nations communities, who are not employees of the department, providing advice and assistance to applicants and organisations, assist with blue card applications and processes, and make targeted referrals to culturally appropriate support services.³⁸
54. The Explanatory Notes indicate that impacts to individual privacy and confidentiality are justified because they are necessary to enable the BCLO to effectively discharge their role. It is further noted that information sharing to

³⁶ Statement of Compatibility, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) 14.

³⁷ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 100.

³⁸ Explanatory Notes, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) 18.

BCLOs will be subject to confidentiality provisions and limitations on the use of information they receive.³⁹

55. The Commission submits that the purpose of information sharing with BCLOs could still be achieved if the person the subject of the information is first asked for permission to share the information. This is less restrictive of the right to privacy and better aligned with the role of BCLOs to provide culturally appropriate assistance to applicants.

Transparency of data for research

Deidentification of information shared for research should not be mandatory

56. The Bill allows genuine researchers to access de-identified data about the blue card system to improve its transparency.⁴⁰
57. De-identifying data to comply with the provision may be resource intensive or impossible depending on the type of data sought to be accessed. A blanket, mandatory requirement to de-identify data could therefore frustrate the goal of identifying system improvements and increasing public confidence and transparency.
58. The right to privacy is already safeguarded by restricting who may access the data and for what purpose, and by enabling the chief executive to impose conditions on the use of the data, which carry a penalty if not complied with. Privacy could be further safeguarded by prohibiting the publication of data that identifies an individual.
59. While information shared for research purposes should be de-identified wherever possible, it is appropriate for the chief-executive to have discretion over whether information shared for research purposes is de-identified or not. Where data is not de-identified, the chief executive must ensure sufficient safeguards are in place to protect individual privacy.

³⁹ Explanatory Notes, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) 10, 19.

⁴⁰ Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (Qld) cl 117 (new section 398B).