



Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020

Submission
to

Queensland Parliament
Health, Communities, Disability Services and
Domestic and Family Violence Prevention Committee

6 July 2020

Introduction

1. Thank you for the opportunity to make a submission on the Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020 (**the Bill**).
2. The Queensland Human Rights Commission (**the Commission**) has functions under the *Anti-Discrimination Act 1991* (Qld) and the *Human Rights Act 2019* (Qld) (**HR Act**) to promote an understanding and discussion of human rights in Queensland, and to provide information and education about human rights.
3. The Commission acknowledges the important purpose of this Bill to provide for nationally consistent worker screening for National Disability Insurance Scheme (**NDIS**) and State funded disability service providers as one measure to protect people with disability from violence, abuse, neglect and exploitation.
4. The Commission further acknowledges that many of the clauses in the Bill are in implementation of the Intergovernmental Agreement on Nationally Consistent Worker Screening for the NDIS, itself a result of the NDIS Quality and Safeguarding Framework endorsed by the Council of Australian Governments.
5. In this submission, the Commission has not considered the human rights implications of every provision of the Bill, but rather seeks to draw the Committee's attention to two broad issues: the impact on Aboriginal and Torres Strait Islander people, and the right to privacy. Unless otherwise specified, references to sections of legislation are references to new sections of the *Disability Services Act 2006* (Qld) proposed by the Bill.

Relevant human rights

6. The human rights of people with disability protected by the proposed amendments include the rights to recognition and equality before the law, to life, and to protection from torture and cruel, inhuman or degrading treatment.
7. However, the rights of those seeking to work with people with disability are also impacted. As identified by the statement of compatibility, these are rights to recognition and equality before the law, fair hearing, privacy (accepting that this may encompass the right to work), and property. This submission also notes the relevance of the cultural rights of Aboriginal people and Torres Strait Islander people.

Impact on Aboriginal and Torres Strait Islander people

8. The barriers for Aboriginal people and Torres Strait Islander people in accessing working with children checks under the *Working with Children (Risk Management and Screening) Act 2000* (**blue cards**) have been well examined.¹ These include:
- a. lack of personal identification;
 - b. decision making based on document-based information received from the applicant;
 - c. problems with delayed and missing post in rural, regional and remote areas;
 - d. discouragement from applying due to misunderstanding of eligibility criteria, lack of culturally appropriate information, literacy and language barriers, daunting paperwork, rigid timeframes for response, and lack of support at every stage of the process;
 - e. costs and challenges to engage in the review and appeal processes; and
 - f. decision making that does not take into account:
 - i. any relevant cultural aspects of the applicant,
 - ii. any input from the local community; and
 - iii. the positive impact employment of an individual can have on the community, or on the child.
9. These issues may also present a barrier for applicants for disability worker screening, although there are some improvements to decision-making proposed by the Bill that are described below. The Bill creates additional impediments by requiring both a disability worker screening check and a blue card for people wishing to work with children with disability. While there is provision for joint application processes (section 67), there will still be two separate screening units, applying different tests, and potentially

¹ See for example: Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (Jun 2013); Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd submission to the Education, Employment and Small Business (EESB) Committee, *Working with Children Legislation (Indigenous Communities) Amendment Bill* (12 Dec 2018); and Queensland Family & Child Commission, *Keeping Queensland's children more than safe: Review of the blue card system* (Jul 2017).

seeking different information, increasing complexity and reducing accessibility of the process.

10. Aboriginal and Torres Strait Islander people may therefore be delayed or prevented from working. This can have negative impacts on already thin markets for disability service providers in rural and remote areas, and can increase the risk of abuse and neglect for people with disability. It also exacerbates problems with sourcing culturally appropriate supports for First Nations people.
11. NDIS participants who self-manage can elect to have non-registered NDIS service providers who are not required to have a disability worker screening check. While this could alleviate some of the problems described above, and appears to support choice and control of NDIS participants, there is the potential to force people with disability into care arrangements with uncleared workers where there is limited choice, increasing the risk of harm and abuse the Bill is designed to reduce.
12. The Statement of Compatibility (at page 5) comments on the issues faced by Aboriginal and Torres Strait Islander people only to the extent that they may experience delays if they do not have access to the internet or possess personal identification.

Improvements in decision-making

13. Under the Bill, the test for clearance, in cases where there is some trigger for assessment that does not involve a disqualifying or serious offence, is whether the applicant poses an 'unacceptable risk of harm to people with disability'. (section 92) The threshold of 'unacceptable risk' is satisfied if there is 'a real and appreciable risk that the person might cause harm to people with disability', and 'without needing to be satisfied it is likely the person will cause the harm'.(section 93(2)(b)) Under section 94(2), the chief executive must have regard to:
 - (a) the nature, gravity and circumstances of the person's offending conduct;
 - (b) how the person's offending conduct is relevant to disability work;
 - (c) how long ago the person's offending conduct occurred;
 - (d) if the person's offending conduct was committed against another person (the victim)—
 - (i) the victim's vulnerability at the time of the conduct; and
 - (ii) the person's relationship to, or position of authority over, the victim at the time of the conduct;

- (e) whether the person's offending conduct indicates a pattern of concerning behaviour;
 - (f) the person's conduct since the offending conduct;
 - (g) any other circumstances relevant to the person's offending conduct.
14. The requirement to consider 'risk of harm' rather than an 'exceptional case in which it would not be in the best interests of people with a disability' (as currently required by section 54(4) of the *Disability Services Act*) better reflects the purpose the provision is trying to achieve. Further, the proposed provisions clearly allow for consideration of the person's current protective factors since the conduct of concern, such as the assumption of responsibility, remorse, positive steps taken to address the conduct, and testaments to character, values and ability to do the job. This is important to ensuring the regime is the least restrictive way to achieve the purpose of the worker screening check.
15. Under section 58(1) of the HR Act, the chief executive is also required to make decisions that are compatible with and give proper consideration to human rights. This includes consideration of the cultural rights of Aboriginal people and Torres Strait Islander people under section 28 of the HR Act and ensuring procedural fairness so that the applicant has a reasonable opportunity to present their case under section 31 of the HR Act. The screening unit would benefit from the employment or consultation of Aboriginal people and Torres Strait Islander people, to inform culturally appropriate decision making.

Other recommendations

16. Other barriers for Aboriginal and Torres Strait Islander applicants may not be a matter for legislation to resolve, but must be a priority in supporting regulations and policy implementation.
17. One matter for further consideration by the Committee is harmonizing the test for blue cards, in view of the improvements to the test for disability worker screening checks outlined in paragraphs 13 and 14 above, as well as reducing complexity and delay for applicants in need of both checks.

Privacy

18. The information that can be obtained by the chief executive to conduct a worker screening check is extremely broad and can contain sensitive information about criminal matters, police investigations, disciplinary information, and mental health. Information about a worker screening

application can then be shared with other agencies, such as Blue Card Services (section 138ZG), interstate NDIS worker screening units or working with children screening units (section 138ZH), funded or NDIS service providers (section 138ZK), and the NDIS Quality and Safeguards Commission (section 138ZI).

19. Under section 25 of the HR Act, a person's privacy is protected from unlawful or arbitrary interference. Interference can be arbitrary, even if provided for by law, if it is 'unreasonable, unnecessary and disproportionate.'² If interference is found to be arbitrary, then it is also likely to limit rights in a way that cannot be demonstrably justified as required for compatibility under section 13 of the HR Act.
20. The collection, use and sharing of information in the course of a worker screening application is an interference with the applicant's right to privacy. The interference may be for the legitimate purpose of protecting the safety of people with disability and of children, and, in relation to sharing information with Blue Card Services, service efficiency. However, failure of privacy protections can result in serious harm to the applicant such as reputational damage and defamation, biased decision making, and unfair loss of work opportunities.
21. Factors relevant to whether the framework is an arbitrary interference with privacy, and similarly, whether it is compatible with human rights, include:
 - a. adequate protections for the secure management and storage of information, including effective sanctions for unlawful use or disclosure of information;
 - b. duration of storage and destruction protocols when the information is no longer required for the purpose for which they were stored;
 - c. express limits on the use and disclosure of information, only to the extent that is necessary to achieve the purpose of the legislation;
 - d. consent obtained from the applicant to share the information; and
 - e. requirements to make reasonable attempts to confirm with the applicant the accuracy of the information received before use or disclosure.

² Human Rights Bill 2018 Explanatory Notes, p 22.

Recommendations

22. Positive obligations are placed on government and other agencies to take reasonable steps to protect personal information and safeguard against misuse under the under the *Information Privacy Act 2009* (Qld) and the *Privacy Act 1988* (Cth).
23. Protection is also provided by the offence provisions of the Bill. It is an offence for a present or past employee of the department to use, disclose or give access to obtained information unless otherwise permitted under the Act (section 227). Section 138ZL restricts the use of information received by a funded or NDIS service provider under section 138ZK. Additional protections in relation to mental health information is provided for in sections 138ZA to 138ZE.
24. The Committee however, should consider the sufficiency of these protections, particularly in relation to NDIS providers who may not be within the scope of privacy legislation.
25. Provisions such as section 138ZK allow the chief executive to disclose ‘a State disability worker screening application made by the person’ to a funded or NDIS service provider. It is unclear what this information might encompass, and there is no limitation defined, such as only to the extent ‘the chief executive reasonably believes...is relevant to the functions’ of the receiver.³ The lack of clear limits around information sharing risks the legislation being incompatible with human rights or the chief executive deciding or acting incompatibility with human rights.
26. The Statement of Compatibility provides that consent ‘will be sought for the sharing of this information at the time of an application’ (at page 18), however this is not provided for in the Bill. For example, it could be included at section 68 regarding the form of application, which already requires the applicant to consent to being screened.
27. An applicant has an opportunity to respond to inaccurate information by responding to a ‘show cause’ notice under section 95. However, information may be shared with other entities without that clarifying information, potentially leading to unfair outcomes for the applicant.
28. Under section 138ZP, the chief executive must make guidelines for dealing with information the chief executive obtains in the course of the

³ See for example section 138ZG(1) ‘The chief executive may give information about a person to the chief executive (working with children) if the chief executive reasonably believes the information is relevant to the functions of the chief executive (working with children) under the Working with Children Act.’

worker screening check. There are also provisions which allow for the establishment of information sharing arrangements⁴ to facilitate information sharing. Some of the privacy issues noted above could be incorporated into these guidelines and agreements to assist with compliance with human rights. It is important that they are made publicly available for transparency.

Conclusion

29. Like blue cards, the disability worker screening check is only one tool in a broader system for reducing the risks of harm to people with disability. As acknowledged by the NDIS Quality and Safeguards Commission:

Worker screening is only one of a range of strategies registered NDIS providers need to put in place to identify and minimise risk of harm to people with disability. Registered NDIS providers must also actively promote a culture that does not tolerate abuse, neglect or exploitation, and focuses on continuous upskilling, education and training for workers.⁵

30. While worker screening is important, the Commission warns against placing too much focus in the check at the expense of other important safeguards such as independent oversight, advocacy, service provider training and support, and effective sanctions against individuals that cause harm. This is particularly important having regard to the extended 5 year renewal period for NDIS clearance holders.
31. In this submission, the Commission has also recommended further consideration be given to:
- a. the structural barriers imposed by the Bill for Aboriginal and Torres Strait Islander applicants, and consequently the impacts on Aboriginal and Torres Strait Islander people with disability. Addressing this concern may be in the drafting of the amendments, in the statement of compatibility, in supporting regulations and/or policy implementation.

⁴ For example: section 138ZN ('Arrangements with chief executive (working with children) about asking for and giving information'); section 138ZO ('Arrangements with police commissioner or other entity about asking for and giving information'); and section 138ZI ('Giving information to NDIS Commission')

⁵ NDIS Quality and Safeguards Commission, *Worker screening requirements (NDIS registered providers)* (Web Page) <<https://www.ndiscommission.gov.au/providers/worker-screening>>

- b. whether the test for blue card screening should be made consistent with the disability worker screening check, to reduce complexity and delay for applicants in need of both checks.
- c. the sufficiency of privacy protections for the collection, use and sharing of information obtained for worker screening checks by government entities and NDIS service providers, in view of the significant harm that can be caused to applicants if their right to privacy is breached.