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.

[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