



Working with Children (Indigenous Communities) Amendment Bill 2021

Submission to Legal Affairs and Safety Committee

22 November 2021

Contents

Summary	2
Purpose of the Bill	3
Application of human rights to the current framework	5
Expanded police information.....	6
The proposed framework	7
Effect of transferring decision making authority.....	8
A tiered approach to approvals.....	9
Other potential reforms	11
Conclusion.....	11

Summary

1. The Queensland Human Rights Commission (the **Commission**) agrees that the current framework for decision making under the *Work with Children (Risk Management and Screening) Act 2000* (Qld) (**WWC Act**) requires reform. The Act requires that to work or volunteer with children in Queensland, a person generally needs to be issued a working with children clearance (known as a **Blue Card**). In considering the proposed framework of the Bill, including the proposed new role for Criminal Justice Groups (**CJGs**) the Commission submits that:
 - (a) The current Blue Card system disproportionately disadvantages Aboriginal and Torres Strait Islander applicants and limits their human rights.
 - (b) The Commission is supportive of any community-led approaches to better address barriers for Aboriginal peoples and Torres Strait Islander peoples in accessing Blue Cards.
 - (c) The Commission recommends further consultation is needed to ascertain Aboriginal and Torres Strait Islander people's attitudes across Queensland, and whether they agree the change proposed by the Bill will be effective.
 - (d) The Bill focuses on applicants seeking Blue Cards for the purposes of employment. The system however also significantly impacts people seeking Blue Cards for the purpose of being foster and kinship carers. Proposed reforms should seek to address both these issues.
 - (e) Further careful consideration needs to be given to the potential issues raised by the role of CJGs in the proposal, including their

obligations, resourcing and capacity, and requires further consultation.

- (f) The Commission recommends consideration of a more flexible and nuanced approach to Blue Card approvals, which would allow for greater consideration of human rights without risking safety.

Purpose of the Bill

2. The Explanatory Notes to the Bill state the objective is to provide a 'framework that empowers indigenous communities to make decisions which best serve their interests in relation to child protection and employment of community members' in order to combat the limitations and rigid nature of the Blue Card system. It goes on to say that 'it is imperative that legislative framework in Queensland recognises the different circumstance of remote indigenous communities and supports the process for job seekers in indigenous communities whilst protecting the interests of children'.¹
3. Current limitations of the Blue Card system are outlined in the Explanatory Notes as follows:
 - There is no mechanism to allow the local community to have input into the issuing of Blue Cards for employment in that community;
 - No mechanism exists that recognises behavioural improvements and the positive impact employment of an individual may have on the community;
 - The current application process has no set timeframe for the issuing of a Blue Card for individuals in indigenous communities, which creates a significant barrier to accessing employment;
 - The current application process does not allow an applicant to undertake work during the application process, even if it can be determined that the individual poses no risk to the safety of children. This can often result in the loss of long-term employment opportunities.²
4. In addition, during the Public Briefing, it was noted that people who identify as Aboriginal and Torres Strait Islander account for five per cent of total blue card applicants but make up 22 per cent of rejected applicants. This may be an underreported problem, as anecdotal evidence was also

¹ Explanatory Notes, Working with Children (Indigenous Communities) Amendment Bill 2021 (Qld), 1.

² Ibid 1-2.

provided that many Aboriginal and Torres Strait Islander don't even apply for Blue Cards due to these barriers.³

5. The Bill proposes to overcome these limitations by creating a framework that enables the local CJG to make a binding recommendation to the chief executive to issue a *restricted working with children clearance* to an individual for work within that community. This approval may be given even if the individual would be issued a negative notice by the chief executive due to specific serious offences (that are not sexually based offences).
6. CJGs are statutory bodies that are located in around 40 different communities throughout Queensland. CJGs deliver a number of core court related activities and services aiming to reduce crime, address recidivism, provide crisis support and promote community wellbeing and healing.

Relevant aspects of the current framework

7. Under the current framework, the chief executive has the power to approve or refuse a Blue Card application.⁴ A Blue Card application may be refused for the following reasons:
 - The applicant is a relevant disqualified person, that is, has been convicted of a disqualifying offence, or is subject to offender reporting obligations, an offender prohibition order (or subject to an application for an offender prohibition order), a disqualification order, or a sexual offender order;
 - The applicant was previously a relevant disqualified person or has been convicted of a serious offence, unless exceptional circumstances exist;
 - There is investigative information, disciplinary information, charges, a conviction (other than for a serious offence), or other relevant information, and it is an exceptional case where it is *not* in the best interests of children to issue the Blue Card.⁵
8. The Bill primarily deals with applicants who may be refused a Blue Card due to a previous serious offence.

³ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021*, Brisbane, 25 October 2021, 2 (Robbie Katter MP).

⁴ *Working with Children (Risk Management and Screening) Act 2000* (Qld) s 220.

⁵ *Working with Children (Risk Management and Screening) Act 2000* (Qld) Chapter 8, Pt 4 Div 9.

Application of human rights to the current framework

9. Any legislation that regulates the ability of members of the community to participate in various areas of public life, including employment and the care of children will require a balancing of rights and interests.
10. The current Blue Card assessment process potentially limits rights protected under the *Human Rights Act 2019* (Qld) (the **HR Act**) including:
 - families and children (section 26) – a person unable to get Blue Card is unable to become a foster or kinship carer;
 - privacy and reputation (section 25) – a person unable to get a Blue Card is prevented from working with children and may be unable to obtain employment; significant personal information is also required and shared through the Blue Card process;
 - Aboriginal People and Torres Strait Islander People cultural rights (section 28) – particularly where a person is unable to pass on cultural knowledge and beliefs. This right is also relevant to the consideration of culture in the decision making process;
 - equality and recognition before the law (section 15) – a person should not be unreasonably or disproportionately affected because of an attribute a person has.
11. Limitation of those rights can be justified if they are legitimate, necessary and proportionate.⁶ In this case, the rights of children (section 26), and their rights to life (section 16) and to be safe (section 29), provides a significant legitimate purpose to factor into assessments of proportionality.
12. However, as the Explanatory Notes state, the current process for assessing applications creates significant barriers facing Aboriginal and Torres Strait Islander people that may not be able to be adequately justified. These barriers include: that many live in rural and remote areas, the lack of culturally appropriate services and support through the application process, the current risk assessment framework, and the significant impact the system has on the critical need for indigenous and kinship carers. Many of these issues were discussed further by the introducing Member, Mr Robbie Katter MP, Member for Traeger during the Public Briefing.⁷

⁶ *Human Rights Act 2019*, s 13.

⁷ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021*, Brisbane, 25 October 2021 (Robbie Katter MP).

13. The Commission submits that in assessing these barriers, it is important to consider that a Blue Card is also only one tool in the broader system for keeping children safe and does not guarantee that children will be safe from harm when interacting with people who hold Blue Cards.⁸ Mr Katter noted in his evidence that reforms to the present system may actually improve the outcomes for children in remote and regional areas.⁹
14. The Commission agrees reform is needed, and is supportive of any community-led approaches to better address barriers for Aboriginal and Torres Strait Islander peoples in accessing Blue Cards, provided that the framework can be demonstrated to achieve the overall purpose of child safety.

Expanded police information

15. While not addressed in this Bill, related reforms to the Blue Card process are relevant to any efforts to make the system fairer. The Child Protection Reform and Other Legislation Amendment Bill 2021, presently before the Parliament, amends the WWC Act to provide for additional information to be considered through the approval process. The changes proposed include enabling the “the chief executive (working with children) to request domestic violence information from the police commissioner”.¹⁰
16. In its submission to the Community Support and Services Committee’s Inquiry into that Bill, Sisters Inside Inc suggested that seeking additional information “would only aggravate the exclusionary and discriminatory effects of the WWC Act”. In the experience of Sisters Inside, “virtually any prior criminal history is considered grounds to deny an individual a positive WWCC”.¹¹ In its submission, PeakCare was supportive of the intent of the provision but submitted that it does not address the broader systemic issue relating to the current criminal history screening approach

⁸ Queensland Family & Child Commission *Keeping Queensland’s children more than safe: Review of the blue card system* (Report, 2017) 5-7.

⁹ ‘I believe there is not a strong, but a very strong need for this. We have tipped the scales far too much in the name of safety to create unintended consequences that I would argue have made things less safe in the home through increased violence, alcohol and substance abuse because of lack of access to work through these blue cards, and this bill seeks to change that.’ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021*, Brisbane, 25 October 2021, 3 (Robbie Katter MP).

¹⁰ Explanatory Notes, Child Protection Reform and Other Legislation Amendment Bill 2021, 25

¹¹ Sisters Inside Inc, Submission No 2 to Community Support and Services Committee, *Child Protection Reform and Other Legislation Amendment Bill 2021* (29 September 2021), 2.

particularly the impact the system was having on the long-term stability and care for children and young people in the child protection system.¹²

The proposed framework

17. The Bill proposes to create a framework that enables CJGs to exercise its judgment, based on the knowledge of the specific circumstances and individual involved, to issue a binding recommendation to the chief executive to issue a *restricted working with children clearance*, where a negative notice would have been issued by the chief executive due to previous serious offences being committed by the applicant. The types of serious offences that can be considered under the new framework are limited to the following:
 - Criminal Code offences:
 - Sections 409, 419 and 427, which relate to stealing with violence, burglary and unlawful entry of a vehicle;
 - Drugs Misuse Act offences
 - Sections 5, 6, 8 and 9D, which relate to trafficking dangerous drugs, supplying dangerous drugs, producing dangerous drugs and trafficking in relevant substances or things.”
18. The Bill further limits applications of the *restricted working with children clearance* to only be used in the specific community area. This Bill does not affect disqualifying offences and only proposes to have discretion over seven of the 41 existing ‘serious offences’.
19. The first reading speech and Explanatory Notes outline the extent of consultation undertaken. The first reading speech provides anecdotes of community members and the Explanatory Notes states the extent of the consultation being with “key stakeholders, most importantly,
 - Community leaders;
 - Law enforcement; and
 - Judicial representatives”¹³
20. However, it is unclear if the proposal put forward in this Bill will achieve its aim of overcoming the current barriers faced by Aboriginal and Torres Strait Islander peoples, and if the proposals have broad support across the community. In particular, it is unclear to what extent all CJGs across

¹² Peak Care Queensland Inc, Submission No 12 to Community Support and Services Committee, *Child Protection Reform and Other Legislation Amendment Bill 2021* (1 October 2021), 6.

¹³ Explanatory Notes, *Working with Children (Indigenous Communities) Amendment Bill 2021*, 6.

Queensland have been consulted. During his evidence, Mr Katter acknowledged this when asked about how all CJGs might react:

It is a good question; there will be some that probably will be reluctant to do it—it is another responsibility that they may not want—but I would argue that the communities better grow up and start trying to advance themselves and help their own people because there are some big problems there.¹⁴

21. Therefore, further consultation may be necessary to ascertain Aboriginal and Torres Strait Islander people’s attitudes across Queensland, and whether they agree such change will be effective. With over 40 CJG programs in operation around Queensland and the outer islands of the Torres Strait further consultation is recommended. There is also a current evaluation of the CJG program, led by Dr Michael Limerick and Dr Heron Loban from Myuma Pty Ltd which will run until December 2023 which may be directly relevant to the application of this Bill and worth further consultation. Nonetheless, the Commission also notes Mr Katter’s evidence that this idea originated from the Mornington Island CJG.¹⁵

Effect of transferring decision making authority

22. The proposed framework effectively provides for CJGs, in some circumstances, to issue restricted Blue Cards. The Statement of Compatibility states that the proposal does not unreasonably limit sections 26 and 25 of the HR Act, that is, the protection of families and children and the right to privacy and reputation. The Statement of Compatibility proposes that a decentralised process can equally protect the rights of a child as it will also operate under the *Working with Children (Risk Management and Screening) Act 2000* and sexual based offences or offences involving children is not under the proposed jurisdiction of the Bill.
23. Nonetheless, during the Public Briefing, Mr Katter acknowledged that the Bill might create ‘two rules in Queensland’ for Blue Card applications and that it might ‘be viewed as a paternalistic type attitude’.¹⁶ On this basis, the proposal may also limit the right to equality in section 15 of the HR Act in that it treats Aboriginal and Torres Strait Islander peoples’ Blue Card

¹⁴ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021*, Brisbane, 25 October 2021, 5 (Robbie Katter MP).

¹⁵ Ibid 3.

¹⁶ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021*, Brisbane, 25 October 2021, 2-3 (Robbie Katter MP).

applications differently. This is not discussed in the Statement of Compatibility.

24. However, section 15(5) of the HR Act acknowledges that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. The barriers already noted for Aboriginal and Torres Strait Islander peoples may constitute special measures set out in section 15(5). It is also relevant that the idea of the revised framework was suggested by members of the community.
25. To further address the limitation on rights, the Commission suggests there would be value in clarifying the role of CJGs in fulfilling this function including:
 - Any new administrative or legal obligations that would apply, including to give proper consideration to human rights as a public entity under the HR Act;
 - To what extent their decision is reviewable, including within the current Blue Card merits review system.
26. Anecdotally, the Commission has also heard concern regarding management of potential and perceived conflicts of interests within communities. Due to the diversity of Queensland's indigenous communities, broader consultation in such matters will enable a diverse and considered approach to the proposed Bill.
27. Careful consideration should also be given to how CJGs will be sufficiently resourced and supported, in view of the significant new responsibilities the Bill would place on them.

A tiered approach to approvals

28. The Bill provides for CJGs to issue a restricted working with children clearance which would only be valid in the specific community area as defined by the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*. This aims to allow "the holder to work only in the specific community to which the *restricted working with children clearance* relates."¹⁷ The Commission sees merit in this approach and suggests to further address the barriers faced by Aboriginal and Torres Strait Islander Peoples, a conditional approval process could be extended beyond that suggested in the Bill.

¹⁷ Explanatory Notes, Working with Children (Indigenous Communities) Amendment Bill 2021, 3.

29. In reviewing Blue Card decisions, the Queensland Civil and Administrative Tribunal (**QCAT**) has noted that once a Blue Card is granted, it is unconditional and fully transferrable to all areas of employment and care of children. This observation has been made in decisions concerning decisions of the chief executive to refuse a Blue Card because the applicant's case is 'exceptional' within the meaning of section 221(2) of the *Working with Children (Risk Management and Screening) Act 2000*. The Act does not define an exceptional case. It is a matter of fact and degree to be decided in each case having regard to the interests of children.¹⁸ Determining whether an exceptional case exists involves the exercise of discretion.¹⁹

30. As the Tribunal has observed, to issue a negative notice in such circumstances it:

...must consider matters which strongly suggest it is not in the best interests of children that a blue card be granted and which overcome the starting point that someone who is charged with an offence that is not a serious offence will be issued with a blue card.²⁰

31. Nonetheless, the lack of a conditional approval framework appears a significant factor. For example, in *SFV v Director-General, Department of Justice and Attorney-General* [2021] QCAT 223, Member McDonnell stated:

[52] A blue card is transferable, allowing the holder to work in any child-related employment or conduct any child-related business regulated by the WWC Act. Thus, the Tribunal must take into account all possible work situations open to the applicant, not just the purpose for which a blue card is presently sought. Once issued, a blue card is unconditional and fully transferable across all areas of regulated employment and business.

32. Member McDonnell further stated in *RD v Director-General, Department of Justice and Attorney-General* [2021] QCAT 253 at paragraph [60]:

The Tribunal must take into account all possible work situations open to RD, not just the purpose for which a blue card is presently sought. Once issued, a blue card is unconditional and fully transferable across all areas of regulated employment and business.

¹⁸ *Commissioner for Children and Young People and Child Guardian v FGC* [2011] QCATA 291 [33].

¹⁹ *SFV v Director-General, Department of Justice and Attorney-General* [2021] QCAT 223 [9].

²⁰ *SFV v Director-General, Department of Justice and Attorney-General* [2021] QCAT 223 [10].

Other potential reforms

33. More nuanced approaches to approvals are used in other jurisdictions. For example, the *Working with Vulnerable People (Background Checking) Act 2011* (ACT) provides for conditional approvals and occupation based approvals for applicants to work with vulnerable people. The Revised Explanatory Statement that accompanied those amendments noted that this allows “lower risk applicants to move between all regulated activities without the need to be rechecked”, and “[a]llows the commissioner to register higher risk applicants by imposing specific conditions addressing any specific risks posed by a particular applicant.” Further, the decision-maker can restrict the person to “role-based registration which restricts a person to engaging in specified regulated activities with a stated employer.”²¹
34. While the Commission is not familiar with the framework, Mr Katter also noted in his evidence during the Public Briefing that the Northern Territory Ochre Card might be another similar model.²²
35. The Commission suggests that further reform should be considered, to allow for a more nuanced approach to approvals. Such reform would be more compatible with human rights, and have better outcomes for Blue Card applicants, as well as the people they wish to work with and care for. In particular, it could address some of the issues identified for children in the protection system, particularly for those applicants seeking to be a foster carer only. Rather than covering only specific serious offences, this could include situations where a decision-maker (eg the chief executive or QCAT) might otherwise refuse a Blue Card due to exceptional circumstances.

Conclusion

36. Thank you again for the opportunity for the Commission to provide a submission.

²¹ Revised Explanatory Statement, *Working with vulnerable People (Background Checking) Bill 2010*, 34, 8.

²² Evidence to Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into the Working with Children (Indigenous Communities) Amendment Bill 2021*, Brisbane, 25 October 2021, 4-5 (Robbie Katter MP).