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

By email: lasc@parliament.qld.gov.au

18th February 2022

Dear Chair,

**RE: THE WORKING WIYH CHILDREN LEGISLATION (INDIGENOUS COMMUNITIES) AMENDMENT BILL
2021**

We welcome and appreciate the opportunity to comment on the *Working with Children Legislation (Indigenous Communities) Amendment Bill 2021*.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submissions are informed by nearly five decades of legal practice at the coalface of the justice arena and we therefore believe we are well placed to provide

meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

COMMENT

We note the proposal in the *Working with Children Legislation (Indigenous Communities) Amendment Bill 2021* to create a specialised blue card (working with children) regime in discrete communities.

The Bill attempts to identify a different way that blue card discretionary decision making can be made, so as to identify a less restrictive and reasonably available way to achieve the purpose of the *Working with Children (Risk Management and Screening) Act* for Aboriginal and Torres Strait Islander blue card applicants living in discrete communities.

What prompted the Bill was that:

- In communities where job prospects are very limited, a huge proportion of jobs in the community require a blue card;
- Lower- level convictions are standing in the way of some potentially very good young people and older people getting jobs;
- A settled and responsible person in their mid-thirties or forties, well respected and trusted in the community, may never get a blue card because of convictions from their late teens and early twenties;
- Many young persons ignore legal advice to challenge charges that are not correct and elect to plead guilty to 'get it over and done with' without realising the impact these offences will have on their future work prospects.

The Bill seeks to address the assessment process for blue card applications. It rightly recognises that as more and more charges and information have been added to factors to be taken into account to refuse or to suspend blue cards, there is a corresponding need to take into account the broader set of circumstances in which those charges or information to be considered arose. Additionally, there is a need to assess what is often quite historical material and its likely present day influence on the safety of a child.

The Bill seeks to improve and inform discretionary decision making which can adversely impact upon and can operate unjustly against Aboriginal and Torres Strait Islander applicants. The Bill proposes to do so by drawing upon Community Justice Group members to provide that knowledge of context and informed assessment of risk based upon the current demonstrated character and behaviour of the applicant in the community.

This Bill focusses on finding a solution for the particular problems for blue card applications in remote and discrete communities and has adopted the following approaches to do so:

- Overcome the limitations of a one size fits all blue card to create an additional type of blue card in the form of restricted positive notices or interim restricted positive notices for employment in specific indigenous communities taking into account their unique circumstances.
- Remove charges that have no direct bearing on safety to children (and remembering this is in

the context of various forms of employment in the community). Numerous examples had been provided at the public hearings of low-level offences that occurred early in the persons history and impacted their ability to get a blue card.

- Use a decision making structure that seeks to empower Aboriginal and Torres Strait Islander communities to be involved in decisions relating to them and their communities

We support the ideas underlying this Bill albeit with some suggested modifications because some form of restricted positive notice has the capacity to reduce the pressure on the regular blue card system. We would also hasten to add at this juncture that there remains a need for a portable blue card.

We note that the gathering of ideas for the Bill and the drafting of the provisions in the bill were done before a number of events including staged implementation of the recommendations contained in the final report of the Queensland Family & Child Commission in their Review of the blue card system and the recommendations for supporting Aboriginal and Torres Strait Islander Queenslanders interaction with the system have been, are being or are in the process of being implemented. These have included the creation of a special community engagement team to work with communities for blue card applications, a codesign process with stakeholders to develop a Strategy and Action Plan for Aboriginal and Torres Strait Islander Peoples and Organisations Accessing the blue card System and providing community legal education and information on request.

Timing of reforms however has been an issue, the launch of “No Card No Start” was on 31 August 2020, which occurred well before the recent launch of the Strategy and Action plan for Aboriginal and Torres Strait Islander Peoples and Organisations Accessing the Blue Card System which occurred on 8 June 2021. Also in the intervening time has been the establishment of the dedicated blue card assessment team for indigenous communities in its present form. We do acknowledge the work that has been done by the team since its establishment in its present form.

For the reasons outlined below we think a hybridised system, combining the best parts of both models could be considered.

The challenges that we see.

The proposals in the bill were first made in 2018 after consultations in the Gulf and Cape communities. We know from that time that the communities were impacted by difficulties getting and retaining suitable workers due to low numbers of blue card holders. These communities have been impacted further by the “No Card No Start” changes, but the even bigger issue that we have seen emerge is the dire shortage of kinship carers who can access a blue card in a timely manner.

We note the support of the Queensland Aboriginal & Torres Strait Islander Child Protection Peak (QATSICPP) the peak child protection body for Aboriginal and Torres Strait Islander communities to work with the government on addressing this issue.

Problems that QATSICPP have specifically identified include:

- Lengthy processing times for Aboriginal and Torres Strait Islander applicants in comparison to non-Aboriginal and Torres Strait Islander employees of QATSICPP Member services
- Lack of information or updates to the applicant during the assessment period (which, in addition to lengthy processing times, often leads to employment opportunities expiring prior to obtaining an assessment result)
- Excessively lengthy appeal process to review a decision through the Queensland Civil and Administrative Tribunal (known to be 15 months in some cases)
- Assessments based on list of offences without any context or consideration of recency of charges (e.g. Elders being declined due to minor, non-serious offences, committed more than 20 years ago)
- Young people leaving care having difficulty obtaining a Blue Card due to their behavioural record also being considered in the assessment process (e.g. fighting in a residential unit).

And QATSICPP notes the overall disengagement with the application and assessment process by potential kinship carers.

This list from QATSICPP accords with our experience as a legal service. A further concern that we would add is

- the structural issues for kinship care households to have and sustain the holding of blue cards.

There are we suspect, unintended impediments created for households to offer kinship care. By way of example:

A relative has applied for a blue card so she can be a kinship carer for a cousin's baby. She is the mother of three children, two who are in their mid-teens and one 18-year-old. Because the 18-year-old is an adult living in the household, he too is required by law to hold a blue card for the kinship care arrangement to continue. Although the younger siblings are fine, the 18-year-old is pushing the boundaries and playing up and getting into trouble with his peer group. He gets charged with offences and now the mother must choose between refusing to let him be bailed to her house or giving up the care of the kinship care baby.

This issue sits at the intersection of the over-representation of Aboriginal and Torres Strait Islander families in the Child Protection system with the consequent strain on the number of available kinship carers, and the over-representation of Aboriginal and Torres Strait Islander adults and children in the criminal justice system.

This intersection creates complexity and delay which in turn leads to the blue card system impeding kinship care arrangements under the *Child Protection Act 1999* (Qld). The impact on the children in care can be considerable.

The outcome of all of this is that there are currently higher numbers of Aboriginal or Torres Strait Islander

children who have been placed with non-indigenous carers as opposed to being placed with kinship carers. While this situation continues, the Aboriginal and Torres Strait Islander Child Placement Principle will be badly undermined.

ATSILS has been involved in the Blue Card review and recognises and agrees that while the blue card framework is strong, the problems that arise in the course of implementing it as identified in the list above show a need for a course correction in the interaction between the blue card system and the managing of placements with kinship carers.

As noted elsewhere, Queensland has been identified as having a higher rate of negative notices than other jurisdictions which may be arising from its broader legislative test applied during assessments. It would be worthwhile to review the list of offences and the test as to examine whether they have expanded beyond their proper focus on risk of harm to children. It is reasonable to stop and ask the question as to whether the settings ought to be adjusted in the blue card space.

A common problem under the existing blue card system is that some people cannot get a blue card to work even though it is considered by their local community that they pose no risk to children and that their employment would have a positive impact on their community.

The proposal contained in the *Working with Children Legislation (Indigenous Communities) Amendment Bill 2018* is an attempt to identify a practical and workable model that incorporates direct input from esteemed members of the local community to identify what would work best in rural and remote communities.

Looking into a hybrid system

ATSILS supports in general terms the approach that seeks to empower Aboriginal and Torres Strait Islander communities to be involved in decisions relating to them and their communities. We note the support by QATSICPP for placing decision making power in the hands of carefully chosen community leaders that hold cultural authority and are representative of their community. And we note that a local decision making body would be consistent with recommendations contained in the Queensland Productivity Commission's final report on their inquiry into service delivery in remote and discrete Aboriginal and Torres Strait Islander Communities¹.

The strengths of the proposed model are that community assessment of the currency and relevance of past criminal or other history to a community member and assessment of their current and likely future conduct would result in the granting or continuation of a blue card rather than a negative assessment. Such a positive assessment would be confined to work in the approving community.

One key aspect of our proposed hybrid system in a regional setup is to address concerns that might arise in individual communities or upon individual decision-makers where there might be community pressures to bolster employment or to impose family-connection obligations or even for concerns about

¹ Queensland Productivity Commission, *Inquiry into Service Delivery in Remote and Discrete Aboriginal and Torres Strait Islander Communities* (2017). Available at <https://s3.treasury.qld.gov.au/files/Service-delivery-Final-Report.pdf>

potential retribution. The hybrid system would help ensure that by requiring a double vote that the decisions ensure the best interests of the child and the benefit of the wider community are protected.

That said, and as is reinforced below – the safety of any given child must be the paramount consideration. Might there for example be pressures placed upon local community leaders to err on the side of approving an application in order to bolster employment or due to family connection-obligations (or fear as to ‘pay-back’) – in situations where such might be at odds with the benefit to the wider community? Might some form of over-arching veto system be an added safeguard (as one example) – at least in higher risk, designated circumstances?

In the particular circumstances of Blue Card Assessments, there are limitations to such a model, some of which were raised in the consultation rounds and some of which arise around issues of confidentiality, avoiding conflicts of interest, and having a relatively small pool of people to draw from when those issues are taken into account.

One solution used in international tribunals facing similar dilemmas is to create a hybrid panel comprised of local and international staff- in this context local members and members drawn from the blue card services indigenous Assessment Unit. “Local” members being drawn from the local region rather than individual communities, such as the Gulf communities or the Cape communities.

Best Interests of the Child and other relevant Human Rights

One further comment should be made on the question of human rights and whether current or proposed measures that curtail human rights are necessary or proportionate.

For the kinship care issues, the Human Rights that are impacted are the best interests of the child under the *UN Convention on the Rights of the Child* and explicit protections under the *Human Rights Act 2019* including: protection of families as the fundamental unit in society and protection of children that is in their best interests as a child; the rights of the child under section 28 to connection to kin, culture and country and to be protected from assimilation; recognition and equality before the law; and protection of privacy and reputation.

The most significant concern which engages these rights is the structural issues that surround the ability of a household of a kinship carer to sustain their blue card statuses and the need to protect Aboriginal and Torres Strait Islander children from the likely long term adverse impacts of being placed out of culture due to delays in obtaining blue cards in the first place or even longer delays challenging suspension and cancellations on relatively low level matters which eventually lead to the restoration of the blue card. The effect of that delay and removal from the household can be considerable, at the same time as the risk factors of low- level matters are being taken into account, the protective factors for a child to remain within culture are should also be given considerable weight.

We would welcome adjustments and legislative changes that could better protect Aboriginal peoples and Torres Strait Islander peoples’ right to enjoy, maintain, control, protect and develop their kinship ties in conjunction with others.

CONCLUSION.

We recognise that our submission opens up considerable consultation and legislative reform and appreciate the committee's willingness to consult at length on this issue.

As the safety of the child is always paramount, we recognise that any amendments that have the potential to impact on the safety of a child or children must be implemented in a way that ensures any potential risks are identified and managed and would seek the appropriate supports to be put in place.

ATSILS thanks the committee for this opportunity to provide feedback and wishes it every success with its deliberations.

Yours faithfully,



Gregory M Shadbolt

Principal Legal Officer

Acting Chief Executive Officer