



Working with Children Legislation (Indigenous Communities) Amendment Bill 2018

**Report No. 13, 56th Parliament
Education, Employment and Small Business Committee
February 2019**

Education, Employment and Small Business Committee

Chair	Ms Leanne Linard MP, Member for Nudgee
Deputy Chair	Mrs Jann Stuckey MP, Member for Currumbin
Members	Mr Bruce Saunders MP, Member for Maryborough
	Mrs Simone Wilson MP, Member for Pumicestone
	Mr Michael Healy MP, Member for Cairns
	Mr Nick Dametto MP, Member for Hinchinbrook

Committee Secretariat

Telephone	+61 7 3553 6657
Fax	+61 7 3553 6699
Email	eesbc@parliament.qld.gov.au
Technical Scrutiny Secretariat	+61 7 3553 6601
Committee webpage	www.parliament.qld.gov.au/EESBC

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Abbreviations and terminology

BCS	Blue Card Services, Department of Justice and Attorney-General
Blue card	Under the current Act, a positive notice or positive outcome of a working with children check
Blue Card Review	<i>Keeping Queensland's children more than safe: Review of the Blue Card system – Blue Card and Foster Care Systems Review</i>
CJG	Community Justice Group – see page 9
Government Bill	Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018
JLOM Act	<i>Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984</i>
JLOM Regulation	Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Regulation 2008
LSA	<i>Legislative Standards Act 1992</i>
Positive notice	Under the current Act, a positive outcome which results in the issue of a 'blue card' following a working with children check
Private Member's Bill	Working with Children Legislation (Indigenous Communities) Amendment Bill 2018
QFCC	Queensland Family and Child Commission
Restricted positive notice	Under the Bill, a blue card that is restricted to one or more discrete Aboriginal and Torres Strait Islander community areas as defined by the JLOM Act.
Regulated business	Defined in section 156 and Schedule 1 of the WWC Act; includes businesses such as health, counselling and support services, education and care services, child care services and accommodation services and others.
Regulated employment	Defined in section 156 and Schedule 1 of the WWC Act; includes employment in places such as residential facilities, schools, child care and child accommodation, health counselling and support services, education programs outside school, school crossing supervisors, and sport and recreation directed at or mainly involving children, and others.
Royal Commission	Royal Commission into Institutional Responses to Child Sexual Abuse
WWC Act	<i>Working with Children (Risk Management and Screening) Act 2000</i>
WWCC	Working with children check

Chair's foreword

This report presents a summary of the Education, Employment and Small Business Committee's examination of the Working with Children Legislation (Indigenous Communities) Amendment Bill 2018, introduced by Mr Robbie Katter MP, Member for Traeger.

The Private Member's Bill, if passed, would limit the range of criminal charges and convictions that would be considered as part of a working with children check for a person who applies for a blue card for use in a discrete Aboriginal or Torres Strait Islander community. The Bill would enable the Community Justice Group for the community to make a binding recommendation about a community member's application for a blue card.

The committee's task was to consider the policy to be achieved by the Private Member's Bill and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

After examination of the Bill, including consideration of the policy objectives to be implemented, stakeholders' views, the Queensland Family and Child Commission (QFCC) review of the blue card system, and information provided by Mr Katter MP and the department, the committee recommends that the Bill not be passed.

While sympathetic to the issues the Bill seeks to address, the committee placed weight on the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse, that nationally there should be no conditional or different types of working with children clearances and the QFCC Blue Card Review endorsement of that recommendation. The Bill in this regard is contrary to both the Royal Commission's and QFCC's recommendations.

Further, the committee does not consider that the Bill has sufficient regard to a child's rights by allowing certain applicants to receive a positive notice, when they otherwise would not be eligible. The Bill would provide a different standard of applicant assessment, and of protection for children, in specified communities.

The committee considered whether they may be alternative ways to achieve the intent of the Bill, to address some of the difficulties experienced by people in Aboriginal and Torres Strait Islander communities with the blue card system. Given the importance of systematic implementation of the broad ranging and significant recommendations of the Blue Card Review, the committee recommends that the Attorney-General and Minister for Justice provide the committee with a progress report on implementation of the Queensland Family and Child Commission Blue Card Review recommendation for reform to how Aboriginal and Torres Strait Islander applicants are supported (Recommendation 73) by 31 July 2020.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank Parliamentary Service staff.

I commend this report to the House.



Leanne Linard MP
Chair

Recommendations

Recommendation 1 **3**

The committee recommends the Working with Children Legislation (Indigenous Communities) Amendment Bill 2018 not be passed.

Recommendation 2 **22**

The committee recommends the Attorney-General and Minister for Justice provide the committee with a progress report on implementation of the Queensland Family and Child Commission Blue Card Review recommendation for reform to how Aboriginal and Torres Strait Islander applicants are supported (Recommendation 73) by 31 July 2020.

1 Introduction

1.1 Role of the committee

The Education, Employment and Small Business Committee (the committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The committee's primary areas of responsibility include:

- education
- industrial relations
- employment and small business
- training and skills development.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

1.2 Inquiry process

The Working with Children Legislation (Indigenous Communities) Amendment Bill 2018 (the Bill) was introduced into the Legislative Assembly by Mr Katter MP on 17 October 2018 and initially referred to the Legal Affairs and Community Safety Committee (LACSC).

The Bill is similar to a 2017 bill introduced by Mr Katter MP which lapsed on dissolution of the Parliament in October 2017 prior to a general election. The LACSC provided the committee with access to documents received by it during the conduct of its 2017 and 2018 inquiries into the Working with Children Legislation (Indigenous Communities) Amendment Bills.

The Committee of the Legislative Assembly determined that the Bill would be considered by this committee, and the Bill was transferred to it on 15 November 2018. The committee was required to report to the Legislative Assembly by 14 February 2019.

Concurrent with its inquiry into the Working with Children Legislation (Indigenous Communities) Amendment Bill 2018, the committee inquired into a Government Bill, the Working with Children (Risk Management and Screening) and Other Legislation Bill 2018 (the Government Bill). The committee has reported separately on the Government Bill.

The LACSC had invited submissions on the Bill with a closing date of 27 November 2018. On 20 November 2018, the committee invited stakeholders and subscribers to make written submissions on the Bill, providing additional time for submissions to be made. Six submissions were received on the Bill, including one which commented on both this Bill and the Government Bill.

Mr Katter MP provided a public briefing on the Bill to the LACSC on 14 November 2018, before transfer of the Bill to this committee.

The committee initially sought advice from the Department of Justice and Attorney-General (the department) on any implications for the legislation, should both the Government Bill and this Bill be passed. After the committee's public briefing and public hearing the department was invited to provide any further commentary.

¹ *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

On 16 January 2019 the committee held a public hearing about this Bill and the Government Bill, to hear from invited witnesses. See Appendix B for a list of witnesses relevant to this Bill.

Witnesses at the public hearing on 16 January 2019 were invited to provide any further comments as answers to questions taken on notice following publication of the department's response to issues raised in submissions.

The submissions, transcripts of the public briefing and hearing and answers to questions taken on notice are available on the committee's webpage.²

1.3 Policy objectives of the Bill

The explanatory notes describe the objectives of the Bill as to provide a new blue card³ framework that empowers Indigenous communities to make decisions that best serves their interests in relation to child protection and employment of community members.

The explanatory notes state that the current blue card system:

*...has significant limitations in the way it applies to the unique circumstances of Indigenous communities and this is resulting in missed opportunities for social and economic development.*⁴

The explanatory notes state the current blue card system limits employment in discrete Aboriginal and Torres Strait Islander communities:

*... whilst well-meaning in its intention, [it] is not practical in its application to remote indigenous communities. Numerous examples exist where individuals who have made significant progress reforming their behaviour are faced with no hope of accessing employment due to the Blue Card system. Feedback from community leaders, law enforcement and judicial representatives indicate that handing more decision-making power to the communities themselves will assist in opening employment opportunities whilst maintaining child safety standards.*⁵

The Bill proposes to amend the *Working with Children (Risk Management and Screening) Act 2000* (the WWC Act) to create a new category of blue card – a restricted positive notice, based on the recommendation of community justice groups in Aboriginal and Torres Strait Islander communities. The Bill limits the scope of an applicant's criminal history that would be considered by a community justice group.

1.4 Consultation on the Bill

The explanatory notes state:

Consultation has been undertaken with key stakeholders most importantly,

- community leaders;*
- law enforcement; and*
- judicial representatives*⁶

² See www.parliament.qld.gov.au/EESBC

³ The term 'blue card' is an abbreviation of what the Act currently calls a 'positive notice blue card'. More meaningful language is proposed by the Working with Children (Risk Assessment and Screening) and Other Legislation Amendment Bill 2018, to refer to a 'working with children card'. See Explanatory notes, p 5.

⁴ Explanatory notes, p 1.

⁵ Explanatory notes, p 1.

⁶ Explanatory notes, p 6

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including consideration of the policy objectives to be implemented, stakeholders' views, the Queensland Family and Child Commission (QFCC) review of the blue card system, and information provided by Mr Katter MP and the department, the committee recommends that the Bill not be passed.

Recommendation 1

The committee recommends the Working with Children Legislation (Indigenous Communities) Amendment Bill 2018 not be passed.

2 Current Act, policy context and background to Community Justice Groups

2.1 Current *Working with Children (Risk Management and Screening) Act 2000*

2.1.1 Principles for administration of the Act

The WWC Act provides the framework for working with children checks, commonly referred to as blue cards. Section 6 of the WWC Act states that it is to be administered under two principles:

- the welfare and best interests of a child are paramount
- every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.

2.1.2 Current blue card screening

A briefing by the department provided an overview of the current blue card system, part of which stated:

The 'blue card' check assesses:

- *a person's national criminal history information—this captures all charges or convictions for offences in Australia, regardless of when or where the offending occurred (this includes spent convictions and pending and non-conviction charges as well as situations where no conviction was recorded);*
- *child protection offender prohibition orders (whether a person is a respondent or subject to an application);*
- *disqualification orders imposed by a court;*
- *whether a person is subject to reporting obligations under the Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 or Dangerous Prisoners (Sexual Offenders) Act 2003;*
- *disciplinary information held by certain professional organisations including teachers, child care licensees and foster carers; and*
- *investigative information (which is information that the police commissioner may provide in relation to police investigations into allegations of serious child-related sexual offences, even if no charges were laid – this can only occur in very discrete circumstances as defined under section 305 of the WWC Act).*

The blue card system disqualifies certain people upfront and prevents people from working with children whose past behaviour indicates they are not eligible to enter regulated employment or carry on a regulated business.

Blue card screening is not required for every environment where a child may be present. Rather, screening occurs in environments where children are receiving services that are:

- *mandatory (that is, required by law)—for example, schools, foster and kinship care and youth detention;*
- *essential (that is, services regulated by law)—for example, education and care services; and*
- *developmentally focused (that is, areas which support and foster children's development)—for example, sporting, cultural and recreational activities.*

There are 15 categories of regulated employment and 11 categories of regulated business. These are set out in Schedule 1 of the WWC Act.

Currently, people can only apply for a blue card where they have an agreement to undertake regulated employment with an organisation (either on a paid or voluntary basis) or where they are proposing to carry on a regulated business. A person's employer is considered a 'notifiable person' under the WWC Act. This means the employer will be given notifications from BCS [Blue

Card Services] about changes to the blue card status of the employee (for example, if the person's application has been withdrawn or blue card suspended). The onus is on the employer to 'link' the employee to the organisation to ensure they receive these notifications.⁷

2.1.3 Key terms and concepts

Some of the important terms and concepts in the WWC Act are:

- *disqualified person*: a person convicted of a disqualifying offence, such as a child-related sex offence, child pornography offence or child murder; or who is subject to a child protection offender prohibition order, sexual offender order, or disqualification order made by a court; or a reportable offender with current reporting obligations
- *relevant disqualified person*: a person convicted of a disqualifying offence and a term of imprisonment was imposed, or a person subject to a prohibition order, sexual offender order or disqualification order
- *eligibility declaration*: a disqualified person (other than a 'relevant disqualified person') may apply for an eligibility declaration, which enables the person to apply for a blue card
- *serious offence*: offences are set out in schedules to the WWC Act, including for example: offences of a sexual or violent nature; child pornography offences; kidnapping; cruelty to children; burglary and drug offences
- *exceptional case*: if a negative decision is proposed where there is police information or disciplinary information, whether or not there is an exceptional case must be considered (see 2.1.4.1 below for a summary of what the decision maker must have regard to).

2.1.4 Assessment and decisions about blue cards

As noted above, the WWC Act is to be administered according to the principle that the best interests of a child are paramount. The information that is assessed and the process under the WWC Act is summarised in the guidelines issued by the department:

Type of information assessed	Assessment process
<ul style="list-style-type: none"> • Conviction for a 'serious offence' • Person was previously a 'relevant disqualified person' but is no longer 	Blue card not issued unless the decision maker is satisfied there is an exceptional case in which it would not harm the best interests of children to issue a blue card
<ul style="list-style-type: none"> • Investigative information • Disciplinary information • Charge for offence (other than current charge for a disqualifying offence, where application will be withdrawn) • Conviction for an offence, other than a serious offence 	Blue card must be issued unless the decision maker is satisfied there is an exceptional case in which it would not be in the best interests of children to issue a blue card
<ul style="list-style-type: none"> • No police information or disciplinary information 	A blue card must be issued

Source: Department of Justice and Attorney-General, Blue Card Services, *Guidelines for dealing with information obtained under Chapter 8 of the Working with Children (Risk Management and Screening) Act 2000*, p 8.

⁷ Department of Justice and Attorney General, correspondence dated 4 December 2018, pp 2-3.

2.1.4.1 Exceptional case

As the preceding table indicates, where there is a conviction, charge, investigative information or disciplinary information about a person, a decision maker under the WWC Act must be satisfied that there is an exceptional case, considering the best interests of children, before a blue card could be issued.

In considering whether or not there is an exceptional case where a person has been convicted or charged with an offence, section 226 of the WWC Act requires a decision maker to have regard to:

- whether it is a conviction or charge
- whether the offence is a serious offence and, if it is, whether it is a disqualifying offence
- when the offence was committed or is alleged to have been committed
- the nature of the offence and its relevance to employment, or carrying on a business that involves or may involve children
- in the case of a conviction – the penalty imposed by the court and, if the court decided not to impose an imprisonment order for the offence or not to make a disqualification order, the court’s reasons for its decision
- any information about the person obtained from the Director of Public Prosecutions or given to the chief executive of Corrective Services under sections 318 and 319 of the WWC Act
- any report about the person’s mental health given to the chief executive by a registered health practitioner with the person’s consent under section 335; information from the Mental Health Court under section 337, or from the Mental Health Tribunal under section 338
- anything else relating to the commission, or alleged commission, of the offence that the chief executive reasonably considers to be relevant to the assessment of the person.⁸

If a decision maker is considering whether or not there is an exceptional case where there is investigatory or disciplinary information about a person, sections 227 and 228 set out the matters to which the decision maker must have regard.

A person about whom a negative decision is proposed must be invited, under section 229 of the WWC Act, to make a submission about whether there is an exceptional case, or why the chief executive should issue a positive notice, or not issue a negative notice.

2.2 Royal Commission into Institutional Responses to Child Sexual Abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse published an interim report on working with children checks in 2015. It made over 30 recommendations, many of which focused on working toward national consistency. Some of those recommendations are subject to other factors such as commencement of continuous monitoring of national criminal history records, and development and implementation of the Royal Commission’s recommendations about ‘child safe standards’.

One of the Royal Commission’s recommendations was that all state and territory governments should amend their working with children check laws so that there would be no conditional or different types of working with children clearances. Both the QFCC Blue Card Review and the Queensland Government response to the Royal Commission recommendation notes this is currently the position under the WWC Act.

⁸ *Working with Children (Risk Management and Screening) Act 2000.*

The Royal Commission recommended that ‘the outcome of a [working with children check] is either that a clearance is issued or it is not; there should be no conditional or different types of clearances’. The Royal Commission was concerned that conditions placed upon working with children clearances:

- *rely on the conditions and situational and organisational factors being static and applied consistently*
- *create challenges for monitoring and enforcing compliance, as it can be difficult to know whether the conditions are being adhered to or if the situational or organisational factors have changed*
- *create barriers to portability across child-related roles and employers.*⁹

2.3 Queensland Family and Child Commission review of the blue card system

2.3.1 Overview

The QFCC commenced a review of the WWC Act and its operation in 2016, and reported in 2017. The Blue Card Review included consideration of the reports and recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse and the 2013 Queensland Child Protection Commission of Inquiry.

The Blue Card Review report, *Keeping Queensland’s children more than safe: Review of the blue card system*, made 81 recommendations about legislative, policy and operational issues. The recommendations in four areas: overarching reforms; streamlining the system; strengthening the system; and improving support and maintaining public confidence.¹⁰

The QFCC also undertook a Supplementary Review¹¹ which arose from a recommendation in an earlier QFCC report into children missing from out-of-home care.¹² That report followed the death of a child and the subsequent arrest of her foster carers.

The Supplementary Review identified the need for greater visibility of home-based care services by regulatory bodies, particularly where households are providing more than one service to children. The Supplementary Review recommended a centralised register of home-based services, to enable regulatory bodies to identify the blue card status of foster and kinship carers, family day care educators, stand-alone care providers and adults who live in these residences.¹³

The Blue Card Review report recommended significant reforms to the blue card system. They included: improvements to the efficiency of the blue card system, online applications and an online employer portal; amendments to the WWC Act; an education and community awareness strategy for parents,

⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, Commonwealth of Australia, 2015, p 102, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_working_with_children_checks_report.pdf.

¹⁰ QFCC, *Keeping Queensland’s children more than safe: Review of the Blue Card system - Blue Card and Foster Care Systems Review*, 2017, Attachment 1, pp 244-245, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf

¹¹ QFCC, *Recommendation 28: Supplementary Review – A report on information sharing to enhance the safety of children in regulated home-based services*, December 2016, <https://www.qfcc.qld.gov.au/sites/default/files/For%20professionals/recommendation-28-supplementary-review.pdf>

¹² QFCC, *When a child is missing: Remembering Tiahleigh – A report into Queensland’s children missing from out-of-home care*, July 2016, <https://www.qfcc.qld.gov.au/kids/monitoring-reviewing-systems/when-child-missing>

¹³ Department of Justice and Attorney-General, Parliamentary Committee Briefing Note, Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018. Available at <https://www.parliament.qld.gov.au/work-of-committees/committees/EESBC>

carers and the community; reforms to the application process, risk assessment and decision making; capacity building and compliance improvements; reforms to how organisations and communities are supported, and a specific recommendation on reforms to how Aboriginal and Torres Strait Islander communities and applicants are supported, which is reproduced below.

2.3.2 Blue card system and Aboriginal and Torres Strait Islander applicants and communities

The QFCC Blue Card Review considered feedback from stakeholders about the impact of the blue card system on Aboriginal and Torres Strait Islander peoples. Those consulted included Aboriginal and Torres Strait Islander communities, non-government organisations, and Mr Robbie Katter MP.

2.3.2.1 Concerns raised during the Blue Card Review

Concerns raised included the system as a barrier to employment and kinship care arrangements, limited support in communities to assist in the working with children process, some of which are not culturally appropriate, and a lack of appropriate community education.

The QFCC summarised the feedback about the concerns raised about the operation of the blue card system on Aboriginal and Torres Strait Islander peoples as:

- *the system is a significant barrier to employment and kinship care arrangements for Aboriginal and Torres Strait Islander peoples*
- *there is limited support in, and engagement with, communities to assist across every stage of the WWCC [working with children check] process*
- *negative outcomes are based on old, irrelevant offences and not on a risk of harm to children*
- *current BCS processes and systems are not culturally appropriate and cultural considerations do not form part of the decision-making process*
- *there is a lack of community education and culturally appropriate information and resources for Aboriginal and Torres Strait Islander peoples.*¹⁴

The QFCC reported some stakeholders identified a need to consider the issue of conditional cards to Aboriginal and Torres Strait Islander peoples to address some of the barriers to obtaining a blue card. Other stakeholders advocated that the safety of children must be the primary consideration and there should not be different levels of protection.¹⁵

2.3.2.2 Findings and recommendations of the Blue Card Review

The Blue Card Review found:

*Aboriginal and Torres Strait Islander peoples experience significant disadvantage at every stage of the WWCC process. Many withdraw from the process when they may have been successful in their WWCC application if they had the right support. Investment in more support will help to improve participation by Aboriginal and Torres Strait Islander peoples in the blue card system.*¹⁶

The Blue Card Review report noted there were no culturally appropriate community education strategies, and a lack of culturally appropriate information and resources for Aboriginal and Torres Strait Islander applicants and communities. It also found that one reason for the adverse impact of the blue card system was the 'significant amount of misinformation in communities about the likelihood

¹⁴ QFCC, *Keeping Queensland's children more than safe: Review of the blue card system*, p 127, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf.

¹⁵ QFCC, *Keeping Queensland's children more than safe: Review of the blue card system*, p 127, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf.

¹⁶ QFCC, *Keeping Queensland's children more than safe: Review of the blue card system*, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf, p 8.

of successfully obtaining a WWCC.¹⁷ More community based sources of information and advice was proposed, to help participation in the system and to reduce withdrawal from the process.

The QFCC Blue Card Review did not support conditional working with children clearances, in line with the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse.

2.3.2.3 Support for Aboriginal and Torres Strait Islander peoples

The Blue Card Review recommended improved support for Aboriginal and Torres Strait Islander peoples:

Recommendation 73

It is recommended that the Department of Justice and Attorney-General develops and implements a specific strategy and action plan to provide more support for Aboriginal and Torres Strait Islander peoples and build cultural capability in the blue card system, including:

- o identifying ways to partner with other agencies for consistency with other Queensland Government initiatives designed to improve outcomes for Aboriginal and Torres Strait Islander peoples*
- o establishing a reference group made up of Aboriginal and Torres Strait Islander stakeholders to co-design the strategy and action plan*
- o developing a specific community engagement plan to address common misconceptions about the blue card system, build understanding and improve participation in the process*
- o developing a suite of culturally appropriate information and resources*
- o funding and providing community-based support to assist with all stages of the WWCC process in all discrete communities*
- o funding and establishing identified positions in BCS to provide greater support to Aboriginal and Torres Strait Islander peoples and provide regular cultural capability training for all BCS staff*
- o developing guidelines to embed an appropriate consideration of culture in WWCC decisions*
- o considering ways to empower communities to be involved in decisions about their community establishing appropriate governance structures—led by Aboriginal and Torres Strait Islander stakeholders—to implement the strategy and action plan*
- o developing an evaluation strategy to measure the effectiveness of the strategy and action plan.¹⁸*

When introducing the Government Bill the Attorney-General and Minister for Justice said the government has broadly supported the intent of all recommendations made by the QFCC, and the Bill is the first stage in a series of legislative reforms.

2.4 Community Justice Groups

The Bill proposes a significant role for Community Justice Groups (CJGs). This section of the report provides background to CJGs. The proposed role of CJGs under the Bill is discussed in section 3 of this report.

¹⁷ QFCC, *Keeping Queensland's children more than safe: Review of the Blue Card system - Blue Card and Foster Care Systems Review*, 2017, p 128, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf.

¹⁸ QFCC, *Keeping Queensland's children more than safe: Review of the Blue Card system - Blue Card and Foster Care Systems Review*, 2017, p 130, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf.

2.4.1 Types of Community Justice Group

The department funds the CJG Program ‘to provide funding to Aboriginal and Torres Strait Islander organisations dedicated to supporting Aboriginal and Torres Strait Islander people who have come into contact with the criminal justice system.’¹⁹

There are statutory CJGs, established under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (the JLOM Act), and non-statutory CJGs that can be established less formally. Statutory CJGs functions primarily deal with criminal justice activity and advice to the relevant Minister under the *Liquor Act 1992* (Liquor Act). Other CJGs are involved in court matters, but do not have a role under the Liquor Act.

Nearly all CJG members are volunteers from the local community and include elders, traditional owners and community members of ‘good standing’. A CJG is run by members of the local community. A co-ordinator must be employed to provide support to a CJG that is established under the JLOM Act.

2.4.2 CJGs under the *Aboriginal and Torres Strait Islander (Justice, Land and Other Matters) Act 1984*

2.4.2.1 Establishment of Community Justice Groups

The JLOM Act provides that a community justice group may be established under a regulation, which must state the group’s name. A CJG is established for a ‘community area’. Section 4 of the JLOM Act defines a community area as:

- (a) a community government area; or*
- (b) the Shire of Aurukun or Mornington; or*
- (c) an IRC area, a part of an IRC area, or an IRC division area; or*
- (d) another area prescribed under a regulation.*

This definition of ‘community area’ includes terms that are also defined in the JLOM Act and the *Local Government Act 2009* (the LGA); in summary they include:

- *community government area*: the local government area of a ‘community government’. Section 273 of the LGA provides that a community government under the repealed *Local Government (Community Government Areas) Act 2004* continues in existence as a local government under the LGA
- *IRC area*: defined in section 4 of the JLOM Act to mean ‘the local government area of an indigenous regional council’
- *IRC division area*: defined as ‘a part of an IRC area that, under the *Local Government Act 2009*, is one of the divisions into which the IRC area is divided for electoral purposes’
- *indigenous regional councils*: the Northern Peninsula Area Regional Council, and the Torres Strait Island Regional Council.

2.4.2.2 Membership of Community Justice Groups

The Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Regulation 2008 (JLOM Regulation) specifies the number of members of a CJG and the groups of Aboriginal or Torres Strait Islander people and/or organisations by which members are nominated, and the term of appointment. The number of members specified in the regulation varies between communities, for example: for Doomadgee the number of members is at least 5 and not more than 17; for Mapoon it is

¹⁹ Queensland Government, Queensland Courts, ‘Community Justice Group Program’, <https://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>

at least 10 but not more than 37 members; and for Mornington Island it is at least 5 but not more than 15 members.

2.4.2.3 *Current membership of statutory CJGs*

The Bill would affect those CJGs that are established under the JLOM Act and JLOM Regulation.

The committee sought information from the department about the current number of members of statutory CJGs. The department advised there are 49 CJGs which receive grants as part of the CJG program. Of those, 19 are statutory CJGs.

The table below, provided by the department lists the number of current active members. Active membership is affected by factors such as: the transient nature of some CJG members who travel between locations but remain members; periods of ill health in the aging population; and instances where CJG members have taken time off to work in other areas. The department also noted that the discrepancy issues will be considered in a review of the JLOM Regulation, which will expire under the *Statutory Instruments Act 1992*.²⁰

Community Justice Group Location	Community Justice Group	No. active members
Aurukun	Aurukun Community Justice Group	5
Bamaga	Northern Peninsula Area Justice Service Aboriginal and Torres Strait Islander Corporation	17
Cherbourg	Barambah Community Justice Group	28
Doomadgee	Ngooderi Mabuntha Community Justice Group	16
Hope Vale	Hope Vale Thurrbill Community Justice Group	10
Injinoo	Injinoo Shire Council (Sponsoring Ikama Ikya Community Justice Group)	6
Kowanyama	Kowanyama Community Justice Group Inc.	5
Lockhart River	Wulpumu Justice Group	3
Mapoon	Mapoon Community Justice Group	7
Mornington Island	Junkari Laka Justice Association Inc.	14
Napranum	TWAL Community Justice Group	7
New Mapoon	Northern Peninsula Area Justice Service Aboriginal and Torres Strait Islander Corporation	15
Palm Island	Palm Island Community Justice Group Ltd.	10
Pormpuraaw	Munkan-Thaayore Community Justice Group	6
Seisia	Northern Peninsula Area Justice Service Aboriginal and Torres Strait Islander Corporation	18
Umagico	Northern Peninsula Area Justice Service Aboriginal and Torres Strait Islander Corporation	7
Woorabinda	Woorabinda Community Justice Group	7
Wujal Wujal	Wujal Wujal Waranga Justice Group	4
Yarrabah	Yarrabah Community Justice Group	2

Source: Department of Justice and Attorney-General, Correspondence, 6 February 2019

²⁰ Department of Justice and Attorney-General, correspondence dated 6 February 2019. Note that a regulation automatically expires under the *Statutory Instruments Act 1992* after ten years, except in specified circumstances.

2.4.2.4 Functions of Community Justice Groups

The current functions and powers of CJGs is set out in section 19 of the JLOM Act.

19 Functions and powers

- (1) The community justice group for a community area has the following functions—*
 - (a) taking part in court hearings and sentencing and bail processes as provided for in the Bail Act 1980, the Youth Justice Act 1992 and the Penalties and Sentences Act 1992;*
 - (b) developing networks with relevant agencies to ensure crime prevention, justice, community corrections and related issues impacting on indigenous communities are addressed;*
 - (c) supporting indigenous victims and offenders at all stages of the legal process;*
 - (d) making recommendations to the Minister administering the Liquor Act 1992, part 6A, about declarations under that part;*
 - (e) carrying out other functions given to it under this or another Act.*
- (2) The group has power to do all things reasonably necessary to be done for performing its functions.*
- (3) Without limiting subsection (2), the group has the powers conferred on it by this or another Act.*

3 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

3.1 Conditional or 'restricted positive notice' in Aboriginal and Torres Strait Islander community areas

The Bill proposes to introduce a new type of restricted positive notice, or restricted blue card that would apply in a 'community area' under the JLOM Act. A person who may not otherwise be eligible for a blue card due to their criminal history could obtain a restricted positive notice for a community area.

The main amendments proposed to the WWC Act are in clause 7 (proposed sections 231A to 231J), which would insert a new division 9A 'Prescribed notice application relating to a community area' in Chapter 8 of the Act.

3.1.1 Community area applications – scope of proposed framework

The proposed amendments would apply to an application for a blue card that:

- states it is for a restricted positive notice
- states the community area/s the application is for
- consents to the chief executive giving documents and information about the applicant to the community justice group for the nominated community area/s (clause 5)
- is from a person who has not been convicted of a 'prescribed serious offence' (see 3.1.3 below).

3.1.2 Locations the amendments would apply

The proposed 'restricted positive notice' would apply in 'community areas' (see section 2.4.2.1 above) under the JLOM Act. The proposed 'restricted positive notice' would not apply in all Aboriginal and Torres Strait Islander communities, nor to Aboriginal and Torres Strait Islander peoples who live in other locations.

A blue card obtained under the proposed amendments would be restricted to the community area or areas to which it relates, and could not be used for regulated employment or a regulated business outside the community area.

3.1.3 Criminal history considered for a community area application

Proposed new section 231A states that the amendments in new division 9A apply to an application where the person has not been convicted of a 'prescribed serious offence' (clause 7, proposed section 231A). A 'prescribed serious offence' is defined in proposed section 231A(4) as a 'serious offence' (listed in Schedule 4 of the WWC Act) other than the property and drug offences described below.

The effect of proposed section 231A is that a CJG would consider a community area application only if the person had not been convicted of a 'serious offence' such as a sexual offence, kidnapping or pornography offences. An application from a person convicted of most 'serious offences' would be outside the scope of the proposed new framework, and would not be considered by a CJG.

The explanatory notes state:

The type of serious offences that can be considered under the new framework are limited to the following,

- *Criminal Code offences*
 - *Section 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.*

No other offences that are currently classified as serious offences or disqualifying offences can be considered by the Community Justice Group under the new framework.²¹

3.1.4 Interim restricted positive notice

Within five business days after a community area application is made, the chief executive must notify the community justice group of the application (proposed section 231B).

The Bill proposes that a CJG could recommend issue of an interim restricted positive notice. Proposed section 231C(5) provides that the interim restricted positive notice would apply only in the community area, and only until the chief executive decides whether to approve or refuse the application.

3.1.5 Restricted positive notice

Within 21 days of receipt of an application the chief executive would be required by proposed section 231D to provide all of the information relating to a community area application to the CJG. However, if the chief executive decides to issue a positive notice within the 21 days after receiving an application, this is not required.

After receiving information from the chief executive, the CJG may (under proposed section 231E), within eight weeks, recommend to the chief executive that a restricted positive notice for the community area is issued. Proposed section 231E(5) states that if the CJG makes a recommendation, the chief executive must issue a positive notice that applies only in the community area.

The chief executive must not decide a community area application until the CJG makes a recommendation or notifies the chief executive it will not be making a recommendation, or eight weeks has elapsed since the chief executive provided all documents relevant to the application (proposed section 231E(6)).

A community justice group may revoke a recommendation for an interim positive restricted positive notice or a restricted positive notice if a majority of its members are satisfied the recommendation was based on wrong or incomplete information, or there has been a change in circumstances (proposed section 231G).

3.1.6 Community Justice Group recommendations about blue cards

The Bill provides for a CJG to make binding recommendations to the chief executive on certain applications for a blue card in a 'community area'. When a CJG is deciding whether to recommend a restricted positive notice be issued to a person, it must have regard to the following:

- all documents and information provided by the chief executive (this would include information about convictions and charges, investigative information and disciplinary information)
- whether, and in what capacity, the person has previously worked with children
- the person's social standing and participation within the community area
- whether, in the group's reasonable opinion, withholding the recommendation would have negative impact on the social or economic wellbeing of the community area's inhabitants
- anything else the group reasonably considers to be relevant to the decision.²²

²¹ Explanatory notes, pp 2-3.

²² Proposed section 231E(4).

When a CJG is considering recommending an interim restricted positive notice be issued, it must have regard to the same matters as above, except that it will not initially have all of the documents and information provided by the chief executive. In relation to an interim restricted positive notice a CJG must have regard to 'any police information, investigative information or disciplinary information about the person that the group is aware of and considers relevant'.²³

A recommendation that a positive notice is issued may be made only if a majority of the CJG members are satisfied that issuing a restricted positive notice 'would not harm the best interests of children in the community area' (proposed new sections 231C and 231E).

3.1.7 Other amendments

3.1.7.1 Amendment of Community Justice Group functions

The Bill also proposes to include making recommendations under the WWC Act to the list of CJG functions in section 19 of the JLOM Act.

3.1.7.2 Transitional arrangements

Clause 8 inserts proposed section 549 so that after commencement of the amendments, an applicant may notify the chief executive that their application is for a restrictive positive notice for a community area and give consent to the chief executive giving documents and information to the community justice group. The application is then taken to be an application for a restricted positive notice.

3.2 Issues raised during examination of the Bill

3.2.1 Support for the new framework proposed by the Bill

In written submissions and public hearings, stakeholders argued that people living in Aboriginal and Torres Strait Islander communities often had a criminal history of offences which had prevented them obtaining a blue card, based on old or low level offences, and that their recent rehabilitation was not taken into account. Four submissions broadly supported the approach proposed by the Bill, particularly the potential to involve community members in decision making, improve employment in discrete communities and the resultant potential to improve economic, health and family circumstances.²⁴ However submitters also highlighted challenges for implementation, or suggested variations to the approach in the Bill.

For example, Sisters Inside's submission saw value in the proposed amendments, and considered that all Aboriginal and Torres Strait Islander people in Queensland must be eligible for support within the blue card system to respond to the history of colonisation and criminalisation.

The submission from North West Queensland Indigenous Catholic Social Services supported CJG involvement in any decision, however suggested a wider community group of interest should be involved in decision making. The submission put forward other proposed variations to the model, and suggested a trial of the model to understand the structure and identify issues.²⁵

The Queensland Children's Hospital noted the need for effective governance and accountability structures to ensure the system is safe and effective.²⁶

The Aboriginal and Torres Strait Islander Legal Service supported the proposed amendments 'in general terms' in that the amendments:

²³ Proposed section 231C(4)(a).

²⁴ Queensland Children's Hospital, North West Queensland Indigenous Catholic Social Services, Aboriginal and Torres Strait Islander Legal Service and Sisters Inside (Submissions 2, 3, 5 and 15).

²⁵ Submission 3, p 1.

²⁶ Submission 2, p 1.

... empower Aboriginal and Torres Strait Islander communities to be involved in decisions relating to them and their communities. 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.²⁷

3.2.2 Concerns about the framework proposed by the Bill – a conditional blue card

The proposed creation of a restricted or conditional card was not supported by some stakeholders. They recognised the importance of measures to overcome systemic disadvantage, a high rate of criminalisation of Aboriginal and Torres Strait Islander peoples, and the important principle of community decision-making; however they did not support implementation of a conditional card.

3.2.2.1 Conditional blue card not supported

In its submission the Australian Association of Social Workers (AASW) recommended that the Bill not be passed and said, in line with the Royal Commission into Institutional Responses to Child Sexual Abuse and the QFCC Blue Card Review, it does not support the use of conditional cards or different types of clearances. The AASW ‘upholds QFCC’s position that any compromise to ensuring the safety of children is problematic.’²⁸

The AASW also highlighted the submission to the QFCC:

... by a Peak stakeholder representing the rights, safety and wellbeing of Aboriginal and Torres Strait Islander children, young people and their families which stated:

The Aboriginal and Torres Strait Islander child protection sector is strong and committed to working together to achieve better outcomes for our children and families and working alongside the Queensland Family and Child Commission. Our position, while clearly privileging the legitimate role of our families, organisations and communities in growing our children up, strong in culture, does not in any way support a lowering of standards safeguards that our children have equitable rights to expect of the adults in their lives and the services and systems with whom they interact.²⁹

In its answers to questions taken on notice the AASW:

...there is no quick fix to what is a longstanding problem. Without a focused, sustainable and meaningful strategy to address the structural issues, any short-term solution is not going to achieve the outcome

and,

People’s past experiences with the justice system can cause significant processing delays as their Blue Card applications require further decision-making and assessment. A lack of transparency in this process and how it accounts for these structural issues is an ongoing concern. It is suggested that without meaningfully addressing the BlueCard application process, there will continue to be ongoing issues and exclusion.³⁰

The Queensland Catholic Education Commission (QCEC) submission said it:

... does not support the proposed modifications to the Blue Card arrangements contained in the Bill. While the specific difficulties associated with the operation of the Blue Card system in Indigenous communities are recognised, a dual system should not be created where particular

²⁷ Submission 5, p 8.

²⁸ Submission 4, p 6.

²⁹ Submission 4, citing QFCC Blue Card Review report, pp 6-7.

³⁰ AASW, correspondence dated 21 January 2019.

*individuals are issued with a Blue Card in circumstances where they would not otherwise be given a Blue Card.*³¹

Committee comment

The committee does not consider that the Bill has sufficient regard to the key principle, that the welfare and best interests of a child are paramount. The Bill would allow certain applicants to obtain a positive notice or blue card, when they otherwise would not be eligible. The Bill would provide a different standard of assessment, and consequently a different standard of child protection, in specified communities.

In addition, the committee notes the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse, that nationally there should be no conditional or different types of working with children clearances (see 2.2 above) and the QFCC Blue Card Review endorsement of that recommendation (see 2.3 above). The committee does not support an approach to working with children checks which is contrary to the Royal Commission's and QFCC's recommendations.

3.2.3 Role of Community Justice Groups

As noted, the importance of community decision making in Aboriginal and Torres Strait Islander communities was widely recognised by stakeholders. The ATSILS Legal Service submission suggested that reliance on CJGs 'would bring greater knowledge of the applicant and greater cultural capability into the risk assessment undertaken for the blue card system' and that the proposed role of CJGs is a logical extension of their existing role.³²

However, a range of concerns were raised about the proposed role of CJGs, which are summarised below.

3.2.3.1 CJG responsibility and potential liability

The decision making framework proposed by the Bill would move responsibility for decisions about some blue cards from the chief executive of the department to CJGs, by requiring the chief executive to issue a restricted blue card if recommended by a CJG under proposed sections 231C and 231E. This raises questions about who is responsible, accountable and liable for decisions and their consequences.

The AASW was concerned about the burden of responsibility the Bill would place on CJG members.³³

Decisions about who is permitted to work with children in regulated employment or run a regulated business are complex and require the exercise of discretion, which is accompanied by some level of risk. For example, if a person has a criminal history, a decision must be made about whether an exceptional case exists, that it would or would not be in the best interests of children to issue a blue card (see table on page 5 about assessment and decisions).

The department commented that shift of responsibility for decisions about a positive notice from the chief executive to a CJG 'raises questions of liability, which would require detailed exploration and legal analysis.'³⁴

Committee comment

The committee is concerned the Bill shifts decision making, risk and liability for those decisions to the voluntary members of CJGs. It also notes that the number of active members of CJGs is variable, and five CJGs currently have five or less active members. The committee does not have sufficient certainty

³¹ Submission 1, p 2.

³² Submission 5, p 6.

³³ Submission 4, p 5.

³⁴ Department of Justice and Attorney General, correspondence dated 21 January 2019, p 4.

that voluntary members of CJGs would have sufficient protection from liability to endorse the decision-making framework in the Bill.

3.2.3.2 Capacity building and training

Some of the Blue Card Review recommendations recognise and propose responses to the complexity of decision making under the WWC Act.³⁵ In light of the recognised complexity of decision making, and concerns about adding a further responsibility to voluntary CJGs, some stakeholders suggested that training and capacity building would be needed for CJGs to fulfil the role proposed by the Bill.

ATSILS recommended increased funding and training for CJGs, implementation of child safe standards³⁶ with ongoing compliance and reporting so that CJGs will be appropriately qualified to make binding recommendations about blue card applications.³⁷

The AASW suggested implementation would require training to develop expertise, funding and administrative support to implement the proposed changes:

... (it) would require development of expertise in understanding the legal requirements, there would need to be support with decision making frameworks to ensure consistency and equity. Yet, there is no discussion of how this would occur and indeed be resourced. It is recognised the CJGs are made up of volunteers including Elders and traditional owners, who already have much responsibility placed on them. Adding another significant layer of decision making and the associated responsibilities, requires appropriate resourcing. The resourcing would include the provision of initial and ongoing training as well as ongoing support and guidance by appropriately experienced personnel. Access to appropriate levels of administrative support would also be essential. The Explanatory notes state that costs will be covered by the existing budget. However, we argue that the current funding is insufficient and there is the significant risk that implementation of proposed changes without additional funding would have detrimental effects.³⁸

3.2.3.3 Potential for different recommendations from more than one community justice program

The amendment to enable an application for a restricted positive notice for one or more communities (clause 4) indicates a person may apply for a blue card to work in more than one community. The Bill is silent on the procedure if conflicting recommendations were made to the chief executive by two community justice groups about an application.

3.2.3.4 Privacy, confidentiality and conflicts of interest

The Bill requires that an applicant give consent to the chief executive giving documents and information about them to the CJG for the community area to which their application relates (clause 4). Proposed section 231F also enables the chief executive to give a CJG that has made a recommendation for a restricted positive notice further information about changes to a person's police information. A CJG is able to revoke a recommendation under proposed section 231G.

³⁵ QFCC, Blue Card Review, 2017, see for example recommendations 42 to 45, which include the recommended establishment of a complex case review committee and a multi-disciplinary panel of advisors, both with representation of Aboriginal and Torres Strait Islander people.

³⁶ Child safe standards were recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse; national implementation is under discussion between jurisdictions.

³⁷ Submission 5, pages not numbered

³⁸ AASW, Submission 4, p 5.

Both the AASW and the department raised concerns about privacy and confidentiality. The AASW highlighted a number of questions about how privacy and confidentiality of applicants for a blue card would be managed and how community members would respond:

There needs to be further consideration of how conflicts of interest will be managed, how much personal information is shared, how information is stored and the implications for breaches of confidentiality. There is also the question of how community members will feel and respond to having their personal information shared with Community Justice Groups (CJGs). This latter point can result in people being reluctant to proceed, along with concerns with conflicts of interest. Concerns have been raised about how issues of nepotism and conflicts of interest that can already exist in small communities will be managed and how these will influence decision making.³⁹

3.2.4 Interaction of Bill with *Working with Children (Risk Management and Screening) Act 2000* and proposed amendments in current Government Bill

3.2.4.1 Monitoring and compliance

The Bill does not address monitoring and compliance with a restricted positive notice, which is intended to apply only in one or more community areas for which it is issued.

The AASW submitted that it:

... has identified limited information in the Bill about the enforcement and responsibility for monitoring an individual who has been granted restricted notice or where a Blue Card has been revoked. There is no information as to who would be responsible for enforcement and monitoring of the individual. This gap needs clarification and resourcing as the potential that CJGs becoming an enforcement agent would change their role and responsibilities. Furthermore, the complexities of managing conflicts of interest given the smallness of many communities requires further attention.⁴⁰

The department commented the Bill is silent on 'how the geographical compliance of a person who has been issued a restricted positive notice or interim restricted positive notice to work in a defined community area would be monitored.'⁴¹

3.2.4.2 Review of decisions

The department advised the Bill does not propose an interface between the proposed new framework with the existing system for review of decisions under the WWC Act. The effect of the amendments would be 'that a recommendation or revocation by a CJG would not be subject to review by the Queensland Civil and Administrative Tribunal.'⁴²

3.2.4.3 Other issues

Also, the department advised that the Bill is silent on any suspension mechanism and the chief executive's current powers of suspension in section 240 of the WWC Act 'do not appear to apply to interim restricted positive notices nor restricted positive notices.' The suspension powers are considered to be a key safeguard which complements the ongoing monitoring of Queensland police information of blue card holders.⁴³ Currently if a blue card holder is charged with a disqualifying offence, the positive notice is automatically suspended.

³⁹ Submission 4, p 6.

⁴⁰ Submission 4, p 5.

⁴¹ Department of Justice and Attorney-General, correspondence dated 21 January 2019, p 3.

⁴² Department of Justice and Attorney-General, correspondence dated 21 January 2019, p 5.

⁴³ Department of Justice and Attorney-General, correspondence dated 21 January 2019, p 2.

3.2.5 Alternative approach recommended by Queensland Family and Child Commission

3.2.5.1 Stakeholder views

Most stakeholders clearly recognised the challenges posed by the blue card system for people in Aboriginal and Torres Strait Islander communities, and supported changes to improve access. The QFCC Blue Card Review examined these issues and proposed overall changes to the blue card system, to legislation, policy and practice, and specific measures to support Aboriginal and Torres Strait Islander peoples. The QFCC approach was considered by some stakeholders to be a preferable approach to addressing issues in the blue card system.

The AASW submission recommended that the Bill not be passed, that reform of the WWC Act should be undertaken alongside a national strategy, and the recommendations of the QFCC report, which supports the Royal Commission recommendations, should be used as the benchmark for safeguarding children and young people. The AASW also recommended that progress of the QFCC's recommendations should be considered in relation to any proposed changes to the WWC Act.⁴⁴

The AASW supported full implementation of the recommendation 73 in the Blue Card Review. In particular it supported:

*...the development of multi-disciplinary, and culturally inclusive decision-making models that assess whether there is a risk of harm to children. These models should include providing more support for applicants throughout the process, and building the capacity to support Indigenous communities to understand and navigate the processes involved. We believe these recommendations can be implemented through changes in Government policy and practice, and would not be supported by the legislative framework outlined in the Private Members Bill.*⁴⁵

The QCEC also submitted it:

*... supports the recommendation made by the Blue Card Review that the Department of Justice and Attorney-General develop and implement a specific strategy and action plan to provide more support for Aboriginal and Torres Strait Islander peoples and build cultural capability in the Blue Card system. Such a plan should work to address the difficulties currently being experienced by Indigenous communities in their interactions with the Blue Card system. The broader changes currently being progressed to the overall Blue Card arrangements, such as a new automated system, changes to the decision-making framework and more targeted support for applicants, should also assist in addressing some of these issues.*⁴⁶

The committee notes the advice from the department that the government has:

*.. broadly supported the intent of all QFCC recommendations noting that they were significant and would require a planned and considered implementation which will be resource and time intensive and require extensive industry and community consultation.*⁴⁷

3.2.5.2 Engagement and support to communities and implementation of the QFCC recommendation

The Blue Card Review report noted in 2017 that BCS had a number of strategies to support Aboriginal and Torres Strait Islander peoples, however stakeholder feedback indicated that more was needed. The report includes the number of community engagement activities and visits to Aboriginal and Torres Strait Islander communities between 2011-12 and 2015-16. Activities reduced significantly in 2013-14, and began to increase in 2015-16. The department advised the QFCC that since it took responsibility for BCS in October 2016 it had recommenced visits to Aboriginal and Torres Strait

⁴⁴ Submission 4, p 7.

⁴⁵ AASW, Correspondence, 21 January 2019, p 3.

⁴⁶ QCEC, Submission 1, p 2.

⁴⁷ Department of Justice and Attorney-General, Briefing Paper, 4 December 2018, p 4.

Islander remote communities to provide face-to face support, practical assistance and to actively encourage individual and community participation in the blue card system.⁴⁸

The department advised that it had increased travel to Aboriginal and Torres Strait Islander communities to provide information, education and individual assistance to applicants to increase participation in the blue card system. During 2017-18 BCS travelled to six remote communities, and to date in 2018-19 it has travelled to 5 remote communities.⁴⁹

The department advised that it is committed to increasing individual and community participation in the blue card system, and that the vast majority of people who identify as Aboriginal and/or Torres Strait Islander who apply for a blue are card are issued with one. The applications received and the number of positive and negative notices in 2017-18 were:

Applications from individuals who identify as Aboriginal and/or Torres Strait Islander	11,701
Blue card or exemption cards issued	10,312
Negative notices issued	103

Source: Department of Justice and Attorney-General, correspondence dated 21 January 2019.

A series of video and radio material has been produced, in partnership with an Indigenous creative agency. The resources address some of the barriers and address common misconceptions about the blue card system, including the misunderstanding that that any criminal history makes a person ineligible, how to access assistance, and clarifying that not all employment involving children requires a blue card.

The Blue Card Review recommended the department develop a specific strategy and action plan to provide more support for Aboriginal and Torres Strait Islander peoples and build cultural capability in the blue card system. The department advised the committee on aspects of progress toward implementation:

- *strategy and action plan*: work will be undertaken by an external consultant. A project board has been formed, project and procurement plans developed, and a four-member n evaluation panel to select a consultant has been formed; three members are people who identify as Aboriginal and/or Torres Strait Islander
- *identified staff position*: work has begun to establish an identified staff position in BCS, and to ensure all staff have cultural capability training .⁵⁰

The department also advised it had intensified support to applicants through the application and assessment processes through:

- increased frequency of contact with service early if an incomplete application is made and further information is required
- establishing a small team focused on reducing disengagement by applicants with a criminal history who are asked to provide a submission to support their application. Applicants are assisted with providing information about their history, the steps taken to address the

⁴⁸ QFCC, *Keeping Queensland's children more than safe: Review of the Blue Card system - Blue Card and Foster Care Systems Review*, 2017, pp 127-128, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf

⁴⁹ Department of Justice and Attorney-General, correspondence dated 21 January 2019, p 3.

⁵⁰ Department of Justice and Attorney General, correspondence dated 21 January 2019, p 3.

triggers for their offending behaviour, evidence of rehabilitation, and character references from people in the community.⁵¹

The increased assistance to applicants resulted in better 'quality of information To inform the decision-making process, and there has been an increase in the issue of blue cards in circumstances where a negative notice may otherwise have been issued, had the person not provided a submission. The proportion of applications where there was no response to a request for further information or a request for a submission has decreased over the last two years. In 2015-16 the no response rate was 17.8% of requests for information or a submission, in 2017-18, and this had decreased to 2.4% of requests.⁵²

Committee comment

The committee considered whether there may be alternative ways to achieve the intent of the Bill, to address some of the difficulties experienced by people in Aboriginal and Torres Strait Islander communities with the blue card system. Noting the recommendations of the Royal Commission and, the QFCC that there should not be conditional working with children cards, and the weight of evidence presented to it, the committee considers that implementation of the recommendations of the Blue Card Review is the preferred approach to addressing concerns about the blue card system.

Given the importance of systematic implementation of the broad ranging and significant recommendations of the Blue Card Review, the committee recommends that the Attorney-General and Minister for Justice provide an update on implementation by July next year.

Recommendation 2

The committee recommends the Attorney-General and Minister for Justice provide the committee with a progress report on implementation of the Queensland Family and Child Commission Blue Card Review recommendation for reform to how Aboriginal and Torres Strait Islander applicants are supported (Recommendation 73) by 31 July 2020.

⁵¹ Department of Justice and Attorney General, correspondence dated 21 January 2019, p 3.

⁵² Department of Justice and Attorney General, correspondence 21 dated January 2019, p 3.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

4.2 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

4.2.1 Rights of children

Clause 7 provides that a CJG may recommend the chief executive issue interim restricted positive notices and restricted positive notices. The criminal history a CJG would be required to have regard to is narrower than criminal history currently considered for all applicants for a positive notice.

4.2.1.1 *Issue of fundamental legislative principle*

The explanatory notes recognise a possible breach of fundamental legislative principle, as the proposed amendments allow certain applicants to receive a positive notice, when they ordinarily would not:

*... in that children in community areas could be exposed to particular convicted persons, while children elsewhere are not.*⁵³

On the rights of children, the explanatory notes for the original WWC Bill (which became the first version of the principal Act) stated:

In most cases where the Bill departs from the fundamental legislative principles, this occurs in the context of the tension between the rights of individuals as safeguarded by the Legislative Standards Act 1992 and the competing rights of a child as set out in the principles under which the Act is to be administered. In particular, the following principles are of significance in provisions where there has been a departure from the fundamental legislative principles:

- *in decisions involving a child, the best interests of a child are the paramount concern*
- *every child is entitled to be cared for in a way that protects the child from harm and promotes the child’s well being; and*
- *every child is entitled to be treated in a way that respects the child’s dignity and privacy.*⁵⁴

The explanatory notes for the Bill justify any breach of fundamental legislative principles in this way:

... the role of the Community Justice Group is to provide the vetting of the individual applicant based on their intimate knowledge of their character and the circumstances of each case. Due to the Community Justice Group’s proximity to each case and the individual and community stakeholders involved, they are in a far better position to determine whether an applicant poses a risk to the children they will be working with. Due to the role of the Community Justice Group

⁵³ Explanatory notes, p 5.

⁵⁴ Commission for Children and Young People Bill 2000, explanatory notes, p 5.

*in the decision making process, the framework ensures that fundamental legislative principles are met.*⁵⁵

Committee comment

The committee does not consider that the Bill has sufficient regard to a child's rights by allowing certain applicants to receive a positive notice, when they otherwise would not be eligible. The Bill would provide a different standard of applicant assessment, and of protection for children, in specified communities.

4.2.2 Confidentiality and disclosure of information

Clause 7 proposes a number of new provisions in the WWC Act.

Proposed section 231B requires the chief executive, when a community area application is made, to give notice of the application to the relevant CJG. The notice must include a copy of the application.

Proposed section 231D requires the chief executive to give to the CJG written notice containing all information the chief executive considers is relevant to deciding the application. The notice must include or be accompanied by:

- a copy of each document received by the chief executive in relation to the application, and
- a written summary of any oral information received by the chief executive in relation to the application.

If the chief executive intends to issue a negative notice, the notice to the CJG must also state:

- the section under which the chief executive proposes to issue the negative notice, and
- the reasons for the chief executive's proposed decision.⁵⁶

Proposed section 231F applies if the chief executive is notified of any change in the applicant's police information. The chief executive must give the community justice group (that has made a recommendation about a person):

- a copy of the notice given to the chief executive in relation to the person's police information, and
- any other document or information obtained by the chief executive in relation to the change in police information.

4.2.2.1 Issue of fundamental legislative principle

The right to privacy and issues regarding the disclosure of private or confidential information are relevant to consideration of whether legislation has sufficient regard to the rights and liberties of individuals.

The Bill provides for the personal information of an individual applicant to be disclosed by the chief executive to a CJG. This information could include quite sensitive content, such as a person's criminal record. The information is then able to be used by the CJG in reaching its decision on a recommendation.

It appears at best doubtful whether a CJG and its members would be bound by any legal duty of confidentiality.

⁵⁵ Explanatory notes, p 5.

⁵⁶ Clause 7, proposed section 231D(2)(b).

The Bill does not contain any provision about the confidentiality of an applicant's information once given to a CJG. However, both the JLOM Act and the WWC Act contain confidentiality provisions to deal with how information is disclosed and protected by entities that hold information.

Aboriginal and Torres Strait Islander (Justice, Land and Other Matters) Act 1984

The JLOM Act confidentiality provisions apply to:

*a person who has gained, gains or has access to, protected information through involvement in the administration of the Act.*⁵⁷

A person is prohibited from recording, using or, intentionally or recklessly disclosing information (unless authorised by the section).⁵⁸

A CJG is formed under Part 4 of the JLOM Act. Therefore the confidentiality provisions in the JLOM Act would apply to its members and they would be subject to an offence if this information is misused, provided the information comes within the scope of section 63A of the JLOM Act.

In considering whether the information does so, two aspects must be satisfied. The information must be :

- protected information
- accessed through involvement in the administration of the JLOM Act.

Protected information

Under section 63A, 'protected information' means information obtained by the chief executive under section 21 of the AISIC Act, which in turn means, broadly, information obtained by the chief executive in investigating suitability for appointment to a CJG (including criminal history information).

Involvement in the administration of the Act

Clause 11 of the Bill adds the following to the functions and powers of CJGs in section 19 of the JLOM Act:

(da) making recommendations under the Working with Children (Risk Management and Screening) Act 2000, chapter 8, part 4, division 9A

It is at best unclear whether the information able to be provided to a CJG under the Bill would be covered by the current JLOM Act confidentiality provision. Whilst the functions under the JLOM Act are extended by clause 11 to the making of recommendations regarding the working with children provisions, the information would be in the hands of the community justice group for purposes other than the making of a recommendation (that is, there will not always be a recommendation being made). In any event, the extension by clause 11 is arguably insufficient to bring that function within 'involvement in the administration of' the JLOM Act, as required by section 63A.

Working with Children (Risk Management and Screening) Act 2000 confidentiality provisions

The WWC Act confidentiality provisions apply to two types of disclosure:

- information about a person's police information, disciplinary information, information about their mental health and their criminal history
- other confidential information.⁵⁹

⁵⁷ Section 63A JLOM Act.

⁵⁸ Section 63A(2) JLOM Act.

⁵⁹ See respectively sections 384 and 385(1) of the WWC Act.

The Act sets out the persons that are able to disclose the above information. These include, for example, being an employee of the department, Minister or a member of an advisory committee.⁶⁰ The WWC Act also provides for the lawful disclosure of this information in certain circumstances.⁶¹

Two situations need to be considered:

- the disclosure of information from the chief executive to the CJG as required under the proposed provisions
- the use and storage of information by the CJG.

Disclosure by chief executive to community justice group

While there are no specific amendments proposed in the Bill, the existing provisions of the WWC Act would seem to adequately cover the disclosure by the chief executive. In relation to information that relates to police information, mental health and criminal history, section 384(5) of the WWC Act would allow disclosure in a number of situations, including if the disclosure is required under an Act. The proposed amendments in the Bill would make it a requirement of the WWC Act and therefore the disclosure of such information would be lawful.

For all other information, the disclosure would come under the requirements in section 385 of the WWC Act. The disclosure would be permitted under subsection 385(4) as the disclosure is made under a requirement of the Act.

Use of information by community justice group

It is highly doubtful that the use by members of a CJG of information that relates to police information, mental health and criminal history, would be covered by the confidentiality provision in section 384 of the WWC Act. This is because such members do not appear to come within the classes of persons covered by those provisions of the WWC Act – being, broadly, public sector employees involved in the administration of the Act.

In relation to other confidential information, it appears doubtful whether members of a CJG would be bound by the confidentiality provision in section 385, as, again, they do not appear to fall within the classes of persons covered. (See section 385(3)).

Committee comment

As it is doubtful that the existing confidentiality provisions of the WWC Act will apply to CJGs, the committee considers that the Bill does not provide adequate protection for private and confidential information. The committee considers the Bill does not have sufficient regard to individual rights to privacy and confidentiality.

4.2.3 Administrative Power

Section 4 of the *Legislative Standards Act 1992* provides:

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation –

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review...

Clause 7 allows a CJG to make a recommendation to issue an interim restricted positive notice or a restricted positive notice. If a CJG makes a recommendation to the chief executive, the chief executive

⁶⁰ Sections 384(1), (2) and 385(3) WWC Act.

⁶¹ Sections 384(5) and 385(4) WWC Act.

must issue an interim restricted positive notice or a restricted positive notice (proposed subsections 231C(5) and 231E(5)).

The CJG must take into account matters listed in proposed subsection 231C(4) and 231D(4). In making a decision on a restricted positive notice, the CJG also receives information listed in proposed section 231D.

The matters considered by the CJG include:

- any police information, investigative information or disciplinary information about the person that the group is aware of and considers relevant
- whether, and in what capacity, the person has previously worked with children
- the person's social standing and participation within the community area
- whether, in the group's reasonable opinion, withholding the recommendation would have a negative impact on the social or economic wellbeing of the community area's inhabitants
- information provided that the chief executive considers relevant
- documents provided to the chief executive in relation to the application.

While the CJG may revoke a recommendation under proposed section 231G, there does not appear to be any provision for review by the applicant of the recommendation decision where the applicant does not receive a positive recommendation.

4.2.3.1 Issues of fundamental legislative principle

Legislation should make rights and liberties, or obligations, dependent on administrative power only if subject to appropriate review. The OQPC Notebook states:

*Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.*⁶²

Committees have expressed opposition to clauses removing the right of review, on the basis that there should be a review or appeal against the exercise of administrative power. Where ordinary rights of review are removed, thereby preventing individuals from having access to the courts or a comparable tribunal, it is a matter of assessing whether sufficient regard has been afforded to individual rights, noting that such a removal of rights might be justified by the overriding significance of the objectives of the legislation.⁶³

The chief executive is required to issue a positive notice following a positive recommendation from a CJG. Effectively, the decision making power lies with the CJG.

The CJG must take into account a number of factors when making their decision. There is no requirement for the decision maker to have specified qualifications, and no review right attached to the decision.

It could be argued that many of the factors that a CJG is considering make them best placed to make a determination, for example, the person's social standing and participation in the community area. It is a significant decision to issue a person a positive notice, particularly when the person would not ordinarily be entitled if they applied under the current Act.

⁶² Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 18.

⁶³ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 19.

The explanatory notes do not provide any comment or explanation regarding the lack of review rights.

Committee comment

The committee is concerned about the lack of review rights. If a decision was made that would affect the applicant's ability to work in child related employment, the person should have a right of review to the same extent as other applicants under the WWC Act.

The committee considers that the delegation of this administrative power to a CJG group is not appropriate, having regard to the nature and role of CJGs, and the policy objectives of the WWC Act.

4.3 Explanatory notes

Section 23 of the *Legislative Standards Act 1992* requires explanatory notes to include specified information, in clear and precise language.

The explanatory notes state that the Bill primarily amends the *Working with Children (Risk Management and Screening) Act 2000*. The explanatory notes also state that consequential amendments are made to seven other Acts, but in fact only one of those is amended – the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*.

The committee notes the importance of clear and accurate explanatory notes to avoid confusion. It also notes that a simple explanation of the purpose and intended operation of each clause of the Bill was not included, as required by section 23(1)(h) of the *Legislative Standards Act 1992*.

Appendix A – Submitters

Sub #	Submitter
001	Queensland Catholic Education Commission
002	Queensland Children’s Hospital
003	North West Queensland Indigenous Catholic Social Services
004	Australian Association of Social Workers - Queensland Branch
005	Aboriginal & Torres Strait Islander Legal Service (QLD) Ltd
015	Sisters Inside – addresses both the Government Bill and Private Members Bill

Submissions 6 to 14 relate to the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018 which was considered by the committee at the same time.

Appendix B – Witnesses at public hearing

Queensland Catholic Education Commission

- Dr Lee-Anne Perry AM, Executive Director
- Mr Patrick MacDermott, Senior Policy Officer, Governance and Strategy

Sisters Inside

- Ms Marissa Dooris, Policy Officer
- Ms Debbie Kilroy, Chief Executive Officer

Australian Association of Social Workers

- Ms Ellen Beaumont, President
- Ms Candice Butler, Subcommittee Convenor, Reconciliation Action Plan

Queensland Aboriginal and Torres Strait Islander Legal Service

- Ms Kate Greenwood, Policy, Early Intervention and Community Legal Education Officer

