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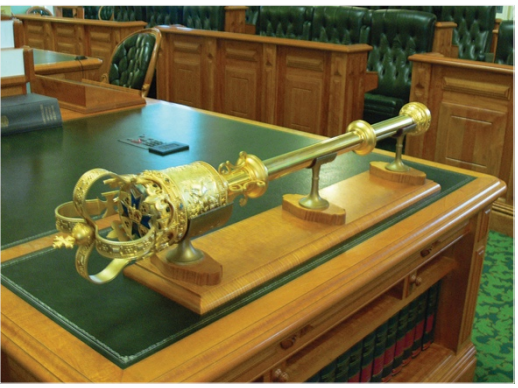
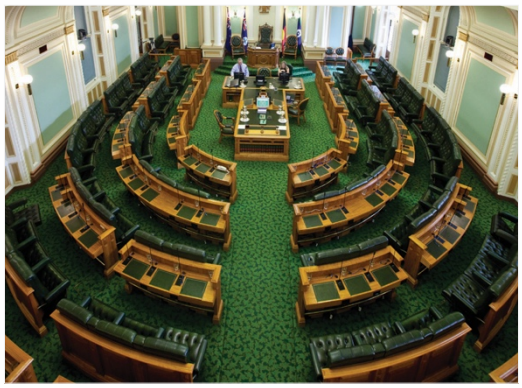
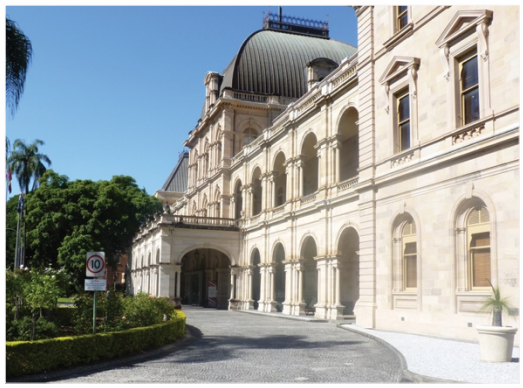

Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020

Report No. 39, 56th Parliament
Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
August 2020

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

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Acknowledgements

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Contents

Abbreviations

Bill	Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020
blue card system	Queensland's Working with Children Check
COAG	Council of Australian Governments
DCDSS	Department of Communities, Disability Services and Seniors
DJAG	Department of Justice and Attorney-General
ESSA	Exercise and Sports Science Australia
Full scheme Bilateral Agreement	Bilateral Agreement between the Commonwealth of Australia and Queensland on the National Disability Insurance Scheme
HRA	*Human Rights Act 2019*
IGA	Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme
LSA	*Legislative Standards Act 1992*
NDIS	National Disability Insurance Scheme
NDIS Commission	National Disability Insurance Scheme Quality and Safeguards Commission
NDIS QSF	National Disability Insurance Scheme Quality and Safeguarding Framework
PPRA	*Police Powers and Responsibilities Act 2000*
RIS	Regulation Impact Statement
QAI	Queensland Advocacy Incorporated
QCAT	Queensland Civil and Administrative Tribunal
QDN	Queenslanders with Disability Network
QHRC	Queensland Human Rights Commission
QLS	Queensland Law Society
WS Rules	NDIS (Practice Standards—Worker Screening) Rules 2018
WWC Act	*Working with Children (Risk Management and Screening) Act 2000*

Chair's foreword

This report presents a summary of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee's examination of the Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020.

The committee's task was to consider the policy to be achieved by the legislation 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. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff, the Department of Communities, Disability Services and Seniors and the Department of Justice and Attorney-General.

I commend this report to the House.

Aaron Harper MP

Chair

Recommendations

1 Introduction

1.1 Role of the committee

The Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (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:

- Health and Ambulance Services
- Communities, Women, Youth and Child Safety
- Domestic and Family Violence Prevention
- Disability Services and Seniors.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019*
- for subordinate legislation – its lawfulness.[2]

The Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020 (Bill) was introduced into the Legislative Assembly and referred to the committee on 18 June 2020. The committee is to report to the Legislative Assembly by 3 August 2020.

1.2 Inquiry process

On 19 June 2020, the committee invited stakeholders and subscribers to make written submissions on the Bill. Six submissions were received.

The committee received a public briefing about the Bill from the Department of Communities, Disability Services and Seniors (DCDSS) and the Department of Justice and Attorney-General (DJAG) on 23 June 2020. A transcript is published on the committee's web page; see Appendix B for a list of officials.

The committee received written advice from DCDSS in response to matters raised in submissions.

On 17 July 2020, the committee held a public hearing (see Appendix C for a list of witnesses) and a second public briefing from DSDSS and DJAG (see Appendix B for a list of officials).

The submissions, correspondence from DCDSS and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Background to the Bill

On 9 December 2016, the Council of Australian Governments (COAG) agreed to the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework (NDIS QSF). The NDIS QSF provides a nationally consistent approach to ensure NDIS participants receive high quality supports with

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

2 *Parliament of Queensland Act 2001*, section 93; and *Human Rights Act 2019* (HRA), sections 39, 40, 41 and 57.

appropriate safeguards in place. This includes the delivery of a nationally consistent worker screening framework, through a shared approach between the Commonwealth and the states and territories.[3]

To support this shared approach to worker screening, the Commonwealth and the states and territories developed the Intergovernmental Agreement on Nationally Consistent Worker Screening for the NDIS (IGA), which was signed by the Premier of Queensland on 3 May 2018. The purpose of the IGA is to provide a framework for conducting nationally consistent NDIS worker screening and to provide assurance of the shared commitment of the Commonwealth, state and territory governments to deliver nationally consistent worker screening.[4]

From 20 March to 3 May 2018 the committee examined the Disability Services and Other Legislation (Worker Screening) Amendment Bill 2018, a bill proposing to implement the first stage of legislative amendments to prepare Queensland for full scheme operation of the NDIS, and for Queensland to meet the obligations under the NDIS QSF to share criminal history information consistent with the information shared for working with children under Queensland's Working with Children Check (the blue card system).[5] The committee recommended that the Bill be passed.[6] The Bill was passed by the Legislative Assembly on 5 September 2018 and assented to on 11 September 2018.[7]

On 15 November 2018, the Education, Employment and Small Business Committee commenced examination of the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018, which proposed to give effect to the government's 'No card, no start' policy as well as other amendments relating to the blue card system. The Bill was passed by the Parliament on 16 May 2019 and assented to on 24 May 2019; however, sections of this Act are yet to commence. The Working with Children (Risk Management and Screening) and Other Legislation Amendment (Postponement) Regulation 2020 postponed the commencement of provisions relating to blue card application processes to 25 May 2021. Part 3 of the Bill proposes to amend a number of sections of the *Working with Children (Risk Management and Screening) Act 2000* which are yet to commence.

On 9 July 2019, the Commonwealth and Queensland Governments entered into the Bilateral Agreement between the Commonwealth of Australia and Queensland on the National Disability Insurance Scheme (Full scheme Bilateral Agreement), to take effect from 1 July 2020. The Full scheme Bilateral Agreement confirms that the NDIS QSF outlines the roles and responsibilities of the Commonwealth and all state and territory jurisdictions in relation to ensuring high quality supports and safe environments for NDIS participants.[8]

1.4 Policy objectives of the Bill

Under the principles set out in the IGA, all states and territories have agreed to implement nationally consistent NDIS worker screening through appropriate legislation. Implementation of a nationally consistent system for NDIS worker screening will mean clearances and exclusions will be nationally

3 Explanatory notes, p 1.

4 Explanatory notes, p 2.

5 Queensland's Working with Children Check, or blue card system, as established by the *Working with Children (Risk Management and Screening) Act 2000*, regulates activities and checks and monitors people who work in industries involving children, including child care, education, sport, cultural activities and foster care. The blue card system consists of three components: screening, monitoring and determining risk management strategies for organisations.

6 Health, Communities, Disability Services, Domestic and Family Violence Prevention Committee (HCDSDFVPC), *Disability Services and Other Legislation (Worker Screening) Amendment Bill 2018, Report No.5, 56th Parliament*, May 2018, p iv.

7 *Disability Services and Other Legislation (Worker Screening) Amendment Act 2018*, https://www.legislation.qld.gov.au/view/html/asmade/act-2018-019/lh.

8 Department of Communities, Disability Services and Seniors (DCDSS) correspondence dated 23 June 2020, attachment, p 1.

portable across roles and employers in all states and territories within the NDIS, and will strengthen safeguards for people with disability (for example, through ongoing monitoring of a screened worker's national criminal history). Queensland will continue to operate a separate state disability worker screening system for disability services it continues to fund or deliver that are outside the jurisdiction of the NDIS Quality and Safeguards Commission (NDIS Commission).[9]

The objectives of the Bill are to:

- support nationally consistent worker screening for the NDIS and the IGA
- enable Queensland to operate a state disability worker screening system for certain disability services that it continues to fund, or deliver, outside of the jurisdiction of the NDIS Commission
- streamline and strengthen the legislative framework for disability worker screening in Queensland, and
- ensure the blue card system operates effectively and efficiently alongside the disability worker screening system and the strongest possible safeguards are maintained in relation to persons working with children with disability.[10]

1.5 Consultation on the Bill

1.5.1 Commonwealth Government consultation on national platform

As set out in the explanatory notes, the Commonwealth Government commenced consultation on the implementation of the NDIS QSF in Queensland from 2015, and on the NDIS (Practice Standards—Worker Screening) Rules 2018 (WS Rules) and IGA from 2017.[11] The national Department of Social Services prepared a Decision Regulation Impact Statement (RIS), which was provided to the COAG Disability Reform Council.[12] The RIS concluded that independent risk-based screening, akin to Queensland's yellow card system, represented the most efficient and effective approach to worker screening. The Department of Social Services noted that, during consultation, stakeholders almost universally supported this option.[13]

1.5.2 Queensland Government consultation processes

The DCDSS undertook consultation in October and November 2018 on wider issues relating to the implementation of the NDIS, and also on particular issues relating to worker screening. Views were sought regarding the screening of unregistered NDIS providers, 'no card, no start', and whether screening systems should interact with each other. From this consultation in 2018, the DCDSS found that many stakeholders strongly recognised the need to ensure choice and control for people with disability and recognise that those who self-manage their NDIS plan would have the capacity to make their own decisions about screening providers.

However, concerns were also raised throughout the discussions about the need to ensure protection for people with disability, recognising that some people are in a more vulnerable position and, consequently, the workers of any organisation providing disability services should be screened. The

9 Explanatory notes, p 1.

10 Explanatory notes, p 1.

11 Explanatory notes, p 25; DCDSS, correspondence dated 23 June 2020, attachment, p 9.

12 The Council of Australian Governments (COAG) Disability Reform Council provides a forum for member governments to discuss matters of mutual interest and progress key national reform in disability policy including the NDIS. The Council oversees both the implementation of the NDIS and reforms that are implemented through the National Disability Agreement and the National Disability Strategy; https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/government-international/disability-reform-council.

13 DCDSS, correspondence dated 23 June 2020, attachment, p 9.

consultation process identified that stakeholders were generally supportive of implementing a 'no card, no start' approach to screening, and almost all respondents said screening systems, such as those for the disability and working with children sectors, should interact with each other to strengthen screening and reduce unnecessary duplication and costs.[14]

Targeted consultation by the DCDSS in February 2020 informed key stakeholders about the proposed legislative amendments related to NDIS worker screening and sought stakeholders' perspectives on operational implementation.[15] Key stakeholders included the Queensland Disability Advisory Council and peak bodies. As advised by DCDSS:

> *Results of consultation informed the implementation of policy issues on which Queensland has discretion, including technical and operational impacts.*[16]

The DCDSS undertook additional targeted consultation in February and March 2020 with Queensland Disability Advisory Council and peak bodies. From this consultation, DCDSS reported:

> *There was broad support for the implementation of nationally consistent NDIS worker screening, and particularly of online and automated processes to improve processing timeframes. Concerns about duplication of screening processes across government, efficiency and timeframes of screening processes were raised. The impact of screening and processes on providers in rural/regional areas and Aboriginal and Torres Strait Islander communities was raised, and the support given to applicants during the screening process.*
>
> *There were mixed views on the optional screening for unregistered providers, and how to incentivise screening. The sessions emphasised the importance of messaging and communication of the proposed changes.*[17]

1.5.3 Consultation with Indigenous communities

Ms Bianchi, Executive Director, Strategic Policy and Legislation, DCDSS, informed the committee that in relation to consultation with Indigenous communities:

> *… there is a lot of work being undertaken under the NDIS more generally. There are specific projects being undertaken around thin markets to try to build the capacity of both individuals to come into the NDIS and service providers to be able to provide services within those markets. As part of the full scheme agreement, Queensland also secured $1.5 million of funding from the Commonwealth government to undertake to provide some funding to actually build some of those services within Aboriginal and Torres Strait Islander communities in Queensland. In addition to that, the department has commenced the development of an Aboriginal and Torres Strait Islander communication and engagement strategy following closely the work that our colleagues at the department of justice are doing in the blue card space.*
>
> *We would also anticipate that as part of the implementation of this bill we will have our own specified communication strategy. As part of that we will be developing material specifically for Aboriginal and Torres Strait Islander peoples and communities.*[18]

The DJAG confirmed that consultation had occurred with Aboriginal and Torres Strait Islander people to build more support and 'cultural capability' within the blue card system.[19] DJAG also advised:

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14 DCDSS, correspondence dated 23 June 2020, p 10.

15 Explanatory notes, p 26.

16 DCDSS, correspondence dated 23 June 2020, p 10.

17 DCDSS, correspondence dated 23 June 2020, p 10.

18 Public briefing transcript, Brisbane, 23 June 2020, p 4.

19 Public briefing transcript, Brisbane, 23 June 2020, p 11.

Blue Card Services have done a lot of travel to remote communities, obviously in a pre-COVID environment. In the last 12 months they visited Cherbourg, Lockhart River, Mossman, Yarrabah, Woorabinda, Palm Island, Doomadgee, Mornington Island, Thursday Island, Darnley Island, Bamaga, Seisia, New Mapoon, Weipa, Mapoon, Napranum, Aurukun, Pormpuraaw, Kowanyama, Coen, Normanton, Hope Vale, Wujul Wujul, Cooktown and Coconut Island.[20]

1.5.4 Consultation with legal stakeholders

The DCDSS reported that legal stakeholders (including the Queensland Director of Public Prosecutions, Legal Aid Queensland and the Queensland Law Society (QLS)) were consulted in relation to the proposal to amend the *Evidence Act 1977* to enable the chief executive (disability services) access to section 93A transcripts.[21] According to the explanatory notes, these stakeholders did not express any objections due to the understanding that the Bill's proposed reforms were 'based on the precedent that has been set in relation to the blue card system'.[22]

1.6 Commencement of proposed provisions in the Bill

The Bill proposes to amend a number of sections in the *Working with Children (Risk Management and Screening) Act 2000* which are yet to commence. The provisions are part of the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2019* (the Amendment Act) assented to on 24 May 2019. Certain provisions of the Amendment Act commenced by proclamation on 1 July 2019, with the remaining provisions yet to commence.

The Working with Children (Risk Management and Screening) and Other Legislation Amendment (Postponement) Regulation 2020 was tabled on 19 May 2020, allowing remaining un-commenced provisions of the Amendment Act to automatically commence by 25 May 2021. Proclamation No. 3—Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2019 (commencing remaining provisions) was notified on 10 July 2020. The proclamation fixes 31 August 2020 for the commencement of the provisions of the Amendment Act that are not in force.

The Minister for Communities and Minister for Disability Services and Seniors, Hon Coralee O'Rourke MP, referred to the delay in the commencement of the national scheme in her introductory speech to the Bill:

It was intended that NDIS worker screening under the IGA would commence on 1 July 2020. However, due to the impacts of the COVID-19 pandemic, this time frame has had to be reconsidered. It would not be sensible to implement such a significant reform in the context of a global health pandemic. This approach ensures that service providers can remain focused on critical service delivery in these challenging times.

The bill will commence by proclamation to enable flexibility to commence the new worker screening arrangements and to allow the final date to be negotiated and confirmed with the Commonwealth and other jurisdictions. Until commencement, the strong screening processes under the current yellow card system will continue. This means that NDIS service providers can continue to apply for a yellow card, a blue card or a yellow card exemption.[23]

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[20] Mr Greg Bourke, Project Director, Blue Card Legislative Review, public briefing transcript, Brisbane, 23 June 2020, p 11.

[21] Explanatory notes, p 26.

[22] Explanatory notes, p 26.

[23] Queensland Parliament, Recording of Proceedings, 18 June 2020, p 1391.

In regard to commencement of the scheme, the DCDSS advised that there will be, 'clear communications that explain how the transitional provisions will work and what this means for workers and employers'.[24]

1.7 Should the Bill be passed?

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

Recommendation 1

The committee recommends the Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020 be passed.

[24] DCDSS, correspondence received 14 July 2020, attachment, p 18.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill. The submissions received by the committee were supportive of the objectives of the Bill.

The Bill proposes to amend the *Disability Services Act 2006* and the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act). There are consequential amendments to the *Evidence Act 1977,* the *Police Powers and Responsibilities Act 2000*, the *Guardianship and Administration Act 2000* and other legislation.

2.1 Amendments to the *Disability Services Act 2006*

The Bill proposes to amend the *Disability Services Act 2006* (DSA) to replace the existing yellow card framework with a new framework for both NDIS worker screening and state disability worker screening.

2.1.1 Definitions

Clauses 6 to 9 propose amendments to a number of definitions within the DSA. Clause 9 provides meaning for the following terms: *funded service provider; NDIS service provider; NDIS sole trader; and State sole trader*.

New section 14 of the DSA would define *funded service provider* as 'a service provider, other than the State, receiving recurrent or one-off funds from the DCDSS, or another department prescribed by regulation, to provide disability services'.[25]

The DCDSS advised that, under the IGA, certain types of information of which the chief executive is aware must be considered when risk assessing a person, such as: police information; domestic violence information; NDIS disciplinary and misconduct information; and outcomes of previous disability worker screening checks. In addition, the chief executive may also consider other types of information such as child protection orders, previous working with children check or vulnerable person checks, and/or employer or professional records.[26]

2.1.1.1 Stakeholders' views

Queensland Advocacy Incorporated (QAI) submitted that the proposed new section 14 in clause 9 be updated to change the definition of *funded service provider* to include the state.[27] According to QAI, by excluding the state from being a funded service provider, workers who are employed by the state are not required to request clearance under this Bill prior to engaging in NDIS work.[28]

The QLS called for greater clarity and consistency in regard to definitions provided in the Bill. In particular, the QLS drew attention to proposed section 88, which states the chief executive must consider information including domestic violence information and disciplinary information. The QLS stated:

> *These terms are not defined in the bill or in the DSA. A definition for each term should be provided to ensure that a worker knows what information they are required to provide and/or what information the chief executive is able to obtain and, so that Parliament can ensure that the personal information obtained for these purposes is fair and reasonable in the circumstances.*[29]

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25 Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020 (Bill), clause 9.

26 DCDSS, correspondence dated 14 July 2020, attachment, p 20.

27 Submission 2, p 4.

28 Submission 2, p 5.

29 Submission 5, p 3.

2.1.1.2 Department response

In response to QAI, the DCDSS advised that the state and its workers are subject to the following worker screening requirements under the Bill:

- a registered NDIS provider does not exclude the state and can include a government department or agency if it is a registered NDIS provider under the *National Disability Insurance Scheme Act 2013* (NDIS Act) (Cwlth) (see proposed new section 15), and
- individual workers engaged by a registered NDIS provider in a risk-assessed role to provide NDIS work, or engaged by the DCDSS to provide state disability work, are subject to worker screening requirements, and offences apply under proposed new sections 54 and 61.[30]

Noting the submission of the QLS on the matter of definitions, the DCDSS stated:

> *There are safeguards built into the Bill to ensure the gathering and use of information by the chief executive is limited to screening purposes. This balances the need to obtain and use sensitive information to risk assess a person with the importance of respecting and protecting privacy rights of that person.*
>
> *For example, section 138D of the Bill provides that the chief executive may only request domestic violence information from the police commissioner if the chief executive reasonably believes a domestic violence order may have been made against a relevant person. This is limited to the definition of 'domestic violence information' as defined under schedule 8 (Dictionary) to mean 'information about the history of domestic violence orders made against the person under the Domestic and Family Violence Prevention Act 2012 '.*[31]

The DCDSS also stated:

> *The 'disciplinary information' obtainable under the Bill is intended to bring the disability worker screening system in line with the blue card system. The relevant agencies responsible for these types of information have been consulted and generally support these types of information being brought into scope for disability worker screening outlined in the Bill. The consent of applicants will also be sought to use their information for the purposes outlined in the Bill.*[32]

2.1.2 Disability worker screening

Clause 11 of the Bill proposes to repeal and replace Part 5 of the DSA (Screening of particular persons engaged by DCDSS or particular service providers) with a new Part 5 (Disability worker screening and related requirements).

New section 40 in clause 11 of the Bill would provide that the main purposes of Part 5 are to establish a scheme for screening persons; require a person who carries out or is proposing to carry out particular work with people with disability to be screened before they start work; and to prohibit persons from carrying out particular work with people with disability if the chief executive decides they pose an unacceptable risk of harm to people with disability. The DCDSS advised that the provision 'reflects the objectives for nationally consistent NDIS worker screening under the IGA to protect and prevent people with disability receiving NDIS supports or services from experiencing harm, and also applies that to Queensland's state disability worker screening framework'.[33]

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30 DCDSS, correspondence dated 14 July 2020, attachment, p 3.

31 DCDSS, correspondence dated 14 July 2020, attachment, p 21.

32 DCDSS, correspondence dated 14 July 2020, attachment, p 22.

33 Explanatory notes, p 28.

2.1.2.1 State disability worker screening

The Bill proposes to retain a state screening system for disability services funded or provided by the Queensland Government that are outside the jurisdiction of the NDIS Commission, for example, Accommodation Support and Respite Services. State disability screening will leverage the national policy for NDIS worker screening, where possible; and an NDIS clearance issued in Queensland will be considered a valid clearance for providing state disability services.[34]

2.1.2.2 Scope of screening

The WS Rules state that registered NDIS service providers are required to screen people if they are in 'risk-assessed roles'. The Bill at clause 45 defines an *NDIS risk-assessed role* to include: a key personnel role; a role for which the normal duties include the direct delivery of specified supports or specified services to a person with disability; or a role for which the normal duties are likely to require more than incidental contact with a person with disability.[35]

Under the IGA, states and territories retain discretion on whether to make screening mandatory for workers of unregistered NDIS providers and persons in non-risk-assessed roles for registered NDIS providers. Queensland will allow, but not require, screening for these workers. However, workers engaged in risk-assessed roles with registered or unregistered NDIS providers who are providing services to children with disability will require a blue card.[36] The DCDSS advised that this is a policy position enabled by the Bill:

> *It is then optional for people with disability who are self-managing their plans to request that someone working for an unregistered provider be screened. That is about people with disability being able to manage their own risks and exercise choice and control.*[37]

The Bill does not extend this element of discretion to people who wish to work with children with disability. Refer to section 2.2 of this report for an examination of the blue card reforms proposed by the Bill.

2.1.2.3 Stakeholders' views

Stakeholders were supportive of the Bill's provisions that would enable adults who are self-managing their NDIS plans to maintain the choice and control to manage their own risks.[38]

The Queensland Human Rights Commission (QHRC) expressed cautious support for the way the proposed framework will affect self-managed participants, stating:

> *NDIS participants who self-manage can elect to have non-registered NDIS service providers who are not required to have a disability worker screening check. While this could alleviate some of the problems described above, and appears to support choice and control of NDIS participants, there is the potential to force people with disability into care arrangements with uncleared workers where there is limited choice, increasing the risk of harm and abuse the Bill is designed to reduce.*[39]

QAI submitted that the Queensland Government, in collaboration with the NDIS Commission, are yet to engage with plan or self-managed participants and unregistered service providers to explain what their clearance means. The QAI stated work should begin, 'with individuals and communities to explain how worker screening can assist with decision-making in relation to employment of individuals and

34 Explanatory notes, p 4.

35 Bill, clause 45(3).

36 Explanatory notes, p 3

37 Public briefing transcript, Brisbane, 23 June 2020, p 3.

38 See for example submissions 1 and 6.

39 Submission 3, p 3.

unregistered service providers and how worker screening can decrease the risk of abuse, neglect and exploitation of people with disability'.[40]

2.1.2.4 Department response

To the concerns expressed by the QHRC, the DCDSS stated:

> *There is no risk that people will be forced to use uncleared workers as a person with disability can ask a worker engaged by an unregistered provider to be screened.*[41]

In response to the QAI, the DCDSS agreed it would be necessary to work with the NDIS Commission to implement an appropriate communication strategy to encourage screening where it is discretionary rather than mandatory.[42] The DCDSS stated:

> *If the Bill is passed, DCDSS will commence detailed communications, which will include:*
>
> - *correspondence to employers and self-managed participants, existing yellow card and yellow card exemption holders and applicants;*
> - *continued engagement with disability stakeholders, including peak bodies;*
> - *fact sheets and internet content; and*
> - *information sessions.*[43]

2.1.2.5 Screening exemptions for students

New section 43 would provide an exemption from the screening requirements under Part 5 for secondary school students on work experience who are carrying out disability work for a service provider. Secondary school students on formal work experience placement, who are directly supervised by another worker of the provider with a clearance or interstate NDIS clearance, are the only exception from the requirement to have a clearance before working in a risk-assessed role for a registered NDIS provider.[44]

2.1.2.6 Stakeholder views

Exercise and Sports Science Australia (ESSA) submitted that the exemption should be extended to include university students working under the direct supervision of another worker who holds appropriate clearance. According to ESSA, widening the requirements for student placements[45] will, 'increase the number of qualified professionals working with disabilities, improve quality of care, facilitate optimal health outcomes and assist with attracting graduates in exercise science into the sector'.[46]

2.1.2.7 Department response

In response to ESSA's submission, the DCDSS stated:

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40 Submission 2, p 6.

41 DCDSS, correspondence dated 14 July 2020, attachment, p 7.

42 DCDSS, correspondence dated 14 July 2020, attachment, p 4.

43 DCDSS, correspondence dated 14 July 2020, attachment, p 4.

44 Explanatory notes, p 29.

45 Submission 4, p 2. ESSA advised approximately 354 Exercise Science (ES) students, and 299 combined ES and Exercise Physiology students will be required to complete practical placements as part of their degree during 2020.

46 Submission 4, p 2.

It was agreed under the IGA that there are no exemptions to NDIS worker screening. The policy rationale is that this ensures a nationally consistent approach to screening people working with people with disability.

…

The purpose of the nationally consistent worker screening is to maintain the highest degree of safeguards for people with disability. Therefore, university students seeking to conduct work experience in a risk assessed role with an NDIS provider, particularly with the view of entering the disability sector as a worker in the future, should be screened and risk assessed. This will enable people who pose an unacceptable risk of harm to people with disability to be identified and excluded from the profession at the earliest possible opportunity.[47]

2.1.3 Application process

The Bill proposes a 'no card, no start' approach for workers required to be screened under the new NDIS worker screening system, so that all applicants in a risk-assessed role for a registered NDIS provider must obtain a clearance before commencing work. The DCDSS advised the proposed amendments are intended to ensure that people who are required to be screened are checked before they provide services to people with disability, and that, 'the strongest safeguards are in place and to achieve consistency with reforms to the blue card system'.[48]

The explanatory notes state that the 'no card, no start' approach will not apply to applicants who are workers of unregistered NDIS providers or who are in non-risk-assessed roles with registered NDIS providers, and who are already providing services to a participant. This will enable workers in these situations to continue to work while their applications are being processed, and reflects the position that screening of workers in these roles is not mandatory.[49]

2.1.3.1 Online application process

The DCDSS advised that NDIS clearances and exclusions will be portable across roles and employers in the NDIS across all jurisdictions.[50] The Bill would enable implementation of an online application process for individuals to improve processing time frames and support the proposed 'no card, no start' approach.[51] An online application process is expected to reduce processing times, according to Ms Bianchi, Executive Director, Strategic Policy and Legislation, DCDSS:

… we would anticipate that the processing time frames would be tighter and sharper than under a manual system if not principally because all of the information comes in an electronic format so there is more ability to automate the pushing of that information to where it needs to go, as opposed to a paper based system that requires data entry of all of those processes.[52]

2.1.3.2 Estimated application cost and extension of card duration to five years

The Bill's proposed reforms to allow national criminal history monitoring under the NDIS system is intended to, 'support NDIS clearances remaining valid for a period of five years rather than the current three-year validity period'.[53]

47 DCDSS, correspondence dated 14 July 2020, attachment, pp 16-17.

48 Explanatory notes, p 4; Public briefing transcript, Brisbane, 23 June 2020, p 2.

49 Explanatory notes, p 5.

50 Public briefing transcript, Brisbane, 23 June 2020, p 2.

51 Public briefing transcript, Brisbane, 23 June 2020, p 2.

52 Public briefing transcript, Brisbane, 23 June 2020, p 4.

53 Public briefing transcript, Brisbane, 23 June 2020, p 2.

In terms of estimated cost for applicants, the DCDSS stated the setting of application fees will be, 'subject to usual government approval processes but, as agreed under the IGA, fee structures will be designed to achieve cost recovery of the operational costs of NDIS worker screening, noting the validity period for the check will now be five years'.[54]

2.1.3.3 Stakeholders' views

The QHRC expressed concern over the potential barriers that Aboriginal and Torres Strait Islander people may experience during the application process under the proposed system. The QHRC recommended that:

> *… further consideration be given to the structural barriers imposed by the Bill for Aboriginal and Torres Strait Islander applicants, and consequently the impacts on Aboriginal and Torres Strait Islander people with disability. Addressing this concern may be in the drafting of the amendments, in the statement of compatibility, in supporting regulations and/or policy implementation.*[55]

Queenslanders with Disability Network (QDN) expressed concern that the cost of applying for worker screening approval will create a financial barrier for those on income support who are looking to gain employment as a disability support worker. QDN submitted: 'We strongly urge the State Government to keep the cost of worker screening applications low to help attract more people to work in the disability sector'.[56]

Ms Michelle Moss of QDN also expressed the potential challenge of accessing the national register for self-managing participants experiencing the digital divide:

> *… the digital divide is a significant one for people with disability. During COVID-19 that has been highlighted even more with people's lack of access to digital technology but also their lack of what we call digital literacy—that is, knowing how to use the technology. … I would ask the committee to consider some of those challenges, particularly when the system is primarily online.*[57]

In its submission, ESSA encouraged the Queensland Government, 'to assist with the continued growth of the NDIS workforce by keeping the cost of screening to a minimum'.[58]

2.1.3.4 Department response

In response to QHRC with regard to barriers experienced by Aboriginal and Torres Strait Islander people, the department stated:

> *In terms of Queensland in particular, it is probably worth noting that as part of the negotiation on the full scheme agreement the Commonwealth government has agreed to provide Queensland with $1.5 million to build the capacity of Aboriginal and Torres Strait Islander organisations to provide services under the NDIS and that is being administered by our department.*[59]

In response to QDN's submission, the DCDSS acknowledged that the continued growth of the NDIS workforce is essential to meet the needs of the growing disability sector. The DCDSS also stated: 'It is

54 Explanatory notes, p 12.

55 Submission 3, p. 7.

56 Submission 6, p 2.

57 Public hearing transcript, Brisbane, 17 July 2020, pp 3-4.

58 Submission 4, p 2.

59 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 17 July 2020, p 3.

noted that the change to a five year validity period provides the opportunity to potentially reduce the costs of the check on an annualised basis'.[60]

To concern expressed by QDN of a digital divide experienced by people with disability, the department stated:

> In terms of access to the national database, I want to confirm for the committee that I am advised that we have already actively raised that concern with the Commonwealth in terms of self-managing participants being able to access the database.[61]

2.1.4 The decision-making framework

2.1.4.1 New disqualifying offences

A broader range of offences will automatically disqualify a person convicted of a disqualifying offence, regardless of whether or not they were sentenced to a period of imprisonment, as is currently required.[62] Pending charges for disqualifying offences and convictions or pending charges for serious offences will result in a presumed exclusion, unless exceptional circumstances exist.[63]

2.1.4.2 Decision-making framework

The DCDSS advised that the Bill intends to introduce a, 'stronger decision-making framework that focuses on risk and considers a broader range of information'.[64] To achieve this purpose, the Bill sets out at Clause 11, Division 4, a decision-making framework available to the chief executive for dealing with and deciding a disability worker screening application. Proposed new section 87 allows the chief executive to decide on a clearance without a risk assessment if there is either no available information to be considered in regard to an applicant (as set out in new section 89), or the applicant is a disqualified person, and therefore an exclusion must be issued for the person (as set out at proposed new section 90).

The range of information available to the chief executive in assessing a person's risk is listed in new section 88(1), including:

(a) police information;

(b) domestic violence information;

(c) disciplinary information;

(d) NDIS disciplinary or misconduct information;

(e) for an applicant for an NDIS disability worker screening application—information about—

(i) whether the person holds, or has previously held, an NDIS clearance, interstate NDIS clearance, NDIS exclusion or interstate NDIS exclusion; or

(ii) if the person has previously held an NDIS clearance or interstate NDIS clearance—whether the clearance was suspended at any time or cancelled.

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60 DCDSS, correspondence dated 14 July 2020, attachment, p 17.

61 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 17 July 2020, p 2.

62 DCDSS, correspondence dated 14 July 2020, p. 2. At the public briefing held 17 July 2020, DCDSS representatives referred to 'acts intended to cause grievous bodily harm and other malicious acts' (section 317 of the *Criminal Code* (Qld)) as an example of an offence that will be a new disqualifying offence under the framework proposed by the Bill. DCDSS correspondence clarified this is currently a serious offence under the DSA if committed in any circumstance; and, the offence will be elevated to a disqualifying offence if committed against a child or vulnerable person.

63 DCDSS, correspondence dated 23 June 2020, attachment, p 5.

64 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 23 June 2020, p 2.

Proposed new section 88(1)(f) sets out information for an applicant for a state disability worker screening application. Refer to section 2.1.2 of this report for provisions relating to state disability worker screening.

Proposed new Section 88(2) would enable the chief executive to more widely consider other information about the person that is relevant to whether the person poses a risk of harm to people with disability.

2.1.4.3 Risk assessment

As stated above, the Bill proposes a number of disqualifying offences that would result in automatic exclusion. However, the IGA prescribes a subset of offences for which an exclusion must be made, unless exceptional circumstances exist. Proposed new section 91 allows the chief executive (disability services) to decide on an application if there are exceptional circumstances, for example, if the chief executive is satisfied that the person does not pose an unacceptable risk of harm to people with disability.[65] Proposed new section 92 would require the chief executive to conduct a risk assessment in circumstances where new sections 89, 90 and 91 do not apply. The chief executive must apply an exclusion to the applicant if satisfied the person poses an unacceptable risk of harm to people with disability.[66]

According to the DCDSS there are a number of safeguards to ensure due process is conducted by the chief executive in assessing an application. The DCDSS described those safeguards at the public briefing on 23 June 2020:

> *Attached to the intergovernmental agreement there is a schedule that specifically provides the next level down of information about how those assessments are to be undertaken in the context of a national system where clearances are portable. In addition to that, there is a national operational manual that is being developed and agreed across all states and territories to provide further guidance around the operation of this on a day-to-day basis. The other important point to make is that the department employs skilled risk assessors who have experience in being able to assess these types of criminal histories and make decisions in relation to that risk.*[67]

Additionally, clause 11 of the Bill sets out the process for conducting a risk assessment of an applicant at proposed new section 93, by setting out how the chief executive would conduct the risk assessment; and at proposed new section 94, the matters the chief executive (disability services) must consider if the chief executive is aware of offending conduct of the person. Matters to consider, at proposed new section 94(2), include the nature, gravity and circumstances of the person's offending conduct, how the person's offending conduct is relevant to disability work, how long ago the person's offending conduct took place, whether the offending conduct indicates a pattern of concerning behaviour and the person's conduct since the offending conduct. Proposed new section 95 requires the chief executive to give the person a 'show cause notice' (in compliance with provisions in new section 96) and consider any submissions the applicant makes in response to the show cause notice.

The DCDSS advised the proposed framework applies at initial application and at any point of reassessment where a person has a change in their assessable information during the validity period of their clearance.[68] Further advice received from the DCDSS outlined the show cause process, 'will apply to a decision to issue a person an exclusion'.[69] When issuing a suspension, the chief executive

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65 Clause 11, new section 91; Explanatory notes, p 39.

66 Explanatory notes, p 39

67 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 23 June 2020, p 7.

68 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 23 June 2020, p 7.

69 DCDSS, correspondence dated 14 July 2020, p 2.

will only be required to provide the person a notice under new section 111, which 'reflects the temporary nature of a suspension'.[70]

The explanatory notes state that the chief executive does not need to be satisfied it is likely that the applicant will cause harm. Clause 31, proposed amendments to Schedule 8 (Dictionary), includes a definition of 'harm' to include any detrimental effect on a person's physical, psychological, emotional, sexual or financial wellbeing, however the detrimental effect is caused. This proposed section implements the meaning of unacceptable risk of harm under clauses B11 – B13 of the IGA.[71]

2.1.4.4 Stakeholders' views

In relation to the proposed decision-making framework, the QLS raised concerns about the limit placed on the types of 'disciplinary information' that may be obtained by the chief executive under proposed new sections 138O and 138P. The QLS highlighted when making a risk assessment, these sections limit the types of disciplinary information to matters relating to 'the care or education of children'.[72]

The QLS stated if the intention of the Bill is, 'to impose a new comprehensive screening process on relevant persons engaged to carry out disability work … it is prudent for other relevant disciplinary information be obtained from other relevant entities'.[73] For example, QLS submitted, information concerning health practitioners should be obtained from the Australian Health Practitioner Regulation Agency or the Office of the Health Ombudsman.[74]

Noting these limits on the types of disciplinary information that can be obtained as part of the decision-making framework, the QLS recommend:

> *… the committee review the types of workers and work that is to be covered by this legislation and ensure the Bill allows for the appropriate information to be obtained.*
>
> *This recommendation is made subject to the requisite confidentiality and privacy provisions being in place and subject to the information only being used for the purpose for which it is obtained.*[75]

Under proposed new section 88(1), the Bill's decision-making framework would also enable the chief executive to obtain 'domestic violence information' as part of a risk assessment. The QLS have submitted that consideration be given to the potential adverse impacts from employment screening relating to domestic violence orders. The QLS added:

> *… it may not be in the best in the best interests of a person protected under a domestic violence order if the application for the order was contested because the respondent was concerned about the information being provided to the chief executive and used to make an employment decision under the Act.*[76]

In noting the discretionary element of the risk assessment framework proposed by the Bill, QAI stated 'it would be beneficial for the public to understand what types of acts a relevant person may have engaged in, in order for them to be disqualified to provide NDIS services'.[77] QAI recommended that this framework be robust to ensure any acts or omission of acts which are not in the best interest of

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70 DCDSS, correspondence dated 14 July 2020, p 2.

71 Explanatory notes, p 40.

72 QLS, correspondence dated 22 July 2020, p 1.

73 QLS, correspondence dated 22 July 2020, p 1.

74 QLS, correspondence dated 22 July 2020, p 1.

75 QLS, correspondence dated 22 July 2020, pp 1-2.

76 QLS, correspondence dated 22 July 2020, p 2.

77 Submission 2, p 5.

people with disability be assessed rigorously. This should include all reportable incidents where the relevant person was involved.[78]

The QDN submitted that one possible advantage of the discretionary element in the risk assessment framework would be that people could work with people with disability, even when they had previous reportable information:

> *QDN members have raised examples where the criminal history of a person is valuable, as it links with the participant's lived experience. For example, someone who has overcome a drug dependency or previously relied on aggressive behaviour to deal with issues is often able to provide important peer support to people with disability who face similar challenges. If people have rehabilitated and want to share their learnings with people with disability, then QDN believes individuals should have the choice to hire them.*[79]

2.1.4.5 Department response

The DCDSS noted that guidelines for dealing with information obtained under Part 5 of the DSA would be made available under section 138ZP. The DCDSS stated, in response to QAI's submission:

> *These guidelines will ensure that disability worker screening functions ensure natural justice is afforded to persons, only relevant information is used to make decisions under Part 5 and decisions are made consistently. This will reflect the nationally agreed approach to risk assessment, as tailored to Queensland's worker screening system.*
>
> *The Bill also includes a number of provisions which provide specific guidance to decision-makers about determining whether a person poses an unacceptable risk of harm to a person with disability. For example, section 88 prescribes the information which must be considered in dealing with an application, and section 94 lists the matters to be considered as part of a risk assessment.*[80]

In relation to comments concerning the discretionary aspect of risk assessment proposed by the Bill, the DCDSS stated:

> *[I]t will be necessary to work with the NDIS Commission to implement an appropriate communication strategy to encourage screening where it is discretionary rather than mandatory. DCDSS will work will the NDIS Commission to make sure there are dedicated resources for plan- and self-managed participants.*[81]

2.1.5 Offences and penalties

The IGA gives states and territories discretion to implement offences and penalties for breaches of NDIS worker screening legislation. While the NDIS Commission has regulatory powers in relation to NDIS providers, this does not include criminal offences for worker screening. The DCDSS advised that Queensland will maintain existing offence provisions for individual workers and service providers (where appropriate) for the NDIS and state disability worker screening systems.[82] The responsibility for compliance is the DCDSS.[83] The Bill also ensures offences and penalties for non-compliance are consistent, as far as possible, with offences under the WWC Act.[84]

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78 Submission 2, p 6.

79 Submission 6, p 2.

80 DCDSS, correspondence dated 14 July 2020, attachment, p 3.

81 DCDSS, correspondence dated 14 July 2020, attachment, p 4.

82 DCDSS, correspondence dated 23 June 2020, attachment, p 6.

83 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 23 June 2020, p 9.

84 DCDSS, correspondence dated 23 June 2020, attachment, p 6.

Offences and penalties will apply to individual workers and service providers that engage workers. The Bill proposes that offences and penalties will apply to roles that must undergo screening under the new NDIS or state disability worker screening systems, as well as roles in which individuals may be screened but are not mandatorily required, such as workers of unregistered NDIS providers.[85]

2.1.5.1 Stakeholder views

The QLS submitted that certain offence provisions in clause 11 be amended so as to provide a 'reasonable excuse' to an applicant or provider for failing to provide the requisite information. According to the QLS:

> *The new sections introduced by clause 11 of the bill contain a number of offence provisions which carry both civil penalties and terms of imprisonment where there are aggravating circumstances. Some of these sections require knowledge or deem knowledge, such as sections 55, 56, 60 and 71, while others such as 53, 54, 57, 61,64 and 70 do not require this element. None of these provisions include a provision to allow for a reasonable excuse to be provided.*
>
> *We note section 62(2), which applies to those offences in Division 1 states, "A court may not find that the person contravened the provision unless the person was given notice about the cancellation of the clearance or interstate NDIS clearance held by the person or the issue of the exclusion or interstate NDIS exclusion to the person."*[86]

The QLS further submitted:

> *Despite the presence of section 62(2), without the ability for a provider or worker to offer a reasonable excuse such as mistake, delay or administrative error, a penalty could be imposed which both the provider or worker may be unable to afford, in circumstances when there was no intent to breach the provision. These offences essentially become strict liability offences which should only be introduced where there is sufficient justification. QLS does not object, necessarily, to a breach attracting a penalty, but we are concerned about liability attaching to an unintentional act or omission. We consider that education and compliance will be more effective focuses.*[87]

2.1.5.2 Department response

In response to QLS' submission, the DCDSS advised:

> *DCDSS notes that there is hierarchy of enforcement strategies in place when it comes to compliance. Non-compliance may be handled using a mix of tools including education, capacity building and development for people with disability (and their NDIS providers and workers), complaints handling, compliance and enforcement functions and related powers.*
>
> *The strict approach to enforcement of the 'no card, no start' policy, including through the offences and penalties framework under clause 11 of the Bill where appropriate, is considered justified given the substantial risk of harm posed by poor quality or unsafe services. To reduce or limit this safeguard by including a reasonable excuse provision in the offences and penalties in the Bill may be considered as reducing safeguards for people with disability.*
>
> *More generally, the significance of the penalties associated with offences under clause 11 of the Bill reflects the seriousness of the potential risk of harm to people with disability if the requirements in the Bill are not properly complied with.*
>
> *The Bill aims to increase safeguards and preventing people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS or state disability*

85 DCDSS, correspondence dated 23 June 2020, attachment, p 6.

86 Submission 5, p 2.

87 Submission 5, p 2.

screening. As such, the offences and associated penalties in the Bill are proportional and relevant to the policy objective of increasing safeguards for people with disability.[88]

The DCDSS also advised that, 'the offences and penalties framework in the Bill is consistent with the equivalent offences in the DSA for the yellow card system'.[89]

2.1.5.3 Subcontractors

QAI submitted that there had been an increase in the number of unregistered and registered sole traders or contactors since the introduction of the NDIS. According to the QAI, in the framework proposed by the Bill, excluding offences for NDIS providers, who have engaged contractors to provide NDIS services prior to receiving clearance, [and] service providers may be tempted to engage contractors in the hopes of circumventing processing time of clearance, putting people with disability at risk of harm.[90]

2.1.5.4 Department response

Concerning subcontractor screening the DCDSS stated:

DCDSS notes that subsection 53(3) of the Bill does not preclude the 'no card, no start' offences from applying to registered NDIS providers when they engage subcontractors. The offence does not apply if the provider complies with the requirements for engaging subcontractors under section 13(3) of the National Disability Insurance Scheme (Practice Standards—Worker Screening) Rules 2018, which state that a registered NDIS provider can engage a subcontractor in a risk assessed role if the provider:

- *identifies to the subcontractor each risk assessed role they are engaged in*
- *enters into an appropriate contract with the subcontractor*
- *has taken reasonable steps* [to] *satisfy itself that the subcontractor has a clearance.*

This balances safeguards while reflecting that a service provider does not have the direct oversight or control for a subcontractor that the service provider would otherwise have if they directly engaged the person.[91]

2.1.6 Information sharing

The provisions in the Bill to support a nationally consistent worker screening for the NDIS and the IGA consequently propose a new level of information sharing as part of the 'shared approach' between the Commonwealth and the states and territories.[92] The DCDSS advised that enabling the sharing of information is 'critical' to the operation of the new NDIS and the state disability worker screening systems, in order to minimise the risk of harm to people with disability.[93]

The revised information sharing framework as proposed by the Bill is intended to ensure the chief executive can, 'undertake comprehensive risk assessments for individuals working with people with disability', and, 'enhance consistency of information considered by both disability worker screening and working with children checks'.[94]

The Bill provides for the revised information sharing framework in three ways:

88 DCDSS, correspondence dated 14 July 2020, attachment, p 19.

89 DCDSS, correspondence dated 14 July 2020, attachment, p 19.

90 Submission 2, p 5.

91 DCDSS, correspondence dated 14 July 2020, attachment, pp 4-5.

92 Explanatory notes, p 1.

93 Explanatory notes, p 20.

94 DCDSS, correspondence dated 23 June 2020, attachment, p 7.

- provisions about obtaining, giving and dealing with information
- the exchange of information between the disability worker screening and blue card systems, and
- sharing information with Blue Card Services, interstate worker screening units and the NDIS Commission for prescribed purposes.

2.1.6.1 Obtaining, giving and dealing with information

Clause 11, new section 69 provides that the chief executive, in considering a disability worker screening application, may give the applicant a notice requesting stated information in relation to the application that the chief executive reasonably needs to establish the applicant's identity, or about a stated matter that the chief executive reasonably believes to be relevant to the application. Proposed new sections 70 and 71 require the applicant to give notice to the chief executive of a change in their information or in police information about them.[95]

Proposed subdivisions 2 and 3 in clause 11 of the Bill would enable the chief executive to ask the police commissioner for police information about a person, including the circumstances of a conviction, charge, investigative information or domestic violence information. Additionally, at new section 138E, the police commissioner must notify the chief executive if he or she reasonably suspects a person has had a criminal history event happen in relation to the person.

Subdivisions 4 and 5 as proposed under clause 11 of the Bill provide for the chief executive to access the same range of information available under the blue card system from other Queensland agencies, for example:

- information from the director of public prosecutions about details of convictions or charges in relation to an offence[96]
- information from the chief executive responsible for corrective services about a person who is subject to a sexual offender order[97]
- disciplinary information about registered teachers from the Queensland College of Teachers, approved education and care services from the Department of Education, [98] and
- disciplinary information related to foster and kinship carers from the chief executive responsible for child safety.[99]

In doing so, the chief executive may request relevant information on a case-by-case basis in order to make a proper risk assessment.[100] The chief executive may also request further information from another agency to confirm information provided through a self-disclosure process by the applicant or other source of information.[101]

2.1.6.2 Obtaining information about a person's mental health

The Bill proposes at clause 11, new sections 138T – 138ZE, to establish certain requirements for and limits on obtaining and sharing information about a person's mental health. For example, proposed

95 Bill, clause 11, new sections 69 – 71.

96 Bill, clause 11, 138M.

97 Bill, clause 11, 138N.

98 Bill, clause 11, 138P.

99 Bill, clause 11, 138P; Explanatory Notes, p 7.

100 Bill, clause 11, 138M, 138P.

101 Bill, clause 11, 138R; Explanatory notes, p 7.

new subsection 138T(1) would enable the chief executive to obtain information about a person's mental health only in prescribed circumstances:

- the chief executive is deciding whether a relevant person poses an unacceptable risk of harm to people with disability
- the relevant person was charged with, or convicted of, a serious offence or an offence relating to, or involving, a person with disability, and
- the chief executive reasonably believes it is necessary to consider the relevant person's mental health to make the decision.

Proposed new section 138U provides that the chief executive may seek a relevant person's consent, by notice, to be examined by a registered health practitioner to enable the health practitioner to prepare a report about the relevant person's mental health, for the chief executive's screening functions.[102] Proposed new sections 138U and 138V outline the process for the consultation to occur. Proposed new section 138VW provides that the chief executive would bear the medical costs for the registered medical practitioner to prepare a report about a person.

Proposed new sections 138X to 138Y relate to obtaining information from the Mental Health Court or the Mental Health Review Tribunal under prescribed circumstances.

2.1.6.3 Exchange of information between the disability worker screening and other entities

The Bill proposes to enable the chief executive of disability services to share accessible information with the chief executive responsible for managing the working with children responsibilities, as required. The DCDSS advised that the provision to share information across agencies will, 'reduce duplication of effort and enhance decision-making', as well as, 'ensure consistency of safeguards are maintained for children'.[103]

Proposed new section 138ZF provides that this subdivision applies to information about a person that the chief executive was given access to or is in the chief executive's possession. For example, if the chief executive had relevant information about a person (such as police, investigative, disciplinary or mental health information) in its possession, the chief executive would be authorised to give this information to the chief executive (working with children) if proposed new section 138ZG applies or to an interstate worker screening unit if proposed new section 138ZH applies.

Proposed new section 138ZG would enable the chief executive to give information about a person to the chief executive (working with children) if the chief executive reasonably believes the information is was relevant to the functions of the chief executive responsible for the working with children check under the WWC Act. Without limiting the ability to share information under subsection 138ZG(1), this information may include information about a disability worker screening application, information about a clearance, interstate NDIS clearance, exclusion or interstate NDIS exclusion held by a person, police information about a person, investigative information, disciplinary information or NDIS disciplinary or misconduct information about a person, and information about a person's mental health.[104]

Proposed new section 138ZH would enable the chief executive to give information about a person to an NDIS worker screening unit if the chief executive is aware a person holds an interstate NDIS clearance or has an interstate working with children authority issued by a working with children screening unit under a corresponding law; or the NDIS worker screening unit or working with children screening unit has asked for information about a person to decide an application made by that person

[102] Explanatory notes, p 51.

[103] Explanatory notes, p 7.

[104] Explanatory notes, p 53.

under a corresponding law. This includes police information or other information considered relevant to the functions of the NDIS worker screening unit or working with children unit under a corresponding law.[105] Proposed new section 138ZI would allow the chief executive to give information about a person to the NDIS commission for the inclusion of that information into the NDIS worker screening database. The information that may be added to the database, as set out in proposed new section 138ZI(2), includes information in relation to an application or a clearance, including the suspension or cancellation of the clearance.

The DCDSS advised that, in regard to national criminal history monitoring, if a person has a change in criminal history in any state or territory, the information will be provided back to the NDIS worker screening unit (and the blue card unit).[106] In terms of how long it may take for the information to filter through to the relevant worker screening entity, Ms Bianchi, DCDSS stated:

> *At the moment, the experience in Queensland in terms of our Queensland criminal history monitoring is that it all happens relatively quickly, within 24 to 48 hours, and then notifications are generally issued immediately upon the worker screening unit being notified of, for example, a charge for a disqualifying offence.*[107]

Proposed new section 138ZK would enable the chief executive to give certain information to an authorised entity about a person's state worker screening application, state clearance or state exclusion or a worker screening notice about a person that is given, or required to be given, to the authorised entity under the DSA, including by allowing the authorised entity to access this information electronically. Further, proposed new section 138ZL provides that if a person is given or has access to information obtained under section 138ZK, the person must not use, disclose or give access to that information to anyone else unless authorised under subsection 138ZL(3). The Bill sets the maximum penalty for failing to comply with this requirement at 100 points.[108]

2.1.6.4 Privacy protection provisions

According to the explanatory notes to the Bill, there are strict controls on the use of, and access to information, including police information, gained by a person conducting disability worker screening.[109] Clauses 19 and 20 amend the confidentiality protections under section 227 (Confidentiality of police, disciplinary, mental health and other protected information) and section 228 (Confidentiality of other information) of the DSA to ensure they apply to information disclosed in the course of worker screening. These provisions provide for specific protections in relation to the confidentiality of police, disciplinary, mental health and other protected information.

It is an offence not to comply with these obligations, which are supported by appropriate penalties for noncompliance. The maximum penalty for failing to comply with section 227 is 100 penalty units or 2 years imprisonment and 100 penalty units for failure to comply with section 228. Refer to Chapter 3 in this report for the committee's examination of the proportionality of offences.

2.1.6.5 Stakeholders' views

Carers Queensland was supportive of the introduction of criminal history monitoring for the assessment of risk and identification of serious and disqualifying offenses, and stated: 'all people have

105 Explanatory notes, p 53.

106 Explanatory notes pp 13-14.

107 Public briefing transcript, Brisbane, 23 June 2020, p 6.

108 Bill, clause 11, new section 138ZL(2).

109 Explanatory notes, p 13.

a right to live their life free from abuse, violence neglect, financial abuse or exploitation (real or threatened)'.[110]

Conversely, the QHRC noted the information that can be obtained by the chief executive to be, 'extremely broad and can contain sensitive information about criminal matters, police investigations, disciplinary information, and mental health'.[111] The QHRC described the collection, use and sharing of information in the course of a worker screening application as 'an interference with the applicant's right to privacy', and stated that while it may be for a legitimate purpose, the failure of any privacy protections in place, 'can result in serious harm to the applicant such as reputational damage and defamation, biased decision-making and unfair loss of work opportunities'.[112] For further discussion on the Bill's compatibility with human rights in accordance with the *Human Rights Act 2019*, refer to Chapter 4 of this report.

The QHRC submitted that the committee consider whether the privacy protections written into the Bill are sufficient, 'in view of the significant harm that can be caused to applicants if their right to privacy is breached'.[113] Ms Rebekah Leong of the QHRC submitted that:

> *While we do not dispute the legitimate reason for which the [personal] information is sought, applicants are entitled to sufficient protections to their privacy to the extent that is reasonably possible, including protections that guard against both human error and intentional misuse. It is important that privacy is given priority in implementation.*[114]

2.1.6.6 Department response

In response to the QHRC's concerns over the Bill's potential impact on an individual's privacy, the DCDSS stated:

> *The proposed information sharing provisions will enable the chief executive to obtain the most current, relevant and comprehensive information in order to make a risk assessment. This will allow the chief executive to make an informed decision and minimise the risk of harm for people with disability. The Bill also seeks to balance the appropriate use and sharing of this information with the maintenance of individuals' privacy, by placing clear limits on the use and sharing of personal information obtained in administering worker screening checks. To this end, the Bill includes specific provisions applying to the use, access to, and disclosure of information obtained under Part 5, including sanctions for the unlawful use and disclosure of information.*
>
> *The power to provide information to another entity, such as another disability worker screening unit, will ensure the relevant decision maker in that jurisdiction has the information required to undertake an informed risk assessment. Jurisdictions are required to have appropriate safeguards in place to protect confidential information.*[115]

The DCDSS further explained the limitations on the use and disclosure of protection information:

> *Protected information can only be used or disclosed for four specific purposes under the bill: to perform the chief executive's screening functions; if it is expressly permitted under part 5, which is like a screening part; if it happens with the consent of the person to whom the information relates; or if it is otherwise required under an act. When we talk about disclosure happening to other NDIS and their interstate screener units … there is an obligation under the IGA specifically for state and territory screening units to have appropriate protections in place. That is an*

110 Submission 1, p 4.

111 Submission 3, p 4.

112 Submission 3, p 5.

113 Submission 3, p 6.

114 Public hearing transcript, Brisbane, 17 July 2020, p 7.

115 DCDSS, correspondence dated 14 July 2020, attachment, p 10.

obligation that every state and territory that is participating under the IGA has agreed to embed.[116]

The DCDSS also outlined additional protections afforded to an individual's right of privacy through existing statute, including the *Information Privacy Act 2009*, the Commonwealth *Privacy Act 1988*, the NDIS Act and the NDIS Code of Conduct.[117]

2.1.7 Reviews and appeals

Before any adverse decision is made after a risk assessment for an application, the chief executive is required, pursuant to proposed new section 94, to issue a show cause notice and consider any submissions the person makes in response to the show cause notice. The show cause notice enables the person to make submissions as to whether there are any exceptional circumstances and why the chief executive should not issue an exclusion to the person.[118]

The Bill continues the current arrangements for disability worker screening with regard to review and appeal rights.[119] That is, in clause 11, proposed new sections 90-92, if the chief executive is aware a person is a disqualified person, the chief executive must issue the person an exclusion. In this circumstance the person does not have the right of review, except on the basis of mistaken identity.[120] For further discussion on these provisions in relation to their departure from the principles set out in the *Legislative Standards Act 1992*, refer to Chapter 3 of this report.

Clause 11 inserts proposed new sections 138ZR-138ZY to provide for a review and appeal process for reviewable decisions, which includes an internal review process, followed by an external review process. The option of an internal review does not apply to a decision to issue an exclusion based on a disqualifying offence. The DCDSS advised there are some additional review rights that do not exist under the current system, in regard to the issuing of an interim bar (as established in proposed new sections 81-85) and suspension (as established in proposed new sections 110-118).[121]

Reviewable decisions, as proposed by the Bill, include:

- a decision to issue an exclusion to a person
- a decision on the application of a person not to end the interim bar imposed
- a decision on the application of a person not to end a suspension of the person's clearance.[122]

Pursuant to proposed new section 138ZW, if the applicant is dissatisfied with the outcome of an internal review, they will have the ability to seek an external review of the matter by the Queensland Civil and Administrative Tribunal (QCAT).[123]

2.1.7.1 Stakeholder views

The QAI supported the provisions in the Bill that allow for a person to review their clearance status via internal review, in certain circumstances, prior to requesting a review at the QCAT. According to

116 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 17 July 2020, pp 4-5.

117 DCDSS, correspondence dated 14 July 2020, attachment, p 13.

118 Bill, clause 11, new section 94.

119 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 23 June 2020, p 8.

120 Bill, clause 11, new section 138ZT; Ms Elizabeth Bianchi, public briefing transcript, Brisbane 23 June 2020, p 8.

121 Ms Elizabeth Bianchi, public briefing transcript, Brisbane, 23 June 2020, p 8.

122 Bill, clause 11, new section 138ZR.

123 Bill, clause 11, new sections 138ZT and 138ZW.

QAI, this opportunity will provide relevant persons with the ability to provide additional information which may influence their clearance status, without proceeding through a tribunal proceeding.[124]

2.1.8 Transitional arrangements

The DCDSS advised that the Bill includes transitional provisions, 'to balance the maintenance of safeguards for people with disability, with the importance of minimising adverse impacts on disability service provision'.[125] At the public briefing Ms Bianchi advised further:

> *From commencement, it is not as though everybody needs to be rushing into the system; it recognises that we already have screening processes in place, and those cards or clearances or positive notices—whatever we want to call them—will remain in effect for the period of their validity unless someone has a change in their assessable information.*[126]

Clause 24 inserts a new Division 13 under Part 9 to provide for the transitional provisions proposed by the Bill. Proposed new section 369 provides that a person with a pending application for a yellow card or yellow card exemption under the DSA, as at commencement of the Bill, can continue working unless they are notified by the chief executive that they must cease work due to an identified risk in accordance with the new decision-making framework.[127] This allows pending applications to be finalised without impacting service provision. Any decisions made from commencement will be made under the new decision-making framework. The DCDSS provided an example: a person with a pending application for a yellow card that has not been withdrawn or decided at commencement will be treated like an application for an NDIS clearance.[128] The transitioned application will have the same characteristics as an NDIS clearance application other than it will not be portable across other NDIS jurisdictions.[129]

A person with a transitioned application may be asked by the chief executive, pursuant to proposed new section 69, to provide further information to enable their application to be managed under the new framework. If this information is not provided, the chief executive will be able to withdraw the application.[130]

The DCDSS advised that existing yellow card and yellow card exemption holders may continue working until expiry of their existing check, unless they have a change in their assessable information, which would require reassessment under the new disability screening framework.[131] However, people who become disqualified, as a result of proposed changes to the disqualifying offences, would have their cards cancelled automatically from commencement;[132] and people with a conviction for a new serious offence or pending charge for a new disqualifying or serious offence, would have their eligibility reassessed under the new decision-making framework.[133]

2.1.8.1 Stakeholder views

ESSA submitted that the Queensland Government should, 'work closely with the NDIS Quality and Safeguards Commission, peak bodies and professional associations, such as ESSA, to clearly

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124 Submission 2, p 6.

125 DCDSS, correspondence dated 23 June 2020, attachment, p 8.

126 Public briefing transcript, Brisbane, 23 June 2020, p 5.

127 Bill, clause 24, new section 369.

128 Explanatory notes, p 8.

129 Bill, clause 24, new section 369(3); Explanatory notes, p 59.

130 Explanatory notes, p 59.

131 Bill, clause 24, new section 369(4).

132 Bill, clause 24, new section 369(6).

133 Bill, clause 24, new section 377;

communicate relevant changes and details of transitional arrangements'.[134] ESSA further submitted that this communication should outline the varying requirements for registered versus unregistered NDIS providers and highlight the continued requirement for people working with children with a disability to obtain a Blue Card. [135]

2.1.8.2 Department response

The DCDSS noted ESSA's submission in regard to informing people of the transitional arrangements planned for the new scheme, and stated:

> *DCDSS is developing a broad communication plan for the implementation of NDIS worker screening in Queensland, so that individuals and service providers are aware of their new obligations.*
>
> *In the lead-up to the commencement of the new system, this will include clear communications that explain how the transitional provisions will work and what this means for workers and employers.*
>
> *DCDSS will also look to automate as much as possible any processes required for people who have current applications as at the date of commencement and will ensure that there are staff available to help those applicants who need it.*[136]

Committee comment

The committee acknowledges the submissions from stakeholders seeking clear, fulsome and timely communication by the department on the proposed disability worker screening system. The committee notes the department's proposed strategies to achieve transparency and certainty around the screening process for both people with disability and workers in disability services.

2.2 Amendments to the *Disability Services Act 2006* and the *Working with Children (Risk Management and Screening) Act 2000* to align the blue card system with disability worker screening (Clauses 33 to 66)

The Bill proposes amendments to both the *Disability Services Act 2006* (DSA) and the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act) to ensure the blue card system operates effectively alongside the disability worker screening system. The DCDSS advised that a key policy driver for the Bill with respect to children related to ensuring safeguards for children were maintained:

> *Children with disability are an inherently vulnerable cohort and, as such, it is critical that persons who propose to provide supports and services to these children are appropriately screened.*[137]

Part 3 of the Bill amends a number of sections of the WWC Act that are yet to commence (as part of the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2019*)[138] (refer to section 1.6 of this report).

2.2.1 Scope of blue card screening

The DCDSS explained that the Bill would require that persons working for a registered NDIS provider in a risk-assessed role with children with a disability hold both an NDIS clearance and a blue card.[139]

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134 Submission 4, p 2.

135 Submission 4, p 2.

136 DCDSS, correspondence dated 14 July 2020, attachment, p 18.

137 DCDSS, correspondence dated 23 June 2020, p 6.

138 Explanatory notes, p 64.

139 DCDSS, correspondence dated 23 June 2020, p 7.

The DCDSS also explained that persons providing unregistered NDIS services would also require a blue card:

> *In relation to children, there are requirements under the blue card system that will effectively mean that if you are providing NDIS services, whether unregistered or registered, you will need a blue card.*[140]

Clause 63 proposes the insertion of new section 6A (Disability work) into Schedule 1 of the WWC Act, 'to consolidate and simplify the blue card screening requirements for persons undertaking disability work with children into one stand-alone category of regulated employment'.[141] Under the proposed new section, the following persons would need to be screened under both the NDIS worker screening and the blue card system:

- a person carrying out risk-assessed NDIS work for an NDIS service provider in relation to a child or children with disability, and
- a person whose business involves providing NDIS supports or services to a child or children with a disability, whether that business is registered or unregistered for the purposes of the NDIS.[142]

2.2.1.1 Stakeholder views

The QHRC warned of the potential for the proposed dual system to add additional impediments to existing barriers faced by Aboriginal and Torres Strait Islander people when accessing working with children checks:

> *The Bill creates additional impediments by requiring both a disability worker screening check and a blue card for people wishing to work with children with disability. While there is provision for joint applications processes (section 67 [of the DSA]), there will still be two separate screening units, applying different tests, and potentially seeking different information, increasing complexity and reducing accessibility of the process.*
>
> *Aboriginal and Torres Strait Islander people may therefore be delayed or prevented from working. This can have negative impacts on already thin markets for disability service providers in rural and remote areas, and can increase the risk of abuse and neglect for people with disability. It also exacerbates problems with sourcing culturally appropriate supports for First Nations people.*[143]

For this reason, the QHRC recommended the committee consider, 'whether the test for blue card screening should be made consistent with the disability working screening check, [as set out in proposed new subsection 92-94 of the DSA] to reduce complexity and delay for applicants in need of both checks'.[144]

2.2.1.2 *Department response*

Acknowledging that, 'NDIS worker screening, as part of the broader registration requirements under the NDIS, may have particular impacts for Aboriginal peoples and Torres Strait Islander peoples, especially in regional and remote communities',[145] DCDSS advised:

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140 Elizabeth Bianchi, public briefing transcript, Brisbane, 23 June 2020, p 9.

141 Explanatory notes, p 73.

142 Explanatory notes, p 9.

143 Submission 3, p 3.

144 Submission 3, p 8.

145 DCDSS, correspondence dated 14 July 2020, p 6.

> *Specialised processes to facilitate identity verification for individuals in Aboriginal communities, Torres Strait Islander communities and remote communities will be developed.*[146]

DCDDS also noted the QHRC's view that the continuation of two checks for disability worker screening and working with children with disability would reduce accessibility for Aboriginal and Torres Strait Islander people.[147] Noting that, 'individuals who require both checks and return some form of assessable information will be subject to assessments under each framework',[148] the DCDSS advised:

> *Opportunities will be explored between the two screening units to ensure that the assessment processes are as efficient as possible, without compromising safeguards or integrity of the decision-making process.*[149]

The DJAG noted that Blue Card Services had implemented new strategies and enhanced existing strategies to support Aboriginal people and Torres Strait Islander peoples. In addition, the DJAG advised that, in partnership with a co-design reference group made up of Aboriginal and Torres Strait Islander peak bodies, a draft Aboriginal and Torres Strait Islander blue card strategy and action plan had been developed to improve the cultural capability of the blue card system and was proceeding through approval processes.[150]

In regard to QHRC's recommendation that the committee consider harmonising the test for blue cards and disability worker screening, the DCDSS advised:

> *Whilst it is arguable this issue is outside the scope of the Bill and it is ultimately a policy matter for Government, DJAG notes recommendation 41 of the QFCC Report[151] which recommends amendments to the WWC Act to introduce a new decision-making framework, to include a requirement to assess whether there is a risk of harm to the safety of children without the use of legislative tests that direct decision-making based on the type of information known about a person.*
>
> *This recommendation will be considered as part of the phased approach to delivering the QFCC Report and its implementation is a matter for Government.*
>
> *Further, DJAG notes the protective factors the QHRC identify in its submission (i.e. accepting responsibility, remorse, testaments to character) are already considered and given their appropriate weight as part of the blue card assessment process.*[152]

Committee comment

The committee recognises the concerns raised by QHRC regarding the barriers for Aboriginal people and Torres Strait Islander peoples in accessing working with children checks. The committee welcomes the DCDSS' advice that specialised processes to facilitate identity verification for individuals in Aboriginal communities, Torres Strait Islander communities and remote communities will be developed. The committee also welcomes recent initiatives undertaken by Blue Card Services and

146 DCDSS, correspondence dated 14 July 2020, p 6.

147 DCDSS, correspondence dated 14 July 2020, p 7.

148 DCDSS, correspondence dated 14 July 2020, p 8.

149 DCDSS, correspondence dated 14 July 2020, p 8.

150 DCDSS, correspondence dated 14 July 2020, p 9. These measures are part of the implementation of recommendation 73 of the *Keeping Queensland's children more than safe: review of the blue card system* report, https://www.qfcc.qld.gov.au/sites/default/files/final_report_BC_review.pdf.

151 Queensland Family and Child Commission report, *Keeping Queensland's children more than safe: review of the blue card system.*

152 DCDSS, correspondence dated 14 July 2020, p 16.

DJAG to support Aboriginal people and Torres Strait Islander peoples and to improve the cultural capability of the blue card system.

2.2.2 Aggravating circumstances to the 'no card, no start' offence

Under sections 175 and 176C of the WWC Act, it is an offence to employ a person in regulated employment unless that employee holds a working with children authority and the employer has notified the chief executive (working with children) about the employment of that person.[153] Sections 176A and 176E of the WWC Act prohibit a person starting or continuing to work in regulated employment unless they hold a working with children authority.[154]

Clauses 33 to 36 of the Bill propose expanding the aggravating circumstances for those offences to include the employee holding a disability exclusion under the DSA or an interstate NDIS exclusion.[155] A maximum penalty of 200 penalty units[156] ($26,690) or two years' imprisonment would apply to breaches of the provision by an employer who knew, or ought reasonably to have known, the employee held an exclusion. A maximum penalty of 500 penalty units ($66,725) or five years' imprisonment would apply to an employee for breaches of the provision.

2.2.3 Refinement of 'restricted employment' definition

Clause 37 proposes expanding and refining the definition of 'restricted employment', which is employment that is not regulated employment under the WWC Act.[157] The proposed expanded definition would capture the employment of a person who is a secondary school student on work experience carrying out risk-assessed NDIS work, or providing disability services, under the direct supervision of a person who holds a working with children authority.[158] Clause 37 also proposes to clarify that the definition also includes the employment of a person at a place where the employee is a person with a disability who receives NDIS supports or services or disability services at the place.[159]

2.2.4 Combined application processes

Clause 38 proposes amending the WWC Act so that a person would be able to combine their working with children check application with a disability worker screening application in a combined application process.[160] This mirrors proposed amendments to the DSA in clause 11. The DCDSS advised that the combined application process would mean, 'an applicant is only required to submit one application for both checks and provides a streamlined process, while retaining strong safeguards'.[161]

Equally, clause 41, proposes that where an applicant has made a combined application, the applicant may combine a notice withdrawing their working with children check application with a request to withdraw their disability worker screening application in a combined withdrawal request.[162] This mirrors proposed amendments to the DSA in clause 11.

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153 Section 17, *Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2019*.

154 Section 17, *Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2019*.

155 Explanatory notes, p 64.

156 The Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2017 provides that the value of a penalty unit is $133.45.

157 Section 176H WWC Act.

158 Explanatory notes, p 65.

159 Explanatory notes, p 65.

160 Explanatory notes, p 65.

161 DCDSS, correspondence dated 23 June 2020, p 7.

162 Explanatory notes, p 66.

Clause 40 proposes that, if the chief executive (working with children) becomes aware that the chief executive (disability services) has imposed an interim bar on a person who has made a working with children application, the chief executive is not required to make a decision on that application until there is a final outcome in relation to the interim bar.[163]

2.2.4.1 Stakeholders' views

ESSA acknowledged the combined application process as one of the measures proposed to streamline and simplify the worker screening process for Queenslanders working with people with a disability.[164]

Carers QLD Australia welcomed the proposal:

> *The management of mandatory screening processes pose a significant administrative and cost burden on our organisation. As such Carers Queensland welcomes the introduction of the proposed joint application process (disability worker and working with children screening) …*[165]

2.2.5 Information sharing and amendments to the blue card decision-making frameworks

The Bill proposes amendments to permit information sharing between the chief executive (disability services) and the chief executive (working with children).

Ms Bianchi, DCDSS, advised that the amendments to the WWC Act proposed by the Bill would:

> *… provide for an information-sharing regime between the blue card and disability worker screening systems; and, as a flow-on of those new information sharing arrangements, make minor amendments to the blue card decision-making framework.*[166]

The explanatory notes advise that the proposed sharing of information between the two systems would provide increased safeguards for Queensland children with disabilities:

> *Strengthening the information sharing framework for the purposes of the disability worker screening and blue card systems increases safeguards for children and people with disability in Queensland by ensuring the same information is assessed under both systems.*[167]

In addition, Mr Greg Bourke, Project Director, Blue Card Legislative Review, DJAG, explained that the proposed information sharing provisions would enhance the customer experience:

> *The information sharing arrangements between the two systems have been significantly enhanced under the bill so both screening systems can share a range of information with each other so that that end customer experience is as streamlined and efficient as possible but still recognising that they are two separate screenings.*[168]

Clause 53 proposes to repeal and replace section 344 of the WWC Act to enable the chief executive (working with children) to share information with the chief executive (disability services) if that information is relevant to the functions of the chief executive (disability services) under proposed replacement Part 5 of the DSA.[169] The information that may be shared would include:

- information about a person's working with children check application

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163 Explanatory notes, p 10.

164 Submission 4, p 1.

165 Submission 1, p 4.

166 Public briefing transcript, Brisbane, 23 June 2020, p 2.

167 Explanatory notes, p 20.

168 Public briefing transcript, Brisbane, 23 June 2020, p 11.

169 Explanatory notes, p 70. Proposed Part 5 of the DSA establishes a scheme for screening persons, by obtaining and considering their criminal history and other relevant information, to assess whether the persons pose an unacceptable risk of harm to people with disability.

- information about a working with children authority or negative notice held by a person
- police information about a person
- disciplinary information about a person, and
- information about a person's mental health.[170]

Clauses 43-46 and 52 propose expanding the information available to the chief executive (working with children) in determining whether there is an exceptional case in which it would be, or would not be, in the best interests of children for the chief executive to issue, reinstate or cancel a clearance. These provisions include:

- other information the chief executive may lawfully receive from other sources, such as the chief executive (disability services)
- new assessable information, that is, police information, disciplinary information or other information that the chief executive reasonably believes is relevant, and
- information previously not known to the chief executive.[171]

Clause 47 proposes that where the chief executive (working with children) is proposing to issue a negative notice, the chief executive must notify the person in writing of any other information about the person that the chief executive is aware of that the chief executive reasonably believes is relevant to determining the application.[172]

Clauses 49 and 50 propose expanding the information the chief executive (working with children) is to consider when deciding applications for a working with children exemption by police officers and registered teachers. The clauses proposes that, before the chief executive issues a working with children exemption to the person, not only must the existing criteria be established but it must also be established that the chief executive is not aware of any other information about the person that would be relevant to deciding whether it would be in the best interests of children for the chief executive to issue the exemption to the person.[173]

2.2.5.1 Stakeholder comments

The QHRC voiced its concern regarding the collection, use and sharing of information in the course of a worker screening application, stating it, 'is an interference with the applicant's right to privacy'.[174] The QHRC stated:

> *The interference may be for the legitimate purpose of protecting the safety of people with disability and of children, and, in relation to sharing information with Blue Card Services, service efficiency. However, failure of privacy protections can result in serious harm to the applicant such as reputational damage and defamation, biased decision making, and unfair loss of work opportunities.*[175]

2.2.5.2 Department response

Regarding the powers included in section 344 as proposed by clause 53, the DCDSS advised:

> *The powers included in section 138ZG of the DSA and section 344 of the WWC Act are necessary to facilitate the joint application process whereby a person will be able to seek a disability*

[170] Proposed new s 344(1).

[171] Explanatory notes, p 66-67.

[172] Explanatory notes, p 68.

[173] Explanatory notes, pp 68-69.

[174] Submission 3, p 5.

[175] Submission 3, p 5.

clearance and blue card as part of the one application; and to ensure that decisions can be made by either chief executive under their respective systems which safeguard the rights, interests and wellbeing of vulnerable persons receiving supports and services. In particular, the sharing of assessable information provides both systems with the most comprehensive information to undertake risk assessments.

The regime includes appropriate safeguards, including confidentiality requirements under both the DSA and WWC Act which require that assessable information can only be used or disclosed if it is for the purpose of a worker screening decision; or if it is expressly permitted under the relevant Acts (that is, if one chief executive determines the information is relevant to the other chief executive's screening functions).

Also, under new section 138ZN of the DSA, the chief executive (disability services) must enter into an information sharing arrangement with the chief executive (working with children) to ensure that appropriate and secure protocols are in place to facilitate the sharing of information between the two worker screening systems. [176]

Committee comment

The committee acknowledges the QHRC's concerns regarding the blue card applicants' right to privacy. However, the committee is of the view that the purpose of the limitation on the rights of applicants is balanced with the need to protect people living with disabilities.

2.2.6 Alignment of currency

Clause 48 proposes amendments to the WWC Act to enable the alignment of the expiry of a person's blue card to their NDIS clearance.[177] The DCDSS advised that this would mean that, 'a blue card could be issued for a period of up to five years'.[178] Equally, clause 51 proposes amendments to the WWC Act to align the term of exemptions issued to police officers and registered teachers to their NDIS clearances.

2.2.6.1 Stakeholder views

Carers QLD Australia welcomed the proposed alignment of the expiry dates and the provision of NDIS clearances for five years.[179]

2.2.7 Notifying self-managed NDIS participants about particular matters

Clause 54 proposes that the chief executive (working with children) be authorised to notify a child who is an NDIS participant, a person with parental responsibility for the child or the child's plan manager of the following information about a person operating an NDIS-regulated business and delivering NDIS supports or services to the child:

- if the person's working with children check application has been decided, and if so, whether the person was issued with a working with children authority or a negative notice
- if the person's working with children authority has expired, or is suspended or cancelled, or
- information about a change in police information relevant to child-related employment in accordance with section 339(3) of the WWC Act.[180]

[176] DCDSS, correspondence dated 14 July 2020, pp 15-16.

[177] DCDSS, correspondence dated 23 June 2020, p 7.

[178] DCDSS, correspondence dated 23 June 2020, p 7.

[179] Submission 1, p 4.

[180] Explanatory notes, p 70.

For discussion on these provisions in relation to their departure from the principles set out in the *Legislative Standards Act 1992*, refer to Chapter 3 of this report.

2.2.8 Confidentiality of information

Clause 57 proposes to repeal and replace existing section 384(1)(b) of the WWC Act to the effect that the confidentiality provisions applying to a person who is or has been a public service employee employed in the DCDSS would also apply to 'protected information'.[181]

The proposed definition of 'protected information' retains the types of information currently covered by section 384(1)(b):

- police information
- disciplinary information
- information about a person's mental health.[182]

Under new section 384(1)(b) as proposed by clause 57, 'protected information' would also include information given to the chief executive (working with children) by the chief executive (disability services) under proposed new section 138ZG of the DSA.[183] Where the chief executive (disability services) reasonably believes the information is relevant to the functions of the chief executive (working with children) under the WWC Act, protected information would include:

- information about a disability worker screening application made by a person
- information about NDIS clearances and NDIS exclusions held by a person
- police information about a person, including investigative information
- disciplinary information or NDIS disciplinary or misconduct information about a person
- information about a person's mental health.[184]

Clause 57 also proposes to clarify that a person may use the protected information, or disclose, or give access to the information to another person if to do so is expressly permitted under Chapter 8 (Screening for regulated employment and regulated businesses) or section 395 of the WWC Act (Reports by chief executive).[185]

The explanatory notes set out that clause 58 proposes to repeal and replace section 385 (Confidentiality of other information) of the WWC Act with new section 385, 'but with appropriate updates to reflect drafting practice and to remove references to the Commission for Children and Young People and Child Guardian, which no longer exists'.[186] The proposed new section 385(2) does not apply to confidential information[187] that is protected information under proposed new section 384 of the WWC Act.[188]

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181 Explanatory notes, p 71.

182 Explanatory notes, p 71.

183 Explanatory notes, p 71.

184 Bill, clause 11, new section 138ZG, p 113.

185 Explanatory notes, p 71.

186 Explanatory notes, p 71.

187 'Confidential information' includes information about a person's affairs but does not include (a) information already publicly disclosed unless further disclosure of the information is prohibited by law; or (b) statistical or other information that could not reasonably be expected to result in the identification of the person to whom the information relates; Schedule 7, *Working with Children (Risk Management and Screening) Act 2000*, p 369.

188 Explanatory notes, p 71.

The proposed new section 385 would apply to a person who is or has been a Minister or a member of the Minister's staff, or a public service employee employed in the department, and, in that capacity was given, or given access to, confidential information.[189] Proposed new section 385 would impose a penalty of 100 penalty units[190] ($13,345) if the person uses, discloses or gives access to the confidential information to anyone else, unless the use, disclosure or giving access:

- is for the purpose of the WWC Act; or
- is for the purpose of obtaining advice for, or giving advice to, the Minister in relation to the information; or
- is for the purpose of performing a function under another law; or
- is for a proceeding in a court or tribunal; or
- is authorised under a regulation or another law; or
- happens with the consent of the person to whom the information relates; or
- is for a purpose directly related to a child's protection or welfare.[191]

Clause 59 proposes amending section 395 (Report by chief executive) to provide that a report provided to the Minister may include information obtained under chapter 8A of the WWC Act (Register of regulated persons who provide home-based care services).[192]

2.2.9 Transitional arrangements

The Bill includes transitional provisions that would apply for people and businesses working with children with disability. Ms Bianchi explained:

> *… the bill does provide for transitional arrangements. From commencement, it is not as though everybody needs to be rushing into the system; it recognises that we already have screening processes in place, and those cards or clearances or positive notices—whatever we want to call them—will remain in effect for the period of their validity unless someone has a change in their assessable information. When the system commences and they have a blue card, they can continue along with their blue card until such time—or their yellow card exemption.*
>
> *The other important thing to point out in that context is that there is already a joint application process working between these two systems and already a lot of connection points between people who need both checks. We already know that there is a fairly significant proportion of people who will have both a blue card and a yellow card exemption and they will be able to continue to utilise those until they come up for renewal unless they have a change in their assessable information, in which case the new decision-making frameworks will apply to them.*[193]

Clause 61 proposes to repeal and replace Chapter 11, Part 20 of the WWC Act to set out the transitional provisions for the Bill.

2.2.9.1 New regulated employment

New section 590 proposed by clause 61 would apply to persons who do not hold a working with children authority and who, immediately before the commencement of the Bill, were employed in

189 Explanatory notes, p 71.

190 The Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2017 provides that the value of a penalty unit is $133.45.

191 Bill, clause 58.

192 Explanatory notes, p 72.

193 Public briefing transcript, Brisbane, 23 June 2020, p 5.

employment, or were continuing in employment, that is mentioned in proposed new schedule 1, section 6A, and the employment was not mentioned in schedule 1, section 6.[194] In those circumstances, subsections 175, 176A, 176C and 176E of the WWC Act—which relate to working with children authorities and employment in regulated employment—would not apply to that person until three months after commencement; or, if the person were to make a working with children check application within that period, until their application was decided or withdrawn.[195]

2.2.9.2 New regulated business

Clause 61 proposes new section 591, which would apply if, immediately before the commencement of the Bill, a person was carrying on a business mentioned in proposed new schedule 1, section 16A, and the business was not a regulated business mentioned in schedule 1, section 16, and the person does not hold a working with children authority.[196] In those circumstances, subsections 176B and 176G of the WWC Act—which relate to working with children authorities and operating regulated businesses—would not apply until three months after commencement; or, if the person were to make a working with children check application within that period, until their application was decided or withdrawn.[197]

2.2.9.3 Information that may be given under section 344

New section 592 proposed by clause 61 would provide that the chief executive (working with children) may give information about a person to the chief executive (disability services) regardless of whether the information relates to a matter that happened before or after commencement of the Bill.[198] Proposed new 592(2) would make clear that that information could include, among other things:

- information about a working with children check application made before the commencement, or
- information about a working with children authority or negative notice issued before the commencement, or
- information mentioned in proposed new section 344(3)(c) to (e)—police information, disciplinary information, information about a person's mental health—obtained by the chief executive before the commencement.[199]

2.2.9.4 Continuing obligation of confidentiality

Clause 61 proposes new section 593, which would make transitional arrangements in relation to persons to whom section 385 applied immediately before commencement and to whom section 385 ceased to apply after commencement. Under this proposed new section, former section 385 would continue to apply to the person in relation to particular information[200] that the person acquired, gained access to, or was given before commencement as if the Bill were not enacted.[201]

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194 Explanatory notes, p 72.

195 Explanatory notes, p 72.

196 Explanatory notes, p 72.

197 Explanatory notes, p 72.

198 Explanatory notes, p 73.

199 Explanatory notes, p 73.

200 Information under section 385 includes information about someone else's police information; disciplinary information about someone else; information about someone else's mental health, information about some else's criminal history or about an investigation relating to the possible commission of a serious offence by someone else.

201 Explanatory notes, p 73.

2.2.10 Regulation-making powers

Clause 60 proposes to repeal and replace subsection (2) of section 401 (Regulation-making power) of the WWC Act to provide that a regulation, if required, may provide for arrangements between the chief executive (working with children) and the chief executive (disability services) in relation to receiving, withdrawing, dealing with and deciding combined applications, including sharing information related to combined applications.[202]

The explanatory notes state:

> *The inclusion of this power is considered justified to address any specific arrangements which may need to be put in place to support the joint application process which may arise following commencement*.[203]

The proposed new subsection (2) would retain the existing ability for a regulation to prescribe fees payable under the WWC Act and provide for the fees to be refunded or waived.[204]

Proposed new subsection (2)(c) would provide that a maximum penalty of 20 penalty units[205] ($2,669) may be imposed for a contravention of a regulation.[206]

2.3 Consequential amendments to other legislation

The Bill proposes consequential amendments to a number of Acts, including the *Evidence Act 1977* and the *Police Powers and Responsibilities Act 2000*. The amendments are outlined below. Stakeholders did not provide views on these or any other consequential amendments proposed by the Bill.

2.3.1 Amendments to the *Evidence Act 1977*

The Bill includes amendments to the *Evidence Act 1977* in regard to a transcript made in accordance with section 93A, of a witness statement made before a proceeding by a child or a person with an impairment of the mind. Currently, the *Evidence Act 1977* (section 93AA) and the WWC Act (sections 311 and 318) authorise the police commissioner or the director of public prosecutions to provide the chief executive (working with children) with a section 93A transcript for the purposes of making a blue card screening decision.[207]

Clause 68 of the Bill proposes to amend the *Evidence Act 1977* so that:

- the police commissioner or director of public prosecutions is authorised to supply a copy of a section 93A transcript to the chief executive (disability services) and for the chief executive (disability services) and chief executive (working with children) to share transcripts with one another
- the chief executive (disability services) does not commit an offence by using a section 93A transcript for the blue card purposes of making a disability worker screening decision.

2.3.2 Amendment to the *Police Powers and Responsibilities Act 2000*

Clause 71 of the Bill proposes to amend the *Police Powers and Responsibilities Act 2000* to insert new section 789B to provide that a police officer has the power to require the production of a disability

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202 Explanatory notes, pp 25, 72.

203 Explanatory notes, p 25.

204 Explanatory notes, p 72.

205 The Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2017 provides that the value of a penalty unit is $133.45.

206 Explanatory notes, p 72.

207 Explanatory notes, p 12.

worker screening clearance card, if the police officer reasonably suspects the person has been charged with a disqualifying offence or is a disqualified person under the DSA.[208] The proposed amendment creates an offence for failing to comply with a police officer's request. The maximum penalty for failing to comply with this requirement is 100 penalty units.[209]

[208] Explanatory Notes, p 75.

[209] Bill, clause 71; Statement of Compatibility, p 15.

3 Compliance with the *Legislative Standards Act 1992*

3.1 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
- 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.

3.1.1 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.

3.1.1.1 Clause 11 – right to privacy regarding personal information - disclosure of criminal history

Clause 11 proposes inserting a replacement Part 5 in the DSA, dealing with worker screening for NDIS and state disability workers. As part of the scheme, the chief executive is able to obtain and assess a person's criminal history. Investigative, mental health and disciplinary information can also be accessed.

Proposed section 138C allows the chief executive to ask the police commissioner for 'police information' about a relevant person.[210]

In this context, 'police information', about a person, means:

- the person's criminal history
- investigative information about the person
- information as to whether the person is or has been—
  - a relevant disqualified person, or
  - named as the respondent to an application for an offender prohibition order, or
  - the subject of an application for a disqualification order or offender prohibition disqualification order.[211]

Issue of fundamental legislative principle

Provisions authorising the obtaining of a criminal history raise an issue of fundamental legislative principle relating to the rights and liberties of individuals, particularly regarding an individual's right to privacy with respect to their personal and confidential information.[212]

In considering similar provisions in Bills, committees have considered whether adequate safeguards are included in the Bill, such as whether:

- The criminal history can only be obtained with consent.
- There are strict limits on further disclosure of that information, including sanctions for any unauthorised disclosure.

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[210] 'Relevant person' is defined in proposed section 136.

[211] See the definition in schedule 8 to the DSA. As to 'investigative information', see proposed section 138I.

[212] See *Legislative Standards Act 1992*, section 4(2)(a).

- The criminal history information must be destroyed when it is no longer required for the purpose for which it was obtained.[213]

As noted by the QHRC in its submission:

> *… failure of privacy protections can result in serious harm to the applicant such as reputational damage and defamation, biased decision making, and unfair loss of work opportunities.*[214]

Another element to consider is the extent of information covered by the term 'criminal history', including for example, whether the term extends to charges that do not result in convictions, and to 'spent' convictions, and convictions that are quashed or set aside, and convictions which are 'not recorded'.

Here, the breach of fundamental legislative principle is heightened as, by virtue of proposed section 42, a criminal history here includes spent convictions. (Proposed section 42 of the DSA provides that Part 5 of the DSA applies notwithstanding anything in the *Criminal Law (Rehabilitation of Offenders) Act 1986*.) That Act provides that an individual does not have to disclose a conviction for which the rehabilitation period has expired and not revived, except in limited circumstances.)

Additionally, the information would be able to be shared with other working screening units and other entities, including agencies in other jurisdictions.[215]

The explanatory notes take a somewhat limited approach here, addressing issues of fundamental legislative principle regarding the obtaining of criminal histories through the narrower prism of the abrogation of rights under the *Criminal Law (Rehabilitation of Offenders) Act 1986*.[216] (This is perhaps because the general powers allowing access to personal information are contained in the existing legislation.) The issue is more appropriately considered as a general issue of rights and liberties regarding the privacy of confidential information—relating to all aspects of the ability to access criminal history as well as other investigative and other information. The explanatory notes adopt this broader approach when considering the *sharing* of such information, as opposed to the *obtaining* of such information.

The explanatory notes offer this justification for the breach of fundamental legislative principle:

> *This potential* [sic] *breach is justified on the ground it is necessary to enable the chief executive to assess whether a person poses an unacceptable risk of harm to people with disability. This is also consistent with the existing disability screening system under the DSA, as well as the blue card system under the WWC Act. The paramount consideration in making a decision is to ensure the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation.*[217]

The explanatory notes set out what are therein described as safeguards:

> *There are also appropriate safeguards in place, including processes that incorporate natural justice. This includes:*
>
> - *a show cause process where a person has the opportunity to make a submission to the chief executive when there is an intention to make an adverse decision against their application, in certain circumstances;*

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213 See for example, Transportation and Utilities Committee, report No. 13, 55th Parliament, *Plumbing and Drainage and Other Legislation Amendment Bill 2015*, March 2016, p 24.

214 Submission 3, p 5.

215 See generally proposed sections 138ZG to 138 ZK.

216 See the heading and the discussion at p 13 of the explanatory notes.

217 Explanatory notes, p 13.

- *the opportunity to seek internal review of the chief executive's decision, in certain circumstances; and*
- *the opportunity to seek an external review of the outcome of an internal review, in certain circumstances.*[218]

These elements are irrelevant in the present context, as they play no role in safeguarding confidentiality of personal information. They relate to the review processes available after a determination is made on an application, and are irrelevant to matters surrounding the obtaining and retention of the criminal history and other information, and in particular protecting the security and confidentiality of the information.

For safeguards, one needs to turn to other clauses in the Bill, in particular clause 19. Clause 19 proposes replacing the current confidentiality provision in section 227 of the DSA (relating to 'police, disciplinary, mental health and other protected information'). It can be noted that clause 20 proposes amending the current confidentiality provision in section 228 of that Act (regarding 'other information'). These amendments would extend the reach of those provisions to the new disability worker screening regime.

Proposed section 227 goes some way to addressing confidentiality issues regarding criminal history and other information by making it an offence to disclose protected information, including police information, without authorisation. Under proposed section 227, it would be an offence for a person who is or has been a public service employee employed in the department to use or disclose such information to another person, unless the disclosure is:

- for the performance of the screening functions of the chief executive, or
- made with the consent of the person to whom the information relates, or
- expressly permitted under Part 5 of the Act, or
- otherwise required by law.

The maximum penalty for failing to comply with proposed section 227 is 100 penalty units or 2 years' imprisonment.[219] (A failure to comply with section 228 incurs a penalty of a maximum 100 penalty units.)

Here, in summary, the following can be noted:

- A person's criminal history can be obtained only with their consent. Such consent is a mandatory aspect of making an application for disability worker screening (proposed section 68).
- There are limits on disclosure, and an offence for unauthorised disclosure.
- Unlike in some other legislation, there does not appear to be a requirement for destruction of the information as soon as practicable after the information is no longer needed.

The information able to be obtained is extremely broad in scope and highly sensitive. The existence or otherwise of certain convictions and other historical information is at the core of the screening system.

[218] Explanatory notes, p 13.

[219] One penalty unit is currently $133.45.

Committee comment

The committee considers there is sufficient justification for the breach of the individual's right to privacy, and there are sufficient protections for the privacy of the individual in the use, storage, and sharing of the criminal history and other police information.

3.1.1.2 Clauses 11 and 54 –right to privacy regarding personal information – other provisions

Disability Services Act 2006

Clause 11 inserts in the DSA:

- new section 100, to provide that the chief executive must give each 'notifiable person' a notice stating whether a person was issued with an NDIS clearance or exclusion
- new sections 74, 83, 112, 117, 118, 123 and 127, under which the chief executive must give each 'notifiable person' a notice in stated circumstances, including where an application is withdrawn, an interim bar is imposed on an application, or a person's clearance is suspended or cancelled.
- new section 52, to define a 'notifiable person', in relation to a clearance holder or applicant, as meaning:
  - an NDIS service provider who engages or proposes to engage the person to carry out NDIS disability work or state disability work
  - a funded service provider, if the service provider engages, or proposes to engage, the person to carry out state disability work, and
  - another entity prescribed by regulation.

Working with Children (Risk Management and Screening) Act 2000

Clause 54 of the Bill inserts new section 344C into the WWC Act**,** to confer on the chief executive (working with children) the authority to notify a child, a person with parental responsibility for the child, or the child's plan manager about the blue card status of a person who is providing the child with NDIS supports or services in the capacity of a NDIS regulated business. The notifications include advice that the business operator has been issued with a negative notice or has had their working with children authority suspended or cancelled.

Issue of fundamental legislative principle

As the amendments would enable the chief executives to share confidential information with other parties, the provisions again raise the issue of fundamental legislative principle relating to the rights and liberties of individuals discussed above, regarding an individual's right to privacy with respect to their personal information.

The right to privacy, and the disclosure of private or confidential information, are relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

In considering the DSA provisions, it can be noted that the definition of 'notifiable person' is broad in scope, such that there are many third parties with whom private and sensitive information can be shared. Further, proposed section 52 extends the term to 'another entity prescribed by regulation', so the precise extent of its reach is unknown.

The explanatory notes state the breach of fundamental legislative principle in these provisions is justified:

> *… to ensure that relevant service providers who engage persons to provide disability supports or services are notified when a person's clearance is suspended, cancelled or withdrawn.*

This will ensure these service providers are aware when a person they engage, as an employee, volunteer, contractor or otherwise, does not have the required clearance to work with people with disability, which minimises the risk of harm that may be caused by poor quality or unsafe supports or services.

It is important that information about the suspension or cancellation of a person's clearance is provided to a potential employer so the employer can appropriately risk manage the situation and ensure the person does not engage in a role which requires the person to hold an appropriate clearance.[220]

In terms of justification regarding clause 54 (the WCC Act provision), the explanatory notes state:

… the Bill includes appropriate safeguards by providing that notifications will only be provided if either the child, the person with parental responsibility for the child, the child's plan manager or the business operator notifies the chief executive (working with children) of the service delivery relationship. Further, it is important that information about the suspension or cancellation of a person's working with children authority is provided to a self-managing child participant or the child's plan manager so that they can appropriately exercise their choice and control under the NDIS system and risk manage the situation.[221]

It is relevant to again note in this context the provisions in the new sections 227 and 228 of the DSA (as discussed above in the context of criminal history).

Committee comment

The committee is satisfied there are sufficient protections for the privacy of the individual, and that the provisions for notification to third parties has sufficient regard to the rights and liberties of individuals.

3.1.1.3 *Clauses 11 and 71 - Proportionality and relevance of penalties*

The bill inserts penalty and offence provisions in the DSA. There is one new offence added to the *Police Powers and Responsibilities Act 2000* (PPRA). Note: one penalty unit is currently $133.45; 500 penalty units equates to $66,725.00.

Disability Services Act 2006

Proposed new Part 5 of the DSA, inserted by clause 11, includes a number of penalty provisions, including sections 53 to 57 (regarding NDIS disability work), 58 to 61 (regarding state disability work), and 84. Some of these replace or amend penalty provisions in the current Part 5, the explanatory notes stating the amendments include:

… modifying penalties to ensure consistency with offences and penalties under the blue card system. These offences will now apply to a broader cohort of persons and providers in certain circumstances. For example, certain offences and penalties will apply to an NDIS provider and a person they engage, depending on whether the provider is registered, unregistered and whether the person is engaged in a risk-assessed role.

This includes offences that apply to registered NDIS providers, and to persons they engage in a risk assessed role who work without an NDIS or State clearance, including relevant sole traders (Queensland's no card, no start approach).[222]

[220] Explanatory notes, p 22.

[221] Explanatory notes, p 21.

[222] Explanatory notes, p 14.

The maximum penalties are:

- for a worker, 100 penalty units or, if an aggravating circumstance applies, 500 penalty units or five years' imprisonment.
- for a provider, 100 penalty units or, if an aggravating circumstance applies, 200 penalty units or two years' imprisonment.

These penalties do not apply to workers of unregistered NDIS providers and workers in non-risk-assessed roles of registered NDIS providers and sole traders who do not elect to be screened.

Proposed new section 64 provides that a person who holds an exclusion (an NDIS exclusion, a state exclusion, or an interstate NDIS exclusion) must not make a disability worker screening application. It is an offence to not comply with this provision, with a maximum penalty of 500 penalty units or five years imprisonment

Proposed new section 84 creates an offence in the context of an interim bar being imposed under proposed section 82. (Interim bars can apply in the period between the making of an application and a decision on the application.) It is an offence for an applicant to start, or to continue, to engage in disability work. The maximum penalty for an applicant, NDIS sole trader or state sole trader is 500 penalty units or five years' imprisonment.

Police Powers and Responsibilities Act 2000

Clause 71 insets new section 789B in the PPRA, authorising a police officer to require the production of a disability worker screening clearance card if the officer reasonably suspects the person has been charged with a disqualifying offence or is a disqualified person. A failure (without reasonable excuse) to comply with such a requirement attracts a maximum penalty of 100 penalty units.

Issue of fundamental legislative principle

The creation of new offences and penalties affects the rights and liberties of individuals.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, penalties and other consequences imposed by legislation are proportionate and relevant to the actions to which the consequences relate. A penalty should be proportionate to the offence:

> *In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.*
>
> *… Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*[223]

Some offences and penalties are consistent with corresponding offences in the WCC Act (for example, proposed sections 53 and 54, and proposed sections 59 to 61 – the 'no card, no start' provisions for NDIS work and state disability work respectively).

Note that the new section 206(1) (amended by clause 15) states:

> *An offence against this Act is an indictable offence that is a crime if the maximum penalty for the offence is —*
>
> *(a) 500 penalty units or more; or*

[223] Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

(b) 5 years imprisonment or more.[224]

Disability Services Act 2006

In relation to the expanded scope of the DSA offences, the explanatory notes state:

> *Expanding the application of these existing offences to unregistered providers that opt into screening may be considered justified by the need to ensure there are appropriate safeguards in place to protect participants from harm or unsafe supports under the state or NDIS disability system, and to ensure the state has the appropriate regulatory levers in place to enforce compliance with the legislation. This in turn ensures the quality of services and supports that are provided to people with disability.*[225]

In relation to the increased penalties for some DSA offences, the explanatory notes state:

> *Increased penalties for individuals for certain offences is reflective of the increased personal responsibility on individuals to comply with strict requirements under worker screening legislation, noting applications will also be made by individuals.*[226]

Police Powers and Responsibilities Act 2000

In relation to proposed section 789B of the PPRA, the explanatory notes state:

> *… giving a police officer the power to require the production of a disability worker screening clearance card is justified by the need to protect people with disability from the risk of harm. The purpose is to ensure there is no misuse of a card that is no longer valid. The power is also supported by appropriate safeguards. A police officer can only require production when the police officer reasonably suspects the person has been charged with a disqualifying offence or is a disqualified person. A person does not have to comply with this requirement if they have a reasonable excuse.*[227]

This provision (and penalty) is consistent with an existing provision in section 789A of the PPRA, which contains a corresponding power to require the production of an employment-screening document under the WWC Act.

Committee comment

In many instances, the new offence and penalty provisions reflect the level of penalty in the current Part 5 of the DSA. The committee therefore considers the various offences and associated penalties to be reasonable, proportionate and relevant to the conduct being prescribed.

3.1.1.4 Clauses 11, 63 and 64– ordinary activities should not be unduly restricted

Disability Services Act 2006

Clause 11 inserts new sections 53, 54, 59 and 61 in the DSA. These provisions collectively have the effect that certain persons must not carry out, or continue to carry out, disability work until they have an NDIS or a state disability worker screening clearance. Offence and penalties apply for any non-compliance and there are corresponding offences and penalties for certain service providers that engage persons who do not have the appropriate clearance. (See above regarding the offences and penalties.)

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[224] There is provision for these offences to be dealt with summarily in some circumstances – see section 207 of the DSA, as amended by clause 16 of the Bill.

[225] Explanatory notes, p 15.

[226] Explanatory notes, p 15.

[227] Explanatory notes, p 15.

These 'no card, no start' provisions can impact on a person's ability to seek employment in certain positions or fields.

Clause 11, in repealing the present Part 5, removes the current exemptions, under NDIS and state disability worker screening, for blue card holders and registered health practitioners.

Working with Children (Risk Management and Screening) Act 2000

Clauses 63 and 64 effect amendments to Schedule 1 of the WWC Act to clarify the blue card screening requirements for persons:

- carrying out or providing risk-assessed NDIS work for an NDIS service provider in relation to a child or children with disability, and
- carrying out or providing disability services to a child or children with disability.

In doing so, these amendments effectively import from regulation (the Disability Services and Other Legislation (NDIS) Amendment Regulation 2019) to Act (the WWC Act) the changes and expansion to the scope of screening that were put in place from 1 July 2019.

These provisions impose additional obligations on certain workers. For example:

- Workers for registered NDIS providers in risk-assessed roles who work with children with a disability will need to be screened under both the NDIS worker screening and the blue card system.
- Workers in risk-assessed roles for unregistered providers will be required to hold a blue card to provide services to children with a disability.

Again, the provisions can impact on a person's ability to seek employment in specified environments.

Issue of fundamental legislative principle

These impacts on a person's ability to seek employment in specified environments can be seen as amounting to a departure from the principle that sufficient regard be given to the rights and liberties of individuals and, in particular, the right to obtain and keep employment and the right to conduct business without interference.

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals. These rights extend to the right to obtain and keep employment and the right to conduct a business or other activity without interference.

Disability Services Act 2006

The explanatory notes state the breach of fundamental legislative principle in the 'no card, no start' provisions is justified:

> *… to ensure the quality of safeguards for disability worker screening under the legislative framework. This approach minimises the risk of harm and is consistent with the paramount consideration in risk assessment and decision-making for worker screening, which is the right of people with a disability to live lives free from abuse, violence, neglect or exploitation (including financial abuse and exploitation).*
>
> *This approach reduces risks to the safety and wellbeing of people with disability as it prevents people working in roles which have been assessed as posing a higher risk to people with disability until they have been issued a relevant clearance. This also ensures consistency between state disability worker screening, NDIS worker screening and the blue card system.*[228]

[228] Explanatory notes, p 17.

In relation to the removal of the current exemptions, the explanatory notes state any departure from fundamental legislative principles is justified:

> *… given the national policy for worker screening provides for an expanded scope which promotes greater consistency of safeguards for people with disability regardless of who they receive NDIS disability supports and services from.*
>
> *NDIS worker screening will be a more comprehensive check as it will consider a broader range of assessable information, implement a strengthened disqualification framework and cardholders will be subject to ongoing national criminal history monitoring. This will enhance the quality of services and supports provided to people with disability.*[229]

Working with Children (Risk Management and Screening) Act 2000

The explanatory notes give this justification:

> *The screening requirements reduce risks to the safety and wellbeing of children by preventing persons with concerning histories from being able to work with children and is consistent with the principles for administering the WWC Act, that the welfare and best interests of the child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing …*[230]

Committee comment

The committee considers the breach of fundamental legislative principle is justified in each case, having regard to the policy intents of the requirements.

3.1.1.5 *Clause 11 – new sections 90 to 92 and 110-111 DSA – Administrative power*

Clause 11 proposes inserting new section 90 in the DSA, to provide that if the chief executive is aware a person is a disqualified person, the chief executive must issue the person an exclusion. A person is a disqualified person if they are convicted of a disqualifying offence, and was an adult when the offence was committed. Once a person is excluded they cannot work with people with disability. There is no right of review, except on the basis of mistaken identity.

Under proposed new section 92, the chief executive must issue an exclusion to a person if satisfied the person poses an unacceptable risk of harm to people with disability.

Proposed new sections 110 and 111 provide the chief executive must suspend a clearance if:

- a person is charged with a disqualifying offence that has not been dealt with, or
- the person is subject to a relevant banning order made by the NDIS Commission, or
- the chief executive is conducting a risk assessment of the person and reasonably suspects the assessment will demonstrate that the person poses an unacceptable risk of harm to people with disability.

Issue of fundamental legislative principle

The provisions resulting in automatic, and permanent, exclusion without any appeal or review, or resulting in suspension, without any right of prior review, raise an issue of fundamental legislative principle.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

[229] Explanatory notes, p 17.

[230] Explanatory notes, p 21.

> *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.*[231]

Committees carefully scrutinise provisions that do not sufficiently express the matters to which a decision-maker must have regard in exercising a statutory administrative power.[232]

In relation to the availability of review and the breach of fundamental legislative principle, the explanatory notes justify the breach on grounds of both consistency and protection of persons with disability:

> *The provisions are considered proportionate and justified to ensure the quality and consistency of safeguards under the NDIS and state disability frameworks. The purpose of these provisions is to prevent people who pose an unacceptable risk of harm from working with people with disability. The paramount consideration is to ensure the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation.*[233]
>
> *…*
>
> *This position is consistent with agreement under the IGA that provides for the limitation on internal and external review rights, if a person is convicted of a disqualifying offence, except on the basis of mistaken identity. This reflects the serious nature of these types of offences and ensures people who pose an unacceptable risk of harm to people with disability are excluded from carrying out disability work, and is consistent with the current policy under the DSA.*[234]

The explanatory notes set out in some detail the agreement reached at a national level in the IGA.[235]

The Queensland Law Society submits:

> *… where provisions are not reasonable, infringe upon cornerstone legal principles or on the provisions of the Human Rights Act 2019, the Parliament should amend the bill, even if doing so means that the Queensland legislation detracts in part from other laws.*[236]

In relation to suspension and exclusion powers, the explanatory notes state:

> *The suspension powers will only apply in certain circumstances and a person will also be able to apply to the chief executive to end the suspension if the clearance has been suspended for a period of six months. However, the chief executive is not required to decide the application if the charge has not been dealt with or if an incident, allegation or complaint about the person's conduct, relevant to a risk assessment, is under investigation.*
>
> *The power to issue exclusions is also supported by a natural justice process (except in those cases where a person has been convicted of a disqualifying offence). This includes requiring the chief executive to issue a show cause notice prior to making an adverse decision. The chief executive must consider any submissions made in response to the show cause notice prior to making a decision.*

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231 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 18.

232 OQPC, *Fundamental Legislative Principles: The OQPC Notebook* (OQPC Notebook), p 15; citing Scrutiny Committee Annual Report 1998-1999, para 3.10.

233 Explanatory notes, p 16.

234 Explanatory notes, p 18.

235 Explanatory notes, p 16. See also the last paragraph on p 18.

236 Submission 5, p 1.

> *If the chief executive decides to issue an exclusion, the chief executive must give the person notice of the decision that includes the reasons for the decision and the relevant review and appeal information. For example, if a person is afforded review and appeals options (i.e. they are not a disqualified person), the notice will explain their right to internal and external review.*[237]

Clause 11 adds proposed new sections 138ZR – 138ZY to the DSA, providing for a review and appeal process for 'reviewable decisions', including both internal and external review.

Reviewable decisions include a decision:

- to issue an exclusion to a person
- on the application of a person not to end the interim bar imposed, and
- on the application of a person not to end a suspension of the person's clearance.

Proposed new section 138ZT sets out who may apply for an internal review. Specifically, this provides that an 'affected person' for a reviewable decision may apply to the chief executive for a review of the decision. However, if the chief executive made the decision because the affected person is a disqualified person, the affected person may only apply for internal review on the grounds of mistaken identity.

Proposed new section 116 provides that if a person's clearance has been suspended for at least six months, the person may apply to the chief executive to end the suspension. However, the chief executive is not required to decide such an application if the relevant charge has not been dealt with or if an incident, allegation or complaint about the person's conduct, relevant to a risk assessment, is under investigation.

(Clause 24 inserts new section 370, providing for specific transitional provisions in relation to existing suspensions on commencement, including that the person may not apply under new section 116 to end the suspension until 6 months after commencement of the Bill.)

In relation to suspension and exclusion powers, the explanatory notes state:

> *The power to issue exclusions is also supported by a natural justice process (except in those cases where a person has been convicted of a disqualifying offence). This includes requiring the chief executive to issue a show cause notice prior to making an adverse decision. The chief executive must consider any submissions made in response to the show cause notice prior to making a decision.*
>
> *If the chief executive decides to issue an exclusion, the chief executive must give the person notice of the decision that includes the reasons for the decision and the relevant review and appeal information. For example, if a person is afforded review and appeals options (i.e. they are not a disqualified person), the notice will explain their right to internal and external review.*[238]
>
> *…*
>
> *In addition, in circumstances where the exclusion is overturned on grounds of mistaken identity, or the conviction is quashed, set aside or otherwise ceases to have effect, excluded persons will be able to reapply for a clearance.*[239]

Committee comment

[237] Explanatory notes, p 16.

[238] Explanatory notes, p 16.

[239] Explanatory notes, p 18.

The committee considers the potential breaches of fundamental legislative principle are justified, having regard to the objects of the provisions, including the protection of persons with a disability.

3.1.1.6 Clauses 11 and 71 – Onus of proof

Onus of proof – Section 4(3)(d) *Legislative Standards Act 1992*

As mentioned, the Bill includes a number of offence provisions. Some of these make it an offence for a person to do certain acts unless the person 'has a reasonable excuse'. Proposed sections 107, 11, 117, 122, 126, 128 of the DSA (inserted by clause 11) and proposed section 789B of the PPRA (inserted by clause 71) all create an offence for a person to not return or produce a clearance card in certain circumstances, unless the person has a reasonable excuse.

Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.[240] Legislation should not reverse the onus of proof in criminal matters, and it should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence.

Generally, in criminal proceedings:

- The legal onus of proof lies with the prosecution to prove the elements of the relevant offence beyond reasonable doubt, and
- The accused person must satisfy the evidential onus of proof for any defence or excuse he or she raises and, if the accused person does satisfy the evidential onus, the prosecution then bears the onus of negativing the excuse or defence beyond reasonable doubt.

Such 'reasonable excuse' provisions are discussed in some detail in the Office of the Queensland Parliamentary Counsel (OQPC), *Principles of good legislation: Reversal of onus of proof*. That discussion starts with the following:

> *If legislation prohibits a person from doing something 'without reasonable excuse' it would seem in many cases appropriate for the accused person to provide the necessary evidence of the reasonable excuse. While there is no Queensland case law directly on point, the Northern Territory Supreme Court has held that the onus of proving the existence of a reasonable excuse rested with the defendant on the basis that the reasonable excuse was a statutory exception that existed as a separate matter to the general prohibition… That approach is consistent with the principles used to determine whether a provision contains an exception to the offence or whether negativing the existence of the reasonable excuse is a matter to be proved by the prosecution once the excuse has been properly raised …*
>
> *… [It] is understood that in Queensland, 'reasonable excuse provisions' are drafted on the assumption that the* Justices Act 1886*, section 76 will apply and place both the evidential and legal onus on the defendant to raise and prove the existence of a reasonable excuse. On the other hand, … departments have often taken the view in their Explanatory Notes that a provision containing an exemption where a reasonable excuse exists is an excuse for which only the evidential onus lies with the accused.*[241]

There follows some examples where departments have disagreed with the view (expressed by the former Scrutiny of Legislation Committee) that reasonable excuse provisions involve a reversal of the onus of proof.

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240 *Legislative Standards Act 1992*, section 4(3)(d).

241 See OQPC *Principles of good legislation: Reversal of onus of* proof, p 25, at legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf

The OQPC discussion concludes:

> *It seems likely that in most cases a reasonable excuse will constitute a statutory exception to be proved by the defendant. However, in the absence of an express statement as to the allocation of the onus, the question will ultimately need to be determined by a court having regard to the established rules of statutory interpretation.* [242]

Elsewhere, the OQPC has noted:

> *Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.*
>
> *For example, if legislation prohibits a person from doing something 'without reasonable excuse', it is generally appropriate for a defendant to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the case for the prosecution.*[243]

In the present case, the explanatory notes for the Bill are silent on the issue. In considering the issue regarding similar provisions in other Bills, explanatory notes justify the reversal of the onus of proof on the basis that establishing the defence would involve matters which would be within the defendant's knowledge and/or on which evidence would be available to them.[244]

Committee comment

These provisions may be seen to reverse the onus of proof. All these offences provide that a person does not commit an offence if the person has a reasonable excuse. The person bears the onus of proof to show that they had a reasonable excuse.

The committee considers that any breach of fundamental legislative principle in regard to the 'reasonable excuse' provisions in the Bill to be sufficiently justified.

3.1.1.7 Clause 24 – retrospective provisions

Clause 24 proposes inserting in the DSA a number of transitional provisions for the purposes of the Bill:

- Proposed new section 377, regarding serious and disqualifying offences (given that the Bill amends the categories of serious and disqualifying offences prescribed under schedules 2 and 4 of the DSA, in the context of both NDIS and state disability worker screening). Section 377 provides that the DSA applies in relation to a person who is charged with a new disqualifying or serious offence even if the charge, or the acts or omissions constituting the alleged offence, arose before the commencement. New section 377 further provides that a conviction or charge for a new serious or disqualifying offence will be taken to be a conviction or a charge, on the commencement.
- Proposed new sections 379 to 385, regarding any review or appeal process which had not been decided or withdrawn in certain circumstances, including providing that if the applicant in an existing but undecided review or appeal is a disqualified person under the DSA, by virtue of amendments in the Bill, the application must be dismissed.
- Proposed nNew section 370 provides transitional arrangements for existing suspensions of positive notices or positive exemption notices. For positive notices or positive exemption

242 OQPC, *Principles of good legislation: Reversal of onus of proof*, p 26.

243 See OQPC Notebook, p 36.

244 For a recent example, see Fisheries (Sustainable Fisheries Strategy) Amendment Bill 2018, explanatory notes, p 17.

notices that have been suspended prior to commencement, an application to end the suspension cannot be made for an additional six months after the commencement.

Issue of fundamental legislative principle

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect the rights and liberties, or impose obligations retrospectively.

Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.[245]

The explanatory notes state regarding section 377:

> *The intention of these provisions is to ensure the new risk assessment framework will apply to these types of offences on commencement, regardless of when an offence was committed.*[246]

The explanatory notes state regarding sections 379 to 385:

> *… the amendment strengthens the assessment process and enables the chief executive to assess whether a person poses an unacceptable risk of harm to people with disability and to minimise the risk of harm caused by unsafe supports or services under the NDIS or State disability worker screening framework. The paramount consideration in undertaking worker screening is to ensure the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation.*[247]

The explanatory notes acknowledge that proposed new section 370, by requiring the additional time before a person may apply to cancel their suspension, potentially extends the period before a person may re-enter the workforce if their suspension is cancelled.

The explanatory notes give this overall justification for the transitional provisions:

> *The proposed transitional approach will provide an appropriate balance of safeguards and an equitable transition to the new worker screening system. It is also considered justified to ensure that persons who are assessed under the new framework to determine whether they present a risk of harm to people with a disability.*[248]

Committee comment

Whilst the retrospective operation of the provisions might have adverse impacts on persons (including, for example, by now becoming disqualified because of their past actions, or having existing review rights impacted), the committee is satisfied that any breach of fundamental legislative principle involved in the retrospective operation of the transitional provisions to be justified, given the overall objectives of the Bill to enhance protection from harm of vulnerable persons.

3.1.2 Institution of Parliament

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

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245 *Legislative Standards Act 1992*, s 4(3)(g.); some specific examples are set out in the OQPC Notebook, pp 55 to 64.

246 Explanatory notes, p 23.

247 Explanatory notes, p 23.

248 Explanatory notes, p 23.

3.1.2.1 Clause 24 – delegation of legislative power; retrospective power

Clause 24 proposes inserting section 391 in the DSA, providing for a transitional regulation making power in these terms:

(1) A regulation (a transitional regulation) may make provision about a matter for which—

(a) it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of this Act as it was in force immediately before the commencement to the operation of the amended Act; and

(b) this Act does not make provision or sufficient provision.

(2) A transitional regulation may have retrospective operation to a day not earlier than the day of commencement.

(3) A transitional regulation must declare it is a transitional regulation.

(4) A transitional regulation may only be made within 2 years after the commencement.

(5) This subdivision and any transitional regulation expire 3 years after the day of commencement.

Issues of fundamental legislative principle

The committee examined whether this was an appropriate delegation of legislative power. As the explanatory notes record:

> *The transitional regulation making power may be considered a breach of the fundamental legislative principle under section 4(2)(b) of the LSA, that legislation should have sufficient regard to the institution of Parliament and should not impose obligations retrospectively. …* [There] *could be an infringement given it may allow a regulation [for transitional matters to] … impose obligations retrospectively. Any transitions made under this transition-regulation making power may also been seen as not having sufficient* [regard] *for the* [institution] *of Parliament given any matters will be prescribed by regulation.*[249]

Section 4(4) of the *Legislative Standards Act 1992* states:

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill–

(a) allows for the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

Transitional regulation-making powers are discussed in the OQPC handbook, based on comments by the former Scrutiny of Legislation Committee.[250]

The form of transitional regulation-making power regarded as most objectionable has the following aspects:

- it is expressed to allow for a regulation that can override an Act
- it is so general as to allow for a provision about any subject matter, including those that should be dealt with by Act as opposed to subordinate legislation

[249] Explanatory notes, p 24.

[250] OQPC Notebook, p 160 and following.

- it is not subject to any other control, for example, a sunset clause.[251]

The Scrutiny of Legislation Committee regularly expressed the view that the subjects about which transitional regulations may be made should be stated in the Bill.[252]

Here the provision is very broad in scope, especially noting the wording of proposed section 391(1) (a matter for which 'it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of this Act as it was in force immediately before the commencement to the operation of the amended Act' and for which 'this Act does not make provision or sufficient provision').

This breadth of application is apparent from the wording, notwithstanding the assertion in the explanatory notes that the clause is 'strictly limited' to matters necessary to effect a smooth provision 'from the previous Act to the new Act' and for matters not sufficiently provided for in the 'new Act'.[253]

The Scrutiny of Legislation Committee regarded it as an inappropriate delegation to provide that a regulation may be made about any matter of a savings, transitional or validating nature 'for which this part does not make provision or enough provision' because this anticipates that the Bill may be inadequate and that a matter which otherwise would have been of sufficient importance to be dealt with in the Act will now be dealt with by regulation.[254]

Moreover, the clause has retrospective effect.

The explanatory notes offer this justification:

> *This potential* [sic] *breach is justified and is an important safeguard to provide for flexibility to rectify any gaps in transitional arrangements and ensure individuals who are assessed as presenting an unacceptable risk of harm to people with disability are prevented from working with people with disability.*
>
> *Whilst the Bill attempts to address all situations that may arise, the inclusion of the regulation-making power is considered pertinent given the complex regulatory environment.*
>
> *The transition regulation making power is also strictly limited to matters necessary to achieve a smooth transition. Any provisions made under this power is subject to tabling and disallowance by Parliament, it is retrospective only until commencement of this Bill and the power is only available for two years after commencement, and any exercise of this power ceases to have effect after three years. This reflects the validity period of a yellow card, yellow card exemption or blue card.*[255]

The clauses include the following sunset provisions:

- A transitional regulation may only be made within two years after the commencement (by virtue of section 391(4)).
- Section 391 and any transitional regulation made under it will expire three years after the day of commencement (by virtue of section 391(5)).

These might be considered to be long periods, particularly compared to some other transitional provisions. (*The Plumbing Bill 2018* provided for a sunset period of one year in each case. The *Medicines and Poisons Bill 2019* had a sunset period of two years in each case. The *Disability Services and Other Legislation (NDIS) Amendment Bill 2019* inserted in the DSA a transitional provision in

[251] See OQPC Notebook p 160.

[252] See OQPC Notebook at p161.

[253] Explanatory notes, p 24.

[254] See OQPC Notebook at p161.

[255] Explanatory notes, p 24.

identical terms as section 391. The *Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018* provided for a sunset period of 18 months in each case.)

Committee comment

The committee considers the sunset periods to be satisfactory, and, more broadly, considers the transitional clause and the subsequent disallowance powers of the House are enough for the clause to have sufficient regard to the institution of Parliament.

3.1.2.2 Clauses 9, 11, 13, 17, 23, 24, 31, 58 and 60 – Scrutiny of the Legislative Assembly of delegated legislative power

Numerous provisions in the Bill contain regulation-making powers. These include:

Disability Services Act 2006

- clause 9 - replacement section 14 of the DSA – a 'funded service provider' is a 'service provider … receiving recurrent or one-off funds from the department, or another department prescribed by regulation, to provide disability services.'
- clause 11 – new section 52 - a notifiable person for a person can be 'another entity prescribed by regulation …'. (This is discussed also above under privacy issues.)
- clause 11 – new section 58 – a regulation 'may prescribe other matters that must be included in a risk management strategy.'
- clause 11 – new section 65 – a person may apply for a clearance if the person 'complies with each other criterion prescribed by regulation.'
- clause 11 – new section 66 – a person may apply for a clearance if 'engaged by [specified entities] … or ... an entity prescribed by regulation … .'
- clause 11 – new sections 68, 103, 105, 131 – various application fees prescribed by regulation.
- clause 11 – new section 70, 103, 104 – applicants and clearance holders to notify of change in matters including another matter prescribed by regulation.
- clause 11 – new section 138R – chief executive may request certain information from prescribed entities, including an entity prescribed by regulation.
- clause 11 – new section 138ZL – disclosure of information is authorised on various grounds, including if authorised under a regulation or another law.
- clause 11 – new section 138ZZA – regulation may prescribe decisions that may not be generated by an information system.
- clause 13 – amended section 140 – part applies to named service providers, and to another service provider prescribed by regulation.
- clause 17 – amended section 216 – division applies to named service providers, and to another service provider prescribed by regulation.
- clause 23 – replacement section 239(2) – general regulation-making power.
- Clause 24 – new section 391 – new transitional regulation-making power (see discussion above).
- Clause 31 – amendment of schedule 1 dictionary DSA:
    - disqualifying offence includes an offence against a provision of an Act of the Commonwealth prescribed by regulation to be a disqualifying offence
    - serious offence includes an offence against a provision of an Act of the Commonwealth prescribed by regulation to be a serious offence
    - risk assessment matter means a matter that is or may be relevant to whether the person poses a risk of harm to people with disability and is prescribed by regulation to be a risk assessment matter
    - 'whole-of-government website' means www.qld.gov.au or another website prescribed by regulation.

Working with Children (Risk Management and Screening) Act 2000

- Clause 58 – section 385 replaced - disclosure of information if authorised under a regulation or another law
- Clause 60 - replacement section 401(2) - general regulation-making power.

Issue of fundamental legislative principle

Whether subordinate legislation has sufficient regard to the institution of parliament depends on whether, for example, the subordinate legislation allows the sub-delegation of a power delegated by an Act only:

- if authorised by an Act, and
- in appropriate cases and to appropriate persons.[256]

The significance of dealing with such matters other than by subordinate legislation is that, since the relevant document is not 'subordinate legislation', it is not subject to the tabling and disallowance provisions in Part 6 of the *Statutory Instruments Act 1992*.

Where there is, incorporated into the legislative framework of the State, an extrinsic document that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the House, it may be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.

A Bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.[257]

> *For Parliament to confer on someone other than Parliament the power to legislate as the delegate of Parliament, without a mechanism being in place to monitor the use of the power, raises obvious issues about the safe and satisfactory nature of the delegation.*[258]

The explanatory notes give a general justification for the numerous provisions allowing matters to be prescribed by regulation on grounds of needs for flexibility and national consistency:

> *These powers generally provide flexibility to deal with a range of operational matters, including fees, fee waivers and, where necessary, other matters necessary to implement nationally consistent NDIS worker screening. Regulations made under these heads of power will* [be] *subject to tabling in Parliament and disallowance.*[259]

Disability Services Act 2006

Similarly, and specifically regarding the power (in amendments, by clause 31, to the dictionary in schedule 1 of the DSA) to prescribe Commonwealth offences by regulation, the explanatory notes state:

> [This] *will ensure appropriate flexibility under the DSA, to prescribe the nationally consistent Commonwealth offences by regulation. Flexibility enables the proper administration of a nationally consistent system and ensures consistency with other jurisdictions.*

The regulation-making head of power regarding the prescription of other support services or organisations which would be eligible to apply for an NDIS or state disability worker screening clearance has the potential to expand, by regulation, the scope of NDIS and state disability screening requirements. The explanatory notes state:

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256 *Legislative Standards Act 1992,* section 4(5)(e).

257 *Legislative Standards Act 1992*, section 4(4)(b).

258 OQPC Notebook, p 154.

259 Explanatory notes, p 24.

> *This power is considered necessary to ensure fidelity with obligations under the IGA and consistency with screening requirements across jurisdictions. It also ensures risk is able to be appropriately managed by providing flexibility to bring other entities within the scope of screening, where appropriate. As with other regulations, regulations made under this power will need to be tabled in the parliamentary legislative assembly, subject to parliamentary committee scrutiny and to disallowance by Parliament.* [260]

Working with Children (Risk Management and Screening) Act 2000

Regarding the amendment (in clause 60) to the current regulation making power under section 401 of the WWC Act, allowing for a regulation to provide for arrangements between the chief executive (working with children) and the chief executive (disability services) in relation to receiving, withdrawing, dealing with and deciding combined applications, including sharing information related to combined applications, the explanatory notes state:

> *The inclusion of this power is considered justified to address any specific arrangements which may need to be put in place to support the joint application process which may arise following commencement.* [261]

Committee comment

The committee considers providing for the prescription of certain matters in regulation, rather than in the legislation itself, has sufficient regard to the institution of Parliament.

3.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins. Especially helpful is the extensive amount of informative detail on the operation and effect of each clause.

When discussing issues of fundamental legislative principle, the explanatory notes sometimes identify the specific clauses under consideration. It would assist the reader if this were always done. The explanatory notes refer to the various (and generally clear-cut) breaches of fundamental legislative principles in the Bill as 'potential' breaches of, or 'potential' departures from, fundamental legislative principles. It is preferable that explanatory notes refer to breaches of fundamental legislative principle in the Bill, rather than referring to them as 'potential' breaches.

[260] Explanatory notes, p 25.

[261] Explanatory notes, p 25.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[262]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the *Human Rights Act 2019* (HRA).[263]

The HRA protects fundamental human rights drawn from international human rights law.[264] Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

4.1 Human rights compatibility

The committee considered clause 11.

4.1.1 Clause 11 of the Bill

4.1.1.1 Criminal record or other information

The committee considered the following relevant provisions:

- making a worker screening check application — clause11 (new Part 5, division 3 of the *Disability Services Act 2006* (DSA)), and
- disqualifying offences framework — clause11 (new Part 5, division 3, subdivision 4 of the DSA; new Part 5, division 4, subdivision 4 of the DSA; and new Part 5, division 6, subdivision 3 of the DSA).

The threshold of 'unacceptable risk' is satisfied if there is 'a real and appreciable risk that the person might cause harm to people with disability', and 'without needing to be satisfied it is likely the person will cause the harm' (proposed section 93(2)(b)).

Under proposed section 94(2), the chief executive must have regard to:

a) the nature, gravity and circumstances of the person's offending conduct
b) how the person's offending conduct is relevant to disability work
c) how long ago the person's offending conduct occurred
d) if the person's offending conduct was committed against another person (the victim)—
    i. the victim's vulnerability at the time of the conduct, and
    ii. the person's relationship to, or position of authority over, the victim at the time of the conduct
e) whether the person's offending conduct indicates a pattern of concerning behaviour
f) the person's conduct since the offending conduct

262 *Human Rights Act 2019* (HRA), section 39.

263 HRA, section 8.

264 The human rights protected by the HRA are set out in sections 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, section 12.

g) any other circumstances relevant to the person's offending conduct.

4.1.1.2 Paramount consideration — clause 11 (new Part 5, division 1 of the DSA, subdivision 1, new section 41)

The paramount consideration in making a decision under this part is the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation.

4.1.1.3 Privacy rights for the applicant worker, including scope of disability worker screening — clause 11 (new Part 5, division 2 of the DSA)

- disability information sharing framework — clause 11 (new Part 5, division 8 of the DSA);
- information sharing between the chief executive (disability services) and chief executive (working with children) — clause 53 (new section 344 of the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act);
- introduction of new categories of regulated employment and regulated business to capture persons performing disability work – clauses 64 and 65 (new schedule 1, part 1, section 6A and schedule 1, part 2, section 16A of the WWC Act); and
- power to require production of disability worker clearance card — clause 71 (amendment of PPRA).

4.1.2 Identified human rights issues

The following human rights issues were identified and addressed in the statement of compatibility:

- protection of families and children (section 26 of the HRA)
- recognition and equality before the law (section 15 of the HRA)
- privacy and reputation (section 25 of the HRA)
- fair hearing (section 31 of the HRA), and
- property rights (section 24 of the HRA).

4.1.2.1 Nature of the human right

The Bill proposes to introduce the consideration of whether a person poses an unacceptable risk of harm to a person with disability as a new threshold for risk assessments related to worker screening. The paramount consideration in making a decision under this Bill is the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation. This is clearly compatible with the HRA, particularly protection from torture and cruel, inhuman or degrading treatment (section 17 of the HRA), protection of families and children (section 26 of the HRA), and equality before the law (section 15 of the HRA).

The assessment is weighted in favour of the safety of the person living with a disability. In determining if there is a real and appreciable risk, the decision maker does not need to be satisfied that it is likely the person will cause harm to a person with disability in the future. However, the grounds set out in proposed section 94 (matters to consider) offer the ability for a three-dimensional and calibrated assessment of the individual applicant. The statement of compatibility notes that, along with the disqualifying offences framework:

> *this is intended to support a risk management approach which is transparent and consistent across jurisdictions, and which prioritises the right of people with disability to live free from abuse, violence, neglect and exploitation.*[265]

In the context of the NDIS requiring a national process, the committee agrees with this assessment.

The screening process itself includes an expanded information collection, use and sharing process to inform whether a person poses an unacceptable risk of harm to a person with disability, as well as a

[265] Statement of Compatibility, p 8.

disqualifying offences framework that works to support the NDIS, a national scheme navigating state criminal law systems. The chief executive can ask for 'police information' (proposed section 138C), investigative information (proposed section 138I), 'disciplinary information' (proposed section 138O), or 'domestic violence information' (proposed section 138D), as well as the more usual criminal record. The committee notes the Bill enables the chief executive to investigate an applicant's mental health (proposed new section 138U) and to request a medical report, for which the chief executive bears the cost.

This Bill also proposes to create new penalties. Clause 11 proposes to insert a new Part 5 to replace the existing Part 5 in the DSA and establishes a new NDIS and state disability worker screening framework. The proposed new sections introduced by clause 11 of the Bill contain a number of offence provisions which carry both civil penalties and terms of imprisonment where there are aggravating circumstances. Some of these proposed sections require knowledge or deem knowledge, such as sections 55, 56, 60 and 71, while others such as sections 53, 54, 57, 61, 64 and 70 do not require this element.

4.1.2.2 Nature of the purpose of the limitation

This proposed new disability worker screening framework includes an application component and a disqualifying offences framework that gives the chief executive the ability to suspend or cancel a person's clearance under particular circumstances (proposed section 93).

As noted, the chief executive must conduct a risk assessment and deny or cancel a clearance if the chief executive reasonably suspects that the person poses an unacceptable risk of harm to people with disability.

This means that the right that is limited is the ability of people with a criminal record or some other factor from their past to successfully apply for any NDIS-funded disability work, or to have their status cancelled in the event of a charge or new incident. This does represent a limit on the right to employment after a spent conviction and limits the potential to fully rehabilitate and integrate into society.

4.1.2.3 The relationship between the limitation and its purpose

Having a prior criminal record can create impacts that endure long after any punishment is served for an offence, and it is timely to carefully address the appropriate use of conviction and criminal records information, or even a record of domestic violence or a serious mental health condition, in someone's employment. However, in certain circumstances, information about a person's prior conviction or criminal record is an important and legal requirement to assess suitability for a service or employment.

The chief executive must consider the following matters:

- the nature, gravity and circumstances of the person's offending conduct
- how the person's offending conduct is relevant to disability work
- how long ago the person's offending conduct occurred
- if the person's offending conduct was committed against another person (the victim)—
  - the victim's vulnerability at the time of the conduct, and
  - the person's relationship to, or position of authority over, the victim at the time of the conduct
- whether the person's offending conduct indicates a pattern of concerning behaviour
- the person's conduct since the offending conduct
- any other circumstances relevant to the person's offending conduct.

The committee considers this list of factors offers sufficient flexibility and transparency to ensure a rights-compliant risk-assessment.

The second limitation on the right to privacy relates to the sharing of information about a worker's application. Factors relevant to whether the framework is an arbitrary interference with privacy, and similarly, whether it is compatible with human rights, include:

- adequate protections for the secure management and storage of information, including effective sanctions for unlawful use or disclosure of information
- duration of storage and destruction protocols when the information is no longer required for the purpose for which they were stored
- express limits on the use and disclosure of information, only to the extent that is necessary to achieve the purpose of the legislation
- consent obtained from the applicant to share the information
- requirements to make reasonable attempts to confirm with the applicant the accuracy of the information received before use or disclosure.

In this circumstance, the committee considers that the sharing of information is privacy compliant.

4.1.2.4 The importance of the purpose of the limitation

This Bill places a limitation on a fair hearing and equality before the law. The law that covers spent convictions in Queensland is the *Criminal Law (Rehabilitation of Offenders) Act 1986.* This legislation is explicitly overridden by this Bill (proposed section 42). In Queensland, a spent conviction is a criminal conviction that has lapsed after a period of time, which results in its being removed from a person's criminal record. If a conviction is spent, it does not appear on a police record check and a person cannot be asked or forced to reveal the conviction, with some limited exceptions. In some circumstances a person is also entitled to swear, on oath, that he or she has not been convicted of an offence. This is an important and rights-compliant principle.

Notably, under the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA), the Australian Human Rights Commission can handle complaints about discrimination in employment or occupation on the basis of criminal record. The commission's powers and functions in relation to discrimination in employment on the ground of criminal record are contained in Part II – Division 4 (sections 30, 31 and 32) of the AHRCA and the Australian Human Rights Commission Regulations 1989 (Cth), reg 4. The commission's jurisdiction to handle these complaints is underpinned by the International Labour Organisation Discrimination (Employment and Occupation) Convention 1958 (ILO 111), which Australia has ratified, and which is scheduled to the AHRCA.

However, the Australian Human Rights Commission can consider public safety exemptions. All spent convictions schemes in other states and territories have similar public safety exemptions around working with children.

The committee considers it is a reasonable and proportionate response to extend the public safety exemption to the care of people living with a disability.

4.1.2.5 The importance of preserving the human right

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability made its first progress report in January 2020, and it is already apparent that abuse of Australian citizens living with a disability is widespread and serious. Often hidden from view, high-profile cases like the deaths of Willow Dunn, David Harris and Ann Marie Smith shine a spotlight on the treatment of people with disability in Australia.

In the testimony received so far by the Royal Commission, the experience of violence, abuse and neglect is not rare for people with disability, with hundreds of reports of recent incidences of abuse.

The committee is therefore satisfied that further and more rigorous screening measures are appropriate to ensure the safety of people living with disabilities.

4.1.2.6 The balance between the importance of the purpose of the limitation and the importance of preserving the human right.

The committee is of the view that the purpose of the limitation on the rights of applicants is balanced with the need to protect people living with disabilities.

Committee comment

The committee considers the limits on human rights in the Bill, namely, the limit on equality before the law and privacy rights for applicants, have been sufficiently justified.

4.1.2.7 Relevant precedents from other jurisdictions

In Victoria, there has been recent support for the argument that consideration of a person's irrelevant criminal record may constitute an arbitrary interference with that person's right to privacy. In the 2013 case of *ZZ v Secretary, Department of Justice & Department of Transport*[266], Justice Bell observed that work was an aspect of human dignity with great personal and social importance to individuals. His Honour also noted that employment restrictions, such as those which prevent a person from being able to gain employment because of a criminal record, 'impact sufficiently on the personal relationships of the individual and otherwise upon his or her capacity to experience a private life.'[267]

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) made a submission to the Legal and Social Issues Committee's 2019 inquiry into a legislated spent conviction scheme in that state. The VEOHRC stated that it receives enquiries from across Victoria where people have been denied employment and access to services, long after a person is rehabilitated. Such actions can cause hardship for people who have otherwise already received punishment or resolved their matters through court processes. In addition, the VEOHRC submitted that processes for disclosure of information are either unclear or inconsistent:

> *The impact of this unfavourable treatment falls heavily on Aboriginal Victorians, who are disproportionately represented in the criminal justice system. The development of a spent conviction scheme that allows the criminal records of offenders to be amended after a certain period of time will allow people with a criminal record to move on from their prior convictions. This can assist people with a criminal record rehabilitate by providing them with a legally sanctioned means of 'moving on'. The Commission supports the development of such a scheme in Victoria*.[268]

Tasmania and the Northern Territory also have provisions around the use of 'irrelevant criminal record' in employment contexts. However, all jurisdictions balance this set of rights with an exemption for working with vulnerable people.

4.2 Statement of compatibility

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights.

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA. The statement contained a sufficient/insufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

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266 *ZZ v Secretary, Department of Justice & Department of Transport* [2013] VSC 267 [(ZZ v Secretary) at 77.

267 *ZZ v Secretary, Department of Justice & Department of Transport* [2013] VSC 267 [(ZZ v Secretary) at 94.

268 Submission downloaded from: https://www.humanrights.vic.gov.au/static/Submission-Inquiry_legislated_spent_convictions_scheme-Jul_2019-b6d61369e63b0feb8901addfbe663a91.pdf

Appendix A – Submitters

Submission#	Submitter
001	Carers Queensland
002	Queensland Advocacy Incorporated
003	Queensland Human Rights Commission
004	Exercise & Sports Science Australia
005	Queensland Law Society
006	Queenslanders with Disability Network

Appendix B – Officials at public departmental briefings

Department of Communities, Disability Services and Senior

- Elizabeth Bianchi, Executive Director, Strategic Policy and Legislation
- Sakitha Bandaranaike, Senior Director, Strategic Policy and Legislation
- Max Wise, Assistant Director-General

Department of Justice and Attorney-General

- Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Greg Bourke, Project Director, Blue Card Legislative Review

Appendix C – Witnesses at public hearing

Exercise & Sports Science Australia

- Anita Hobson-Powell, Chief Executive Officer
- Anna Harrington, Policy and Advocacy Officer

Queenslanders with Disability Network

- Michelle Moss, Director of Policy and Strategic Engagement

Queensland Human Rights Commission

- Neroli Holmes, Deputy Commissioner

  Rebekah Leong, Principal Lawyer

Queensland Law Society

- Luke Murphy, President
- Ken Mackenzie, Criminal Law Committee Deputy Chair
- Kerryn Sampson, Senior Legal Policy Solicitor

Statement of Reservation

STATEMENT OF RESERVATION

WITH RESPECT TO THE

DISABILITY SERVICES AND OTHER LEGISLATION WORKER SCREENING AMENDMENT BILL 2020

The LNP Members of the Health Disability Committee support the recommendation that the Bill be passed.

There are a couple of issues we wish to bring to the attention of the Members of the House during the Second Reading Debate of the Bill.

SECURITY OF INFORMATION GATHERED

The Bill, in part, deals with "worker screening" provisions to support a nationally consistent approach for the N.D.I.S. and the I.G.A.

We acknowledge the importance of "worker screening" checks to ensure only those who meet rigorous standards are permitted to work with people with a disability.

We acknowledge the necessity for caution "recognizing that some people are in a more vulnerable position".

We further acknowledge the need for full information to be gathered however there are two questions that arise from that.

Firstly, what protections exist internally, of the Department, to ensure information gathered is seen only by those who should by legislation, regulation or delegation have the right to access it here in Queensland.

Secondly, what protections are in place to ensure that information shared to another jurisdiction, in relation to a Queensland resident, is similarly protected.

The submission by the Human Rights Commission becomes important which, at points 20 and 21 states:

> *"20. The collection, use and sharing of information in the course of a workers screening application is interference with the applicants right to privacy. Interference may be for the legitimate purpose of protecting the*

safety of people with disabilities and of children, and in relation to sharing information with Blue Card Services, service efficiency. However, failure of privacy protection can result in serious harm to the applicant such as reputational damage and defamation, bias decision making and unfair loss of work opportunities.

"21. Factors relevant to whether the framework is an arbitrary interference with privacy, and similarly whether it is compatible with human rights, includes;

a) adequate protections for the secure management and storage of information, including effective sanctions for the unlawful use or disclosure of information;
b) duration of storage and destruction protocols for when the information is no longer required for the purpose for which they were stored
c) express limits on the use and disclosure of information only to the extend it is necessary to achieve the purpose of the legislation
d) consent obtained from the applicant to share the information and
e) requirements to make reasonable attempts to confirm with the applicant the accuracy of the information received for disclosure"

<u>The First Question</u>

There are 2 points here:

1) What protections exist, inbuilt into the system, so that a third party who wants to access the information for their own purposes, can't and;
2) What internal mechanisms are in place to ensure that documents, USB sticks and the like are not left lying about, that contain information that could be seen or accessed by unauthorised third parties though not with a malicious intent.

The Department was asked;

"…..could you provide background as to what protections exist in relation to that information either being misused or in some manner disseminated to organisations or people who do not have the right to receive it ?"

The Department, in response made several comments and then this statement;

"Protected information can only be used or disclosed for four specific purposes under the Bill; to perform the chief executive's screening functions; If it is expressly permitted under part 5 which is like a screening part; if it happens with the consent of the person to whom the information relates; or if it is otherwise required under an Act."

Whilst accepting the provisions of the Bill there is still a necessity, when one considers by the Human Rights Commission to ensure internal mechanisms outside the terms of the Bill are put in place to ensure such privacy is secured.

The Department was asked;

"Because the Department receives and holds information, what is the hierarchy in relation to who can access that information?"

In part the Department responded as follows;

"The database is being built to standard Queensland government ICT specifications in terms of the controls that operate around that. That means it undergoes significant penetration testing against any external attacks and has to conform to all the required security configurations. There are data encryption protocols that apply to it, both data in aesthetic form and when in transit, moving between different people who are authorized to have access to it. There is the standard CITEC web application firewall, and internally we will have the administrative control figures – it does not exist yet—around user access reviews, password expiration. Only the people who actually have a need operationally to access a certain level of data or the database will have access to it. It is not open to the Department at large. It is those people who have a specific job requirement who will have access to it."

The LNP members note that the data base is *"...being built…*". This raises concerns in relation to an IT system involving a Government that has had a checkered history in this area, at best. There will be more comment on this during the Second Reading Debate.

<u>The Second Question</u>

This arises in relation to data that Queensland will be asked to provide to another jurisdiction. The Department was asked;

"Are the different State jurisdictions and Federal bodies seamless in how they treat information? Are they mirrored one against the other, or do the States have their own systems in relation to security of information?"

The Department responded with;

"*The States have their own legislative frameworks in relation to how information is protected.*

The Department was asked;

"How do you satisfy yourself – because it is still information that may not normally be gathered or passed on – that the body who receives it has security in place to satisfy the requirements that it should go to them and it is secure in relation to the person it relates to?

The Department answered with;

"We are operating on the basis that they are meeting their obligations under the intergovernmental arrangement that they are compliant with their State laws requiring privacy and confidentially, just as we do"

That particular answer does go back to the factors outlined in clause 21 of the submission by the Human Rights Commission and raises the question as to whether or not adequate protocols exist to ensure relevant practical standards are met so that information provided by Queensland to another jurisdiction is secure against unauthorised third parties accessing it.

We will discuss this further during the Second Reading Debate.

The Submission by the Human Rights Commission is an important document in this area.

ISSUE OF FUNDAMENTAL LEGISLATIVE PRINCIPLE

Page 36 of the Report commences the section that deals with compliance with the Legislative Standards Act 1992. At page 53 of the Report and the top of page 54 there are a number of clauses listed that provide regulation making powers. In fact, there are 17 such heads of power. The use of regulations to implement further provisions of an Act takes away the capacity of the Parliament to properly scrutinize the impact of such regulations. Though the regulation is accompanied by a Statement of Compatibility with the Human Rights Act, it does not go through a full process of scrutiny. Increasingly this Government is using regulations to avoid the scrutiny of The Parliament.

There are also a number of provisions in the Bill being proposed, sections 107,11,117,122, 126, 128, that create an offence for a person to not return or produce a clearance card in certain circumstances unless the person has a "reasonable excuse". This creates a criminal offence and in those circumstances the question of whether or not legislation is justified where there is a reversal of onus of proof.

The question is, what are the principles that should be applied in this case.

Dated this 31st day of July 2020

Mark McArdle
State Member for Caloundra
Deputy Chair

Marty Hunt
State Member for Nicklin