

Disability Services and Other Legislation (NDIS) Amendment Bill 2019

Explanatory Notes

FOR

Amendments to Be Moved During Consideration in Detail by the Honourable Coralee O'Rourke MP, Minister for Communities and Minister for Disability Services and Seniors

Title of the Bill

Disability Services and Other Legislation (NDIS) Amendment Bill 2019 (the Bill).

Objective of the Amendments

The policy objectives of the amendments are to ensure consistency with recent changes to the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act). This will ensure consistency between Queensland's working with children check (blue card system) and the disability screening system (yellow card system) is retained. This is important given the current intersection of the two systems through an exemption process that operates to reduce duplication of screening.

The proposed amendments:

- elevate additional offences to the list of serious and disqualifying offences under the *Disability Services Act 2006* (DSA);
- ensure equitable transition arrangements for current yellow card holders at commencement who have a previous conviction for a new serious offence or new disqualifying offence as a result of the Bill; and
- establish a new framework for dealing with cardholders and applicants charged or convicted of a serious offence.

The amendments also ensure that remaining provisions of the Bill that do not commence on assent, will commence on 1 July 2019. This will ensure the jurisdiction of the NDIS Quality and Safeguards Commission is recognised when it commences operation in Queensland on 1 July 2019. This commencement date also ensures that the strengthened framework for disqualifying and serious offences commences in a timely way to ensure people with disability are safeguarded.

Achievement of policy objectives

New serious offences

This objective is achieved by elevating to the serious offences list, under Schedule 2 of the DSA, the offences of:

- Manslaughter (section 303 of the Criminal Code – currently neither a serious nor disqualifying offence); and
- Servitude offences (section 270.5 of the Criminal Code (Commonwealth) – currently neither serious nor disqualifying).

New disqualifying offences

This objective is achieved by making changes to the disqualifying offences list in Schedule 4 of the DSA to include the following offences:

- Attempt to murder (section 306 of the Criminal Code – currently a serious offence);
- Conspiring to murder (section 309 of the Criminal Code – currently a serious offence);
- Choking, suffocation or strangulation in a domestic setting (section 315A of the Criminal Code – currently neither a serious nor a disqualifying offence);
- Cruelty to children under 16 (section 364 of the Criminal Code – currently a serious offence);
- Torture, if the offence was committed against a child (section 320A of the Criminal Code – currently a serious offence);
- Attempt to commit rape of an adult (section 350 of the Criminal Code – currently a serious offence);
- Assault with intent to commit rape of an adult (section 351 of the Criminal Code – currently a serious offence);
- Servitude offences, if the offence was committed against a child (section 270.5 of the Criminal Code (Commonwealth) – currently neither a serious nor disqualifying offence);
- Offence of trafficking in children (section 271.4 of the Criminal Code (Commonwealth) – currently a serious offence); and
- Offence of domestic trafficking in children (section 271.7 of the Criminal Code (Commonwealth) – currently a serious offence).

Attempt to commit rape and assault with intent to commit rape are already disqualifying offences if the offence is committed against a child.

Transitional arrangements for new serious and new disqualifying offences

This objective is achieved by amending the transitional arrangements as introduced by the Bill to provide transitional arrangements for persons who held a current positive notice or positive exemption notice immediately before the commencement of the Act, and were convicted of a new serious offence or new disqualifying offence before commencement.

New framework for dealing with charges and convictions for serious offences

This objective is achieved by amendments that provide that:

- an applicant with a charge for a serious offence is taken to have their application for a positive notice or positive exemption notice withdrawn;
- a cardholder who has been charged with a serious offence will have their positive notice or positive exemption notice suspended, and the chief executive is not required to make a decision regarding the suspension whilst the charge or any appeals processes are not finalised;
- an applicant with a conviction for a serious offence must not commence engagement or continue to be engaged at a service outlet of a service provider, before their application has been decided and a yellow card issued.

The proposed amendments intend to retain consistency between the blue card and yellow card systems during the period that Queensland transitions to a nationally consistent NDIS worker screening system.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objectives.

Estimated cost for government implementation

There are no additional costs to government in implementing the amendments.

Consistency with fundamental legislative principles

Legislation has sufficient regard to the rights and liberties of individuals (section 4(2)(a) Legislative Standards Act 1992) – new serious and disqualifying offences – Amendments 10-15

New serious offences

The amendments introduce new serious offences into the DSA which will apply retrospectively. This means a person who held a current yellow card or yellow card exemption notice before commencement, and has previously been convicted of a new serious offence, will be reassessed but still be able to carry out disability-related work during this assessment period.

The retrospective application of these amendments is considered justified to protect people with disability from harm. As these amendments mirror the amendments to the WWC Act, this also retains consistency between the blue card and yellow card system.

New disqualifying offences

The amendments introduce new disqualifying offences into the DSA, and also apply retrospectively. This means that a person who held a current yellow card or yellow card exemption notice before commencement, and has previously been convicted of a new disqualifying offence, will be reassessed but still be able to carry out disability-related work during this assessment period.

As these amendments expand the scope of disqualifying offences, including elevating additional offences within the DSA to disqualifying offences, this will result in the automatic and permanent exclusion of a broader range of individuals from working with people with disability. As such, this may be considered legislation that has insufficient regard to the rights and liberties of individuals.

Under section 109 of the DSA, a person who is convicted of a disqualifying offence is afforded no review rights. This will also apply to the broader range of persons captured by the new disqualifying offences. This may be considered a breach of the fundamental legislative principle that administrative power should be sufficiently defined and subject to review.

These amendments are considered justified for the protection of people with disability from harm. The amendments are necessary to mirror the amendments to the WWC Act and preserve consistency between the blue card and yellow card system.

Legislation has sufficient regard to the rights and liberties of individuals (section 4(2)(a) Legislative Standards Act 1992) – framework for dealing with cardholders and applicants charged or convicted of a serious offence – Amendments 2-4 and 6-10

New framework for dealing with charges and convictions for serious offences

The amendments will introduce a new framework for dealing with yellow card applicants and cardholders who are charged or convicted of a serious offence, including suspension or cancellation of cards. This may affect the principle that legislation has sufficient regard to the rights and liberties of individuals.

This framework is considered justified for the protection of people with disabilities from harm, as it prevents individuals with charges or convictions for specified offences from working with people with disability in regulated disability-related service environments, until they have been issued with a yellow card or yellow card exemption notice.

Consultation

Consultation of the Bill was undertaken by the Education, Employment and Small Business Committee. Stakeholders supported the amendments the Bill introduced to the yellow card disqualifying framework. In addition, consultation was undertaken in relation to the comparable amendments made to the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act).

Notes on provisions

Amendment 1 amends Clause 2 (Commencement) to provide that the remaining provisions of the Act commence on 1 July 2019.

This will ensure the jurisdiction of the NDIS Quality and Safeguards Commission is recognised when it commences operation in Queensland on 1 July 2019. This commencement date also ensures that the strengthened framework for disqualifying and serious offences commences in a timely way to ensure people with disability are safeguarded.

Amendment 2 inserts Clauses 17A, 17B, 17C, 17D, 17E, 17F, 17G and 17H.

Clauses 17A, 17B and 17C amend existing sections 65, 66 and 67 to remove the ability for a funded non-government service provider or NDIS non-government service provider to allow a person engaged or seeking to be engaged in paid employment who has been convicted of a serious offence to commence work while their application is being processed. These amendments are part of the new framework for dealing convictions for serious offences.

Clause 17D inserts new section 69A, which applies to applicants in paid engagement, convicted of a serious offence. Section 69A provides that an applicant with a conviction for a serious offence must not commence or continue paid regulated engagement at a service outlet of a service provider, before the application has been decided and a positive notice or positive exemption notice has been issued.

Subsection (1) provides that this section applies where a prescribed notice or exemption notice application has been made about a person to which sections 65, 66 or 67 apply, the application has not been decided or withdrawn and the chief executive becomes aware of the person's conviction for a serious offence.

If the person's conviction has not previously been assessed resulting in the issue of a positive notice or positive exemption notice, the person must not commence or continue work until they have been issued with a positive notice or positive exemption notice.

Subsection (2) requires the chief executive to give the person a written notice that states the person is no longer allowed to work at a service outlet of the service provider before the application is decided, and it is an offence for the person to start or continue in regulated engagement, unless the person is issued with a positive notice or positive exemption notice.

Subsection (3) provides that a person who receives a notice under subsection (2) is prohibited from starting or continuing in regulated engagement unless the person is issued with a positive notice or positive exemption notice, with a maximum penalty for this offence at 500 penalty units or 5 years imprisonment.

Subsection (4) clarifies that subsection (5) applies where the chief executive gives a notice, under subsection (2), to a person engaged by a funded non-government service provider or NDIS non-government service provider.

Subsection (5) requires the chief executive to give a service provider a notice about a person (the engaged person) under subsection (4), stating that the service provider must not allow the

person to work at the provider's service outlet before the person's application is decided, it is an offence to do so unless the person is issued a positive notice or positive exemption notice and the service provider must not terminate the person's engagement solely or mainly due to the notice.

Subsection (6) provides a service provider may not terminate a person's engagement or continued engagement, solely or mainly because the service provider has been issued with a notice under subsection (5).

Clause 17E amends section 70(2) to expand the prohibition against a funded non-government service provider or NDIS non-government service provider engaging, or continuing to engage, a person at a service outlet if:

- under new section 69A(5), the person is not allowed to work as they have an application for a positive notice or positive exemption notice that has not been decided; or
- a notice of deemed withdrawal, due to the person's conviction for a serious offence or disqualifying offence, has been given to the provider under amended section 132(6) and (7).

Clause 17F amends the heading of section 86 to read 'Suspension of positive notice if charged with serious or disqualifying offence or subject to temporary or interim order' and expands the section to apply to a person with a current positive notice who has been charged with a serious offence.

Clause 17G expands the application of section 87, regarding the ending of a suspension notice under section 86, so that it also applies to a pending charge for a serious offence.

Clause 17H amends section 132 to provide that an engaged person is also deemed to have withdrawn their consent to screening if the person is charged with a serious offence, and has notified the chief executive, or vice versa.

Amendment 3 amends Clause 46 (Insertion of new pt 9, div 12) to insert a definition for 'new serious offence' for the transitional provisions in the Act. A 'new serious offence' is defined to mean an offence that is a serious offence, but was not a serious offence immediately before commencement (i.e. an offence which is added to the list of serious offences in Schedule 2 under the amendments).

Amendment 4 amends Clause 46 to insert new sections 345A and 345B.

Section 345A provides that in applying the Act, a person who is the subject of a charge for a serious offence that has not been dealt with on the commencement will be taken to have been charged with the offence on commencement.

Section 345B provides that the amended Act applies to a person convicted of a new serious offence, regardless of when the offence was committed or the person convicted. The Act also applies to a person charged with a new serious offence even if the charge, acts or omissions constituting the offence happened before the commencement.

Amendment 5 amends Clause 46 of the Bill, to amend section 346 (Effect of conviction or charge for new disqualifying offence) to provide that in applying the amended Act to a person that held a current positive notice immediately before commencement, if the person has a

charge for a new disqualifying offence that has not been dealt with on commencement, the person is taken to be charged on commencement.

Amendment 5 also inserts section 346A, which applies to a person who held a current positive notice or positive exemption notice immediately before commencement and was convicted of a new disqualifying offence before commencement.

Subsection (2) provides that in applying the Act to existing positive notice or positive exemption notice holders, the previous conviction for a new disqualifying offence before commencement is taken to be, or to continue to be, a serious offence, despite the enactment of the amending Act.

Subsection (3) provides that if the person applies for another positive notice or positive exemption notice after the commencement, or sections 347, 348 or 349 apply, the person's previous conviction for a new disqualifying offence before commencement is taken to be, or to continue to be, a conviction for a serious offence and the person is taken not to be a disqualified person or relevant disqualified person.

Amendment 6 amends Clause 46, to amend the heading of section 348 to read 'Existing positive notice held by person convicted of new serious offence or new disqualifying offence', and amend the section to provide that persons who held a current positive notice immediately before commencement, and were convicted of a new serious offence, or a new disqualifying offence that is taken to be a serious offence under section 346A(2) before commencement, will be reassessed.

New subsection (1A) provides that section 74 does not apply to the person in relation to the person's conviction for the offence such that the person does not have to cease engagement with the service provider while their positive notice is being reassessed.

New subsection (1B) provides the chief executive must consider whether it is appropriate to cancel the person's positive notice under this section because of the person's conviction for the offence and give the person a notice stating that, because of the enactment of the amending Act, the chief executive is considering whether the person should continue to hold their positive notice.

New subsection (1C) provides that if the person is engaged by a funded non-government service provider or an NDIS non-government service provider and is not a sole trader, the chief executive must also provide the service provider with this notice.

Amendment 7 amends Clause 46 to clarify that in applying section 348 (Existing positive notice held by person convicted of new serious offence or new disqualifying offence), sections 83(2), (3), (5) and (6) apply to the decision under subsection (2). It also provides that if the chief executive decides not to cancel a person's positive notice under section 348, the chief executive must give a written notice to the person, and each service provider given a notice under new subsection (1B).

Amendment 8 amends Clause 46 to amend the heading of section 349 to read 'Existing positive exemption notice held by person convicted of new serious offence or new disqualifying offence' and amend the section to provide that persons who held a current positive exemption notice immediately before commencement, and were convicted of a new serious offence, or a

new disqualifying offence that is taken to be a serious offence under section 346A(2) before commencement, will be reassessed.

New subsection (1A) provides that section 74 does not apply to the person in relation to the person's conviction for the offence, such that the person does not have to cease engagement with the service provider while their positive notice is being reassessed.

New subsection (1B) provides the chief executive must consider whether it is appropriate to cancel the person's positive exemption notice under this section because of the person's conviction for the offence and give the person a notice stating that, because of the enactment of the amending Act, the chief executive is considering whether the person should continue to hold their positive notice.

New subsection (1C) provides that if the person is engaged by a funded non-government service provider or an NDIS non-government service provider and is not a sole trader, the chief executive must also provide the service provider with this notice.

Amendment 9 amends Clause 46 to clarify that in applying section 349 (Existing positive exemption notice held by person convicted of new serious offence or new disqualifying offence), sections 84(2), (3), (5) and (6) apply to the decision under subsection (2). It also provides that if the chief executive decides not to cancel a person's positive exemption notice under section 349, the chief executive must give a written notice to the person, and each service provider given a notice under new subsection (1B).

Amendment 10 inserts Clause 46A to introduce the offence of choking, suffocation or strangulation in a domestic setting to the serious offences list.

Clause 46A elevates the offence of manslaughter to the serious offence list by removing the existing qualifier in column 3 which applies to the offence of 'unlawful homicide' under the Criminal Code.

Clause 46A also removes the repealed Commonwealth offence of sexual servitude (section 270.6 Criminal Code (Cwlth)), replacing it with the Commonwealth offences of servitude (section 270.5 Criminal Code (Cwlth)); trafficking in children (section 271.4 Criminal Code (Cwlth)); and domestic trafficking in children (section 271.7 Criminal Code (Cwlth)).

Clause 46B inserts the repealed Commonwealth offence of sexual servitude (section 270.6 Criminal Code (Cwlth)) as an entry into Schedule 3 (Repealed or expired serious offences) list.

Amendment 11 amends Clause 47 by inserting the following entries for the Criminal Code into the disqualifying offences list:

- Section 306 (Attempt to murder);
- Section 309 (Conspiring to murder);
- Section 315A (Choking, suffocation or strangulation in a domestic setting); and
- Section 320A (Torture) with the qualifier – if the offence was committed against a child

Amendment 12 amends Clause 47 to insert the offence of Cruelty to children under 16 (Section 364 Criminal Code) into the disqualifying offences list.

Amendment 13 amends Clause 47 to remove the child qualifier that applies to the following offences under the Criminal Code:

- Section 349 (Rape);
- Section 350 (Attempt to rape); and
- Section 351 (Assault with intent to commit rape).

The effect of these amendments is that the offences of rape, attempt to rape, and assault with intent to commit rape will be treated as disqualifying, whether the offence was committed against a child or an adult.

Amendment 14 amends Clause 47 to remove the entry for sexual servitude (section 270.6 Criminal Code (Cwlth)) and insert the following entries for the Criminal Code (Cwlth):

- Section 270.5 (Servitude offences) with the qualifier – if the offence was committed against a child;
- Section 271.4 (Offence of trafficking in children); and
- Section 271.7 (Offence of domestic trafficking in children).

Amendment 15 inserts new Clause 47A to insert the repealed Commonwealth sexual servitude offences (section 270.6 Criminal Code (Cwlth)) into Schedule 5 (Repealed or expired disqualifying offences).