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9th July 2024

Committee Secretary
Education, Employment, Training and Skills Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Committee Secretary,

Re: Consultation on the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024

Thank you for the opportunity to provide comments on the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2024 (**Bill**) which proposes to amend the *Working with Children (Risk Management and Screening) Act 2000* (**WWC Act**), *Child Protection Act 1999* (**CP Act**), *Childrens Court Act 1992* and the *Disability Services Act 2006* to implement certain recommendations from key reports including from the Royal Commission into Institutional Responses to Child Sexual Abuse, the Queensland Family and Child Commission (**QFCC**) and the Legal Affairs and Safety Committee, with the aim of strengthening the working with children (**Blue Card**) regime and improving outcomes for Aboriginal and Torres Strait Islander peoples. We broadly support the Bill as it contains some key and long-awaited reforms that we hope will enable more Aboriginal and Torres Strait Islander individuals to obtain a Blue Card, and reforms that should increase the likelihood of Aboriginal and Torres Strait Islander children that are at risk of being placed in out-of-home care remaining with kin. In reviewing the Bill, we also identified some concerns which we have sought to outline in this submission.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 25 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil (including, child protection and domestic violence) and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Comments on the Bill

Amendment to the principles for administering the WWC Act

Clause 30 of the Bill proposes to amend the principles for administering the WWC Act by inserting the following wording at section 6(b) after 'wellbeing': '*, which for an Aboriginal child or Torres Strait Islander child includes recognising the importance of connection with the child's family, community, culture, traditions and language*'. Whilst we welcome this proposed amendment, as Aboriginal and Torres Strait Islander peoples are the experts in their own experience including in relation to the importance of cultural connection and identity, we are hopeful that this proposed amendment is supported with targeted and ongoing strategies to increase the number of Aboriginal and Torres Strait Islander individuals recruited in decision-making roles within Blue Card Services and associated government units of administration that have a role or influence in the decision-making process enshrined in the WWC Act. This would be consistent with the principles of self-determination and co-design, as enshrined in the

National Agreement on Closing the Gap (**NACTG**). Additionally, we recommend that the word '*kin,*' be inserted after '*family,*' in the proposed wording to be inserted at section 6(b), as extracted above.

Amendments to remove the requirement for kinship carers to hold a Blue Card

We strongly support proposed amendments to the CP Act and the WWC Act in the Bill that would, effectively, remove the requirement for kinship carers, as defined in the CP Act, to hold a Blue Card if they are caring for children in their family. We understand that this is intended to be a first step in a pathway of reform and that there will be a second set of reforms to develop a more nuanced screening approach, which Child Safety will develop in due course and with due consultation with relevant stakeholders.

We note, however, with a level of concern, that the Bill proposes to 'turn off' the auto-commencement provisions (where any uncommenced provisions of an Act commence automatically after 1 year after the date of assent), with those amendments to commence on a date to be fixed by proclamation, which is anticipated to occur some years later. We understand that the intent is to allow time for Child Safety to develop the new screening model for kinship carers, including 'time for sufficient regard to Aboriginal Tradition and Torres Strait Island custom to ensure that any new framework is culturally appropriate'[1]. We are concerned that 'turning off' the auto-commence provisions might allow this timeframe to blow out and leave implementation, and the associated benefits to Aboriginal and Torres Strait Islander children and families, in limbo.

Reform in this space is urgently needed. We note that despite the Queensland Government's commitments under the NACTG, including socio-economic outcome (**SEO**) 12 which provides: 'By 2031, reduce the rate of overrepresentation of Aboriginal and Torres Strait Islander children (0 – 17 years old) in out-of-home care by 45%', the data shows that the rate of Aboriginal and Torres Strait Islander children in out-of-home care is significantly worsening. **Specifically, as at 30 June 2019, the rate of Aboriginal and Torres Strait Islander children aged between 0 and 17 years of age that were in out-of-home care was 37. Fast forward 5 years later, this rate is 46.5[2].** Removing the barriers that prevent willing and able kinship carers from being able to care for children that are at risk of being removed from their parents and moved into

[1] Explanatory Notes to the Bill, page 24.
[2] Closing the Gap Information Repository, Socioeconomic Outcome Area 12, available at <https://www.pc.gov.au/closing-the-gap-data/dashboard/se/outcome-area12>.

out-of-home care is an essential step to achieving this critical Closing the Gap outcome.

As Child Safety already performs risk assessments on parents and suitability assessments on carers, we anticipate that it will leverage off these existing tools and processes to create a suitable framework that is fit for purpose. We see no reason why it would take more than one year to develop this framework. For these reasons, we do not support the proposed delayed commencement of these provisions.

Adult household members still require a Blue Card under the Bill

We note that the Bill does not remove the legal requirement that each member of an approved kinship carer's household that is over 18 years of age must have a Blue Card. We understand that the State has indicated that this might be considered as part of a second stage of reforms. In our view, it is essential that the Bill also removes this legal requirement, which has been a significant bar to willing and able kinship carers being able to take care of a child that would otherwise be at risk of being removed from their parent/s and placed into out-of-home care. We share concerns raised by the Queensland Aboriginal and Torres Strait Islander Child Protection Peak body (QATSICPP), that it is entirely inappropriate for what is essentially an employment screening regime to be imposed in a family context and retaining the requirement for adult household members to obtain a Blue Card is inconsistent with self-determination of Aboriginal and Torres Strait Islander families and insufficient regard and recognition of Aboriginal and Torres Strait Islander child rearing practices. We strongly urge the Queensland Government to remove the requirement for adult household members to obtain a Blue Card, or at minimum, to remove this requirement for adults aged 25 and under.

Proposed new decision-making framework for Blue Cards

We strongly support proposed amendments to the decision-making framework which will be based on a 'risk to the safety of children' test, rather than the 'best interests of the child' test. This is a long-awaited reform, which not only will bring Queensland into alignment with other jurisdictions, but should result in fairer outcomes for those seeking a Blue Card.

We also support the proposed inclusion of an additional statutory factor that the decision-maker must have regard to when undertaking a Blue Card assessment of an Aboriginal and/or Torres Strait Islander applicant, which is to consider the effect of

systemic disadvantage and intergenerational trauma and the historical context and limitation on access to justice[3]. However, we would like to understand how this is intended to be achieved in practice. The effect of systemic disadvantage and intergenerational trauma might be experienced differently for each individual, and might also not be readily apparent, or manifest in a way that is easily identifiable or quantifiable. Whilst we appreciate that this additional factor appears to have been included in the Bill for the benefit of Aboriginal and Torres Strait Islander applicants, we are hopeful that the creation of this statutory factor might not have unintended negative implications in practice, for example, that it does not effectively result in a greater level of scrutiny being applied to Aboriginal and Torres Strait Islander applicants when compared to non-Indigenous applicants, which may be detrimental to their application. To reiterate our earlier comments, Aboriginal and Torres Strait Islander peoples are the experts in their own experience. To give the policy objectives behind this proposed amendment the best chance of success, we recommend that the Bill be supported with targeted and ongoing strategies to increase the number of Aboriginal and Torres Strait Islander individuals recruited in decision-making roles within Blue Card Services, especially where the applicant is an Aboriginal and/or Torres Strait Islander person.

Self-disclosure obligations and the introduction of new offences

The Bill proposes to insert discrete obligations on applicants and cardholders to self-disclose the existence of a 'disclosable matter' which includes where a Domestic Violence Order or Police Protection Notice has been issued against the person under the *Domestic and Family Violence Protection Act 2012*, whether the person has received an adverse interstate working with children decision, whether there is an allegation of harm caused by the person substantiated by the chief executive of Child Safety or the chief executive of another State that administers a child welfare law of the State, disciplinary action taken against the person (prescribed by regulation), or another matter relevant to whether the person poses a risk to the safety of children (prescribed by regulation).

The Bill proposes to amend section 188 of the WWC Act (Form of application) to provide that the approved form for a Blue Card application may provide for the applicant to disclose particular police information or a disclosable matter in relation to the applicant. Failure to disclose whether a disclosable matter exists is proposed to be an offence, attracting a maximum penalty of 10 penalty units.

[3] Clause 56 of the Bill, proposed section 234(2)(g)(i).

The Bill also proposes to introduce a new offence where an applicant, card holder or a negative notice holder who has applied to cancel the notice has failed to notify Blue Card Services of relevant changes to information (changes to their name, business information or contact details). This offence attracts a maximum penalty of 10 penalty units.

The Explanatory Notes justify the creation of these new offences as follows: 'The new offences are intended to facilitate the disclosure of information, or the notification of changes in information, relevant to the assessment or reassessment of a person's eligibility to hold a blue card. The offences are considered justified because the effective and timely disclosure of information is crucial to the operation of the blue card system and its objective of promoting and protecting the rights, interests, and wellbeing of children.'[4]. The Explanatory Notes go on to state that the intention is not to punish[5]. In our view, a fine of $1613.00, at the time of writing, is not an insignificant penalty especially for those individuals that might be living on or under the poverty line.

Whist we appreciate, as stated in the Explanatory Notes, that 'the intention is for the offence to operate on a discretionary basis, where applicants who fail to disclose a disclosable matter by way of honest mistake will not be penalised.'[6], we are still concerned about individuals that might fall foul of this requirement. Accordingly, we do not support the creation of these new offences.

We also note that a new offence has been proposed for failing to disclose police information as part of a Blue Card application. This offence attracts a maximum penalty of 100 penalty units. We cannot understand why this offence is needed when the police check that is undertaken as part of the assessment process of an application includes the broader spectrum of criminal history of the individual. Obtaining the police check and assessing the same is the responsibility of Blue Card Services and part of its administrative duties as regulator of, and decision-maker under, the WWC Act. Imposing a disclosure obligation on the applicant to disclose police information coupled with the creation of a new offence for failure to disclose the same, with a maximum penalty of 100 penalty units is severe and punitive, in our view. Therefore, we do not support this creation of this new offence.

With respect to proposed sections 235 and 236 of the WWC Act, in particular, relating to the part of the decision-making process that involves inviting the person to make

[4] Explanatory Notes to the Bill, page 20.
[5] Note 4.
[66] Note 4.

submissions to the chief executive about why the person does not pose a risk to the safety of children and why the chief executive should issue a working with children authority to the person, we recommend that the Queensland Government consider importing the approach in Victoria wherein upon inviting a person to make submissions, the invitation will contain specific questions that the decision-maker needs answers to and/or specific concerns that the decision-maker requires to be addressed. In Queensland, we understand that applicants are merely invited to make submissions without any specific direction on the particular concerns that need to be addressed by the applicant in their submissions. This can result in a lot of time-wasting with the potential for submissions to be made that entirely miss the mark (especially for unrepresented individuals or those that require extra support in making submissions).

Extending the duration of a negative notice from 2 years to 3 years and extending the sit-out period for applying to cancel a negative notice from 2 years to 3 years

The Bill makes proposed amendments that extend the duration of a negative notice from 2 years to 3 years and will require a negative notice holder to wait until 3 years have elapsed after the negative notice was issued before the individual the subject of the negative notice can apply for the negative notice to be cancelled. The current sit-out period is 2 years. According to the Explanatory Notes, the reason for this approach is to increase operational/administrative efficiencies for Blue Card Services. This is concerning, given the serious negative implications of having a negative notice imposed on an individual. As a legal service provider, we rely upon those that have been issued with a negative notice to promptly come to us so that we can represent the applicant in a review of the decision within 28 days after the applicant received the negative notice. This, unfortunately, does not always occur. The current 2 year sit-out period has already been the subject of criticism, especially in the context of the demonstrated negative impacts of the Blue Card regime on Aboriginal and Torres Strait Islander communities. In our view, improving administrative and operational efficiencies for Blue Card Services is not a justifiable or proportionate reason for increasing an already lengthy period of time for being able to apply to cancel a negative notice. Accordingly, these proposed amendments are opposed.

Removal of the exemption on practising lawyers from needing a Blue Card

Currently the Blue Card regime exempts practising lawyers from needing a Blue Card. The Bill will remove the current exemption from obtaining a Blue Card for practising lawyers and effectively impose a new obligation on lawyers that provide legal support services to a child to obtain a Blue Card (clause 127 of the Bill). We understand that the policy objectives behind these proposed amendments, as described in the supporting material to the Bill, are to create a consistent approach to exemptions across jurisdictions; however, in our view, consistency alone is not sufficient justification for these proposed amendments. Barristers and solicitors are already subject to strict ethical and professional obligations, the supervision of which is undertaken by the Bar Association of Queensland and the Queensland Law Society respectively, along with the Legal Services Commission. Upon being admitted to practice, lawyers are subject to a 'fit and proper person' test and once admitted, have an ongoing obligation to disclose changes to relevant 'suitability matters' including, for example, relating to a person's good fame and character, whether the person has been convicted of an offence and whether the person is subject to an unresolved complaint, investigation, charge or order under relevant law. Removal of the exemption will unnecessarily increase the administrative burden placed on already heavily regulated lawyers. Further, we are concerned that by removing the exemption, a child might be posed with the risk of having their choice of legal practitioner potentially be interfered with by 'the administrative'. This is especially a concern for remote and regional areas where access to legal representation is limited.

If, despite our concerns, the exemption for lawyers is to be removed, we would in the alternative comment as follows:

(a) that the exemption is also removed for other categories, i.e., police officers and teachers (e.g. if uniformity is indeed the aim);

(b) **that a lawyer can practice once an application for a Blue Card is lodged** (i.e., prior to approval) as, in the absence of this, we could see months of delays with children not being able to be legally represented. We offer the example of a newly recruited lawyer in a remote region who does not currently have a Blue Card and who is the only lawyer in the region. Further, such an initial right to practice (upon lodgement of an application) would be provisional, subject to the eventual outcome of the application.

Advisory Committee

Whilst we welcome the proposed introduction of a mechanism in the WWC Act to enable advisory committees to be established, we strongly recommend that there be Aboriginal and Torres Strait Islander representation on such advisory committees, especially when such has been set up to advise on any matters involving Aboriginal and Torres Strait Islander applicants or which might impact Aboriginal and Torres Strait Islander children and families.

Obligation on chief executive to make risk assessment guidelines

We refer to proposed new section 246E (Risk assessment guidelines) which provides that a chief executive must make guidelines about how a risk assessment is conducted. In our experience, risk assessment frameworks have a tendency to inadequately, if at all, address cultural considerations resulting in a disproportionate amount of risk being attributed to Aboriginal and Torres Strait Islander individuals where such is not always justified. We strongly recommend that in developing risk assessment guidelines, the chief executive partners with Aboriginal and Torres Strait Islander individuals, to embed cultural considerations into the framework.

Proposed section 246J (Public sector entity to be given particular advice)

We refer to proposed new section 246J (Public sector entity to be given particular advice) which enables the chief executive to advise a chief executive of another public sector entity (the 'other chief executive') that proposes to start employing, or continue employing, the person in regulated employment, that the other chief executive may need to undertake a further assessment of the person under the *Public Sector Act 2022* (Chapter 3, Part 5, Division 4) to decide whether the other public sector entity should employ, or continue employing, the person. Proposed new section 246J further provides that the chief executive may only give such advice if the chief executive is aware that the person has a criminal history and that if the chief executive goes on to provide this advice to the other chief executive, that the advice must be accompanied by a written notice that states that no adverse inference about the person's criminal history or suitability for employment, or continued employment, by the other public sector entity should be made because the advice was given.

We hold significant concerns about this proposed section on the basis that, in our view, it confers powers that appear to extend beyond the purpose and objectives of the WWC Act and unjustifiably prejudices the individual that is seeking employment from

the public sector entity. We do not understand why this power is needed and the Explanatory Notes, unfortunately, do not shed any light on this matter. Providing a written notice that states that no adverse inference about the person's criminal history or suitability for employment, or continued employment, is to be made by the public sector entity because the advice was given, is not a sufficient safeguard for the individual. It is inevitable that such information could be highly prejudicial to the applicant in their prospects of success in employment/continued employment. In our view, this proposed provision is wholly inappropriate and should be removed from the Bill.

New suspension and cancellation reforms

The Bill proposes to confer new powers on the chief executive to: suspend a person's Blue Card pending the determination of an assessment of the person's continuing eligibility to hold a Blue Card in certain circumstances; decide to cancel a Blue Card in the absence of submissions from the cardholder if the chief executive has made reasonable attempts to obtain submissions from the cardholder for the purpose of deciding whether it is appropriate to issue a negative notice and the chief executive has been unsuccessful in contacting the person; and withdraw an application to cancel a negative notice if the applicant has not engaged in the submission process or if their identity cannot be established. Notably, under the Bill, decisions that are made pursuant to these powers do not have a right of review. Whilst we appreciate the need for swift action in the event that new information becomes known to the chief executive which might affect the chief executive's view on whether a person would pose a risk to the safety of children, such swift action can have a significant impact on an individual and, therefore, decisions made pursuant to these proposed new powers should be reviewable. Take the example of the sole income earner of a family with children living in a remote community where mail and other forms of communication might not be reliable. Suspension and/or cancellation of their Blue Card will mean that they individual cannot earn an income. While the safety and wellbeing of children is and always should be paramount, in our experience and as has been identified in relevant QFCC reports, we have seen that when decision-makers under the Blue Care regime have made decisions involving Aboriginal and Torres Strait Islander individuals, they have, unfortunately, not always 'gotten it right'. By way of an example, one legal practitioner from our Ipswich office advised that out of 16 negative notice matters which he challenged in QCAT, 14 of those resulted in the decision being overturned and a Blue Card being issued to our client. When a person's livelihood is on the line, it is important that the rights of the individual be sufficiently balanced against the risks

and, therefore, in the interest of natural justice, we strongly recommend that such decisions be reviewable.

We thank you for the opportunity to provide feedback on the Bill.

Yours faithfully,

Shane Duffy
Chief Executive Officer