

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

## Statement of Compatibility

### Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Coralee O'Rourke, Minister for Communities and Minister for Disability Services and Seniors, make this statement of compatibility with respect to the Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

## Overview of the Bill

The objectives of the Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020 (the Bill) are to:

1. support nationally consistent worker screening for the National Disability Insurance Scheme (NDIS) and the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the NDIS* (the IGA);
2. 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 Quality and Safeguards Commission (NDIS Commission);
3. streamline and strengthen the legislative framework for disability worker screening in Queensland; and
4. 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.

In making a decision under the new worker screening framework, the paramount consideration of the Bill is the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation.

On 9 December 2016, the Council of Australian Governments agreed to the NDIS Quality and Safeguards Framework (NDIS QSF). The NDIS QSF provides a nationally consistent approach to ensure NDIS participants receive high quality supports with appropriate safeguards in place. This includes the delivery of nationally consistent, risk-based worker screening, through a shared approach between the Commonwealth and the states and territories. For state funded or delivered disability services that are outside the jurisdiction of the NDIS Commission, Queensland will continue to operate a separate State disability worker screening system.

To support this shared approach to worker screening, the Commonwealth and the states and territories developed the IGA, which was signed by the Queensland Premier on 3 May 2018. 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 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 Commission.

The Bill amends the *Disability Services Act 2008* (DSA), the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act), the *Evidence Act 1977* and the *Police Powers and Responsibilities Act 2000*, and consequentially amends other legislation, to ensure the objectives of the Bill are achieved.

## Human Rights Issues

### Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the human rights under the HR Act that are relevant to the Bill are:

- Protection of families and children (section 26 of the HR Act);
- Recognition and equality before the law (section 15 of the HR Act);
- Privacy and reputation (section 25 of the HR Act);
- Fair hearing (section 31 of the HR Act); and
- Property rights (section 24 of the HR Act).

The clauses of the Bill that are relevant to the above rights are detailed in the following section, including whether further analysis of the limitation of each right is required for this statement.

#### *Protection of families and children*

The Bill promotes the protection of children by enhancing the current regulatory safeguards that dictate who can work in certain roles and circumstances. Workers will be required to obtain an NDIS clearance to work with persons with disability. Employers will also be required to ensure persons hold a clearance to perform certain work. If a person wishes to work with children with disability, they will need to obtain both an NDIS clearance and a blue card. These arrangements recognise the special vulnerability of children, and in particular children with disability, by prohibiting individuals from working with children with disability where that is assessed as not being in the best interests of the child.

The clauses of the Bill that are relevant to this right are:

- Registered NDIS provider engaging person to carry out risk-assessed NDIS work — clause 11 (new section 53 of the DSA);
- Carrying out risk-assessed NDIS work without an NDIS clearance or interstate clearance prohibited — clause 11 (new section 54 of the DSA);
- Person engaged to carry out State disability work by funded service provider must hold a clearance — clause 11 (new section 59 of the DSA);
- Carrying out State disability work without clearance prohibited — clause 11 (new section 61 of the DSA);
- Exemption for secondary school student on work experience — clause 11 (new section 43 of the DSA); and
- Disability work – new categories of regulated employment and regulated business – clauses

63 and 65 (new schedule 1, part 1, section 6A, and new schedule 1, part 2, section 16A of the WWC Act).

The right of protection of families and children, with relevance to how it is engaged by the Bill, protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child's best interests. This recognises the special vulnerability of children, and entitles each child to special protection to ensure their survival and development to the maximum extent possible.

The Bill also minimises a potential administrative impact on children by providing a new exemption from disability worker screening for secondary school students on work experience. This is only available if the student carries out risk-assessed NDIS work or State disability work under the direct supervision of a person who holds a clearance. This new exemption removes administrative barriers for children who wish to seek out development opportunities (in the form of work experience), provided they are supervised by a person who has been screened, and holds a clearance.

I have assessed that the Bill engages the protection of families and children right through the promotion of additional safeguards and the removing of barriers to development opportunities, and as such I believe consideration of the limitation of this right is not required.

#### Recognition and equality before the law

The right to recognition and equality before the law encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination. This right reflects the essence of human rights: that every person holds the same rights by virtue of being human and not because of some particular characteristic or membership of a particular group.

The clauses of the Bill that are relevant to this right are:

- Making a worker screening check application — clause 11 (new part 5, division 3 of the DSA); and
- Disqualifying offences framework — clause 11 (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 Bill provides for a new disability worker screening framework that 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. This new framework interacts with the right to equality before the law, whereby applicants and workers are subject to differing levels of scrutiny, based on a balance of risk, such as their criminal history.

As such, I have assessed that the Bill engages the right to recognition and equality before the law and that further consideration of the limitation (including restriction or interference) of this right is required.

#### Privacy and reputation

The right to privacy and reputation protects individuals from unlawful or arbitrary interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is intentionally broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally.

The clauses of the Bill that are relevant to this right are:

- 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 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 *Police Powers and Responsibilities Act 2000*).

The Bill introduces an expanded information sharing framework for the purposes of disability worker screening, including the scope of people to be screened in order to obtain a clearance to work. The Bill also amends the *Police Powers and Responsibilities Act 2000* to provide the power for a police officer to require production of a person's disability worker clearance card. The screening process itself includes an expanded information collection, use and sharing process to inform whether a person poses and risk of harm to a persons with disability. These amendments interact with the right to privacy and restrict the operation of the right as they subject a broader range of people to disability worker screening and hence associated conditions related to the collection, use and sharing of personal information and the holding of a clearance.

As such, I have assessed that the Bill engages the right to privacy and reputation and that further consideration of the limitation (including restriction or interference) of the right is required.

#### Fair hearing

The right under section 31 of the HR Act to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings, and guarantees such matters must be heard and decided by a competent, impartial and independent court or tribunal. What constitutes a 'fair' hearing depends on the facts of the case and requires the weighing of a number of public interest factors.

The clauses of the Bill that are relevant to this right are:

- Review and appeal — clause 11 (new division 9 of the DSA);
- Transitional provisions — clause 24; and
- Disqualifying offences framework — clause 11 (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).

These amendments may involve restrictions on a person's right to be heard and respond to or appeal decisions made about them, including the decision to issue a suspension to a clearance holder, or to subject an applicant to an interim bar. The right to a fair hearing is engaged as the proposed amendments create new processes for the review of administrative decision-making related to disability worker screening that restrict the operation of the right in particular circumstances.

As such, I have assessed that the Bill engages the fair hearing right and that further consideration of limitation (including restriction or interference) on this right is required.

#### Property rights

Property rights protect the right of all people to own property alone or with others. This requires

that a person must not be arbitrarily deprived of their property. The right does not include a right to compensation if a person is deprived of their property.

The following clause of the Bill is relevant to this right:

- Power to require production of disability worker clearance card — clause 71 (amendment of *Police Powers and Responsibilities Act 2000*).

The Bill amends the *Police Powers and Responsibilities Act 2000* to provide the power to require production of a person's disability worker clearance card. This amendment restricts the operation of the right to property as provides a new confiscation power to police officers.

As such, I have assessed that the Bill engages property rights and that further consideration of limitation (including restriction or interference) on this right is required.

**If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)**

The factors relevant to a consideration of the limitation of each right imposed by the Bill are detailed below.

**Recognition and equality before the law (section 15)**

(a) the nature of the right

The purpose of the right to recognition and equality before the law, as it relates to the Bill, is, in essence, the right for persons to be treated equally in the ability to apply for, access and maintain work arrangements related to the provision of disability services in Queensland.

The Bill engages this right specifically through the worker screening check application process, disqualifying offences framework and risk assessment process by creating eligibility criteria for accessing or maintaining work arrangements.

How each of these elements of the Bill limit the right to recognition and equality before the law is detailed below.

*Making a worker screening check application*

Under the Bill, it will be an offence for a provider to engage a person who does not hold a clearance in certain circumstances. Specifically, a registered NDIS provider who engages a person in risk-assessed NDIS work or a funded service provider who engages a person in state disability work will be required to ensure that person holds a clearance. Additionally, there is a corresponding offence for individuals who work without holding a clearance.

The Bill prescribes particular features of the application process to obtain a clearance, including that an application must be made in a particular way. These provisions enable applications to be made through an online portal, and enable the production of identity documents and the use of a photo on disability worker clearance cards.

This means people wishing to lodge an application who do not have access to the internet or possess a verified form of identification may face barriers to engaging in work, and may have to attend in person to have their identity verified. This may delay their ability to start working while their application is processed. The right of a person to have equal access and consideration for work arrangements, as it applies to the Bill, may also be limited by placing barriers to those who may find it more difficult to produce documents to establish their identity,

including Aboriginal people and Torres Strait Islander peoples.

In some cases, people may face genuine difficulty in providing the necessary evidence to identify themselves to the required level of assurance. Exceptional cases are those where a person does not possess and is unable to obtain the necessary information or evidence of identity. This may include people whose birth was not registered; Aboriginal and Torres Strait Islander peoples; people who are homeless; undocumented arrivals to Australia; people living in remote areas; people who are transgender or intersex; people effected by natural disasters; people with limited access to identity documents; people with limited participation in society; and young people or those over 18 who are yet to establish a 'social footprint' in the community.

In addition, the Bill places restrictions on who may lodge an application for a clearance. Exclusion holders will be prohibited from making an application for a clearance (clause 11, new section 64 of the DSA).

As such, the application element of the Bill limits the purpose of the right to equality before the law by placing legislated restrictions on the way in which an application for a clearance may be made, including limitations on who may make an application which are applied differently to persons depending on their criminal history.

#### *Disqualifying offences framework*

The Bill provides a new disqualifying offences framework that encapsulates how suspension, exclusion and disqualification elements of the worker screening framework are to operate. This new framework expands on the current disqualifying framework by changing the categorisation of certain serious and disqualifying offences which may result in the automatic suspension and/or cancellation of clearances.

Suspension of a clearance under the new framework can occur because either: the person who holds the clearance becomes the subject of a banning order by the NDIS commission; the chief executive is conducting a risk assessment and reasonably suspects the assessment will demonstrate that the person poses an unacceptable risk of harm to people with disability; or the person is charged with a disqualifying offence that has not been dealt with and was an adult at the time of the alleged offence. A banning order is a written notice issued by the NDIS Commissioner under the *National Disability Insurance Scheme Act 2013* which prohibits or restricts a person from engaging in specified activities for an NDIS provider if the Commissioner reasonably believes the person is not suitable to be involved in the provision of supports or services, or that there is an immediate danger to the health, safety or wellbeing of a person with disability. Once a person has had their NDIS clearance suspended, it is an offence for an NDIS service provider to engage that person to carry out disability work. For persons with an application, an interim bar will be imposed in these circumstances instead of a suspension.

Exclusion of a person from carrying out disability work must occur if the chief executive becomes aware that the person is a disqualified person (a person who has been convicted of a disqualifying offence). If a person has a pending charge for a disqualifying offence or serious offence or conviction for a serious offence the chief executive must issue an exclusion unless there are exceptional circumstances. An exclusion must also be issued if the chief executive is satisfied the person poses an unacceptable risk of harm to people with disability. Once a person has been issued with an exclusion, it is an offence for an NDIS service provider to engage the person, or for the person to make a disability worker screening application or carry out work. An exclusion remains in force unless cancelled (under clause 11, new division 7 of the DSA).

A person who has been issued an exclusion on the basis of being a disqualified person is unable to apply for this exclusion to be cancelled (clause 11, new section 130 of the DSA).

The effect of these provisions is to prevent people who have been charged with, or convicted of, serious or disqualifying offences from working with people with disability in certain circumstances. This limits the right to recognition and equality before the law by restricting the ability of persons who have been charged with, or convicted of, certain offences from applying for, engaging in, or continuing particular types of employment. The disqualifying offences framework also means that disqualified persons are not equally able to access particular rights of reply, and particularly the right to challenge a decision to issue them an exclusion, on the basis of the seriousness of the offence committed.

### Risk assessments

The Bill introduces 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. An application for a clearance proceeds to a risk assessment if it does not result in an automatic clearance (due to an applicant having no assessable information), or an automatic exclusion (due to a conviction for a disqualifying offence).

If a person has assessable information which does not automatically result in an exclusion, the chief executive must assess the risk of harm the person poses to people with disability.

This limits the right to recognition and equality before the law because it creates different assessment scenarios and eligibility criteria for a person upon application for a clearance, on the basis of criminal history information, in conjunction with other relevant information. The risk assessment element of the Bill uses this approach to determine the eligibility of a person to work with people with disability, based on an assessment of unacceptable risk of harm. As a result, this may indirectly discriminate against people who wish to apply for, commence or maintain employment, but are unable to access this on an equal basis due to their criminal history and other relevant historical information related to the assessment of risk.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of each of the elements of the Bill that limit the right to recognition and equality before the law is detailed below.

### Making a worker screening check application

The purpose of legislating how an application for a clearance is made is to ensure a consistent, automated and comprehensive platform for applications when implementing the new worker screening framework in the Bill. This includes the ability for other states and territories to interact with the application portal where necessary. The purpose of limiting an excluded person's ability to lodge an application is to provide additional safeguards to the application process, ensuring there is an offence in place for persons seeking an application where they have historically been issued an exclusion.

### Disqualifying offences framework

The purpose of the new disqualifying offences framework is to adopt the nationally consistent offences framework and, in doing so, implement Queensland's agreement under the IGA to provide for a nationally consistent worker screening framework that utilises a prescribed set of

offences. This ensures a consistent approach to worker screening across jurisdictions.

The disqualifying offences framework, and associated limitation of the right of people to access and maintain work arrangements on an equal basis as others, contributes to achieving a core objective of nationally consistent worker screening – namely, to protect people with disability from the risk of harm and unsafe supports or services. This objective reflects the paramount consideration given under the Bill to the right of people with disability to live free from abuse, violence, neglect and exploitation. The objective is achieved in part through the disqualifying offences framework, which identifies a nationally consistent set of offences which are considered so heinous or indicative of serious underlying risk that the offender may be automatically considered to constitute an unacceptable risk of harm to people with disability.

#### Risk assessments

The risk assessment and decision-making framework ensures that assessments and decisions are made through a transparent, consistent and appropriate process. The purpose of the new risk assessment threshold that has differing eligibility criteria based on a person’s criminal and other history is to provide a framework for the evaluation of whether a person poses an unacceptable risk to people with 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. As 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.

The purposes of the above elements of the Bill are considered consistent with a free and democratic society based on human dignity, equality and freedom. They allow for the new worker screening framework to approach applications, disqualification and the assessment of risk on the basis of risk of harm posed to a person with disability and the primacy of the rights of the person with disability.

Preventing people who pose an unacceptable risk of harm from working with people with disability is consistent with the values of a free and democratic society. It promotes the right of people with disability to live lives free from abuse, violence, neglect or exploitation, which is enshrined in the Bill as the paramount consideration underpinning the screening system.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

#### Making a worker screening check application

The limitation of the prescribing of a particular application method in the Bill achieves the purpose of the amendment by ensuring there is a comprehensive and automated approach to worker screening applications that can manage the information required from applicants. This is because it enables the implementation of the worker screening framework through the digital keeping and storing of information related to worker screening. Requiring applicants to declare certain information and provide proof of identity is an essential component of the application process, ensuring an application is properly made and relates to the applicant. Prohibiting excluded persons from making an application will reduce undue pressure on the application system by preventing inappropriate applications.

#### Disqualifying offences framework

The limitation of adopting a nationally consistent disqualifying offences framework that



evaluates based on relevant criminal and other history achieves the purpose of ensuring a consistent, efficient and accurate approach to who may participate in disability related work based on the risk of harm posed to persons with disability. This is because it enables jurisdictions to have certainty and consistency in how each jurisdiction is approaching worker screening and the issuing of clearances based on the risk a person poses to a person with disability.

### Risk assessments

As with the disqualifying offences framework, the limitation of adopting a new risk assessment threshold for worker screening based on risk achieves the purpose of ensuring a consistent framework for evaluating risk. It supports certainty and consistency by ensuring each jurisdiction is approaching worker screening and the issuing of clearances based on the risk a person poses to a person with disability.

Limiting the right to equality before the law by discriminating on the basis of relevant criminal history and other information will enable the exclusion of particular applicants on the basis of prior charges or convictions for serious or disqualifying offences and risk, and other relevant matters. The risk assessment and disqualification framework treats persons differentially based on their conduct and the circumstances of any offending behaviour, rather than solely because of the existence of criminal history. The differential treatment is based on an assessment of risk of harm to people with disability, which further supports the purpose of the Bill to be achieved.

Allowing reasonable consideration of previous criminal history and other information of applicants is essential to achieving the purpose of the amendments, and to protecting the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation, through enabling nationally consistent worker screening.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

### Making a worker screening check application

To implement an application method without utilising an online platform would create limitations and further administrative barriers for those seeking to apply for and maintain employment, and restrict the implementation of a consistent, efficient and accurate worker screening framework. To reduce any adverse unintended impact for applicants unable to access and online platform, a manual form process will be made available.

If the provision that removes the ability for excluded persons to lodge an application was not in place, a person who had been previously assessed as posing an unacceptable risk of harm would be able to lodge an application for a clearance. This would be in contradiction to the principles and objectives of the Bill to strengthen safeguards to persons with disability. Additionally, under the Bill, the validity period for a clearance is five years, extended from three years. This enables the benefits of the enhanced screening requirements to be achieved in a way which limits the adverse impact on applicants and workers.

To reduce any impact on persons who may have difficulty obtaining sufficient evidence to prove their identity during the application process, operational assistance will be provided during implementation of the Bill to ensure a process is in place to navigate and assist with the provision of identity documents for applications.

### Disqualifying offences framework

The disqualifying offences framework reflects substantial interjurisdictional consideration of the categories of offences which are so heinous or indicative of serious underlying risk that the offender poses an unacceptable risk of harm to people with disability.

Applicants who have been charged or convicted of a serious offence or charged with a disqualifying offence will be able to provide submissions to the chief executive, as the decision maker, to demonstrate the exceptional circumstances which show that the person does not pose an unacceptable risk of harm to people with disability. Exceptional circumstances are those which are considered unusual, uncommon or special, and which result in the decision maker being satisfied the person does not pose an unacceptable risk of harm to people with disability. This provides an avenue to those treated differently under the screening framework to seek the review of decisions in appropriate circumstances.

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill. The disqualifying offence framework, and the associated limitation on a person's right to access and maintain work arrangements on an equal basis, are necessary to achieve a nationally consistent approach which includes a mechanism by which persons can be permanently excluded. Any alternate approach to the disqualification framework would lead to inconsistencies between jurisdictions, in turn creating further restrictions on the ability for a person to equally seek or maintain work arrangements across jurisdictions.

### Risk assessments

Any alternate approach to the assessment of risk, or the threshold by which risk is evaluated, would lead to inconsistency by which jurisdictions apply each worker screening framework. This would create further restrictions on the ability for a person to equally seek or maintain work arrangements across jurisdictions.

No less restrictive and reasonably available ways to achieve the purpose of the Bill have been identified.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The adoption of a nationally consistent approach to worker screening through the assessment of risk, identification of disqualifying offences and utilisation of an online application approach that necessarily limits excluded persons from applying for a clearance ensures that persons seeking to access and maintain work arrangements are able to do so on an equal basis nationally. It also contributes to the objective of ensuring people with disability are protected from risk of harm from unsafe supports and services.

### Making a worker screening check application

The benefit of prescribing an application method implemented through the use of an online portal is that it provides clarity and certainty of the types and forms of information required by applicants, ensuring requirements are applied consistently to all applicants. Where the ability to make an application is restricted (in the case of persons who hold an exclusion), this is justified in order to ensure consistency of approach nationally, as well as minimise the risk of harm posed by a person who has been previously assessed and excluded under a worker screening framework from across all jurisdictions.

### Disqualifying offences framework

The benefit of adopting a nationally consistent disqualifying offences framework is in providing certainty to jurisdictions and individuals that person's will be treated equally in their ability to seek and maintain employment in the provision of disability services. The ability to manage a person's clearance or application differently on the basis of their criminal history and other relevant information related to risk is justified as it allows for appropriate decision-making discretion in the screening of workers.

### Risk assessments

Similarly, the benefit of adopting a new risk assessment threshold based on unacceptable risk of harm posed allows for a nationally consistent approach and the ability to manage a person's clearance or application differently on the basis of their criminal history and other relevant information is justifiable as it allows for appropriate decision-making discretion for the screening of workers. The threshold also reduces the administrative burden on persons seeking to apply for a clearance who do not have any assessable information (and who therefore will receive an automatic clearance).

The Bill provides for a consistent worker screening framework and delivers substantial benefits through safeguards such as promoting national consistency across risk assessment processes, national ongoing monitoring of criminal history, and portability of clearances, to support and promote the human rights of people with disability.

On balance, I consider the limitations on the right to recognition and equality before the law are reasonable and demonstrably justifiable.

#### (f) any other relevant factors

The IGA and accompanying documents outline the national requirements for the disqualifying framework and risk assessment. Clause 61 of the IGA outlines the decision-making framework for automatic clearances, exclusions and presumed exclusions and clauses 63–69 of the IGA set out the criteria for assessing risk, where an application does not result in an automatic clearance or exclusion due to disqualifying offences.

### **Privacy and reputation (section 25)**

#### (a) the nature of the right

There has been some support in Victoria for the notion that the right to privacy and reputation encompasses a right to work. In *ZZ v Secretary, Department of Justice & Department of Transport* [2013] VSC 267, Bell J observed that work was an aspect of human dignity that arguably had great personal and social importance to individuals.

Bell J also noted that employment restrictions, such as those which prevent a person from being able to gain employment because of a previous conviction, 'impact sufficiently on the personal relationships of the individual and otherwise upon his or her capacity to experience a private life'. Whether or not the right to privacy and reputation does in fact extend this far, however, is unresolved in both the Victorian and Queensland context. The below analysis assumes that the right to privacy and reputation does extend to a right to work.

The purpose of the right to privacy and reputation, as it relates to the Bill, is, in essence, the right for persons to have their privacy and reputation protected when applying for, accessing and maintaining work arrangements related to the provision of disability services. This right is

protected by ensuring that any limitation is not imposed arbitrarily – that is, any limitation imposed is done so in a way that is lawful, reasonable, necessary and proportionate to the purpose of the limitation.

The Bill engages this right specifically through: the scope of disability worker screening; the expanded disability information sharing framework; information sharing between the chief executive (disability services) and chief executive (working with children); creation of new blue card categories of regulated employment and regulated business; and empowering police officers to require the production of a disability worker clearance card.

How each of these elements of the Bill limits the right to recognition and equality before the law is detailed below.

#### *Scope of disability worker screening*

The Bill expands the scope of NDIS worker screening requirements, compliance and enforcement of requirements, as the screening framework will now apply to persons who have opted to be screened and not just to those who are screened on mandatory basis. It does this by permitting persons who are not required to be screened to nevertheless elect to be screened, including those who are working for unregistered providers. The expanded scope in the Bill requires a broader range of individuals to disclose information to the chief executive, and to consent to the sharing and disclosure of certain information for the purposes of worker screening. The Bill also removes the previous exemption from requiring a positive notice (yellow card) for volunteers who are relatives of a person with disability who receives disability services from a funded service provider. This also removes the previous exemption under the former framework as it applied to consumers of a service provider. This differs from the WWC check, which retains this exemption.

As such, the scope of screening in the Bill limits the purpose of the right to privacy and reputation through expanding the application of worker screening requirements by placing barriers on disability workers' ability to access and maintain work arrangements. Particularly for those workers who now fall under the expanded (including volunteers), this may limit the right to privacy and reputation and the right of a person's family not to be unlawfully interfered with by requiring these persons to be screened, which, in certain circumstances, may lead to their exclusion from these environments and thus the right to reputation gained from participating in certain employment.

#### *Disability information sharing framework*

The Bill provides an expanded information sharing framework for disability worker screening that builds on current processes in the DSA to ensure information can be requested from, and shared with, prescribed entities for limited purposes of worker screening. The information sharing framework broadly deals with information related to disability worker screening in three ways; collection of information, use of information and disclosure of information. These are detailed below.

- *Collection of information*

Through the application process, an applicant seeking clearance to work with people with disability may be requested to provide personal information in order for the chief executive to make an informed risk assessment.

Under the Bill, the chief executive may also request information about an applicant from

prescribed public entities such as: Queensland Police Service; the Director of Public Prosecutions; Queensland Corrective Services; the Mental Health Court; the Mental Health Review Tribunal; as well as other relevant Queensland Government entities.

The information that can be requested includes, for example, sufficient information to confirm an applicant's identity; criminal history information; mental health information; domestic and family violence history; information relevant to other worker screening processes; NDIS disciplinary or misconduct information; and other information about the person that is relevant to whether the person poses a risk of harm to people with disability.

The processes for obtaining information from Queensland Police Service, the Director of Public Prosecutions, Queensland Corrective Services, the Mental Health Court and the Mental Health Review Tribunal will remain as they currently are in the DSA. However, the new framework also enables the police commissioner and the director of public prosecutions to give the chief executive a section 93A transcript under the *Evidence Act 1997* if required to consider when risk assessing a person (clause 11, new section 138M of the DSA). This will put the disability worker screening system on equal footing with the blue card system and ensure that the chief executive (disability services) can have regard to this information as part of a risk assessment.

New part 5, division 8, subdivision 5 of the DSA (as inserted by clause 11) will enable the chief executive to request disciplinary information about a person from particular State entities. This includes the ability to request disciplinary information about registered teachers from the Queensland College of Teachers, and disciplinary information about foster and/or kinship carers from the chief executive responsible for child safety.

The chief executive may request other types of information (such as child protection information) from prescribed entities for the purposes of worker screening. In this circumstance, the relevant entity has discretion to give this information to the chief executive if they reasonably believe it is relevant to the chief executive's screening functions.

These amendments are required to ensure the chief executive can obtain the same information as the working with children check and to adhere to the national information sharing obligations in the IGA.

- *Use of information*

The information obtained by the chief executive will be used to risk assess a person, based on their relevant personal information, in order to determine whether they pose a risk of harm to people with disability.

- *Sharing, disclosure and giving of information*

Certain confidential information (such as police information or disciplinary information about a person), may be used or disclosed to the following entities:

- the chief executive (working with children) (discussed separately below);
- the NDIS Commission for the purpose of being included in the National Clearance Database, being communicated electronically to the person (or a notifiable person for the person) through the database, or if relevant to the NDIS Commission's functions; and
- NDIS worker screening units in other states and territories, if the person holds an interstate NDIS clearance or if another worker screening unit requests information upon an application being received. This includes police information or other information (e.g.

disciplinary information) if the chief executive reasonably believes the information is relevant to the functions of that worker screening unit.

Information sharing with other NDIS worker screening units will be achieved through a process whereby the information is first provided to the NDIS commission to be included on a national database including a record of decisions (the National Clearance Database). Individual jurisdictions (including employers and potential employers) may then request further information related to the record directly from the jurisdiction. The National Clearance Database provides a register of cleared and excluded applicants and workers from all jurisdictions to support national portability and enable ongoing monitoring of cleared applicants' criminal history.

The information sharing framework outlined above is necessarily broad in scope. It engages with a person's right to privacy and reputation due to the sensitive and confidential nature of the information required to properly risk assess a person, and the requirement to disclose this information to other prescribed entities. The expanded information sharing framework requires a person to self-disclose information when seeking work (i.e. by lodging an application), as well as requiring information received by public entities to be shared with other prescribed entities.

*Information sharing between chief executive (disability services) and chief executive (working with children)*

The Bill establishes a facilitative information sharing regime to support the effective operation of the disability worker screening system alongside the blue card system.

New section 138ZG of the DSA provides that the chief executive (disability services) may give information about a person to the chief executive (working with children) if the chief executive reasonably believes the information is relevant to the functions of the chief executive (working with children) under the WWC Act.

Consistent with the changes to the DSA, clause 53 of the Bill inserts new section 344 into the WWC Act so that chief executive (working with children) may give information about a person to the chief executive (disability services) if the chief executive reasonably believes the information is relevant to the worker screening functions of the chief executive (disability services).

Information that may be shared under these provisions includes, but is not limited to, information about a disability worker screening or working with children check application made by a person; information about a clearance or exclusion/negative notice held by a person; as well as assessable information about a person (for example, their police information and disciplinary information).

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.

As a corollary of the information sharing regime introduced by the Bill, minor amendments are made to the WWC Act to ensure the chief executive (working with children) has a clear legislative basis to consider any relevant information (including information provided to the chief executive (working with children) by the chief executive (disability services)) as part of a blue card eligibility assessment.

*New blue card categories of regulated employment and regulated business*

The provision of disability services is already regulated under the WWC Act through the existing regulated employment and regulated business categories which deal with 'health, counselling and support services'. Clauses 63 and 64 of the Bill insert new standalone categories of regulated employment (schedule 1, part 1, section 6A) and regulated business (schedule 1, part 2, section 16A) into the WWC Act which deal exclusively with persons performing disability-related work with children with disability.

The blue card screening requirements in relation to NDIS service providers are imported from the current Working with Children Regulation 2011 and will not result in any additional scope of screening.

With respect to non-NDIS disability services, changes are made to remove the existing funding nexus which exists under the WWC Act which requires the service provider delivering the service to be receiving funding from the State in order to be in scope. While it is noted disability services delivered without State funding would likely be already caught under the WWC Act (for example, as a counselling or support service), the Bill includes a new catch-all provision to provide that any persons who provide disability services to children with disability, outside the jurisdiction of the NDIS, will require a blue card in all circumstances.

In the event these amendments do extend the scope of blue card screening under the WWC Act, the analysis below has taken that into account.

*Power to require production of disability worker clearance card*

The Bill adds new section 789B to the *Police Powers and Responsibilities Act 2000*, which limits the right to privacy and reputation to the extent that it empowers a police officer who reasonably suspects that the card holder card has been charged with a disqualifying offence or is a disqualified person to require the person to give their clearance card to the officer. The amendment creates an offence for failing to comply with a police officer's request. A clearance card is taken to be evidence of a person holding a clearance and thus their ability to continue certain employment (clause 14, new section 205 of the DSA).

This engages with the right to privacy and reputation in two ways. Firstly, the confiscation power engages the person's privacy due to the types of information held on that clearance card, which include a person's photo identification and name. Secondly it engages the person's reputation due to the link between the holding of a clearance card and participating in certain employment.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of each element of the Bill that limits the right to privacy and reputation is detailed below.

*Scope of disability worker screening*

The purpose of limiting a person's right to privacy and reputation through expanding the scope of disability worker screening (to require a broader range of people to be screened) is to necessarily ensure that all persons engaging in risk-assessed roles are appropriately and consistently screened across jurisdictions.

Disability information sharing framework

The purpose of limiting a person's right to privacy through the expanded information sharing framework is to ensure that a broad scope of information (as it relates to worker screening) can be accessed in order to properly inform an assessment of whether a person poses an unacceptable risk of harm to people with disability.

Information sharing between chief executive (disability services) and chief executive (working with children)

The information sharing regime between the chief executive (disability services) and the chief executive (working with children) is required to be broad and facilitative in nature to ensure that the safeguards and protections provided by both screening systems are not diminished. This will involve the sharing of a potentially high volume of sensitive and personal information, including an applicant's personal details and assessable information. However, it is necessary for the two chief executives to:

- disclose personal information to each other to facilitate a joint application process whereby a person will be able to seek a disability clearance and blue card as part of the one application; and
- disclose assessable information to each other 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.

The minor changes to the blue card decision-making framework enable the chief executive (working with children) to consider any information about the person that the chief executive reasonably believes is relevant to deciding whether it would be in the best interests of children for the chief executive to issue a working with children authority. It is important that the integrity of the blue card decision-making framework is preserved and information that may impact on a person's blue card eligibility can be properly considered as part of an assessment.

New blue card categories of regulated employment and regulated business

The introduction of the new categories of regulated employment and regulated business under the WWC Act may expand the circumstances in which a person will need to apply for and obtain a blue card, thereby requiring these individuals to provide personal information to the chief executive (working with children).

Consistent with the objects of the WWC Act, the purpose of these amendments is to ensure an established, rigorous screening process applies to disability service providers and workers in order to safeguard the rights, interests and wellbeing of children with disability receiving supports and services.

Power to require production of disability worker clearance card

The purpose of this amendment is to enforce the legislative framework and ensure that a person who has been charged with a disqualifying offence or is a disqualified person does not hold a disability worker clearance card. This is to minimise risk of harm to people with disability by ensuring people cannot continue working in risk assessed roles despite their suspension or exclusion.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose,



including whether the limitation helps to achieve the purpose

Scope of disability screening

Expanding the scope of screening to a nationally adopted, broader range of persons achieves the purpose of ensuring that persons engaging in risk-assessed roles are appropriately and consistently screened across jurisdictions. Consistency with the IGA promotes the safety of people with disability by enabling portability of NDIS worker screening checks nationally and enabling national daily monitoring of criminal history information for clearance holders. This will eliminate the opportunity for people to make multiple attempts to gain a clearance by ensuring that people with adverse records in one jurisdiction cannot obtain a clearance in another jurisdiction. This requires that all jurisdictions implement legislation to enable nationally consistent worker screening, and have access to decisions made by other worker screening units through the national database.

Disability information sharing framework

The limitation imposed by the Bill assists the chief executive in gathering and obtaining relevant information to determine whether a risk assessment is required and if an applicant poses an unacceptable risk of harm to a participant. The aim is to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS, which is an underlying purpose of the Bill.

Information sharing between chief executive (disability services) and chief executive (working with children)

The limitation on the right to privacy which arises through the sharing of information between the chief executive (disability services) and the chief executive (working with children) provides both the disability worker screening and blue card systems with the most comprehensive information to undertake their risk assessments of whether a person poses an unacceptable risk of harm to people with disability (for disability worker screening) or whether it is in the best interests of children for the person to carry out child-related work (for the blue card system).

While the range of information that can be disclosed is necessarily quite broad, the nature of mandatory information required and information requested have been agreed with other jurisdictions as relevant information to enable a comprehensive risk assessment to be undertaken. This is to ensure any assessment of the risk a person poses to persons with disability is performed with the most current, relevant and comprehensive information available about that person.

New blue card categories of regulated employment and regulated business

Limiting the right to privacy by requiring persons delivering NDIS supports and services or disability services to undergo a 'blue card' check achieves the purposes of protecting children with disability by requiring persons to have their criminal history and any other relevant information assessed by the chief executive (working with children) and a determination made as to whether issuing a blue card to the person would be in the best interests of children.

Power to require production of disability worker clearance card

The Bill will minimise risk of harm to people with disability by giving police the power to require the production of disability worker clearance card. This will ensure a person who has been convicted of a disqualifying offence, or is a disqualified person, is prevented from

representing that they are entitled to work once their clearance card has been confiscated.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

*Scope of disability screening*

Substantial interjurisdictional consideration has been given to the roles and types of work required to be screened under the new nationally consistent worker screening framework. The outcomes of this consideration were agreed at a national level and are outlined in the IGA, which identifies the categories of information relevant and necessary to a risk assessment of whether a person poses an unacceptable risk of harm to people with disability. To adopt a different scope would reduce the Bill's ability to achieve its purpose, as well as restrict the ability for consistent screening across jurisdictions. Additionally, under the Bill, the validity period for a clearance is five years, extended from three years under the current Queensland screening system. This balances the enhanced screening requirements with appropriately limiting the impact on applicants and workers.

*Disability information sharing framework*

Consideration has been given to the categories of information which will be required to be collected and are likely to indicate a potential risk as part of the collection of information for a risk assessment. As outlined in the IGA, it has been agreed nationally that the categories of information to be considered as part of a risk assessment are relevant and necessary to determine if a person poses an unacceptable risk of harm to people with disability.

The information sharing framework has a specific purpose and requirements, which reduce the impact of the limitation and balance the limitation with the right to privacy. Information received under these expanded information sharing provisions can only be used and shared with prescribed entities for the purpose of worker screening functions. Consent will be sought for the sharing of this information at the time of an application, and information will be safeguarded by appropriate confidentiality provisions around the use and disclosure of information received under these new provisions.

The Bill also provides for the secure management and storage of, and dealing with, confidential information, as well as offences for unlawfully using or disclosing confidential information. For example, a person who obtains confidential information about a person through lawful means under the Bill is prohibited from using, disclosing or giving access to that information unless authorised. Sections 138ZA to 138ZE restrict what information can be shared, including explicitly stating the types of information that cannot be disclosed to a relevant person under a confidentiality order (138ZB), and other information that must not be given (138ZE).

Entities such as the Director of Public Prosecutions and chief executives responsible for other types of information (e.g. community services information and child protection information) are not compelled to give information to the chief executive. Rather, if the chief executive requests this information, the relevant entity has the discretion to give this information to the chief executive if they reasonably believe it is relevant to performance of the chief executive's screening functions.

*Information sharing between chief executive (disability services) and chief executive (working with children)*

The information sharing regime between the chief executive (disability services) and the chief executive (working with children) will be safeguarded by confidentiality requirements under

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).

In addition, the privacy notices on both disability worker screening and working with children check applications will advise applicants of how their information may be used and disclosed.

The two chief executives will also be required to enter into a written agreement about the exchange of information – this will provide for rigour and accountability in the processes used to disclose information to each other.

#### *New categories of regulated employment and regulated business*

No less restrictive and reasonably available ways to achieve the purposes discussed under (b) above, have been identified.

The amendments are safeguarded by the limitations under the WWC Act which provide that information obtained under the Act must not be used about a person, other than for the purposes of employment screening. Penalties also apply under the WWC Act in relation to the unauthorised disclosure of confidential information.

#### *Power to require production of disability worker clearance card*

A police officer's power to require a person to give their clearance card is limited by the requirement that the officer must hold a reasonable suspicion that the person had been charged with a disqualifying offence or is a disqualified person. Without this power, a person who has been charged or convicted of a disqualifying offence would be able to continue to hold their clearance card and potentially continue to engage unlawfully in disability work.

As such, no less restrictive and reasonably available ways to achieve the purpose of the Bill have been identified.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

#### *Scope of disability screening*

The scope of screening in the Bill does not arbitrarily or unlawfully interfere with a person's right to privacy or reputation, as it has been designed to adopt a robust and nationally consistent scope that applies to all workers across all jurisdictions in the same manner. In terms of limits to a person's right to privacy, the scope of screening ensures that only certain roles are subject to screening, so the right to reputation in accessing work arrangements may be partially limited but access to work is not entirely prevented. This partial limitation is reasonable, necessary and proportionate, having regard to the purpose of the Bill to prevent harm to people with disability.

Adopting scope of screening in the Bill is lawful, reasonable, necessary, and proportionate in order to protect participants from harm, and on balance its benefits outweigh the negative impact on the right to privacy and reputation to the extent this right is limited by the Bill.

#### *Disability information sharing framework*

The information sharing framework does not arbitrarily interfere with a person's right to privacy, as information is collected, used and shared in accordance with the prescribed purpose of assessing risk associated with a person's engagement in disability work and any risk of harm

posed to people with disability. In recognising the particularly sensitive nature of 93A statements, the Bill provides for narrow circumstances in which this information can be disclosed, including making it an offence to disclose 93A statements unless authorised.

On balance, it is considered that the importance of conducting an accurate risk assessment to protect participants from harm outweighs the negative impact on the right to privacy and reputation to the extent that it is limited by the Bill.

*Information sharing between chief executive (disability services) and chief executive (working with children)*

The importance of the purpose of limiting the right to privacy (discussed under (b) above) through the information sharing regime established between the chief executive (disability services) and the chief executive (working with children) outweighs the potential negative impact on an individual's right to privacy. The amendments appropriately balance ensuring that vulnerable people are protected and providing sufficient safeguards to ameliorate the limitation on the right.

*New categories of regulated employment and regulated business*

The WWC Act creates a 'protective jurisdiction' that justifies the restrictions imposed on access to child-related employment. This is recognised by the paramount principle by which the working with children check is administered — that is, the welfare and best interests of a child are paramount. This outweighs any negative impact on the right to privacy and reputation, to the extent that it may be limited by the potential expansion to scope of screening.

Any interference with a person's right to privacy and reputation which may arise from the amendments to the WWC Act regarding the disclosure of personal information will be neither unlawful nor arbitrary. The collection and use of personal information to enable an assessment of an applicant's eligibility to work with children is consistent with the aims and the intention of the WWC Act — the promotion and protection of the rights, interests and wellbeing of children and young people.

*Power to require production of disability worker clearance card*

Any interference with a person's right to privacy under this amendment would not be unlawful or arbitrary, but would be undertaken in accordance with a transparent process and where the requisite suspicion is held. The amendment is necessary, reasonable and proportionate in order to ensure a person is unable to engage in certain work if they have a charge or conviction for a disqualifying offence.

(f) *any other relevant factors*

The IGA outlines the national requirements for the types of information that are required to be collected to determine whether an applicant poses an unacceptable risk of harm to a participant. The relevant clauses of the IGA that detail the types of information required to be checked are clauses 56–60. The IGA also requires a person to hold a clearance in order to deliver to NDIS supports and services (clauses 39-41).

In prescribing frameworks and processes for the scope of worker screening, the power to share information and the power to require production of clearance cards, the Bill places reasonable, necessary and proportionate limitations on a person's right to privacy and reputation. The Bill delivers substantial benefits, including providing for a nationally consistent working screening framework which promotes the human rights of people with disability and ensures the quality

of services and supports that are provided to people with disability. This is consistent with the paramount consideration in making a decision in relation to disability worker screening checks – that is, the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation.

### **Fair hearing (section 31)**

#### (a) the nature of the right

The purpose of the right to fair hearing, as it relates to the Bill, is, in essence, the right for a person to obtain a fair hearing in administrative decisions and appeals in relation to seeking and continuing employment in the provision of disability services.

Certain amendments may restrict or limit a person's right to be heard and respond to or appeal decisions made about them. The Bill engages this right by creating and restricting reviews of administrative decision making through transitional provisions, provisions about the availability of reviews and appeals, and the disqualifying offence framework (and related suspension and exclusion powers).

How each of these elements of the Bill limit the right to fair hearing is detailed below.

#### Transitional provisions

The Bill provides transitional arrangements to transition to the nationally consistent worker screening framework. This includes providing a process for the management of existing positive notices and offences.

Existing positive notice holders (or positive exemption notice holders) will be permitted to work until the expiry of their current cards, subject to any change in circumstances that would trigger other components of the legislation.

For offences, if a person holds a current positive notice or current positive exemption notice immediately before commencement and the person is:

- convicted of a **new disqualifying offence** or a **new serious offence** before commencement – the person is taken to have been convicted of the offence on commencement; and
- subject to a charge for a **new disqualifying offence** or a **new serious offence** that has not been dealt with on commencement – the person is taken to have been charged with the offence on commencement.

This means that, on commencement, the new disqualifying and serious offences will apply to all current clearance holders and the following will occur:

- a person who is convicted of a **new disqualifying offence** will be issued with an exclusion and precluded from working with people with disability;
- a person who is charged with a **new disqualifying offence** will have their card suspended and the chief executive will conduct a risk assessment with a presumption of an exclusion unless there are exceptional circumstances;
- a person who is convicted or charged with a **new serious offence** will be subject to a risk assessment with the presumption of an exclusion unless there are exceptional circumstances.

In addition, new section 370(5) (as inserted by clause 24) may limit the right to a fair hearing as it requires a person with an existing suspension of positive notice or positive exemption

notice under the former Act to wait six months after commencement of the Bill before applying to end the suspension.

This arrangement may limit the right to a fair hearing by suspending or cancelling a person's clearance prior to providing a chance to be heard and limiting the avenues for internal or external review, in the ways described below.

#### Disqualifying offences framework

The disqualifying offences framework under the Bill also includes associated powers related to suspension, interim bars and exclusion.

Clearance holders must have their clearance suspended if they are charged with a disqualifying offence that has not been dealt with, or if the person is subject to a banning order made for a reason that the chief executive believes is relevant to whether the person poses a risk of harm to people with disability. If the chief executive is conducting a risk assessment due to a change in relevant information and reasonably suspects the assessment will demonstrate that the person poses an unacceptable risk of harm to people with disability, the person's clearance must also be suspended. The suspension notice must include the relevant review and appeal information. For those within the discretionary scope of screening, an interim bar must be imposed on an applicant under the same circumstances.

A person can only apply to the chief executive to end a suspension after six months of the suspension being in place. If a person has a charge for an offence that has not been dealt with, or if an investigation about the incident is ongoing, the chief executive is not required to decide the person's application to end their suspended clearance until the criminal matter is finalised.

If a person has been convicted of a disqualifying offence, they cannot apply to cancel an exclusion. If a person otherwise holds an exclusion, that person is required to wait five years from its issuing in order to apply for the cancellation of that exclusion. If a person has a significant or exceptional change in their circumstances during that five year period, they may apply to cancel their exclusion prior to the expiration of the period.

These provisions may limit the right to a fair hearing as they delay the right of internal review for suspensions, and limit the right of access to external review. They do this by only permitting a review of a suspension after six months of the suspension being in place, and after five years in the case of an exclusion.

#### Review and appeal

The Bill provides for the following decisions of the chief executive as reviewable decisions (new section 138ZR of the DSA):

- a decision to issue an exclusion to a person;
- a decision, on application of a person under section 85, not to end interim bar imposed on the person's clearance; and
- a decision, on the application of a person under section 117, not to end the suspension of the person's clearance.

The Bill also sets out the process for internal and external review (new sections 138ZR-138ZY of the DSA), including that an affected person for a reviewable decision may apply to the tribunal for a review of the decision only if:

- the affected person has applied for an internal review of the decision; and

- the internal review application has been decided or is taken to have been decided.

If the chief executive made the reviewable decision because the affected person is a disqualified person, the affected person may apply for an internal review of the decision only on the grounds that the chief executive mistakenly identified the person as a disqualified person.

This may limit the right to a fair hearing as it restricts the external review to particular decisions in certain circumstances, and excludes disqualified persons from applying for a review of a decision.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of each of the elements of the Bill that limit the right to fair hearing before the law is detailed below.

#### Transitional provisions

Transitional provisions which bring workers into the new framework on commencement are designed to minimise the risk of harm to people with disability while also streamlining the transition to reduce the impact on service delivery and the workforce to the fullest extent possible. By transitioning workers to the new system as soon as possible, more workers will be captured in the new, more robust framework sooner, including by being subject to ongoing monitoring and a higher risk assessment standard. This helps to achieve the overall purpose of the Bill and ensures the transitional arrangements prescribed in the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules* (Cth) as in force from time to time (WS Rules), are adhered to.

#### Disqualifying offences framework

The purpose of the limitation on the right to a fair hearing arising from the disqualifying offence framework is (when a clearance is suspended or an interim bar issued) to provide necessary and sufficient time for an NDIS worker screening unit to gather information, and to take into consideration the outcome of all pending charges or allegations, when making a determination. In the case of an excluded person (who is not excluded on the basis of a conviction for a disqualifying offence), the purpose of the limitation is to ensure that the person is unable to engage in certain employment unless there is a significant and exceptional change in circumstances that will allow the chief executive to be satisfied that the person no longer poses a risk of harm. The six-month and five year timeframes are consistent with the nationally consistent policy under the IGA.

#### Review and appeal

Excluding review for disqualified persons and requiring a person to seek internal review prior to seeking external review through the Queensland Civil and Administrative Tribunal is also consistent with the nationally consistent policy under the IGA. In particular, these arrangements are necessary to exclude disqualified persons from being able to seek review, given there will never be a circumstance so exceptional that would justify disqualified persons working with people with disability as the risk of harm is too great.

This also aims to deter individuals who pose a high risk of harm to people with disability (disqualified persons) from seeking work in the sector, and to reduce the potential for providers to employ workers who pose an unacceptable risk of harm to people with disability.

Overall, the purpose of these arrangements is to promote the right of people with disability to live free from abuse, violence, neglect or exploitation, including financial abuse and exploitation. Given the critical significance of that purpose, the arrangements are consistent with the values of a free and democratic society.

The purposes of the above elements of the Bill are consistent with a free and democratic society based on human dignity, equality and freedom as they allow for the new worker screening framework to necessarily approach transitional, disqualification, and appeal and review arrangements on the basis of risk of harm posed to a person with disability.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

#### *Transitional provisions*

The transitional provisions are designed to minimise the risk of harm to people with disability and ensure the NDIS worker screening system safeguards can apply as consistently as possible to people who apply for a clearance pre- and post-commencement of the Bill. The limitation of the right to fair trial in relation to the restriction imposed by the transitional provisions on certain persons achieves the purpose of the amendments by balancing the imposition of restrictions with a smooth and effective transition to the new framework that reduces the disruption of services to the greatest extent possible.

#### *Disqualifying offences framework*

The limitation imposed by the six month and five year wait times before a person may apply to cancel a suspension and an exclusion respectively achieves the purpose of the amendments by ensuring that those workers who have been assessed as posing an unacceptable risk of harm cannot work during periods that a suspension or exclusion applies. These amendments also assist in achieving national consistency of these imposed wait times, to limit a person's ability to apply for certain work in other jurisdictions during these timeframes.

#### *Review and appeal*

The limitation imposed by the Bill in restricting the right to external review in certain circumstances and having transitional arrangements which apply on commencement helps to achieve the purpose of nationally consistent worker screening and to prevent individuals who may pose an unacceptable risk of harm from working with people with disability under the NDIS or State disability system.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

#### *Transitional provisions*

The transitional provisions have been designed to align with the WS Rules and the IGA and ensure a smooth transition to the new worker screening framework. Not adopting this transitional approach would result in a number of different clearance systems operating concurrently in Queensland, thereby reducing the ability to apply a consistent framework to ensure safeguards and limiting the Bill's capacity to achieve its purpose.

Additionally, the Bill provides the validity period for a clearance is five years, extended from three years under the DSA currently. This extended validity period balances the enhanced screening requirements with the minimisation of adverse impact on applicants and workers required to go through the screening, application and re-application processes.



### Disqualifying offences framework

The Bill balances the opportunity to be heard with the reduction in any immediate potential risks to people who have chosen to access NDIS supports or services or State disability services. If the wait times imposed on the cancellation of a suspension were not implemented, there would not be sufficient time to form an assessment of whether a person poses an unacceptable risk of harm to persons with disability. Similarly, if the time limit extended to the cancellation of exclusion did not exist, the risk that a worker may pose to persons with disability would be exacerbated. To ensure a balance between safeguards and protecting the right of persons to access fair trial, a person may apply for the cancellation of an exclusion before the end of the five year period if they have a significant and exception, for example, a conviction for an offence is quashed.

### Review and appeal

If the proposed provisions in relation to review and appeal rights under certain circumstances were not in place, the Bill would be restricted in its ability to achieve its purpose of preventing individuals who may pose an unacceptable risk of harm from working with people with disability under the NDIS or State disability system. To appropriately manage this risk, the Bill provides that, if the chief executive made the reviewable decision because the affected person is a disqualified person, the affected person may apply for an internal review of the decision only on the grounds that the chief executive mistakenly identified the person as a disqualified person.

As such, no less restrictive and reasonably available ways to achieve the purpose of the Bill have been identified.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

### Transitional provisions

The Bill's transitional provisions seek to balance the need to transition to the new nationally consistent worker screening framework with reducing administrative impacts on existing workers and service delivery. The Bill achieves this by ensuring workers can continue to work under certain circumstances where there is no identifiable likelihood that they pose an unacceptable risk to persons with disability.

### Disqualifying offences framework

The timeframes in the Bill imposed on a person seeking to cancel a suspension or exclusion balance ensuring the rights of persons with disability to live free from harm with the rights of persons to have a fair trial in the seeking and maintenance of certain disability related employment. This is achieved by ensuring they provide for substantial and exceptional changes in circumstances to be taken into account where applicable.

### Review and appeal

The proposed amendments appropriately balance reducing the risk of harm to people with disability with the provision of sufficient safeguards to ameliorate the limitation on the right. This is achieving by providing review and appeal rights under certain circumstances and for particular decisions and only removing appeal rights where a person is assessed as presenting an unacceptable risk of harm to persons with disability. This balances the right of people with

disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse or exploitation, with the right to a fair hearing for persons wishing to seek and maintain employment related to the provision of being a reasonable imposition and demonstrably justified.

(f) any other relevant factors

The IGA outlines the national requirements for ongoing monitoring and suspensions (clauses 78–79), restrictions on the internal review of suspensions (clause 80), and where internal reviews can be sought (clause 82).

**Property rights (section 24)**

(a) the nature of the right

The purpose of property rights, as they relates to the Bill, is, in essence, the right for persons to not have their property confiscated in the course of seeking, commencing or maintaining employment arrangements related to the provision of disability services in Queensland.

The Bill engages this right specifically through amendment to the *Police Powers and Responsibilities Act 2000* to create an additional power for a police officer to require the production of a person’s worker clearance card, and the subsequent confiscation of that card under certain circumstances.

How this element of the Bill limits property rights is detailed below.

Power to require production of disability worker clearance card

The amendment to the *Police Powers and Responsibilities Act 2000* allows a police officer who reasonably suspects a person has been charged with a disqualifying offence, or is a disqualified person, to require a person to give the police officer their clearance card. The person must comply with the police officers request unless the person has a reasonable excuse. The police officer may only require a person to give their clearance card if acting under the general power afforded under section 19 of the *Police Powers and Responsibilities Act 2000*. This limits the right to property by providing a power to confiscate a person’s valuable property which they require to engage in particular types of work.

(b) the nature of the purpose of the limitation to be imposed by the provisions if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

The purpose of this amendment is to enforce the legislative framework and ensure a person who has been charged with a disqualifying offence or is a disqualified person does not hold a disability worker clearance card. This is to minimise risk of harm to people with disability, by ensuring workers in risk-assessed roles cannot work, and cannot represent themselves as entitled to work, unless they hold a disability worker clearance card.

(c) the relationship between the limitation to be imposed by the provisions if enacted, and the purpose, including whether the limitation helps to achieve the purpose.

The amendment will minimise risk of harm to people with disability, by giving the power to require the production of disability worker clearance card. This is to ensure that a person who has been convicted of a disqualifying offence, or is a disqualified person, cannot represent that they are entitled to work once their clearance card has been given to a police officer.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

of the provisions

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill. Without these powers, a person who has been charged or convicted of a disqualifying offence would be able to continue to hold their clearance card and potentially continue to engage unlawfully in disability work.

Any deprivation of a person's property would be under reasonable suspicion the person had been charged with a disqualifying offence, or was a disqualified person.

(e) the balance between the importance of the purpose of the provisions, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extend of the limitation.

On balance, the need to empower a police officer to require the production of a person's clearance card for the purposes of minimising risk to people with disability outweighs the limited impact of the person's right to holding a clearance card as property.

As such, any interference with a person's property under this amendment would not be done so unlawfully or arbitrarily.

(f) any other relevant factors

The IGA outlines the national requirement that there is to be an offence for delivering NDIS supports and services without a clearance (clauses 39-41).

The amendment requires a police officer who has been given a persons' disability worker clearance card to provide a receipt for the card to the person.

## **Conclusion**

In my opinion, the Disability Services and Other Legislation (Worker Screening) Amendment Bill 2020 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

**Coralee O'Rourke**

Minister for Communities and Minister for Disability Services and Seniors