

Child Protection Reform and Other Legislation Amendment Bill 2021

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*, I, Leanne Linard MP, Minister for Children and Youth Justice and Minister for Multicultural Affairs make this statement of compatibility with respect to the Child Protection Reform and Other Legislation Amendment Bill 2021.

In my opinion, the Child Protection Reform and Other Legislation Amendment Bill 2021 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Child Protection Reform and Other Legislation Amendment Bill 2021 (the Bill) seeks to amend the *Child Protection Act 1999* (CP Act) in the three key reform areas:

- reinforcing children's rights in the legislative framework
- strengthening children's voices in child protection decisions that affect them
- streamlining, clarifying and improving the regulation of care.

The Bill will implement the reforms proposed within the 2019 discussion paper titled *Rethinking rights and regulation: towards a stronger framework for protecting children and supporting families*, which outlined a number of options for legislative reform to the CP Act to continue implementing the *Supporting Families, Changing Futures* reform program. The Bill will further implement recommendations of the Queensland Family and Child Commission's (QFCC) *Keeping Queensland's children more than safe: Review of the foster care system* (QFCC foster care report) and *When a child is missing: Remembering Tiahleigh – A report into Queensland's children missing from out-of-home care* reports, as well as the Royal Commission into Institutional Responses to Child Sexual Abuse.

The Bill seeks to embed a human rights focus throughout the CP Act, so children and families are aware of their rights and how to exercise them. The Bill will broadly include amendments to:

- support collaboration with, and involvement of, Aboriginal and Torres Strait Islander children and families in the child protection system;
- further protect and promote rights for children in care;
- encourage participation of, and communication with, children and young people in decisions that affect them;

- streamline the regulation of carers to ensure a robust, safe and transparent framework for children; and
- make minor and technical amendments to modernise provisions and support operational efficiencies.

In addition, the Bill amends the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act) to:

- enable the chief executive (working with children) to request domestic violence information from the police commissioner to inform working with children (blue card) eligibility assessments;
- facilitate Queensland's participation in the Working with Children Checks National Reference System (WWCC NRS);
- simplify and streamline the categories of regulated employment and regulated business that deal with licensed care services; and
- expand the definition of 'notifiable persons' to enable a licensee to link to, and receive updates on, any changes to the blue card status of a person performing a risk-assessed role for the licensed care service.

The Bill will also make minor and technical amendments to:

- the *Adoption Act 2009* to resolve issues related to the delegation made under the *Immigration (Guardianship of Children) Act 1946* (Cth); and
- the *Disability Services Act 2006* to clarify that Police Protection Notices are part of the information sharing arrangements under that Act.

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 *Human Rights Act 2019* (HR Act) that are relevant to the Bill are:

- Recognition and equality before the law
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Property rights
- Privacy and reputation
- Protection of families and children
- Cultural rights – generally
- Cultural rights – Aboriginal and Torres Strait Islander peoples
- Right to a fair hearing
- Right not to be tried or punished more than once.

For the reasons outlined below, I am of the view that the Bill protects and promotes the following human rights.

Further analysis of human rights which are limited by the Bill is detailed within the *'If human rights may be subject to limitation if the Bill is enacted'* section.

Amendments to the Child Protection Act 1999

Recognition and equality before the law

Section 15 of the HR Act provides the right to recognition and equality before the law as a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination. The scope of the right expressly recognises that measures taken for the purpose of assisting persons or groups of persons disadvantaged because of discrimination do not constitute discrimination (section 15(5)).

The clauses of the Bill which are relevant to the right are detailed below.

- Amendment of the 'partnership' element of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) to reflect the involvement of Aboriginal and Torres Strait Islander peoples, community representatives and organisations to participate in decisions relating to the development and delivery of services by the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) (clause 9 of the Bill).
- Requirement for the chief executive to make "active efforts" in applying the ATSICPP under section 5C when making a decision in relation to an Aboriginal and/or Torres Strait Islander child (clause 12 of the Bill).
- Requirement for consent of the child and their family for an independent entity's participation in decision-making (clauses 14, 25 and 31 of the Bill).

There is a disproportionate representation of Aboriginal and Torres Strait Islander children involved in the child protection system, an enduring legacy of the Stolen Generations, making it imperative that Aboriginal and Torres Strait Islander children in the system are connected to family, community, culture and kin.

Clauses 9 and 12 of the Bill provide positive steps must be taken to adhere to section 5C of the CP Act and to facilitate participation of Aboriginal and Torres Strait Islander peoples, community organisations and representatives in departmental decision-making and service delivery for Aboriginal and Torres Strait Islander children and families.

Clauses 14, 25 and 31 recognise the right to equality before the law where Aboriginal and Torres Strait Islander families can exercise their right to consent or not consent to the involvement of an independent entity, including the level of involvement of an independent entity in decisions and court proceedings under the CP Act.

It is considered that the above clauses fall within the definition of a positive measure and therefore the right to recognition and equality before the law is not limited by the amendments.

Protection from torture and cruel, inhuman or degrading treatment

Section 17 of the HR Act provides the right to protection from torture and cruel, inhuman or degrading treatment. The right imposes positive obligations on the State to adopt safeguards to prevent torture, cruel, inhuman or degrading treatment. The scope of the right captures a broad range of conduct, including acts that can cause both physical and mental suffering.¹

Clause 11 promotes the right to protection from being treated in a way that is cruel, inhuman or degrading by giving a child the opportunity to express their views with the intent of ensuring decisions made about them are acceptable and suitable for their circumstances. This intends to prevent a child from experiencing mental suffering by enhancing their voice and autonomy in child protection decisions affecting their lives.

Freedom of thought, conscience, religion and belief

Section 20 of the HR Act provides that the right to freedom of thought, conscience, religion and belief. The right protects the freedom to have or adopt a religion or belief of the person's choice and to demonstrate the person's religion or belief in worship, observance, practice and teaching as an individual or as part of a community, in private or in public.

Clause 66 of the Bill inserts additional rights for children in care under the charter of rights ('Charter') contained in Schedule 1 of the CP Act. The additional rights include rights relating to religion and language. This will promote the right by requiring the chief executive to ensure a child can practise or observe their religion when in care, including to worship or express their beliefs without interference.

Freedom of expression

Section 21 of the HR Act protects an individual's right to hold an opinion without interference and to seek, receive and impart information and ideas orally, in writing or print, by the way of art or other means. Any act which may be perceived by reasonable members of the public as trying to convey some meaning can be defined as imparting information and ideas, whether or not it is conveyed to a specific person.²

The clauses of the Bill which promote the right are detailed below.

- Insertion of additional rights under the Charter to include rights relating to religion and language, personal belongings, play and recreational activities (clause 66 of the Bill).
- Requirement for the chief executive to inform children of their rights under the Charter on an ongoing basis and in a child-focussed way (clauses 29 and 30 of the Bill).
- Requirement for a person who makes a decision or exercises a power relating to a child under the CP Act must ensure a child is given meaningful and ongoing opportunities to participate and express their views, and take those views into account (clause 11 of the Bill).

¹ United Nations Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992) [2].

² *Magee v Delaney* [2012] VSC 407 [61]-[64].

- Amendment to enable information about a deceased person to be disclosed to a parent upon application (clause 63 of the Bill).

The above clauses promote the right of children to seek and impart information and express their views in decisions which affect them. Clauses 29 and 30 protect the right where children will be informed of their rights on a regular basis, in writing or orally, to enable them to seek or convey further information as they choose. The right is also promoted where the Charter will include additional rights, such as the right to use language and engage in play or recreational activities including art, which are recognised forms of expression.

Clause 11 promotes the right of children to express their views in decisions that affect them in a way that they choose. Decision-makers must also ensure a child is given opportunities to participate with regard to their capacity and maturity. As an additional safeguard, new section 5E(4)(b) protects a child's ability to choose to not express their views and for this decision to not disadvantage them in any way.

Additionally, clause 63 promotes the right where a parent will be able to seek information held by DCYJMA about their deceased 'child', who was an adult at the time of their death.

Property rights

Section 24 of the HR Act protects the right of persons to own property alone or in association with others. It also protects the right of persons to not be arbitrarily deprived of their property. 'Arbitrary' in the human rights context refers to interferences which are 'capricious, unpredictable or unjust, or unreasonable to the extent of not being proportionate to a legitimate aim that is sought'.³

Clause 66 of the Bill, which inserts additional rights into the Charter to include the right of children to have personal belongings (e.g. photographs, school reports and special belongings), further protects the property rights of children in care by requiring the chief executive to ensure they are not deprived of their personal belongings.

Privacy and reputation

Section 25 of the HR Act provides that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. As stated above, 'arbitrarily' in the human rights context refers to interferences which are 'capricious, unpredictable or unjust, or unreasonable to the extent of not being proportionate to a legitimate aim that is sought'. The scope of the right to privacy extends to protecting a person from interference with their individual identity, including sexual identity, and personal development to make meaningful social relationships and maintain personal security and mental stability.⁴ The clauses of the Bill which promote the right are detailed below.

³ *P J B v Melbourne Health & Ors (Patrick's Case)* [2011] VSC 327 [85].

⁴ *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 [619]-[620].

- Insertion of additional rights under the Charter, including the child’s right to develop and maintain their identity, for example, their sexual orientation and gender identity (clause 66 of the Bill).
- Providing for the disclosure of information about a person to a third party when the person has expressly provided consent to the disclosure (clause 62 of the Bill).

Clause 66 promotes the right to privacy where it protects against decisions which may interfere in a child’s private life, including their individual identity and personal development.

The disclosure of personal information under clause 62 also promotes the right as information is shared only when a person has requested and consented for information about them to be shared with a specific person or entity. This enables a person to exercise rights over their personal information.

Protection of families and children

Section 26 of the HR Act provides the right to the protection of families and children, recognising that families are the fundamental group unit of society and entitles families to protection by society and the State. The meaning of families under the HR Act is broad and recognises that the term ‘family’ is understood broadly in international law, extending to different cultural understandings of family and small family units with or without children.

The right also 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 right recognises the special protection that must be afforded to children based on their particular vulnerability. The right requires the State to take into account the best interests of the child as the primary consideration in all actions affecting a child.⁵

The clauses of the Bill which promote the right are detailed below.

- Requirement for the chief executive to make “active efforts” in applying the ATSI CPP under section 5C when making a decision in relation to an Aboriginal and/or Torres Strait Islander child (clause 12 of the Bill).
- Amendment of the ‘partnership’ element of the ATSI CPP to reflect the involvement of Aboriginal and Torres Strait Islander peoples, community representatives and organisations to participate in decisions relating to the development and delivery of services by DCYJMA (clause 9 of the Bill).
- Insertion of additional rights under the Charter (clause 66 of the Bill).
- Requirement for the chief executive to inform children of their rights under the Charter on an ongoing basis and in a child-focussed way (clause 29 and 30 of the Bill).
- Requirement for a person who makes a decision or exercises a power relating to a child under the CP Act must ensure that a child is given meaningful and ongoing opportunities to participate and express their views, and take those views into account (clause 11 of the Bill).

⁵ *Convention on the Rights of the Child*, GA Res 44/25 (2 September 1990) art 3(1).

- Provision for the chief executive to consider the compliance of licensed care facilities and the person responsible for directly managing a facility when amending a licence (clause 44 and 45 of the Bill).
- Clarification of the definition of “kin” to recognise persons of significance and with a cultural connection to an Aboriginal or Torres Strait Islander child or the child’s family group (clause 68 of the Bill).
- Requirement for consent of the child and their family for an independent entity’s participation in decision-making (clauses 14, 25 and 31 of the Bill).

The above clauses seek to promote the right by improving protections for children and families. Requiring “active efforts” in applying the ATSI CPP, inserting additional rights in the Charter, informing children of their rights and providing opportunities for expression of a child’s views promotes the right of the child to protection which is in their best interests. It supports children in providing input to decisions which affect them and considers their needs when making placement decisions. Enabling the assessment of facilities operated by a licensed care service ensures the chief executive can monitor the suitability of the licensee’s facility to ensure the safety and care of children.

The amendments to the ATSI CPP to reflect the involvement of Aboriginal and Torres Strait Islander peoples, community representatives and organisations in the development of services and requiring consent for the involvement and participation of an independent entity protects families – recognised in line with the amended definition of “kin” – by supporting culturally appropriate support and service delivery.

Cultural rights – generally

Section 27 of the HR Act provides that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background. It provides the right of a person to enjoy their culture, to declare or practise their religion, and to use their language.

Clause 66 of the Bill promotes cultural rights (generally) where a child in the care of the chief executive must not be denied additional rights to develop, maintain and enjoy their culture, practise their religion and use their language under the Charter.

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

Section 28 of the HR Act recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples, and explicitly protects their distinct cultural rights as Australia’s first peoples to enjoy, maintain, control, protect and develop their identity and cultural heritage. It further protects the right of Aboriginal and Torres Strait Islander peoples to use their language and enjoy their kinship ties, without being subjected to forced assimilation or destruction of their culture.

The clauses of the Bill which promote the right are detailed below.

- Requirement for the chief executive to make “active efforts” in applying the ATSI CPP under section 5C when making a decision in relation to an Aboriginal and/or Torres Strait Islander child (clause 12 of the Bill).
- Amendment of the ‘partnership’ element of the ATSI CPP to reflect the involvement of Aboriginal and Torres Strait Islander peoples, community representatives and organisations to participate in decisions relating to the development and delivery of services by DCYJMA (clause 9 of the Bill).
- Clarification of the definition of “kin” to recognise persons of significance and with a cultural connection to an Aboriginal or Torres Strait Islander child or the child’s family group (clause 68 of the Bill).

Clause 12 protects cultural rights for Aboriginal and Torres Strait Islander peoples by ensuring the ATSI CPP is applied by the relevant authority defined under section 6AA proactively. This amendment will promote cultural rights of Aboriginal and Torres Strait Islander children and families by ensuring they are more consistently emphasised in decision-making.

Clause 9 also promotes the cultural rights of Aboriginal and Torres Strait Islander peoples where it seeks to enable community representatives and organisations to participate in decision-making relating to departmental services provided to families and children in the child protection system. The amendment supports cultural rights by:

- recognising the particular interests of Aboriginal and Torres Strait Islander peoples;
- providing for Aboriginal or Torres Strait Islander peoples to express cultural practice in relation to children and families; and
- supporting Aboriginal and Torres Strait Islander peoples to participate in decisions which may affect kinship ties.

Clause 68 protects cultural rights of Aboriginal and Torres Strait Islander persons by recognising ‘kin’ as persons who are of significance to, and have a cultural connection with, an Aboriginal or Torres Strait Islander child or the child’s family group. This supports Aboriginal and Torres Strait Islander children to enjoy their kinship ties by preventing a distorted operation of the definition.

Right to a fair hearing

Section 31 of the HR Act provides that all persons who are charged with a criminal offence or are a party to a civil proceeding have the right to a fair and public hearing for the matter to be decided by a competent, independent and impartial court or tribunal. The right to a fair hearing reaffirms the right of all individuals to procedural fairness when coming before a court or tribunal and access to justice.⁶

Clauses 24 and 67 promotes the right of a child and a child’s parents to a fair hearing by providing access to natural justice for decisions which affect a child’s welfare (including those

⁶ United Nations Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [9].

relating to a review of their case plan), enabling matters to be decided by the Queensland Civil and Administrative Tribunal (QCAT) as a competent, independent and impartial tribunal.

Clause 33 promotes the right to a fair hearing where it enables a parent to directly seek review of the decision to place a child with a particular carer. Currently, an aggrieved person is required to undergo a two-stage process to seek a review of a placement decision. This amendment reduces the burden on aggrieved persons (commonly parents of a child) to undertake multiple proceedings when they seek one decision, thereby supporting their right to access justice.

Amendments to the *Working with Children (Risk Management and Screening) Act 2000*

Protection of families and children

Section 26 of the HR Act provides the right to the protection of families and children, recognising 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 right recognises the special protection that must be afforded to children based on their particular vulnerability and requires the State to take into account the best interests of the child as the primary consideration in all actions affecting a child.

The amendments to the WWC Act promote the rights under section 26(2) of the HR Act by improving the protections afforded to children.

The amendments provide for the sharing of domestic violence information by the police commissioner with the chief executive (working with children) and enable the chief executive to access adverse interstate working with children decisions through the WWCC NRS for the purposes of a blue card assessment. These amendments are consistent with the principles for administering the WWC Act, that the welfare and best interests of the child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing (section 6, WWC Act).

Right not to be tried or punished more than once

Section 34 of the HR Act provides the right to not be tried or punished more than once for an offence of which a person has been finally convicted or acquitted in accordance with the law. The scope of the right applies only to criminal and not civil proceedings and does not prevent other non-penal consequences arising from the same conduct which resulted in the criminal conviction where they do not seek to punish the person but to protect the public.⁷

⁷ *Psychology Board of Australia v Ildiri (Occupational and Business Regulation)* [2011] VCAT 1036 [34]-[35]; *Sim v Business Licensing Authority (Occupational and Business Regulation)* [2011] VCAT 583 [41].

Clause 87 of the Bill amends the WWC Act to provide for the sharing of domestic violence information by the police commissioner with the chief executive (working with children) for the purposes of a blue card assessment. Similarly, the Bill also amends the WWC Act to enable information sharing between the chief executive (working with children) and corresponding interstate screening units in other jurisdictions by enabling the adverse clearance history of applicants and cardholders and their personal information to be shared via the WWCC NRS.

These amendments do not engage or limit the right not to be tried or punished more than once. The purpose and effect of preventing a person from engaging in child-related work is not to penalise persons for offending behaviour, but to assist in protecting children from harm in situations where the assessable information of a person indicates that it would not be in the best interests of children to issue that person a blue card.

Where domestic violence information or adverse interstate working with children (WWC) information, obtained in line with the amendments made by clauses 87, 119 and 124, leads to the issuance of a negative notice or a prohibition from applying for a blue card because the information indicated that it would not be in the best interests of children for the applicant to engage in child-related work, it is considered a protective rather than a punitive measure because there is no element of punishment involved.

It is well established in common law that the actions of a regulatory body to dismiss, disbar, de-register or cancel a professional's right to practice in various industries and professions is not viewed as a punitive measure; it is a protective measure that operates to ensure the adequate standard of services to the public and to maintain the reputation of the profession.⁸

Although the blue card system does not strictly amount to professional registration, it does seek to prohibit individuals with certain criminal histories or other relevant history from engaging in child-related industries where it would not be in the best interests of children for them to do so.

International jurisprudence also suggests that this sort of consequence, (i.e. restrictions regarding work for individuals with certain types of offending), does not constitute punishment. For example, the New Zealand Court of Appeal has held in relation to a corresponding right in their Bill of Rights, that it would be erroneous to treat the word 'punished' as 'embracing punishment outside the ambit of criminal processes and its associated enforcement of the public law.'⁹

In my opinion, the amendments proposed by the Bill reasonably and justifiably limit the following human rights in accordance with section 13 of the HR Act.

Amendments to the *Child Protection Act 1999*

⁸ *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46; *Clyne v NSW Bar Association* [1960] HCA 40; *New South Wales Bar Association v Evatt* [1968] HCA 20. See also *Queensland College of Teachers v TSV* [2015] QCAT 186 for an application of these principles in relation to teacher registration.

⁹ *Daniels v. Thompson* [1998] 3 NZLR 22.

Collection of expanded criminal history information

(a) the nature of the right

Recognition and equality before the law

As discussed above, the right to recognition and equality before the law (section 15 HR Act) encompasses both the right to recognition as a person before the law and the right to enjoy human rights without direct or indirect discrimination on the basis of the protected attributes (e.g. age, impairment, political belief or activity, race, religious belief or activity, sex or sexual orientation) under the *Anti-Discrimination Act 1991*. The definition of discrimination under the HR Act is broad and may extend to discrimination on the basis of attributes which are currently outside the scope of discrimination under the *Anti-Discrimination Act 1991*, such as a person's history of criminal convictions.

Clause 55 limits the right to recognition and equality before the law where the collection of criminal history information may result in the refusal of a provisional carer certificate for persons who have prior convictions and charges that indicate a risk to a child. This will result in the exclusion of particular applicants, which would be more likely to occur for groups who are over-represented in the criminal justice system, for example, Aboriginal and Torres Strait Islander peoples.

Privacy and reputation

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. 'Arbitrarily' in the human rights context refers to interferences which are 'capricious, unpredictable or unjust, or unreasonable to the extent of not being proportionate to a legitimate aim that is sought'.¹¹ The scope of the right extends to a person's private life and their ability to develop personal relationships.¹²

Clause 55 of the Bill limits the right to privacy where expanded criminal history information about a person who seeks to be a provisionally approved carer and their adult household members is collected and assessed by the chief executive, which may result in a decision to not issue a carer certificate.

(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 obtaining interstate criminal history information for provisionally approved carers and adult members of their household is to protect children from harm from a person while they are in short-term or long-term care placements. Enabling the chief executive to request expanded criminal history information from interstate law enforcement agencies is intended to ensure DCYJMA is better informed of a provisionally approved carer's and their

¹¹ *P J B v Melbourne Health & Ors (Patrick's Case)* [2011] VSC 327 [85].

¹² *ZZ v Secretary, Department of Justice* [2013] VSC 267 [94].

adult household members' criminal history. This is for the purpose of increasing the protections for children who need to be placed in urgent care by preventing persons with a history of criminal convictions or charges in other States and Territories which indicate they may be a risk to a child.

This purpose is consistent with the right to protection of families and children (section 26, HR Act) in recognising the right of children to protection that is needed by the child without discrimination. The nature of the purpose is also consistent with the right to liberty and security of person (section 29, HR Act), particularly the right to security of person, in protecting the physical safety of children, including protection from injury to the body and mind to which the scope of the right may extend.¹³ The amendment ensures children are not placed in the care of a person who has a history of interstate criminal convictions or charges which indicate a risk to a child. This is a purpose consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The limitation achieves the purpose by preventing children from being placed with persons who are deemed unsuitable to care for, or live with, children due to their interstate criminal history. This amendment enables decision makers to undertake a targeted, risk-based consideration of the offence history in the context of providing care for children requiring an immediate placement. It seeks to enable DCYJMA to make an informed decision of a person's suitability while an assessment of a person's foster or kinship carer application occurs.

The clause enables the department to become a participating screening unit under the *Intergovernmental Agreement for a National Exchange of Criminal History Information for People Working with Children* (Intergovernmental Agreement) as recommended by the QFCC's foster care report. This amendment supports implementation of recommendation 11 of the QFCC foster care report, which was made in response to an identified potential risk where an applicant could be permitted to care for children when they are unsuitable if the department was unable to access comprehensive criminal history information.

Currently, DCYJMA obtains police information about applicants' in the form of their criminal and domestic violence history, including charges and spent convictions (section 142C). Police information for a provisionally approved carer and their adult household members is the person's criminal history and domestic violence history (section 142). However, DCYJMA can only receive limited interstate criminal history information in the form of conviction information, not in a routine manner and not in a detailed form. As a participating screening unit, DCYJMA will be able to obtain details of interstate criminal history such as charges made against the person and convictions (including spent convictions), including information held by an interstate law enforcement agency about the circumstances of a conviction or alleged

¹³ United Nations Human Rights Committee, *Delgado Paez v. Colombia*, Comm. 195/1985, 39th sess, UN Doc CCPR/C/39/D/195/1985 (23 August 1990) [5.5], [5.6]; *R K v Mirik & Mirik* [2009] VSC 14 [5].

offence. This will only be used for the purpose of assessing any risk provisionally approved carers and their adult household members might pose to the safety of children.

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

No less restrictive or reasonably available ways achieve the purpose of protecting children from harm through a comprehensive assessment of a proposed carer or their adult household members than to permit the chief executive to seek interstate criminal history information about a person. This amendment expands upon the current ability for DCYJMA to seek a person's detailed criminal history in Queensland to determine their suitability for a provisional carer certificate and/or as an adult household member of a carer.

Safeguards will be in place to minimise the impact on Aboriginal and Torres Strait Islander persons who apply. New section 142F provides the chief executive may have regard to the person's expanded interstate criminal history information only to the extent of considering whether a proposed provisionally approved carer or their adult household members pose a risk to the child's safety. Existing provisions will apply to protect the confidentiality of information collected under new section 142E, for example, Part 6 of the CP Act restricts the disclosure of a person's information collected in accordance with the Act except to authorised persons. Further procedural safeguards will be in place for secure access and storage of the information, to ensure only certain staff undertaking the assessment can access it.

(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

While interstate criminal history screening may present a disproportionate impact on Aboriginal and Torres Strait Islander persons due to the over-representation of Aboriginal and Torres Strait Islander people within the criminal justice system, it is considered more important to ensure the protection of children from a risk of harm from provisionally approved carers or their adult household members while they are in care.

Additionally, the collection of personal information in the form of interstate criminal history is necessary for DCYJMA to consider whether an individual is suitable to be a provisionally approved carer of a child requiring urgent care.

On balance, the importance of the purpose of obtaining and assessing interstate criminal history information about a person applying to be a provisionally approved carer and/or their adult household members outweighs the limitation on the right to recognition and equality before the law and the right to privacy and reputation considering the limitation seeks to protect the safety of children.

(f) any other relevant factors

Nil.

Mandatory reporting obligations of foster and kinship carers

(a) the nature of the right

Freedom of expression

The right to freedom of expression (section 21, HR Act) protects an individual's right to hold an opinion without interference and to seek, receive and impart information and ideas orally, in writing or print, by the way of art or other means. The freedom to express an opinion necessarily includes freedom to not express an opinion.¹⁴

Clause 17 limits the right where foster and kinship carers and other relevant care placement support persons will not have the freedom to choose whether to impart information or their opinion when they reasonably suspect a child in care has suffered, is suffering, or is at an unacceptable risk of harm.

Privacy and reputation

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with, or their reputation unlawfully attacked. The scope of privacy is broad and extends to the gathering and holding of personal information by public authorities, including the name and address of a person.¹⁵

Clause 17 of the Bill limits the right to privacy and reputation where kinship and foster carers and other relevant care placement support persons will be required to report reasonable suspicions of significant harm to a child to the chief executive. These reports will include personal information, including details of the suspected harm to a child and identifying details of the child, notifier and an alleged perpetrator of the suspected abuse.

(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 extending the mandatory reporting obligations to foster and kinship carers and other relevant care placement support persons is to improve protections for all children in care. Mandatory reporting seeks to ensure that a reportable suspicion is provided to the chief executive to ensure appropriate action is taken to address the risk of harm to a child.

This purpose is consistent with the right to protection of families and children (protected under section 26, HR Act), where a child has a right to protection which is in their best interests, and the right to life (section 16, HR Act) where the State has positive obligations to protect a child

¹⁴ United Nations Human Rights Committee, *General Comment No. 34 (Article 19: Freedoms of Opinion and Expression)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [10].

¹⁵ United Nations Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (8 April 1998) [10]; *DPP v Kaba* [2014] VSC 52 [132]–[134].

from acts or omissions which may cause loss of life.¹⁶ The purpose is also consistent with the right to liberty and security of person (protected under section 29, HR Act), in particular the right to security of person, to protect the physical safety of a child from a risk of harm. This is a proper purpose that is consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The limitation helps to achieve the purpose by ensuring when a foster or kinship carer or other care placement support person suspects a child has suffered significant harm, or is currently suffering or at risk of suffering significant harm, they report that suspicion to the chief executive so appropriate action can be taken to protect the child. Such action includes the recording and investigation of the report to determine the risk to a child. Where a report is substantiated, the chief executive may take a child into protective custody, or, take a child to a safe place to provide for their care (section 21 and 24 of the CP Act).

The limitation is consistent with existing mandatory reporting requirements under section 13E and 13F of the CP Act for authorised officers, departmental employees, and persons employed in a departmental or licensed care service. Clause 17 expands mandatory reporting obligations to protect children in all care settings from harm, recognising the State has an equal responsibility to protect all children in its custody or guardianship regardless of the type of care setting in which a child is placed.

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

There are no less restrictive or reasonably available ways to achieve the purpose of protecting children from significant harm than to require that foster and kinship carers and other care placement support persons must report suspicions of harm. A less restrictive measure would not provide appropriate protections for children in care.

Existing legislative and procedural safeguards which apply to persons who provide reports (i.e. notifiers) will apply to foster and kinship carers and other care support persons who report suspected harm to a child. Section 197A of the CP Act protects a notifier from civil and criminal liability or administrative or disciplinary action for making a report. Protections against arbitrary use of the information contained in the report continue to apply as per Part 6 of the CP Act.

Further, new section 186B(1) of the Bill requires disclosure may only be made to a senior police officer when necessary for an enforcement action and to protect the safety, wellbeing or best interests of a child.

¹⁶ United Nations Human Rights Committee, *General Comment No. 36 Article 6: Right to life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019) [3], [7].

- (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

On balance, the importance of the purpose of the limitation, to protect children from harm or the risk of harm, outweighs the limitation on the right to freedom of expression and right to privacy and reputation.

The limitation, which compels foster and kinship carers and other care placement support persons to disclose suspicions of significant harm to a child, is consistent with existing practice for other mandatory notifiers (e.g. departmental officers and licensed care services) and will enable DCYJMA to take appropriate action to protect children in all care settings.

- (f) any other relevant factors

Clause 17 is responsive to the newly introduced criminal offences under the *Criminal Code Act 1899* (Criminal Code) for an adult who does not report sexual offending against a child by another adult to police and who fails to protect a child from sexual abuse in an institution where it clarifies reporting obligations in an effort to ensure DCYJMA is aware of issues that may require action.

Principles for participation of children

Privacy and reputation

- (a) the nature of the right

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with, or their reputation unlawfully attacked. The scope of privacy is broad and includes the gathering and holding of personal information by public authorities.¹⁷

Clause 11 of the Bill requires a person who makes a decision or exercises a power under the CP Act must ensure a child is given meaningful and ongoing opportunities to participate and express their views, and take those views into account in their decisions. This limits the child's right to privacy where a decision-maker seeks a child's views in a way that entails collecting further personal information, particularly where it is collected through a written statement or recorded video.

- (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 clause 11 is to enable DCYJMA to consider the child's views when taking action in care or placement decisions in the best interests of a child. A child will have input to

¹⁷ United Nations Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (8 April 1998) [10]

decisions which affect them by participating in decision-making in a way that is proportionate to their age, maturity and capacity.

The purpose is consistent with the right to protection of children and families (protected under section 26, HR Act) where further information is collected and disclosed for the purpose of supporting DCYJMA in taking action to afford children protection in their best interests. In particular, the purpose of clause 11 is consistent with the right to freedom of expression (protected under section 21, HR Act) where children are provided the opportunity to express their views, in a way or medium that considers their age, maturity and capacity to communicate. These are proper purposes that are consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The limitation achieves the purpose by enabling the collection of information about a child's views, either through recorded or other mediums with the consent of the child. Clause 11 prescribes the mediums through which a child's views may be collected, for example, verbally or non-verbally, including through a written statement, recorded video or audio, via a legal representative, family member or trusted person.

The decision-maker must also ensure the child is informed of the making of the decision, why their views are being sought, and is given help to express their views if they decide to give them. When informing a child, the person must communicate in way that is considerate of the child's capacity and understanding.

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

There are no less restrictive and reasonably available ways of achieving the purpose than by enabling children to participate in decisions relating to their care or interactions with the department. Clause 11 recognises a range of mediums for children to choose from in communicating their views in a way that is equitable considering their capacity, including through recorded video or written statements.

Alternative measures to facilitate participation, such as permitting children to express their views only through a written statement, would limit their right to expression and not consider the developmental capacity of the child. It would also not be equitable as not all children would have capacity to express their views through written statements alone.

Safeguards are in place under Part 6 of the CP Act which protects the confidentiality and restricts disclosure of information under the Act, only to authorised persons. DCYJMA also adheres to the requirements of the *Information Privacy Act 2009*, in collecting, managing and securing information about individuals, particularly children. Additionally, clause 10 protects a child's ability to choose to not express their views to a decision-maker and ensures that this decision will not operate to the detriment of the child.

- (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

On balance, the importance of collecting personal information under clause 11 to enable a child to participate in decision-making outweighs the limitation on the right considering it enables children to freely express their opinions and safeguards are in place to protect the information collected.

- (f) any other relevant factors

Nil.

Disclosure of information to carers

Privacy and reputation

- (a) the nature of the right

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The right to privacy extends to the protection of an individual's private life and relevantly protects against interference with their family and home, including a person's individuality and identity.

Clause 32 limits the right where foster and kinship carers may be provided with additional personal information about a child in their care, or proposed to be in their care, compared to what they may previously have been provided with.

- (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 the limitation is to ensure a child's needs can be met and supported by a carer when placing a child in care. Clarifying the types of information that should be provided, while not limiting the provision of additional information, recognises the importance of carers having relevant information to make decisions for themselves and their families and to provide appropriate care for a child, ensures children are cared for by people who can meet their individual needs, and supports fair, transparent and consistent processes.

This purpose is consistent with the right to protection of families and children (section 26, HR Act) which provides the right of a child to protection as needed and which is in their best interests. The disclosure of information enables a carer to consider whether or how they can provide children in their care the protection which is in their best interests, such as any support they may require. This is a proper purpose that is consistent with a free and democratic society based on human dignity, equality and freedom.

- (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

The limitation helps to achieve the purpose by clarifying the types of information and providing examples of specific information which should be provided to carers, including proposed carers, so they can determine if they can meet a child's health needs or care for a child for a specified amount of time. Clause 32 clarifies, including by way of examples, the information that should be given to carers which reflects existing legislative and policy requirements and supports carers to make informed decisions about accepting placements and to provide appropriate care for a child.

Currently, this information may be disclosed to carers in line with the Child Safety Practice Manual (CSPM) guidance for child safety officers. Section 83A of the CP Act requires the chief executive to provide information about a child to a carer and proposed carer to ensure they can provide care to a child and ensure their safety while in care. Clause 32 clarifies this provision and CSPM guidance by providing examples of the information that may be required by the carer to care for the child, for example, a child's case plan and/or any information about the child's goals, personality, preferences and behaviours.

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

No less restrictive or reasonably available ways are available to ensure that carers obtain all necessary information relevant to the child which may be, or is, placed in their care. The existing provisions are broad and have been considered insufficient in clarifying the information which carers require to enable them to make important decisions for a child who is, or may be, in their care.

To minimise the impact on a child's right to privacy, the amendment differentiates between the amount of information provided to proposed carers and carers currently caring for a child. Approved carers of a child receive a more comprehensive amount of information relating to a child's needs than proposed carers, considering proposed carers may choose to not care for the child. Further safeguards are in place to protect against arbitrary disclosure of the prescribed information as existing confidentiality requirements will continue to apply as per Part 6 of the CP Act.

(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

On balance, it is considered the amendment prescribing, by way of examples, the documentation to be disclosed to carers, which will include personal information about children (which may be, or are, placed in their care), outweighs the limit on the right to privacy as the information is disclosed for the purpose of ensuring the protection and support of a child in care. Further, the existing safeguards under Part 6 of the Act will be in place to mitigate the impact of the limitation on the right.

(f) any other relevant factors

Nil.

Disclosure of notifier identity

Privacy and reputation

(a) the nature of the right

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The right to privacy extends to the protection of an individual's private life and relevantly protects against interference with their family and home. The right also extends to electronic and written correspondence or communication.¹⁸

Clause 61 limits the right to privacy and reputation as it involves the disclosure of a notifier's identity, including their contact details, to senior police officers of the QPS.

(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 the amendment is to promote the safety, welfare and wellbeing of any child or young person who has been reported as a victim of suspected harm by a notifier under Chapter 2, Part 1AA of the CP Act by enabling police to take enforcement action against an alleged perpetrator of harm against a child or young person.

This purpose is consistent with the right to protection of families and children (section 26, HR Act) which provides a child with the protection that is needed and in the child's best interests. It is also consistent with the right to liberty and security (section 29, HR Act) which places positive obligations on the State to ensure the physical safety of those who are in danger of physical harm (including bodily and mental integrity, or freedom from injury to the body and mind). This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The limitation helps to achieve the purpose by allowing the disclosure of the identity of a notifier to police when it may assist investigators to reach more reliable conclusions more quickly, and increase the ability of police and prosecutors to successfully prosecute persons who have committed crimes against children. It will enable senior police officers to seek further evidence from a notifier around the alleged offence.

This amendment was informed by the Australian Law Reform Commission's *Family violence: A national legal response* report (recommendation 20-1) and reiterated by the Royal

¹⁸ UN Human Rights Committee, *General Comment No.16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)*, 32nd sess (8 April 1988), UN Doc HRI/GEN/1/Rev.9 (Vol. I) [8].

Commission *Criminal Justice Report* recommendation that state and territory legislation be amended to authorise a person to disclose the identity of a notifier to a law enforcement agency (recommendation 8).

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

No less restrictive and reasonably available ways will ensure that a notifier's identity can be obtained by law enforcement to support the investigation and prosecution of alleged perpetrators for crimes against children.

Safeguards are included in clause 61 to require that the identity of a notifier will only be permitted to be disclosed to a senior police officer (of the rank of sergeant or above) when it is necessary for the prevention, detection, investigation, prosecution or punishment of a criminal offence against a child. A notifier must be notified of the disclosure unless it is not possible or is not appropriate because it may prejudice an enforcement action. New subsection 186B requires that disclosure of the notifier's details can only be made to a senior police officer by the chief executive or a person authorised by the chief executive to do so.

(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

It is important to enable the disclosure of a notifier's identity to police, including without their consent, to protect children from abuse by supporting the ability of police and prosecutors to successfully prosecute persons who have committed crimes against children.

On balance, the importance of this purpose outweighs the limitation on the right to privacy and reputation through the disclosure of personal information considering safeguards will be in place under clause 61 to minimise the limitation of the right.

(f) any other relevant factors

Nil.

Court may dispense with need to serve a notice of appeal on other parties

Right to a fair hearing

(a) the nature of the right

As discussed above, section 31 of the HR Act provides persons who are charged with a criminal offence or a party to a civil proceeding have the right to a fair and public hearing, and for the matter to be decided by a competent, independent and impartial court or tribunal established by law.¹⁹ The right to a fair hearing reaffirms the right of all individuals to procedural fairness

¹⁹ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN Doc A/RES/2200A(XXI) (16 December 1966) art 14(1).

when coming before a court or tribunal and access to justice.²⁰ The right may extend to civil proceedings such as proceedings relating to child protection in the jurisdiction of the Childrens Court.²¹

Clauses 37 and 38 limit the right to a fair hearing where other parties won't be notified that an appeal has been filed, which means they may not be present to give evidence or contest evidence in proceedings. This limits the right of other parties, who are commonly a child's parents, to access justice because they may be excluded from a proceeding.

(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.

Clauses 37 and 38 seek to ensure the safety and wellbeing of the child who is the subject of the application for appeal by permitting the court to not serve a notice of appeal. By not serving a notice of appeal, proceedings are prevented from being delayed when there is a pressing urgency that they be finalised. This is particularly relevant where the original application was decided on an *ex-parte* basis due to immediate safety concerns regarding the child.

This purpose is consistent with the right to protection of families and children (protected under section 26, HR Act) where the child is entitled to protection in their best interests. The purpose is also consistent with the right to security of person (protected under section 29, HR Act) which may place positive obligations on the State to ensure the physical safety of those who are in danger of physical harm (including bodily and mental integrity, or freedom from injury to the body and mind). The exemption from serving notices of appeal ensures the court is not delayed in making urgent orders to protect the immediate safety of a child. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The limitation of clauses 37 and 38 help to achieve the purpose by allowing urgent proceedings to continue without significant delay from serving a notice of appeal. For example, where the Childrens Court or a magistrate determines no temporary order is to be made, a relevant party may apply for an appeal of the decision in circumstances where any delay may place the child at an immediate risk of harm. In such circumstances, section 118 of the CP Act requires a notice of appeal to be served by an appellant (e.g. the child, the child's parents, or the applicant) on other persons entitled to appeal against a decision relating to a temporary assessment order or a temporary custody order for a child. The notice of appeal must be filed within 28 days, but a court may extend this period.

²⁰ United Nations Human Rights Committee, *General Comment No. 32 (Article 14: Right to equality before courts and tribunals and to a fair trial)*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) [9].

²¹ *Secretary, Department of Human Services v Sanding* [2011] VSC 42 [204].

As a result, there may be significant delays of 28 days or more to appeal proceedings when a notice of appeal is served on a child's parents, which could increase the immediate risk to a child's safety and wellbeing. The amendment to permit the court to dispense with the need to serve a notice of appeal on other parties prevents this delay from occurring and enables timely decisions of the court to protect the best interests of a child.

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

There are no less restrictive and reasonably achievable ways of ensuring the safety and wellbeing of the child, particularly where a child may be at risk of harm from a parent or guardian while appeal proceedings are ongoing or fail to be finalised in a timely manner. An alternative measure, such as reducing the period for filing a notice of appeal under section 118(3) of the CP Act, would not address the immediate risk of harm to a child during the time it takes for the notice to be served and filed.

Allowing the court to dispense with the requirement to serve the notice of appeal also aligns with existing sections 26 and 51AD of the CP Act where the magistrate has discretion to decide the application for the temporary order without notifying the child's parents or hearing them on the application.

(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

On balance, it is considered that the importance of protecting a child from immediate risk of harm by dispensing with the requirement for serving a notice of appeal outweighs the limitation on the right to a fair hearing considering it aligns with existing provisions under the CP Act.

(f) any other relevant factors

Nil.

Amendments to the Working with Children (Risk Management and Screening) Act 2000

Changes to category of regulated employment and regulated business for licensed care services

Privacy and reputation

(a) the nature of the right

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The right to privacy extends to the collection of names and addresses and other relevant personal information.

As identified above, section 25 of the HR Act is similar to Article 8 of the ECHR which the European Court of Human Rights has interpreted to find that the notion of 'private life' in Article 8 includes, in principle, activities of a professional or business nature. Therefore,

restrictions imposed on access to a profession have been found to affect ‘private life’ by the Court similar to observations made in Victorian jurisprudence.²²

Clause 129 of the Bill limits the right to privacy in circumstances where a licensee has determined a person is performing a risk-assessed role in line with clause 39 (new section 123A of the CP Act) and this captures an expanded scope of persons than what is currently captured under existing screening requirements, thereby requiring these individuals to provide personal information to the department for assessment.

(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 the limitation is to protect the wellbeing and safety of children. It achieves this purpose by streamlining the existing category of regulated employment and making amendments to the category of regulated business to ensure persons (e.g. contractors and sub-contractors as well as self-employed persons) who perform a risk-assessed role for a licensed care service are required to hold a blue card. The amendments seek to ensure the scope of the blue card framework captures the contemporary service delivery model used by licensees in discharging their functions.

This purpose is consistent with the right to protection of families and children (section 26, HR Act) which provides that every child has the right to protection and is in the child’s best interests. It is also consistent with the right to liberty and security (section 29, HR Act) which places positive obligations on the State to ensure the physical safety of those who are in danger of physical harm (including bodily and mental integrity, or freedom from injury to the body and mind). This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The limitation imposed by the Bill achieves the purpose by protecting children from harm by ensuring that the categories of regulated employment and regulated business that deal with licensed care services accurately captures and imposes blue card obligations on all individuals who work with children.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments and ensure that the screening requirements in relation to licensed care services are contemporary.

Safeguards are in place under the WWC Act which will protect the confidentiality of the information that the chief executive (working with children) will receive about relevant persons

²² *ZZ v Secretary, Department of Justice & Anor* [2013] VSC 267 [94].

as part of the blue card assessment. In particular, either section 384 or 385 of the WWC Act will apply to the information depending on its sensitivity.

- (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 purpose of protecting children from harm requires the reframing of the screening requirements as they apply to licensed care services. While acknowledging that the amendments will limit the right to privacy for persons performing a risk-assessed role for a licensed care service, it is important to ensure only persons who have undergone a blue card assessment are able to work with children and the amendments uphold the paramount principle for administering the WWC Act.

On balance, the importance of the purpose of the limitation outweighs the limitation on the right to privacy and reputation considering the extent of the limitation is mitigated by safeguards which protect against unlawful use and disclosure by a person under the Act.

- (f) any other relevant factors

Nil.

Expanded definition of notifiable persons

Privacy and reputation

- (a) the nature of the right

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The right to privacy extends to the protection of an individual's private life and protects against interference with their family and home.

Under the WWC Act, if BCS are aware a person has applied for, started, or is continuing in, regulated employment the person's employer is considered a 'notifiable person' (Schedule 7, definition notifiable person, WWC Act). A notifiable person is provided with updates about the blue card status of persons they have linked to. For example, the chief executive (working with children) must give each notifiable person for a cardholder written notice of the suspension or cancellation of the person's card (as well as other notifications—see for example, sections 292 and 297 of the WWC Act).

The amendments made by clause 131 limits the right to privacy and reputation where personal information, including information about a person's blue card status, is disclosed to a licensee as a 'notifiable person' for any person performing a risk-assessed role for the licensed care service.

- (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 the amendment is to ensure licensed care services do not engage a person to perform child-related work where the person no longer has a valid blue card, thereby ensuring the licensee upholds their obligations under the CP Act and protecting children from harm.

This purpose is consistent with the right to protection of families and children (section 26, HR Act) which provides that every child has a right to protection that is needed by the child and is in the child's best interests. It is also consistent with the right to liberty and security (section 29, HR Act) which places positive obligations on the State to ensure the physical safety of those who are in danger of physical harm (including bodily and mental integrity, or freedom from injury to the body and mind). This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The limitation helps to achieve the purpose by enabling licensees to link to and receive blue card status updates from the chief executive (working with children) directly for any person performing a risk-assessed role for their licensed care service.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments and ensure that a licensee is able to receive blue card status updates about a person performing a risk-assessed role for a licensed care service.

Safeguards are in place which will protect the confidentiality of the information that is disclosed about relevant persons to licensees. Section 344B of the WWC Act requires a person who is provided information under section 344A (e.g. cancellation, suspension or other notifications) to not use, disclose or give access to the information to anyone else except under limited specified circumstances.

(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

Enabling licensees to be informed of the cancellation or suspension of an individual's blue card who is undertaking a risk-assessed role for their licensed care service is important and necessary to ensure that a licensee is aware of when such a person's blue card status changes so that they can take necessary steps to respond and mitigate the risk to children in the service environment. Although the amendments will limit the right to privacy of such individuals for whom notifications are provided, it is considered that, on balance, the importance of the purpose of the limitation outweighs the limitation on the right to privacy and reputation considering the extent of the limitation is mitigated by safeguards which protect against unlawful use and disclosure by a notifiable person.

(f) any other relevant factors

Nil.

Participation in the WWCC NRS

(a) nature of the right

Recognition and equality before the law

The right to recognition and equality before the law (section 15, HR Act) encompasses both the right to recognition as a person before the law and the right to enjoy human rights without direct or indirect discrimination based on the protected attributes (e.g. age, impairment, political belief or activity, race, religious belief or activity, sex or sexual orientation) under the *Anti-Discrimination Act 1991*. The definition of discrimination under the HR Act is broad and may extend to discrimination on the basis of attributes which are currently outside the scope of discrimination under the *Anti-Discrimination Act 1991*, such as on the basis of prior criminal convictions.

An assessment for a WWCC is made by screening units (including BCS) on the basis of a person's criminal record. For groups who are over-represented in the criminal justice system, for example Aboriginal and Torres Strait Islander peoples, the amendments to the WWC Act within the Bill limit the right to recognition and equality before the law where an interstate adverse WWC decision (usually as a result of charges, or convictions for certain types of offences) results in a person being unable to engage in child-related work.

Privacy and reputation

The right to privacy and reputation under section 25 of the HR Act protects individuals against unlawful or arbitrary interferences upon their privacy, family, home, correspondence (written and verbal) and reputation. 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 Bill limits the right to privacy and reputation by enabling the chief executive (working with children) to share information about a person with the Australian Crime Commission (ACC) and interstate screening units if the chief executive (working with children) reasonably believes the information is relevant to the functions of the ACC or the corresponding screening unit. Essentially, this means:

- identifying information about a person who holds, or has held, an adverse WWC decision will be entered and stored on the WWCC NRS; and
- assessable information about a person who has received an adverse WWC decision in Queensland will be shared with a corresponding interstate screening unit if that unit requests the information to inform its own assessment and the chief executive (working with children) reasonably believes the information is relevant to the functions of the interstate screening unit under the corresponding WWC law.

The decision-making amendments in the Bill also limit the right to privacy and reputation because the chief executive (working with children) will be able to prevent an applicant who has an adverse interstate WWC decision that is in effect which is stored on the WWCC NRS, from working in child-related regulated environments in Queensland based on this interstate adverse history.

- (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 amendments seek to increase protections for children by enhancing the visibility of adverse WWC decisions across jurisdictions to enable a more comprehensive assessment of the eligibility of an applicant or cardholder to work with children. The purpose of the limitation on the right to recognition and equality before the law and the right to privacy is to ensure that persons who have an adverse interstate WWC decision that is in effect are prohibited from engaging in child-related work in Queensland.

This purpose is consistent with the right to protection of families and children (section 26, HR Act). The nature of the purpose is also consistent with the right to liberty and security of person (section 29, HR Act), particularly the right to security of person, in protecting the physical safety of children, including protection from injury to the body and mind to which the scope of the right may extend.

The proposed information sharing amendments will provide an important safeguard by ensuring visibility between jurisdictions in relation to individuals who have been found ineligible to work with children. Further, the proposed decision-making amendments will allow BCS to consider adverse outcomes from other jurisdictions as part of its eligibility assessment process – this will enhance protections for children. This is a purpose consistent with a free and democratic society based on human dignity, equality and freedom.

- (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

The limitation on these rights achieves the purpose of enhancing protections for children by mitigating the risk that individuals who have been determined to be ineligible to work with children in one jurisdiction are unable to work in child-related work in Queensland.

The chief executive (working with children) will be able to access information stored on the WWCC NRS, and request and receive information from an interstate screening unit. It is important for the chief executive (working with children) to have access to such information to enable a holistic assessment of an individual's application for a blue card.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments. Alternative measures, such as making amendments to the WWC Act to enable information sharing with individual interstate screening units, would create significant administrative burdens on the chief executive (working with children) in comparison to enabling Queensland's participation in the WWCC NRS.

In addition, the Bill provides that the chief executive (working with children) must not use, disclose or give access to the information it obtains from interstate screening units other than for the prescribed purposes set out in section 384 of the WWC Act (i.e. for the making of an employment screening decision). Interstate screening units would be bound by the confidentiality protections of their own legislation.

(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 right, taking into account the nature and extent of the limitation

The limitations on the right to recognition and equality before the law and the right to privacy are important to prevent a person from engaging in child-related work where that person has an adverse interstate WWC decision that is in effect. This assists in protecting children from harm in situations where a person has been deemed ineligible to work with children in another jurisdiction.

While the information-sharing and decision-making amendments limit the right to privacy and reputation where it enables the sharing of a person's adverse WWC decision and their personal information across jurisdictions, this limitation is mitigated by the safeguards in place under the Bill which will protect the confidentiality of information, including only enabling the information to be used for purposes under the WWC Act.

On balance, the importance of safeguarding children, outweighs the limitation on the right to privacy and reputation and the right to recognition and equality before the law for those persons who have adverse interstate WWC information.

(f) any other relevant factors

Nil.

Amendments to the WWC Act and Disability Services Act 2006 for sharing domestic violence information

(a) nature of the right

Privacy and reputation

The right to privacy and reputation under section 25 of the HR Act protects individuals against unlawful or arbitrary interferences upon their privacy, family, home, correspondence (written and verbal) and reputation. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally.

As identified above, Article 8 of the ECHR is similar to section 25 of the HR Act and has been interpreted by the European Court of Human Rights to find that while there is no general right to employment, the notion of ‘private life’ in Article 8 does not exclude, in principle, activities of a professional or business nature. Therefore, restrictions imposed on access to a profession have been found to affect ‘private life’, which is similar to observations made in Victorian jurisprudence.²³

The amendments limit the right to privacy and reputation where domestic violence information which include personal information about a respondent and aggrieved person/s, may be disclosed as part of information sharing arrangements for screening purposes under the WWC Act and the *Disability Services Act 2006* (DSA).

(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 the amendments to the WWC Act is to protect the wellbeing and best interests of children by ensuring that the chief executive (working with children) has all relevant information before them to make a holistic assessment of a person’s eligibility to engage in child-related work.

Likewise, the purpose of the amendments to the DSA is to safeguard people with disability by ensuring that the chief executive (disability services) makes an assessment of a person’s eligibility to work with people with disability based on all relevant information.

These purposes are consistent with the right to protection of families and children (protected under section 26, HR Act). The nature of the purpose is also consistent with the right to liberty and security of person (section 29, HR Act), particularly the right to security of person, in protecting the physical safety of children and people with disability, including protection from injury to the body and mind to which the scope of the right may extend.

The amendments to the WWC Act support the underlying principles of the WWC Act, which is that the welfare and best interests of a child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child’s wellbeing.

These purposes are consistent with a free and democratic society based on human dignity, equality and freedom.

(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

The purpose of limiting a person’s right to privacy through the sharing of domestic violence information is to ensure that such information can be considered as part of a blue card assessment or a disability worker screening assessment.

²³ *ZZ v Secretary, Department of Justice & Anor* [2013] VSC 267 [94].

The limitation achieves the purpose by enabling the sharing of domestic violence information to ensure that the chief executive (working with children) and the chief executive (disability services) to access and can consider such information to make a holistic assessment of a person's eligibility to conduct child-related work or for their disability worker screening application or clearance.

The right to privacy will only be limited where an interference with privacy is unlawful and arbitrary. Powers which authorise a limit on privacy must be conferred by legislation or common law, be confined and structured rather than unclear, be accessible to the public, and be formulated precisely. The proposed amendments are precise and appropriately circumscribed and are proportionate to the legitimate aims sought by those amendments.

Accordingly, the information sharing arrangements proposed do not unlawfully or arbitrarily interfere with a person's right to privacy, as information is collected, used and shared in accordance with the prescribed purpose of assessing whether it would be in the best interests of children for a person to work with children, or assessing whether a person poses an unacceptable risk to working with people with disability.

Detailed information about the existence of domestic violence orders, particularly where more than one order has been issued and there are different complainants, is relevant to a blue card assessment as it suggests a repeated pattern of abusive behaviour which is relevant to how an applicant may behave in a child-related environment. In particular, the naming of a child on an order to which an applicant for, or holder of, a blue card is the respondent is highly relevant to their ability to act appropriately, parent responsibly and make decisions in the best interests of children who may be in their care.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments.

Safeguards are in place which will protect the confidentiality of the domestic violence information received under the arrangements. Section 384 of the WWC Act will apply to ensure that the use, disclosure or giving of access to the domestic violence information can only occur in defined circumstances (in particular, for the purpose of an employment screening decision). Section 227 of the DSA requires a person must not use, disclose or give access to protected information (including domestic violence information) to anyone else unless it is permitted under that Act.

(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 right, taking into account the nature and extent of the limitation

The collection and use of personal information in the form of domestic violence information is necessary for the chief executive (working with children) to make a holistic assessment of the person's eligibility to engage in child-related work.

Similarly, it is important to enable domestic violence information relating to police protection notices to be disclosed to the chief executive (disability services) to enable a comprehensive risk assessment of applicants for, and holders of, a disability worker screening clearance to protect people with disability from a risk of harm.

On balance, the importance of the purpose of the amendments outweighs the limitation of the right to privacy and reputation considering the limitation seeks to protect the safety of children and the disclosure and use of domestic violence information is for a defined and limited purpose.

(f) any other relevant factors

Nil.

Amendments to the Adoption Act 2009

(a) the nature of the right

Privacy and reputation

The right to privacy and reputation (section 25, HR Act) protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The right to privacy extends to the protection of an individual's private life and relevantly protects against interference an individual's personal and social identity.²⁴

Clauses 4 and 5 of the Bill limits the right to privacy and reputation where it enables the chief executive to supervise the wellbeing and interests of a child after the child has been placed with their prospective adoptive parents, which includes monitoring of the child and prospective adoptive parents' private life.

The amendments further limit the right where the final adoption order has the effect of transferring guardianship of the child to their adoptive parents, and thus interferes with the personal and social identity and legal relationships of the child and their family. In other words, the right is limited to the extent that the amendments interfere with family by finalising the adoption process for certain children and severing family ties.

Protection of families and children

Section 26 of the HR Act provides the right to the protection of families and children, recognising that families are the fundamental group unit of society and entitles families to protection by society and the State. The meaning of families under the HR Act is broad and

²⁴ *Kracke v Mental Health Review Board (General)* [2009] VCAT 646 [619]-[620].

recognises that the term ‘family’ is understood broadly in international law, extending to cultural understandings of family.²⁵

Clauses 4 and 5 limits the right where it enables the final adoption orders to be made for non-citizen children, which has the effect of interfering in a family unit or legal relationships when it legally recognises a child’s family as including adoptive parents and not biological parents.

Cultural rights – generally

Section 27 of the HR Act provides that all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background. It provides the right of a person to enjoy their culture, to declare or practise their religion, and to use their language.

Clauses 4 and 5 limits cultural rights (generally) where it enables an application for a final adoption order to be made for children who were not born in Australia. It is considered likely that children will be adopted by parents who may not share their cultural, religious, racial or linguistic background, and the cultural rights of the child may be limited in such circumstances.

(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 the limitation is to support the adoption of children in a way which promotes their wellbeing and best interests throughout their lives. It clarifies that the adoption process can be finalised for non-citizen children subject to intercountry adoptions who are placed with prospective adoptive parents in Queensland by the relevant Australian Government Minister, or by the chief executive under the *Adoption Act 2009* (Adoption Act) other than as the guardian and that post-placement supervision will be provided.

This purpose is consistent with the right to recognition and equality before the law (protected under section 15, HR Act) which provides that every person has the right to equal protection before the law without discrimination. Non-citizen children will be recognised under Queensland law as a part of their adoptive family unit through registration for a Queensland Birth Certificate which acknowledges their adoptive parents as their legal parents. Further, finalised adoptions enable non-citizen children to apply for Australian citizenship, which will promote their right to recognition and protection under Australian law.

Conversely, the purpose of the limitation is consistent with the right to protection of children (section 26, HR Act) in their best interests as clause 4 also has the purpose of ensuring that non-citizen children and their prospective families are provided with advice and the appropriate level of support through post-placement supervision.

This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.

²⁵ UN Human Rights Committee, *Views: Communication No 549/1993 (Hopu et al v France)*, 60th sess, UN Doc CCPR/C/60/D/549/1993/Rev.1 (29 July 1997) [10.3].

(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

The limitation, which occurs as a result of enabling post-placement supervision, helps achieve the purpose by ensuring non-citizen children and their prospective families are provided with advice and the appropriate level of support through post-placement supervision by the chief executive, and enables the chief executive to apply to the Childrens Court of Queensland for a final adoption order.

In relation to the purpose of the limitation which enables final adoption orders to be made for non-citizen children, the United Nations Convention on the Rights of the Child recognises that adoption is a means for appropriate protection of children in proper circumstances. Similarly, the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption recognises that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.

These principles are recognised within the adoption framework in Queensland. For example, the Adoption Act must be administered in line with guiding principles, which provide that adoption is appropriate for a child, including a non-citizen child, where the child's parents choose adoption for their long-term care (i.e. consent to the adoption) or the child does not have a parent who is willing and able to protect them from harm and provide for their needs (section 6(2)(b)).

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

No less restrictive and reasonably available ways will ensure that applications for final adoption orders can be made in Queensland when a non-citizen child is placed by the relevant Australian Government Minister or by the chief executive under the Adoption Act other than as the guardian.

Remaking the delegation is not a reasonably available alternative. The relevant Australian Government Minister alone has the discretion to make and revoke the Instrument of Delegation when there are any changes required. The Australian Government Minister is not obligated to remake the delegation instrument.

Safeguards are in place to promote the best interests of a child in the adoption process, including by keeping the child informed of decisions which affect them and supporting them to maintain a connection with their culture and their biological family (section 6(2) and 200). Further, the Adoption Act includes protections to preserve the confidentiality of information obtained by officers involved in the supervision of the child and prospective adoptive family (section 314). For example, information about a child or prospective adoptive parents must not be used or disclosed to anyone else unless permitted under the Act. Contravention of this provision incurs a maximum penalty of 100 penalty units or two years imprisonment.

- (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

It is important to enable the chief executive to make an application final adoption orders for non-citizen children where there are any issues with the delegation so that prospective adoptive families can be legally recognised, and children can access stable and long-term care. Likewise, it is important to permit the chief executive to provide post-placement supervision so prospective adoptive parents and children receive any support needed to support the child's best interests and the application of a final adoption order.

On balance, having regard to the extent of the potential limitations on the rights of persons involved with the intercountry adoption process described above, it is considered that the importance of ensuring that applications for final adoption orders can be made and post-placement supervision can occur outweighs the limitations on human rights. This is especially so considering there are protections in place to minimise the impact of the limitations on privacy, families and cultural rights under the existing provisions of the Adoption Act (sections 6, 200 and 314).

- (f) any other relevant factors

Nil.

Conclusion

In my opinion, the Child Protection Reform and Other Legislation Amendment Bill 2021 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 a free and democratic society based on human dignity, equality and freedom.

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