

Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021

Human Rights Certificate

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

In accordance with section 41 of the *Human Rights Act 2019*, I, Craig Crawford, Minister for Seniors and Disability Services and Minister for Aboriginal and Torres Strait Islander Partnerships provide this human rights certificate with respect to the *Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021* (the Amendment Regulation) made under the *Disability Services Act 2006*, *Transport Planning and Coordination Act 1994*, *Working with Children (Risk Management and Screening) Act 2000* and *Police Service Administration Act 1990*.

In my opinion, the Amendment Regulation as tabled in the Legislative Assembly, 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 Subordinate Legislation

The objective of the Amendment Regulation is to support the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020* (Amendment Act), which implements nationally consistent disability worker screening in Queensland. The Amendment Regulation amends the *Disability Services Regulation 2017* (DSR), *Working with Children (Risk Management and Screening) Regulation 2020* (WWC Regulation), *Transport Planning and Coordination Regulation 2017* (TPCR) and *Police Service Administration Regulation 2016* (PSAR).

On 3 May 2018, the Premier for Queensland signed the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme* (IGA), committing Queensland to implement nationally consistent NDIS worker screening to enhance regulatory safeguards and prevent people with disability from receiving unsafe NDIS supports or services.

On 4 December 2020, the Amendment Act was passed by Queensland Parliament. The Amendment Act will amend the *Disability Services Act 2006* (the DSA) to deliver on Queensland's commitment to implement nationally consistent NDIS worker screening and continue a state screening system for disability services outside the jurisdiction of the NDIS Quality and Safeguards Commission (NDIS Commission).

All states and territories have agreed to commence nationally consistent NDIS worker screening by 1 February 2021 as per the *NDIS (Practice Standards—Worker Screening) Rules 2018* (WS Rules).

This Amendment Regulation supports the administrative detail underpinning the Amendment Act. Collectively, the Amendment Act and Amendment Regulation effectively implement nationally consistent NDIS worker screening in Queensland.

The Amendment Regulation also:

- omits an unnecessary provision from the WWC Regulation as the scope of blue card screening for persons who perform disability work will be set under the *Working with Children (Risk Management) and Screening Act 2000* (refer Schedule 1, section 6A).
- ensures that digitised photos and signatures can be used for the purposes of disability worker screening under the TPCR
- ensures an expanded range of criminal history information can be shared with all interstate disability worker screening units under the PSAR.

Human Rights Issues

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

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

- Protection from torture and cruel, inhuman or degrading treatment (section 17 of the HR Act)
- The right to privacy and reputation (section 25 of the HR Act)
- The right to recognition and equality before the law (section 15 of the HR Act)
- Cultural rights of Aboriginal and Torres Strait Islander peoples (section 28 of the HR Act)

The provisions of the Amendment Regulation relevant to the above rights are detailed below, including whether further analysis of the limitation of each right is required within this certificate.

Protection from torture and cruel, inhuman or degrading treatment

In my opinion, the proposed amendments promote the right of persons with disability to protection from torture and cruel, inhuman or degrading treatment by operationalising provisions of the Amendment Act to implement a nationally consistent disability worker screening framework.

The following amendments promote the right to protection from torture and cruel, inhuman or degrading treatment:

- enabling other organisations who are not engaged to provide NDIS disability work to make an NDIS disability worker screening application;
- enabling departmental staff administering worker screening functions under Part 5 of the DSA to make a State disability worker screening application;
- confirming services related to the provision of care and support, or protection to a forensic disability client at the Forensic Disability Service (FDS) under the *Forensic Disability Act 2011* are a 'disability service' for the purposes of Part 5 of the DSA thereby requiring workers at the FDS to be screened;

- prescribing other entities that the chief executive may request information from in order to inform a risk assessment of a person.

In my opinion, the Amendment Regulation promotes the right to protection from torture and cruel, inhuman or degrading treatment for persons with disability by broadening the scope of who may apply and be screened under the new screening system before working with people with disability. This ensures that roles related to the provision of services and supports to people with disability are subject to screening to increase safeguards for people with disability.

Also, broadening the scope of information that may be considered when risk assessing a person will also ensure the chief executive has all relevant information about a person when assessing the risk of harm they may pose to a person with disability.

I have assessed that the Amendment Regulation engages the right to protection from torture and cruel, inhuman and degrading treatment and that further consideration of the limitation (including restriction of interference) of this right is not required.

Right to privacy and reputation

The Amendment Regulation engages the right to privacy and reputation by:

- enabling the use of photo identification and digitised signatures for disability worker screening;
- prescribing the matters that a clearance holder must notify the chief executive of if that information changes;
- requiring a person to notify the chief executive if their engagement status changes (for example, change from one employer to another);
- prescribing other interstate worker screening units that the Queensland Police Service (QPS) may exchange criminal history information with for the purposes of NDIS worker screening.

I have assessed that the Amendment Regulation engages the right to privacy and reputation and that further consideration of the limitation (including restriction of interference) of this right is required.

The right to recognition and equality before the law

The Amendment Regulation engages the right to recognition and equality before the law by:

- adding a further criterion regarding a nexus to Queensland for a person to make a disability worker screening application; and
- prescribing Commonwealth offences that form part of the disqualifying and serious offence framework.

I have assessed that the Amendment Regulation engages the right to recognition and equality before the law and that further consideration of the limitation (including restriction of interference) of this right is required.

Cultural rights of Aboriginal and Torres Strait Islander peoples

The Amendment Regulation engages the cultural rights of Aboriginal people and Torres Strait Islander people by prescribing the matters that a person must notify the chief executive of if there is a change of information and enabling the use of photo identification and digitised signatures.

I have assessed that the Amendment Regulation engages the cultural rights of Aboriginal people and Torres Strait Islander people and that further consideration of the limitation (including restriction of interference) of this right is required.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

The human rights limited by the Amendment Regulation are analysed further below.

Privacy and reputation

(a) the nature of the right

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

Collecting, using and sharing a person's information may interfere with an applicant and clearance holder's right to privacy. Enabling the use of photo identification and requiring clearance holders to disclose any change in a risk assessment matter, or a change in engagement (such as moving from one employer to another) may also limit the right to privacy and reputation.

This right may also be limited by the amendment under the PSAR to prescribe NDIS worker screening units in Victoria, Northern Territory and Western Australia, which will allow the QPS to exchange an expanded range of criminal history information with these agencies.

How each of these amendments limit the right to privacy and reputation is detailed below.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of these amendments is to protect people with disability from risk of harm by ensuring all relevant information about an applicant or clearance holder may be obtained to inform a risk assessment. This is consistent with the paramount consideration when making a decision under the Amendment Act, which is the right of people with disability to live lives free from abuse, violence, neglect or exploitation, including financial abuse and exploitation.

The amendment to the PSAR will ensure QPS may share expanded criminal history information with screening units in those jurisdictions for the purposes of NDIS worker screening. This is consistent with Queensland's commitment to supporting a national information sharing framework to support NDIS worker screening.

These amendments are consistent with a free and democratic society and are reasonably necessary to protect people with disability from an unacceptable risk of harm caused by poor quality or unsafe supports or services.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Limiting the right to privacy by collecting and using information about a person is necessary to achieve the purpose of delivering a nationally consistent worker screening system. For example, it is necessary for the chief executive to meet robust identification verification requirements and use the person's photograph as a part of the screening process, with the ultimate purpose being to protect people with disability from risk of harm. It also reduces the risk of a person fraudulently using another person's clearance card. The ability for QPS to exchange criminal history information with screening units in every jurisdiction will support ongoing national criminal history monitoring, which is a significant safeguard under the NDIS worker screening system.

In the same way, requiring a person to update the chief executive if there is a change to their assessable information ensures the chief executive has all relevant information about a person to make a fully informed risk assessment.

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

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

The Amendment Act also provides for appropriate safeguards around the use and disclosure of information provided by an applicant or clearance holder or shared by another entity. There are specific obligations placed on officers that deal with information obtained in administering worker screening under the DSA, including to maintain confidentiality and only disclose information in specific scenarios. Offences and penalties apply to unauthorised disclosure of information.

(d) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

On balance, it is considered the importance of protecting people with disability, receiving disability services, from harm outweighs the limitations to the right to privacy and reputation from the proposed amendments.

(e) any other relevant factors

The Amendment Regulation implements the requirement under the IGA for a person to disclose certain types of information for consideration as part of the risk assessment to determine if they pose an unacceptable risk of harm to people with disability.

Recognition and equality before the law

(a) the nature of the right

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

The right to recognition and equality before the law as it relates here refers to the right of individuals to be treated equally in the ability to apply for, access and maintain work arrangements related to the provision of disability services.

The Amendment Regulation may limit this right by introducing the requirement for an applicant to either live or work, or propose to live or work, in Queensland in order to make an NDIS worker screening application. The Amendment Regulation may also limit this right by prescribing Commonwealth offences that form part of the disqualifying and serious offence framework.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of requiring an applicant to have a nexus to Queensland is to clarify, beyond doubt, that only a person who is already living or working, or proposes to live or work, in Queensland may make an NDIS worker screening application under the DSA. This confirms the presumption at common law and under the *Acts Interpretation Act 1954 (Qld)* that the DSA applies within the jurisdiction of Queensland, and not elsewhere. Whilst an NDIS clearance and exclusion remains portable across roles in the NDIS and other jurisdictions, the ability to apply in Queensland is restricted.

The purpose of prescribing Commonwealth offences is to reflect the disqualifying offences framework agreed to by all jurisdictions. The disqualifying offences framework is crucial to risk assessments under NDIS worker screening and is aimed at protecting people with disability from the risk of harm and unsafe supports or services. This reflects the paramount consideration in the Amendment Act, to the right of people with disability to live lives free from abuse, violence, neglect and exploitation and as such, is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The limitation regarding who can apply for an NDIS worker screening check achieves the purpose of the amendment by ensuring that NDIS worker screening applications are only received by those who live or work, or propose to live or work, in Queensland. This achieves the purpose of ensuring that Queensland can maintain the status quo regarding application of Part 5 of the DSA within Queensland whilst still ensuring that NDIS clearances and exclusions remain portable across roles in different jurisdictions.

The purpose of prescribing the Commonwealth offences in the Amendment Regulation is to reflect the nationally agreed offences framework that inform a risk assessment of an applicant or clearance holder. A person may also become subject to an interim bar, suspension or exclusion if they have been charged or convicted or a Commonwealth serious or disqualifying offence. This enables consistency and certainty across all jurisdictions when considering the same offences within the same risk assessment framework.

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

There are no less restrictive and reasonably available ways to achieve the purpose. By prescribing Commonwealth offences by regulation, this allows the requisite flexibility to allow

Queensland to amend these offences if there is a change in Commonwealth offences (including the introduction of new offences). This will enable Queensland to administer a nationally consistent worker screening system effectively.

(d) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

On balance, it is considered that the importance of protecting participants from harm outweighs the limitations to the right to recognition and equality from this amendment.

(e) any other relevant factors

Clear messaging will be disseminated to the disability sector leading up to and during the implementation of the new NDIS worker screening system in Queensland to ensure all stakeholders including are aware of the changes. There will also be supports available to assist the sector to transition to the new system.

Cultural rights of Aboriginal and Torres Strait Islander peoples

(a) nature of the right

Section 28 of the HR Act recognises that Aboriginal people and Torres Strait Islander people have distinct cultural rights. Aboriginal people and Torres Strait Islander people may experience unique barriers when seeking to enter and maintain continuous employment.

In some cases, people may face genuine difficulty in providing the necessary evidence to identify themselves to the required level of assurance. Exceptional cases are those where a person does not possess and is unable to obtain the necessary evidence of identity.

This right, as it relates to the provisions of the Amendment Regulation, refers to the cultural rights of Aboriginal people and Torres Strait Islander people to not be arbitrarily hindered in seeking to enter and maintain continuous employment.

This requirement that people must disclose certain information to the chief executive and provide valid photo identification may limit the cultural rights of Aboriginal people and Torres Strait Islander people.

The barriers for Aboriginal people and Torres Strait Islander people in accessing working with children checks have been well examined. This included the barriers incurred by imposing limited methods to respond to requests for information (including rigid timeframes, requiring submissions in writing and requiring proof of identification).

This can have negative impacts on already thin markets for disability services in rural and remote areas and can increase the risk of unsafe supports or services for people with disability. It may also exacerbate existing problems with sourcing culturally appropriate supports.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is ultimately to protect people with disability from risk of harm posed by unsafe supports and services. It also reflects the paramount consideration under the Amendment Act which is the right of people with disability to live life free from abuse, violence, neglect or exploitation, including financial abuse and exploitation.

Given the proposed amendments align with the ultimate objectives of the Amendment Act, they are considered to be consistent with a free and democratic society and are reasonably necessary to protect people with disability from an unacceptable risk of harm caused by poor quality or unsafe service and supports.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Requiring a photo on a person's clearance card achieves the purpose of ensuring a robust verification process. It also reduces the risk of a person fraudulently using another person's clearance card.

Additionally, requiring a person to update the chief executive if their information changes is necessary to ensure the chief executive has all the relevant information about a person in order to accurately assess risk workers and administer the screening system in Queensland.

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

There are no less restrictive and reasonably available ways to achieve the purpose. The application process is nationally consistent.

(d) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

On balance, it is considered that the importance of protecting participants from harm outweighs the potential limitations to the cultural rights of Aboriginal people and Torres Strait Islander people from the amendments.

(e) any other relevant factors

The proposed amendments implement the national requirements under the IGA for the types of information that are required to be disclosed to determine whether a person poses an unacceptable risk of harm to people with disability.

There is a significant amount of work being undertaken more generally under the NDIS to build the capacity of the system to support both Aboriginal people and Torres Strait Islander people to participate in the NDIS and to build the capacity of service providers to participate in the NDIS market, particularly in Aboriginal communities and Torres Strait Islander communities and in rural and remote communities.

There is also an Aboriginal and Torres Strait Islander Strategy and Action Plan being developed, similar to that designed by blue card services. The Strategy and Action Plan will play a significant role in empowering Aboriginal people and Torres Strait Islander people to engage with the disability worker screening system in Queensland. This will include clear communication about screening requirements and how to participate in the process.

Conclusion

I consider that the *Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021* is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with certain human rights, but those limitations are reasonably justified in a free and democratic society based on human dignity, equality and freedom.

CRAIG CRAWFORD
MINISTER FOR SENIORS AND DISABILITY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER PARTNERSHIPS

© The State of Queensland 2021