Queensland Law Society

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Office of the President

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Our ref: KS-ACTLC

Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Committee Secretary

Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019

Thank you for the opportunity to provide comments on the Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (**the bill**).

Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

We note the proposed amendments have arisen as a result of the second five-yearly review of the operation of the Workers' Compensation scheme (**the Review**). We understand the bill seeks to implement 12 of the 15 legislative amendments arising from the Review.

This response has been compiled by the QLS Accident Compensation and Tort Law Committee, whose members have substantial expertise in this area.

General comments

QLS largely supports the proposed amendments to the *Workers Compensation and Rehabilitation Act* 2003 which seek to 'improve the process and experience for injured workers' and in particular, the Society is pleased to see the following:

- Clause 34 which amends section 32 (Meaning of Injury) to remove the requirement that for a psychiatric or psychological disorder, employment is the major significant contribution to the injury; that is, that all injuries, be assessed the same
- Clause 36 which amends section 39A (Meaning of *terminal* condition) to remove the requirement that the condition is expected to terminate the worker's life within 2 years after the terminal nature of the condition is diagnosed; and

- Clause 78 which is intended to set out that unpaid interns are workers for the purposes of the *Workers Compensation and Rehabilitation Act* 2003 and entitled to compensation for injury.

However, QLS has some reservations with some aspects of the bill and in particular, the unintended consequences of the proposal to exempt expressions of regret and apologies provided from being considered in any assessment of liability in a civil matter. Due to the size of the bill, QLS has limited its comments to those aspects outlined below.

Workers Compensation and Rehabilitation Act 2003 - amendments

Clause 61 New section 220 Insurer's responsibility for rehabilitation and return to work

Proposed section 220(1) only contemplates the insurer's responsibilities with respect to workers who have an entitlement to compensation and workers who are participating in an accredited rehabilitation and return to work program of the insurer. However, the responsibility described in section 220(2)(c) refers to a worker who has stopped receiving compensation and therefore, no longer has an entitlement to compensation. There are no penalty provisions attached to an insurer in these circumstances. This apparent inconsistency does not seem justified. It would seem appropriate to extend the responsibilities in section 220(1) to 'workers who have stopped receiving compensation and have not yet been referred to an accredited rehabilitation and return to work program'. This would also be consistent with section 220(2)(c).

Clause 69 Insertion of new ch 5, pt 14

Part 14 Expressions of regret and apologies

QLS notes from the Explanatory Notes that new Chapter 5, Part 14 is proposed to align the *Workers Compensation and Rehabilitation Act 2003* (Qld) (**WCRA**) with the *Civil Liability Act* 2003. In our respectful submission, the consequences of the exemption in the WCRA, are a significant point of difference. In the Society's view, the key distinction is the potential evidentiary use of an apology in related or subsequent criminal proceedings and in particular, prosecutions under the *Work Health and Safety Act 2011* (Qld) (**WHSA**) which, notably, includes custodial sentences for manslaughter. Rarely does a risk of a similar nature arise from incidents that give rise to claims under the CLA.

In these circumstances it is absolutely essential that legal practitioners advise employers of this risk associated with making an expression of regret or an apology. In our view, once an awareness of this risk is attained, the effect of the policy objective (in seeking to encourage employers to offer sincere apologies to a worker following a workplace injury), may unfortunately likely be diluted.

If the government determines to proceed with the amendment, we would urge that consideration be given to a similar amendment in the WHSA to facilitate (some) legal protection for 'the maker of an apology' and its implication in potentially serious criminal proceedings. In our view, this is necessary to achieve the policy intent of the proposal.

Clause 73 Power to require information or documents from particular persons

QLS is concerned by the wider scope of the proposed change. We do not agree with the breadth of information that might be required or documents requested for a "contravention" of the Act by an authorised person in the absence of legal advice in relation to the consequences of providing the information or documents.

The Society is of the view that the threshold of "reasonable belief" is an insufficient hurdle for an authorised person to satisfy where the extent of the power proposed is "any contravention" of the Act and there are significant penalty provisions for non-compliance. We also note that where a person does not comply with the requirement and does not have a reasonable excuse for doing so, a maximum penalty of 100 penalty units may apply.

While we note that current section 532C(6) provides that a "reasonable excuse" includes 'complying might tend to incriminate the individual or expose the individual to a penalty', without the current nexus to an offence provision – which would be lost with the proposed change - the person may not be aware of the potential legal ramifications of providing the information or documents required. We therefore suggest that consideration be given to the following additional amendments:

> ***532CPower to require information or documents from particular persons***
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> *(4)When making the requirement, the authorised person must give the person a~~n offence~~ contravention warning for the requirement.*
>
> *(6)It is a reasonable excuse for an individual not to comply with a requirement under subsection (2) if complying might tend to incriminate the individual or expose the individual to a penalty, including any contravention of this Act.*

Where the proposed amendment seeks to widen the investigative power (from "any offence" to "any contravention"), protection from self-incrimination should also clearly extend to contraventions of the Act.

***TAFE Queensland Act 2013* - amendments**

Finally, QLS supports the steps being taken to promote cultural diversity on government boards and in this regard, note Clause 29 which sets out that 'at least 1 member of the board must be an Aboriginal person or Torres Strait Islander'.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Bill Potts
President