Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

Our ref: Criminal Law Committee 5 July 2013

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email: lacsc@parliament.qld.gov.au

Dear Research Director

Justice and Other Legislation Amendment Bill 2013

Thank you for providing the Society with the opportunity to comment on the *Justice and Other Legislation Amendment Bill 2013* (the Bill).

Please note that in the time available to the Society and the commitments of our committee members, it is not suggested that this submission represents and exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

We make the following comments for your consideration.

1. Anti-Discrimination Act 1991

Amendment of s140- commissioner may reject or stay complaints dealt with elsewhere

The Society notes the amendment to allow the commissioner to reject or stay a complaint if the commissioner reasonably considers the act or omission that is the subject of the complaint may be effectively or conveniently dealt with by another entity (proposed section 140(1)(b)). There may be several courses of action available to a complainant and we consider that it is a complainant's choice as to which avenue they pursue. This may be because they seek to pursue a specific remedy, to comply with legislative timeframes, or because of costs reasons.

In terms of varying time lines, for example, the Fair Work Commission requires an application to be lodged within 21 days for unlawful termination. Alternatively, the Anti-Discrimination Commission Queensland generally requires that the discrimination have occurred within 12 months of the complaint.

We also note that an applicant can request reasons for the decision to reject a complaint (section 142). However, it is not clear from the legislation whether the commissioner has an obligation to invite the applicant to make submissions about the matter before making a decision to reject the complaint. We suggest that it is important for a person to be given the opportunity to inform the commissioner's decision-making, particularly in light of section 3(b) of the *Legislative Standards Act 1992* which provides that legislation should be consistent with principles of natural justice.

Insertion of new s168A- complaint may lapse if dealt with elsewhere

Proposed section 168A(4) gives the commissioner power, after considering submissions made within a show cause period, to cause a complaint to lapse. This is on the basis that the act or omission has been adequately dealt with by another entity or may be more effectively or conveniently dealt with by another entity. The options which exist at both Commonwealth and State law offer varying remedies; are subject to different time frames; and may produce a range of costs depending on the outcome. We consider that for the commissioner to 'reasonably' consider whether a complaint should lapse on these grounds, due consideration must be given to these issues.

The issues needing to be addressed by the complainant are complex and may require extensive knowledge of the various other avenues available for redress. In cases where a person is unrepresented, this may present an access to justice concern.

We consider that the following issues should be clarified in the Bill:

- The commissioner should be obligated to provide reasons to the complainant for the decision made;
- There should be provision to extend the time frames involved on request by the complainant, to ensure that the complainant has enough time to consider the detailed issues involved; and
- There should be a mechanism in place by which a complainant can appeal the decision to lapse the complaint.

The Society considers that these issues should be clarified across the various provisions regarding lapsing applications in the Bill (sections 168, 168A, 169 and 170).

2. Coroners Act 2003

Insertion of s46A- publication of coroner's findings or comments

The Society agrees with the amendment to provide for the publication of the coroner's findings or comments, as this will increase transparency in the process.

Insertion of s62A- access to physical evidence exhibit

This insertion largely brings access to physical evidence exhibits in line with how one deals with investigation documents. In order to ensure consistency and that physical evidence is appropriately handled, we suggest that section 55 (conditions imposed on access) and section 56 (refusing access in the public interest) of the *Coroner's Act 2003* should apply to access to physical evidence exhibits. Currently, these sections appear only to apply to access to investigation documents.

Similarly, section 52 (documents that cannot be accessed) of the *Coroner's Act 2003* provides situations where a coroner must not give a person access to an investigation document. These important exceptions include where it is subject to legal professional privilege, where it contains information that is likely to prevent a person from receiving a fair trial, or was obtained from a person under a requirement in another Act that compelled the person to produce the information. The Society considers that the Legal Affairs and Community Safety Committee should recommend amending the Bill to ensure that any relevant exceptions provided in section 52 apply, so that access to physical evidence exhibits is protected in a similar way to access to investigation documents.

3. Domestic and Family Violence Protection Act 2012

Replacement of s48- temporary protection order in relation to application for variation

We note the purpose of the proposed amendments to the *Domestic and Family Violence Protection Act 2012 (DFVPA)* is:

> *"to provide that when a temporary protection order is made on an application to vary a domestic violence order, the existing domestic violence order is suspended until the variation application is finalised to ensure there is only one order in force and clarity as to the conditions the respondent must comply with."*

We support, in principle, the purpose of the proposed amendments, however the experience of our members is that in practice there appears to be divergent practices as to whether a Magistrate will allow an application to vary a temporary protection order to be heard.

We note that section 23(2) of the DFVPA defines "domestic violence order" to include a temporary protection order. Section 86 of the DFVPA provides that an application for a variation to a domestic violence order may be made by the aggrieved, respondent, named person, authorised person for the aggrieved, a statutory agent or a police officer. As it is clear from the legislation that a temporary protection order may be varied by application, we recommend, for clarity, that there be an editor's note or an example in the DFVPA that a temporary protection order may be varied (either by oral or written application) at any time.

Replacement of s142- procedure for proceeding under this Act

The Society supports the proposal to have stand-alone rules of Court for domestic violence proceedings in principle. It is the experience of our members that, presently, self-represented litigants struggle with understanding the process and also the circumstances when the *Uniform Civil Procedure Rules 1999 or the Justices Act 1886* will apply. The Society considers that the rules must be drafted in consultation with stakeholders to ensure that they provide for a simple and easy to understand process.

The Society briefly highlights that, as the Childrens Court of Queensland is empowered to make orders under the *Domestic and Family Violence Protection Act 2012*, any establishment of stand-alone Rules should also consider whether consequential amendments need to be made to the *Childrens Court Act 1992 or Childrens Court Rules 1997.* The Society has not considered this issue in detail but brings this to your attention for further analysis.

4. Justices Act 1886

Amendment of s154- copies of records

The Society notes the sub-delegation of the Minister's powers to an appropriately qualified officer or employee of the department (proposed section 154(5B)). Given the sensitive nature of the records in question (including a record of proceeding in the Childrens Court or a record of a proceeding that has been made while the court is closed under a provision of an Act), consideration should be given as to whether the power to act in these situations should be with the Minister or chief executive.

5. Legal Profession Act 2007

Amendment of s662 – administrative support of the board

In addition to the proposed amendment to the heading of section 662 of the *Legal Profession Act 2007* contained in clause 115 of the Bill, it is suggested that the words "and legal" be inserted in section 662(1) after the word "administrative". This would reflect the wording in the heading and make it consistent with the renumbered section 662(3).

Amendment of s706 – Duty of relevant entities to report suspected offences

It has come to the Society's attention that there are some in-house legal officers employed by statutory authorities and corporations engaging in legal practice who may not hold a practising certificate. This is mostly through inadvertence but, in those cases, the in-house legal officers are in breach of section 24(1) of the *Legal Profession Act 2007*.

When there is a breach or a suspected breach of the Act, the Society has an obligation under section 706 of the Act, as the regulatory authority, to report those suspected offences to,

relevantly, the Commissioner of Police, the Crime and Misconduct Commission and the Director of Public Prosecutions.

The Society considers that, when these inadvertent and minor breaches occur, it would be preferable that the Society had a discretion as to whether that matter is reported based on its assessment of the severity of the suspected offence and the surrounding circumstances. This is similar to the discretion the Society already has in relation to matters concerning practising certificates and show cause notices.

While this is not currently an amendment in the Bill, we consider that it would be timely for this issue to be addressed. Accordingly, the Society requests that consideration be given to amending section 706(2) to remove the word "must" and replacing it with the word "may".

6. Magistrates Court Act 1921

Insertion of s57C- Rule-making power

This amendment inserts the power for the Governor in Council to make rules of court for the *Domestic and Family Violence Protection Act 2012*, aside from appeals. The Society notes that consequential amendments may need to be made to the *Childrens Court Rules 1997* to reflect the development of *Domestic and Family Violence Protection Rules*, given that applications under this Act can be made in the Childrens Court.

7. Peaceful Assembly Act 1992

Replacement of s17- limitation on delegation

Currently the commissioner can delegate powers under the *Peaceful Assembly Act 1992* to a Superintendent of Traffic within the meaning of the *Transport Operations (Road Use Management) Act 1995*. We note that section 4.10 of the *Police Service Administration Act 1990* grants the commissioner wide delegation powers to "a police officer or staff member." The amendment seeks to limit this delegation only to a police officer who is of the rank of sergeant or higher. Given the significant scope of the powers contained in the *Peaceful Assembly Act 1992,* we suggest that the Legal Affairs and Community Safety Committee could consider whether delegation should be to a police officer who is of the rank of Inspector or higher.

8. Personal Injuries Proceedings Act 2002

Amendment of s67A- definition of 'community legal service'

The Society was only given two days to provide feedback on the change to the definition of 'community legal service' in the *Personal Injuries Proceedings Act 2002*. Since that time, our Access to Justice and Pro Bono Law Committee has identified the following issues for consideration with regard to the proposed definition:

- The requirement that an organisation 'holds itself out' as a community legal centre appears to lack minimum standards for service provision. We understand that there is a national accreditation scheme "developed to provide an industry based certification process for Community Legal Centres (CLCs) that will support and give recognition to good practice in the delivery of community legal services."[1] We suggest that the Legal Affairs and Community Safety Committee should consult with the Queensland Association of Independent Legal Services Inc (QAILS) to develop a definition which takes into account accreditation specifications.
- The Queensland Indigenous Family Violence Legal Service appears to have been excluded from the definition and we recommend consideration of its inclusion.
- The definition of 'legal services' is the same as provided in the *Legal Profession Act 2007.* However, there may need to be specific consideration of the types of legal service provision undertaken by community legal services. We suggest the Legal Affairs and Community Safety Committee consult with QAILS on this issue.

9. Queensland Civil and Administrative Tribunal Act 2009

Amendment of s46- withdrawal of application or referral

The Bill amends the *Queensland Civil and Administrative Tribunal Act 2009 (*QCAT Act) so that an application or referral may be withdrawn without leave of the tribunal generally, except for certain applications under the *Disability Services Act 2006,* the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998.*

The Society is concerned that applications in the child protection jurisdiction would be able to be withdrawn without leave of the tribunal. We highlight the principle that, when dealing with children's matters in QCAT, the best interests of the child must be considered (section 99C(a), *Child Protection Act 1999).* In our view, once a matter has come before the tribunal, the tribunal should oversee the application to ensure that any withdrawal is in the best interests of the child.

We recommend that applications or referrals made under the *Child Protection Act 1999* should be included in the list of exceptions to the general rule for withdrawal of an application or referral.

Amendment of s122- Dispensing with request for written reasons and *s142- appeal*

The Society notes that the clause 150 proposes to limit the circumstances where the tribunal is not required to comply with the request for written reasons. We note the Explanatory Notes state that:

[1] National Association of Community Legal Centres Accreditation Scheme, found at: http://www.naclc.org.au/cb_pages/accreditation_spp.php

Clause 150 amends section 122 (Request for written reasons) to provide the tribunal with a discretion as to whether or not to issue written reasons for particular procedural decisions under the Act. This will assist the tribunal to apply its resources appropriately. For instance, parties have requested reasons where the tribunal has decided to adjourn a matter for a small number of days. The requirement to provide written reasons in such situations places an unnecessary burden on the tribunal, and a discretion to provide written reasons is appropriate.

The Society does not support clause 150 as it is inconsistent with the fundamental legislative principles set out in sections 3(b) and 3(g) of the *Legislative Standards Act 1992* and also section 3(e) of the QCAT Act. In our view, not only does it reduce the Tribunal's transparency, it also negatively impacts on the rights of individuals and will likely weaken the public's confidence in the justice system. The right of review and right to reasons are fundamental components of natural justice. Whilst the Society notes that there may be some procedural burdens placed on the tribunal as a result, in our view, ensuring participants are afforded with natural justice is paramount. This means affording participants with the right to reasons for:

- a decision by default under section 50 on terms, including terms about costs and the giving of security has been set aside;
- a decision where 2 or more proceedings concerning the same or related facts and circumstances have been consolidated;
- a decision determining the sequence of the hearing for 2 or more proceedings which have been consolidated;
- a decision on whether the matter is to be heard separately or together for 2 or more proceedings which have been consolidated;
- a decision on how evidence is to be taken, a matter is to be adjourned or person is called as a witness;
- a decision where the Tribunal has decided to extend or abridge time or waiver compliance;
- a decision where the Tribunal has made a direction at any time in a proceeding to do whatever is necessary for the speedy and fair conduct of the proceeding (including producing a document);
- a decision where the Tribunal has made a direction for a third party to produce a document (including costs for producing a document); and
- a decision where the Tribunal has made an order requiring that a relevant document be amended.

We also consider that parties should be afforded an appeal right where a decision has been made to set aside a decision by default under section 51.

We therefore recommend that clauses 150 and 152 be deleted from the Bill.

Amendment of s237- Immunity of participants

We note clause 157: "Amendment of s 237(11) (Immunity of participants etc.)," which provides the assessor with immunity from suit, defines assessor as: "… a person appointed by the tribunal to assess costs under the rules."

Our members are concerned that an assessor who is not appointed by the Tribunal "under the rules" will not be afforded with immunity as section 107(2) of the *Queensland Civil and Administrative Tribunal Act 2009* provides the member with a discretion whether to make an order in accordance with the rules.

We therefore recommend that section 107 of the QCAT Act be amended so that any order for a cost assessment is deemed to be an order pursuant to the rules. Such an amendment would not only provide costs assessors immunity from suit when undertaking a cost assessment (which is consistent with the procedure in the Courts), but would also provide costs assessors and Registry Tribunal staff with certainty as to the procedures involved for cost assessments.

10. Succession Act 1981

Insertion of Division 6A- International wills

The Society was provided with an opportunity to submit feedback on the proposed amendments prior to its introduction into Parliament. We commend the Attorney-General for this initiative and maintain our view that broad consultation on legislation at an early stage is the key to good law.

The Society supports uniformity and supports, in principle, adopting the UNIDROIT Convention. Our feedback on the proposed amendments is summarised below.

Proposed section 33YE - Application of Act to international wills

We commend the drafters for the inclusion of proposed section 33YE ('application of Act to international wills') which states:

> *To avoid doubt, it is declared that the provisions of this Act that apply to wills extend to international wills (our underlining).*

However we note there may be some confusion as to which "provisions of this Act" are to apply. For example if it is to be all provisions of the Act, this may provide some confusion as to whether section 102 witnessing requirements or the proposed Schedule 3 Convention witnessing requirements are to apply. To that end, we recommend that it be made clear (whether through an amendment of the *Succession Act* or the inclusion of an editor's note or example) that section 18 of the *Succession Act 1981* (QLD) applies to an international will to save it as an "ordinary will" but cannot apply to save it as an "international will."

[2] "How a will must be executed."

We also recommend that it be made clear that the provisions regarding dispensing with executing formalities[3] and statutory wills[4] are to apply to an "international will."

Thank you for providing the Society with the opportunity to comment on the Bill. For further inquiries, please contact our Principal Policy Solicitor, Mr Matt Dunn on (07) 3842 5889 or m.dunn@qls.com.au ; or Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dcruz@qls.com.au.

Yours faithfully

Annette Bradfield
President

[3] *Succession Act 1981* (QLD) s18.
[4] Relevantly *Succession Act 1981* (QLD) Subdivision 3: Persons without testamentary Capacity.