Queensland Law Society

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Office of the President

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Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
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By email: lacsc@parliament.qld.gov.au

Dear Research Director

Court and Civil Legislation Amendment Bill 2017

Thank you for the opportunity to provide comments on the Court and Civil Legislation Amendment Bill 2017 (the Bill).

Due to the short timeframe allowed to consider all of the proposed amendments, and consequences thereof, we advise that unfortunately our response is not able to be an exhaustive review of the clauses. We submit that consultation periods should be sufficient to ensure that people are adequately able to assess and respond to any changes to their rights and obligations.

Therefore, while the Society does not propose to comment on all amendments proposed in this Bill, we happy to support those that correct numbering and similar errors, and those that generally make provisions easier to read and interpret.

To that end, we note that the amendments proposed in clauses 174 and 223 will need amendment so that the amended sections contain a subsection (1) and a subsection (2).

1. **Amendments to acts requiring publication in the gazette**

We note the proposed amendments to the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*, the *Acts Interpretation Act 1954*, the *Justices of the Peace and Commissioners for Declarations Act 1991* and the *Professional Standards Act 2004* propose, inter alia, that publication of requisite forms, notices and appointments etc will not need to be published in the gazette.

The Society considers that the gazette is an important public record and that there should be a central source for government notices to be published rather than information of this nature being dispersed across various government websites. The gazette is also a permanent public record which is important for the retention and identification of public information.

However, the Society supports the publication of documents and information on a relevant website in addition to the gazette.

2. *Appeal Costs Fund Act 1973*

Firstly, we submit that it is difficult to assess the practical effect of changes to the Appeals Costs Fund (the Fund) without being provided with more information about the general operation of the Fund, including claims made against it, the funds available and what effect any change in funding arrangements may have. No basis or policy consideration for these amendments has been provided.

Based on the information publicly available, and the experience of our members, the Society does not support the amendments in their current form.

The amendments to section 5 of the Act remove the payment of interest on the Fund and remove the mechanism to top up the Fund if the Fund is insufficient. Unless there are alternative mechanisms in place, or the Fund is sufficiently large, this is likely to mean that the Fund will be unable to pay valid claims. While we note the amendments also remove the cap on the Fund (which currently exists in section 5(7)), without claims data we do not know whether this will compensate for the removal of the support of consolidated revenue.

A further point not dealt with in the Bill is that section 16(3) of the Act limits the amount payable, with respect to an appeal, to the amount fixed by regulation. This amount has not increased for some time despite costs, in all other respects, rising. Given that section 16 refers to both the respondent's own costs, and the costs they are ordered to pay, the Society considers this limit is inadequate and ought to be removed or increased.

We submit that proposed amendment to section 22 of the Act to insert subsection (1B) may not capture all of the events that will result in costs thrown away, for example, where a matter is adjourned. Accordingly, we recommend that the subsection say:

> *For subsection (2), costs thrown away means costs that are reasonably incurred that are wasted or no longer of any use in the proceedings having regard to the indemnity certificate.*

Finally, we note the amendment to insert section 31 into the Act gives retrospective effect to the above. The Society opposes the proposed amendment on this basis it is unfair to parties who are yet to receive monies or benefit from the Fund. The adoption of the amendment may create unjust and unforeseeable outcomes and may be contrary to section 4(3)(g) of the *Legislative Standards Act 1992*.

3. ***Classification of Computer Games and Images Act 1995*, *Classification of Films Act 1991*, *Classification of Publications Act 1991* and the *Criminal Code*.**

The Society has not had the opportunity to consider these amendments in any detail. From an initial reading of the clauses, it appears that the ambit of this legislation is to allow for the classification of some films and games etc, in Queensland, to be brought in line with the federal classification system.

The Society does not take issue with the proposed amendments to the *Criminal Code* on the basis that these amendments will not abrogate any defence a person has available if he or

she is charged under section 228E of the *Criminal Code* and, that the amendments simply transfer the power to determine if something is exempt from classification from the State Government to the Commonwealth Government.

However, given that these powers to make material exempt from classification are now moving to the Commonwealth Government, we urge the State Government to make appropriate submissions to the Commonwealth to ensure sufficient funding and resources are available to allow for the review of Queensland computer game, film and publication material, subject to conditional cultural exemptions, in a timely and relevant manner.

4. ***Land Court Act 2000***

The Society supports the proposed amendments to the *Land Court Act 2000* as set out at clause 144 of the Bill.

5. ***Legal Aid Queensland Act 1997***

The Society opposes amendments to this Act to allow the appointment of a CEO of Legal Aid Queensland who is not a lawyer. The rationale for our opposition is founded in the *Legal Aid Queensland Act 1997* (LAQ Act) itself.

Firstly, section 3 of the LAQ Act provides that one of that the LAQ Act's main objectives is "*giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way*."

"*Legal assistance*" is defined in section 5 to mean the, "*giving of a legal service, including legal advice*." It is therefore imperative that the CEO of the body established to perform these functions is a lawyer, capable of giving and administering legal advice.

We note that the current wording of section 65 says that a CEO must not only be a lawyer but must have at least 5 years' experience as a lawyer.

There is significant value in having a lawyer as the CEO of Legal Aid Queensland. Lawyers owe and understand their duties to the Court, to their client and understand the rule of law. A lawyer will be able to comprehend the intricacies of the work that Legal Aid Queensland performs and is equipped to assess the merits, quality and risks of the services provided. A CEO who is a lawyer will also appreciate the consequences of decisions made by the CEO on the legal and ethical obligations of the lawyers, both within and outside the organisation.

We do not believe that our concerns will be addressed by the proposal for a Legal Aid lawyer, whether a "primary holder" or a "reserve holder", to hold a practising certificate. This additional position is unnecessary duplication which could be avoided if the CEO was legally qualified.

If the Act is amended in this way, we believe there ought to be clear delineation between the role of the CEO and the persons nominated under clause 73A so that the CEO is not in a position to compromise privilege or the integrity of the work that Legal Aid performs. There

must be proper oversight of these positions and consideration of who appears publically on behalf of Legal Aid.

Rule 10(b) of the *Queensland Law Society Administration Rule 2005* (the Rule) provides that a limited principal practising certificate may be issued, relevantly, to the chief executive officer of Legal Aid Queensland, appointed pursuant to section 64 of the LAQ Act, or to other persons employed by Legal Aid Queensland and who are nominated by the chief executive officer for this purpose.

Therefore, the Society will not be able to issue a practising certificate to a person who is appointed under clause 73A as it is currently worded. If the wording in this clause is to remain, the Rule will need to be amended by our Council. We cannot provide any advice on whether our Council will support such an amendment at this time, as it has not considered the issue.

We also note that if these amendments are made, the appointment process under the amended clause 73A must be carried out in such a way as to ensure that if a non-lawyer CEO is appointed, the "primary holder" and "reserve holder" of a relevant practising certificate must be nominated and appointed before the CEO is appointed. Otherwise, there is a risk that there will be a period of time where no one at Legal Aid Queensland has the requisite practising certificate to allow the entity to perform its legal functions.

Accordingly, the process must be carefully conducted to ensure the relevant Legal Aid lawyer holds a limited principal practising certificate before the CEO (who is not a lawyer) is appointed.

6. ***Legal Profession Act 2007***

This Bill proposes amending section 330(7) of the Act to allow for a client to consent to a bill being provided by electronic communication. The Society does not believe this amendment is sufficient.

The Society had previously requested an amendment to section 330(5) and potentially section 330(7) in relation to bills being sent by a law practice to a client. Specifically, the Society had requested an amendment to section 330(5) to enable a law practice to send a bill to a client by way of email as of right.

There is no difference between an email and a posted letter insofar as a client has provided these details as his or her contact details. Posted mail is just as likely, and we submit even more likely, to be ignored or misplaced or seen by someone other than the client, than an email. No consent however, is needed from the client before a letter or bill is posted to them.

We request that the Act be amended to allow for the electronic conveyance of bills as a right.

7. ***Ombudsman Act 2001***

Section 83(4) of this Act states that each strategic review (of the Ombudsman's office) is to be undertaken by an appropriately qualified person. Clause 183 of the Bill inserts subsection (4A) into section 83 to say that a corporation is an appropriately qualified person if a director,

employee or other staff member of the corporation is appropriately qualified to undertake the review.

We submit that this new subsection should expressly state that this qualified director, employee or staff member is the person who needs to conduct or supervise the review.

Clauses 175 and 178 are examples of provisions which the Society finds very concerning. Any breach of a fundamental right, such as the right to claim privilege against self-incrimination, should be a last resort. Fundamental rights of this nature underpin the rule the law and the justice system as a whole. The High Court has found that fundamental rights can be lawfully abrogated either expressly or by implication by statute. Over the past 20 years there has been a trend to introduce legislation across the country which abrogates fundamental rights, more often than not, relating to the abrogation of self-incrimination privilege. If legislation of this nature continues to be implemented at its current rate the right, the ability to claim privilege against self-incrimination will cease to exist within our justice system.

If clause 178 will abrogate self-incrimination privilege as proposed by clause 175, then strong and specific protections of the admissibility and use of that evidence must be included in the statute. Clause 178(2) is strongly worded, however, should also protect against the use of derivative evidence being admissible against the individual. It is noted that the Act specifically refers to 'derivative evidence' being admissible to use against an individual in criminal proceedings about the falsity or misleading nature of the evidence (perjury type offences). However, the Act is silent on protecting against the otherwise use of derivative evidence against an individual.

8. ***Penalties and Sentences Act 1992***

The current drafting of these proposed new sections do not make clear whether the amendments would apply retrospectively. If so, this is concerning as court may not have had the opportunity to consider whether a notation in relation to domestic violence should be recorded in association with the criminal conviction in the circumstances. The Society takes no issues with the proposed amendments on the basis that they prospective.

9. ***Property Law Act 1974***

QLS supports the amendment of section 57A(1) of the *Property Law Act 1974* as proposed.

In particular, QLS supports the policy position that subordinate legislation should not be permitted to void a contract and agrees that, as noted in the Explanatory Notes, "any such provisions (other than prescribed subordinate legislation) will be contained in primary legislation which is appropriately subject to the scrutiny of Parliament."

10. ***Public Guardian Act 2014***

The Society supports the proposed amendment to the *Public Guardian Act 2014*, which addresses a gap in the definition of relevant child, by expanding it to include children who are subject to an application for a temporary custody, temporary assessment, court assessment or child protection order.

11. ***Queensland Civil and Administrative Tribunal Act 2009***

Whilst we do not take issue with the proposed changes to this Act, we query whether it is the Government's intention to have costs in QCAT determined in accordance with the processes set out under the UCPR as a matter of course, given that wording in the proposed new section 131(2) says that a person "may" enforce a decision in the way prescribed.

We believe that providing for all costs to be assessed under the UCPR will promote consistency and certainty for parties and we note that that this process is self-funding, as costs assessors fees are recoverable as part of the costs order.

On this point, we wish to raise that the current wording of section 59(4)(b) of the *Civil Proceedings Act 2011* is confusing in its operation as it refers to costs being paid within 21 days after assessment where the money order includes an amount for costs. This provision deals with the situation where the Court is fixing costs, not where an assessment is needed. Obviously if an amount for costs is included in the money order, there will not be an assessment. However, we propose amending section 59(4)(b) of the Act as follows to cover both instances:

> *(b) if the money order includes an amount for costs and the costs are paid within 21 days of service of the money order or are paid within 21 days of the service of the money order debt, interest on costs is not payable unless the Court otherwise orders.*

12. ***Retail Shop Leases Act 1994***

12.1 Background

The Society does not support clause 220, proposing an amendment to section 21F of the *Retail Shop Leases Act 1994* (RSLA).

Similar wording to the proposed new section 21F(3A) of the RSLA was proposed during the recently concluded consultation on the Retail Shop Leases Amendment Bill 2015 (2015 Bill), which was passed in May 2016 as the *Retail Shop Leases Amendment Act 2016.*

The wording in the 2015 Bill formed part of an objection notice and dispute resolution process involving Queensland Civil & Administrative Tribunal. The Society opposed the amendment at the time due to the practical and commercial effect of prescribing this lengthy regime.[1]

The Society was pleased that the provisions of concern were ultimately removed from the Bill during consideration in detail.

[1] Submission dated 24 November 2015 at page 4 - http://www.parliament.qld.gov.au/documents/committees/ETISBC/2015/Retail%20Shop%20Leases%20Amendment%20Bill%202015/submissions/003.pdf

On review of the proposed section 21F(3A), the Society does not support this amendment.

12.2 Current position

The RSLA Act requires landlords to give a lessor disclosure statement to retail tenants (who are predominately small business owners) prior to entry into a lease so that tenants are aware of the key terms of the lease before signing.

It is important that tenants are able to rely on the information in the disclosure statement.

At present, a tenant may terminate a lease if the disclosure statement is defective, that is either it:

(a) is incomplete in a material particular; or

(b) contains information that is false or misleading in a material particular.

The right may only be exercised within the period of 6 months after the lessee enters into the lease.

The Society submits this is an appropriate test as it does not allow termination for a minor (non-material) error or omission but enables a lessee to determine, based on the nature of the error or omission, whether it has a remedy as a result of the inaccuracy.

12.3 The Proposed Amendment

The proposed amendment provides that a lessee cannot terminate a lease because of a defective disclosure statement if:

(a) The lessor acted honestly and reasonably in giving the disclosure statement; and
(b) The lessee is in substantially as good a position as the lessee would be if the disclosure statement were not a defective statement.

Whilst this seems reasonable in theory, the practical effect is to deprive retail lessees of any real remedy if an inaccurate disclosure statement is given, except in cases of blatant fraudulent behavior. In the Society's, view this is contrary to the underlying principles of the legislation.

Firstly, an assessment of whether a lessor has acted honestly and reasonably requires the lessee to know:

(i) the lessor's state of mind; and

(ii) the reasons for, and circumstances which led to, the lessor to issue an incomplete or inaccurate statement.

Except in the most obvious cases, a lessee cannot be expected to know these things. It would be very difficult for a lessee to prove to a court or tribunal that a lessor had acted dishonestly or unreasonably.

Secondly, paragraph (b) is unclear and open to different interpretations. On the one hand, it may simply mean that the lessee is worse off because (for example) the rent in the lease is substantially more than what was stated in the inaccurate disclosure statement. On the other hand, it may require a lessee to establish that it was actually mislead by the inaccuracy, that is a landlord may be able to argue that the tenant is no worse off because it must have been aware of the true position (for example, it is clearly stated in the lease or in a letter of offer).

The decision in *Horvat v Geoffrey Grantham & Associates (Legal Practice)* [2008] VCAT 1278, which involves consideration of very similar wording in relation to disclosure statements under section 32 of the *Sale of Land Act 1962* (Victoria) seems to support the latter interpretation. A purchaser was found not to be entitled to terminate for an inaccuracy in a disclosure statement because the purchasers had inspected the property and the VCAT member found they would have been aware of the true state of affairs in relation to an omitted covenant.

The proposed changes are, in the Society's opinion, unnecessary and significantly detract from the intended purpose of the disclosure statement as a small business protection measure.

15 Right to Information Act 2009

The Society supports the amendment proposed in clause 238 of the Bill which inserts "16 Particular documents relation to judicial appointments" into Schedule 1 of the Act.

16 Succession Act 1981

The Society supports the proposed amendments to the *Succession Act 1981* as set out in the Bill.

17 Trusts Act 1973

Section 67 of the Trusts Act does not, in its current form, appear to extend to informal administrators, that is to say, a person who would be entitled on intestacy to obtain letters of administration, but who is able to administer an intestate estate without it. Such a person is recognised to exist by section 111(2)(b)(i) of *Land Title Act 1994* which, with its preceding analogues including section 32A of *Real Property Act* of 1877, represents continued recognition of such a person for 140 years.

This continued willingness to recognise the role of the informal administrator suggests that they are not a rare individual. Yet an informal administrator and their counterpart in the case where there is a will (the non-proving executor), receive very little recognition, even though the ability to administer estates without a grant will save, at the least, disbursements including court filing fees of the order of $900 per estate.

There is a difference between persons who administer estates in Queensland without a grant (whether there is a will or not) and those that administer with a grant. Those that administer with a grant have undergone a judicial or quasi-judicial testing of their entitlement to be clothed with that authority. Yet there is no equivalent process of authentication in relation to an inter vivos trust deed. There is no mechanism to determine whether there is a subsequent trust deed which terminates the trust, or entirely amends the terms of it. There is therefore no great quantum leap from the provisions of the Act applying to inter vivos trustees (who do not

have to do establish the integrity or existence of the trust in any way that matches the processes involved in applying for and obtaining probate or letters of administration), to those provisions applying to administrators and executors who administer without obtaining a grant.

Therefore, the Society suggests that the definition of 'personal representative' under section 5 of the *Trusts Act* be amended as follows:

> *"**personal representative** means the executor, original or by representation, or the administrator (**with or without a grant)** for the time being of the estate of a deceased person."*

The inserted words "*with or without a grant"* will ensure that section 67 applies to informal administrators and in doing so, will offer the same protection to those personal representatives as is afforded to a personal representative who has obtained a grant.

The Society is reticent to continue to deal with proposed amendments to the *Trusts Act* in a piecemeal way. Rather, we support the model proposed by the Queensland Law Reform Commission and considers that the implementation of that model will be a more effective approach to reforming the *Trusts Act*.

18 Vexatious Proceedings Act 2005

The Society supports the proposed amendments to this Act as set out in the Bill.

If you have any queries regarding the contents of this letter, please do not hesitate to contact Binari De Saram, Acting Advocacy Manager on 07 3842 5889 or b.desaram@qls.com.au.

Yours faithfully

Christine Smyth
President