

Your Ref:

Our Ref: 326 – 3

24 September 2012

The Research Director
Education and Innovation Committee
Parliament House
GEORGE STREET QLD 4000

By Post and Email to: eic@parliament.qld.gov.au

Dear Research Director

EDUCATION LEGISLATION AMENDMENT BILL 2012

Thank you for the opportunity for the Queensland Law Society to provide comments to the Inquiry into the *Education Legislation Amendment Bill 2012* (the Bill).

The Society notes that an in-depth analysis has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. Furthermore, the Society is only able to comment on the following discrete amendments, and does not make comment on other parts of the Bill.

1. Amendments to *Education and Training Legislation Amendment Act 2011*

Queensland Law Society made submissions to the Industry, Education, Training and Industrial Relations Committee on the *Education and Training Legislation Amendment Bill 2011*. We **enclose** our submission here for your reference.

The Society made submissions in relation to the potential for school staff to fear criminal penalties for non-reporting of likely future sexual abuse:

“...the Society fears that school staff will feel obliged to report any suspicion they might have without having regard to the proper exercise of the test enshrined in the legislation. Staff working under the threat of criminal penalties would form the view that it would be better to report, even if there is no reasonable basis, rather than risk penalties and a criminal conviction if no report is made.”

Additionally, the Society's representative at the public hearing regarding the *Education and Training Legislation Amendment Bill 2011* stated:

The bill goes further than just an obligation to report sexual abuse that is reasonably suspected by the staff and extends the obligation to report sexual abuse that is likely, and it seems that that refers to sexual abuse that is likely to occur in the future. So a member of staff is put in the position of being asked to assess, firstly, what they reasonably suspect and whether what they reasonably suspect is going to be likely to occur. That

would seem to cover the situation where perhaps a student has formed a friendship with an older man. The teacher might not know anything about that friendship other than it appears to be affectionate, but in those circumstances the teacher might, for their own protection, have to ask themselves, 'Could it be said that I reasonably suspected something was likely to occur here and therefore be in a position to make the report?'

It is important to remember that these duties that are being placed upon the teachers and staff are duties which create criminal penalties: if they get it wrong, they are likely to be charged or face the risk of being charged with a criminal offence themselves and having a criminal record—which in some ways chimes in with the later provisions that my colleague Mr Dunn will speak on about the effect of a criminal record on somebody's teaching career. But any teacher or member of staff who is concerned about their career is likely to adopt a 'better safe than sorry' approach to reporting these reasonable suspicions of things that might be likely to occur in the future.¹

Clauses 3 and 4 of the Bill seeks to rectify this situation by providing that a person does not commit an offence against the *Education (General Provisions) Act 2006* or another Act only because the person omits to do an act required under the relevant section. This is to be applied to proposed new ss 365A, 366A and 366B, *Education (General Provisions) Act 2006* ('the Act').

The Society welcomes these amendments, having raised our concerns with this issue during the initial debate on these proposed sections. We applaud the government for listening to the views of relevant stakeholders and acting to resolve this particular issue.

However, the Society's concerns about applying criminal sanctions to matters of professional conduct remain in relation to the reporting of suspected sexual abuse (ss 365 and 366). The Society is opposed to the existence of the criminal offences created in this area. The problem is the nebulous definition of "sexual abuse" (s 364). The full definition is as follows:

sexual abuse, in relation to a relevant person, includes sexual behaviour involving the relevant person and another person in the following circumstances—

- (a) the other person bribes, coerces, exploits, threatens or is violent toward the relevant person;
- (b) the relevant person has less power than the other person;
- (c) there is a significant disparity between the relevant person and the other person in intellectual capacity or maturity.

The first area of uncertainty is created by the use of an inclusive, rather than an exhaustive definition. A teacher consulting the legislation is not assisted to know whether any particular scenario falls outside the definition. The width is presumably intended, at a minimum, to include all sexual behaviour that is also a criminal offence. That requires the mandatory reporting of, for example:

- (a) suspected consensual sexual activity by a couple each 15 years old;
- (b) suspected consensual sexual activity by a teenage couple, one of whom is not yet 16 years old and the other of whom is above 16 years old;
- (c) suspected consensual anal intercourse by a teenage couple, one of whom is not yet 18 years old; and
- (d) the voluntary exchange of sexualised photographs between teenage children using mobile telephones or email ("sexting").

¹ Public hearing on *Education and Training Legislation Amendment Bill 2011*, Transcript of proceedings, Wednesday 12 October 2011, page 13 found at: <http://www.parliament.qld.gov.au/documents/committees/IETIRC/2011/ETLAB/pht-12Oct2011-ETLAB.pdf>

A second area of uncertainty is created by the use of undefined, general terms such as “bribes”, “exploits”, “power” and “maturity”. When is a gift of jewellery, a dinner bill, or a movie ticket suspected to be a bribe? How great a disparity in maturity is considered significant? Is there a disparity in power between the captain of the volleyball team and the reserve players? These are concepts that are perhaps useful for academic studies, perhaps even as a basis for guidelines as to what should be reported, but as a test of criminal liability, they are impossibly vague.

All reports must be passed to a police officer (for example, ss 365(2A), 366(2A)). The unintended effect of the legislation will be therefore to deter many young people from confiding in school staff about their personal relationships. It may also deter teachers and other staff, such as counsellors, from being approachable on the subject. No confidentiality is possible (for example, s 365(7)(b)) even when, in the examples cited above, it would be clearly in the best interests of the child.

The vagueness of the possible scenarios that give rise to an obligation to report mean that a failure to report should not, in the Society’s view, be a criminal offence. It might more appropriately be dealt with as a question of professional conduct. The position in relation to suspected abuse is not materially different in that regard from suspicions of likely abuse. The protection from criminal prosecution proposed in Clause 3 and Clause 4 of the Bill should be extended to apply also to ss 365 and 366 of the Act.

2. Amendments to *Education (General Provisions) Act 2006*

The Society has considered the proposal to remove the requirement for the chief executive to provide an annual notice to a person under 17 years of age permanently excluded advising him or her of the upcoming opportunity to have the decision revoked (clauses 7-11 of the Bill). We note that the right to seek a review of the exclusion each year has not been altered by the Bill, but the regular notice provided to a person in anticipation of the periodic review time frame will be eliminated.

Our members have reported that young people who are excluded often do not know their rights in relation to the periodic review process. Additionally, there is little funding available for legal representation to assist young people in navigating reviews of decisions in this jurisdiction, which can be quite complex. Therefore, the ‘anniversary letter’ can assist in making an excluded person aware of his or her rights to make an application for review each year.

Also, in cases where a young person is in the care of the State, the ‘anniversary letter’ is important because it informs the Child Safety Officer involved with the young person that the periodic review is available. Our members report that, due to the frequency with which Child Safety Officers rotate, the ‘anniversary letter’ is sometimes the only way in which these officers are made aware of the periodic review. Perhaps the Education and Innovation Committee can inquire how many letters are currently going to children in the care of the State, to ascertain the effect that this amendment could potentially have.

Thank you for providing the Society with the opportunity to comment on this Bill. Please contact our Senior Policy Solicitor, Ms Binny De Saram on (07) 3842 5885 or b.desaram@qls.com.au; or Policy Solicitor, Ms Raylene D’Cruz on (07) 3842 5884 or r.dacruz@qls.com.au for further information.

Yours faithfully

Annette Bradfield
Deputy President