

Your Ref: One Funding System for Better Services Bill 2011

Our Ref: Direct Advocacy

1 November 2011

The Research Director
Health and Disabilities Committee
Parliament House
George Street
BRISBANE QLD 4000

By Email: hdc@parliament.qld.gov.au

Dear Research Director

ONE FUNDING SYSTEM FOR BETTER SERVICES BILL 2011

Thank you for providing the Queensland Law Society the opportunity to provide comments with respect to the *One Funding System for Better Services Bill 2011* (the Bill). Thank you also for agreeing to receive this submission from the Society late.

Consultation

The Society was provided an opportunity to make comments on a consultation draft of the Bill as a part of the stakeholder engagement process. We are grateful that some of our comments have been taken up in whole and in part.

Ongoing Concerns

While some aspects of the Society's comments have been adopted in the Bill brought before the Parliament there remains some areas of concern relating to:

- applications for funding and funding agreements; and
- powers to access and compel information and client legal privilege.

Applications for Funding and Funding Agreements

Under the Bill applications for funding and funding agreements are closely inter-related, yet while the processes and limits on applications for funding are set out clearly in the Bill, the process and permissible content of funding agreements are not regulated.

Funding Applications

With respect to funding applications, the Society acknowledges that section 12(2)(j) relating to providing funding under another Act would most likely exclude grants of assistance from the Legal Practitioners Interest on Trust Accounts Fund under the *Legal Profession Act 2007*. The Society proposed to the department that including such a grant in the example would assist certainty of application of the legislation.

Section 18 of the Bill deals with the funding decision of the Minister with respect to an application. We note that there is no time-frame set for a decision to be made with respect to an application and there is no deemed refusal or approval mechanism proposed. The current drafting leaves it open to the Minister simply to never make a decision with respect to an application.

Funding Agreements

Section 19 of the Bill deals with funding agreements to be settled between the relevant chief executive and a funded entity following a decision to approve funding by the Minister. The proposed section does not fetter the types of terms which can be included in such an agreement provided they are 'terms and conditions the relevant chief executive considers appropriate'. There does not appear to be any mechanism proposed in the Bill for an entity which has been approved funding by a Minister to deal with an objectionable term in a funding agreement or to negotiate other than to simply forgo the funding agreed to them by the Minister. The Society is concerned that this permits a relevant chief executive to effectively veto a funding decision of a Minister by proposing unreasonable terms in a funding agreement.

The Society also notes that there is no provision in section 19 or elsewhere in the Bill which provides that any term of a funding agreement which is inconsistent with the Act is void. The QLS sees this as important to ensure that the varying agencies entering into funding agreements do so on a consistent basis with respect to obligation and can not seek to extend the scope of the powers in the Bill by contract to a level which would not be condoned by the Parliament. The QLS has concern that the absence of any check on the scope of content in a funding agreement makes section 19 akin to a Henry VIII clause as a relevant chief executive can by contractual arrangement extend and modify the effect of an Act of Parliament.

Powers to Access and Compel Information and Client legal Privilege

The Bill as it is proposed provides an Interim Manager and Authorised Officers extensive powers to access and compel information from a funded entity.

The QLS is aware that there are a number of Community Legal Centres which provide both legal and non-legal community support services. These legal practices derive their funding from a variety of sources, including those covered by the Bill.

The QLS is concerned that the powers proposed in sections 42 (with respect to Interim Managers), 75 (with respect to Authorised Officers) and 80 (with respect to the chief executive) do not adequately recognise or protect client legal privilege.

Interim Managers

We note that a new section 43 has been added to provide for confidentiality obligations on an Interim Manager in relation to information or documents accessed or gained through that appointment. The proposed section makes it an offence for the person appointed as Interim Manager to disclose the

information to anyone else, with a number of exceptions. One such exception, section 43(2)(f) provides that disclosure is permitted 'if the person reasonably believes a serious concern exists'. The Society notes that one of the threshold issues required for the appointment of an Interim Manager in section 26 is that a serious concern exists. It is submitted that the exclusion provision in (f) will be fulfilled in most cases as the Interim Manager will have been appointed on the basis of a serious concern. As a result we anticipate that the protections provided in section 43 will be of little utility.

Further the QLS has concern that disclosure of privileged client advice by an Interim Manager will abrogate that privilege. The Society sees that a mechanism is required in the Bill for a senior staff member of a funded entity to resist provision of material to an Interim Manager which is subject to client legal privilege. Currently doing so is an offence under section 40 as the Bill does not appear to recognise client legal privilege in material.

Authorised officers and chief executives

Section 75 of the Bill provides the general powers of an authorised officer on entering premises, including the power to examine documents and make copies without recognising client legal privilege in that material. The QLS strongly suggests that client legal privilege needs to be protected for their privacy, to preserve the trust and independence of legal advice and also to ensure that clients of funded entities with claims against the State are not prejudiced in their actions. A mechanism to protect client legal privilege which could be adopted for use in the Bill is contained in section 78 of the *Crime and Misconduct Act 2001*.

We propose that the power in section 80 of the chief executive to compel material also be subject to the recognition of client legal privilege.

Information Sharing

In addition to the concern we have raised with respect to disclosing information under section 43, the Society is concerned about information sharing under section 105 and the fact that client legal privilege is not protected. We suggest that if the previous information gathering powers are not made subject to client legal privilege that sharing or disclosure of information under sections 43 and 105 is prevented for material to which client legal privilege did apply when it was seized.

Thank you for providing the Queensland Law Society with the opportunity to make these comments. If you require any further comments or clarification please do not hesitate to contact our Principal Policy Solicitor, Mr Matt Dunn, on 3842 5889 or via email on m.dunn@qls.com.au.

Yours faithfully

Bruce Doyle
President