Queensland Law Society

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Office of the President

Your Ref:

Our Ref: Elder Law Committee 2100326/8 4 February 2013

The Honourable Trevor Ruthenberg MP
Health and Community Services Committee
Parliament House
Brisbane Qld 4000

By Post and Email: [redacted]

Dear Research Director

QUEENSLAND MENTAL HEALTH COMMISSION BILL 2012

Thank you for your letter dated 30 November 2012, inviting the Queensland Law Society to provide comments in relation to the Queensland Mental Health Commission Bill 2012 (the Bill).

The attached submission has been written with the assistance of the Elder Law, Children's Law and Criminal Law Committees.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitors, Raylene D'Cruz on [redacted] or Louise Pennisi on [redacted]

Yours faithfully

[redacted]

Annette Bradfield
President

Queensland Law Society

Submission

QUEENSLAND MENTAL HEALTH COMMISSION BILL 2012

Health and Community Services Commission

A Submission of the
Queensland Law Society

4 February 2013

Queensland Law Society

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Consultation

The Society has not been consulted on the Bill and notes that there has been no community consultation for amendments to the *Mental Health Act* before the omnibus Bill was introduced into the House. The Society is strongly of the view that broad consultation on legislation at an early stage is the key to good law.

Overall comments

The Society has had the benefit of reading submissions submitted to the Committee by the Adult Guardian, Queensland.[1] The Society endorses the submission in its entirety. The Society overall agrees that including persons with substance abuse issues is a positive step however concurs with the Adult Guardian that a response that addresses deficits in functioning as opposed to stipulating a response based on an assessment of the basis of that need fitting within a particular assessment is more likely to achieve a good outcome not only for the individual concerned but for the whole community. The Society also has similar concerns that the Bill, whilst with admirable intentions, will have narrow application in practice and limited powers to effect positive change.

The Society is also concerned that the Bill infringes fundamental legislative principles by unnecessarily impeding the rights and liberties of individuals. The Society will consider the main issues of concern in the submission below. Because of the limited consultation that has occurred there may be additional unintended consequences arising from the Bill that has not been identified in this submission.

The Bill in detail

Clause 3 – Act binds all persons

The Society notes that clause 3(2) states:

> *Nothing in this Act makes the State liable to be prosecuted for an offence.*

As the Explanatory Notes are silent as to the background and intent of this subclause (which considers arguably criminal offences), we are seeking clarification as to how it is intended to operate. Is it intended to absolve an officer or employee of the State from criminal responsibility?

[1] Letter from the Adult Guardian dated 4 January 2013, accessible on the Parliamentary Committee website: http://www.parliament.qld.gov.au/documents/committees/HCSC/2012/QldMtlHlthComBil2012/submissions/003.pdf

Clause 4 – Objective

Clause 4(1) sets out the objective of the Act which is:

> *to establish the Queensland Mental Health Commission to drive ongoing reform towards a more integrated, evidence based, recovery-orientated mental health and substance misuse system.*

While the Society lauds the objectives for the establishment of a Mental Health Commission in Queensland, the Society is concerned that the objectives have narrow application. To some extent, the narrow scope of proposed power of the Queensland Mental Health Commission, does not seem to justify the utilisation of resources necessary for both its establishment and ongoing needs.

The Society considers that, to effect change, the reform objective should be focused on delivering services and providing frontline assistance to those in need. To that end the Society notes that the West Australian Mental Health Commission's reform objectives are to provide, inter alia "person-centred services that support recovery."[2] The Society therefore recommends that the intended Queensland Mental Health Commission mirror the objectives, policies and processes of the West Australian Mental Health Commission.

Clause 11 – Commission's functions

The Society is concerned that the Commission has very limited functions under the Bill to enact change. Presently the Bill empowers the Commission to:

- prepare a strategic plan;
- monitor, review, evaluate and report on the strategic plan and issues surrounding mental health and substance misuse;
- promote and facilitate sharing of knowledge;
- support and promote:
    - strategies to prevent or facilitate early intervention;
    - general health;
    - social inclusion; and
    - community awareness.

While these are important functions, what is notably absent is facilitating improvement of support and delivery of frontline services for all affected persons. The Society recommends its express inclusion.

[2] http://www.mentalhealth.wa.gov.au/about_mentalhealthcommission/reform_objectives.aspx#

The Society also notes that on the face of clauses 11(1)(h)[3] and 11(1)(k)[4] it is unclear what "support" and "other action" respectively the Commission may take to address the general health, wellbeing and needs of affected persons. For instance, is it proposed that the Commission will take on an advocacy function on behalf of affected persons and their support network? The Society considers an example or further information would assist in confirming the parameters of the Commission's functions.

Clause 13 – Ministerial direction

Clause 13(1) states that the Commissioner is subject to the directions of the Minister when performing the Commissioner's functions. The Society considers that the Commission should be autonomous and be able to exercise its functions independently and that the introduction of this clause unnecessarily inhibits the Commission in the exercise of its functions. This is of concern as it will result in increased approvals and procedures which will cause delay and be to the detriment of those seeking frontline services. Therefore we consider that the Commission ought to be responsible for the discharge of its own responsibilities and not subject to either ministerial direction or protection.

The Society therefore recommends that the clause be revised and a provision similar to section 176 of the *Guardianship and Administration Act* 2000 be substituted.

Clause 18 – Term of office

The Society notes that clause 18 sets out that the Commissioner holds office for a three year term. The Society recommends including provisions for reappointment and a maximum term for appointment (including reappointment) of, for example, nine years.

Clause 55 – Review of Commission

Clause 55 sets out that an independent review must take place within three years after commencement. As this is a bourgeoning area, the Society recommends that an independent review take place every three years for the first nine years after creation of the Commission.

Further the society is not aware of any research that suggests that the use of electronic monitoring devices is beneficial either to the wearer or the community. The cost of the devices and their ancillary technology and staff is high, and unless evidence exists as to their beneficial nature, there is no ethical basis for advocating their use.

Amendment of the Mental Health Act 2000

The Society is very concerned that the proposed amendments to the *Mental Health Act 2000* will impede the rights and liberties of individuals, and infringe fundamental legislative principles.

[3] "to support and promote the general health and wellbeing of people with mental illness and people who misuse substances, and their families, carers and support persons;"
[4] "to take other action the commission considers appropriate to address the needs of relevant persons."

Clause 61 – Amendment of s131 (What treatment plan must state for limited community treatment)

Clause 61 provides that if a patient is authorised to have limited community treatment, the plan can include "any monitoring condition required by the Director under section 131A." The Society is very concerned about the operation of this proposed amendment as:

- it unnecessarily impedes the rights and liberties of individuals.
    - There is no explanation as to why this kind of monitoring is required to facilitate treatment, or how it is to take place. Of concern is how it to be utilised in practice and, in particular, who will monitor the monitors to ensure there is transparency, accountability and no abuse of process.
    - The definition of "monitoring condition" in proposed section 131A(3) is vague and the Society is concerned that there is potential for it to be subject to abuse, particularly in the absence of an independent oversight mechanism.
    - The introduction of a monitoring condition in this broad context may also become inadvertently punitive in some cases. For example there may be circumstances where the person is delayed from returning for a reason that is beyond the person's control (for example delays in public transport);
- it will unnecessarily increase red tape for patients, their support network and health care providers but does not increase the efficacy of treatment plans, as a monitoring device will not prevent undesirable behaviour as discussed above;
- it is contrary to the Commission's functions set out in clauses 11(1)(i) and (v) "to support and promote **social inclusion** (emphasis added) and recovery of people with a mental illness or who misuse substances" and "…reducing stigma and discrimination:"
    - Presently the only persons who are required to be monitored are those who are classified as dangerous sex offenders whose status is determined by application to the Supreme Court.[5] By requiring a patient to wear a monitoring device in the community may further stigmatise the patient and inhibit social inclusion; and
- it may create a conflict between the doctor and the Director as s131(1)(b) allows the doctor to set out the conditions necessary for clinical management and the proposed clause 61 (s131(1)(c)) allows the Director to mandate a monitoring condition for treatment:
    - The Society has always held the view that the treating doctor is best placed to provide treatment and clinical management for a patient. We suggest that a monitoring condition imposed by someone without direct clinical knowledge of the patient may adversely impact on the patient's treatment and recovery, and hinder social inclusion.

[5] *Dangerous Prisoners (Sexual Offenders) Act 2003,* s16A.

The Society strongly recommends that clauses 61 to 70 and 73 (as they deal with monitoring conditions) be excluded from the Bill. The Society considers there should be no monitoring conditions for affected persons.

Intersecting roles

The Society notes that the Bill seeks to interweave the role of the doctor with that of the Director of Mental Health. The Society is concerned that the Bill is limiting the powers of the treating doctor by passing them onto the Director. This overlap may will inhibit a person's treatment.

The Society also queries how the Director of Mental Health will interface with the proposed Commission and Mental Health Review Tribunal as under the Bill the Director has increased reporting requirements but no facility in place to divide the districts and manage or effectively assist the local health centres. The Society recommends that these issues be considered further.

Impact on young people

The Society is concerned about the impact the Bill will have on young people. For instance, the Bill is silent on the definition of a "young patient." The Society recommends that this term be defined.

Of concern is the impact of proposed clause 75 – amendment of s526 (Publication of information disclosing identity of parties to proceedings – *Mental Health Act*) on young people. The proposed amendment allows the Director to authorise in writing the publication of information disclosing the identity of a young person who is a party to proceedings. The Society is concerned that this will have a negative impact on the rights and freedoms of individuals, effectively "naming and shaming" young persons with mental illness or substance misuse issues. The publication of this information, particularly in this digital age, will not only have a minimal positive affect on a person's treatment but is likely to create an ongoing reminder of the young person's illness after successful treatment, which may in turn inhibit recovery and inclusion in society. Further, publication may reduce the young person's ability to gain employment. The Society therefore recommends that clause 75 be excluded from the Bill.

Practical application

The Society notes that the success of the Commission hinges on adequate funding allocations and appropriate access to advocacy for patients and their support networks. The Society strongly recommends that these issues be considered, should the Bill be passed.

Thank you for the opportunity to make comments on the proposed legislation.