

11 February 2021

Our ref: LP-MC

Your ref: #5412385

The Honourable Justice Peter Applegarth AM  
Judge, Supreme Court of Queensland  
Chair, Queensland Law Reform Commission  
PO Box 13312  
George Street Post Shop  
BRISBANE QLD 4003

By email: [REDACTED]

Dear Justice Applegarth

**Development of Queensland Law Reform Commission proposed program: 2021-2026**

Thank you for the opportunity to provide feedback on the development of the Queensland Law Reform Commission's proposed program: 2021-2026. The Queensland Law Society (QLS) appreciates being consulted on the program and acknowledges the important work undertaken by the Commission.

QLS proposes the following matters for consideration by the Queensland Law Reform Commission (QLRC) as part of the upcoming program.

***1. Powers of attorney and general powers of attorney***

QLS recommends a detailed investigation of the law relating to powers of attorney, including enduring powers of attorney and general powers of attorney.

The laws relating to the execution of general powers of attorney require clarity and differ from those relating to the execution of enduring powers of attorney.

We are concerned that as both types of documents (enduring and general) have the same effect, general powers of attorney relating to individuals may be more easily able to be used as tools for financial abuse. Consideration should be given as to whether the same strictures and witnessing requirements that exist for enduring documents are necessary for general powers of attorneys for individuals and whether a registration process should be implemented for these documents.

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### **2. Trusts legislation – update of the Queensland Law Reform Commission report, *A Review of the Trusts Act 1973 (Qld)* (June 2013)**

In 2013, the QLRC published its report *A Review of the Trusts Act 1973 (Qld)* (R71).<sup>1</sup>

QLS recommends that the QLRC review and update relevant aspects of its report.

For example, QLS notes that the report was premised on the anticipated abolition, at the time, of the Australian Charities and Not-for-profits Commission (**ACNC**) and the recommendations are based on assumptions that are now out of date.

As part of a review of the 2013 recommendations, QLS also requests that QLRC considers conferring standing to the ACNC to make an application in State courts to assist the Attorney-General in the Attorney's role in the preservation of charitable trust assets. Often the Australian Charities and Not-for-profits Commission will have undertaken significant investigation and evidence-gathering before submitting a brief to the Attorney.

The trusts legislation is critical to the operation of many areas of law and has a significant impact on the day-to-day practice of our members across many practice areas.

### **3. Elder law issues**

QLS recommends that the QLRC investigate and determine whether any legislative response (criminal, civil or equitable, including restitution) is required to address the vulnerability of older persons to violence, exploitation, neglect or any other form of elder abuse.

Any review should also consider:

- Coercive control reforms;
- Whether neglect should be included in the *Domestic and Family Violence Protection Act 2012* and its potential application to older persons and others with disability.
- Any other gaps in the laws protecting older persons from interpersonal violence, including any definitional issues and gaps.

### **4. Children's law issues**

The Society considers that investigation into raising the minimum age of criminal responsibility is required. The Criminal Code sets out the minimum age of criminal responsibility in Queensland. Section 29 (1) of the Criminal Code provides that a person under 10 years is not criminally responsible for any act or omission. Section 29 (1) reflects the common law presumption that children under 10 years are *doli incapax*, or incapable of doing wrong, as they lack criminal intent. The Criminal Code further provides a rebuttable presumption against criminal responsibility for children under 14 years.

The issue of raising the minimum age of criminal responsibility has been raised at both the state, federal and international levels. However, it would be worthwhile for the Commission to investigate the issue from a Queensland perspective.

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<sup>1</sup> <https://www qlrc.qld.gov.au/publications>



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We note that community awareness and support for the need to raise the minimum age of criminal responsibility is increasing. We note further that:

- The Law Council of Australia and a number of eminent bodies have called for change to raise the minimum age;<sup>2</sup>
- 31 countries meeting at the United Nations Universal Periodic Review called for Australia to raise the minimum age of criminal responsibility;
- In 2020, the ACT became the first state or territory government to commit to raise the minimum age of criminal responsibility from 10 to 14; and
- This issue has been discussed at Council of Attorneys-General.
- QLS considers the Commission would be best placed to review the literature surrounding this issue, including data from other jurisdictions and make a recommendation to Government for reform.

### 5. *Coroners Act 2003*

We recommend that the QLRC consider a review of the role and function of coroners in Queensland, including the operation of the *Coroners Act 2003*, in light of:

- The Queensland Audit Office review of [Delivering Coronial Services](#)
- The [QUT Report](#) Justice and Attorney General (JAG) Final report: Evaluation into State Wide Coronial Assistance Services 2016-2020
- The Victorian [Inquest into the Death of Jessica Wilby](#)

The review should examine the:

- legal framework for coronial inquests and whether it best meets the community's needs;
- whether the system should and does deliver therapeutic jurisprudence;
- impact of the *Human Rights Act 2019* in this jurisdiction;
- reporting system effectively investigates institutional deaths such as deaths arising from elder abuse.<sup>3</sup>

### 6. *Anti-Discrimination Act 1991*

The *Anti-Discrimination Act 1991* should be reviewed to:

- consider whether the inconsistent provision of remedies, for example:
  - harassment not provided on grounds other than sex (e.g. age, disability etc);
  - vilification not provided on grounds other than race and religion;

<sup>2</sup> <https://www.lawcouncil.asn.au/media/media-statements/law-council-calls-on-government-to-raise-the-age>

<sup>3</sup> Mitchell, Bill, Identifying Institutional Elder Abuse in Australia through Coronial and Other Death Review Processes, [2018] *MqLawJl* 4; (2018) 18 *Macquarie Law Journal* 35

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have an adverse impact on complainants and other parties;

- consider whether exemptions and exceptions should be modernised to reflect the *Human Rights Act 2019* and other changes in societal expectations;
- consider whether the current list of attributes in the Act is still relevant and adequate;
- identify areas which need technical clarification including identifying the relevant comparator and assessing / awarding costs and damages.

### **7. Powers of entry, seizure of information and compulsion given to departmental officers**

The Queensland Parliament, over the course of several years, has passed a number of pieces of legislation, across a broad spectrum of areas that contain provisions allowing broad powers of entry and seizure of information and documents.

Some of these provisions are considered to be “model provisions” which are inserted into each piece of legislation without specific review or consideration of their effect.

We call on the QLRC to review the reasonableness and proper use of powers given to departmental and authorised officers to enter premises, search for and seize documents and information and to otherwise compel compliance.

The Commission could develop model provisions which adhere to fundamental legislative principles for use in future legislative reform.

### **8. Review of the Oaths Act 1861**

QLS has called on the Government make the legislative reforms necessary to retain the ability to electronically sign and witness certain documents as permitted under the *Justice Legislation (COVID-19 Emergency Response- Documents and Oaths) Regulation 2020*:

- affidavits (used in all State courts and jurisdictions);
- statutory declarations;
- deeds; and
- certain mortgages listed in the regulation.

In doing so, we have advised that certain existing provisions of the *Oaths Act 1861* (**Oaths Act**) are ambiguous or difficult to reconcile with some provisions of the *Uniform Civil Procedure Rules 1999* and existing practices.

QLS requests that the QLRC review the Oaths Act in light of the need to modernise its requirements and effects on legal processes.

### **9. Review of charitable and not-for-profit fundraising regulation, including the Collections Act 1966**

QLS recommends that the QLRC undertake a complete review of the *Collections Act 1966* (**Collections Act**) and the regulatory and legislative framework for charitable and not-for-profit fundraising generally.



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The current regulatory framework does not take account of significant changes in modern society, including the advent of the internet, email, social media and crowd-funding. A compelling example of the contemporary issues that should be addressed in such a review is the bushfire appeals in 2019-2020, mainly conducted via digital means and involving the receipt of significant funds from donors outside the jurisdiction.

The Collections Act is no longer fit for purpose for any stakeholders, whether a regulator, charity, community organisation, donor, beneficiary or the public. In particular:

- The provisions were drafted decades ago without the advantage of modern drafting techniques and plain English disciplines. The comprehension of the act is difficult for qualified lawyers let alone members of the public, the audience to which the regulation is addressed.
- The definitions of charity and community organisations are no longer fit for purpose given changing law, social expectations, social enterprise, crowdfunding and other regulators using more modern definitions. For example, a number of ACNC Queensland-based charities are not charities for the Collections Act.
- The provisions fail to address the modern mischiefs of public fundraising such as undesirable conduct involving the internet, email, crowd-funding, social enterprise and social media.
- The provisions fail to address modern fundraising practice and concepts such as donor lifetime value, multi-channel fundraising techniques, social enterprise, impact investing and the nationalisation and internationalisation of fundraising.
- The exceptions and exemptions provided to some organisations in the Act may require reassessment given changed circumstances.
- The altered regulatory environment, including the advent of new legal forms, the ACNC and consumer protection laws needs to be considered to avoid duplicative compliance obligations.
- Government agencies are using only partially satisfactory 'workarounds' to address fundraising mischiefs such as police powers and local government regulation to cover the deficiencies of the 'unfit for purpose' provisions of the Collections Act. There is a general non-profit sector sentiment that the Act is inappropriate and an unnecessary compliance burden with few redeeming features.

QLS foreshadows that there are significant risks of fundraising fraud and mischiefs which the current Act is unable to appropriately address and this may result in a disastrous reduction of confidence in Queensland charitable fundraising, which will ultimately impact upon Queensland communities.

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As many of our legal policy committees have not yet had their first meetings for the year and many of the members of these committees have only recently returned from leave, we would appreciate the opportunity to raise any additional matters for the QLRC's consideration by the middle of March 2021, after these meetings take place.

In the interim, if you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully

  
Elizabeth Shearer  
President