

5 February 2021

Our ref: OccD-KB

Mr Craig Crawford MP
Minister for Seniors and Disability
Services and Minister for Aboriginal
and Torres Strait Islander Partnerships
PO Box 15457
CITY EAST QLD 4002
By email: [REDACTED]

Dear Mr Crawford MP

Disability Services and Other Legislation (Worker Screening) Amendment Act 2020

We refer to the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020 (Amendment Act)* which was passed by the Queensland Parliament on 7 December 2020, assented on 11 December 2020 and proclaimed on 18 December 2020.

The Queensland Law Society (QLS) made a submission to the Parliamentary Inquiry examining this legislation when it was introduced into Parliament last year. However, due to time constraints, we were only able to raise a few points relevant to access to information by the Chief Executive under the scheme.

It has now come to our attention that there are particular transitional provisions in this legislation that will have a significant adverse impact on individuals who, immediately before the commencement of the Amendment Act, were in the process of reviewing or appealing a decision made under the *Disability Services Act 2006 (DSA)*.

For the reasons set out below, we call on the Government to:

- a. **amend Division 13, Subdivision 6 of the *Disability Services Act 2006* to preserve an individual's right to pursue a review or appeal of a decision made before the commencement of amendments made by the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020*; and/or**
- b. **enable a person who, by virtue of Division 13, Subdivision 6, has had their review or appeal dismissed, to proceed through an expedited decision-making process, including for reviews and to seek the assistance of QCAT to enable an appeal to proceed expeditiously once commenced.**

The Amendment Act inserts "Division 13 Transitional provisions for Disability Services and Other Legislation (Worker Screening) Amendment Act 2020" into the DSA. The effect of these provisions prevents a person from proceeding with a review or appeal of a decision made under

Disability Services and Other Legislation (Worker Screening) Amendment Act 2020

Part 5 of the DSA and instead, requires that a person to seek a new decision be made under new the provisions of this act. For example, the new section 385 of the DSA provides:

382 Undecided reviews or appeals

- (1) This section applies if, immediately before the commencement—
 - (a) an application for a review of a part 5 reviewable decision, made under former section 109 by the affected person for the decision, had not been decided or withdrawn; or
 - (b) an appeal against a decision of the tribunal relating to a part 5 reviewable decision, started under the QCAT Act by the affected person for the decision or the chief executive, had not been decided or withdrawn.
- (2) The entity hearing the review or appeal must dismiss—
 - (a) the application or appeal; and
 - (b) any proceeding that relates to the application or appeal.
- (3) (2) applies to a proceeding before the tribunal even if the dismissal would be contrary to a direction of the Court of Appeal.
- (4) The chief executive must make a new decision about the affected person under section 385.

As stated, these transitional provisions essentially prescribe a retrospective application of the new amendments to a decision already made under Part 5 of the DSA. Prior to these amendments commencing, a decision made and a review or appeal sought were based on the law, facts and personal circumstances of the individual at the time.

The reason that prospective legislation is important for maintaining the rule of law is that retrospective laws often unfairly impose an obligation on someone that did not exist at the time they did the thing that was the subject of the law.¹ In these circumstances, a person has had a decision made against them and has decided, by considering the applicable law and other factors, to seek a review or appeal. This is often done with the assistance of legal advice and representation, at the person's own expense.

Due to the operation of these transitional provisions, a person's application for review or appeal is unilaterally dismissed. Is this dismissal recorded and if so, how does this impact a person's future applications for clearances etc?

Dismissing an application for review or appeal for reasons other than the merits of the matter is unfair. It creates uncertainty for the individual and will lead increased costs and delays in resolving the issue. These processes will often take an emotional toll on an individual and their ability to work and earn an income may be impacted as well, which will have additional and substantive flow on effects.

We are advised by our members that some of their clients have already spent several thousand dollars in legal fees preparing their appeals which will now be unilaterally dismissed. They will need to start the process again. It is likely that, in many cases, the Chief Executive will make the same decision as was previously made, requiring individuals to review the decision under a new statutory scheme and then decide if an appeal can be lodged. Despite the same

¹ Legislation should have sufficient regard to rights and liberties of individuals. Section 4(3)(g) of the *Legislation Standards Act 1991* states that this includes whether legislation "does not adversely affect rights and liberties, or impose obligations, retrospectively".

Disability Services and Other Legislation (Worker Screening) Amendment Act 2020

substantive decision being made, the review and appeal documents will need to be redrafted to reflect the new legislation.

These transitional provisions are extraordinary in our view and are likely to see individuals, who were already complying with existing processes, treated unfairly. We would be pleased to discuss our recommendations with you further.

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 or by phone on (07) 3842 5930.

Yours faithfully



Elizabeth Shearer
President