

Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

Statement of Compatibility

FOR

Amendments during consideration in detail moved by the Honourable Shannon Fentiman MP

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (the HR Act), I, the Honourable Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the amendments moved during consideration in detail (ACiDs) of the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill).

In my opinion, the ACiDs for the Bill are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill includes amendments to the *Legal Profession Act 2007* (LPA) in relation to the Legal Practitioners' Fidelity Guarantee Fund (the Fund). The Fund was established to provide a source of compensation for persons who have lost trust money or property due to a dishonest default by a solicitor or law practice. The Queensland Law Society (QLS) administers the Fund under part 3.6 of the LPA.

Currently, section 364 of the LPA provides that amounts may be paid out of the Fund for certain purposes, including the payment of claims, legal expenses incurred in relation to the Fund, and expenses incurred in the administration of the Fund.

The objective of the ACiDs is to allow payments to be made from the Fund from 1 July 2021 for measures which are directed to reducing the risk of defaults by solicitors or law practices and subsequent claims against the Fund.

The ACiDs achieve these objectives by permitting payments from the Fund for programs or tools to assist the QLS or law practices in identifying defaults and educational programs for law practices aimed at improving compliance with part 3.3 (Trust money and trust accounts) of the LPA.

The amount of any payments from the Fund for such measures is limited to an amount prescribed by regulation.

The ACiDs also replace section 367 of the LPA to require the QLS to report to the Minister on or before 30 September each year for the previous financial year on its use of the additional payments, amounts paid for claims made against the Fund, the balance of the Fund, and any other matters prescribed by regulation.

Human Rights Issues

Human rights relevant to the amendments (part 2, divisions 2 and 3, HR Act)

In my opinion, the human rights relevant to the ACiDs are property rights (section 24 of the HR Act).

The **right to property** protects the right of all persons to own property (alone or with others) and provides that persons have a right to not be arbitrarily deprived of their property. Property is likely to include all real and personal property interests recognised under the general law and may include some statutory rights.

Amendments promoting human rights

Property rights (section 24 of the HR Act)

The ACiDs will amend the LPA to permit payments from the Fund for programs or tools to assist the QLS or law practices in identifying defaults and educational programs for law practices aimed at improving compliance with part 3.3 (Trust money and trust accounts) of the LPA. This promotes property rights by reducing the risk of defaults by solicitors or law practices and subsequent claims against the Fund.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13, HR Act)

(a) the nature of the right

Section 11 of the HR Act provides that only natural persons have human rights – corporations do not. While the QLS does not have human rights, the property rights of potential claimants and the individual solicitors who are required to contribute to the Fund may be limited. To assist in preventing trust account defaults, the ACiDs will permit payments from the Fund for programs or tools to assist the QLS or law practices in identifying defaults and educational programs for law practices aimed at improving compliance with part 3.3 (Trust money and trust accounts) of the LPA. The payment of these additional amounts will affect the balance of the Fund, thereby limiting the property rights of potential claimants and the solicitors who may be required to pay additional amounts to support the balance of the Fund in the future.

(b) the nature of the purpose of the limitation to be imposed by the amendments if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to assist in preventing persons from being arbitrarily deprived of their property by trust account defaults. The ACiDs are also intended to promote a reduction of claims against the Fund, thereby preserving the balance of the Fund. These purposes are consistent with a free and democratic society based on human dignity, equality and freedom.

- (c) the relationship between the limitation to be imposed by the amendments if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on property rights is necessary to ensure trust account defaults are minimised, public confidence in the legal profession is maintained and the balance of the Fund is preserved.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the amendments

There are no less restrictive and reasonably available ways to achieve the purpose of the ACiDs. Therefore, I consider that the ACiDs are the most effective and reasonably adapted way of achieving this purpose.

- (e) the balance between the importance of the purpose of the amendments, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation, I consider that the importance of ensuring that trust account defaults are minimised, public confidence in the legal profession is maintained and the balance of the Fund is preserved outweigh any limitation on property rights.

- (f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the ACiDs for the Bill are compatible with the human rights protected by the HR Act because they limit human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

SHANNON FENTIMAN MP
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE
MINISTER FOR WOMEN AND
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