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Office of the President

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[redacted]

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

By email: CSCC@parliament.qld.gov.au

Dear Committee Secretary

Child Protection Reform and Other Legislation Amendment Bill 2021

Thank you for the opportunity to provide feedback on the Child Protection and Other Legislation Amendment Bill 2021. The Queensland Law Society (**QLS**) appreciates the opportunity to provide submissions on this Bill.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the QLS Children's Law Committee, whose members have substantial expertise in this area.

The Society commends the government for permitting public consultation on the proposed Bill. As there has been only a very brief opportunity to review the proposed amendments, an in-depth analysis of the Bill has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We note that the comments made in this submission are not exhaustive and we reserve the right to make further comment on these proposals. We urge the government to extend the period in which to provide comments and also extend the reporting date of the Committee, so that the Committee has a reasonable opportunity to consider the draft legislation before it.

In principle, QLS supports the amendments and the policy intent behind them. We have outlined our comments with respect to particular aspects of the Bill below.

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Amendments to the Child Protection Act 1999

QLS supports the amendments in clause 4 that propose to broaden the purposes of the *Child Protection Act 1999* by including a focus on promoting the safety of children and, to the extent it is appropriate, supporting families in caring for children.

QLS further supports the new principles for participation of children. We highlight, however, that directly involving children in legal processes can be traumatic, and there needs to be a focus on ensuring that engagement with children is done in a way that is safe, culturally competent and promotes the child's emotional and psychological wellbeing. The specific requirements to facilitate a child's safe participation in decision-making and other processes will necessarily vary and will need to be tailored to the circumstances of the child. In this respect, we particularly support the proposed section 5E(2)(g), which provides that communication with the child is to be carried out in a way that is appropriate for the child, noting that the definition of 'appropriate' in the Bill requires consideration of the age, maturity, capacity, culture and circumstances of the child. We also support proposed section 5E(3) which requires the person to ensure that the child is allowed to decide how they will participate and sets out examples of how a child may participate, including separately from particular persons and indirectly through an expert.

Principles for Aboriginal and Torres Strait Islander children

At the outset, QLS acknowledges the disproportionate number of Aboriginal and Torres Strait Islander children in the child protection system. Nationally, Aboriginal and Torres Strait Islander children are almost 8 times as likely to have received child protection services compared with non-Indigenous children.[1] In Queensland, Aboriginal and Torres Strait Islander children are 8.5 times as likely to be placed in out-of-home care compared with non-Indigenous children.[2] The reasons for this are complex and connected to legacies of colonisation, including the ongoing impacts of intergenerational trauma and discrimination.[3]

QLS strongly supports measures designed to reduce the overrepresentation of Aboriginal and Torres Strait Islander children in the child protection system, and to facilitate and maintain Aboriginal and Torres Strait Islander children's connections to family, community, culture and country.

As such, QLS supports the amendment in clause 12, which proposes to amend section 6AA of the *Child Protection Act 1999* to require the chief executive, litigation director and authorised officers to make *active efforts* to apply the Aboriginal and Torres Strait Islander child placement principle. The definition of 'active efforts' requires 'purposeful, thorough and timely efforts to apply the principle'.

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[1] Australian Institute of Health and Welfare, 'Child protection' (18 May 2021) <https://www.aihw.gov.au/reports/australias-welfare/child-protection>.

[2] Australian Institute of Family Studies, 'Child protection and Aboriginal and Torres Strait Islander children' (CFCA Resource Sheet, January 2020) <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>. See also Queensland Department of Children, Youth Justice and Multicultural Affairs, 'Placement of Aboriginal and Torres Strait Islander Children, https://www.cyjma.qld.gov.au/about-us/performance-evaluations/our-performance/representation-aboriginal-torres-strait-islander-children/placement-aboriginal-torres-strait-islander-children.

[3] Australian Institute of Family Studies, 'Child protection and Aboriginal and Torres Strait Islander children' (CFCA Resource Sheet, January 2020) <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>.

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We consider that the phrase 'active efforts', as opposed to 'have regard to', will encourage more active, thoughtful and comprehensive consideration of the principle. However, we are of the view that the definition of 'active efforts' does not provide sufficient instruction on how the new process is to be incorporated into the policies and procedures that guide the relevant decision maker when dealing with Aboriginal and Torres Strait Islander children. Accordingly, it is our submission that the definition of 'active efforts' should be expanded to include the steps that the relevant decision maker should take when making a decision that engages section 6AA. This amendment may serve to facilitate more considered decision-making.

Supporting carers

QLS highlights the provisions in the Bill that are designed to support carers, in particular:

- Clause 32, which amends section 83A to provide examples of the information a proposed carer may be provided to assist them in making an informed decision about whether to agree to a placement for a child; and
- Clause 58, which inserts a new Part 4 requiring the chief executive to provide support and training to approved carers.

QLS considers that these measures are important elements of a functional child protection system. In our view, providing carers with greater information, training and support will ensure that they are better equipped to provide a safe environment for children.

Clause 32 amends section 83A to provide examples of the information that proposed carers may reasonably need to help them make an informed decision about whether to agree to the placement of the child. The Bill proposes to include, among other things, information about the child's family, culture and background. In our view, this provision should be applied in a way that gives appropriate consideration to the cultural sensitivity of certain information. We highlight that, in some circumstances, it may not be appropriate nor necessary to share some or all family and cultural information with the carer, for example where there are cultural sensitivities around the sharing of family information. The chief executive should adopt a flexible and discretionary approach when determining whether certain information should reasonably be disclosed.

We highlight that a functional child protection system requires sustained resourcing not only to carers, but also associated support services to meet the child's psychological and physical health needs and address potentially complex and high-risk behaviours. The link between out-of-home care, youth justice, and adult incarceration has been well established.[4] To reduce the transition of children from child protection to youth justice, there needs to be a sustained focus on increasing access to evidence-based early intervention services that are designed to address the underlying needs of children in the child protection system (including potentially trauma, disability and psychological and health needs), in concert with measures designed to increase the capacity of carers.

[4] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/15-child-protection-and-adult-incarceration/crossover-out-of-home-care-into-detention/>

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Additionally, we highlight the need for greater access to high quality expert and culturally competent early intervention services for families to reduce the number of children placed into out-of-home care.

Appeals

Currently, an applicant, a child or child's parent may appeal against a decision on an application for a temporary assessment order or a temporary custody order for a child. Section 118(2) of the *Child Protection Act 1999* requires the appellant to serve a copy of the notice on the other persons entitled to appeal against the decision.

The Bill proposes to insert a new section 118A providing that, despite section 118(2), the appellant may ask the clerk of the appellate court to arrange for the appeal to be heard by the court before a person is served. Similarly, clause 38 of the Bill inserts a new section 121A that provides the appellate court with the power to hear an appeal in the absence of the respondent if the court is satisfied the respondent has been served with the notice of appeal under s 118(2) or the court dispenses with the requirement for service under s 118(2). The effect of these provisions is that an appeal may be heard before service and in the absence of the respondent.

According to the Explanatory Notes on the Bill, the purpose of this new provision is to allow decisions to be appealed immediately in circumstances where delay may place a child at risk of harm. We note, however, that the proposed sections 118A and 121A do not contain any express limitation on, or indication of, when these powers should be exercised. While we accept that circumstances may arise where such applications should be heard urgently, we consider that the legislation should expressly include limitations on when this is appropriate. That is, the drafting should reflect the intention expressed in the Explanatory Notes and provide that an application may be heard without service on other relevant persons where the court is satisfied that any delay in an appeal may place a child at an immediate risk of harm. The respondent should also be provided with sufficient notice of the hearing.

Criminal history information sharing

Clause 55 inserts new sections 142E and 142F into the *Child Protection Act 1999*, creating a head of power for the chief executive to obtain and consider expanded interstate criminal history from an interstate commissioner of police, for the purpose of assessing the suitability of a person to be a provisionally approved carer.

QLS accepts the policy intent behind this information sharing, and we consider that ultimately, such systems may serve to ensure that children are placed in safe environments. It is critically important that where a decision is made to remove a child from their family, the Department is satisfied that the child is placed in a safe home. However, we note that in some circumstances, the disclosure of criminal histories may have adverse impacts that are disproportionate. We have outlined some of the potentially adverse consequences of criminal history screening below in our discussion of domestic violence orders. We submit that discretion must be applied when considering the criminal history of a proposed carer, including by giving due consideration to whether the offences are minor, historical and unrelated to the capacity of the proposed carer to provide a safe home. We consider that these factors could be inserted as an inclusive list of what the chief executive must consider when exercising their discretion. This might be included after subsection 142E(1).

Further, we note that in developing information sharing arrangements, the chief executive and interstate police commissioner should have due regard to privacy principles, which will involve developing robust systems to ensure that the information is transmitted securely, is accessible only to relevant authorised persons, and is used solely for the purpose of assessing the suitability of the carer.

Register of carers

The Bill proposes to insert a new part 5, obligating the chief executive to keep a register of applicants for authorities, holders of authorities and former holders of authorities. While we note the benefits of such a register, we reiterate the need to ensure that information is kept and managed in a way that safeguards privacy. In the context of the register, this may involve putting in place restrictions on who can access the database and for what purposes, how long the information can be retained, and what can be done with the information.

Interaction with other laws

QLS strongly supports the proposed amendments to section 159R, which clarifies that nothing in this chapter requires a person or entity to disclose information that is subject to privilege.

Disclosing the identity of notifiers to police

Currently, section 186 of the *Child Protection Act 1999* prohibits the disclosure of the identity of a notifier or information from which the notifier's identity could be deduced. The Bill proposes to insert a new s 186B, which provides that an authorised person may disclose a notifier's identity or information from which the notifier's identity could be deduced to a senior police officer in certain circumstances, namely where –

(a) The officer has given the authorised person a written request for the identity or information that states the identity or information is required for the prevention, detection, investigation, prosecution or punishment of a criminal offence against a child; and
(b) The authorised person is reasonably satisfied the disclosure is necessary to ensure the safety, wellbeing or best interests of the child mentioned in paragraph (a) or another child.

The provisions appear to have a broad application; information shared for the prevention, detection, investigation, prosecution or punishment of a criminal offence against a child could capture a very wide range of information. In this context, we highlight the importance of protecting the identity of notifiers to encourage people to disclose concerns about a child without fear of their identity being disclosed. We suggest that the provision should be amended to provide further structure around revealing the identity of notifiers. It is the view of the Society that there should be provisions in place so as not to deter disclosure.

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Review of plan

Clause 24 proposes to insert new provisions in section 51V of the *Child Protection Act 1999* to allow a child to ask the chief executive to review the child's case plan. The proposed amendments to section 51V also provides the chief executive with a discretion to not review the child's case plan where they are satisfied that the child's circumstances have not changed significantly since the plan was finalised or reviewed, or where it would not be appropriate in all the circumstances.

We do not support the proposed amendments contained in clause 24 that allow a chief executive to not review a child's case plan in certain circumstances. A child's case plan is a significant aspect of a child's care arrangement, in that it allows the child to share their wishes and desires. The child's case plan also adds greater stability for the child by providing a plan for contact, placement and care throughout a child's out-of-home care. Accordingly, we do not support clause 24 on the basis that the discretionary power not to review a case plan may limit a child's ability to address their concerns and issues.

Amendments to the Working with Children (Risk Management and Screening) Act 2000

Domestic violence information sharing & participation in the Working with Children Check National Reference System (WWCC NRS)

Clause 87 inserts a new section 315A into the *Working with Children (Risk Management and Screening) Act 2000* (**WWC Act**), which enables the chief executive to request domestic violence information from the police commissioner if the chief executive reasonably believes a domestic violence order may have been made, or a police protection notice may have been issued.

Likewise, the Bill proposes amend the WWC Act to enable the chief executive to:

- Enter and upload decisions on the WWCC NRS limited to adverse outcomes;
- Give information to an interstate screening unit if the chief executive reasonably believes the information is relevant to the functions of the interstate screening unit; and
- Request information from an interstate screening unit about a person if the chief executive believes the unit has information that is relevant to the performance of the chief executive's screening functions.

In Queensland, domestic violence orders may be made by consent without admission as to the content of the application. This is to encourage the making of an order where the respondent agrees to an order, but not to the content of the application. This provides additional protection for applicants in many cases where they may otherwise have to go through a contested application and given evidence in a hearing.

Some consideration should be given to the potential adverse impacts associated with screening for domestic violence orders. For example, the proposed amendments may mean that an allegation of domestic violence in a civil proceeding could affect whether a person is permitted to engage in an occupation that requires a blue card even when the order is consented to on a 'without admission' basis. Further, there is a risk that more applications would be opposed and subject to a contested hearing because the respondent was concerned about the information being provided to the chief executive and used to make a decision under the WWC Act. This

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would have an adverse impact on applicants and impose significant additional burden on the system.

As noted above, the chief executive should adopt a discretionary and flexible approach when requesting and relying upon shared criminal history and domestic violence information. Appropriate safeguards to ensure privacy and confidentiality are essential, and the chief executive should ensure that natural justice is afforded to the applicant. This should include appropriate avenues to challenge an unfavourable decision.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

Elizabeth Shearer
President