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Committee Secretary
Finance and Administration Committee
Parliament House
George Street
Brisbane QLD 4000

Our Ref: KB-ILC

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

Dear Committee Secretary,

Labour Hire Licensing Bill 2017

Thank you for the opportunity for the Queensland Law Society (the Society) to make a submission on the Labour Hire Licensing Bill 2017 (the Bill).

By way of background, the Society is the peak professional body for the Queensland's legal practitioners. We advocate for good law and good lawyers. The Society is an independent, apolitical representative body upon which government can rely to provide advice which promotes good, evidence-based law and policy.

As a general comment, we note that the scope of this Bill is quite broad and will extend to persons and businesses who are already regulated under other schemes and who have demonstrated compliance with these schemes. However, we are also aware that there is clear evidence that many labour providers have failed to meet their obligations to their employees. The Society supports strong, effective measures to ensure workers receive their entitlements.

We have reviewed the Bill and raise the following issues that we believe should be addressed to ensure the proposed licensing scheme is able to achieve its purpose.

1. Firstly, we note that many of the particulars of the proposed scheme are proposed to be left to regulation. We therefore request that the Society be consulted on the drafting of the regulation to this legislation.

2. We note that pursuant to clause 5, the Bill applies inside Queensland however, nothing further is expressed about whether the provider of labour hire services or a worker needs to be located in Queensland. The Bill needs to provide clear instruction on, for example, whether a license is needed for Queensland workers provided (by a Queensland provider) to perform work outside of Queensland or whether a license is needed for interstate providers and workers who perform work in Queensland.

   The Bill does not deal with 'out-of-state workers' or 'interstate workers' nor does it state that employment must be 'connected' with Queensland akin to the provisions under the *Workers' Compensation and Rehabilitation Act 2003.* We submit that this issue needs to be addressed.

3. We note that clause 7 of the Bill outlines who will be considered a "provider of labour hire services" under the licensing scheme. The drafting of this clause makes clear that anyone who "supplies, to another person, a worker to do work" will fall within the scheme. Whilst the Society unequivocally supports workers in the legal sector, and in all sectors, being paid their correct entitlements, we are concerned that some lawyers and law practices will fall within the scheme when this may not be appropriate.

   Lawyers and law practices who predominantly provide legal services (work done, or business transacted, in the ordinary course of legal practice) may, from time to time, arrange for their staff to work in other workplaces or to be seconded to clients. This is not akin to providing workers as labour hire provider. These workers are undertaking work for their employer, the lawyer or law practice, who is providing a service to their client. We do not believe that the requirement to hold a license, and the other requirements of the Bill, should be imposed on lawyers/law practices in these circumstances. To extend the scheme in such a way would seem to be an unintended consequence of the current drafting.

   Further, there is no definition of "work" in the Bill. Therefore, businesses such as law firms who arrange for their staff to volunteer at a community legal centre, may be considered to be providing workers and thus will need a license and comply with the other requirements of the Bill. Again, an unintended consequence of the Bill may be that there is a reduction or cessation of firms supplying their workers in volunteer capacities. This will impact the capacity of these volunteer organisations to provide services to vulnerable people.

   Employers who employ workers in the professional services industry, such as in accounting firms, legal firms and medical practices, could potentially be subject to the conditions of the scheme. These employers and employees are already heavily regulated within their industries. For example, details of law firms and lawyers are listed on the Society's registry, information can be obtained through a RTI request made to the Society and the Legal Services Commission (LSC). If a practitioner is subject to a condition on their practising certificate an inquiry can be made to find out the nature of these conditions (s81 of the *Legal Profession Act 2007*). Further, the LSC has a complaints registry which can be accessed to obtain a lawyer's complaints history.

4. The Society submits that the movement of, or hiring of labour within related body corporate, partnerships, joint venturers and grouped entities should be clearly excluded from the scheme or regarded as a single employer under regulation. It is very common for a business, regardless of its size, to have a separate employing entity which supplies workers to a related entity to do the work.

   In most cases, the separate employing entity will have legitimate corporate and tax purposes and, in fact, may protect funds dedicated to employee entitlements from being targeted by unrelated claims, for example, a product liability or professional negligence claim. Therefore requiring one entity to hold a license under this Bill and prohibiting another, related entity from engaging this first entity unless there is a license, will have unintended consequences including unnecessary costs and compliance burdens. We submit that the scope of clause 7 should be reconsidered for these reasons.

5. We submit that clause 11 should specifically state that the person must not *knowingly* enter into an arrangement with a provider for the provision of labour hire services unless this provider holds a license and unless there is a reasonable excuse. While

knowledge may be considered a 'reasonable excuse', we submit that it must be a threshold element of the offence.

6. In respect of clause 13(3)(b)(v), it may be difficult for a person applying for a license to provide details of all specific entitlements it intends to provide to its workers, such as details of accommodation. We submit that if these details cannot be provided at the time of application, that this not disrupt the application and that the person must report this detail once it is agreed between the employer and employee.

7. In respect of clause 14(2), the Society submits that a body corporate, who is related to a corporation whose license has been cancelled, should not be prohibited from applying for a license if the chief executive is satisfied that the related body corporate did not have influence or control over the corporation whose license has been cancelled.

8. As to clause 14(3), we believe there should be discretion given as to when a person can apply for another license. For example, if a license was refused because sufficient information was not provided, then the applicant should be able to reapply when they can provide this information.

9. The definition of a "fit and proper person" under clause 27 of the Bill, particularly sub-section (1)(a), is very broad and we query how that element will be established to the satisfaction of both people applying for a license, and those concerned about a labour hire provider's behaviour. Given that the other matters in this clause specifically relate to a person's demonstrated ability to meet entitlements, we submit sub-clause 1(a) be removed.

   Further, as this term is not found in the proposed Dictionary in Schedule 1, each reference to it in other clauses such as clauses 22(1)(b)(v), 24(c) and 35(2)(b), should refer to its definition in clause 27.

10. The Society considers that timeframes should run from the date a document is received, rather than when it is sent. We request these changes be made to clauses 23(2)(c) and 30(c) of the Bill. If asked by the chief executive, a person can then provide evidence of receipt.

11. In respect of clause 31(2)(g)-(i), we submit that the addresses of the workplaces and accommodation should not to be published or disclosed. This is commercially sensitive information and, if published or otherwise released, it must be further de-identified to larger geographical regions.

    The Australian Bureau of Statistics has a long history, dating back to 1986, of structuring labour force surveys via 'Statistical Regions (SR)'. The SR Structure has six levels of hierarchy, comprising in ascending hierarchical order: Collection District (CDs) - Statistical Local Areas (SLAs) - Statistical Region Sector (SRSs) - Statistical Regions (SRs) - Major Statistical Region (MSRs) - States/Territory (S/Ts). Competitors looking at localised information can quickly draw reasonable assumptions regarding large regional employers or other large localised commercial activities. The proposed scheme is not intended to provide a commercial advantage or publicly spotlight lawful commercial activities exposing providers to undue security. Doing so will elicit multiple unanticipated consequences that may have significant social or economic impacts on local communities.

12. We consider that clause 31(2)(n) of the Bill may also be problematic as this information will not specify whether the applications for compensation were accepted, rejected or withdrawn. The licensee should have the ability to provide details of this additional information to the chief executive.

13. In respect of the reporting requirements generally, we note that providers who are national or at least operate in more than once state may have difficulties in complying with the requirements. We are also concerned about this information being obtained for purposes other than those stated in clause 3, as outlined above.

14. As to clause 32, we submit that the example of someone "non-English speaking background" is vague and ambiguous. Again, we request that the Society be consulted on the drafting of the regulation to this legislation to ensure that the matters required to be reported on are specific and directly related to the purpose of the legislation.

15. We note clause 44(2)(b) and do not consider that the chief executive should be able to use alleged offences to determine whether someone is a "fit and proper person". Consideration should be given to offences that the person has been convicted of.

16. As to clause 55(d), the Society considers that this power for entry seems extremely broad. It states the workplace "is required to be open for inspection under a condition of a license". This is too broad and does not specify what the license authority is, or whether a license has actually been issued to the workplace in question.

    The requirement that workplace simply has to be "open for carrying on a business" or that "work is being carried out at the workplace" is far too broad, in our view, for entry to be authorised. There is the potential that this power will be abused by investigating officers. Further, this power is far broader than police powers of entry under the Police Powers and Responsibilities Act without evidence of the overriding privacy concerns and our right to privately enjoy premises. This is concerning as many businesses will be in possession of commercially sensitive, private, and confidential information including medical practices and law firms.

    The Society has these same concerns with respect to clause 56(c) as this provision authorises entry into residences under the conditions in subsection c.

17. We submit that clause 58 should be amended so as to prohibit an investigator from carrying on investigation until consent is obtained under this provision.

18. The Society is pleased that clause 61 only allows for the issuing a warrant by a magistrate and not other parties, for example, a justice of the peace.

19. We are concerned that clause 68(1)(c) and (e) give the investigator power to take a thing but there do not appear to be any provisions covering return of property taken. An appropriate mechanism should be inserted into these provisions. Similarly, clause 68(3) does not specify a date or period for return of a document. Feasibly, this could result in inspectors taking documents indefinitely. "As soon as practicable" is not defined. A date period (and procedures for seeking an extension) should be preferred.

    We are also concerned about what will be interpreted by an inspector as a "necessary step" per clause 68(2). Examples should be provided about what the government will accept as a "necessary step". Additionally, we believe that clause 68(1)(h) should have

a caveat as to the time an inspector can be on private property. "Time necessary to achieve the purpose of the entry" is too vague and leaves it entirely up to the investigator.

Similarly, clause 69 does not express what behaviour will be considered "reasonable help" and thus this decision will be left in the hands of the investigators.

20. We express similar concerns with clause 70(1) which requires a person to make something available for inspection at a "reasonable time and place nominated by the inspector". The subject of the requirement is afforded no recourse or review as to what is nominated as reasonable by the inspector.

21. Clause 70(5) waives the right against self-incrimination. The Society is very concerned by this. Any breach of a fundamental right, such as the right to claim privilege against self-incrimination, should be a last resort and we can see no justification for it in this Bill. Fundamental rights of this nature underpin the rule the law and the justice system as a whole. As stated below, we do not consider that clause 101 is strong enough to protect this right by preventing self-incrimination and the derivative use of evidence.

22. The Society expresses serious concerns with respect clause 71 on the same basis. It compels people to give evidence about offences in the same way that the CCC does. Even though there is protection against self-incrimination, this is not justified by the objects of the Bill, specifically because it does not state that there are other protections in place for persons compelled by this provision.

23. We are concerned that the clause 80 forfeiture provisions do not impose a high enough standard on inspectors to return property. This should be specifically addressed in the clause.

24. The Society is concerned about clause 97(6) of the Bill. If a party has a right of review, then that party should be afforded that right by their review being progressed and determined within an appropriate timeframe. Allowing a decision to be confirmed simply due to the passage of time is unjust and unfair.

25. We submit that clause 98 should be amended to say “appeal” rather than “review”.

26. The Society is concerned that clause 101 does not adequately protect someone from self-incrimination. Sub-section (1) should not limit the types of documents covered by this immunity. Further, we submit that sub-section (3) should be removed.

27. The Society is also concerned about the information required to be placed on a public register and we refer to our comments above about the potential misuse of this information.

28. Finally, we query whether the timeframe under clause 109 is sufficient to allow businesses to apply for a license. While these businesses may have some knowledge of the proposed scheme prior to the commencement of the legislation, they will not know the particulars and processes for application until commencement. They will then have only 28 days to obtain and provide the requisite information. There may be a genuine inability to meet this timeframe which will then put them in breach of the legislation and may impact their contracts with other businesses.

The period under clause 109 should be increased to 3 months at least post-commencement.

Please do not hesitate to contact our Policy Solicitor, Kate Brodnik on [redacted] if you wish to discuss the content of this letter.

Yours faithfully

[redacted]

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President

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29 June 2017

Committee Secretary
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Our Ref: KB-ILC

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Dear Committee Secretary,

Labour Hire Licensing Bill 2017

Thank you for the opportunity to provide further comment on the Labour Hire Licensing Bill 2017 (the Bill).

We would like to make some specific comments in respect of the some of the very significant penalties outlined in the Bill. We note our previous submission took issue with some of the offences.

Clauses 10, 11 and 12

We note that clauses 10, 11 and 12 of the Bill impose penalties on someone who provides labour hire services without a license (cl. 10) and/or uses a provider for the provision of labour hire services without a license (cl. 11) and/or enters into an arrangement for the supply of a worker if the arrangement is designed to circumvent or avoid an obligation imposed by the Act (cl 12).

The maximum penalty for breaching each of these provisions is 1034 penalty units or 3 years imprisonment for an individual.

We wish to make three points in respect of these clauses:

1. Based on the current drafting of clause 12, a person can be prosecuted under clause 12 *and* under either clause 10 or clause 11. If this is not the policy intent behind these provisions, we recommend that clause 12 be amended.

2. Clauses 10 and 11 operate when someone either does not have a license or engages someone without a license. There is no intent element involved. Conversely, clause 12 applies to someone who has arranged to avoid obligations under the Act. The law generally treats these types of offences differently and this is reflected in the penalties imposed. We submit that the penalties under clauses 10 and 11 should therefore be lower than those in clause 12.

3. Finally, in respect of the penalties, a penalty unit is currently $121.90 and is set to increase as at 1 July 2017. Therefore, the penalty for breaching each of these

provisions could, for an individual, be incarceration or a penalty of more than $162,000. A corporation could have to pay more than $400,000.

These penalties are extreme and are not commensurate with other offences of a similar type. For example, sections 55, 56 and 57AA of the *Electrical Safety Act 2002* are offence provisions relating to licenses. These sections set a maximum penalty of 400 penalty units (currently $48,760) and there is no term of imprisonment. We note that the purpose of this Act is "directed at eliminating the human cost to individuals, families and the community of death, injury and destruction that can be caused by electricity" (section 4), whereas this Bill, though important, relates to a licensing scheme for labour hire providers to ensure workers are not exploited.

Further we note that the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, currently before the federal parliament, amends the *Fair Work Act* to, inter alia, introduce a higher scale of penalties for 'serious contraventions' of prescribed workplace laws. In this case, the Bill seeks to increase the penalties for a serious contravention of the Act to 600 penalty units.

We submit that the Committee should recommend that the penalties under these clauses of the Bill be reduced in accordance with other like statutes.

Clause 89

Clause 89 of the Bill provides that if, in the exercise of a power under this Act, an inspector makes a requirement of a person, the person must comply with the requirement unless the person has a reasonable excuse. This requirement carries a maximum penalty of 200 penalty units.

By contrast, the *Electrical Safety Act 2002*, has maximum penalties of 100 penalty units for provisions similar to those captured by clause 89 such as a requirement to give reasonable help and to produce documents and answer questions. Similar penalties and provisions are also found under the *Workplace Health and Safety Act 2011*. Again we note that both of these Acts are about preventing incidents and injuries and promoting safety. The main purposes of this Bill (clause 3) do not justify the imposition of the severe penalties currently contained within the clauses.

Regulation

The other issue we wish to raise arises from the Society's attendance at the public hearing for this Bill. We were asked by the Committee to advise which aspects of the Bill, that are currently to be defined in a regulation, should be in the Act itself.

Clause 7(3) states that a person does not provide labour hire services merely because the person is, or is of a class of person, prescribed by regulation. Clause 7(4) provides that a regulation may prescribe a person, or a class of person, under subsection (3)(c) only if the supply of a worker by the person or class of person is not a dominant purpose of the business ordinarily carried on by the person or class of persons.

We submit that the "dominant person test" should be contained within the Act given the considerable discretion involved in this test and impacts flowing from the exercise of this discretion. Further, we believe consideration should be given to an inclusive list of discretionary matters to be taken into account.

Further, the classes of individuals who are not workers under clause 8 also needs to be set and determined. Whilst it is appropriate to enable prescription of classes by regulation, this should preclude the inclusion of classes in the legislation, where appropriate.

Labour Hire Licensing Bill 2017

Thank you again for the opportunity to highlight these issues with you. Please do not hesitate to contact our Policy Solicitor, Kate Brodnik on [redacted] if you wish to discuss the content of this letter.

Yours faithfully

[redacted]

Christine Smyth
President