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Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
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Dear Ms Jeffrey

Re: Director of Child Protection Litigation Bill 2016 and Child Protection Reform Amendment Bill 2016

Thank you for inviting the Bar Association of Queensland ("the Association") to contribute a submission concerning the review of the *Child Protection Reform Amendment Bill 2016* and the *Director of Child Protection Litigation Bill 2016*.

The Association welcomes the introduction of this legislation pursuant to the recommendations made by the Child Protection Commission of Inquiry.

The Association supports the principles behind the establishment of the Director of Child Protection Litigation and does not have any comment at this stage on how that institution is to be structured. We would welcome the opportunity when its workability is able to be assessed.

With respect to the *Child Protection Reform Amendment Bill 2016* we make the following comments:

1. The Association supports the overall effect of the amendments in clarifying and enhancing the supervisory jurisdiction of the Childrens Court and allowing children and parents to remain appropriately engaged with the process irrespective of the type of child protection order imposed.

Clause 5 – Amendment of s 51VA

2. This amendment addresses a critical pressure point in the child protection system. It is, sadly, not uncommon for very young children to be made subject to orders granting long-term guardianship to someone other than the chief executive. A child who, for example, is placed under a long-term order at age eight will, absent any revocation, spend the next decade under that order.

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3. That point of departure at which a long-term order is made frequently presages the substantial or total breakdown of a relationship, however flawed, between a child and their parents. Under a long-term order, contact arrangements for parents and their participation in the child's life is at the discretion of others. That contact can be minimal and difficult for parents to negotiate, especially, given the time span of such orders.

4. The amendment of this provision provides an avenue for parents to remain engaged in the care and development of their child throughout childhood. The mechanism does no more than provide standing to parents to request that the chief executive do that which they are statutorily obliged to do anyway: supervise and ensure the best interests of subject children.

5. Given that imperative, it seems an unnecessary impediment to the ongoing supervision of, and accountability for, a child's best interests to permit the chief executive not to review a child's case plan if "the child's circumstances have not changed significantly" (see the proposed section 51VA(5A)(a)(i)). The use of that adverb is problematic. A significant change in the life of a child is a concept so protean and ambiguous as to risk being meaningless.

6. Subjectively, what constitutes a significant change for a child will vary substantially depending on perspective. It is unlikely a child, their guardian, their parent and the chief executive (or indeed individual judicial officers) will share precisely the same view as to what makes a significant change.

7. Objectively, a significant change represents too high a threshold before the chief executive's statutory obligations can be enforced. In a jurisdiction where the bests interests of children are paramount and where the chief executive is required, by statute, to ensure the welfare of children subject to orders sought by it, then it is a legitimate expectation of a child or their parent that, if requested, the chief executive will ensure once a year that a case plan exists that is appropriate to the child's welfare and development.

8. For those reasons, we suggest that the proposed section 51VA(5A)(a)(i) is an unnecessary limitation on the duty of the chief executive to supervise and ensure the best interests of subject children.

Clause 10 – Insertion of new s 57A

9. The inclusion of this provision is an essential amendment. It has been a long-standing lacuna in the child protection statutory framework that an application brought by the chief executive in the best interests of a child could be withdrawn without leave.

10. That approach was incongruent with the nature of the power conferred on the Childrens Court by s 59 of the *Child Protection Act 1999* ("the CPA"). Once the jurisdiction of the Court is engaged by a relevant application, the statute requires that any order can only be made if the court is first satisfied of a number of specific criteria.

11. Not only that, once the jurisdiction of the court is invoked, then the inherent nature of a best interests jurisdiction means the court should also turn its attention to whether it is satisfied that the withdrawal of the application accords with the paramount principle of the CPA.

12. This amendment ensures that the only reason behind an application being withdrawn is the proper one: that it is in the best interests of the child.

Clause 18 – Amendment of s 99M

13. Although not the amendment to this subsection contemplated by the Bill, s 99M(2)(b) may also bear consideration given the seeming omission of "more" before "quickly". The purpose of the section is to ensure the forum most able to deal, effectively and efficiently, with the subject matter of the review is utilised. That would usually be the Childrens Court subject to the matter being "dealt with more quickly".

Clause 24 – Replacement of s 110; Clause 25 – Replacement of s 113

14. The replacement of s 110, substantially, clarifies and strengthens the role and duties of the separate representative in child protection litigation.

15. The broadening of class of "non-parties" under s 113 who may intervene or take part in some or all of the proceeding is a positive reform. The section provides sufficiently specific criteria against which the discretion is to be exercised to ensure due regard to the best interests of the subject child.

16. However, regard should be given to the meaning and effect of the separate representative or non-party to the proceeding being permitted to "do anything allowed to be done by a party".

17. In respect of both provisions, the question arises as to whether a separate representative and a non-party have the power to institute an appeal against a decision on a child protection application.

18. Section 120 of the CPA permits a party to a proceeding to appeal against a decision on the application. Applying the ordinary meaning of s 110(6)(b) and s 113(2), both the separate representative and a non-party would be entitled to appeal against a decision (including interim decisions such as contact and directions to parties) on a child protection application.

19. While, on one view, it is reasonable and proper that a separate representative should have the right to appeal on an application, there is cause for concern in that right being extended to an indeterminate class of potential non-parties.

20. Finality in litigation assumes a particular importance when it concerns the future and best interests of children. As much as those involved may try to shield them from it, too often, children are very much aware of, and detrimentally affected by, the trauma and emotion induced by child protection litigation. Having an otherwise resolved proceeding being re-litigated by a non-party with a limited relevance or interest in the proceeding would not be conducive to the best interests of children or the expeditious determination of proceedings.

21. The purpose of s 113 is not for such a non-party to dictate the direction of proceedings but for the court to have an avenue by which it can best inform itself on all the relevant issues. That will quite conceivably include hearing submissions from a non-party.

22. Given that it is impossible to define who a potential non-party may be in any given child protection proceeding, it is suggested that there should be, at least, a presumption against affording such a person rights of appeal. That presumption should be specifically expressed in the language of s 113.

Clause 31 – Insertion of new ss. 189C – 189E

23. The imposition of a duty of disclosure on the litigation director will likely significantly improve the speed and conduct of child protection litigation. It is frequently the experience of those who practice in the jurisdiction that hearings, particularly those involving complex or lengthy Departmental involvement or medical interventions, are waylaid well before they commence by (non and late) disclosure issues and the cumbersome process of discovery by subpoena.

24. The procedure set out in the proposed provisions regarding the treatment of sensitive or confidential information is practical and fair to the extent permitted by the overriding best interests of a child. Information and evidence that cannot be responsibly disclosed arises continually when the lives of children are

involved and the measures set out balance those interests against the need for procedural fairness to be afforded to the parties.

25. The language used in the proposed s 191(4)(a) warrants further consideration. Subsection (a) confers a discretion on the court to order the disclosure of the evidence if it is materially relevant to the proceeding. However, relevance in this particular evidentiary context is a binary state. It would seem otiose to require only the disclosure of a document that is "materially" relevant when the true threshold of admissibility for this purpose is simply relevance.

26. The insertion of "materially" adds nothing to the purpose and effect of the provision but poses the potential semantic quandary as to the precise distinction between evidence that is materially relevant and evidence that is relevant but not materially relevant. It is also noted that the same term is employed at s 191(2)(g)(i).

Yours faithfully

Christopher Hughes QC
President