Queensland Law Society

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Office of the President

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Research Director
Health and Community Services Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email

Dear Research Director

Communities Legislation (Funding Red Tape Reduction) Amendment Bill 2014

Thank you for providing the Society with the opportunity to make brief comments on the *Communities Legislation (Funding Red Tape Reduction) Amendment Bill 2014* (the Bill). The submission has been prepared with the assistance of our Not-For-Profit Law Committee.

Given the timeframes available for making submissions and the commitments of our Committee members, it has not been possible to conduct an exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended consequences or fundamental legislative principles which we have not identified.

The Society notes several positive aspects of the Bill including:

- Providing for contracting under one Act, rather than three, which will assist in removing duplicated provisions.
- Removing requirements under the *Community Services Act 2007* and *Disability Services Act 2006* for entities to become approved service providers before being able to apply for funding. We suggest this may improve access to funding opportunities for small organisations and potentially reduce paperwork for larger providers.
- Including a duty for authorised officers to avoid inconvenience and damage to an entity and its property in exercise of their powers (proposed s61A of the *Community Services Act 2007*) is a positive step.
- The Department of Communities, Child Safety and Disability Services has specifically highlighted in the Public Briefing on 17 February 2014 that there is no intention to make the acquittals process more onerous. We note this particular exchange:

Dr DOUGLAS[Member for Gaven]: I have one more question. This is more of a theoretical question. You will still keep going with your funder-provider mechanisms as before, but you are streamlining some of the other funder mechanisms to the more direct funding; is that what I am hearing? You made mention then of UnitingCare and I know the Benevolent Society is possibly another one where they get holistic-type funding. I do not want to get into the specifics of all the different ones. Can you give me a little bit more of an overview of what you are saying there?

Ms Taylor [Acting Deputy Director-General, Strategy Policy and Programs, Department of Communities, Child Safety and Disability Services]: We are doing a couple of things, Dr Douglas. First of all, we are removing the requirement about pre-approvals. As Matt mentioned, we are moving to a one-step funding process. We are also removing some of the funding approval and contracting requirements that will be dealt with administratively, rather than through legislation. We are removing prescribed requirements so, instead, when we need to investigate or remedy something that is wrong, that will be triggered where there is a serious concern about service delivery. We are removing the legislative show-cause process and we will use the process that is set out in our contracts. In terms of applying the act, it will be under a new process whereby the minister will actually make a declaration that the act applies to either a funding program or to one-off funding. It is a combination of all of those that will, in fact, deliver more streamlined and less administratively burdensome requirements for agencies that receive funding from the department.

Dr DOUGLAS: This is a devil's advocate question: does that then imply that the acquittals process will be more onerous for a lot of those bodies? In other words, you are talking more about the front-end stuff; this is the back-end. Is there, in some ways, like a compensatory mechanism to cover; is that part of this?

Ms Taylor: Acquittals are dealt with under our contractual arrangement. There is no intention to make those unnecessarily burdensome.

Dr DOUGLAS: So there is no extra acquittals mechanism being added in as a result of these changes?

Ms Taylor: No.

Dr DOUGLAS: Thank you.[1]

The Society notes that this may depend on the new model contract adopted by the Department. We suggest that the contract should not extend the powers of the Department beyond what this Bill contemplates.

[1] Public briefing transcript found here: http://www.parliament.qld.gov.au/documents/committees/HCSC/2014/CommLegFRedTapeRAB14/trns-pb17Feb2014.pdf

We now provide specific feedback on sections of the Bill.

Proposed Part 3 – Managing serious concerns

In seeking flexibility in decision-making, the Bill creates a definition of 'serious concern' for funding received by an entity (proposed s16):

> ***16 Meaning of serious concern***
>
> *A serious concern for funding received by a funded entity exists if any of the following happen or there is a serious risk that any of the following will happen—*
>
> *(a) the funding received by the funded entity is improperly used;*
>
> *Examples of improper use of funding—*
>
> - *funding is used for a dishonest or fraudulent purpose*
> - *funding is used for a purpose other than providing a funded product or service*
>
> *(b) the funded entity significantly fails to deliver a funded product or service;*
>
> *Example of significantly failing to deliver a product or service— closing an emergency accommodation service delivered with funding where the service is required, under the funding agreement, to be continually open*
>
> *(c) an act done or omission made by the funded entity in providing a funded product or service results in harm to an individual;*
>
> *Example—*
>
> *an individual uses a funded service delivered by a funded entity and the individual suffers physical, psychological, emotional or financial harm as a result of neglect, abuse or exploitation by the funded entity*
>
> *(d) if the funded entity received the funding to deliver disability services to which the Disability Services Act 2006 applies—the funded entity contravenes a provision of the Disability Services Act 2006.*

Generally, the Society suggests that these matters are more appropriately dealt with under individual contractual arrangements, which would encourage a cooperative approach to managing funding issues or concerns.

The Society notes that these concepts (for example, 'harm to an individual' and 'significant failure') have the potential to be extremely wide, and we note that they appear to be subjective. For example, 'results in harm to an individual' does not require that the harm was foreseeable or that the harm is serious. We note that this language could cause confusion for funded organisations in terms of their obligations. We note in particular that s4(3)(k) of the *Legislation Standards Act 1992* in relation to fundamental legislative principles provides that legislation should be "unambiguous and drafted in a sufficiently clear and precise way." Legislation should also make "rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review" under s4(3)(a) of the *Legislative Standards Act 1992*.

Proposed s17 states that "*Before deciding whether to take action under this part in relation to a funded entity, a chief executive may obtain a written report from an authorised officer appointed by the chief executive about whether a serious concern exists for funding received by the funded entity.*" The current drafted threshold is 'may', the Society suggests that in the interests of transparent and informed decision-making this is made '*... must, unless there is a risk of imminent misappropriation of funds or harm to an individual, obtain a written report ...*'

To promote objective and transparent decision-making, the Society suggests that a necessary element of the compliance notice process following under proposed s19 should be the disclosure to the funded entity of the written report produced. This will enhance adherence to principles of natural justice, one of the fundamental legislative principles under s4(3)(b) of the *Legislative Standards Act 1992*.

Proposed s12- Minister may declare funding to which this Act applies

The Society notes that proposed s12(3) states a range of factors which the Minister "may" consider when making a declaration of the funding to which this Act applies. Given the considerable power that has been provided to the Minister in making these declarations (also noting that funding declarations can be made before or after funding has been provided), it may be prudent to ensure the Minister "must" consider the list of stated considerations in proposed s12(3).

We also note concern that while the Department is obliged to tell a funded entity if a declaration has been made over it after the fact (proposed s14), failure to tell the entity does not stop the Act applying.

Proposed s129- Power to require information

Proposed s80 – Powers (of interim managers)

It is the understanding of the Queensland Law Society that there are Community Legal Centres which draw funding from mixed sources, which may subject the organisation to the Bill. For example, an organisation described as a Community Legal Centre may be operating as a legal practice and also offering other non-legal services to the community. The Society is keen to see that the Bill respects client confidentiality and client legal professional privilege in respect of all legal files held by the funded entity. We note that under proposed s129 of the Bill a chief executive can require a funded entity to give the chief executive, within a stated reasonable time, information relating to the provision of a funded product or service by the funded entity. An interim manager is given broad powers to carry out duties under proposed s80.

In order to maintain client legal professional privilege we suggest that the proposed sections be amended to provide that an executive officer of a funded entity may refuse to provide documents or information to which client legal professional privilege attaches. The potential loss of confidentiality when privileged information is disclosed to a third party could have serious consequences for the client and may confuse the status of that client information. We suggest that clauses are explicitly added to the Bill to clarify that the powers conferred do not abrogate the law relating to client legal professional privilege and respect client legal

confidentiality. A mechanism to protect client legal privilege which could be adopted for use is found in section 78 of the *Crime and Misconduct Act 2001*.

We further suggest that the sections should be amended to provide that an executive officer of a funded entity can only provide access to client legal files of the funded entity with the express written permission of the funded entities client if, in fact, access to those files is reasonably necessary to carry out their function. We also suggest that documents or information should be expressly inadmissible in any legal proceedings due to the nature of the power used to obtain the information.

Removal of external merits review

The Bill removes the ability to apply for external merits review of the decisions to appoint an interim manager and ceasing or suspending funding following a compliance notice process. Whilst we note that internal review and judicial review avenues are still available, we note that having a review avenue to QCAT can be accessible for small organisations, given its cost effectiveness.

Proposed s95 - Stay of operation of original decision

The Society notes that the Bill removes the ability to apply to QCAT for a stay of a decision while the Department is reviewing the decision. We consider that a funded organisation should continue to be able to apply to QCAT for a stay, or alternatively, a funded organisation should be able to apply to the chief executive specifically to request a stay.

Proposed s131- Chief executive may share information about funded entity

The Society submits that it is inappropriate for any client legal information or information subject to client legal professional privilege obtained by a chief executive to be shared between Government agencies and this should be specifically excluded from the information sharing provisions. Additionally any confidential information which is shared should import to the receiving entity the same obligations of confidence that applied to the chief executive who obtained the information.

Thank you for the opportunity to provide these brief comments. Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dcruz@qls.com.au for further inquiries.

Yours faithfully

[redacted]

Ian Brown
President