Queensland Government

Our ref: 1771642, 541035/1

Department of
Justice and Attorney-General

The Honourable Dean Wells MP
Acting Chair
Legal Affairs, Police, Corrective Services
and Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Wells

Re: Technical Scrutiny of Legislation Secretariat examination of the Civil Proceedings Bill 2011

I am writing in response to the request contained in your letter of 2 November 2011 that the Department provided comments on the issues raised in the report provided by the Technical Scrutiny of Legislation Secretariat concerning the Civil Proceedings Bill's compliance with fundamental legislative principles.

I have enclosed the Department's response to the issues raised by the Technical Scrutiny of Legislation Secretariat.

I trust this information is of assistance to the Committee.

Yours sincerely

Philip Reed
Director-General

Enc. 8/11/11

State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
Telephone (07) 3239 3520
Facsimile (07) 3221 2534
Website www.justice.qld.gov.au
ABN 13 846 673 994

ATTACHMENT

Response to Technical Scrutiny of Legislation Secretariat examination of the Civil Proceedings Bill 2011

Amendments to the *Retirement Villages Act 1999*

Rights and Liberties

The report considers the proposed amendment to the *Retirement Villages Act 1999* about exit fees, in relation to whether it adversely affects rights and liberties, or imposes obligations retrospectively (section 4(3)(g) *Legislative Standards Act 1992*). The report refers to the 'apparently retrospective operation of section 53A(2) as proposed by this Bill'.

The proposed new section 53A(2) of the Retirement Villages Act requires the exit fee paid by the resident to be calculated on a daily basis for all existing residence contracts where the fee is calculated by reference to the length of the resident's stay in their unit and the contract does not prescribe another calculation method. Therefore, application of the default daily basis method only applies where there is no alternate method of calculation prescribed in the residence contract.

Arguably then, this amendment does not adversely affect rights and liberties, or impose obligations, retrospectively, as it does not change a term in an existing contract. Rather, the amendment inserts a necessary term which is otherwise missing, for contracts where the exit fee has yet to be calculated. If a residence contract provides the exit fee is to be calculated by reference to the resident's length of occupancy in their unit, but then does not specify whether the basis of this calculation is daily, weekly, fortnightly, monthly, yearly or some other interval, this aspect of the contract is uncertain. Unless the calculation method could be derived from the other terms of the contract, the uncertainty would remain and the parties would need to negotiate as to what method should apply. The amendment merely removes the uncertainty in that specific, narrow situation and does not purport to apply to exit fees already calculated. This is to be contrasted with the 2006 amendment to section 15(2), also referred to in the report, which was clearly intended to modify existing contractual provisions.

The report also notes the concern of the Queensland Law Society that the new provision section 53A(3), which introduces a mandatory daily basis method for future contracts, limits the parties' freedom of contract. In relation to this issue, it is not uncommon for laws to change, particularly to enshrine consumer protections, and all contractual arrangements made following such changes must therefore comply with the laws in place as at that time. As such, 'freedom of contract' is always subject to laws and changes to those laws, and this amendment is no different to any other like restriction designed to ensure a fairer and more certain marketplace.

Clear and Precise Drafting

The report also considers whether these amendments are clear and precise (section 4(3)(k) *Legislative Standards Act 1992*). In particular, the report notes the concerns expressed by the Queensland Law Society about the proposed new section 53A(2), in relation to whether the wording of the section may cause uncertainty about whether a term in the contract provides a way of working out the exit fee which is not on a daily basis. The accuracy of the example in the section was also questioned.

Given the many variations in the wording of residence contracts, both within and between villages, it would be problematic to be more specific in the Bill as to what wording in contracts would (and would not) prescribe a calculation method other than a daily basis. Consequently, this issue must be decided case-by-case. In relation to the example, both examples in the proposed new section 53A include the same hypothetical contractual exit fee term, intended to illustrate an exit fee which is calculated by reference to the length of the resident's occupation in their unit. Consequently, the example under the proposed new section 53A(1) and then repeated as part of the example under the proposed new section 53A(2) does not purport to invoke a daily calculation method. However, the concerns raised by stakeholders in their submission to the Committee have been noted.

Amendments to the *Justices of the Peace and Commissioners for Declarations Act 1991*

Clear and Precise Drafting

The report queries whether clause 235 of the Bill is unambiguous and drafted in a sufficiently clear and precise way (section 4(3)(k) *Legislative Standards Act 1992*).

The proposed section would allow for Justices of the Peace (JPs) and Commissioners for Declarations (C. Decs) to sight a proof of identity (POI) document and record information in the document, including by taking a copy of the document, for the purpose of taking an affidavit or attesting an instrument or document.

It should be noted that this amendment does not oblige JPs or C. Decs to record or copy POI details. The amendment provides discretion for a JP or C. Dec to elect to record or copy POI details, to assist them in the event that later verification of these details is required. The proposed amendment has arisen in response to requests from JPs who wish to have this information available should the documents they have attested later be called into question, for example, before a court.

The report suggests that it would be appropriate for the provision to include further statutory guidance concerning the requirement to keep POI information 'in a secure way'.

The JP Branch in the Department of Justice and Attorney-General intends to issue guidelines concerning the handling, recording and secure storage of confidential POI information to assist and inform JPs. The JP Branch also conducts workshops regarding best practice in witnessing documents where information and document security matters would be

canvassed. It is considered that this administrative approach would be the most appropriate; allowing for detailed guidance and quick response to any practical issues that may arise.

The suggestion for an allowance to be paid to JPs for secure storage is noted but is not under consideration by government due to the cost and practical administrative considerations. In this regard it should be noted that there are approximately 89,000 registered JPs in Queensland.

The report raises an additional concern that, while the draft provision prohibits a JP or C. Dec from disclosing POI information other than in performance of their official duties or as required by law, there is no specific prohibition on the use of these POI documents. The Bill restricts the purpose for which the information may be taken to the purpose of "taking an affidavit or attesting an instrument or document".

Title of the Bill

Sufficient Regard to the Institution of Parliament

The report considers whether the Bill has sufficient regard for the institution of Parliament (section 4(2)(b) *Legislative Standards Act 1992*).

Firstly, the report indicates that it would be preferable for the title of the Bill to make reference to the other, unrelated amendments contained in the Bill.

The Office of the Queensland Parliamentary Counsel (OQPC) has provided advice on this issue. OQPC undertakes the drafting of all Queensland Government Bills and has confirmed that it is its usual practice not to include "and Other Legislation Amendment" in the short title of a Bill for a principal Act even if the Bill includes amendments to other Acts.

This is to be contrasted with OQPC's usual practice to include those or similar words in the short title of a Bill for an exclusively amending Act. OQPC considers that the absence of the word "amendment" in the short title alerts Parliament and users to the fact that the Bill is for a new principal Act.

OQPC points out that the long title for Bills like the Civil Proceedings Bill include a list of affected legislation. The Bill's table of contents and explanatory notes also serve as additional indicators of the Bill's scope.

The long title for the Civil Proceedings Bill clearly alerts Parliament and others to the fact that, in addition to matters comprising the principal Act, the Bill is for an Act that repeals a named Act and amends several named Acts and makes minor and consequential amendments of Acts mentioned in a schedule.

By virtue of the *Reprints Act 1992*, section 40, the Civil Proceedings Act as reprinted would not include the repealed, or other amendments, when commenced. Rather, the amendments would be consolidated into the reprints of the affected legislation. For this reason, clause 212 of the Civil Proceedings Bill proposes to amend the long title by removing the repeal and

amendment details. If the short title included "and Other Acts Amendment", it would be necessary to include an amendment removing those words on assent, otherwise the principal Act would be inappropriately named.

The second issue raised in the report on this point is the grouping of unrelated amendments within a Bill, requiring members to support or oppose a Bill in its entirety when it may contain a number of significant unrelated amendments that would be better presented in topic-specific stand alone Bills.

The unrelated amendments, while to nine separate Acts, are all of a facilitative nature, aimed at providing greater consumer protection or improved effectiveness of existing legislative schemes, and are therefore included with this legislative vehicle for expediency. The amendments are not substantial enough to each constitute a stand alone Bill, but due to their beneficial impacts are considered desirable, and in some cases urgent, for passage at this time. For example, technical amendments to clarify the operation of provisions of the *Electoral Act 1992* are desirable for passage at the earliest opportunity, to ensure their enactment prior to the next election, rather than waiting for inclusion in a specified omnibus Bill.

Finally, the suggestion that omnibus bills are inappropriate in "forcing members to vote to support or oppose a bill in its entirety" does not sufficiently recognise the opportunity for individual amendments to be voted on during consideration in detail of the Bill.