Justice and Other Legislation Amendment Bill 2023

Submission No: 3

Submitted by: Xuveo Legal

Publication: Making the submission and your name public

See attached:

Our Ref:
Your Ref:

22 June 2023

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Justice and Other Legislation Amendment Bill 2023 (Qld) - Submission

This submission concerns the amendments to the *Legal Profession Act 2007* (Qld) (**LPA**) under Part 16 and *Legal Profession Regulations 2007* (Qld) (**LPR**) under Part 17 of the Bill.

1. General Comments

The majority of practising members of the Queensland Law Society (**QLS**) are engaged in Sole, Micro or Small sized law practices.[1] According to the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**), small businesses also make up the vast majority (97.5%) of businesses in the Australian economy.[2]

Xuveo Legal was established as a Queensland law practice in 2018 and practises in the intellectual property, commercial law and technology fields. The author was admitted to the legal profession in Queensland in 2006 and has worked extensively in small and micro law practices since that time. As a sole practitioner incorporated law practice, our law practice falls within the category of micro and small business.

We submit that, in the current context of the rising cost-of-living and cost-of-doing-business pressures, policy to regulate the legal profession in Queensland should appropriately focus on reducing the amount of 'red tape' and regulatory compliance costs imposed on law practices; and particularly those that are small and micro businesses.

Broadly, we support the Bill's initiatives to reform and reduce the regulation and compliance imposts on Queensland law practices. Reduction of such imposts enables small and micro law practices to better serve their clients and to apply their resources to compete in the marketplace more efficiently.

[1] QLS Annual Report 2021-22, at p29. See: https://www.qls.com.au/Content-Collections/Annual-report/2021-2022/Annual-Report-2021-2022
[2] ASBFEO, Key Statistics. See: https://www.asbfeo.gov.au/key-statistics

2. Streamlined Costs Disclosure – Clauses 109-114, 121

Broadly, we support the streamlining and simplification of costs disclosure to clients in matters that have low professional fees or are not complex in nature.

From our experience, the imposition of significant formal costs disclosure requirements in such matters can impose both compliance costs to the law practice, and transactional friction for the client at the point of engagement of the law practice.

3. New s 713A (Destruction of Client Documents) – Clause 118

We note one of the specific stated aims of the Bill is to:

> *address the increasing risk to clients' privacy and confidentiality arising from the prolonged retention of client documents by law practices, the Queensland Law Society and community legal centres, and the mounting substantial costs associated with securely storing large volumes of client files that are no longer of utility in the Legal Profession Act 2007*.

Broadly, but subject to the following comments, we support the measures to allow law practices to destroy client documents in prescribed circumstances.

The author's own personal experience over a number of years in practice is that file maintenance and destruction – particularly legacy paper files and archives – can be a time consuming, painstaking and expensive process. This impost can divert precious and limited resources away from the operation of the law practice and the provision of service to its current clients.

3.1. Factors in support

Factors weighing in support of the reform include the following:

(a) **The reform allows law practices to minimise unnecessary long-term or indefinite retention of client data and personal information, thereby reducing the risks of such data and personal information being exposed to cyberattacks, data breaches or exfiltration.**

Modern computerised law practices frequently engage cloud-based electronic data storage for client documents.

Whilst storage of data in electronic form can be comparatively less expensive than traditional paper storage, the recent spate of data breaches and cyberattacks impacting Australians (such as the well-publicised Medibank and Optus data breaches) have sparked community concerns around cybersecurity and the unnecessary, long-term or indefinite retention of data and personal information.

We consider that there is likely to be a continued shift in community expectations against the retention of such information, as community awareness of the risk and impacts of cyberattacks and breach of personal information and data increases.

Law practices are frequently compelled to obtain large quantities of personal information and sensitive data – such as verification of identity documents, evidence, witness statements, business records and commercial-in-confidence, privileged or trade secret information. It is believed that law practices are increasingly becoming the target of cyberattacks with the objective of exfiltration of personal information and other sensitive client data.[3]

[3] Note the recently-reported significant data breach concerning the law firm HWL Ebsworth: ABC News Online, 'Russian-linked hackers taunt HWL Ebsworth over data breach, claim to have published files to dark web' (9 June 2023) https://www.abc.net.au/news/2023-06-09/russian-linked-hackers-taunt-hwl-ebsworth-over-data-breach/102461608

The risk of unauthorised access to, or exfiltration of, such data carries significant potential impacts for law practices, their clients and other parties (such as third parties involved in a matter).

(b) The reform allows law practices the ability to limit ongoing physical document storage costs.

Law practices with legacy or paper-based filing systems may be subject to the ongoing impost of secure storage of those files and archives – often through a third-party storage provider.

Our experience is that such ongoing costs can be significant, especially for small and micro law practices. Under the *Australian Solicitors Conduct Rules* (**ASCR**) (which were adopted in Queensland in 2012), law practices are not permitted to pass-on charges for document storage and retrieval without the client's consent.[4]

(c) The reform provides law practices with a safe harbour to destroy client documents if it takes reasonable steps to obtain instructions from the former client. The reform also balances the need to only permit destruction of client documents where such destruction is appropriate in the circumstances.

A requirement to obtain express consent of a given client imposes the burden on the law practice to contact a former client to obtain such instructions. This can prove problematic in several instances, such as where the former client:

(1) is not readily able to be located, such as due to a change of address or contact details;

(2) is deceased, or (for a non-individual client) has been deregistered, dissolved or wound-up; or

(3) is disinterested in the archived client documents, but yet still fails to respond to or engage with the law practice's requests for express instructions to destroy their client documents.

Our experience is that the majority of clients do not request a copy of their legal files at the conclusion of a matter, and become less likely to request a copy of their archived legal files as time progresses. Indeed, we speculate that many clients would assume a law practice is already permitted to destroy client materials after a certain period of time has elapsed.

However, under the current common law position, the law practice is considered to be a bailee and is therefore unable to destroy the client documents outside of express client authority. In the absence of explicit instructions to destroy them, a law practice would theoretically be required to retain 'orphaned' documents indefinitely.[5] The reform addresses this shortcoming.

(d) The reform is broadly consistent with the Australian Privacy Principles under the *Privacy Act 1988* (Cth) and foreign privacy regulations.

The Australian *Privacy Act*, and the Australian Privacy Principles (**APPs**) prescribed by that legislation, applies to many law practices. Foreign privacy laws, such as the European Union's GDPR, may also apply to law practices in some circumstances.

The Office of the Australian Information Commissioner's (**OAIC**) Guidelines for APP 11 provide that "Where an APP entity no longer needs personal information for any purpose for which the

[4] See Australian Solicitors Conduct Rules (**ASCR**), Rule 16. https://www.qls.com.au/Guides/Australian-Solicitors-Conduct-Rules/Relations-with-clients/Charging-for-document-storage

[5] See QLS FAQ Article "Can I destroy client files after 7 years?" https://www.qls.com.au/Practising-law-in-Qld/Ethics-Centre/Rules-Resources/Can-I-destroy-client-files-after-7-years

information may be used or disclosed under the APPs, the entity must take reasonable steps to destroy the information or ensure that it is de-identified."[6]

The GDPR provides individual 'data subjects' with a "Right to Erasure" or "Right to be Forgotten" in relation to personal data, and similarly requires that data be retained "no longer than is necessary for the purposes for which the personal data are processed".[7]

We consider that the reform is consistent with a subject organisation's obligations to destroy or de-identify personal information once no longer required and allows law practices to better comply with such obligations.

3.2. Suggested Improvements and changes

(a) The proposed section does not clearly provide permission to destroy where client instructions exist

The proposed section does not appear to clearly provide that a law practice may destroy client documents if it has obtained the consent, instruction or authority of the relevant client.

Rule 14.2 of the ASCR provides that:

> *[14.2] A solicitor or solicitor's law practice **may destroy** client documents after a period of 7 years has elapsed since the completion or termination of the engagement, **except where there are client instructions** or legislation **to the contrary**.* [emphasis added]

ASCR Rule 14 appears to be inverse to the proposed section, in that:

- the ASCR provides the law practice **may** destroy the document unless the client instructs otherwise;

whereas:

- the proposed section provides the law practice **may not** destroy a document unless it obtains those client instructions or complies with the requirements of proposed subsection (1).

There has been long-held conjecture as to the authoritative status of the ASCR. Whilst Rule 14.2 appears to provide a clear permission for a law practice to destroy documents, the concept of common law bailment has been suggested to subvert the application of Rule 14.2 to the extent that the ASCR is considered to be non-authoritative.[8]

Obtaining a written client authority or instructions for document destruction at the outset of the client retainer (such as by including the authorisation under the form of a Costs Agreement) is currently suggested as good practice by QLS.[9] We consider that law practices should be enabled to rely upon express client instructions regarding document destruction.

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[6] See OAIC, *Australian Privacy Principles Guidelines*, Chapter 11. https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-guidelines/chapter-11-app-11-security-of-personal-information

[7] See GDPR Articles 5(1)(e) and 17: https://gdpr.eu/article-5-how-to-process-personal-data/; https://gdpr.eu/article-17-right-to-be-forgotten/

[8] See QLS FAQ Article "Can I destroy client files after 7 years?" https://www.qls.com.au/Practising-law-in-Qld/Ethics-Centre/Rules-Resources/Can-I-destroy-client-files-after-7-years

[9] QLS Ethics Centre Guidance Statement No. 6 "Form of Delivery for Client Documents" at [2.6]. https://www.qls.com.au/Guidance-Statements/No-06-Form-of-Delivery-for-Client-Documents

For greater clarity, we suggest that subsection (1)(b) of the proposed section be amended to include an express clause stating a law practice may destroy a client document if the law practice holds the relevant client's instructions or authority to do so – for example:

> *(b) the law practice:*
>
> *(i) has obtained instructions from the client about the destruction of the document; or*
>
> *(ii) has been unable, despite making reasonable efforts, to obtain instructions from the client about the destruction of the document;*

Whilst we recognise that the "reasonable efforts" test will necessarily be dictated by the relevant circumstances of each case, some guidance or examples may be helpful concerning what is likely to amount to "reasonable efforts".

(b) Definition of "client document" remains unclear

Subsection (4) of the proposed section provides "***client document*** means a document to which a client is entitled."

We consider such definition to be vague and unhelpful, as it does not seek to clarify the documents to which the client is "entitled".

A client file may consist of many types of documents and not all documents may be documents to which the client is "entitled" at law – such as file documents prepared by the law practice for its own benefit, without charge to the client.[10]

We submit that further guidance would be required to provide clarity and certainty around the definition.

4. Other Opportunities for Reform

4.1. Modernising Law Practice Trust Account Operations

(a) Background

The operations of law practice statutory trust accounts are regulated by Part 3.3 of the LPA and LPR.

Presently, the LPA and LPR permits a law practice to draw funds out of a general trust account only by cheque or electronic funds transfer (**EFT**). However, a law practice may use EFT only if it has been authorised to do so by the law society.[11] Other transaction methods (such as phone banking and cash withdrawals) are also prohibited.[12]

As a result, law practice trust accounts must still retain the capability to use cheques – to facilitate payments in the event that:

- the law practice does not obtain the necessary law society approval; or
- such approval is revoked by the law society.

The Australian Government has recently noted the steady decline in general usage of cheques (which have reportedly fallen to approximately 0.2% of all payments) and announced its

[10] See QLS FAQ Article "Who owns what in a client file?" and cases cited therein. https://www.qls.com.au/Practising-law-in-Qld/Ethics-Centre/Rules-Resources/Who-owns-what-in-a-client-file
[11] LPA ss 250(1)(b), 252(1)(b).
[12] LPA ss 250(2), 252(2).

intention to phase out the use of all cheques within the Australian banking and payments system by 2030.[13]

The Australian Government has also announced its intention to phase out BECS (the Bulk Electronic Clearing System) – which operates the current BSB and Account Number payment system – in favour of transitioning to the New Payments Platform (**NPP**).[14] The NPP's PayID functionality is currently available on accounts offered by "over 100 banks, credit unions, building societies and other organisations."[15]

(b) Remove the default requirement for cheques for law practice trust accounts

Given the Australian Government's stated policy intent to remove cheques from the banking system, we submit that the present Bill is an opportunity to modernise law practice trust account regulation by removing the requirement for cheques as the default method of payment from law practice trust accounts.

This could be achieved by amending the LPA and LPR to:

- remove the requirement for a law practice to specifically obtain law society approval before making outbound trust account payments using EFT transactions;[16] and
- allow an ADI to open a law practice trust account without requiring a cheque book to be issued for the account.

(c) Allow use of modern payment methods and technologies for EFT payments from law practice trust accounts

Where a law practice is authorised to draw funds via EFT, the LPR prescribes that the law practice must keep a record of the BSB Number and Account Number to which the payment is made.[17]

BSB and Account Number transactions are known to be less secure, as this method:

- does not provide for adequate verification of payee identity at the point of transaction;
- is vulnerable to mistakes arising from incorrect data entry or typographical errors; and
- is vulnerable to criminal fraud or scam activities where BSB and Account Number information can be substituted to divert payments away from the legitimate payee account.

Payers, including law practices and their clients, have been targeted by cyber criminals who attempt to intercept and divert payments through the use of false or compromised BSB and Account Numbers. As a result of these security risks, law practices and their clients face additional administrative overheads to verify payments, particularly where large transaction sums are involved. Law practices and principals also face greater insurance and liability risks in the event of a fraudulent or erroneous diversion of trust account monies.

[13] Australian Government, Department of Treasury, *A Strategic Plan for Australia's Payments System* (7 June 2023), Report at pp 18-19, 33. https://treasury.gov.au/publication/p2023-404960
[14] ibid, at pp 20-22, 33.
[15] PayID Homepage, https://payid.com.au (7 June 2023).
[16] See LPA s 250(1)(b) and (3) and s 251(1)(b) and (3).
[17] See LPR s 38(5)(c) and (d), s 41(2)(c) and (d), s 42(6)(c) and (d), s 50(6)(c) and (d),

The present legislation was enacted prior to the advent of the New Payments Platform (**NPP**). The NPP allows for modern, secure and near-real-time electronic transactions that rely upon use of PayIDs rather than traditional BSB and Account Numbers.

Even where EFT approval is obtained, law practices are unable to utilise modern payment methods or technologies (such as BPAY or PayID) as they are constrained by the requirement to record the BSB and Account Numbers of outbound funds transfers.

We submit that, given the Australian Government's stated intention to transition the banking system to the NPP, the Bill is an opportunity to modernise law practice trust account regulation by allowing the use of modern, more secure payment technologies in addition to the existing BSB and Account Number payment method.

We suggest the LPR should be amended to remove the strict requirement to record a BSB and Account Number as part of trust transaction records when making an EFT transaction from a trust account.[18] Instead, the LPR could provide that the law practice may record an appropriate "payee identifier" (such as a BSB/Account Number, PayID, or BPAY Biller Code and Reference Number) for the payment. However, such an amendment would also need to ensure that it:

- is not limited to current available technologies, methods or platforms; and
- is sufficiently platform-independent and allows for the emergence of new payment methods and technologies.

Amendments to remove the current restriction to BSB and Account Numbers would future-proof the LPA and LPR by allowing for use of modern and emerging payment methods to be adopted by law practices when dealing with trust account monies.

5. Conclusion

Thank you for the opportunity to make submissions regarding the Bill. Should the Committee require any clarification or further information regarding this submission, please contact the author.

Yours sincerely,

[redacted]

Ben Thorn | Legal Practitioner Director

[redacted]

[18] Specifically, LPR s 38(5)(c) and (d), s 41(2)(c) and (d), s 42(6)(c) and (d), s 50(6)(c) and (d), with consequential amendments to the Dictionary in Schedule 2, and s 27 (Definitions for Part 3.3).