

## Justice and Other Legislation Amendment Bill 2023

**Submission No:** 9  
**Submitted by:** Legal Aid Queensland  
**Publication:** Making the submission and your name public  
**See attached:**

# **Justice and Other Legislation Amendment Bill 2023**

Submission by Legal Aid Queensland

June 2023

## ***Justice and Other Legislation Amendment Bill 2023***

### **Introduction**

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission regarding the *Justice and Other Legislation Amendment Bill 2023* ('the Bill').

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system. LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

This Bill proposes legislative amendments to remove the eligibility of LAQ funded litigants claiming on The Appeals Cost Fund ('the Fund'). LAQ has historically pursued claims against the Fund to ensure, where possible, public funds are recovered to off-set the cost of providing legal assistance and representation. This is consistent with LAQ's responsibility to administer and deliver legal assistance in the most effective, efficient and economical way. In the event that these funds are not recovered, it could have a substantial impact upon LAQ's budget and operating position going forward.

This submission also calls upon the experience of our lawyers in the Criminal Law Services Division, which is the largest criminal law practice in Queensland providing legal representation across the full range of criminal offences and is informed by their knowledge and experience. Given our areas of practice, the remainder of our submission focusses on the aspects of the Bill relating to the attempts to recognise the death of an unborn child and the removal of the restriction on the pre-committal publication of the identity of an adult accused of a prescribed sexual offence.

### **Submission**

#### **Part 3      Amendment of Appeal Costs Fund Act 1973**

The Fund helps compensate litigants for costs arising from decisions that are upset on appeal or if proceedings are aborted *through no fault of their own*.<sup>1</sup>

When the *Appeal Costs Fund Act 1973* (Qld) was introduced, it was remarked,

*I hope that no-one will be denied justice at the commencement of legal proceedings because he is deprived of legal aid.*<sup>2</sup>

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<sup>1</sup> Queensland Government, *Appeal Costs Fund* (Web Page) <<https://www.qld.gov.au/law/court/appeal-costs-fund#:~:text=The%20purpose%20of%20the%20Appeal,no%20fault%20of%20their%20own>>

<sup>2</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 September 1973, 677 (Hanlon).

Clause 19 of the Bill provides for a significant amendment to the *Appeal Costs Fund Act* by prohibiting the Board from making a payment from the Fund to LAQ or to a Legal Aid service provider. LAQ notes Clause 22 (new section 35) does not prevent such payments where the Board has issued the certificate before commencement, however this will still preclude the Board from issuing a certificate for payment from the Fund in circumstances where the indemnity certificate has been issued by the Court prior to the commencement of the provisions.

Precluding payment from the Fund to LAQ will have real and substantial financial implications for the availability of legal assistance to financially disadvantaged persons if not adequately accounted for in some other way. LAQ relies upon this funding stream and without this, financial pressure would be placed on LAQ moving forward.

An assessment of claims made to the Fund by LAQ in December 2022, confirmed that over the past three (3) years on average, almost \$1M has been recovered annually. Given the increases in LAQ preferred supplier fees for State funded criminal law matters in August 2022, this amount could be expected to increase by up to 20%.

In the event that this Bill is passed, LAQ will seek to ensure that recurrent funding is secured to maintain financial stability. LAQ will, therefore, engage with the Department of Justice and Attorney-General (DJAG) and work with Queensland Treasury (QT) to progress options to secure recurrent funding allocations that would incorporate the inclusion of the equivalent of Fund claims as part of future budgets.

To that end, LAQ would appreciate the support and assistance of DJAG through the process of navigating negotiations with QT representatives in the lead up to the finalisation of funding submissions for the 2024-25 Budget.

## **Part 8      Amendment of Criminal Code**

Developing an effective and practically operable legal framework to better recognise the death of an unborn child as a result of criminal acts is complex. LAQ raised concerns during the development of these amendments, and we remain of the view that Queensland's criminal law currently contains provisions which allow for appropriate responses where the death of an unborn child has occurred due to a criminal act. The Bill proposes amendments to the *Criminal Code 1899* (Qld) ('the Code') that would allow the details of an unborn child (name or description) to be added to an indictment. We hold concerns regarding this proposal, including that such amendments would represent a step toward foetal personhood.

Section 564 of the Code contains provisions relating to the form of the charge, and the allegations against the accused. Clause 50 of the Bill seeks to enable the name, or a description of an unborn child allegedly destroyed as a result of an offence committed against a pregnant person, to be inserted into the indictment; which is read to the Court and to which an accused enters their plea, including before a jury where the matter is a trial. It seeks to do so analogously to section 564(3A) of the Code, which allows for the recognition of a relationship between offending and domestic violence in relation to a domestic violence offence.

In LAQ's view section 564(3A) sits differently to that which is suggested via this amendment. Section 564(3A) has the support of the legislative definition 'domestic violence offence' contained in section 1 of the Code, the definition of "domestic violence"<sup>3</sup> and a "relevant relationship" in the

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<sup>3</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

*Domestic and Family Violence Protection Act 2012 (Qld)*<sup>4 5</sup>. It is therefore clear and sits within an established, familiar framework. In our experience, if the substantive charge is accepted or established, that aspect of the indictment is very rarely challenged. There are no such definitions nor solid legal foundation upon which the proposed amendment can rely.

Clause 50 seeks to assume a connection between the criminal act and the destruction of an unborn child, and therefore will represent in reality something more than an aspect of form of an indictment, but more a circumstance of aggravation or a further standalone offence. As was said when the Bill was introduced, '[the amendments] ensure independent recognition of the unique harm caused when the life of an unborn child is ended as a result of criminal conduct'.<sup>6</sup> The raising of such an allegation without clarity will add a layer of complexity to proceedings involving evidential requirements (most likely the appropriate evidential standard of proof; beyond reasonable doubt) particularly in relation to causation.<sup>7</sup> Any effort to provide clarity will see a blurring of the ethical and moral issues beyond that which is a relevant consideration for a court.

To raise such an allegation on an indictment without such evidentiary requirements, will affect an accused's rights in criminal proceedings, particularly in relation to being informed of the nature and reason (for the charge).<sup>8</sup>

Irrespective, the naming or description of an unborn child represents a move closer to the recognition of foetal personhood, a move LAQ does not support. As LAQ has previously submitted, it also has potential implications for the rights of pregnant persons and those who provide them with medical care. By extending culpability beyond the harm to the pregnant person, it risks placing criminal responsibility on a pregnant person for any criminal actions of theirs that result in such harm to their unborn child.

Further, the offence contained in s 313(2) of the Code already recognises the loss of an unborn child as part of an unlawful assault caused to a pregnant female. There is no express qualification or implied qualification as to the age of the unborn child to which it refers,<sup>9</sup> as the harm to the foetus is treated as harm to the mother.

### **Part 9 Amendment of Criminal Law (Sexual Offences) Act 1978**

LAQ notes that recommendation 83 of the Women's Safety and Justice Taskforce, which recommended the removal of the restriction on publication of the identity of an adult accused of a sexual offence before a committal hearing, urged such amendments to not commence until the Queensland Government developed a guide for the media to support responsible reporting of sexual violence. LAQ is not aware of such a media guide having been consulted upon or prepared

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<sup>4</sup> *Domestic and Family Violence Protection Act 2012 (Qld)* Schedule.

<sup>5</sup> *Domestic and Family Violence Protection Act 2012 (Qld)* s 13.

<sup>6</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 May 2023, 1684 (YM D'Ath, Attorney-General and Minister for Justice and the Minister for Prevention of Domestic and Family Violence), emphasis added.

<sup>7</sup> In contrast to the suggestion that expressly providing for the name or description of the unborn child on the indictment would eliminate arguments as to the inclusion rendering the indictment prejudicial, defective or duplicitous such that the name of the unborn child is not included and therefore not read to the court: Queensland, *Parliamentary Debates*, Legislative Assembly, 25 May 2023, 1684 (YM D'Ath, Attorney-General and Minister for Justice and the Minister for Prevention of Domestic and Family Violence).

<sup>8</sup> *Human Rights Act 2019 (Qld)* s 32(2)(a).

<sup>9</sup> *R v Waigana* [2012] QSC 202 at 3-3, line 50, and 3-5, line 10.

in conjunction with these amendments and would urge the development of such guidance before these amendments occur to protect against inadvertent identification of victims, decrease the risk of 'trial by media' and retribution in some communities, and reporting that perpetuates harmful stereotypes about sexual violence.<sup>10</sup>

#### Part 25 Amendment of Penalties and Sentences Act 1992

LAQ supports a sentencing regime that allows the court to retain discretion as to the weight to be placed on all relevant factors when arriving at a just sentence and does not support Clause 165 of the Bill.

In our experience, the current section 9 *Penalties and Sentences Act 1992* (Qld) ('PSA') in combination with sentencing principles, already allows for regard to be had to the loss of an unborn child in the course of a criminal act. Courts are already required to have regard to the extent of injury in assessing the seriousness of an offence. The current laws allow for appropriate recognition in the sentence imposed without the need to cross into moral and ethical territory.

Section 9(3) PSA requires the sentencing judge to have regard primarily to a number of matters relevant to sentencing for such an offence. When any offence results in physical harm to another person or involves the use of violence against another person,<sup>11</sup> s 9(3) PSA is enlivened. This requires the sentencing judge to have regard primarily to a number of matters relevant to sentence, including:

- (c) the personal circumstances of any victim of the offence;
- (d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;
- (e) the nature or extent of the violence used, or intended to be used in the commission of the offence, and
- (f) any disregard by the offender for the interests of public safety.

The scope of "*any injury to a member of the public*" and "*the personal circumstances of any victim*"<sup>12</sup> are broad enough to require a court to consider such loss to the pregnant person as a matter of primary relevance at sentence.

Requiring a court to consider the death as an aggravating factor as proposed in Clause 165 of the Bill, would provide another layer of complexity to the sentencing process and place a sentencing court in a position where criminality may be measured according to stages of pregnancy.

However, if the PSA was to be amended in this way, LAQ supports the inclusion of the discretion in exceptional circumstances not to treat the destruction of the unborn child's life as an aggravating factor; assisting to avoid unintended consequences and allow a court to retain discretion according to the particular facts of the case.

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<sup>10</sup> Women's Safety and Justice Taskforce, *Hear her voice Report 2 Volume 1: Women and girls' experiences across the criminal justice system*, (2022), 369.

<sup>11</sup> *Penalties and Sentences Act 1992* (Qld) s 9(2A).

<sup>12</sup> *Penalties and Sentences Act 1992* (Qld) s 9(3).

### Part 35 Amendment of Youth Justice Act 1992

For reasons akin to feedback on Part 25 of the Bill, LAQ does not support the corresponding amendment to section 150 of the *Youth Justice Act 1992* ('YJA'), contained in Clause 245 of the Bill. The sentencing principles of the YJA already require the sentencing court to take into account the loss of an unborn child in the course of a criminal act through having regard to the nature and seriousness of an offence.<sup>13</sup> The court must also have regard to the youth justice principles which underpin the Act<sup>14</sup> including upholding the rights of children and to consider the child's age and maturity in making decisions under the Act.<sup>15</sup> The need to protect the community and in particular from recidivist high-risk offenders, also exists within the Charter of Youth Justice principles.<sup>16</sup> Different sentencing considerations apply to children in recognition of their vulnerability, immaturity, to support their rehabilitation and minimise future offending. The inclusion of a specific aggravating factor could unfairly impact these most vulnerable of offenders and result in sentencing outcomes which may be inconsistent with these principles.

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<sup>13</sup> *Youth Justice Act 1992* (Qld) s 150(1)(d).

<sup>14</sup> *Youth Justice Act 1992* (Qld) s 150(1)(b).

<sup>15</sup> *Youth Justice Act 1992* (Qld) Schedule 1, Charter of youth justice principles, 2 and 13.

<sup>16</sup> *Youth Justice Act 1992* (Qld) Schedule 1, Charter of youth justice principles, 1.