Justice and Other Legislation Amendment Bill 2023

Submission No:	10
Submitted by:	Queensland Law Society
Publication:	Making the submission and your name public

See attached:

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Office of the President

23 June 2023

Our ref: [LP:MC]

Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lasc@parliament.qld.gov.au

Dear Committee Secretary

Justice and Other Legislation Amendment Bill 2023

Thank you for the opportunity to provide feedback on the Justice and Other Legislation Amendment Bill 2023 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of members of the QLS Criminal Law, Privacy, Data, Technology and Intellectual Property Law, Litigation Rules, and Ethics Committees. We acknowledge that in preparing our response to the Bill, we have also had the benefit of considering the submission prepared by Ben Thorn, Xuveo Legal.

General comments

We note that this is an omnibus Bill that makes amendments to several pieces of legislation. In this regard, we highlight comments made by the Legal Affairs and Community Safety Committee in relation to the inappropriate nature of omnibus bills. In particular we note the Committee's remarks in its consideration of the *Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012*. Here, the Committee noted that omnibus bills,

> *Arguably may breach the fundamental legislative principle in section 4(2)(b) of the Legislative Standards Act 1992 because they fail to have sufficient regard to Parliament, forcing Members to vote to support or oppose a bill in its entirety when that (omnibus) bill may contain a number of significant unrelated amendments to existing Acts that would more appropriately have been presented in topic-specific stand-alone bills.*[1]

[1] Legal Affairs and Community Safety Committee, *Youth Justice (Boot Camp Orders) Other Legislation Amendment Bill 2012* (Report No. 18, November 2012), p. 5.

Due to the size of the Bill, QLS has limited its comments to those aspects outlined below. The absence of comment on a particular matter should not be considered an endorsement by QLS.

Civil Proceedings Act

QLS appreciates being given the opportunity to suggest improvements to the drafting of section 59 of the *Civil Proceedings Act 2011* (Qld). As the proposed amendments are consistent with QLS's earlier recommendations, QLS supports the amendments.

Criminal Law (Sexual Offences) Act

Publishing the identity of defendants in sexual offence proceedings before committal

The findings and recommendations of the Women's Safety and Justice Taskforce (the **Taskforce**) Report, Hear Her Voice 2: Women and girls' experiences across the criminal justice system (**Report Two**) are detailed and extensive. As a result, sexual offences have rightly assumed critical importance in criminal policy. As is contemplated in Report Two, complexities arise when seeking to strike a balance between open justice and an accused person's right to a fair trial.

QLS acknowledges the Taskforce's observation that the drafting of section 7 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) (**CLSO Act**) is unclear.

Recommendation 83 in Report Two proposes to remove the restriction on publication of the identity of an adult accused of a sexual offence before a committal hearing where it would not identify or tend to lead to the identification of a victim-survivor.

We observe that Recommendation 83 in Report Two is contingent upon implementation of Recommendation 84 which involves the development and promotion of a sexual violence media guide to support responsible reporting of sexual violence.

The Government supported this recommendation and has committed to developing this guide which, in our view, is material to evaluating the operation of the proposed amendments to the CLSO Act. As we are not yet aware of the Queensland Government's development of a sexual violence media guide, we may seek to supplement this submission at such time it becomes available for consultation.

Nevertheless, QLS considers that the current position in Queensland provides for the protection of the complainant's identity in certain circumstances whilst seeking to strike a balance between the right of the accused to a fair trial and the general rule of openness of the court and that court proceedings may be openly reported.

In jurisdictions such as New South Wales and Victoria, the complainant must not be identified without authorisation by the court unless consent has been obtained from a complainant (over the age of 14). Whilst it is recognised that complainants being able to self-publish details (and others publishing details with the consent of the complainant) provides a complainant with control over the circumstances in which their 'story' is told, there are obvious risks to the accused's ability to receive a fair trial in circumstances where jurors may have access to details of the complaint of which the prosecution, court and defence have not been made aware. It has been long recognised by the courts that:

> If material is obtained or used by the jury privately, whether before or after retirement, two linked principles, bedrocks of the administration of criminal justice, and indeed the

> rule of law, are contravened. The first is open justice, that the defendant in particular, but the public too, is entitled to know of the evidential material considered by the decision making body; so indeed should everyone with a responsibility for the outcome of the trial, including counsel and the judge, and in an appropriate case, the Court of Appeal Criminal Division. This leads to the second principle, the entitlement of both the prosecution and the defence to a fair opportunity to address all the material considered by the jury when reading its verdict. Such opportunity is essential to our concept of a fair trial. These principles are too basic to require elaboration. Occasionally however, we need to remind ourselves of them.[2]

QLS considers that the appropriate balance between the ability of a complainant to tell their story and for the accused to receive a fair trial is struck where the complainant is able to self-identify and be identified (if they consent in writing, are over 18 and have mental capacity) in a report only after the defendant is convicted.

Legal Profession Act

Cost Disclosure Amendments (clauses 109 to 114)

The Bill proposes to amend the *Legal Profession Act 2007* (Qld) (**LPA**) as follows:

- by increasing the prescribed amount under section 311 of the LPA (which triggers cost disclosure obligations for a law practice) from $1,500 to $3,000; and
- to provide that an abbreviated costs disclosure obligation will apply if the total legal costs in a matter, excluding disbursements, are not likely to exceed $3,000, and that no costs disclosure obligations will apply if the total legal costs in a matter, excluding disbursements, are not likely to exceed $750.

QLS broadly welcomes the proposal to amend the LPA to increase the detailed disclosure threshold amount from $1,500 to $3,000, or other amount prescribed by regulation. However, we raise the following issues for the Committee's consideration.

Firstly, QLS is concerned that the proposed amendments will mean that practitioners who are not currently required to provide costs disclosure for matters less than $1,500.00 will, if the Bill is passed, need to provide *abbreviated costs disclosure* for legal costs expected to fall within the $750 and $1500 threshold amounts. In our view, this is contrary to the legislative intention to reduce the regulatory burden for law practices and may also have an unintended consequence of deterring practitioners from conducting smaller low fee matters.

It is important to highlight that costs disclosure is distinguished from the provision of a costs agreement to clients. That is, provision of a costs agreement to the client is strongly recommended, regardless of whether the legal costs are likely to be less than the costs disclosure threshold amount.

Accordingly, we suggest that the current $1,500 should be maintained as the disclosure threshold amount, so that small fee matters continue to be accepted without requiring that cost disclosure obligations be met, albeit on an abbreviated basis. This more appropriately facilitates access to justice, particularly for low bono and smaller matters.

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[2] *R v Karakaya* [2005] 2 Cr App R 5 [24]

Additionally, if the threshold amount is to be fixed in the legislation, QLS supports a regular review of the prescribed amount to account for inflation and to ensure that the thresholds are set at an amount consistent with their intended purpose.

Secondly, we understand that the Uniform Law jurisdictions are soon to review their cost disclosure elements and may consider an increase to $5,000 for their upper threshold.

Given our preference for a $1,500 disclosure threshold amount, we would propose that Queensland take the opportunity to lead nationally and implement a $5,000 upper threshold for the use of abbreviated cost disclosure.

Thirdly, proposed section 307B(2)(a) of the LPA requires disclosure of "*in general terms, the legal services that will be provided to the client*". This is an important element of the formation of a retainer and scoping the engagement of a law practice, however, in our view this element should not form part of the mandated cost disclosure. Disclosure of this information is not required in the detailed disclosure provisions under section 308 of the LPA and therefore seeks to extend the cost disclosure regime into mandating certain elements of practice management. Scoping a retainer is very important and clearly communicating the nature of the work is a part of prudent practice management, however it is inappropriate for the validity of cost disclosure to a client to rest upon the clarity of this exercise. It is also uncertain how this mandated disclosure assists a client to better understand their likely legal costs when an estimate of the total amount of legal costs and disbursement is required. Communication of the scope of works is properly a matter for appropriate management systems.

Lastly, consideration should be given to the inclusion of transitional provisions so that practitioners can appropriately deal with matters that were engaged prior to the commencement of any new costs disclosure regime. For example, under the Bill, law practices would be required to review active matters which fall between the current costs disclosure threshold of $1500 and the new abbreviated threshold of $750 and issue costs disclosure. Adequate lead in time should be afforded to enable those practices sufficient time to prepare.

Document destruction (clause 118)

Consistent with our 2020 Call to Parties Statement,[3] QLS welcomes enhanced legislative certainty as to the circumstances under which a law practice may destroy client documents, after a designated period of time, without obtaining client consent.

In this regard, we note that clause 118 of the Bill inserts a new section 713A (Destruction of client documents) to allow a law practice to destroy a client document relating to a matter if:

(a) it is at least 7 years since the completion of the matter; and

(b) the law practice has been unable, despite making reasonable efforts, to obtain instructions from the client about the destruction of the document; and

(c) it is reasonable in the circumstances, having regard to the nature and content of the document, to destroy the document.

QLS strongly supports legislative amendments to the LPA which seek to address the increasing risk to clients' privacy arising from the prolonged and costly retention of client documents which

[3] 'Call to Parties Statement – Queensland State Election 2020' *Queensland Law Society* < https://www.qls.com.au/Content-Collections/Statements/QLS-call-to-parties-QLD-State-Election>.

are no longer of utility. This includes the ever-present risks posed to clients by cyber-attacks where, as is usually the case, the solicitor holds client documents, or copies of them, in the cloud.

However, to ensure clarity and alignment with the existing requirements set out in rule 14.2 of the Australian Solicitors Conduct Rules (**ASCR**) for our members, we provide the following comments and suggested amendments for the Committee's consideration:

1. For context, it is important to note that rule 14.2 of the ASCR must be read in conjunction with rule 14.1, which requires client documents to be returned to clients on request at the conclusion of a matter, subject to any lien the solicitor may have for unpaid fees. Where client documents are provided at that stage, the obligation to retain them for seven years under rule 14.2 does not apply, because the client's documents have already been returned to them. Many client documents may also be provided to the client during the course of the matter.

   Rule 14.2 is intended to cover the situation where the client does *not* request their documents at the end of the matter, requiring the solicitor to retain them, should the client make such a request in the future. Ordinarily, the terms of the retainer or costs agreement with the client will address this by permitting the solicitor to destroy them after seven years, or such earlier period as may be agreed.

   To improve the efficacy of proposed section 713A of the LPA in practice, to provide greater clarity for clients and solicitors in applying the new reforms, and to preserve those existing practices which currently work well for both clients and solicitors, we have proposed some minor amendments in Attachment A, including:

   (a) affirming the principle of client autonomy by clarifying that clients have the right to instruct their solicitor to return or destroy their client's documents, including by agreeing at the start of the retainer, such as in a costs agreement, either at seven years or even earlier, if that is what the client wishes;

   (b) reflecting rule 14.1, by specifically reflecting that the obligation to retain client documents does not apply if the client's documents have already been provided to the client; and

   (c) acknowledging that a law practice may in some situations be permitted to lawfully retain copies of client documents for its own purposes, for example to manage future claims.

   Attachment A also notes some other minor changes, which are explained below.

2. It is hoped that the proposed amendment will also address the issue of certain classes of documents, such as wills and deeds, that may have been entrusted to a law practice as safe custody documents, but where the utility of retention has long since passed and where the client may no longer be reasonably contactable or deceased. These cases are where section 713(1)(b) and (c) of the LPA will be most useful going forward.

   Our proposed amendment to the definition of 'client documents' in proposed section 713A(4) of the LPA clarifies that 'client documents' includes safe custody documents, as rule 14 of the ASCR is not directed at all such documents. This is because not all

such documents will have been created by the solicitor to which they have been entrusted.

We also consider there will be a need for appropriate guidance to be issued to the profession with respect to '*reasonable efforts*' in section 713A(1)(b) of the LPA and what is '*reasonable in the circumstances*' in section 713A(1)(c) of the LPA. QLS is prepared to issue such guidance and as such, we suggest that it would be of assistance to reference such guidance as a drafting note within the legislation.

3. To ensure the proposed section clearly captures retired legal practitioners holding files and/or law practices which have ceased to operate, a 'law practice' for the purpose of section 713A of the LPA should be defined to include former law practices (see Attachment A).
4. While the definition of 'client documents' in proposed section 713A of the LPA is the same as in the ASCR, case law has interpreted this to mean, in effect, client-owned documents, i.e., what the client has paid for or substantially created for the benefit of the client. This is well-established legal principle.[4]

We also commend to the Committee the excellent submission of Xuveo Legal, on this topic.

QLS would be pleased to provide our views on any subsequent amendments if it would be of assistance to the Committee and/or to the respective departmental officers.

Oaths Act and Oaths Regulation

QLS supports the various legislative reforms that have permitted electronic signing and remote witnessing. These reforms have introduced considerable benefits and efficiencies, and are a welcome improvement on the approach taken in other jurisdictions. In this respect, QLS also supports the proposed amendments to the *Oaths Act 1867* (Qld) (**Oaths Act**) and *Oaths Regulation 2022* (Qld) to further support the implementation of those reforms.

Additionally, QLS appreciates the Department considering our views in relation to removing the requirement to include a witness's place of employment on affidavits and statutory declarations. Consistent with our previous submission on this matter, we support the amendments to section 13E of the Oaths Act.

In relation to substitute signatories, QLS does not support limiting the circumstances when a substitute signatory can be used to sign an affidavit or declaration under the Oaths Act. We support an approach that is consistent with the *Succession Act 1981* (Qld) and the *Powers of Attorney Act 1998* (Qld).

Penalties and Sentences Act and Youth Justice Act

Better recognition of the deaths of unborn children as a result of criminal conduct

Legislation is complex, including when and how to reform it. The complexity of legislation is, for the most part, unavoidable and responsive to an ever-evolving network of changing socio-political factors and individual and community behavioural trends. However when considering the introduction or amendment of criminal offences in particular, it is critical to determine whether it is, in fact, necessary. With respect to the proposed amendments contained in Parts

[4] *Wentworth v de Montford* (1988) 15 NSWLR 348, 355-6.

25 and 35 of the Bill, QLS contends that the proposed amendments are not necessary, and are not modelled on evidence or data that supports their introduction or likely to achieve their policy objective.

QLS acknowledges that the death of an unborn child is a naturally shocking and distressing event for individuals and communities. However, amendments which only seek to ensure that community views are taken into account in the sentencing process are misguided and have the potential to cause individual injustice.

The purpose for the proposed amendments to the Criminal Code, the *Penalties and Sentences Act 1992* (Qld) (**PS Act**) and the *Youth Justice Act 1992* (Qld) (**Youth Justice Act**) is said to be to enable better recognition of the deaths of unborn children as a result of criminal offending.

Consistent with previous submissions on this matter, QLS contends that there are alternative ways to recognise the death of unborn children as a result of criminal conduct other than amending the proposed sections of the PS Act and Youth Justice Act alike. QLS supports the Bill's amendment to the *Victims of Crime Assistance Act 2009* (Qld) to expand the definition of a victim for the purpose of who may make a victim impact statement and who has rights under the Charter of victims' rights.

Similar issues were comprehensively canvassed in 2010 in New South Wales by the Honourable Michael Campbell QC in his 'Review of the Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child'.[5] In his report, Campbell QC resisted implementing any new offences or circumstances of aggravation, concluding that existing legislation provided appropriate avenues for prosecution in cases resulting in the death of a foetus. Although we acknowledge that the legislative framework differs in New South Wales,[6] in our view Campbell QC's analysis clearly articulates the complexities associated with this proposal.

There are numerous unintended consequences to the proposed reform which will lead to arbitrary and unjust outcomes. These include:

- There is no fault element for the circumstance of aggravation. Contrary to fundamental norms of human rights and criminal law, an offender who knowingly causes the death of a foetus would be exposed to the same aggravated penalty as an offender who unknowingly causes the death of a foetus. Fault, in the context of section 328A of the Criminal Code is already challenging because the charge necessarily contemplates various levels of culpability, including negligence, dangerousness, recklessness and intentionality.
- The proposed reform, in effect, will focus the sentencing discretion towards the outcome of the actions, rather than their level of culpability. Our long held position is that outcome-focused sentencing should be resisted because it leads to disproportionate outcomes.

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[5] The Honourable Michael Campbell QC, 'Review of the Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child' (October 2010) <https://www.iustice.nsw.qov.au/iusticepolicv/Documents/final Campbell report.pdf>. See in particular sections 5, 7 and 10. See also *R v King* (2003) 59 NSWLR 472 (available at <https://www.qlobalhealthriqhts.orq/wp-content/uploads/2013/02/SC-2003-R-v.-Kinq.pdf>).

[6] *Crimes Amendment (Grievous Bodily Harm) Act 2005* (NSW) was passed in 2005 and amended section 4 of the *Crimes Act 1900* (NSW) so that the definition of grievous bodily harm now includes 'the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm'.

- As to causation, there will be inevitable and unavoidable difficulties associated with establishing that the dangerous operation of the motor vehicle caused the death of the foetus. Questions of causation in this context will be particularly difficult to establish where the loss occurs earlier in a pregnancy. This is a distressing prospect for the pregnant person and their families and may create uncertainty in terms of prosecutions.
- Complications may also arise where the pregnant person is responsible for the dangerous operation of the motor vehicle, causing the death of the foetus. In these circumstances, the pregnant person could be captured by the proposed circumstances of aggravation.

We consider that similar unintended consequences will flow from the amendments to section 9 of the PS Act to those outlined above. Treating the death of an unborn child as a consequence of an offence as an aggravating factor is likely to extend criminal liability for an event that is a wholly unintended, unforeseen, unforeseeable result of an act (of driving). This will mean the attribution of criminal responsibility in circumstances that do not reflect the culpability of the defendant.

In saying this, QLS appreciates there is precedent within the Criminal Code for harm to an unborn child to be taken into account. However, the elements of the relevant offence address an entirely different mischief to section 328A of the Criminal Code.

Section 313(2) of the Criminal Code makes it an offence for any person to lawfully assault a female pregnant with a child and destroy the life of, or do grievous bodily harm to, or transmit a serious disease to, the child before its birth. Relevantly, this provision requires proof of an unlawful assault on a pregnant mother and the death of an unborn child. The mischief addressed is an assault on a pregnant female occasioning harm to the life forming within her.[7]

This type of conduct, involving a deliberate unlawful assault on a woman (who is pregnant), is materially different from a mere act of dangerous driving, causing a motor vehicle incident, resulting in harm to a pregnant female and the death of her foetus. Section 328A of the Criminal Code is already one of, if not the most, consequence-based areas of sentencing in Queensland. Introducing the proposed circumstance of aggravation to section 328A of the Criminal Code, with a no fault element, is contrary to fundamental norms of human rights and criminal law because it will expose an offender who does no more than dangerously operate a motor vehicle, to consequences that are unintended, unforeseen and not reasonably foreseeable. Put differently, to treat the culpability of such an offender the same way as a person who knowingly assaults a woman who is pregnant, is manifestly unwarranted.

The proposal to apply the aggravating factor to the proposed relevant serious offences that resulted in the death of an unborn child would result in significant uncertainty as to its application and may be used oppressively against pregnant mothers. For example, pregnant mothers may fear punishment for self-regarding behaviours (particularly drug use) that result in foetal harm, which in other jurisdictions has been shown to drive 'women away from the healthcare system, jeopardizing prenatal care'.[8]

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[7] *R v Waigana* [2012] QCS, [4].
[8] Hannah Robert, 'The bereavement gap; Grief, human dignity and legal personhood in the debate over Zoe's Law' (2014) 22 *Journal of Law and Medicine* 319, 331.

This is further complicated by the need to consider whether the foetus was viable at the time of injury. Courts have previously acknowledged "the degree of difficulty in proving the cause of damage to the unborn life form during pregnancy is greater earlier in the pregnancy."[9] Even where a statutory definition requiring evidence of the foetus being able to live independently of the mother is introduced to engage the aggravating factor, this would not address the other issues identified.

It has also been argued that acknowledging the death of an unborn child in this way could be to downgrade other consequences of the offence of dangerous operation of a vehicle (and other offences), for example the total loss of reproductive capacity which some might regard as more serious than the loss of a foetus.[10]

More broadly, QLS has reservations about the ways in which the proposed changes, which conceptually acknowledge separate personhood for a foetus, might be used oppressively against pregnant persons in the future. For example, to justify the imposition of a duty of care upon pregnant persons and/or to limit access to abortion. This would result in repercussions in other areas including in creating uncertainty for medical practitioners.

Whilst we acknowledge the underlying intent to provide specific recognition to a foetus in the context of dangerous driving, appropriate recognition could be achieved without changes to the substantive law. QLS supports this recognition, in this regard, afforded by proposed Part 34 of the Bill.

QLS also acknowledges the existence of similar legislation in other states to that being proposed to the Criminal Code and Youth Justice Act in the Bill. If an amendment must occur because of political imperatives, QLS urges careful consideration is taken to ensure that simplistic notions of liability are not confounded by the amendments. This may take the form of outcome-focused sentencing whereby the proposed reform will redirect sentencing discretion towards outcomes of actions, rather than their level of culpability associated with the action, leading to disproportionate outcomes.

Community awareness plays an important role in the public's perception of the judicial system. Further measures to properly inform members of the community about the facts of a case may also assist in developing community views.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted].

Yours faithfully

[redacted]

Chloé Kopilovic
President

[9] *R v Waigana* [2012] QCS, [5].
[10] The Honourable Michael Campbell QC, 'Review of the Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child' (October 2010) 13.

Attachment A

Amendments to proposed section 713A of the Legal Profession Act 2007 (Qld)

713A Destruction of client documents

(1) A law practice may destroy a client document relating to a matter if—

(a) the law practice has obtained instructions from the client about destruction of the document; or

(~~a~~b)- it is at least 7 years since the completion of the matter; and

(~~b~~c)- the law practice has been unable, despite making reasonable efforts, to obtain instructions from the client about the destruction of the document; and

(~~c~~d) it is reasonable in the circumstances, having regard to the nature and content of the document, to destroy the document.

(2) Destruction of a client document by a law practice, other than as provided by subsection (1) or on instructions from the client, is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of—

(a) any Australian legal practitioner involved in the destruction; and

(b) if an associate of the law practice involved in the destruction is not a principal of the law practice—a principal of the practice.

(3) The law society may destroy a client document relating to a matter if—

(a) the law society holds the document because of the appointment, under part 5.5, of a receiver for the law practice that was engaged by the client to provide legal services for the matter; and

(b) the law practice or law society has obtained instructions from the client about destruction of the document; or

(~~b~~c) it is at least 7 years since the end of the law practice's engagement by the client to provide legal services for the matter; and

(~~c~~d)- the law society has been unable, despite making reasonable efforts, to obtain instructions from the client about the destruction of the document; and

(~~d~~e) it is reasonable in the circumstances, having regard to the nature and content of the document, to destroy the document.

(4) In this section—

client document means a document to which a client is entitled and includes:

(a) a document entrusted to the law practice by a client for safe custody, whether or not created by the law practice;

(b) for a community legal service, a document to which a client would ordinarily be entitled, had the client had been charged a fee for the legal services provided,

but does not include client documents:

(c) the law practice has already provided to the client; or

(d) copies of client documents lawfully retained by the law practice for its own purposes.

instructions from the client includes agreement at the start of a retainer, such as in a costs agreement..

law practice includes a community legal service and a former law practice.