Queensland Law Society
Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

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Committee Secretary
State Development and Regional Industries Committee
Parliament House
BRISBANE QLD 4000

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

Dear Committee Secretary

Justice Legislation (COVID-19 Emergency Response - Permanency) Amendment Bill 2021

Thank you for the opportunity to provide feedback on the Justice Legislation (COVID-19 Emergency Response - Permanency) Amendment Bill 2021.

The Queensland Law Society (**QLS**) commends the State Government for the introduction of legislative and other measures over the last 18 months to respond to the COVID-19 pandemic, specifically those measures which allowed for flexibility and compliance with the health directives arising from the pandemic and consequential closures and restrictions.

These measures, many of which are being made permanent by this bill, have been of great assistance to our members and their clients. In addition to the need for these measures during the course of the pandemic, the legal profession and the community at large have derived significant benefit from the modernisation of legislation which has led to increased access to justice, increased certainty and reliability as well as time and cost savings.

As a consequence, we strongly support the passage of this bill and the reform it achieves. We note that other jurisdictions are considering similar reform and, at a national level, there is consultation aimed at modernisation and harmonisation of execution of documents.

Electronic document creation - responding to business and community needs

The ability for parties to create, sign (and have their signatures witnessed, including remotely witnessed) and file or otherwise give a document to the appropriate person or entity electronically allows these parties to access the justice system and carry on business in the way that best suits their circumstances.

Electronic communication and information storage are rapidly becoming the norm in general life and commerce. There are significant savings in cost and environmental impact. Electronic processes are more convenient, more efficient and subject to our comments below about the risk of a digital divide, more accessible. Regional Queensland is not as burdened by the tyranny

of distance, or the paucity of services. Records are often more accessible, secure and reliable, as it is easier to store and locate documents executed electronically. In practice, often it can be easier to establish that documents and communications have been properly signed, or received and opened as there is a clear electronic forensic trail. Paper communication is not becoming any easier or more reliable.

For individuals whose work and/or carer commitments, location or disability or other health needs would prevent or make it difficult for them to complete and sign paper documents, the ability to use digital resources to complete documents is invaluable. For example, if a party reaches a settlement in a legal matter and is required to physically sign a deed, their options prior to the pandemic were to attend their lawyer's office, for their lawyer to attend upon them or to otherwise have the deed posted to them and then make arrangements to post it back after signing. Even if, for example, the lawyer provided a return envelope, this was still cumbersome and time-consuming. These reforms will assist parties to progress and resolve their matters efficiently and cost effectively.

There will be efficiencies created in the court process and within government departments and agencies as well which will assist to ease the burden on courts and these bodies. Information sharing will be easier.

However, there should not be a prohibition on parties using hard copy documents and physical signing where appropriate. We understand that the purpose of these reforms is to provide flexibility to progress matters in the way that best suits the parties. Any reform that limits the ability to use paper documents and to physically sign these could impact vulnerable people, who may not have the same level of access to digital resources. This will ensure no unintended digital divide.

Comments on the bill

Notwithstanding our support for the bill, we have identified some aspects of the bill that should be considered further. These are identified below, together with some recommendations for improvement.

Amendment of the *Domestic and Family Violence Protection Act 2012* and the *Domestic and Family Violence Protection Rules 2014*

QLS expresses broad support for these amendments. Using AV or audio links, alternative verification of private applications and electronic filing, in particular circumstances will be of significant benefit to many victims of domestic and family violence.

New section 142A will make permanent the ability to use audio visual links or audio links in the proceedings in the Magistrates Court. The provision rightly allows the court to decide whether to conduct all or part of the proceeding in this way.

The provision will apply to all proceedings and all witnesses under the DFVP Act, not just to those who are vulnerable or qualify as "special witnesses" under the *Evidence Act 1977*.

In the view of many of our members who practise in domestic and family violence and criminal matters, the best evidence is obtained by witnesses appearing in person in a court room, however we acknowledge that there will be circumstances where the court may consider that

justice will be better served by a vulnerable witness giving evidence by audio visual link (or other remote means). It may be that the quality of the evidence is compromised where a vulnerable witness is required to give evidence in the court room in circumstances where they do not feel safe to do so. This should always be a matter for the discretion of the court, as is presently provided for in the DFVP Act in conjunction with the special witness provisions in the *Evidence Act 1977* as well as in section 142A.

The new section does not change the existing position that vulnerable witnesses are at liberty to apply to the court for special provisions to be made when giving evidence. It is important that this flexibility is retained both during the emergency period and beyond, as the exercise of judicial discretion in determining these applications is most likely to achieve fairness and justice between the parties.

The ability to provide evidence virtually during the COVID-19 emergency has offered a safe way to engage with court processes in circumstances where domestic and family violence issues.

Amendment of the *Oaths Act 1867*

Definition of "accepted method" and proposed section 13A

Our preference is that the *Oaths Act 1867* (**Oaths Act**), as the primary legislation, prescribe the accepted method for electronically signing a document, in line with the drafting in paragraph 2 of the definition of *accepted method* of proposed section 1B.

Proposed section 13A(1) provides that an accepted method for electronically signing an affidavit or a declaration may be prescribed in a regulation, while subsection (2) allows a court or tribunal to make a similar rule or practice direction.

This is also provided for in the proposed definition of *accepted method* to be inserted into section 1B of the Oaths Act.

The drafting of the definition of *accepted method* in section 1B suggests that the policy intent is for a rule to be made, or for a court or tribunal to publish a practice direction, about how an affidavit or declaration can be sworn and then, only if this does not occur, should the way prescribed in the legislation be relied upon.

Paragraph 2 of the definition of *accepted method* in section 1B reflects the requirements under the present emergency regulation[1] and, in turn, is consistent with the technologically-neutral approach adopted in the *Electronic Transactions (Queensland) Act 2001*. QLS submits that this method (i.e. the *accepted method* in paragraph 2 of section 1B) be mandated.

We are concerned at the prospect of regulations, rules or practice directions introducing requirements that require particular software or otherwise limit the significant benefits of the present regulations experienced by our members and clients or that are inconsistent across different jurisdictions.

We do not consider allowing for different rules to be made for signing documents is the best approach. Varied processes will likely lead to uncertainty, delay and, potentially, documents being created in a way that would be acceptable to one court, but not another. We note that proposed section 13A(3) provides that the court must "'consider the need to ensure consistency"

[1] *Justice (COVID-19 Emergency Response - Documents and Oaths) Regulation 2020*

with other rules and practice directions (which we would support if our preferred position is not adopted), but there remains a potential for inconsistency.

Subject to our earlier observations, we support the approach in proposed subsection 13A(4), although we have some concerns at the possibility that regulations could remove methods that courts or tribunals find acceptable.

Section 31Y Official and originating versions of document

The drafting of proposed section 31Y is confusing, although the Explanatory Notes provide some clarification of the intent of the terms *official version* and *originating version*.

In particular, we query the drafting of proposed section 31Y(3) which says that both the electronic document and a printout of the electronic document can be the *official version* of the document. This provisions does not clarify whether the first printout of the electronic document is intended to be the *official version* or whether a subsequent printout could be the *official version*.

We recommend that the drafting of section 31Y be reconsidered.

Amendment of the *Powers of Attorney Act 1998*

Amendment of section 12 (clause 45 of the Bill)

Section 12(1) of the *Powers of Attorney Act 1998* (**POA Act**) provides that the section does not apply to a power of attorney created by and contained in another instrument, for example, a mortgage or lease, that is signed by, or by direction of, the principal.

Proposed s 46A of the *Property Law Act 1974* (**PLA**), applies to POAs contained in documents for a commercial or arms' length transaction.

QLS recommends that a cross-reference to the new section 46A of the PLA be added to section 12 of the POA Act.

Proposed section 24H of the POA Act (clause 46 of the Bill)

This section mirrors proposed s 46F of the PLA.

While the same comments can be made about this section, it is unlikely a corporation sole will empower a person to act on its behalf through the use of a power of attorney. Usually the legislation creating the corporation sole will empower the corporation sole to delegate its power. A POA is not required.

QLS does not recommend the proposed amendment to s 24H.

Amendment of *Property Law Act 1974*

Section 46F – signing by a corporation sole

The definition of corporation in proposed section 44 distinguishes between a 'corporation sole' and a statutory corporation. This suggests that a corporation sole is not a statutory corporation.

Proposed section 46F, which provides for how a corporation may sign a document, contains a specific provision (proposed section 46F(4)) for how a statutory corporation will sign, presumably because a statutory corporation does not sign in the same way as a corporation. There is no equivalent provision for a corporation sole, which also will not fall within proposed section 46F(1) or (2). A corporation sole will not usually sign by an agent and usually will be able to delegate authority under the relevant statutory provision.[2]

The effect of having no specific provision is that there is arguably no statutory approval for a corporation sole to sign an electronic deed in accordance with these provisions.

QLS submits that proposed section 46F(4) be redrafted to provide that for a statutory corporation and corporation sole, a document may be signed as authorised by the Act under which they are established.

Proposed section 53B

Under proposed section 53B, a third party can presume a document is duly executed by a corporation if it appears to be signed under section 46F(1) or (2). This section is limited to providing protection to parties where a document is signed by a company with directors and/secretaries or where an agent or attorney signs.

There is no specific reference to proposed section 46F(4) (for statutory corporations) or to corporations that are unable to fall within proposed section 46F(1) or (2).

Unless there is a similar provision in the legislation establishing the statutory corporation or the current section 227 of the PLA is retained in the new Property Law Bill, there will be no ability for third parties to rely on what appears to be due execution and further evidence will be required.

We note that under section 11C of the *Public Trustee Act 1978,* execution by the public trustee is deemed to be governed by section 227 of the PLA, which provides in section 227(2) that:

> *"A contract or other transaction made or effected under this section shall be effective in law, and shall bind the corporation and the corporation's successors and all other parties to the contract or other transaction."*

QLS submits that in the event section 227 of the PLA is not retained in the amended Property Law Act, an amendment to expand the application of proposed section 53B will be required.

Deeds signed by the State

There is no provision in the Bill for how the State of Queensland may sign a paper or electronic deed.

This has been identified as a deficiency in the existing legislation in Queensland and most other Australian States. As the legislation refers to *individuals* and *corporations* a court is unlikely to conclude that the provisions apply to execution by the State.

[2] Note the *Public Trustee Act 1978*, section 11A.

There is an opportunity in this legislation to include a provision clarifying the position, particularly in relation to electronic deeds, and to provide a presumption of valid execution that other parties to a deed with the State can rely upon.

For example, the section 9(6) of the *Property Law Act 2007* (NZ), provides:

> (6) The Crown executes a deed if—
>
> (a) it is signed on behalf of the Crown by 1 or more Ministers of the Crown or other officers or employees of the Crown of Her Majesty the Queen in right of New Zealand having express or implied authority to sign the deed on behalf of the Crown; and
>
> (b) in the case of a deed signed by only 1 person under paragraph (a), the signature is witnessed in accordance with subsection (7).

Subsection (7) provides for the form of witness for all individuals who sign deeds.

QLS submits that the Bill should be amended to include a provision in the PLA for the execution of a deed either in paper or electronically by the State.

Deeds invalid after alteration

At common law a deed that is altered after execution of the deed will be void on the basis of the rule in *Pigot's Case*.

In New South Wales and New Zealand this rule has been abolished (see below). The effect of abolishing the application of the rule is that the agreement is not invalidated by the change and the validity of the variation remains to be considered by a court. If the change invalidates the deed merely by reason of the change, then the original agreement cannot be enforced. This would seem to favour unscrupulous parties.

> ***Conveyancing Act 1919* (NSW)**
>
> 184 Abolition of Rule in Pigot's Case
>
> (1) The rule of law known as the Rule in Pigot's Case is abolished.
>
> (2) Accordingly, a material alteration to a deed does not, by itself, invalidate the deed or render it voidable, or otherwise affect any obligation under the deed.
>
> (3) This section applies to and in respect of alterations made before or after the commencement of this section, but does not apply in relation to proceedings instituted before the commencement of this section.
>
> (4) This section extends to dealings under the *Real Property Act 1900*.
>
> (5) In this section, ***deed*** includes a written contract or any document evidencing a contractual intention.

> ***Property Law Act 2007* (NZ)**
>
> 11 Alterations after deed executed

(1) The rule of law that a deed becomes invalid if there is a material alteration after its execution is abolished.

(2) Subsection (1) does not validate an alteration if it is invalid for another reason.

QLS submits that that the Bill should be amended to abolish this rule in Queensland.

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

Elizabeth Shearer
President