

JUSTICE AND OTHER LEGISLATION AMENDMENT BILL 2003

AMENDMENTS IN COMMITTEE

EXPLANATORY NOTES

General Outline

Objectives of the amendments

The amendments in committee to the *Justice and Other Legislation Amendment Bill 2003* have the following purpose:

- To amend the *Queensland Law Society Act 1952* to impose a cap on fees so that a solicitor operating on a “no win no fee” basis in relation to a personal injury claim is prevented from billing a client more than half of the judgment or settlement, less expenses.
- To amend the *Civil Liability Act 2003* to make it clear that doctors are subject to both a reactive and proactive duty to advise in relation to proposed medical treatment. Further, the restriction on damages for loss arising out of the costs ordinarily associated with rearing or maintaining a child proposed in the *Justice and Other Legislation Amendment Bill 2003* is extended to claims arising from a breach of duty by a person advising about methods of contraception or performing a contraceptive procedure.
- The *Justice and Other Legislation Amendment Bill 2003* proposed an amendment to the *Industrial Relations Act 1999* to correct an anomaly that has arisen in the appeals process in returning unsuccessful appellants to custody. The proposed amendment requires a minor amendment to ensure that appellants who withdraw their appeal or whose appeal is struck out may be returned to prison to serve an unexpired term.

- To make minor amendments to the *Coroners Act 2003*, *Freedom of Information Act 1992* and the *Personal Injuries Proceedings Act 2002*. The *Coroners Act 2003* is amended to renumber an amendment made to the *Police Powers and Responsibilities Act 2000* by the *Coroners Act 2003*. The *Freedom of Information Act 1992* is amended to correct a section number. The *Personal Injuries Proceedings Act 2002* is amended to remove duplicate references between sections 37(4)(c)(ii) and 37(4)(c)(iii).

Reasons for the objectives and how they will be achieved

The amendment to the *Queensland Law Society Act 1952* is being made as a result of the Supreme Court decision of *Holland v Queensland Law Society Incorporated* [2003] QSC 327 which held that a ruling by the Council of the Queensland Law Society purporting to cap fees that could be charged by practitioners in speculative “no win no fee” personal injuries claims was of no legal effect. The Supreme Court found that in order to cap fees in such matters, the Act would need to be amended. The proposed amendment is based on the original ruling made by the Council of the Queensland Law Society.

Administrative cost to Government of implementation

Implementation of the amendments will involve no cost to Government.

Consistency with Fundamental Legislative Principles

Do the amendments have sufficient regard for the rights and liberties of individuals?

The proposed amendments to the various statutes are largely consistent with fundamental legislative principles outlined in section 4 of the *Legislative Standards Act 1992*. However, the amendment to the *Queensland Law Society Act 1952* may potentially breach the principle of not adversely affecting rights and liberties retrospectively.

The amendment, which imposes a cap on fees that can be charged by practitioners in speculative “no win no fee” personal injuries claims applies to any request for payment made on or after the day the amendment commences, whether or not a client agreement was entered into before that date. As such the amendment may potentially affect the rights and obligations of contracting parties.

The amendments are considered justified. On 22 August 2002, the Council of the Queensland Law Society adopted a ruling on professional fees in 'no win, no fee' cases which in essence ensured that a practitioner received no more by way of professional fees from the award than did his or her client. The ruling responded to community concern over the charging practices adopted by certain law firms in relation to speculative personal injury claims. The Chief Justice has publicly questioned the ethics of 'no win, no fee' arrangements that conclude with 'successful' plaintiffs receiving a disproportionately small amount of the award or settlement.

Damages are awarded to compensate a plaintiff for his or her loss. It is unjust for successful plaintiffs to receive little or nothing from their judgment or settlement while their solicitor takes a disproportionate amount of the award as professional fees. The ruling was designed to ensure that a client can only be charged reasonable and proper professional fees. However, the recent Supreme Court decision of *Holland & Anor v Queensland Law Society Incorporated & Anor* [2003] QSC 327 held that the Ruling has no legal effect because:

- it was not approved by Governor in Council; and
- it is inconsistent with section 48I of the *Queensland Law Society Act 1952*.

The proposed amendment is necessary to give effect to the ruling which has been in existence since August 2002.

CONSULTATION

Community

The Queensland Law Society has been consulted in relation to the amendments to the *Queensland Law Society Act 1952*. The amendment to the *Civil Liability Act 2003* in relation to the duty of care when advising about proposed medical treatment is made as a result of comments received in relation to the Act from the Queensland University of Technology Law School.

Government

The Department of Industrial Relations requested the amendments to the *Industrial Relations Act 1999*. Queensland Health has been consulted in relation to the amendments to the *Civil Liability Act 2003*. The Department

of the Premier and Cabinet has been consulted in relation to the proposed amendments.

NOTES ON AMENDMENTS

Amendment 1 amends clause 2 of the Bill to provide that the amendments to the *Queensland Law Society Act 1952* commence on assent.

Amendment 2 inserts a new clause 40B into the Bill containing amendments to the *Civil Liability Act 2003*. Section 21 of the *Civil Liability Act 2003* is amended to remove any doubt as to the requirements necessary for a doctor to rely upon the section. The amendment makes it clear that a doctor is subject to both a reactive and proactive duty to advise in relation to proposed medical treatment. The duty to advise on a proactive basis, that is, to provide all information that a reasonable person requires to make a decision in relation to medical treatment that may cause personal injury, is ongoing. In relation to the reactive duty, in circumstances where the doctor knows or reasonably ought to know that the person has sought information, the doctor is under a duty to provide that information. The amendment clarifies that the doctor is not, and was never, able to provide either proactive or reactive advice to satisfy their duty of care. Failure to provide one or the other will allow a finding of breach of duty in appropriate circumstances.

Amendment 3 amends the heading to new Part 5 of the *Civil Liability Act 2003* to be inserted by the Bill so that the heading reflects the changes made by Amendment 4.

Amendment 4 amends clause 41 of the Bill which inserts a new Part 5 into the *Civil Liability Act 2003*. The amendment extends the restriction on damages for the loss arising out of the costs ordinarily associated with rearing or maintaining a child, to claims arising from a breach of duty by a person advising about methods of contraception or performing a contraceptive procedure.

Amendment 5 inserts new clause 43A into the Bill which contains amendments to the *Coroners Act 2003*. Schedule 1 of the *Coroners Act 2003* is amended to renumber the amendment to section 420 of the *Police Powers and Responsibilities Act 2000* (the PPR Act) made by the *Coroners*

Act 2003. The *Coroners Act 2003* amended section 420 of the PPR Act by inserting a subsection (3). That amendment will commence when the *Coroners Act 2003* commences. However, the *Criminal Proceeds Confiscation Act 2002* (the CPC Act) also amended section 420 of the PPR Act by also inserting in a new subsection (3). The CPC Act commenced on 1 January 2003. Thus, the *Coroners Act 2003* amendment to section 420 of the PPR Act is renumbered to (3A).

Amendment 6 inserts a new Part 14A into the Bill which contains amendments to the *Freedom of Information Act 1992*. A minor amendment is made to the *Freedom of Information Act 1992* to correct a section number. The need for the amendment has arisen because of a renumbering provision in the *Juvenile Justice Act 1992* not being able to be given effect because of the impact of a subsequent amendment.

Amendment 7 amends clause 79 of the Bill to clarify the amendments to section 341 of the *Industrial Relations Act 1999* proposed in the Bill. Clause 79 amends the *Industrial Relations Act 1999* to correct an anomaly that has arisen in the appeals process in returning unsuccessful appellants to custody. However, a minor amendment is required to ensure that appellants who withdraw their appeal or whose appeal is struck out may be returned to prison to serve an unexpired term.

Amendment 8 further amends clause 79 of the Bill to clarify the terms of a warrant issued pursuant to section 341(6) of the *Industrial Relations Act 1999* as amended by the Bill.

Amendment 9 inserts a new clause 105A into the Bill which contains an amendment to section 37 of the *Personal Injuries Proceedings Act 2002* (the PIP Act) to remove the duplicate references between subsections (4)(c)(ii) and (4)(c)(iii) to the amount equal to the respondent's offer. The amendment properly reflects the costs implications referred to in sections 56(2)(a) and 56(3)(a) of the PIP Act.

Amendment 10 inserts a new Part 22A into the Bill which contains amendments to the *Queensland Law Society Act 1952*. The *Queensland Law Society Act 1952* is amended to impose a cap on professional fees in speculative "no win no fee" personal injury claims. The amendments ensure that a practitioner may receive no more by way of professional fees from a judgment or settlement than does his or her client. A formula is outlined for calculating the maximum amount of professional fees that may be charged. However, a practitioner may apply to the Council of the Queensland Law Society for approval to charge a greater amount.

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