Attorney General; Minister for Electoral Affairs

Our Ref: 67-25803/3

Ms Rebecca Lee
President
Law Society of Western Australia
Level 4, 160 St Georges Terrace
PERTH WA 6000

By email: president@lawsocietywa.asn.au

Dear Ms Lee

COURTS LEGISLATION AMENDMENT (MAGISTRATES) BILL 2021

I refer to your correspondence dated 14 February 2022, in which you set out, on behalf of the Law Society's Executive, various concerns regarding the above Bill. It is noted that the Bill was introduced in the Legislative Assembly on 23 June 2021 and passed on 3 August 2021. Debate in the Legislative Council resumed yesterday and is expected to continue today.

Leaving aside specialist magistrates (such as Family Court Magistrates), magistrates are generally dually appointed to both the Children's Court of Western Australia and the Magistrates Court. The Bill does not alter the length or terms of either of these appointments. In this respect, there can be no suggestion that the Bill affects judicial independence.

The head of jurisdiction for the Children's Court of Western Australia and the Magistrates Court are different people. The head of the Children's Court is the President, who is the equivalent of a District Court Judge. The head of the Magistrates Court is the Chief Magistrate. The Bill introduces a mechanism to allocate work between courts for all dually appointed magistrates. This mechanism is contained in proposed section 11 to be inserted into the *Children's Court of Western Australia Act 1988* (WA). No such mechanism presently exists.

The allocation mechanism in section 11 depends upon the President's consideration of what is necessary or desirable, having regard to the workload of the Children's Court. If the President wishes that any magistrate should have an increased workload, having regard to what is necessary or desirable to deal with the workload of the Court, the President must consult with the Chief Magistrate, and the Chief Magistrate must consent to the increased duties as a Children's Court magistrate (with a corresponding diminution in the duties of that magistrate in the Magistrates Court): section 11(2) and (3). On the other hand, if the President considers that it is not necessary or desirable having regard to the workload of the

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Court (and no other matter is specified) for a magistrate to continue carrying out duties as a Children's Court magistrate, the President may inform the Chief Magistrate that the magistrate is not required for the same level of duties: section 11(4) and (5). No consent of the Chief Magistrate is required to reduce the duties of a magistrate in the Children's Court. However, the magistrate is then available for greater work allocation in the Magistrates Court by the Chief Magistrate.

The decision of the President to seek to increase or to decrease the duties of a magistrate in the Children's Court is a matter of the absolute discretion of the President, and the President is not required to take into account the seniority or length of service of a magistrate: section 11(6). The President may therefore make work allocation decisions upon the basis of the needs of the Children's Court, having regard to its workload, its nature and the specialist skills of a particular magistrate.

In your letter, the Law Society Executive expresses the view that the enactment of the Bill will affect more than the administration of the Children's Court. Your letter claims that section 11 "gives the President the power to strip a specific magistrate of the power to sit in the Children's Court and that decision is an *unfettered non-reviewable discretion*".

With respect, there are various difficulties with that statement. No dually appointed magistrate has an absolute entitlement or unilateral "power" to sit in the Children's Court.

As well, any dually appointed magistrate will continue to be able to sit as a magistrate of the Children's Court, as required. For example, a magistrate carrying out the general duties of the Magistrates Court in Perth or at a regional or suburban location, may still be required to sit as a magistrate of the Children's Court as needs require.

Another difficulty is that, in the past, allocation of workload has required judicial comity between the Chief Magistrate and the President, and the acknowledgement of a magistrate that he or she will perform the work allocated to them. This mechanism can potentially break down. There is no difficulty in principle about providing a legislative framework for workload allocation. Indeed, the Chief Magistrate already has the power to unilaterally direct a magistrate to sit in particular divisions of the Magistrates Court (section 25(1)(a) of the *Magistrates Court Act 2004* (WA)), and there has been no complaint about this.

You also say that the exercise of the discretion is not reviewable. As I have indicated, it must be exercised on a particular basis, and that is provided by the statute. However, I hope that decisions about workload allocation to judicial officers would not feature in the courts. Public confidence in the proper administration of justice is compromised by unseemly court proceedings between judicial officers. No doubt, if there is a legitimate grievance about the basis for the exercise of a discretion to allocate workload in a particular way, this may be raised with me (for the time being). In the future, it may be raised with a Judicial Commission which I propose to create. As well, as I have already pointed out, the *Magistrates Court Act 2004* itself gives a unilateral power to the Chief Magistrate to direct magistrates to sit in particular divisions of the Court, and no complaint has been made about the existence of such a power. I do not think that it is unusual to have such a statutory provision.

As to your query about Chapter III of the Constitution, as far as I am aware, there is no analogous case which suggests that a workload allocation mechanism such as that contained in proposed section 11 affects the decisional independence of the judiciary. Contrary to your suggestions, such a provision is simply an administrative provision, necessary for the proper functioning of a court, and it does not direct or usurp the exercise of any judicial power.

Finally, you have suggested that somehow the decisional independence of magistrates of the Children's Court will be affected if the President uses the power to allocate work for an ulterior purpose, other than exercising it upon the statutory basis of what is necessary or desirable for the workload of the Children's Court. In particular, you suggest that if the President takes a different view as to how a magistrate is determining specific cases, the President may "remove" magistrates who do not "fall into line". Not only does that suggestion disregard the fact that the person who will be exercising the discretion will be a senior judicial officer, namely the President of the Children's Court (who will be a District Court judge or equivalent), it is a dreadful slur on the current President. You have not made any similar suggestion that the longstanding powers available to a Chief Magistrate to direct that a magistrate only work on specific types of cases, or to only sit in a particular division of the Magistrates Court, could be abused in this way. These baseless assertions risk greatly undermining public confidence in the judiciary. Whether you are minded to withdraw this slur and apologise to the President is a matter for you.

Yours sincerely

Hon. John Quigley MLA
ATTORNEY GENERAL; MINISTER FOR ELECTORAL AFFAIRS

16 February 2022

Attach: Letter from the Law Society dated 14 February 2022

Copy: President and Honourable Members of the Legislative Council
His Honour Judge Hylton Quail, President of the Children's Court
Joshua Thomson SC, Solicitor General
Martin Cuerden SC, President, WA Bar Association