

14 February 2022

URGENT

Dear Honourable Members

COURTS LEGISLATION AMENDMENT (MAGISTRATES) BILL 2021 (“THE BILL”)

I refer to the letter dated 9 August 2021 from the Law Society of Western Australia, after our Executive (“the Executive”) had initially considered the Bill and its potential impact.

The Executive remains concerned about particular provisions in the Bill which give the President of the Children’s Court ***an unfettered, non-reviewable discretion*** to direct that a particular Magistrate shall no longer perform duties under their Commission in that Court.

We are particularly concerned with proposed section 11(6) which provides for the President to have “...*absolute discretion and is not required to take into account the seniority or length of service of the Magistrate or any other matter*” in exercising the new power (emphasis added): see Clause 7 of the Bill, introducing s11(6) to the *Children’s Court of Western Australia Act 1988*.

The Society continues to urge you not to pass the Bill in its current form because creating this form of permissible interference with judicial independence does not reflect current community standards. This provision, and related supporting provisions, potentially imperil judicial independence of decision making by depositing power in one individual (whomever occupies the role of President of the Children’s Court) to in effect override the granting of a Commission to another Magistrate at any time and for any reason.

The Executive remains the view that the enactment of the Bill as drafted **will** affect more than “*the administration of the Court*”, as the proposed s11 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*.

By voting in favour of the Bill, you are in effect being asked to support the devolution of power to one judicial officer, over the State’s granting of a Commission, in a way which means that if the President took a view on criminal sentencing (for example, non-custodial sentences for particular types of crime) or how to exercise the ‘protection and care’ jurisdiction in relation to vulnerable children, then Magistrates who do not ‘fall into line’ could be removed by the President without challenge. It may be that the decisions in each individual matter may be appealable, but this would place an increased burden, which could not be currently borne, on the judicial system. In any event, the stain on the State for failing to protect judicial independence would remain.

We repeat that the Executive takes no issue with provisions that empower and enable the President of the Children’s Court to direct the efficient management and administration of the Court (such as that a specific Children’s Court Magistrate is to sit at Joondalup every second Tuesday).

New legislation that may impact the independent administration of justice in our community is the business of every Law Society. The Executive is disappointed there has still been **no** consultation with the Law Society of Western Australia.

We also query whether the Parliament has had an opportunity to consider whether the Bill in its current form may be the subject of a legal challenge on the ground that it interferes with the operation of Courts, contrary to Chapter III of the Commonwealth Constitution.

Further, there appears to be no urgency to the passage of this Bill.

We urge that the Bill at least be deferred for further consultation and consideration.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Rebecca Lee', with a stylized flourish underneath.

Rebecca Lee
President

cc: The Honourable John Quigley MLA, Attorney General of Western Australia
Joshua Thomson SC, Solicitor General
Martin Cuerden SC, President, WA Bar Association