QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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Criminal Law Amendment Bill 2014
Submission 009

The Secretary
Legal Affairs and Community Safety Committee

By Email: lacsc@parlaiment.qld.gov.au

Dear Sir/Madam

Criminal Law Amendment Bill

About the QCCL

The QCCL is a voluntary organisation established in 1967 to promote civil liberties.

Double Jeopardy

Whilst of course the rule against double jeopardy has already been substantially changed by the previous legislation, it is important when considering this Bill which makes those changes retrospective to remember why we had the rule against double jeopardy in the first place.

Finality

The rule against double jeopardy is a feature of one of the fundamental principles of our legal system, that is, of finality.

Whereas once an acquitted person could leave the court room with the prospect of rebuilding their life that is no longer the case. The prospect of their being charged again will hang over their head for evermore. Wrongful acquittals are quite different from wrongful convictions as they do not involve the unconscionable incarceration of an innocent.

Principled Assymetry

The rule against double jeopardy is not a rule designed to protect the guilty but to protect the innocent.

The Bill undermines the principled asymmetry which is at the heart of the criminal justice system. That principle reflects the proposition that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual of an alleged offence.

The state has many advantages over the Defendant in a criminal trial including greater resources and powers to conduct investigations.

The prosecution in a criminal offence starts from the advantage that many jurors will say "If there was nothing in this case the police would never have brought it."

The criminal justice system rectifies those imbalances by the presumption of innocence and placing the burden on the prosecution. In addition, this attempt to correct the imbalance is supported by the rule against double jeopardy.

This amendment compounds all these difficulties by making the changes to the law retrospective.

Carroll Case

Once again the decision in the *Carroll* case appears to be a motivator for these changes.

The Queensland Court of Appeal in the second *Carroll* case found that the "fresh" evidence presented at Carroll's perjury trial concerning the bite marks was not fresh at all but a re-interpretation of old evidence. The Court found the new confession evidence unreliable and attached no weight to it. The Court in fact ruled that that evidence should never have actually been allowed to go before the jury. In short, even if the double jeopardy rule did not exist, Carroll would still be free because the evidence upon which his perjury conviction was obtained would have been held inadmissible.

DNA and Other Technology

A lot of the impetus for this legislation flows from DNA. When the explanatory memorandum refers to advance in technology it is to DNA that it principally refers. But the reality is that DNA cannot be used to determinably prove someone's guilt. It can only be used determinably to establish someone's innocence.

It is the QCCL's submission that the justification for these laws based on the improvement of technologies is fundamentally flawed and dangerous. Are we to set aside the rights of individuals every time there is an advancement in technology? We did not change the law when fingerprints were introduced.

As DNA is now a standard investigatory technique in a few short years this retrospective provision will become redundant and yet an alteration of one of the fundamental principles of our legal system will remain on the statute books.

Retrospectivity

The Courts have traditionally opposed retrospective legislation for two reasons:

1. because of the uncertainty they create; and

2. they could be used to harm the disaffected or the disadvantage more easily.

The legislation is justified in the explanatory memorandum as a violation of the principle against retrospectivity on the basis that the distinction between persons acquitted before 25 October 2007 and after that date is arbitrary. It is not at all arbitrary. It represents the date when the law was changed. On the basis of this logic whenever the Parliament passes a law it ought to be retrospective because every change in the law will be arbitrary. And of course you only need to consider the vast uncertainty that would be caused to commerce by the making of every single law retrospective to see the stupidity of that proposition. The same level of uncertainty is being created here. At least under the existing law people who had obtained acquittals prior to the date of the passage of the current legislation knew those acquittals were safe and could lift their lives with certainty. Similarly people who had not obtained an acquittal at that date were also aware of the uncertainty attributable to that acquittal. But at least that uncertainty lived from the time the acquittal was acquired and was not imposed after the event.

It is our submission that to submit a person who is acquitted before this legislation was introduced to a further criminal trial is an abuse of power.

Miscarriage of Justice

It is the Council's submission that this government ought, if it is concerned with miscarriages in the justice system, to introduce a miscarriage of justice unit as previously recommended by the Fitzgerald inquiry to deal with the many people who are detained in our criminal justice system even though they are innocent. As we have previously noted, it is far more morally reprehensible to detain a person knowing that they are innocent or having good reasons to suspect they are innocent than to acquit a guilty person.

Amendments to Section 146A of the *Justices Act*

Whilst the Council is supportive of increasing the efficiency of the justices system, we are concerned about the potential for injustices that may be generated by these types of provisions. We would suggest that Section 147A of the *Justices Act* needs to be amended to insert a specific right of re-opening for situations where:

3. A written plea of guilty is made; and

4. The court is satisfied that the written plea was not delivered by the defendant; or

5. The written pleas was made in circumstances of duress or lack of capacity; or

6. Due to the decision of the court to bring the hearing of a matter forward the defendant had inadequate time to obtain legal advice or representation.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
6 June 2014