RJD;dgr

Justice & OLAB 2014
Submission 012

BAR ASSOCIATION OF QUEENSLAND

22 December 2014

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane QLD 4000

By email: *lacsc@parliament.qld.gov.au*

Dear Sir

Re: Justice and Other Legislation Amendment Bill 2014

This is a submission by the Bar Association in respect of the Bill sent in response to the invitation for submissions contained in a letter dated 2 December 2014.

Below we address this omnibus Bill by reference to the primary legislation being amended.

Aboriginal and Torres Strait Islander Communities (Justice), Land and Other Matters Act 1984:

No comment.

Acts Interpretation Act 1954:

No comment.

Anti-Discrimination Act 1991:

No comment.

Appeal Costs Fund Act 1973:

Clause 13 amends s 22(1)(b) of the Act to extend the circumstances in which a person is entitled to be paid from the fund to include a circumstance where an appeal succeeds on the ground that there was a miscarriage of justice and a new trial is ordered.

The amendment is a sensible extension of the entitlement of a person to be paid from the fund after a successful appeal on a question of law, and is supported by the Association on that basis.

BAR ASSOCIATION
OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au
Constituent Member of the Australian Bar Association

Births Deaths and Marriages Registration Act 2003:

No comment.

Civil Liability Act 2003:

What is proposed is the repeal and replacing of s 45, coupled with enactment of a transitional provision in a new s 86.

The Association's concern is with the terms of the proposed s 45.

Section 45 aside, the common law otherwise makes significant provision, in clear cases, for exclusion of a right of action for damages by those involved in criminal activity: *Gala v Preston* (1991) 172 CLR 243; *Miller v Miller* (2011) 242 CLR 446. Section 45 augments this outcome in other cases.

The existing s 45 bears the following features:

- First, the requirement that the injured person's offending conduct must have "contributed materially to the risk of the harm".
- Second, the power of the court to award damages if it is satisfied that to refuse damages "would operate harshly and unjustly".
- Third, in the event of the invoking of the second point, to reduce contributory negligence "by 25% or greater percentage decided by the court to be appropriate in the circumstances of the case".

The proposed s 45 removes these features.

Analogous provision to the existing s 45 is made in NSW, SA, Tas, NT and ACT legislation, except that the third feature above has no analogue. Vic legislation requires only that the criminal conduct must be taken into account but is otherwise silent. WA carries no provision relating to criminal conduct.

See, in this regard, s 54 of the *Civil Liability Act* 2002 (NSW), s 14G of the *Wrongs* Act 1958 (Vic), s 43 of the *Wrongs Act* 1936 (SA), s 6 of the *Civil Liability Act* 2002 (Tas), s 10 of the *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) and s 94 of the *Civil Law (Wrongs) Act* 2002 (ACT).

Amendment to remove the first and second features above would place Queensland out of step with the (modified) common law applicable in the other states and territories. That lack of comity is undesirable.

The first feature, at the least, in the Association's view serves to properly recognize that a person tortiously injuring another ought to remain liable for damages where he or she has engaged in conduct towards an offender which is wholly out of proportion to the injured person's criminal offence.

Two case examples make the point:

- In *Hackshaw v Shaw* (1984) 155 CLR 614 the occupier of a farm having a petrol tank on it, from where there had been a series of night time thefts, lay in wait and observed a man alight from an unlit car and proceed to pour farm petrol into it. He fired at the car and called out to the man to abandon it, fired

another shot at the car when the man was running to it, and fired more shots as the driver was making off in the car. A young woman who, unknown to the occupier of the farm, was in the car and was injured. She sued the occupier of the farm. Four members of the High Court (Gibbs CJ, Murphy, Wilson and Deane JJ, Dawson J dissenting) held that a duty of care was owed and breached despite such plaintiff being a party to the stealing offence. The breach occurred by the dangerous act of firing repeatedly in the direction of the vehicle. The plaintiffs damages were reduced by 40% for the plaintiffs contributory negligence.

- In *O'Connell v 1st Class Security Pty Ltd* [2012] QDC 100, the plaintiff was giving modest resistance to arrest by police. An overzealous security guard "assisting" police, picked up the plaintiff and threw him to the ground heavily, causing him to sustain a serious leg fracture. Applying the existing s 45(1)(b), the court (Andrews DCJ) found that the plaintiff offender's conduct was not such that it "contributed materially to the risk of harm".

Each example consisted of an excessive response by the defendant (or its employee) to the conduct of a plaintiff. The proposed amendment would entail the plaintiff likely failing in each of the above cases.

The proposed amendment, in the view of the Association, would only serve as an encouragement to excessive retaliation in the community and is undesirable.

The proposed s 45(2) presents no remediation of this outcome. It will be a rare instance in which there would be satisfied the proviso that "the harm suffered by the offender arose from an unlawful act that was intended to result in the offender suffering harm". Each of the above cases underscores that view.

The vice in the proposed provision is also pointed up by the wide extended definition of "criminal conduct" in subs (6)(b). That definition could comprehend a time significantly before, and involve events remote in character from the indictable offence which might be in contemplation. For example:

- "preparing for the offence" – Bill, a householder, angry with his neighbour, attends a retail outlet to purchase hammer so as to trespass onto the neighbour's property and physically damage the neighbour's noisy pool cleaner (or airconditioning unit etc). Bill slips in the retail outlet common area by reason of a negligently defective cleaning system therein, and is seriously injured. Subsection (1) would preclude a recovery of damages against the negligent occupier.

- "travelling to … the place where the offence is committed" – in the last example, Bill purchases the hammer, manages to avoid slipping, but is driving home intending to do the offending deed when another vehicle negligently passes through a red light colliding with Bill's vehicle and seriously injuring him. Again, Bill is not entitled to recover damages against the negligent driver.

In all the above examples, the taxpayer, by social security, would be obliged to meet Bill's future income and medical needs.

In truth, the proposed provision, in its totality, represents sub-optimal policy and drafting respectively. A raft of unsatisfactory outcomes exist. It is difficult to

believe these were within contemplation of the Attorney General upon the Bill being read in the Parliament. The present provision maintains the requisite balance, as the content of the legislation in the other states underscores. The amendment ought be abandoned or extensively redrafted. At the very least, subs (6)(b) ought be jettisoned.

Civil Proceedings Act 2011:

Beyond what is canvassed under the subheadings below, the amendments are apt, and indeed overdue for enactment.

(a) Consent to be a group member

The proposed s 103D addresses when consent to be a group member is, or is not required. It differs from Commonwealth, Vic, and NSW regimes in that it does not require consent by a Territory, Minister of a Territory, a body corporate established for a public purpose by a law of a Territory or an officer of a Territory.

Granted it is the case that the *Acts Interpretation Act* 1954 defines "State" to include the ACT and the NT.

Notwithstanding this, for consistency and comity, as aforesaid, the Association suggests that reference to a Territory should be added.

(b) Adequacy of representation

The Association notes that s 103P adopts the federal provision, not the NSW provision, in allowing for discontinuance based on inadequacy of representation.

The advantage of the NSW provision is that adequacy of representation may be raised by the court or a defendant while the federal approach leaves the matter to be raised by group members.

Coroner's Act 2003:

Clauses 38 and 39 will amend s 29 of the Act which currently applies if a coroner who is investigating a death is informed that someone has been charged with an offence in which the question of whether the accused caused the death may be in issue. In those circumstances, the coroner must not start or continue an inquest until after the end of the proceedings for the offence.

The explanatory memorandum recognizes that the purpose of s 29 (in its current form) is to limit the prejudicial effect on a potential prosecution of an accused in which the question of whether the accused caused the death may be in issue.

Clauses 38 and 39 will restrict the application of s 29 to indictable offences. The effect will be that a coroner may start (or continue, as the case may be) an inquest when a person is charged with a non-indictable offence in which the question of whether the accused caused the death may be in issue.

The explanatory memorandum recognizes that the amendment to s 29 might be seen to reduce the protections available to an accused charged with a summary offence and that it potentially impacts on the rights and liberties of individuals charged with a summary offence.

The Association is opposed to the amendment for that reason.

Any offence, indictable or otherwise, where the question of whether the accused caused a death is in issue, is serious. Even summary charges are likely to result in significant consequences for an accused person if the person is found to have caused the death of another.

Consequently, the Association considers that s 29 should continue in its current form so as to limit the prejudicial effect on a prosecution of an accused person regardless of whether the person is charged with an indictable or summary offence.

It appears from the explanatory memorandum that one of the reasons justifying the proposed amendment is that the amendment would be likely to affect only a small number of coronial matters. Given the limited number of matters the amendment is expected to affect, the public benefit in having coronial matters proceed expeditiously is not such as to warrant the impact on the rights and liberties of persons charged with even summary offences.

The amendment would insert a new part 6, division 5 and new s 116 into the Act, making the amendment to s 29 retrospective in operation. The Association is opposed to any amendment which will retrospectively limit the rights and liberties of individuals charged with summary offences.

Corporations (Administrative Actions) Act 2001:

No comment.

Corrective Services Act 2006:

Clause 43 would insert a new offence provision into the *Corrective Services Act* 2006. By virtue of the new s 48A it will be an offence for a prisoner to send, or attempt to send, distressing or traumatic correspondence to a victim. It will not matter whether the prisoner has been found guilty of the alleged offence against the victim or is on remand in respect of the offence.

Section 48A(3)(a) states that material is distressing or traumatic for a person if the material is reasonably likely, in all the circumstances, to cause the person to suffer distress or trauma. Section 48A(3)(b) provides that it does not matter whether the prisoner intended to cause the person to suffer distress or trauma.

The explanatory memorandum recognises that the provision constitutes a potential breach of fundamental legislative principles. It is said, though, that the provision is justified by the intention that it will act as a deterrent to ensure prisoners do not make inappropriate and unwanted contact with a victim.

However, the offence provision will apply regardless of the type of offence alleged to have been committed against the victim and regardless of the relationship between the accused and victim. Moreover, the provision does not appear to require a complaint by the intended addressee. Section 48 of the Act gives a corrective services officer the power to seize a prisoner's mail to, *inter alia*, stop threatening or otherwise inappropriate correspondence leaving the prison.

In conjunction, ss 48 and 48A could act to thwart genuine acts of restorative justice and, further, see a prisoner charged with an offence against s 48A for well-intended and otherwise lawful correspondence. For example, a prisoner could be prosecuted

for attempting to send a letter to his brother apologising for causing serious injuries to him in a car accident in which the prisoner was the driver on the basis that reference to the offence is reasonably likely to cause distress to the brother.

The Association is opposed to the new offence provision in its current form.

It is suggested that consideration be given to limiting the circumstances in which a prisoner could be prosecuted under this section to circumstances in which the contents of the correspondence make it clear that the prisoner intended to cause distress or trauma, without reasonable cause, to the recipient of the correspondence.

Court Funds Act 1973:

No comment.

Criminal Code:

(a) Misconduct with regard to corpses:

Clause 48 would amend s 236 of the Code to increase the maximum penalty for an offence of misconduct with regard to corpses from two years to five years imprisonment.

The amendment is said to be justified on the ground that the manner in which a deceased's body is treated following their death can cause substantial distress to the deceased's family and may destroy, weaken or contaminate any evidence in relation to the body that may reveal the cause of death or the identity of the killer.

The Association observes that the amendment is proportionate to the stated justification and otherwise makes no comment in relation to the amendment.

(b) Bulk pleas:

Clause 49 would amend s 552I of the Code to allow a Magistrate to take bulk pleas in relation to charges being heard pursuant to s 552B, namely charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial.

This amendment is analogous to the proposed amendment to s 145 of the *Justices Act* 1886 which inserts a similar provision allowing a Magistrate to take a plea of guilty on several different complaints (charges) at the one time.

The Association supports the amendment to s 552I for the same reasons it supports the analogous amendment to the *Justices Act* 1886, as discussed below.

Criminal Proceeds Confiscation Act 2002:

(a) Amendments to provisions for breach of restraining orders and prohibited dealings with property that is subject of a forfeiture order:

Clauses 51, 52, 53, 55, 56 and 57 would amend the provisions of the Act relating to breaches of restraining orders and prohibited dealings with property that is subject of a forfeiture order.

The amendments are a response to the Court of Appeal decision in *State of Queensland v Bank of Queensland & Brett Raymond Stevens* [2013] QCA 225.

The intention of the amendments is said to be the strengthening of the authority of orders of the Supreme Court of Queensland issued under the Act and to ensure that assets that are liable to confiscation or forfeiture to the State are not dissipated.

The effect of the provisions is to remove the requirement for proof of an intention to defeat the operation of the relevant order. In each case, however, it remains a defence to the charge for the person to prove that the person had no notice that the property was restrained or forfeited under an order and no reason to suspect it was (except to the extent that charges were registered on the property under the *Personal Property Securities Act* 2009 (Cth) or a relevant caveat was registered under the *Land Title Act* 1994).

The Association considers that the amendments appear apt to meet their stated purpose. The retention of the defence in each case is appropriate.

Also, in each case, the maximum penalty for the offence is significantly increased. The Association considers that it is appropriate that the maximum penalties for financial institutions is significantly higher than those that would apply to individuals.

The amendments insert a new sub-section in each case which provides that the offence provision does not prevent the prosecution and punishment of a person who does an act or makes an omission mentioned in that sub-section for contempt of court or another offence under this Act or another Act. Those sub-sections appear to simply clarify what would already appear to be the situation and do not create any further liability for potential defendants. Accordingly, the Association makes no comment in relation to those provisions.

(b) Amendments to s 93ZZB regarding the making of serious drug offender confiscation orders:

Clause 54 would amend s 93ZZB in relatively minor ways. It inserts an example which is a useful tool to aid in the understanding of the operation of the section and otherwise clarifies the operation of the provision. Accordingly, the Association makes no comment in relation to the amendment.

(c) Amendments to s 249(3) to accommodate the serious drug offender confiscation order scheme in chapter 2A:

Clause 58 would amend s 249(3) to allow financial institutions to provide information to the Crime and Corruption Commission that relates to a matter for which an order may be made under chapter 2A.

The Association notes that this amendment does not, in practical terms, significantly expand the matters about which financial institutions may already provide information to the Crime and Corruption Commission and, accordingly, is not opposed to the amendment.

(d) Retrospective nature of the amendments:

Clause 59 would insert a new chapter 12, part 5 which provides that the amendments in relation to restraining orders and forfeiture orders apply whether those orders

were issued before or after the commencement of the provisions.

The amendments only apply to breaches of the orders which occur after the commencement of the amendments. Therefore, the Association is not opposed to the amendments created by Clause 59.

Drugs Misuse Act 1986:

Clause 62 would insert a note after paragraph 6(2)(e) reflecting the changes made to subs 9(11A) – 9(11D) *Penalties and Sentences Act.*

The Association makes the same comment concerning the note as it does concerning the original amendments.[1]

Clause 63 expands the matters that can be contained in an analyst's certificate to include, effectively, the work of other analysts. The explanatory note for the Bill explains the need for the provision as follows: "The amendment to allow the analyst to certify what may be 'hearsay' evidence is necessary to accommodate current scientific and operational practices of analysis whereby some elements of examinations may be conducted by an assistant rather than an analyst or may be an automated process. The amendment does not prevent a party to the hearing from challenging the information contained in the certificate."

The amendments are supported on that basis.

However, the amendments indicate existing difficulties associated with the principal provision[2] which provides that "in the absence of evidence to the contrary, [the certificate] shall be conclusive such evidence".

Whereas, previously, defence counsel might have been able to adduce evidence to the contrary by cross-examining the analyst who signed the certificate, such cross-examination may now be ineffective because of the hearsay nature of the contents of the certificate.

Consideration ought be given to removing the reference to "conclusive" in s 128.

Clause 64 applies the amendments in clause 63 to past certificates in past cases. The explanatory memorandum explains the reason for the amendment as "This curative provision removes any doubt as to the validity of certificates upon which past prosecutions have been based. The provision does not affect the decision making in those cases and is technical in nature."

The retrospective effect may be more than technical where hearsay components of certificates have been challenged in the manner mentioned above. The "conclusive" aspect of the certificate may cause an injustice in those circumstances.

Electoral Act 1992:

No comment.

---

[1] See paragraphs below. The Association opposes the changes.
[2] Section 128 *Drugs Misuse Act 1986*

Evidence Act 1977:

Clause 69 makes minor changes to the procedural requirements in s 95A of the Act to make an author of a DNA certificate attend to give oral evidence.

No objection is taken to those changes per se.

Clause 69(1) inserts a provision that the procedural requirements do not apply to committal proceedings. The reason provided in the explanatory memorandum is "Amendments are also made to clarify the application of s 95A to committal proceedings. The provisions governing the giving of evidence at a committal hearing are contained in the *Justices Act 1886*."

In itself, this change is a logical extension of past changes to the law.

The reference is to what are commonly "the Moynihan amendments" in respect of committal hearings restricting the right to have witnesses attend for cross-examination unless a magistrate grants permission therefor. This requirement to show cause with its concomitant need to telegraph one's defence continues to be a matter of concern for the Association.

The express extension to DNA analysis certificates aggravates this concern in respect to the effect of the Moynihan changes.

Clause 70 makes the changes retrospective. The Association does not support these changes being given retrospective effect. They may have unpredictable results where parties have relied on the existing provisions including, in a committal hearing situation, rather than the alternative procedure under the *Justices Act 1886*.

Industrial Relations Act 1999:

No comment.

Justices Act 1886:

Clause 19 amends s 145 of the Act to insert a provision that allows a Magistrate to take a plea of guilty on several different complaints (charges) at the one time.

The new subs 145(2) and (3) will not be applicable if the defendant is not represented and the Magistrate must also be satisfied that the defendant is aware of the substance of each and every one of the charges against him or her.

The Association supports the changes. It is noted that it has been practice over a long period of time for persons representing clients to "take the charges as read" and to enter the appropriate plea to each charge without them being specifically and separately read out.

This time saving change to the law appears to merely bring the letter of the law up to date with this sensible practice.

Legal Profession Act 2007:

Clause 78 would add a new s 9(1)(c) which raises as a suitability matter for the purpose of the LPA, that a person has been a director of an incorporated legal practice while it has been under administration.

The Association supports the addition. Existing paragraph 9(1)(b) makes personal insolvency a suitability matter.

The new paragraph is appropriate because of the ability of legal firms to incorporate and conduct their practices by way of a corporate vehicle.

Clause 80 makes a significant change to the work that can be carried out with moneys from the Legal Practitioner Interest on Trust Accounts Fund (also known as "LPITAF").

The existing s 289(1)(h) of the LPA facilitates payments to NGOs including Community Legal Centres for law reform; the collection of data on a number of important subjects including law reform, legal education and the legal profession; and, thirdly, provision of legal assistance, legal services and legal education, particularly, to disadvantaged members of the community.

The effect of the amendment is to restrict the purpose of these grants only to the provision of legal services, assistance and education.

The Association considers this to be an inimical change to the law and to the use of those moneys not raised by government through the imposition of taxes but, rather, the product of interest earned on moneys placed in solicitors' trust account by their clients.

The explanatory memorandum describes this significant change as to "make minor amendments [to the LPA] to reflect changes as a result of the implementation of recommendations resulting from the Review of the allocation of funds from the Legal Practitioner Interest on Trust Accounts Fund".

The Association does not regard these amendments as minor changes. The Association has also had difficulty finding any support for the changes in the Department of Justice and Attorney General publication referred to, namely, the Review of the allocation of funds from the Legal Practitioner Interest on Trust Accounts Fund ("the review").[3]

The first recommendation of the review included: "The strategic objectives for the allocation of LPITAF funds should be: Frontline service delivery - LPITAF funding will be directed to the provision of frontline justice services for Queenslanders; - Priority will be given to services that assist vulnerable people and disadvantaged community members to access justice".[4]

The review went on to say that the "QAILS and QPILCH submissions support amendment of the LPA to reflect the shift from the current funding priorities" to those in the recommendation.

It seems a misapprehension to construe the reference to frontline service delivery for disadvantaged people as advocating the repeal of the ability for LPITAF funds to be directed to law reform and strategic research. This seems a very unlikely reading in

---

[3] See http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.justice.qld.gov.au%2F__data%2Fassets%2Fpdf_file%2F0005%2F178718%2Flpitaf-review-report.pdf&ei=RJ2PVNzDKtGA8gXw8oDAAg&usg=AFQjCNHNbhpOcGOQV5RVJwzxPZs34mZBwQ&sig2=SRuwehzAcJ6NkOpD-QBaVA&bvm=bv.81828268,d.dGc

[4] Page 16 of the review

circumstances where QAILS and QPILCH submissions are indicated as two of the sources of the recommendation.

This impression is strengthened when one looks at QAILS' response to this proposed amendment.[5] QAILS has requested support to oppose the amendment. In seeking that support, QAILS makes the obvious point that strategic advocacy for changes to the law are an obvious way in which the poor and disadvantaged can, effectively, be assisted.[6]

QPILCH also is known as a very strong proponent of strategic advocacy and law reform. In the QPILCH response to the Productivity Commission's Draft Report on Access to Justice Arrangements,[7] QPILCH strongly endorsed the Productivity Commission's support for these activities.[8]

The Productivity Commission[9] had recommended[10] that State and Commonwealth governments "should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues ..."

The Association shares the opinions of QPILCH, QAILS and the Productivity Commission respectively.

Law reform, strategic research including the collection of data, and strategic advocacy are crucial aspects of the work of Community Legal Centres and other NGOs providing services to disadvantaged members of the community.

The Association is aware of two justifications put forward to found these changes.

One justification is that priority should be given to the actual provision of legal advice and legal services. The problem with this approach is that, once strategic advocacy is excluded, what the LPITAF moneys are funding is nothing but band aid solutions.

In providing individual legal services, lawyers gain expertise and understanding and insight into flaws in the legal and social systems which give rise to the need for legal services. The QAILS site referred to earlier[11] identified several important ways in which the plight of disadvantaged people, largely without an effective voice of their own, have had their situation markedly improved by strategic advocacy on their behalf by Community Legal Centres.

It is short sighted and counterproductive for the Parliament to cut off LPITAF funding to this important aspect of their overall work.

The second justification is that the Law Reform Commission (to which the government has recently made appointments) is capable of carrying out all of

---

[5] See http://www.qails.org.au/01_cms/details.asp?ID=190

[6] For example, part of the request includes the following: w reform work can take a variety of forms, from running test cases to individual advocacy that broadens systemic advocacy and the running of public campaigns. All these techniques can help to improve the lives of the vulnerable and CLCs have a future in furthering this outcome.

[7] The link to the PDF file may be found at: http://www.qpilch.org.au/

[8] Paragraph 21.1: "**Strategic advocacy and law reform**
We strongly support this discussion and finding."

[9] http://www.pc.gov.au/inquiries/completed/access-justice/report

[10] Recommendation 21.1

[11] http://www.qails.org.au/01_cms/details.asp?ID=190

Queensland's requirement for law reform advice. There are two fallacies in that argument.

The first is that, often, the Law Reform Commission is allocated technical legal issues which are far removed from the needs and concerns of disadvantaged people. Advising on changes to the *Trust Act* or the *Succession Act* are two examples of this work.

More importantly, however, the obvious fact is that the Law Reform Commission; Parliamentary Committees; Government Departments; the Productivity Commission and every other formal advisory body to government are dependent for their effectiveness on the information and advice provided by groups engaged in the community. Because of their knowledge and experience, the input of Community Legal Centres is crucial for advisory bodies to carry out their work, especially, when they are dealing with questions affecting disadvantaged people.

The Review carried out by the Justice Department[12] and the inquiry by the Productivity Commission[13] are just two of many examples where this can be observed to have taken place as the above discussion shows.

There is a third reason why the proposed amendment is poor policy.

Community Legal Centres, because strategic research, law reform and strategic advocacy are crucial to the effectiveness of their work, will run chook raffles and engage in other painstaking fundraising to allow that work to continue. Because the work of Community Legal Centres is integrated, much important time will be wasted in time keeping and paperwork to ensure that LPITAF funds are not used in the excluded areas and that proper acquittal is made. In effect, much of the moneys saved by banning law reform work will be spent in bureaucratic record keeping. The change will add to needless red tape and waste.

For these reasons, the Association urges that the Committee recommends against the amendment proposed in clause 80 to s 289(1)(h).

Magistrates Courts Act 1921:

No comment.

Penalties and Sentences Act 1992:

Clause 89 would insert a new subs 9(11A), 9(11B), 9(11C) and 9(11D)) into the list of principles in s 9 of the Act.

The proposed amendments add as an aggravating factor to offences involving the supply of dangerous drugs the circumstance that a person who used the drugs died and there was some, albeit partial or limited, causal relationship between the use of the drugs and the death which resulted.

---

[12] http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.justice.qld.gov.au%2F__data%2Fassets%2Fpdf_file%2F0005%2F178718%2Flpitaf-review-report.pdf&ei=RJ2PVNzDKtGA8gXw8oDAAg&usg=AFQjCNHNbhpOcGOQV5RVJwzxPZs34mZBwQ&sig2=SRuwehzAcJ6NkOpD-QBaVA&bvm=bv.81828268,d.dGc

[13] http://www.pc.gov.au/inquiries/completed/access-justice/report

If the amendments were limited to that change, the effect of the legislative change would be fairly minimal and the amendment would ne unobjectionable.

However, the proposed subs 9(11C)(a) and subs 9(11D) have a further and unclear additional effect. The sentencing court is directed to have regard primarily to subs 9(3) which, in effect, deems the defendant to be a violent offender[14] also requires the court to treat the subsequent death as caused by the drug supply offence.[15]

The better view is that the amendments make no actual difference to the law.

However, they create uncertainty and present very much as an attempt to micromanage the sentencing process.

The task for judges carrying out the important duty of sentencing offenders is already fraught with complexity.

Amendments like these proposed in clause 89 should be avoided.

The Association opposes the proposed changes.

Clause 93 makes the application of the proposed changes retrospective. If they do have any substantive effect, this offends the principal that persons will only be punished for breaches of the law (as it stands at the time of the offence).[16]

Curiously, the explanatory memorandum seeks to justify this improper resort to use of retrospective criminal laws by stating that it "is anticipated that this circumstance of aggravation will be utilised rarely and therefore a limited cohort of offenders will be affected by the partial retrospective application of the amendment".

In the Association's opinion, injustice and a breach of fundamental legislative principles do not lose that characterisation whether it affects few or the many.

For these reasons, the Association opposes both the substantive proposed changes and their proposed retrospective application.

Professional Standards Act 2004:

No comment.

Property Law Act 1974:

No comment.

Public Guardian Act 2014:

No comment.

---

[14] Subsection 9(13) already defines "violent offender" as a person who commits a crime that results in some harm to someone else (even if no actual violence is used). Technically, therefore, if harm occurs to the user of the drugs and there is some causal relationship with the supply, subs 9(3) is already technically applicable.

[15] It is difficult to understand the relationship between "partly or wholly the cause of the person's death" in paragraph 9(11A)(c) and "death was a result of the offence" in subs 9(11D).

[16] See article 9(1) International Covenant on Civil and Political Rights: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

Queensland Civil and Administrative Tribunal Act 2009:

No comment.

Recording of Evidence Act 1962:

Clause 112 proposes to amend s 11A(6)(b)(ii) of the Act to provide that un-transcribed master recordings of Magistrates Court proceedings may be destroyed if permission of the State Archivist is obtained.

The permission of the State Archivist is sufficient safeguard.

The Association supports the proposed change.

Referendums Act 1997:

No comment.

Supreme Court Library Act 1968:

No comment.

Telecommunications Interception Act 2009:

No comment.

Tourism and Events Queensland Act 2012:

No comment.

Trusts Act 1973:

No comment.

Vexatious Proceedings Act 2005:

No comment.

If any further enquiry is necessary of the Association in relation to this submission, would you please contact the Chief Executive, Ms Robyn Martin, on 07 3238 5100.

Thank you for the opportunity to make this submission.

Yours faithfully

Geoffrey Diehm QC
Vice President