QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
GPO Box 2281 Brisbane 4001
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Justice & OLAB 2014
Submission 015

The Research Director
Legal Affairs and Community Safety Committee
Parliament House

lacsc@parliament.qld.gov.au

Dear Sir

Justice and Other Legislation Amendment Bill 2014

Thank you for the opportunity to make a submission in relation to this Bill.

Consultation Timing

We object to the imposition of requirement for submissions in relation to this Bill to be delivered by 2 January 2015. This is a ridiculous requirement.

We accordingly reserve the right to put in a supplementary submission in the first week of January.

Submissions

For the time being we comment on the following aspects of the Bill:

1. **Clause 26**

According to *Halsbury's Laws of Australia* this is the common law relating to illegality in a negligence claim;

> The mere fact that the Plaintiff engaged in some form of illegal conduct when he or she suffers injury or damage does not, in itsself, give rise to a defence to an action in negligence. Similarly that fact that the Plaintiff and the Defendant are jointly engaged in an illegal enterprise does not, in itself, give rise to a defence in an action in negligence [paragraph 300-157].

However, the practical effect of the decision of the High Court in *Gala v Preston* (1991) 172 CLR 243 must be that a duty of care is rarely going to arise when people are engaged in a joint illegal enterprise the more recent decision of *Miller v Miller* (2011) 275 ALR 611 notwithstanding.

It is our view that the question of whether or not a person is entitled to recover damages when they are engaged in an illegal activity should be determined by the common law. For example why should a person who constructs a dangerous trap on their land be able to escape liability because the person who has entered the land was a trespasser? Even as the common law previously stood this was recognised as form of occupiers liability.

2. **Clause 43**

This provision is in many respect unobjectionable. Clearly a person in their own home is entitled to stop people from communicating with them in side the privacy of their own home. Certainly there is no right for a person to seek to intimidate another.

However, we are concerned as a matter of principle about the creation offences that do not require an element of personal guilt. For this reason we are concerned about the proposed clause 3(b). No doubt the committee can take evidence on the point but it would be difficult to conceive what correspondence would not fall within clause 3(a) which would not involve an element of intent. If there is such correspondence then the matter could be dealt with by allowing the victims and family members to register themselves as not wanting to be sent correspondence.

3. **Clause 51**

This creates an offence of dealing with restrained property in contravention of a restraining order.

It provides a defence to that charge for the accused person to "prove that the person had no notice that the property was restrained under a restraining order and no reason to suspect it was."

It is our view that in order to promote the greatest level of person liberty criminal liability ought to rest on a finding of personal guilt that is the conduct when done knowingly and with intention or at the very least recklessness as to the consequence of the person's conduct.

For the same reason the onus of proof in such matters ought to lie on the prosecution.

These rules in our view are fundamental to the maintenance of the principled asymmetry of our criminal justice system.

For these reasons we oppose this provision which has the effect of shifting the onus of proof in relation to intentionality from the prosecution to the defence.

These comments of course apply to other provisions in the Legislation which have the same effect.

4. **Clause 80**

This amendment deprives the Minister of the power to make grants from the Legal Practitioner Interest on Trust Accounts Fund for the purposes of:

4.1. The advancement of law reform; and

4.2. The collection, assessment and dissemination of information concerning legal education, the law, the legal system, law reform, the legal profession and legal services.[1]

[1] The QCCL discloses that it received a grant from this fund to support the publication of its history.

This provision is utterly without merit. One of the great benefits of the community legal centres movement has bought to this country in the last 40 years is its contribution to law reform in areas of particular relevance to the most disadvantaged people in the community. The writer is aware from personal experience of the contributions of the Caxton Legal Centre in the areas of consumer law and tenancy law.

It is entirely legitimate for government funded community legal services to seek to change the law in order to deal in a systematic way with the problems they see every day of the week.

As Marc Galanater argued in his seminal article *Why the "haves" come out ahead – speculation on the limits of legal change* 1974 Law & Society page 94 you do not have to believe in some Marxist theory of how the economy and government works to understand how the views of the disadvantaged and ordinary people are not likely to impact on the development of the law by the courts. It is because the courts are passive institutions and have to be activated by someone. They are usually activated by what Galanater referred to as the "repeat players" namely government, insurance companies, prosecutors and financial institutions. It is their views that courts hear most often and they tend of course in the same direction.

Organisations like community legal services can of course represent their clients in individual cases. But even they are not in a position to influence the court in the way that the repeat players are. They must necessarily seek to advance the interests of their clients in a broader sense through political and quasi political processes.

Presumably this legalisation will be mirrored in grant conditions which restrict the rights of funding recipients to campaign in these areas or undertake these activities. This is in our view a clear violation of the right to freedom of speech. The fact that these organisations are receiving government money is irrelevant. The government is not entitled to stop people from criticising it own laws. Such a condition would clearly be struck down in the United States for violating the First Amendment. So should any such requirement in this country.

A government committed to the principles of pluralism and confident in the correctness of its own position should not be afraid to fund its critics. This is because if it is correct in its policies it has nothing to fear from criticism. And if its current policies are not correct it should be confident enough to admit that the policies need to be changed and do so.

Clause 93

Retrospective legislation is fundamentally repugnant. The Council particularly opposes the retrospective increase in criminal penalties. The fact that only a small number of people may be effected can not alter the violation of the principle involved in this amendment.

5. **Clause 143**

Having represented clients facing opponents who are if not vexatious certainly border on the vexatious the writer has some sympathy for the attempt of the courts to control such individuals. However, it must be remembered that the right to access the courts is fundamental. There is always the prospect that a

person who has been declared vexatious may find themselves legitimately needing access to the courts. We are concerned that the hearing of application by such persons on the papers will increase the possibility that those people will be deprived of some legitimate right of action. We are also concerned that this sort of move will simply entrench an already sometimes paranoid and often aggressive attitude by such individuals, It is our recommendation that this provision should not proceed

Yours faithfully

Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
24 December 2014