No. 10.

INTERNATIONAL COMMISSION OF JURISTS

AUSTRALIAN SECTION (QUEENSLAND BRANCH)

C/ - School of Justice Administration, Griffith University
Mt Gravatt Campus, Messines Ridge Road
Mt Gravatt, QLD 4111

Telephone (07) 3875 5612
Fax (07) 3875 5608

15 January 1998

Ms Kerryn Newton
Research Director,
Legal, Constitutional and
Administrative Review Committee
Parliament House

BRISBANE
QLD 4000

Dear Ms Newton,

RE: CRIMINAL LAW (SEX OFFENDERS REPORTING BILL) (1997)

Apropos our telephone discussion earlier this week, please now find enclosed our submission in response to the above-mentioned Review.

Should the Committee have any queries in relation to this submission, please do not hesitate to contact me

yours faithfully

Andrew McLean Williams
Honorary Secretary
3875 5612/ 0411 756 624/A.Williams@hum.gu.edu.au

RE: THE *CRIMINAL LAW (SEX OFFENDERS REPORTING) BILL (1997)*

The Queensland Branch of the Australian Section of the International Commission of Jurists ('the ICJ') thanks the Legal, Constitutional and Administrative Review Committee ('the Committee') for the opportunity to make comment in relation to the *Criminal Law (Sex Offenders Reporting) Bill 1997*.

The ICJ wishes for the Committee to note that there are a number of aspects of this Bill which are objectionable, from point of view of Australia's international obligations under human rights covenants.

In this regard, the most significant concern is raised by the 'centre-piece' requirement of the Bill, which would require for all persons released from prison after having served sentences of imprisonment for sexual offences to register with the Commissioner of Police within a stated period of fourteen days.

This requirement, of itself, suggests that the person has a propensity to commit an offence quite separate from that for which they have previously been dealt with in accordance to law. Criminologists are at repeated pains to remind us that the capacity within the forensic sciences to predict future criminal propensity - on the basis of past patterns of offending behaviour - is at best exceedingly limited, and, at worst, notoriously unreliable. Moreover, it is not in the nature of our system of law - that which we describe as the 'Rule of Law' to impose penalty

regimes upon citizens for anything other than *proved* offences for which they have been dealt with properly, in accordance with law.

Article 11 of the *Universal Declaration of Human Rights* provides that every person charged with a criminal offence is to be presumed innocent until proven guilty, in accordance with law. By necessary corollary, every person *not yet charged* with an offence (and indeed not yet even known by the State to have engaged in any other offence), must be entitled to that same presumption. Clearly therefore, the *Sexual Offenders Reporting Bill*, as currently proposed, is contrary to the requirements imposed by Article 11.

Article 12 of the *International Covenant on Civil and Political Rights* provides that every person within the boundaries of a nation state shall have the 'right to liberty of movement and freedom to chose his residence, and that such right shall not be subject to any restrictions except for purposes of national security, public order, public health or morals or the rights and freedom of others'.

Although it may be asserted by some that the reporting requirements contained in Clause 6(5) of the Bill, requiring persons described throughout the Bill as "offenders" to give notice of their movements to police, falls within the acceptable qualifications to Article 12 (ie: restrictions imposed upon freedom of residence in the name of 'public order, public health or morals, or the rights and the freedom of others'), such is not the view of the ICJ.

In this regard, similar post-release reporting requirements for convicted paedophiles have already been imposed in the United States and are now referred to via the common media epithet of 'Megan's law'.

Despite the public prominence accorded to the enactment of 'Megan's law', there is, as yet, no empirical evidence capable of supporting the conclusion that requirements of the kind imposed in America by 'Megan's law' - and as is envisaged will shortly be imposed in Queensland via the *Sex Offenders Reporting Bill* - actually have the effect of preserving 'public order, public health or morals, or the rights and the freedom of others'.

Indeed, quite to the contrary, restrictions of the kind imposed by 'Megan's law' are thought to have the potential for increasing the risk of convicted paedophiles re-offending, although it is recognised that the 'Megan's law' provisions in the United States do enable to swift apprehension of re-offenders. Even so, swift apprehension after subsequent offending is rather akin to 'shutting the gate after the horse has bolted', and does not act to protect child victims, merely to punish offenders.

The risk of swift apprehension acts only as a preventative discentive to criminal activity among those offenders who are fully rational, and well-able to calculate the personal costs of their further apprehension. In the case of paedophilia, as clinical treatment experts tell us, felons are often not fully rational, but rather they are often in the grip of a highly compulsive and addictive disorder. As such,

the risk of swift interdiction becomes quite meaningless, and has no deterrence value or preventative effect, as is so-often simply presumed to be the case.

Moreover, reporting requirements of this nature may further underscore the social division between post-release prisoners and the mainstream community, thereby thwarting their re-integration into society; and effectively destroying carefully designed (and State-funded) programs for their treatment and rehabilitation.

Rather than preventing re-offending, the proposals contained in the *Sex Offenders Reporting Bill* may result in the 'labelling' of offenders, such that they are scorned (or 'labelled') by the community to the extent that they themselves will draw no distinction between their offending behaviour and their own personae. Put more simply, to require offenders to report to police *after* they have 'served their debt to society' means that there is to be, in future, no line of delineation after which the 'sins of the past' are to be put aside and forgotten.

Finally, in this regard, the ICJ wishes to highlight the fact that 'Megan's Law' reporting requirements are highly likely to increase the liklihood of acts of violence or vigilantism against post-release child sex offenders as they endeavour to reintegrate themselves into the community. This fact is simply not able to be categorised as a step in furtherence of public order, and is likely to markedly detract from, rather than contribute to, a state of public order, peace and tranquility in Queensland towns and communities.

Because of all of these factors, the ICJ is of the view that the proposal contained within the *Sex Offenders Reporting Bill* cannot be reasonably said to constitute a recognised exception to the requirements contained in Article 12 of the *International Covenant on Civil and Political Rights*. Moreover, in this regard, the ICJ is of the view that legislative acts that are intended to deny liberty of movement and freedom in choice of place of residence ought not to be enacted at all, unless there is first clear, empirically ascertainable, evidence to demonstrate that such restriction will be in legitimate and productive furtherance of public order, public health or morals, or the rights and freedom of others. Such is simply not the case in this instance, as there is simply no evidence to suggest that 'Megan's law' type regimes have had the impact on re-offending as was predicted.

The relevant provisions of the Bill requiring disclosure of personal details is also a matter of significant concern for the ICJ. Apart from the specific personal details already specified in the proposed Bill, there is further provision that persons may be additionally required to disclose "anything else that may be prescribed by regulation". Matters prescribed by regulation do not have the advantage of clear public scrutiny, (or even always properly adequate legislative scrutiny), and the provision, as drafted, is overly uncertain and open-ended.

This in itself raises important concerns for the ICJ from point of view of the preservation of the Rule of Law. As Professor Beinart of the University of Cape Town avers:

> 'the first and most fundamental requirement of the rule of law is justice according to law as opposed to the rule of official discretion....when drastic powers of control [over the rights of individuals] are desired, the tendency is to pass laws conferring more discretions and granting greater powers of decision to the executive or the administration rather than to enact precise and detailed laws'.[1]

On this basis alone the ICJ must voice its strenuous opposition to proposals that will require the reporting of further matters of a personal nature 'of a nature to be proclaimed'.

Clause 3(2)(b) provides that sex offender registration is to be required with respect to a conviction which occurs within the 'window' ten years *prior* to the commencement of that clause, once passed. This provision clearly breaches Article 15 of the *International Covenant on Civil and Political Rights* by its retrospectively imposing a harsher and additional penalty to that which was applicable at the time when the person was originally convicted.

Article 17 of the *International Covenant on Civil and Political Rights* provides that no-one shall be subjected to arbitrary or unlawful interference with their privacy; and Article 10(3) provides that the prison system shall have a central aim of reformation and social rehabilitation. For reasons already articulated (above), the ICJ has great difficulty in ascertaining how the reporting requirements contained within the *Sex Offenders Reporting Bill* will have the effect of further advancing the requirement imposed by Article 10(3).

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[1] Beinart, cited in Walker, G. de Q., *The Rule of Law: Foundation of a Constitutional Democracy* Melbourne University Press, 1988 at p. 20

Of even greater concern is the proposal contained within Clause 8 of the Bill with respect to the proposed 'Sex Offender's Register'. This clause provides that the Commissioner of Police may disclose information to 'certain persons' including an "entity prescribed under regulation" (whatever that may be), yet there is no restriction to the class of persons or organisations that may be subsequently prescribed by regulation.

Equally, it would appear that the Commissioner of Police may keep the said register in any form whatsoever, and, while there is a permissive provision enabling the Commissioner of Police to lawfully disseminate this information to others; there are no accompanying safeguard requirements within the Bill requiring for the Commissioner of Police to maintain confidentiality or secrecy; or to take other steps appropriate to the preservation of the privacy of persons whose names may appear upon the register.

Equally, the ICJ can find no offence provisions within the proposed Bill for the punishment of persons who may breach the privacy of persons named on the register. Although improper disclosure of information by members of the Police Service is an offence punishable by up to 100 penalty units under the provisions of section 10.1 of the *Police Service Administration Act (1990)*, this provision does not speak to persons who are not 'members' of the Police Service, within the meaning of that term in that Act. As such, existing confidentiality requirements imposed upon 'members' of the Police Service will not prevent subsequent leaking of the names of past sex offenders by persons who obtain that information from police officers acting in their approved capacity. As such, the

ICJ is of the view that there are currently inadequate penalties within the *Sex Offenders Reporting Bill* itself for those who may offend the right to privacy of those citizens who have the misfortune to be listed on the Sex Offender's Register.

While the ICJ is mindful of Principle 9 of the *Declaration of the Rights of the Child* (ie: 'children should be protected against all forms of neglect, cruelty and exploitation'), the entire 'spirit' of the *Sex Offenders Reporting Bill* remains a matter of some considerable concern to the ICJ.

Here, for example, there appears to be no distinction between sex offences against children that amount to a "one off' or aberrational form of behaviour, and other more serious forms of repeat sex offending. "One off" offenders are seemingly "lumped together" with pathological child sex offenders, and no distinction is drawn between them and the treatment they might expect under the proposed reporting regime currently under examination. In this regard, the United Nations has further prescribed *Standard Minimum Rules for the Treatment of Prisoners* ('the Geneva Convention' 1955 & 1957). Article 67 of the *Geneva Convention* provides that, in their treatment, prisoners ought be divided into classes to 'facilitate their social rehabilitation.'

Aside from the obvious fact that persons who are to come under the regime of the *Sex Offenders Act* are no longer prisoners, but free citizens (yet are to still be treated as prisoners), the failure within the provisions of the *Sex Offenders Reporting Bill* to distinguish between aberrational sex offences and acts

perpetrated by inveterate recidivist paedophiles may still be said to be in breach of the 'spirit' of the expectations imposed by Article 67 of the *Geneva Convention*.

Finally, the ICJ wishes to refer the Committee to the recent report of a decision of the English Courts. Comments made in the judgement therein are instructive.

In *R v Chief Constable of the North Wales Police; Ex parte A B* (1997) 3 WLR 724, with respect to a similar regime of paedophile reporting legislation in that jurisdiction, the court recognised the importance of limiting the dissemination of information with respect to previously convicted paedophiles. This need arose due to a 'fundamental need' to strike an appropriate balance between the ability of a convicted person to live a normal life and to avoid a risk of violence to their own person, on the one hand, against the need to protect vulnerable and defenceless children from predatory sexual acts, on the other.

Quite apart from the view already expressed by the ICJ that the proposed *Sex Offenders Reporting Act* is not likely to have the effect intended (ie protection of vulnerable children from predatory sexual acts), the ICJ is of the view that the important and necessary balancing exercise just described has not yet been achieved by the *Sex Offenders Reporting Bill*.

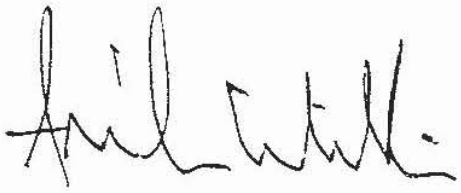
In particular, the *Sex Offenders Reporting Bill* appears as no more than a piece of 'high moral symbolism', and has taken no practical cognisance of the statistical and lived reality of child sex offending, that indicates that this crime is *not* one that is perpetrated, in the main, by strangers, but rather by members of the

victim's own immediate household. Given this sad reality, it is most unlikely that mere reporting requirements, of the kind proposed, will have any desirable impact on rates of child sex predation or the consequences of same for poor, defenceless child victims.

It is the submission of the ICJ therefore, that:

- the *Sex Offenders Reporting Bill* ought not to proceed in its present form. The proposed legislation ought not return before the Legislative Assembly until such time as there has been further attempts to address competing and significant rights of the various effected parties; and
- the Bill not proceed further until such time as the *likely effectiveness* of this proposal has been properly and carefully ascertained.

yours faithfully



Per the Secretary,
International Commission of Jurists (Queensland Branch)
15th January, 1998.