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QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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27 January 1998

Ms. J. Ganim M.L.A.
Chair
Legal, Constitutional and Administrative
Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
BRISBANE. Qld. 4000

Dear Ms. Ganim

RE: CRIMINAL LAW (SEX OFFENDERS REPORTING) BILL 1997

I refer to your letter of the 2 December 1997 requesting a submission on the above Bill.

I regret our inability to comply with the 16 January 1998 deadline but the annual holiday period simply made it impossible to have the submission to you by that date.

INTRODUCTION:

It is difficult to understand the impetus for this Bill but, having regard to the lead time between the Private Member contacting the Office of Parliamentary Counsel and the release of the Bill, one is left with the strong impression that this Bill has been thrown up out of the controversy that surrounded the tabling of the Report of the Queensland Children's Commission into paedophilia in July/August 1997.

It is to be observed that the Private Member asserted in the House at about the time of the tabling of the Children's Commission Report that there were networks of paedophiles operating in the area of her electorate, the Whitsundays.

It is noteworthy that that suggestion was strongly rejected by a number of business groups in the Whitsundays and no credible evidence has been offered to support the Member's assertion in that regard.

We have had regard to the Private Member's second reading Speech and note the superficiality of the coverage of the Bill in that Speech.

Indeed there is nothing in the Speech which gives any indication as to any actual need for such a law.

The second reading Speech does not attempt to address the problems which might be caused by the proposed Bill.

SECTION 3 - MEANING OF "SEX OFFENDER":

Sex Offender is defined to be a person who has been sentenced to serve a term of imprisonment for six (6) months for:

- a serious sex offence in relation to a child;
- an offence relating to obscene material depicting children;

Further, a Sex Offender is said to include:

- a person acquitted of a serious sex offence in relation to a child on the basis of unsoundness of mind;
- a person in respect of whom an Order has been made under the Criminal Law Amendment Act 1945, namely a person detained as being incapable of controlling their sexual instincts;

It is pertinent to observe that there is no attempt in the Bill to distinguish between sexual offences committed within the home and those offences committed by strangers on children.

Indeed, if one has regard to the definition of serious sexual offence as well as including rape and sodomy it also includes a general range of offences under which prosecutions for sexual abuse within the home are commonly brought.

Indeed, it specifically refers to incest.

While the list of offences referred to in the Bill can clearly cover criminal activity by non-family and non-relatives towards children, the Bill totally fails to make any prediction as to the extent to which the Register and associated reporting conditions will apply to those convicted of sexual abuse within the home.

Indeed, there is no attempt in the second reading Speech to make any prediction as to the economic consequences of the Bill's provision, particularly as to maintaining the Register.

As is frequently the case in the Criminal Law what is defined as a serious sexual offence in this section would not necessarily be regarded as serious, although many such non serious offences are, of course, totally objectionable.

It is to be observed that the Queensland Court of Appeal in recent years has made it quite clear that in relation to offences of a sexual nature against children, generally offenders should be sent to prison.

If one has regard to the comparative sentences, a person who is sent to prison to serve 6 months as envisaged in this section would generally be a person who has committed the most minor of sexual transgressions with a child.

It is noted that even a person acquitted by reason of unsoundness of mind of any of the described sexual offences against children, including possession of obscene material depicting children, will be subject to the reporting conditions outlined under the Bill. Quite apart from the objectionable due process consequences of visiting the Bill's regime on an acquitted person, there is an element of the bizarre in requiring a person whose mind is so disordered as to be more appropriately dealt with under the relevant Mental Health Legislation to be required to participate in the reporting and other aspects of the proposed arrangement.

It is noted that a person becomes a "sex offender" for the purposes of the Register if he was convicted of the relevant sexual offence within 10 years before the Bill commences to have effect.

This provision ignores the reality of a significant number of prosecutions in this area both within the family and by persons in position of authority namely that the complaint alleging some relevant form of sexual interference may not be made for 30 or more years and, despite substantial evidence that there has been no offending behaviour since, a person will be required to be part of the Register if convicted in, say 1998, of an offence alleged to have been committed in 1968. It is ludicrous to suggest that such a person in respect of whom no allegation of sexual misconduct has been made concerning the intervening 30 years should have to be part of the relevant Register.

If the Bill is to be implemented it is appropriate, in accordance with basic principles of the Criminal Law, that there be no retrospectivity in relation to the legislation.

It is a fundamental tenet of the Criminal Law that a person should not be penalised years after a particular event by a

subsequent change in the law.

REGISTRAR OF COURT TO ADVISE COMMISSIONER OF CONVICTION OF SEX OFFENDERS:

This is a machinery provision on which no comment is necessary.

However, it is appropriate under this section to indicate that, notwithstanding our fundamental objection to a Sex Offenders Register, if the scheme outlined in the Bill is to go ahead we would contend that it should be court based and administered rather than, at the moment, totally sourced and based within the Queensland Police Service.

We would contend that if the legislation is to proceed who should be required to be listed on the Register should be decided by a Sentencing Judge at the end of a particular sentence proceeding.

We contend that, if despite our opposition, the Register proceeds, the decision as to whether a person is to be affected by the Register is one which should be made at the end of a person's sentencing hearing.

It is at the time of sentence that a person's potential to reoffend can be properly assessed.

This procedure has been employed in respect of the declaration of a person being a dangerous offender under the Penalties and Sentences Act and is apparently working satisfactorily.

It is clear that a person who is to be affected by the quite significant adverse consequences of being listed on a Register should have the opportunity of being heard and this should occur in the open and transparent forum of a court room, rather than, say, in the significantly unaccountable procedures of the Parole Board.

A court based Register which is able to distinguish between serious offenders who are likely to pose a problem in the future from one-off offenders is absolutely necessary.

SECTION 5 - REQUIREMENT ON SEX OFFENDERS TO ADVISE COMMISSIONER OF PRESENCE IN QUEENSLAND:

This clause, more than most, highlights the administrative absurdity of the proposed reporting scheme.

It will require even persons who come to Queensland from interstate to report to police but there is nothing outlined in the Bill indicating how interstate or even overseas tourists are to be made aware of this quite peculiar

provision.

A similar absurdity has occurred in the prostitution laws since the 1992 amendments where persons who have come to Queensland from interstate, or from overseas, unaware that it is an offence to be in a brothel are subject to arrest procedures, and in some cases significant adverse publicity consequences.

Are we to have an arrangement similar to what occurs when one flies into Malaysia, namely an announcement to be made on all interstate and overseas flights landing in Brisbane or Cairns that persons who have a conviction for a whole range of child sex offences are required to go to the nearest police station after they emerge from Customs and advise of that fact? Is there to be a sign at the border notifying motorists who travel to Queensland, in similar terms.

The absurdity of the necessary notification conditions only have to be stated to realise that the reporting requirements are an unmitigated administrative nightmare.

There is nothing in the second reading Speech to estimate how many thousands of people may be required to register and what, even in approximate terms, the administrative cost may be.

The rule that ignorance of the law is no excuse is a particularly harsh one when the law is so unique and unusual that visitors could not possibly be expected to know of the existence of such a reporting law. If a visitor cannot be expected to know of this law, then it should not be a law, absent quite substantial advertising so as to bring to visitors notice the existence of the Register.

It is to be noted that both the requirement to advise the Commissioner of presence in Queensland and of change of address (including leaving Queensland) do not have to be complied with "unless the offender has a reasonable excuse".

There are no indications in the Bill as to what might constitute a reasonable excuse. Arguably, though, a concern of retribution to the offender or his family could be put up by a defendant as a reasonable excuse. The total failure to list what might amount to a reasonable excuse, and what might not, is another major gap in the Bill.

SECTION 7 - PERIOD FOR WHICH SEX OFFENDERS ARE SUBJECT TO REPORTING REQUIREMENTS:

The period for which a person is subject to reporting seems to be calculated on a totally arbitrary basis. One looks in vain for some guidance from the second reading Speech (as there are no Explanatory Memoranda) as to how it is calculated that if a person is sentenced to serve 6 months or more he is required

to report for a period 2.5 times the term of imprisonment the prisoner is sentenced to serve.

One is absolutely unenlightened as to where the figure fo 2.5 times has been derived from. It seems totally arbitrary and illogical, as with many other of the Bill's provisions.

SECTION 8 - SEX OFFENDERS REGISTER:

It is noted that there are specific identifiers which a sex offender must provide for the Register.

However, there is then a provision in Section 8(2)(e) that a sex offender can be required to provide "anything else the Commissioner considers appropriate". This is an extraordinary provision and it renders the system liable to arbitrariness, capriciousness and abuse.

The Commissioner under this heading can arguably require identifying particulars of the type that so interests a significant number of people in the U.S.A. in the Paula Jones/Bill Clinton case.

The Scrutiny of Legislation Committee could well be expected to be highly critical of such a provision which delegates enormously to the Commissioner a significant amount of information destribution from the Register.

The most objectionable provision of the whole Bill is clause 8(4) which provides that the Commissioner may disclose information in the Register "only to" law enforcers, the Children's Commissioner and the Chief Executive of a Department of Government but then goes on to provide that this "only to" provision of information can be given to any entity prescribed under a regulation.

Therefore, there is the very real potential for a regulation to be later formulated greatly expanding the class and category of persons or groups who might be able to obtain access to information on the Register which would cause an uproar if such expanded disclosure entities were included in the legislation itself.

The terms of the Bill are so wide that it could arguably be permitted to disclose the information, by regulation, to all sorts of groups such as child care centres, and scout and cub groups who have contact with children.

It is to be remembered that in the controversy generated by the factually inaccurate Children's Commission Report on paedophilia, it was indicated by the Education Minister that teachers applying for positions in schools would be subject to vetting.

This Council reluctantly supported such a proposal but only on the basis that the vetting be restricted to child sexual offences.

It is also to be borne in mind that any person who applies for a job in a child care centre can be required by the Centre to provide written permission so as to enable Queensland or interstate police to advise if such a job applicant has a conviction for a child sex offence.

Accordingly the protections are already in place to ensure that persons who have criminal convictions for sexual offences with children will become known.

Therefore, the provision that allows the Commissioner to disclose the information in the Register to an entity prescribed by a later Regulation is obnoxious and thoroughly objectionable.

It is also to be observed that once the controversy of the Bill itself dies down, it is unlikely that any Regulation prescribed under the legislation will attract anywhere near the amount of public critical attention as is occurring with the Bill itself.

Another huge deficiency with this section is that it does not provide for any restrictions on what can be done with the information provided by the Commissioner once it reaches, say, the Chief Executive of a Department of Government. Therefore, what the Bill does is provide an illusory superficial degree of protection against misuse of information in the Register but the on-going or derivative use of the information once it reaches a Government Department is absolutely and totally unregulated.

It is particularly to be noted that Queensland has absolutely no privacy laws and, accordingly, there is no framework in place to regulate the 'willy nilly', arbitrary or even maliciously motivated misuse of the information once it reaches a Government Department.

In this regard it is to be noted that the Dictionary does not even provide for a definition of a "Department of Government" and accordingly this concept would therefore appear to encompass a Commonwealth, State and even Local Government Department.

CONCLUSION:

This Bill is utterly misconceived, is atrociously drafted and has no justification in fact or current public policy.

Whilst this Council very much supports the improved administrative access to Private Members to the Parliamentary

Counsel's Office, the instant Bill is so flawed and so bereft of any articulated public policy justification by its proponent that it should proceed no further.

Yours faithfully,
QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

TERRY O'GORMAN
VICE PRESIDENT

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