



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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The Committee Secretary
Senate Legal and Constitutional Affairs Committee

Email: legcon.sen@aph.gov.au

Dear Madam/Sir

Crime Legislation Amendment (Organised Crime and other measures) Bill 2012

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

This submission is based on a paper originally prepared for the Queensland Council for Civil Liberties by Julian Wagner, Barrister-at-Law. It is based on his experience in Queensland. However we have no reason to think the situation is substantially different in other states.

Statements of General Principle

The Council for Civil Liberties continues its opposition to all civil forfeiture schemes as they inherently violate fundamental rights not to be deprived of property without due process and the right to be free from punishment that it is disproportionate to the offence.

Council notes that at common law the fact of possession gives the possessor of a chattel possessory title which is not prejudiced by the fact that possession was obtained unlawfully.¹

The decision to seize a person's chattels or assets involves then the acquisition of property.

Secondly, these procedures are clearly criminal in that their express purpose is said to be the combating of criminal activity by confiscating what is alleged to be the proceeds of crime on the basis of a person's alleged criminal behaviour. As a result in our submission the subject of such legislation is entitled to the full range of protection afforded to those accused of a crime. For example, orders should not be made relying on hearsay and on the balance of probabilities.

The Council has no opposition to criminal forfeiture as it is imposed in a criminal proceeding directed against an individual for his or her alleged misconduct.

¹ *Costello v The Chief Constable of Derbyshire* [2001] 3 ALL.E.R 150 at paragraph 14

Legal Costs

The QCCL objects to the proposal to remove the power of the Court to provide that individuals the subject of Applications in relation to Unexplained Wealth to have access to their funds to provide legal representation.

The QCCL has reviewed the report of the Parliamentary Committee which led to this recommendation and sees absolutely no evidence, apart from bald assertions, that this right is being abused. It seems to us that the mechanism of ensuring that any claims for costs are independently assessed or taxed by an independent costs assessor is an appropriate safe guard.

As noted in our opening statement, we consider that this legislation is criminal in nature. In that context the right to a Counsel of the Respondent's choice is engaged.

The legislation envisages that legal aid will be available to defendants where property is restrained.

However there is no **guarantee** legal aid will be granted. In short, legal aid will not be granted if the Legal Aid Office 'means test' determines that the defendant is not in need of such assistance. This will be the case where unrestrained assets exceed the limited 'assets ceiling' to justify grant of legal aid. The family home, for instance, might be the only asset not restrained. Yet its equity value may deny an entitlement to legal aid.

A defendant may be forced to further mortgage the family home or sell it at a 'fire sale' loss where the family home, for instance, is also the abode of children and/or other innocent third parties.

By contrast, a defendant would ordinarily be granted legal aid where all of the defendant's property has been restrained by a 'global order.' Oddly, a defendant would be better off in terms of getting legal aid if all of his or her property were restrained.

This invidious conundrum raising fundamental civil liberties concerns is due to the State, in effect, indirectly determining whether a defendant ultimately gets legal aid.

It is the Prosecution which has an unfettered discretion concerning the extent of property to be restrained that effectively determines the likelihood of legal aid. The Court has no say, least of all the defendant.

Any assumption that the State would ensure fairness in its approach to restraining orders and confiscation order generally can never be made. Furthermore, the usual requirement of an undertaking as to damages and/or costs as a condition of a restraining order is never, in reality, going to adequately compensate a defendant who is ultimately successful in a confiscation proceeding. By the time an undertaking is called upon, after a typically long and protracted proceeding, there is potentially irreparable damage. Furthermore costs are invariably never awarded on an indemnity basis.

One notable instance of a denial of legal aid in Queensland was where the defendant's remaining unrestrained asset was the family home. The defendant needed legal representation for both serious criminal charges and related complex confiscation proceedings. Yet the defendant, for various legitimate personal and economic reasons, was not in a position to sell the family home. Nor, it appears was the defendant able to raise a loan against the family home given his sudden unemployment due to the criminal proceedings.

In summary, the availability of legal aid and a defendant's predicament generally is at the whim of the State from the outset when a restraining order is sought.

Any argument that lawyers simply always want to be paid more and are greedy holds no water in this arena.

Confiscation proceedings are often very time consuming and complex. Voluminous amounts of documentary and other evidence is not uncommon and then there's the ongoing need to contend with a team of State lawyers and investigators who are well versed in the machinations of Confiscation proceedings.

Arguably, the complexity of confiscation legislation and proceedings requires a higher level of skill than might otherwise apply in civil litigation. In addition to being well versed with the Uniform Civil Procedure Rules (UCPR), hearings include various types of restraining orders, proceeds assessment orders, pecuniary penalty orders and various types of forfeiture orders as well as applications for hardship orders and exclusion orders (for 3rd parties or Respondents). Representation at Court ordered Examinations is also necessary as well as general out of Court involvement which now also includes the preparation and provision of a statement of 'property particulars.'

The non-availability of adequate legal representation also has the potential to cause grave difficulties even from the State's perspective. In England, for instance, there was a case where a defendant was granted legal aid but 30 barristers turned down the case because of the low fees. The defendant's assets had been frozen whereby he could not pay otherwise pay for representation. Ultimately, a confiscation order was set aside on the grounds that the defendant could not get legal representation.²

There is also a limit to legal aid funding not only in relation to legal representation. Forensic accountants, for instance, may need to be engaged by a defendant. Such extra professional services must, however, be shown to the Legal Aid Office as justified.

Another factor in this area which may cause lawyers to be hesitant in representing clients is the concern as to where payment does in fact come from when a defendant is 'somehow' able to pay fees at reasonable rates despite claiming to have had all of his or her assets restrained. This raises both ethical concerns and also concerns as to potential allegations of money laundering. Lawyers, needless to say, are far from exempted from requirements of accountability and the exercise of a search warrant on a law firm can be highly damaging to one's practice even if the lawyer is completely innocent.

² *The Times* 28 October 2009.

Discretion

The Council opposes the proposal to remove the discretion from the Court to make these Orders.

It is clear in our view that this type of legislation increasingly make the Court's vassals of the State by removing or limiting the Court's discretion in relation to Orders and obliging the Court to act in a certain way without deciding the merits of the matter. Not surprising, the High Court in 2006³ observed that similar Western Australian legislation was draconian in its operation and complex in several of its provisions.⁴

The Court is effectively obliged to make Restraining Orders regardless of just notions of proportionality concerning the appropriate extent of property which should reasonably be restrained. Traditionally the Court's discretion ensures independent and objective fairness to both parties in legislation or as between the Crown and the accused person in criminal proceedings. The removal of discretion disturbingly underlines the fundamental integrities and independence of the Courts and in turn the doctrine of the separation of powers.

The residual public interest discretion is not in our submission sufficient.

The amorphous concept of the 'public interest' is not defined. It is unclear, therefore, whether the 'public interest' proviso includes, for instance, the public interest that a person is entitled to a fair trial by being given legal aid and adequate legal representation. Nor is it clear whether there can be various competing public interests whereby the Court must decided upon a dominant public interest. So far, it has been held that the lack of proportionality between the property sought to be restrained and the alleged offences was not a 'public interest' basis to forestall the making of a restraining order.⁵

Where there is no provision for adequate legal representation, it is not inconceivable that a *Dietrich* type argument⁶ will one-day soon be accepted by a Supreme Court. This might either be based on the 'public interest' proviso or under the Supreme Court's general and/or inherent jurisdiction. It has already been seen that in England a Court refused to make a confiscation order where a defendant was unrepresented.

Dietrich, of course, concerned criminal proceedings. In our view as stated above confiscation proceedings are in reality criminal proceedings. Perhaps a Court will prepared one day to side step the legislative fiction that confiscation orders are not a form 'punishment.'⁷ However if the legislature were truly being attentive to the basic liberties of citizens this would not be necessary.

³ *Mansfield v DPP (WA)* [2006] H C A 38

⁴ at paragraph 50

⁵ *Queensland v Kupfer* [2003] QSC 458

⁶ See *Dietrich v The Queen* (1992) 177 CLR 292 and the recent Queensland decision of *R v East* [2008] QCA 144 where Keane JA (as the new High Court Justice then was) observed that a defendant was disadvantaged by not having legal representation.

⁷ Section 9 CPCA.

Lastly, Courts are conscious of the ever-increasing numbers of self-represented defendants and litigants generally. This places more onerous requirements on the judiciary and also adds to the cost and time it takes to justly hear and determine proceedings.

Other issues

In light of our view that this legislation is fundamentally flawed and contrary to basic principles of justice we oppose any proposal to extend Search Warrant powers in support of it.

We have no objection to the procedural change to give the Court a power to extend time for the bringing of Applications where a person cannot be served.

Similarly, we have no objection to the fundamentally procedural change of creating charges to secure enforcement of Orders which have been made.

We trust that this is of assistance to you.

Yours faithfully,

Andrew Sinclair
President
Queensland Council for Civil Liberties
5 February 2013