



19 August 2011

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RB;rp

Section 71A Consultation
c/- Legislation and Legal Policy
Attorney-General's Department
GPO Box 464
ADELAIDE SA 5000

Dear Sir/Madam

Review of Section 71A of the *Evidence Act 1929*

I refer the Attorney-General's invitation (8 July 2011) to consider the Discussion Paper on Section 71A of the *Evidence Act 1929*. The Paper has been considered by the Society's Criminal Law and Children and the Law Committee. We provide the following comments.

Summary of Submissions

For the reasons outlined below, we consider that

1. sex offences should continue to be treated differently to other types of offences
2. the identity of child sex accused should be suppressed unless they are found guilty or the court otherwise orders
3. the identity of adult sex accused should be suppressed prior to listing for trial (for superior matters) and commencement of trial (for summary matters); and
4. the Court should be empowered to make orders allowing publication of any information, including concerning the alleged victim, in appropriate cases.

General Observations

The principal issue is whether people accused of sex offences who are ultimately not found guilty should be treated differently to those, in the same position, accused of non-sex offences. The different treatment concerns publication of the accused's identity.

Sex offences are a special class of offences for, broadly, two reasons. Firstly, they uniquely are of a class that tend to attract a stigma for both the assailant and the victim. The law recognises this in protecting, at certain stages, the identity of the complainant and the accused.

Secondly, anecdotally they are more liable to false reporting than any other type of offence.

A combination of these two reasons of speciality leads to the real risk that an accused person who is innocent in the eyes of the law will forever be considered guilty by the community. In a sense, it could be a life sentence of prejudice for the innocent accused.

One must be very careful in placing too much weight behind contemporary community attitudes to the extent that they support the "right to know" view. Often it is not until someone has been in the position of an innocent sex accused, or close to him/her, that they are aware of the devastating effects publication can have.

Recently a parliamentarian prepared Bills for introduction into Parliament based on his unsavoury experiences in the criminal justice system after contesting an expiation notice. The Bills seek to avoid similar unsavoury experiences for other members of the community who might one day be in the same position as the parliamentarian.

This is typical of human nature that unless people are in the position of vulnerability (in this case, the stigma of an unproven sex offence) they do not know of or otherwise consider the devastating effects on the innocent accused.

The reasons that moved Parliament to pass such laws in the past have not changed. The stigma still exists. The public attitude to sex offences and the parties thereto are not materially different today than through the ages. The development of the social media does not render a suppression order otiose. The reach of the electronic and print media in this State is far in excess of social media.

Similarly, changes to laws in other jurisdictions should not mean that South Australia should change its laws. If there is a change of law it should be for reasons other than that another jurisdiction has that same law. If it is considered that the policy behind the existing law is sound then it should not be changed.

We would prefer for no publication for all sex accused unless guilt has been determined by a court. In the event this preference does not find favour, we suggest a change in the law to reflect the substantial differences in stigma between adult sex accused and child sex accused.

ADULT SEX ACCUSED

The stigma associated with adult sex offences is, generally, much less than with child sex offences. If the identity of any sex accused is to be published, it should only be adult sex accused and, even then, after the minimum safeguards similar to s71A have been reached.

Superior Court Matters

The nature of committal hearings in South Australia changed in 1992. The role of the magistrate in ensuring the sufficiency of a case to answer has diminished. Unlike pre-1992, the magistrate at the committal hearing may only reject evidence if it is "*plainly inadmissible*".

The effect of this is that any evidence, provided it is not plainly inadmissible, on an element of an offence will be accepted as being sufficient to satisfy that element.

The greater test as to whether a matter has sufficient merit to proceed to trial is, in theory, after the DPP has reviewed the matter post-committal and determined that it will proceed. It is only after this stage that the DPP prepares and files information (for the superior court).

We consider that the equivalent safeguard today to the committal hearing pre-1992 is after the matter has been listed for trial after a directions hearing in the superior court. We recommend, therefore, an amendment to s71A so that it prohibits publication of the identity of the adult sex accused until after the matter has been listed for trial.

Prior to the listing for trial, it is not uncommon for matters to be withdrawn by the authorities. This recommendation will have the effect of minimising any unnecessary stigma to an innocent adult accused.

Summary Court Matters

The summary jurisdiction does not have the benefit of safeguards such as committal hearings or reviews by the DPP and the laying of fresh information. Summary matters are prosecuted by non-lawyers.

Generally, one could not be confident that a charged sex offence will go to trial until the trial commences. For that reason we recommend the suppression of the identity of an adult sex accused until the commencement of trial.

Withdrawal, Dismissal etc

We consider that s71A is seriously flawed by permitting publication after a matter is dismissed, withdrawn or lapses after the death of the accused. To allow publication after an effective finding of not guilty is to strike at the heart of the policy behind the legislation. This apparently fails to contemplate that stigma attaches regardless of the result of the criminal proceedings. After all, a court result rarely, if ever, determines whether the accused was in fact innocent.

CHILD SEX ACCUSED

There is, in all walks of life, an overwhelmingly negative stigma that attaches to child sex offenders. To be branded a paedophile is arguably the most insulting label one can place on a person. This is for good reason. Parliament recognises this, and the fact that many paedophiles are repeat offenders, by the passing of legislation to create a Child Sex Register.

Such is the unique nature of this offending that, not only is there perceived to be a need for the Register to be created, but that it imposes onerous restrictions on the liberty of a person who is on the Register.

Publication of the identity of a child sex accused who ultimately is not found guilty is tantamount to entry on such a Register for life. An innocent child sex accused will forever be marked and carry the overwhelming stigma to his/her substantial prejudice.

An illustration of the how the community views child sex offenders is the way they are treated by the prison community. The prison community is, in one sense, the most dishonourable and undesirable of any community in the land. Notwithstanding this, the prison community does not tolerate child sex offenders and targets them for violent retribution.

It is our firm submission that no child sex accused should ever be identified unless found guilty.

DISCRETION BY THE COURT

An inflexible rule will always lead to an unjust result. Courts should be given the discretion to order publication of any information of whatsoever nature in any case in appropriate circumstances. This includes information identifying the accused or complainant in a sex case.

Answers to Specific Questions

We answer the specific questions as follows:

- 1 *Whether the current restrictions in Section 71A are necessary or desirable.*

Yes, but they do not go far enough. In relation to child sex accused, there should be a blanket prohibition unless and until a finding of guilt. In relation to adult sex accused, the prohibition should only be lifted after the directions hearing in superior matters, and after the trial commences in summary matters.

2. *Whether any changes to the restrictions are appropriate, and if so, the nature of those changes.*

Yes, see comments above.

3. *In particular, whether the law with respect to suppression of identity of a person charged with a sexual offence should be different from laws governing suppression or identity of persons charged with other types of crime and, if so, in what respect.*

Yes, see comments above.

4. *If changes are to be made to the current restrictions, what other measures, if any, need to be taken to*

- (a) *ensure that an accused receives a fair trial*

Existing measures should be sufficient.

- (b) *ensure that the prosecution case is not prejudiced*

If there is any prospect of a complainant or a witness not wanting to give evidence because of publicity, then the trial judge should have the power to order a suppression for whatever period is considered appropriate.

- (c) *protect or restore the reputation of persons who are accused of but found not guilty of a sexual offence.*

The only way is not to publish the accused's name until a finding of guilt.

I trust these comments are of assistance. We would be pleased to discuss any aspect of this response, with you or the Honourable Brian Martin AO QC or the Officers within your Department, should that be of assistance.

Yours sincerely



Ralph Bönig
PRESIDENT