SUBMISSIONS BY DR DONALD STEVENS QC TO LAW AND ORDER SELECT COMMITTEE ON CRIMINAL PROCEEDS (RECOVERY) BILL

(This submission was made to the select committee at Parliament Buildings on 1 August 2007)

Introduction

I have practiced criminal law in Wellington for 30 years. I hold a Ph.D. in jurisprudence and I was appointed a Queen's Counsel in 2002.

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This submission deals with clause 28(2) of the Bill, which removes the right for restrained property to be used to meet legal expenses.

Submission:

A person whose property is subject to a restraining order should not be prevented from using that property to meet reasonable legal expenses associated with conducting a defence to criminal proceedings or resisting proceedings under the legislation.

Discussion

1. The Criminal Proceeds (Recovery) Bill removes the right of a person whose assets are restrained by a restraining order to use the assets to defend criminal charges or defend proceedings under the proposed legislation.

2. This is contrary to principle and contrary to elementary notions of justice.

3. Clause 28 of the Bill provides that the court may make a restraining order subject to conditions including conditions that allow certain expenses to be met out of restrained property. These include reasonable living costs, business expenses and other debts. However, clause 28 (2) provides that a court may not allow any legal expenses to be met out of a respondent's restrained property.

4. This provision contrasts with section 42(2) of the present legislation (the Proceeds of Crime Act 1991), which allows the court to permit restrained property to be used in order to meet the owner's reasonable expenses in defending any criminal proceedings (including any proceedings under the Act).

5. It has been claimed that the removal of the right to use restrained property to meet reasonable legal expenses is justified by the need to avoid the property being used to fund *Rolls Royce defences*. This contention is both misguided and misconceived.

6. The Proceeds of Crime Act 1991 only allows *reasonable* legal expenses to be met from restrained property.

7. The High Court has kept a watchful eye on the use of restrained property for this purpose. In no case has a Rolls Royce defence been permitted. Indeed the Full bench of the High Court set a formula in *Solicitor-General v Panzer*[1] that ensures that funding of legal expenses is strictly supervised and contained. The formula is such as to preclude any unnecessary expenditure on legal services.

[1] [2001] 1 NZLR 224

8. What is now proposed in this Bill would see New Zealand in breach of its international obligations.

9. It is an elementary principle that a person accused of crime is entitled to employ the legal representation of his or her choice[2]. The fundamental importance of that principle is emphasized by its inclusion in the International Covenant of Civil and Political Rights to which New Zealand is a party.[3] This is described by the Covenant as a *minimum guarantee*.

10. Presumably what is intended in this Bill is that a person whose entire assets or principal assets are restrained, leaving that person with insufficient to fund a legal defence, should be defended on legal aid.

11. The theory that this is acceptable assumes that the legal aid system can be relied upon to provide counsel of choice. The reality is that it cannot. The legal aid system is under-resourced, with the result that increasing numbers of experienced lawyers are declining to handle cases on legal aid. Counsel of choice can only be guaranteed where a person is able to fund his or her legal expenses from his or her own resources.

12. What the Bill proposes could produce the following situation. A farmer spends his life energy working his land so as to develop a substantial asset. He does so in the knowledge that his asset could be called upon to fund any unexpected exigency. He has reinvested in improvements to the land whenever surplus funds have been available. He has no other assets of significance.

13. Unbeknown to the farmer a remote part of his land is used by cannabis growers to cultivate a substantial crop of cannabis. The cannabis is found by the police who do not believe the farmer's denial that he was involved in its cultivation.

14. The farmer is charged with cultivating cannabis. This is a qualifying forfeiture offence for the purposes of the Criminal Proceeds (Recovery) Bill. The land is an instrument of crime because it was used to commit or facilitate the commission of the offence. A restraining order is obtained. The result is that the land, the farmer's only significant asset, cannot be used to fund his defence. He has no other way to meet legal fees. As a result, he is compelled to apply for legal aid. Counsel he would wish to be represented by does not handle cases on legal aid. He is thus denied counsel of choice. Instead he has to accept representation on legal aid.

15. The Legal Services Agency allows only limited payment to the legal aid lawyer for preparation. The maximum in the case of a charge of cultivating cannabis is three hours preparation for the depositions hearing and five hours preparation for the trial. These amounts can be

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[2] See the decision of the Supreme Court of South Australia in *Vella* (1993) 70 A Crim R 241
[3] Article 14 (3)(d)

exceeded on application to the Agency if a case can be made out to exceed the maximums, but even if more preparation time is approved (and in many cases it would not be) it would seldom, if ever, come any where near meeting the preparation that is required to adequately defend the case. The key to a successful defence is preparation.

16. To make matters worse, the limited preparation time that is allowed is remunerated at a rate substantially less than the market rate for legal services.

17. The farmer who had planned to use the equity in his only asset of significance to cover any unexpected life crisis is prevented from doing so. He is effectively denied counsel of choice and thrown on the state funded legal aid system. And this in a situation where the state is seeking to imprison him and forfeit his asset.

18. The courts in Australia have recognized the obvious injustice of this.

19. Chief Justice King of South Australia described in 1993 the purpose of proceeds of crime legislation as being to deprive an offender of the fruits of criminal activity. He said that this purpose is not defeated by an accused person's access to his property to the extent necessary to secure legal representation of choice. This was because:

> If he is found not guilty, he has merely used his own money. If he is convicted and an order for forfeiture is made, the amount of the legal expenses, although not available for forfeiture, is nevertheless money of which the offender has been deprived by the proceedings against him, by reason of the necessity of paying for his defence. An expensive defence, which does not go to the point of being wasteful, is not to be thought of as a luxury to which an accused person is not entitled out of property subject to forfeiture. The importance of a professionally conducted defence in our adversarial criminal justice system has recently been stressed by the High Court in *Dietrich* (1992) 177 CLR 292.... It is an assumption of the adversarial system that the more highly skilled the presentation of the case on either side, the more likely it is that a just result will be achieved.
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> In general, I consider that the defendant should be entitled to engage the solicitor and counsel of his choice and to have his defence conducted in the manner which he and his legal advisers wish. He should have access to his property to the degree necessary for that purpose, that is to say to the degree necessary to pay the fees ordinarily charged by the solicitor and counsel of choice for a case of this kind.[4]

20. Chief Justice Gleeson of New South Wales said *in NSW Crime Commission v Fleming and Heal*[5] that justice requires that persons

[4] *Vella* (1993) 70 A Crim R 241, 244
[5] (1991) 24 NSWLR 116

accused of criminal offences, or confronted with a threat of forfeiture of their property, should not be unfairly deprived of the means of defending themselves and should not be deprived of the "opportunity of obtaining proper legal representation." Furthermore, he said:

> …the efficient working of the justice system depends heavily upon litigants being professionally and capably represented, and it would not assist the administration of justice to deprive litigants of the means of securing adequate professional assistance.[6]

21. In the same case Justice Kirby (who was then the President of the New South Wales Court of Appeal, and is now a judge of the High Court of Australia) observed that the New South Wales proceeds of crime legislation:

> …was enacted against a background of settled civil rights. These include the presumption of innocence in criminal proceedings; the presumption that a person may use his or her property as that person decides, and specifically may use the property to defend serious legal proceedings. It is not only in the interests of the individual that such property should be used for the last-mentioned purpose. It is also in the interests of society in at least three respects. It helps to ensure both the reality and appearance of a fair trial of issues seriously in contest (as cases involving drugs often are). It may assist in the provision of considered legal advice which may result, in proper cases, in a plea of guilty to serious criminal charges which may save significant court time and public cost. And it may ensure that a person is not thrown upon public legal assistance in resisting serious actions of the State which threaten that person's property, livelihood, reputation and even liberty.[7]

22. Justice Kirby continued:

> Public legal assistance or legal aid are conserved for needy cases. The maintenance of an independent, private legal profession, whose fees are paid to the greatest extent possible by clients is not only the way legal practice has traditionally been organized in this country, and before it in England. It is also arguably a course preferable to the expansion of demands upon the public purse.[8]

23. The arguments against enforced reliance upon government funded legal representation were cogently outlined by Justice Blackmun of the United States Supreme Court, writing for the minority, in *Caplin & Drysdale, Chartered Petitioner v United States*:

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[6] At p 124
[7] At p 136
[8] ibid

> The right to retain private counsel also serves to ensure some modicum of equality between the Government and those it chooses to prosecute. The Government can be expected to 'spend vast sums of money… to try defendants accused of crime', *Gideon v Wainwright* 372 US at 344…and of course will devote greater resources to complex cases in which the punitive stakes are high. Precisely for this reason, 'there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present their defences'. Ibid. But when the Government provides for appointed counsel, there is no guarantee that levels of compensation and staffing will be even average. Where cases are complex, trials long, and stakes high, that problem is exacerbated. 'Despite the legal profession's commitment to pro bono work', *United States v Bassett* 632 F Supp 1308, 1316… even the best intentioned of attorneys may have no choice but to decline the task of representing defendants in cases for which they will not receive adequate compensation, See, eg, *United States v Rogers* 602 F Supp 1322, 1349 (Colo 1985). Over the long haul the result of lowered compensation levels will be that talented attorneys will 'decline to enter criminal practice…This exodus of talented attorneys could devastate the criminal defence bar'… Without the defendant's right to retain private counsel, the Government too readily could defeat its adversaries simply by out-spending them.

24. The implications of this are obvious. The state often has a decided advantage over a person defended on legal aid.

25. Consequently, it is both wrong and offensive to deprive a person of recourse to his or her assets for the purposes of defending himself or herself from an attempt to deprive the person of those assets, not to mention an attempt to imprison the person. The state, which will ultimately benefit from the forfeiture of the asset, has a vested interest, which it is seeking to establish through this Bill, in denying the person affected access to his asset or her asset for the purposes of an adequate defence by counsel of choice.

26. In the case of the civil action proposed by the Bill a person will be able to be deprived of assets without the necessity of conviction for a criminal offence. Proof beyond reasonable doubt will not be required and the Bill contains a reverse onus. This in itself is troubling. That, however, is not considered by the Bill's authors to be sufficient inroad into fundamental human rights. The Bill proposes, as well, to strike at the person's capacity to resist the operation of the legislation by rendering those without unrestrained assets incapable of defending themselves without recourse to publicly funded legal aid.

27. As noted the publicly funded legal aid system is under-resourced and overused. It is obvious that this may impact on the quality of the legal representation it affords. To deprive a person of the right to use their

assets for the purpose of obtaining privately funded counsel of choice is thus offensive to fundamental tenets of justice. This would, as earlier observed, also breach the county's international obligations.