BY HAND

23 June 2015

The Hon. Carol A.M. Bassett, JP
President of the Senate
The Cabinet Building
105 Front Street
Hamilton, Bermuda

Dear Senator Bassett

An Open Letter
The constitutionality of the Disclosure and Criminal Reform Act 2015 and the Criminal Jurisdiction and Procedure Act 2015

By way of introduction, Centre for Justice is a non-governmental, non-profit and non-partisan organization whose aim is to promote the rule of law, human rights and civil liberties in Bermuda in accordance with the rights proclaimed in the Bermuda Constitution, the Universal Declaration of Human Rights and other international human rights instruments such as the European Convention on Human Rights.

We write to you to draw to your attention; to our concerns regarding certain provisions of the Disclosure and Criminal Reform Act 2015 (the "**Reform Act**") and the Criminal Jurisdiction and Procedure Act 2015 (the "**Procedure Act**", collectively referred to as the "**Bills**") which potentially infringe the Bermuda Constitution.

We wish to associate ourselves with the Bermuda Bar Association's ("the **Bermuda Bar**"), support for any reform that is aimed at improving the efficiency and effectiveness of the administration of the criminal justice system. However, certain provisions of the Bills potentially contravene the right to a fair hearing guaranteed by the Bermuda Constitution.

The Bills passed by the House of Assembly on 5 June 2015, will be before the Senate soon and it is hoped that the constitutionality of certain provisions of the Bills will be given serious consideration by the Senate in its deliberations.

As you may be aware, the Bermuda Bar had the opportunity to consider the reforms contained in the Bills and provide feedback to the Attorney-General. Centre for Justice unreservedly endorses the views of the Bermuda Bar, in particular as it relates to the right to silence.

The Right to Silence

There are two provisions in the Bills that depart from the right to silence. Section 6 of the Constitution provides that if any person is charged with a criminal offence, he must be afforded a fair hearing within a reasonable time by an independent and impartial court.

A fair hearing means *inter alia*:

- Everyone is presumed to be innocent until she or he is proved to be guilty or has pleaded guilty;
- Everyone must be given adequate time and facilities for the preparation of his defence;
- A person who is tried for a criminal offence cannot be compelled to give evidence at the trial; and
- Everyone is allowed the right to legal representation of his own choice (at his own expense) or a legal representative at the public's expense.

In our view, section 91 of the Procedure Act and sections 5 and 10 of the Reform Act erode the right to a fair hearing, specifically the right to be presumed innocent until proven guilty. Hither to, an accused was not obligated to say anything when he was arrested. If charged and prosecuted, no adverse inferences could be drawn from the accused's silence.

Section 59 of PACE provides:

> "A person who has been arrested is not obligated to say anything."

Section 59 conforms to section 6 of the Bermuda Constitution, however, the newly introduced sections 59A- 59F of PACE contemplated by section 91 of the Procedure Act allows adverse inferences to be drawn by the court, if the accused is silent when questioned or charged.

Furthermore, under section 5 of the Reform Act, an accused person who intends to give evidence at trial, is required to serve a defence statement to the prosecution within twenty eight (28) days of his arraignment (section 5 (2) – (4)). Under section 10 of the Reform Act, if an accused does not do so, adverse inferences may be drawn.

We strongly object to the provisions of sections 5 and 10 of the Reform Act. We understand that the Bermuda Bar also strongly objected to the proposed legislation. We are authorized to set out the position of the Bermuda Bar as it was relayed to the Attorney-General:-

> "... The right to remain silent and the presumption of innocence are paramount and recognized by our Constitution, the supreme law in Bermuda. The Bermuda Constitution Order, s.1 reads:
>
> **Fundamental rights and freedoms of the individual**
>
> Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Although not identical, this section is sufficiently similar to s.7 of the *Canadian Charter of Rights and Freedoms* that the jurisprudence related thereto must be considered highly persuasive. The Supreme Court of Canada has found that the right to silence is a fundamental right that is not subject to limitations imposed by Government, minimal or otherwise.

...the right to remain silent is no less a fundamental right in Bermuda. Whilst there have been limits on this right for years in the UK (where there is no written Constitution), there were no limits placed on the right to remain silent in either Bermuda or Canada prior to their respective written Constitutions coming into force.

In the **Queen v. Hebert,** [1990] 2 SCR 151 (SCC), a unanimous Supreme Court of Canada held that the right to remain silent was protected by s.7 of Canada's *Charter of Rights and Freedoms* from the moment the relationship between the individual and the State became adversarial. The Supreme Court unanimously upheld the unfettered right to remain silent. Sopinka J. delivering separate reasons consistent with the reasons of the other Judges of the Court, summarized the position as follows:

> *The threshold question in the present case is when the right arises. The right to remain silent has uniformly been recognized to arise upon arrest (see Taggart v. R (1980), 13 C.R. (3d) 179 (Ont. C.A.), at p.183; and Eden, supra, at p.283), and upon charge (see Symonds, supra, at p.227). Indeed, the gist of the adoptive admissions cases, and particularly the judgment of the Privy Council in Hall, supra, points to a positive right to remain silent during any allegation of criminality in the presence of a person in authority. There is, too, support for this point of engagement of the right in American jurisprudence. Miranda v. Arizona, 384 U.S. 436 (1966), held that criminal suspects must be informed of the right to remain silent upon arrest or prior to custodial interrogation. American authorities are, of course, of limited usefulness in this area, because the American constitutional provisions that have been held relevant to the facts with which we are concerned are significantly different from the comparable Charter provisions. The leading American cases, which include Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); and Kuhlmann v. Wilson, 477 U.S. (1986), have been decided on the basis of the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence"), which does not correspond directly to s.10(b) of our Charter, much less to s.7. However, I find some of the language in the American cases to be instructive, particularly concerning the element of compulsion*

> *that is inherent in any conversation with an accused while under detention. In Henry, supra, Burger C.J. states for the majority of the court, at p.274:*
>
> *...the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents.*
>
> *Prior to arrest or detention, such pressures do not operate: see Hoffa v. United States, 385 U.S. 293 (1996).*
>
> ***The right to remain silent, viewed purposively, must arise when the coercive power of the state is brought to bear against the individual – either formally (by arrest or charge) or informally (by detention or accusation) – on the basis that it is at this point that an adversary relationship comes to exist between the state and the individual. The right, from its earliest recognition, was designed to shield an accused from the unequal power of the prosecution, and it is only once the accused is pitted against the prosecution that the right can serve its purpose." [Emphasis added]***

We take the view that the provisions of section 5 as read with section 10 of the Reform Act potentially violate the right guaranteed by s.6(7) of the Constitution that no person in Bermuda can be compelled to give evidence against himself at a criminal trial. We say this, because to require a defendant to serve a defence statement on the prosecutor and the court within twenty eight (28) day of his arraignment (if he is going to give evidence at trial) is tantamount to compelling a defendant to give evidence. In practice, the decision by a defendant to give evidence is often made after the prosecution rests its case. The important point here is that the burden of proof is the cornerstone of the presumption of evidence. To require a defendant to set out his defence within twenty eight (28) days of arraignment when there has been no opportunity to examine the veracity of the evidence diminishes the right to the presumption of innocence until proven guilty.

Furthermore, the provisions of section 5 as read with section 10 of the Reform Act go even further than the comparable UK legislation in that said provisions would deny the defendant the right to call evidence, such as alibi evidence, at trial if he has failed to give notice of the alibi evidence to the prosecutor and/or police prior to trial. The comparable UK legislation merely permits, in appropriate circumstances, a comment and, should the jury decide the alibi evidence was false, an adverse inference. Denying a defendant, whose liberty is at stake, the opportunity to call positive defence evidence that could result in reasonable doubt about his guilt, notwithstanding the failure to provide notice of that evidence, is not only unconstitutional and draconian but also runs the risk of wrongful convictions as punishment for procedural failures.

Furthermore, the proposed amendments regarding defence statements make no provision or exception for unrepresented defendants who may be unable to, for a myriad of reasons, comply with the requirement of section 5(2) and (3) of the Reform Act.

The Bermuda Bar submitted to the Attorney-General that "what is required by the Defendant by way of pretrial disclosure is onerous and unprecedented, requiring that the Defendant, at the defence statement stage service notice of all facts with they take issue and all authorities they

intend to rely on at trial. This will essentially require counsel to prepare for trials at an early stage and again at a later stage as the trial approaches thereby most certainly increasing costs to the Legal Aid Plan not to mention the difficulties and delays that will be occasioned when the Defendant is unrepresented."

The Bills, as currently drafted, - represent a significant intrusion on the constitutionally guaranteed rights of all persons in Bermuda and would be viewed by the international legal community, the European Court of Human Rights and groups such as Amnesty International as an abject failure by Bermuda to respect the rights of individuals to the fair and full protection of the law. Accordingly, we support the Bermuda Bar's recommendation that the Attorney-General engage in further consultation so that any reform would not result in increased costs, delays and potentially wrongful conviction.

Finally, please note that human rights that are enshrined in most constitutions and international conventions are not always absolute. Some rights, such as the right to freedom of expression or the right to freedom of assembly and association and the right to freedom of conscience are not absolute which means that departure from those rights is permitted so long as it is reasonably justifiable in a democratic society. By contrast, the right to a fair hearing in the Bermuda Constitution is not qualified or limited in any way.

Preliminary Inquiry Hearings

The Procedure Bill repeals the Indictable Offence Act 1929 and section 15 of the Young Offender Act 1950 and replaces the age old requirement for a hearing or inquiry where the prosecution must be able to show that there is sufficient and reliable evidence against the accused prior to the matter being administratively sent to the Supreme Court and substitutes said legislation with - Clauses 23 and 24 of the Procedure Act.

Our understanding is that the Bermuda Bar is of the strong view that the preliminary inquiry is a vital safeguard of an individual's constitutional right to "life, liberty, security of person and the protection of the law." Full submissions were made to the Attorney-General with respect to the importance of maintaining the preliminary inquiry hearing as a necessary procedural step to safeguard the individual's constitutional rights.

Conclusion

We respectfully submit that the legislative measures in the Bills, as discussed above, erode the fundamental rights of the citizen, therefore on this point alone, the Bills ought to be rejected.

Yours sincerely

Venous Memari
Managing Director