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Jon Stanhope MLA

CHIEF MINISTER

ATTORNEY GENERAL MINISTER FOR THE ENVIRONMENT
MINISTER FOR ARTS, HERITAGE & INDIGENOUS AFFAIRS

MEMBER FOR GINNINDERRA

Mr Bill Stefaniak MLA
Chair
Standing Committee on Legal Affairs
Legislative Assembly for ACT
GPO Box 1020
CANBERRA ACT 2601

Dear Mr Stefaniak

Thank you for your letter of 20 January 2006 inviting my department to make a submission to the inquiry into Court Procedures (Protection of Public Participation) Amendment Bill 2005, referred to the Standing Committee on Legal Affairs by the Legislative Assembly on 14 December 2005. I offer the following comments regarding the Bill.

While the general objectives of the Bill are strongly supported, my government does not support the Bill in its current form. I offer the following reasons for this position.

My department has identified several potential obstacles to effective implementation of the Bill. In particular, it is noted that the Bill aims to prevent SLAPP actions ('strategic lawsuits against public participation' actions) by targeting such actions during the pre-court procedures stage, providing for actions to be dismissed if they are brought or maintained for an "improper purpose". However, the legislation may not meet its principal objective of enabling early resolution of anti-SLAPP applications, because there will always be a need to have the question of "improper purpose" judicially determined.

The Bill also overlaps existing legislation in two important areas. Part 14.2 of the *Civil Law (Wrongs) Act 2002* requires solicitors, acting in relation to a claim for damages, to certify that their proceedings have a reasonable prospect of success, and for a court to impose penalties through costs if those prospects are not substantiated. Part 9.2 of the same Act makes provision for the resolution of defamation matters without litigation, by affording publishers an opportunity to offer amends, the offer being a defence to any continued action by a plaintiff. Overlapping of existing legislation can result in a lack of clarity of the law, and increase risk of future inconsistencies in legislation.

National consistency in this area of the law would discourage forum shopping and provide public advocates with greater certainty about their rights and potential exposure to liability. Therefore, any

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433



legislation dealing with these issues should, ideally, be developed in collaboration with other jurisdictions. My department has suggested that this issue be proposed for discussion at a Standing Committee of Attorneys General meeting. Until nationally consistent laws can be developed, local legislation on the issue of SLAPP actions should be avoided.

There are several technical points that may require attention, and possibly amendment to the Bill. In particular the proposed new section 37I, which allows parties to make arguments about the question of "improper purpose", is considered unnecessary as that right is provided elsewhere.

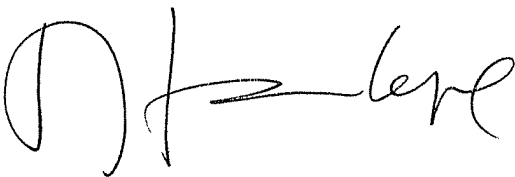
While anti-SLAPP legislation addresses an area of growing concern for governments across the world it can, if not carefully framed and implemented, result only in putting public advocates at greater risk of financial loss, by introducing further judicial process aimed at filtering out unworthy litigants – in effect, generating litigation to protect advocates from unmeritorious litigation. While the Court Procedures (Protection of Public Participation) Amendment Bill 2005 aims to achieve an admirable objective, any new legislation on this topic requires substantial consultation, and rigorous testing of principles, in order to avoid this detrimental outcome. I reiterate that the development of this legislation would most likely benefit from the input of a national working party.

In developing such legislation, there should also be some examination of the appropriate balance between the rights of individuals to protest and the rights of commercial interests to do their business without improper hindrance. The Court Procedures (Protection of Public Participation) Amendment Bill 2005 does not reflect a detailed consideration of these factors.

Overall, it is my view that the Bill should not be supported for passage at this stage. While I strongly endorse the spirit of the proposed amendments, I feel that the best course of action is to allow the government to proceed with investigating the best options for reform.

Thank you for providing me with the opportunity to comment on the Court Procedures (Protection of Public Participation) Amendment Bill 2005.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jon Stanhope', written in a cursive style.

Jon Stanhope MLA
Attorney General

23 FEB 2006