Criminal Law
Amendment Bill 2012
Submission 010

Peter Rogers

From: Erin Ahearn [redacted]
Sent: Friday, 29 June 2012 5:01 PM
To: Legal Affairs and Community Safety Committee
Subject: Submission - Criminal Law Amendment Bill 2012; Criminal Law (Two Strikes Child Sex Offenders) Amendment Bill 2012
Attachments: Submissions from Potts Lawyers.doc

Legal Affairs and Community Safety Committee
By Email

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LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

29 June 2012

Dear Sir/ Madam,

RE: Submission - Criminal Law Amendment Bill 2012; Criminal Law (Two Strikes Child Sex Offenders) Amendment Bill 2012

Please find enclosed a submission from Potts Lawyers in relation to the abovementioned Bills.

Regards,

Erin Ahearn
Law Clerk

Email: [redacted]

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SUBMISSION TO THE QUEENSLAND GOVERNMENT REGARDING THE *CRIMINAL LAW AMENDMENT BILL* AND THE *CRIMINAL LAW (TWO STRIKE CHILD SEX OFFENDERS) AMENDMENT BILL 2012*

The *Criminal Law Amendment Bill 2012* and *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012* ("the Bills") should not be implemented.

The majority of the proposals contained in the Bills involve:

- The introduction of new mandatory minimum non-parole periods;
- Increases to existing non-parole periods; and
- New minimum penalties for the evading of police

MINIMUM NON-PAROLE PERIODS

BACKGROUND

Minimum standard non-parole periods are essentially mandatory periods of imprisonment imposed by legislation. They represent a direction to the Court to apply a flat rate or pre-determined penalty to all defendants who have been charged with a particular type of offence.

The dispensation of justice needs to be fair. This involves a court imposing penalties that can accommodate the individual merits of a case. An approach that requires all penalties to be "equal" (i.e. subject to a minimum) strikes at the very heart of this principle.

Every citizen is entitled to expect equal access to justice and to be treated fairly. This does not translate into equal penalties.

Every single criminal case, defendant and victim that come before the court have their own individual features. To suggest that it would be fair for every defendant charged with a particular type of offence to receive the same minimum punishment ignores this fundamental truth.

In December 2010 the former Attorney General Cameron Dick asked the newly formed Sentencing Advisory Council to examine and report on:

- Offences to which a minimum standard non-parole period should apply; and
- The appropriate length of the minimum standard non-parole period for each of the offences identified in the Terms of Reference.

To its credit, the Council refused to be constrained by its limited terms of reference and opted to reply on the key issue – should minimum standard non-parole periods be introduced.

Its answer was a resounding "No".

The majority of the Council found:

> "that there is limited evidence that standard non-parole period schemes meet their objectives, beyond making sentencing more punitive and the sentencing process more costly and time consuming. Added to this are the possible negative impacts of such a scheme on vulnerable offenders"[1].

The contents of the Bills make it clear that the government does not plan to heed the comprehensive research and analysis completed by the Council.

REASONS WHY MINIMUM STANDARD NON-PAROLE PERIODS SHOULD NOT BE IMPLEMENTED

1. VICTIMS WILL BE CROSS-EXAMINED MORE REGULARLY

In a system where all of the factors of a case are taken into account and courts are not restricted by blanket sentencing schemes, there are extremely high rates of pleas of guilty. Usually, when an offender pleads guilty the complainant is not subject to cross-examination or the stresses of a trial.

These benefits are particularly apparent where complainant children are involved.

There is a very real risk that defendants who would otherwise have pleaded guilty will opt to take their chances at a trial, rather than be subject to mandatory minimum prison terms.

As recently as January this year, the Queensland Sentencing Advisory Council have written a report on 'Sentencing of Child Sexual Offences in Queensland' in which they found that "the decline in the number of offenders pleading guilty to maintaining a sexual relationship with a child may be partly explained by the 2003 amendment that increased the maximum penalty for some forms of the offence"[2].

2. A SYSTEM ALREADY EXISTS FOR FIXING INADEQUATE SENTENCES IF THE CROWN BELIEVES THAT A SENTENCE THAT WAS IMPOSED IS INADEQUATE

At present the prosecution can appeal any sentence they believe is too light.

This allows for inadequate sentences to be reviewed and overcomes the problem of the community having to accept a decision handed down by a particular Judge or Magistrate.

3. A NON-PAROLE PERIOD SYSTEM ALREADY EXISTS

At present, there are substantial non-parole periods imposed for relevant offences – for example, the serious violent offender declarations.

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[1] Sentencing Advisory Council, *Minimum standard non-parole periods*, Final Report, September 2011 at xv.

[2] Sentencing Advisory Council, *Sentencing of Child Sexual Offences in Queensland*, Final Report, January 2012 at 36.

There have been no studies to determine whether the introduction of non-parole periods in the past has achieved any sentencing aims whatsoever.

To consider introducing a new regime of minimum non-parole periods, when there has been no detailed analysis of the old one, is unwise in the extreme.

4. CURRENT SENTENCES ARE NOT FUNDAMENTALLY INCONSISTENT

The implementation of increased non-parole periods is simply not necessary for consistency in sentencing. The Council's detailed analysis of current sentencing practices:-

> "...indicate good sentencing consistency for offenders convicted of serious violent offences and sexual offences in Queensland. There is no compelling evidence to indicate a systemic problem with sentencing consistency in the Queensland higher courts"[3].

5. THE SCHEME WILL NOT REDUCE CRIME

The Council concedes that there is "limited evidence that either general or specific deterrence in a sentencing context is effective in reducing offending"[4]. Therefore, any claim that the minimum jail terms will reduce the commission of offences is not based on persuasive data.

Research conducted into Western Australia's foray into mandatory sentencing concluded there was compelling evidence that the laws did not achieve a deterrent effect and in fact:-

> "There was a leap in residential burglaries immediately after the introduction of the new laws at precisely the time when the greatest reduction would have been expected".

Of further concern, there is no verifiable link between increased jail terms and a decrease in crime:-

> "From research in the 1970s and 1980s, the wake of evidence clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short terms effects that rapidly waste away"[5].

Further:-

> "...US experience with various forms of mandatory sentencing policies over several decades shows clearly they do not deter, they do not

[3] Sentencing Advisory Council, above n 1 at 60.
[4] Sentencing Advisory Council, above n 1 at 99.
[5] Michael Tonry (1990: 243-244) cited in Brown, D, "Mandatory Sentencing: A Criminological Perspective" (2001) 7(2) *Australian Journal of Human Rights* 31 <http://www.austlii.edu.au/au/journals/AJHR/2001/16.html> at 20 July 2011.

incapacitate high risk repeat offenders and have little or not effect on crime rates"[6].

6. AN INFORMED PUBLIC DOES NOT SIGNIFICANTLY DISAGREE WITH THE COURTS

In the terms of his reference to the Sentencing Advisory Council, the former Attorney-General and Deputy Premier, Paul Lucas cited "the concern of the Queensland Government that the penalties being imposed for child sexual offending are not always commensurate with community expectations" and "the need to promote public confidence in the criminal justice system".

The Council conceded that there is no data available at present to measure community views in this regard[7].

A newspaper article or editorial only reflects the opinions of its writer. Quick doorstop–style surveys of members of the community rarely involve the participant being informed of the specifics of a particular case and the factors that were taken into account in determining the penalty.

In a comprehensive review of international and national sentencing research, the Council cited a number of consistent findings on public sentencing opinion[8], including:-

- "People often base their opinion on sentencing on information reported by the media, which tend to focus on the small number of atypical cases"[9]; and

- "When research participants are put in Judges' shoes (that is, they are provided with the same facts as those considered by Judges) they generally hold similar sentencing views to those of the Judges"[10].

These two conclusions are based on research – not gut feelings or quick responses.

When both national and international research suggests an informed public generally share Judges' views on penalties, increased minimum non-parole periods are not needed to promote public confidence in the criminal justice system. Nor are they necessary for making sentences in line with community expectations.

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[6] Brown, D, above n 5.
[7] Sentencing Advisory Council, above n 1 at 17.
[8] Sentencing Advisory Council, above n 1 at 34.
[9] Sentencing Advisory Council, above n 1 at 34.
[10] Lovegrove, A, 'Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community' (2007) *Criminal Law Review* 769 cited in Sentencing Advisory Council, *Minimum standard non-parole periods,* Consultation Paper, June 2011 at 34.

7. IT WILL INCREASE THE INTAKE FOR INSTITUTES OF HIGHER CRIMINAL EDUCATION

Imprisoning people for a minimum period as a result of some mandatory provisions will increase the number of people in jail. The New South Wales experience with standard non-parole periods has shown this.

Placing more people in jail than would otherwise be there, increases the exposure of these individuals to more serious criminal elements and effectively expands the recruiting ground for the unsavoury elements of our community.

In submissions to the Council by various stakeholders including the Queensland Law Society and Prison Fellowship Australia (Queensland), there were concerns raised about "the lack of access to treatment programs for offenders in custody, either on remand or serving a sentence".[11]

The Court needs to retain its discretion to determine whether or not someone should be jailed based on all the factors of the case.

8. THERE ARE OTHER WAYS TO IMPROVE THE SYSTEM

When research shows that an informed member of the public generally agrees with Judges' decisions, there are clearly other ways to address any need to promote public confidence in the criminal justice system and the accusation that sentences do not always meet public expectations.

The Council is to be applauded for its suggestion:-

> "To improve transparency of the sentencing process and public confidence in the criminal justice system, greater evidence could be placed on providing information to inform the community about current sentencing practices, including through the work of the Council, improving access to sentencing statistics and ensuring that sentencing comments are publically available".

The Sentencing Advisory Council has spent nearly seven months investigating sentences imposed for child sex offences, considering the impact of previous sentencing reforms and determining whether additional guidance is required in sentencing.[12]

In their Final Report on Sentencing for Child Sex Offences, the Council concluded that "based on its review of current approaches, the Council has formed the view that there is insufficient evidence to suggest that existing guidance in the form of legislation, appellate court decisions, comparative sentences or other resources is in need of substantial reform"[13].

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[11] Sentencing Advisory Council, above n 2, at 62.

[12] Sentencing Advisory Council, 'Sentencing Advisory Council Newsletter – March 2012', available at <http://www.sentencingcouncil.qld.gov.au/news-room/newsletters/sentencing-advisory-council-newsletter2>

[13] Sentencing Advisory Council, above, n 2 at 8.

Further, after lengthy debate about the adequacy of current sentencing approaches relating to child sexual offences and consideration of options to improve those approaches,

> "The Council affirms the critical importance of maintaining the court's discretion to respond to the individual circumstances of each case, and acknowledges that it may be possible to enhance current forms of guidance and information available to the courts in sentencing".[14]

MANDATORY MINIMUM FOR THE OFFENCE OF EVADING THE POLICE

Under the *Criminal Law Amendment Bill 2012*, the government has pledged to increase the penalty for 'evading the police' so as to "create an alternative to pursuits and to ensure that a sufficient deterrent exists in light of the move towards a more restrictive police pursuit policy".[15]

The specific penalty being altered applies to failing to stop a motor vehicle when directed by a police officer using a police motor vehicle. This charge reaches well beyond those offenders involved in high-speed car chases.

A person who panics for fear they haven't paid a recent parking fine and drives three blocks before regaining their composure and pulling over, now faces the standard minimum penalty.

In reality any conduct involving a police chase traditionally encompasses more serious offending behavior than failing to stop, such as dangerous driving. The penalties available for the criminal offence of dangerous driving allow for adequate punishment of offenders. Imposing significant penalties for arguably the least dangerous part of a police chase (ie the failure to stop) achieves no clear objective and punishes people who have not even participated in a "police chase".

Failing to pull over to the side of the road within a reasonable time, regardless of whether the person voluntarily desisted very shortly thereafter, will result in the blanket imposition of one of the largest fines handed down in the Magistrates Court and a two year licence disqualification.

A person with no previous criminal or traffic history, and who was not speeding or driving erratically, faces losing a job that requires a licence and being unable to provide for their family.

A person who drove with a blood alcohol reading of 0.149% faces a court which has more capacity to consider their individual circumstances.

The government cites a need for "commensurate" penalties, but fails to recognize that such penalties can only be given by those who have access to all of the

[14] Sentencing Advisory Council, above, n2 at ix.
[15] Explanatory Notes, Criminal Law Amendment Bill 2012 (Qld) at 2.

information concerning the offence, the impact on any victim and the surrounding circumstances, including the needs of the community.

DISSOLUTION OF THE SENTENCING ADVISORY COUNCIL

Perhaps the greatest error of the proposed *Criminal Law Amendment Bill 2012* is the decision to dissolve the Sentencing Advisory Council.

The Council was created to "help bridge any gap between community expectations, the courts and government on the complex issue of sentencing criminal offenders".[16] During its operation it has played an important role in the justice system.

The government has decided to dissolve the Council on the basis that it performed a function that the Queensland Law Reform Commission can undertake.[17]

However, it has failed to focus on the Council's achievements. The Council has been involved in extensive state-wide consultation in relation to a variety of issues, it has made presentations to the public[18] and has educated a variety of professions involved in the criminal justice system.

It has brought together a variety of views and given a voice to the public, the legal profession, victims of crime and experts in a variety of areas.[19] It has raised important issues and sought to undertake extensive research before making recommendations as to how our laws should be changed.

CONCLUSION

The short timeframes allowed for submissions from the public do not allow sufficient ventilation of the issue. Thankfully, up until now, we have been able to rely on the Sentencing Advisory Council who has had spent several months investigating these issues.

A government deciding what is appropriate by a broad-brush approach ultimately harms the system, the victims and the community itself.

Sentencing is an intricate and difficult task. A sentencing magistrate or judge, cannot do justice to the myriad of factors confronting the court, when he or she is limited to applying a baseball metaphor. The sentencing process is much more complex than two strikes and you're out. The community deserves better.

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[16] Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) at 1.

[17] Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) at 2-3.

[18] Sentencing Advisory Council, "Sentencing Advisory Council Newsletter - December 2011", available at: < http://www.sentencingcouncil.qld.gov.au/news-room/newsletters/sentencing-advisory-council-newsletter>

[19] Sentencing Advisory Council, "About Us", available at <http://www.sentencingcouncil.qld.gov.au/about-us>