PJD:dgr

Criminal Law Amendment Bill 2014
Submission 007

BAR ASSOCIATION OF QUEENSLAND

6 June 2014

Mr Ian Berry MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Email: *lacsc@parliament.qld.gov.au*

Dear Mr Berry

Re: Criminal Law Amendment Bill 2014

I refer to your letter dated 12 May 2014, seeking any submissions in relation to the *Criminal Law Amendment Bill* 2014 ("the Bill"). The Bar Association of Queensland (the Association) has reviewed the Bill and makes the following submissions.

Criminal Code Act 1899 – Double Jeopardy

The Association strongly opposes the retrospective operation of the existing double jeopardy exception regime.

On 25 October 2007 exceptions to the double jeopardy rule came into operation in Queensland. The exceptions were enacted as a legislative response to the High Court decision in *The Queen v Carroll* (2002) 213 CLR 635. These exceptions currently apply to acquittals that occurred after 25 October 2007. The Bill proposes to amend the *Criminal Code Act 1899* so that the exceptions apply regardless of when the acquittal occurred.

One of the essential characteristics of our criminal justice system is fairness to accused persons. The Association considers that any further erosion of the double jeopardy rule carries with it a serious potential for unfairness, if not oppression.

The key considerations underpinning the double jeopardy rule are:

a) to ensure that the administration of justice operates efficiently so that an accused person is not continually retried for the same or similar offences arising out of the same facts;
b) to avoid embarrassment to the Courts and a loss of confidence in the integrity of the criminal justice system that would be caused if a different verdict is reached at a retrial; and
c) to provide accused persons as well as the community with closure.

BAR ASSOCIATION OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au
Constituent Member of the Australian Bar Association

Indeed, in *Carroll,* the High Court identified many of these features and then highlighted the following additional considerations:

a) the imbalance of power (and resources) between the prosecution and an accused;
b) the seriousness of a conviction for an accused;
c) the potential use of the prosecution as an instrument of tyranny; and
d) the importance of finality to the criminal justice system.

These above considerations are applicable to the amendments proposed under the Bill. The Association is, in addition, concerned that the effect of what is proposed will be to underwrite the pursuit of individuals by the State many years, if not decades, after they have been acquitted for an offence.

The Association therefore opposes the proposed amendment to Chapter 68 of the *Criminal Code* and urges you to reconsider the policy underlying the proposal in light of the considerations I have drawn to your attention.

Dangerous Prisoners (Sexual Offenders) Act 2003

The Bill contains an amendment to include a mandatory sentencing provision under the *Dangerous Prisoners (Sexual Offenders) Act 2003.*

The Association is staunchly opposed to mandatory sentencing.

Research into the effects of mandatory sentencing supports the conclusion that such sentencing regimes fail to reduce offending rates. Moreover, mandatory sentencing regimes have been found to increase the prison population, and in turn, the cost to the community of housing offenders.

The Association's position has always been, and remains, that sentencing judges must be equipped with an appropriately flexible discretion so as to avoid unjust outcomes. It is of vital importance to the avoidance of such injustice that sentencing judges be permitted to approach the sentencing task in a way that reflects not only the circumstances of the offending but also factors personal to each offender. This very point has been made in numerous judicial decisions, including *R v Jurisic* (1998) 45 NSWLR 209 at 221C where Chief Justice Spigelman said "*[t]he preservation of a broad sentencing discretion is central to the ability of the criminal courts to ensure justice is done in all the extraordinary variety of circumstances of individual offences and individual offenders*".

It follows that the Association is opposed to these proposed amendments and requests that they be re-formulated so as to remove their mandatory effect.

Youth Justices Act 1992

The Bill amends the *Youth Justice Act 1992* to enable youth detention centre officers to use a range of practices to maintain good order and discipline at a boot camp centre (such as restraint, seclusion and personal searches) and expose young offenders participating in a boot camp program to the potential use of force.

The Bill sets out the new section 282BA of *Youth Justice Act 1992.*

> ***282BA Detention centre employees may provide services at boot camp centres***
> *(1) The chief executive may enter into an arrangement with a boot camp centre provider for a detention centre employee to provide services (the **services**) to maintain good order and discipline at a boot camp centre.*
> *(2) A detention centre employee may only provide the services prescribed by regulation.*
> *(3) A detention centre employee providing the services is subject to the direction and control of the chief executive to the extent the detention centre employee is providing the services.*

The term "good order and discipline" is a term that has wide scope.

The explanatory notes state that the use of force will be subject to a number of careful safeguards, including the insertion of clear guidelines into the *Youth Justice Regulation* 2003.

> *The use of this force will be subject to a number of careful safeguards, including the insertion of clear guidelines into the Youth Justice Regulation 2003. These guidelines will prescribe the circumstances in which the use of force is approved, the purposes for which force may be used, the type and degree of force that may be used and other limitations such as the duration for which force may be used. Youth detention centre officers will also be required to record details of each episode in which force is used in a boot camp centre.*

These "guidelines" are essential to understanding the scope of disciplinary measures to be inflicted upon children.

Critically, these "guidelines" have not yet been published; the Association, therefore, cannot comment upon the adequacy, or not, of these guidelines and whether sufficient protective measures have been embedded into the Regulations.

Yours faithfully

Peter J Davis QC
President