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Criminal Law Amendment Bill 2014
Submission 010

The Research Director

Legal Affairs and Community Safety Committee

Parliament House

George Street

BRISBANE QLD 4000

By email: lacsc@parliament.qld.gov.au

6 June 2014

Dear Colleague,

Re: Criminal Law Amendment Bill 2014

We welcome and appreciate the opportunity to make a submission in relation to the Criminal Law Amendment Bill 2014 ("the Bill").

PRELIMINARY CONSIDERATION: OUR BACKGROUND TO COMMENT

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for over four decades, has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences. We trust that our submission is of assistance.

Our submission:

COURT MAY CONSIDER PREVIOUS INDICTMENT DESPITE NOTICE NOT BEING GIVEN

Clause 33 Amendment of s 564 (Form of indictment) of Criminal Code
insert—

(2A) Despite subsection (2), a relevant circumstance of aggravation may be relied on for the purposes of sentencing an offender for the offence charged in the indictment despite the relevant circumstance of aggravation not being charged in the indictment for the offence.

(5) In this section—
relevant circumstance of aggravation means a circumstance of aggravation that is a previous conviction of the offender.

Clause 58 Amendment of s 47 (What is sufficient description of offence) of Justices Act
(6) Section 47(6)—
omit, *insert—*

(7) Subject to subsection (2), the circumstance that the defendant has been previously convicted of an offence may be relied on for the assessment of penalty for a simple offence whether or not a notice has been served or given under subsection (5).

Clause 63 Insertion of new pt 11, div 7 into Justices Act
Part 11—
insert—

Division 7 Criminal Law Amendment Act 2014
281 Application of s 47
Section 47(7) and (8) applies to the sentencing of an offender for an offence whether the proceeding for the offence was started before, on or after the commencement of this section.

It is noted that the proposed changes are restricted to reliance by a sentencing court upon *prior convictions*. The rationale for such changes can be well appreciated and in our view, could not be said to be anything but reasonable.

DOUBLE JEOPARDY EXCEPTION REGIME APPLIES RETROSPECTIVELY

Clause 35 Amendment of s 678A (Application of ch 68) of Criminal Code
(1) Section 678A(1)—
omit, insert-
(1) This chapter applies if a person has been acquitted of an offence, whether before, on or after the commencement of this section.

(2) Section 678A(2) and examples, 'is'—
omit, insert—
was

Clause 36 Insertion of new ch 94 into Criminal Code
After section 732—
insert—

Chapter 94 Transitional provisions for Criminal Law Amendment Act 2014
733 Extended application of ch 68
Chapter 68 applies to a person acquitted of an offence—
(a) whether the person has been acquitted of the offence before, on or after the commencement of—
(i) chapter 68 on 25 October 2007; or
(ii) the *Criminal Law Amendment Act 2014,* section 35; and
(b) whether the circumstances supporting an order for a retrial of the person arose before, on or after the commencement of a provision mentioned in paragraph (a)(i) or (ii).

Chapter 68 (as it currently stands) in effect abrogates the former "double jeopardy" rule (at least in relation to offences punishable by life imprisonment). Given that on the general principle of the benefits associated with the "finality" of outcomes, we were opposed to the changes at the time – we are by virtue of same, opposed to the retrospectivity of such.

Whilst we are predominantly a "defence" law firm, we do pride ourselves on our objectivity, and thus we can well appreciate the rationale behind the existing abrogation of the double jeopardy rule – despite our opposition based upon the benefits of finality. However, making such retrospective is a breeding ground for uncertainty and potential unfairness. It might be all well and good for some to assume that such an application would not be made unless the Crown were confident of someone's guilt – but what of those instances where an acquitted individual, despite seemingly cogent evidence suggestive of guilt, is actually innocent? What of the trauma visited upon the family of victims of having old wounds re-opened?

Further, should the push for retrospectivity have as its genesis, a particular past case – we view legislative reform based upon such (but destined to apply broadly), is generally misconceived.

AMENDMENT TO YOUTH JUSTICE ACT

Clause 74 Insertion of new s 282BA into Youth Justice Act

After section 282B—
insert—

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.

We interpret clause 74 of the Bill as stipulating that where a detention centre employee is contracted to provide services at a boot camp, the services they may provide are confined to those set out in the Youth Justice Regulation 2003, namely:

1. Discipline a child under regulation 17(2);
2. Restrain a child under regulation of 20(1).
3. Separate the child in a locked room pursuant to regulation 22; and
4. Search a child pursuant to regulation 24.

We appreciate the need for this amendment. However our concern is whether this amendment goes so far as holding detention centre employees to the same level of accountability at a boot camp as they are at a detention centre? For example, the Regulations also provide that (<u>at a detention centre</u>):

1. Only in specific circumstances can a child be separated in a locked room (regulation 22) and a register of these instances must be kept (regulation 23);

2. Only in specific circumstances can restraint(s) be used (regulation 20) and a register of these instances must be kept (regulation 21); and
3. There are specific procedures regarding how a search is to be conducted and what can and cannot be done (regulation 25 to 27) and a register of when searches are conducted must be kept (regulation 28).

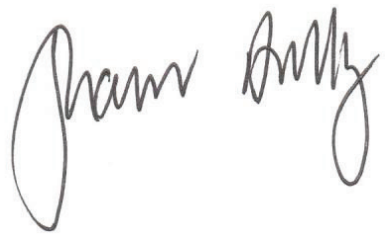
We submit that the Bill needs to go further so as to specifically hold detention centre employees to the same level of responsibility and accountability when providing 'services' at a boot camp, as they are at a detention centre. For example, perhaps proposed s 282BA(2) could read:

"A detention centre employee may only provide the services prescribed by regulation and in the manner prescribed by regulation".

We acknowledge that such might well have been the intended effect of the proposed draft – but raise this point out of an abundance of caution.

I close by once again thanking the Committee for this opportunity to have input into this very important area. If required, we would be only too pleased to provide additional information to the Committee.

Yours sincerely,



Shane Duffy
Chief Executive Officer