Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

Criminal Law Amendment Bill 2014
Submission 012

Our ref: 337 - 78

12 June 2014

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email to: lacsc@parliament.qld.gov.au

Dear Research Director

Criminal Law Amendment Bill 2014

Thank you for the opportunity to provide a submission on the amendments to the *Criminal Law Amendment Bill 2014* and for granting an extension until 12 June 2014. The Society commends the government for undertaking public consultation on the proposed Bill.

As there has been only a very brief opportunity to review the amendment to the Bill, an in-depth analysis has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We request that the government extend the period by which to provide feedback and also extend the reporting date of the Committee, so that the Committee has a reasonable opportunity to consider the draft legislation and provide more useful and in-depth feedback which will hopefully assist in improving the quality of the legislation being passed. The members of the Society are in a unique position to provide informed feedback based on their extensive experience in practice.

With respect to the proposed amendments, we make the following comments on specific clauses in the Bill.

1. *Acts Interpretation Act 1954*

Clause 3

Clause 3 of the Bill seeks to amend the *Acts Interpretation Act 1954* to allow various government bodies and tribunals to choose their preferred title. We note that the Explanatory Notes do not provide the reasons for the proposed amendment and we request information on why this change is required.[1] We query whether this public expenditure is needed when a gender neutral option is currently in place. The Society supports the use of gender neutral titles and does not support the proposed change.

[1] Explanatory Notes, page 13.

2. *Animal Care and Protection Act 2001*

Clause 5 – amendment of s 115 (functions)

Clause 5 seeks to amend section 15 of the *Animal Care and Protection Act 2001* which deals with the functions of inspectors. Currently, inspectors may investigate and enforce compliance with the *Animal Care and Protection Act 2001*. The proposed amendment would allow the expansion of an inspector's functions to include, 'the investigation and enforcement of the new section 242 (Serious animal cruelty) and section 468 (Injuring animals) of the Criminal Code.[2] This will mean that RSPCA inspectors appointed under the Act can investigate and commence proceedings for indictable offences.'[3]

The Society does not support this provision. In our view, the expansion of inspectors' powers is inappropriate and the investigation and enforcement of these new offences should properly lie with police officers. Police officers are trained to investigate and prosecute such offences and must adhere to strict operational, ethical and legislative standards, including pursuant to the *Police and Responsibilities Act 2000*. We are concerned that RSPCA inspectors will not be appropriately trained or be required to operate under a similarly strict ethical, reportable and legislative framework.

We also note there is much debate currently regarding the apperance in Courts of non-lawyers. Like police officers, lawyers are also required to adhere to a strict ethical and legislative framework, including the obligations pursuant to the Australian Solicitors Conduct Rules.

Clause 6 – amendment of s 122 (power of entry)

Clause 6 seeks to amend section 122 of the *Animal Care and Protection Act 2001* which deals with powers of entry. The proposed amendment seeks to expand an inspector's powers of entry beyond the *Animal Care and Protection Act 2001* to include 'animal welfare offences' in all legislation. The Explanatory Notes state that this has been done to include the new section 242 of the Criminal Code.[4] While we understand the policy rationale for this proposed change, we note that these inspectors have broad powers of entry, including the ability to enter without an occupier's consent. We therefore suggest that a more prudent amendment would be to specify that an inspector's powers of entry apply only in relation to offences under the *Animal Care and Protection Act 2001* and the relevant Criminal Code provisions.

We would also appreciate if we could be advised of what training is intended to be provided to inspectors, and what accountability measures and standards will be in place. Finally, we seek to know if the exercise of such powers includes any disciplinary measures for the breach of the same.

3. *Criminal Code 1899*

Clause 26 – Procuring engagement in prostitution (s229G)

---

[2] Explanatory Notes, page 13.
[3] Explanatory Notes, page 13.
[4] Explanatory Notes, page 14.

The proposed amendment seeks to increase the maximum penalty for this offence from 14 years to 20 years. The Society submits that substantial increases to penalties should only be undertaken on the basis of empirical evidence and research. There is, at present, a lack of evidence which establishes a strong link between increasing penalties and a reduction in the rates of offending.

Clause 27 – insertion of new pt. ch 25

Clause 27 proposes to include new section 242 which creates a new offence of serious animal cruelty.[5] Section 242 makes it an offence to:

> "Unlawfully kill, cause serious injury or prolonged suffering to an animal with the intention of inflicting severe pain or suffering on the animal. The new offence is a crime, carrying a maximum penalty of seven years imprisonment. A person is relieved of criminal responsibility if the conduct is authorised, justified or excused under the *Animal Care and Protection Act 2001* or another law, other than section 458 of the Criminal Code. Subsection (3) defines the phrase 'serious injury', borrowing in part from the definition of grievous bodily harm as defined in section 1 of the Criminal Code."[6]

The proposed section 242 is reproduced in the table below.

242 Serious animal cruelty

(1) A person who, with the intention of inflicting severe pain or suffering, unlawfully kills, or causes serious injury or prolonged suffering to, an animal commits a crime.

Maximum penalty—7 years imprisonment.

(2) An act or omission that causes the death of, or serious injury or prolonged suffering to, an animal is unlawful unless it is authorised, justified or excused by—

(a) the *Animal Care and Protection Act 2001*; or
(b) another law, other than section 458 of this Code.

(3) In this section— serious injury means—

(a) the loss of a distinct part or an organ of the body; or
(b) a bodily injury of such a nature that, if left untreated, would—

(i) endanger, or be likely to endanger, life; or
(ii) cause, or be likely to cause, permanent injury to health.

The Society is concerned about the inclusion of this provision and questions the effect that it may have on the professions of farming and the veterinary sciences. The potential impacts on agriculture, hunting and fishing in Queensland will need to be carefully considered. We suggest that further targeted consultation be undertaken to ensure that the defences available

[5] Explanatory Notes, page 16.
[6] Explanatory Notes, page 16.

are conducive to accepted industry practices. We also note that the conduct in the proposed offence is covered by other legislation.

If the government is minded to enact this provision we suggest that proposed section 242(2) be amended. Currently, proposed section 242(2) introduces strict liability which we do not consider is intended by the legislature. We suggest the clause be amended as follows:

> (2) An ***intentional*** act or omission that causes the death of, or serious injury or prolonged suffering to, an animal is unlawful unless it is authorised, justified or excused by—

The other unintended consequence is that the proposed section 242(2) would also make any serious injury to an animal unlawful unless it was authorised, justified or excused by law. Serious injury includes the loss of a distinct organ or part of the body. There is an enormous potential impact on standard animal husbandry practices; for example castration, tail docking, de-horning, and ear-marking.

Clause 29 - Amendment of s 398 (Punishment of stealing)

Section 398 of the *Criminal Code Act 1899* deals with stealing by looting and states, 'any person who steals anything capable of being stolen is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for **5 years**.' Item 13 of this section deals with punishment in special cases and is reproduced in the table below. The effect of item 13 is to essentially double the maximum penalty that may be imposed from five to 10 years.

13 Stealing by looting If— (a) the offence is committed during a natural disaster, civil unrest or an industrial dispute; or (b) the thing stolen is left unattended by the death or incapacity of the person in possession of the property; the offender is liable to imprisonment for **10 years**.

Clause 29 seeks to amend item 13, section 398 of the *Criminal Code Act 1899* to include a subsection to cover the situation of looting in a declared disaster area. Clause 29 is reproduced in the table below.

Amendment of s 398 (Punishment of stealing) Section 398, punishment in special cases, item 13— insert— (c) the offence is committed in an area that— (i) is a declared area for a disaster situation under the *Disaster Management Act 2003*; or (ii) was, immediately before the offence was committed, a declared area for a disaster situation under the *Disaster Management Act 2003*;

The Society notes our submission to the Committee dated 16 May 2013 on the *Criminal Code (Looting in Declared Areas) Amendment Bill 2013* (**enclosed**) and we reconfirm the views within. We wish to highlight that we do not support clause 29 and do not consider that an additional offence is required. In our view, the conduct contemplated by clause 29 is already appropriately covered in item 13, section 398 of the *Criminal Code Act 1899*.

Clause 33 – amendment of s 564 (form of indictment)

Clause 33 is reproduced below.

Section 564—

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.

The Society does not support this provision. Proper disclosure by the prosecuting body should be made, including the information that is to be relied upon in sentencing the offender. This is integral to the principles of natural justice and procedural fairness. Given the current provisions of the *Penalties and Sentences Act 1992*, criminal history is a factor that is taken into account by the sentencing judge in any event. Therefore we seek clarification as to why this provision is required.

Clause 36 – proposed section 733

The Society does not support the proposal to retrospectively apply this provision. The Society is concerned that the double jeopardy exception will now apply retrospectively. We particularly note that section 4(3)(g) of the *Legislative Standards Act 1992* states that legislation should not "adversely affect rights and liberties, or impose obligations, retrospectively." The Society submits that it is not an appropriate answer to this breach of legislative standards to state that Queensland will otherwise be the only state which does not have a regime operating retrospectively.

An accused may have conducted his or her previous trial in a particular way (such as making a decision to give evidence or not) understanding that the law as it then stood provided that an acquittal prevented a retrial. It would be unconscionable for this to be altered by retrospective application of this provision. In this regard, we note that such an approach would not accord with the principles of natural justice and procedural fairness.

4. Dangerous Prisoners (Sexual Offenders) Act 2003

Clause 40 – replacement of 43AA (contravention of relevant order)

Proposed section 43AA(2) is reproduced in the table below

(2) If a released prisoner commits an offence against subsection (1) by removing or tampering with a stated device for the purpose of preventing the location of the released prisoner to be monitored, the released prisoner commits a crime.

Minimum penalty—1 year's imprisonment served wholly in a corrective services facility.

Maximum penalty—5 years imprisonment.

The Society is concerned with the proposed mandatory minimum penalty of 1 year imprisonment for this new offence. The Society has a longstanding objection to mandatory minimum penalties, which the Bill purports to introduce. The Society considers that maintaining judicial discretion is central to the effective functioning of our justice system.

Judicial officers are best placed to understand and assess all the individual circumstances of a matter before the Court and make an informed decision as to sentence.

Clause 41 – replacement of 43AC (proceedings for offences)

Proposed section 43AC Indictable offences that must be heard and decided summarily on prosecution election

This new section provides for a prosecution election to hear and determine a matter summarily.

The Society is strongly opposed to the removal of the fundamental right of an accused to elect to be tried by a jury of his or her peers, particularly because there has been no explanation given as to why such a change should occur.

We consider that the election should continue to be solely at the defendant's election, especially when a mandatory actual term of imprisonment is to be imposed upon a finding of guilt.

We are not aware of any inherent or systematic trend of defence lawyers currently electing to take matters on indictment where summary disposition would have been more appropriate. The cost of funding private representation, together with expected sentencing benefits of an early plea, promote the election of appropriate matters being dealt with in lower courts where possible.

We also note that it is particularly concerning that, given the current Legal Aid funding guidelines for indictable and summary matters, the prosecution election does not only carry the decision as to jurisdiction, but would also have consequences as to whether or not an accused person can access legal representation, and particularly counsel, to defend a charge. This may result in the overcrowding of the magistrates court lists and have non-legally qualified police prosecutors dealing with more serious matters.

Clause 42 - Insertion of new pt 9

Proposed section 65 - application of amended definition of serious sexual offence

Proposed section 65(1) is reproduced in the table below.

(1) For the purposes of this Act, the amended definition of serious sexual offence applies to include an offence mentioned in the amended definition that was committed before the commencement of the Criminal Law Amendment Act 2014.

The Society is concerned that the definition of serious sexual offence will apply retrospectively. The Society's stance against retrospective application of legislation has been noted above.

5. *Evidence Act 1977*

Clause 50 - insertion of new pt 3A, div 3A

Proposed section 39PB – Expert witnesses to give evidence by audio visual link or audio link

Proposed section 39PB(2) requires expert witnesses, 'to give the evidence to the court by audio visual link or audio link.' Whilst the Society understands and supports the objective, we consider that a default situation that an expert witness give evidence by audio

link is inappropriate. Although availability of good quality 'telepresence' systems is growing, it is not yet common and technological deficiencies will potentially impede the effective administration of justice. The Society considers that there are better ways of addressing the fundamental concern of costs of the justice system than the proposed amendment to the Act.

In our view, it my be more appropriate to require the parties to consider video or audio links and, having regard to such factors as:

- the nature and scope of their evidence;
- the potential impact of using audio or visual links, including how this would affect ability to assess credibility and reliability of the expert;
- the location of the court and the expert; and
- the availability and nature of telecommunication systems available

to either agree to the use of video conferencing for some or all experts or justify why it is inappropriate in that instance. This preserves a greater discretion than a default position. Another more cost-effective and practical solution would be a practice direction for civil and criminal matters as the appropriate way to address this issue. This will allow for a more responsive change to circumstances and technology than amending legislation in a piecemeal fashion.

We also question whether the test of "the interests of justice" (39PB(2)) would be sufficient to comfortably deal with a situation where one party wishes to call an expert who prefers to attend in person, and the other party consents. Simply because the parties consent, and the expert is prepared to come in person, will this be sufficient to satisfy an "interests of justice" test? We request further clarification on how proposed section 39PB(5) will operate.

6. Justices Act 1886

Clause 57 - amendment of s 39 (Power of court to order delivery of certain property)

This provision proposes to include RSPCA inspectors in the definition of public officer. The Society does not support this provision.

In our view, prosecutions are the duty of the Crown, that is, the Office of the Director of Public Prosecutions or police prosecutors, including the Police Prosecution Corps. We note that these State Government entities are subject to the strict legislative standards set out in the *Public Service Act 2008, Public Sector Ethics Act 1994* and the Code of Conduct for Public Service. We also note that RSPCA prosecutions are not subject to the complaints, oversight and disciplinary mechanisms of the DPP or Queensland Police Service such as the Crime and Misconduct Commission and Queensland Ombudsman. Lastly, there is also no compulsion for RSPCA prosecutions to follow the Office of the Director of Public Prosecutions' Guidelines that are designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice.

Therefore, we do not support the expansion of the prosecutorial functions of the RSPCA. The interests of justice and the public interest would best be served if existing Crown prosecutorial bodies were better resourced to prosecute charges of animal cruelty. This will ensure that the rights of all parties involved will be promoted and respected.

Clause 62 – amendment of s 222 (appeals to a single judge)

The Society is concerned with the proposal to permit the Attorney-General to appeal decisions dealt with by the Magistrates Courts on a summary basis. We do not support the proposal to

extend these appeal rights. The Society's general view is that decisions concerning whether a matter is appealed falls within the responsibilities of the Office of the Director of Public Prosecutions. It is our view that matters of appeals of this nature should remain with the Office of the Director of Public Prosecutions, thereby removing any suggestion of political interference in the criminal justice system, especially given the principles of the separation of powers.

Further, it is our understanding that Queensland is the only state in which the Attorney-General has standing to appeal indictable matters to the Court of Appeal. In other states, this is a power reserved for the Office of the Director of Public Prosecutions. We suggest this is an issue which may require further consideration to ensure consistency with other jurisdictions.

Clause 61 – Amendment of s 146A (Proceeding at the hearing on defendant's confession in absentia)

The Society notes that the Attorney-General has indicated that he proposes to introduce a 'plead guilty on-line service'. The Society's overarching concern is to ensure that persons who decide to utilise the on-line plea of guilty service do so having been fully informed of their rights, options, and the pros and cons of proceeding in this particular way. To that end, the Society considers the following issues must be addressed:

- that on-line material should make specific reference to the maximum penalties applicable for the offences to which people might plead guilty.
- Advice should be provided about both the meaning and effect of a plea of guilty.
- Guidance should be provided to people so that they understand that they should advise the Magistrate of any and all factors in their favour which they want the Magistrate to consider.
- Specific details of the quantum of the offender levy to be imposed should be provided.
- Caution should be exercised when considering whether this scheme should apply to young people and when deciding which offences to include in the proposal.

7. *Youth Justice Act 1992*

Clause 71 - insertion of new s 151A

Clause 71 proposes to introduce new section 151A which is reproduced below.

151A Permitted use and disclosure of information for pre-sentence report The chief executive may make information about a child, obtained under this Act or another Act, available to a person in order to assist the chief executive comply with section 151(1).

The Society is concerned about this provision. While we understand that this information is to be provided for the preparation of pre-sentence reports only (clause 72), we are concerned that this information might become publicly known given that the children's court may in some instances be an open court.

Clause 73 - Amendment of s 176B (Sentence orders—recidivist vehicle offences)

Clause 73 is reproduced in the table below.

(1) This section applies if, under section 206A(1), a court must make a boot camp (vehicle offences) order against a child.

The Society does not support this provision and notes our submission to the Committee dated 6 March 2014 on the *Youth Justice and other Legislation Amendment Bill 2014* - boot camp orders for vehicle offences (**enclosed**). We also note the Society's stance against mandatory sentencing regimes.

Clause 74 - insertion of new s 282BA

Cause 74 proposes to insert a new section 282BA which is reproduced in the table below.

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 Society does not support this new section and has serious concerns about proposed section 282BA(1) which would allow an employee of a boot camp centre provider to maintain good order and discipline at a boot camp centre. The Explanatory Notes state, that these employees may 'employ a range of practices such as use of force, restraint, separation and personal searches'.[7]

Page 29 of the Explanatory Notes state:

> Clear guidelines around the use of practices such as use of force, restraint, separation and personal searches will be prescribed in the *Youth Justice Regulation 2003*, as well as the obligation to record all instances of their use.[8]

Therefore, the guidelines and safeguards concerning the use of force, restraint, separation and personal searches in youth detention centres will be prescribed by regulation, as opposed to legislation.

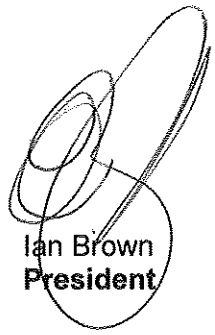
First, in our view, this proposal should be reconsidered noting the recommendations of the Child Guardian in relation to the use of separation at a Queensland Youth Detention Centre. Secondly, in line with our previous submissions, we do not support the inclusion of detailed material of this nature within Regulations. Regulations, by their nature are not subject to the same level of scrutiny as legislation and as such, the Society is concerned with this approach. Thirdly, if the proposal, as it stands proceeds, we respectfully submit that the proposed amendments to the regulation be released for public comment so that stakeholders can

[7] Explanatory Notes, page 28.
[8] Explanatory Notes, page 29.

provide their views on the legislative regime as a whole. In our view, this is essential when considering the serious nature of the proposed amendments.

If you require clarification of any of the issues of raised in this submission, please do not hesitate to contact our policy solicitors. We look forward to receiving a copy of the Committee's report.

Yours faithfully



Ian Brown
President

Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

Amendment to the Youth Justice and Other Legislation Amendment Bill 2014
Submission 005

Our ref: 337 - 16

6 March 2014

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By Post and Email to: lacsc@parliament.qld.gov.au

Dear Research Director

Youth Justice and other Legislation Amendment Bill 2014 - boot camp orders for vehicle offences

Thank you for the opportunity to provide a supplementary submission on the amendments to the *Youth Justice and other Legislation Amendment Bill 2014*. We understand that these amendments will be moved by the Honourable Attorney-General and Minister for Justice during consideration in detail of the Bill.

The Society commends the government for permitting public consultation on the proposed boot camp orders for vehicle offences flagged by the Attorney-General in his introductory speech. We are supportive of public consultation and consider it one of the key tenets of good law. We note that the Society flagged its concern about this proposal at the public hearing on the Bill on 3 March 2014. Unfortunately, we were not provided with the opportunity to discuss our issues in this public forum as the proposed amendments to the Bill were not before the Committee. We respectfully submit that a further public hearing be conducted so that relevant stakeholders may ventilate their views on this proposal.

We also note the limited time frame for comment, with draft legislation being provided on 4 March 2014 and comments due by 6 March 2014. As there has been only a very brief opportunity to review the amendment to the Bill, an in-depth analysis has not been possible. There may be issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We urge the government to extend the period within which to provide comments and also extend the reporting date of the Committee, to ensure that the Committee has a reasonable opportunity to consider in detail the implications of the draft legislation before it.

With respect to the proposed amendments, we make the following comments on specific clauses in the Bill.

Clause 9B

This clause seeks to insert a new section 176B. This section proposes to introduce a mandatory boot camp order for young people who are recidivist vehicle offenders.

Proposed section 176B(3) states that:

> *(3) Without limiting section 175, the court must make a boot camp (vehicle offences) order for the child.*

The Society maintains its principled objection to mandatory sentencing. In our view, mandatory sentencing laws are unfair, unworkable and run contrary to the fundamental tenets of our justice system. The Society supports judicial discretion for sentencing in all criminal matters, particularly in youth criminal matters, in order to reflect the discrete facts of each case and each individual offender.

The Society also considers that there are difficulties with this proposal. Anecdotal evidence suggests that approximately 100 young people will be affected by these provisions. The mandatory sentencing regime will have a huge impact on these young people. The introduction of the boot camp (vehicle offences) order will result in young people being moved from environments which are known, familiar and secure, such as their homes and their schools, to unfamiliar and foreign surroundings. Also highly problematic is the removal of support networks for these young people, by virtue of the fact that they will be taken out of their home environment – such as access to family, positive school support networks and therapists with whom the child may have a pre-existing relationship. Compounding this concern is the fact that this will be done without the young person's consent and without judicial review.

In regard to consent, we note that this provision contravenes section 226(2)(c) of the *Youth Justice Act 1992*. This section mandates that, 'a child is an eligible child for a boot camp order if the child—consents to participating in a boot camp program.' In our view, mandatory participation in boot camps potentially diminishes the effectiveness of the program and may ultimately contribute little to reducing recidivism. If the young person is being forced to participate, they might not be engaged and therefore not fully participate in the program. As such, the boot camp order may have significantly reduced prospects of achieving its desired outcome.

The Society would be pleased to be involved in consultation with the government regarding the boot camp experience, particularly in relation to information from the trial thus far.

From a practical perspective, it might prove unworkable to continue to force a young person to complete a boot camp (vehicle offences) order. We particularly note that from the point of view of the young person, there might be cogent and persuasive reasons why they should not or can not participate in a boot camp program – for example, psychological, emotional, cultural reasons. These reasons should not be discounted and the well-being of the young person should be considered. In this regard, we note proposed section 176B(2) which states:

> *(2) Before sentencing the child, the court must—*
>
> *(a) order the chief executive to prepare a pre-sentence report; and*
> *(b) have received and considered the report.*

The Society requests clarification whether the court must make a boot camp order if, upon consideration of the pre-sentence report, it does not support the making of the boot camp order. The Queensland Law Society strongly supports the retention of judicial discretion in

these matters. We consider that s176B(3) should provide that "the court may make a boot camp (vehicle offences) order for the child."

We note that the court is not limited to making other sentencing orders (in section 175 of the *Youth Justice Act 1992*) in addition to the mandatory boot camp order. The Society is concerned that more appropriate sentencing options might be underutilised if boot camp orders were made mandatory.

We urge the government reconsider its decision to enact clause 9B.

Clause 9D

This clause purports to insert a new section 178B and deals with the combination of boot camp (vehicle offences) orders and other community based orders. This provision states that community based orders are suspended until the child has performed the boot camp order or the boot camp order has been discharged.

The Society does not support this provision for several reasons. First, it gives primacy to the status of the boot camp (vehicle offences) order over community based orders. Secondly, it will mean that these orders will be served cumulatively and not concurrently. As a result, the length of time of the community based orders will be increased, which might not be the intention of the court. For example, probation orders would arguably run for a longer period than anticipated by the court. Thirdly, there might be a disparity in sentencing for the same conduct, depending on when the young person was found guilty of the offences – that is, before or after the implementation of the amendments.

We provide the following hypothetical example. Young persons A and B committed two motor vehicle offences together and are placed on a community based order handed down prior to the implementation of the amendments. As a result of fingerprints found, young person A is identified after the amendments and found guilty of an offence of 'Unlawful Use of a Motor Vehicle' which occurred about the time of his earlier offences. A is therefore subject to a boot camp (vehicle offences) order and young person A's community based order is suspended until the completion of the latter order. In the case of young person A, the original sentencing court would not have had the ability to contemplate the extension in time of the community based order and also the fact that the order would be served cumulatively. In contrast, young person B's fingerprints are located on the door of a vehicle and she is found guilty of a charge of 'Entering Premises with Intent'. B receives a community based order. This order runs concurrently with her prior order as the court is mindful that it occurred at about the same time as her other offences. Consequently B's order is finalised three months before A's order despite the significant parity in their behaviour. The Society does not consider that this is an appropriate outcome. We hold the view that the effective extension of orders and the possibility of disparate orders is manifestly unjust and functions to undermine the intention of the judiciary.

Clause 10

The Society notes that the wording of the Regulation which will prescribe the areas for the purpose of a boot camp (vehicle offences) order has not been provided and we have had no opportunity to comment on this document.

In line with our previous submissions, we reiterate that it might not be prudent practice to prescribe the areas in which people reside, in this case Townsville, by regulation. Regulations are not subject to the same level of scrutiny and as such, the Society is concerned with this approach.

Clause 11

Proposed section 206A discusses boot camp (vehicle offences) orders.

Proposed section 206A(3) states:

> *(3) For this section, advice from the chief executive contained in the pre-sentence report that the child usually resides in an area prescribed for the purposes of a boot camp (vehicle offences) order is, unless the contrary is proved, sufficient proof that the child usually resides in that area.*

The Society is concerned about this provision and considers that there may be unintended consequences and unjust outcomes as a consequence of its application. For example, a young person might choose to relocate, during the inevitable remand period, to avoid the imposition of a boot camp (vehicle offences) order. This is problematic because young people may choose to relocate to unsafe environments, away from their family, in order to suggest that they no longer "usually reside" in a prescribed area for the purposes of a mandatory boot camp (vehicle offences) order. This might ultimately place young people at a greater risk of homelessness in the future. Compounding this issue is the possibility that well-resourced young people may have better access to alternative placements, assistance to enrol in other schools and the ability to establish networks to suggest where they "usually reside". This may result in penalties being imposed, not only on geographical location, but on the basis of economic and social resources. To avoid the provisions of the legislation it is also possible that matters may be set for trial to cause further delay to provide greater opportunity to establish a young person's usual residence outside the prescribed area which is undesirable from the perspective of State resources and matters resolving with in a child's sense of time (see Section 3 of the *Youth Justice Act 1992*) .

The Society also notes that this provision may have an inequitable impact on young people who are experiencing homelessness.

Clause 18A

This clause purports to insert a new section 246AA and deals with the court's power on breach of boot camp (vehicle offences) order.

Proposed section 246AA(4) states:

> *(4) If the court varies a boot camp (vehicle offences) order under subsection (1)(b), the court can not vary the details of the boot camp program.*

In our view, this is overly prescriptive and rigid and we consider that the court should have the ability to vary the details of the boot camp program. We query why this is not analogous to community based orders, where courts can impose certain conditions if it is appropriate - given the young person's circumstances or the circumstances of the offence. The Society requests information as to why this would not be a viable option.

Proposed section 246AA(5) states:

> *(5) The onus is on the child to satisfy the court it should permit the child this further opportunity.*

We are concerned with the reversal of the onus of proof in section 246AA(5). This reversal is contrary to the fundamental legislative principles as stated in section 4(3)(d) of the *Legislative Standards Act 1992*. This provision requires that legislation, 'does not reverse the onus of

proof in criminal proceedings without adequate justification'. While the Society notes that the onus of proof is reversed in other provisions of the Act, we do not support these provisions.

Clause 24

Clause 24 proposes insertion of a new section 367 in order to deal with the application of provisions about boot camp (vehicle offences) orders. This provision states:

> *(1) A court may make a boot camp (vehicle offences) order for a recidivist vehicle offender found guilty of a vehicle offence after the commencement.*
>
> *(2) Subsection (1) applies even if 1 or both of the following happened before the commencement—*
>
> *(a) the commission of the vehicle offence;*
> *(b) the start of the proceeding for the offence.*
>
> *(3) In this section— vehicle offence see section 206A(3).*

In relation to proposed section 367(2), we note that this provision relates to offences committed before the commencement of the amendments. In line with our stance against retrospective application of legislation, the Society does not support this provision. We note that retrospective provisions run contrary to section 4(3)(g) of the *Legislative Standards Act 1992*, which requires that legislation, 'not adversely affect rights and liberties, or impose obligations, retrospectively'. If the government is minded to proceed, we suggest that boot camp (vehicle offences) orders only be made available for recidivist vehicle offences that were committed after the commencement of the amendments.

Clause 26

Clause 26 states:

> *recidivist vehicle offender means a child who—*
>
> *(a) is found guilty of a vehicle offence (the relevant vehicle offence); and*
>
> *(b) has, on or before the day the child is found guilty of the relevant vehicle offence, been found guilty of 2 or more other vehicle offences (the other vehicle offences); and*
>
> *(c) committed the other vehicle offences within 1 year before or on the day the relevant vehicle offence was committed.*

With regard to clause 26(b), we note that this might include conduct in relation to the same vehicle on the same day. For example, a young person who steals a car, parks the car and then re-enters that same car may be found guilty of two or more vehicle offences. The Society considers that this behaviour would form part of the same course of conduct and should not be the subject of separate charges. Therefore, a young person who uses the same car at different times on the same day should not be charged with several offences. We suggest that this provision be amended accordingly.

Clause 31

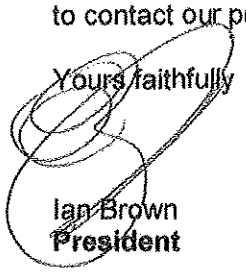
Clause 31 proposes the insertion of a new Part 4, Division 2. This clause states:

(6) Subsection (1) does not apply to the court when constituted by a judge exercising jurisdiction to hear and determine a charge on indictment.

The Society understands that this provision preserves the current position in the Childrens Court of Queensland, Supreme Court and Court of Appeal.

If you require clarification of any of the issues raised in this submission, please do not hesitate to contact our policy solicitors. We look forward to receiving a copy of the Committee's report.

Yours faithfully



Ian Brown
President

Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

Criminal Code (Looting in Declared Areas) Submission 004

Our ref: 339-40, JR/RDC

16 May 2013

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

By post and email to: lacsc@parliament.qld.gov.au

Dear Research Director

Criminal Code (Looting in Declared Areas) Amendment Bill 2013

Thank you for providing Queensland Law Society with the opportunity to comment on the *Criminal Code (Looting in Declared Areas) Amendment Bill 2013* (the Bill).

Please note that in the time available to the Society and the commitments of our committee members, it is not suggested that this submission represents an exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

We make the following comments for your consideration.

Clause 3 – Amendment of s398 (Punishment of stealing)

The Society is opposed to the introduction of new offences where the same conduct is covered under an offence which already exists in legislation. We consider the insertion of the special case 's13A Stealing by looting in a declared area' creates unnecessary duplication.

In his explanatory speech, Mr Carl Judge MP highlighted the new legislation would seek to address concerns arising from offences that occurred during flood and cyclone related disasters in 2011 and 2013. The Society considers that the current offence of stealing by looting[1] appropriately deals with the issue of looting at the time of a natural disaster. The section states:

> **13 Stealing by looting**
> If—
> (a) the offence is committed during a natural disaster, civil unrest or an industrial dispute; or
> (b) the thing stolen is left unattended by the death or incapacity of the person in possession of the property;
> the offender is liable to imprisonment for 10 years.

[1] *Criminal Code* s398(13)

The Disaster Operations Activities Reports by Emergency Management Queensland, State Disaster Coordination Centre indicate that between July 2008 and December 2012, there were approximately 17 declared disaster situations made under the provisions of the *Disaster Management Act 2003*. These declarations were made for both specific areas across Queensland and State-wide. Of these declared disaster areas, all but one arose from natural disasters, which included flooding, tropical cyclones, and extreme storms. The remaining declaration was made following an oil spill in coastal waters. The Society considers that under these circumstances, offences of looting were sufficiently covered by s398(13) of the *Criminal Code*. Section 398(13) also refers to stealing during civil unrest or an industrial dispute. The Society considers that these broad definitions in the most part cover the disaster events defined in s16 of the *Disaster Management Act 2003* that are likely to give rise to instances of looting.

Increased penalty

The current offence of stealing by looting carries a maximum penalty of 10 years imprisonment which is double the standard penalty for stealing. We consider this special case of punishment suitably reflects the community's denunciation of such an act and for the last five years has captured stealing offences committed in declared areas.

There may be some confusion within the public as to what constitutes the offence of 'stealing by looting' given the concept of 'looting' is often used to refer to a broad range of property crime. The definition of stealing refers specifically to the act of taking something capable of being stolen, for example where clothing is taken from the footpath outside a business. Where the criminal act is of a more serious nature, there are appropriate offences within the *Criminal Code* that prescribe a higher maximum penalty.

The Society does not consider it necessary to create an additional offence which carries a heavier term of imprisonment given the nature of the offending may not warrant the increase in penalty. Already, the *Criminal Code* covers offences which capture the type of offending that would cause community concern during a disaster. For example, any person who enters or is in any premises and commits an indictable offence in the premises faces a maximum penalty of 14 years imprisonment.[2] The maximum penalty increases to imprisonment for life where a person enters the dwelling of another and commits an indictable offence in the dwelling.[3] These offences carry heavier maximum penalties in line with community expectation. Where the circumstances of the case bear out charging an accused person with a more serious offence, the existing offences suitably reflect the scale of punishment afforded to the type of criminal behaviour.

---

[2] *Criminal Code* s421(2)

[3] *Criminal Code* s419(4)

Thank you for providing the Society with the opportunity to comment on the Bill. Please contact our Policy Solicitor, Ms Raylene D'Cruz on [redacted] or [redacted] or Graduate Policy Solicitor, Ms Jennifer Roan on [redacted] or [redacted] for further inquiries.

Yours faithfully,

Annette Bradfield
President