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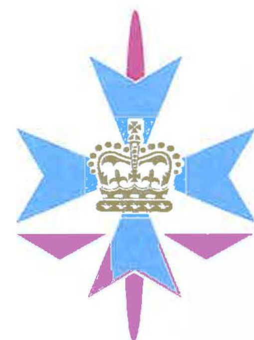
Criminal Law Amendment Bill (No. 2) 2012
Submission 007



BAR ASSOCIATION OF QUEENSLAND

14 February 2013

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

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

Dear Sir

Re: Criminal Law Amendment Bill (No 2) 2012

As the Committee knows, the Queensland Drugs Misuse Act criminalises the possession and/or distribution of dangerous drugs. The relevant dangerous drugs are categorised in Schedule 1 and Schedule 2 of the Act. Most of the drugs relevant to this debate – amphetamines ("ice" and "speed"), MDMA (ecstasy), heroin and cocaine are in Schedule 1. Cannabis is in Schedule 2. The elements of the offence of trafficking are the same, irrespective of the drug traded. Trafficking in a Schedule 1 drug is punishable by up to 25 years imprisonment; in a Schedule 2 drug, 20 years imprisonment.

When an offender is sentenced for the offence of trafficking in any dangerous drug, the presiding judge is presented with a range of discretions. The first of those is to set the "head term", which is conventionally regarded as the sentence that would, but for any mitigating circumstances, be required to be served by the offender.

As things stand, there is no further discretion to be exercised if the head term imposed for trafficking is 10 years or more. In these circumstances, the offender must serve 80% of the sentence before they are eligible for parole. There is no other option.

If the head term is between 5 and 10 years, the sentencing judge currently has a further discretion. That is, he or she can decide to declare the offence of trafficking a "serious violent offence" (this term is used irrespective of whether the offence actually involved violence) in which case this offender must also serve 80% of the head term before being eligible for parole.

If that term is less than 10 years imprisonment, and the judge elects not to invoke the "80%" provision, they can exercise another discretion by which they decide how much of that term is actually to be served. For sentences of 5 years or less, they may decide whether the "balance" is to be suspended conditional that no further offence of any kind be committed for a prescribed period. Some such circumstances

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may be accompanied by orders for probation. Alternatively, for any sentence of less than 10 years, it might be decided that the offender should serve a period on parole. If the sentence is less than 3 years imprisonment, then the date upon which the judge says parole should take effect is fixed. For sentences of over 3 years (and, obviously, less than 10) the judge merely fixes a date upon which the offender is eligible for parole. The range of options is wide, and allows each sentence to be tailored to the circumstances of the case.

The logic underpinning the "80%" rule applicable to sentences of 10 years or more is debatable, but understandable. If the scale of trafficking warrants such a sentence, then it is obviously a serious offence indeed, and ought to attract punishment that is, even in this context, severe.

However, the insistence upon this single structure of sentence for lower levels of offending will have undesirable consequences, and any suggestion that the "80% rule" should be extended must be viewed with caution.

This is because the offence of trafficking in dangerous drugs can be committed in an extraordinarily wide range of circumstances – from the truly cynical operations involving millions of dollars, to the desperate few efforts of hopeless addicts attempting to support a habit over which they have no control. The possibilities are endless. Many trafficking offences are conventionally punished by terms of much less that 10 years imprisonment, so the logic which underpins the "80%" rule for the more serious offences does not apply.

The dangers involved in the "80%" approach can be illustrated by reference to a type of trafficking that, in the Bar's experience, is becoming increasingly common. The offender is typically in their late teens or early twenties. They may be male or female. Buoyed perhaps by the social acceptance which comes from being accepted within a peer group – whether nightclub based or otherwise – they find themselves at the hub of a distribution network in which ecstasy pills or cannabis are exchanged. These networks rarely extend beyond their acquaintances. Transactions are typically conducted by way of text messages or brief mobile phone calls. These offenders are rarely trafficking for profit – those attending nightclubs in particular are often gainfully employed, or educated children of parents from comfortable circumstances – but are often seeking to support (and conceal) a habit.

This type of offender is often remorseful upon detection. Many such offenders are convicted not on the basis of direct evidence from other witnesses, but rather on the basis of evidence of their own admissions, readily volunteered to police. They are in fact known to welcome police intervention, because it proves to be the thing which removes them from the milieu in which they are immersed. They almost invariably plead guilty.

Nevertheless, and even if the only evidence is their confession, these young people are – and should be – charged with trafficking. They routinely spend part of their sentence in actual custody. In the case of drugs such as ecstasy and/or cannabis, it is common that they will be sentenced to somewhere between 2 and 4 years

imprisonment. It is not unusual for some amphetamine pills to creep into the distribution, in which case the penalties would range between 3 and 5 years imprisonment, even for "low level", largely profitless trafficking committed by a young offender with no relevant convictions.

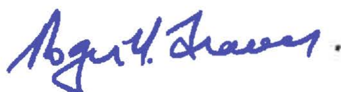
As noted above, such head sentences might be thought to reflect objective expectations of punishment for the distribution of dangerous drugs, even if no profit is involved. But in the case of a young first offender who has exhibited remorse and has excellent prospects of rehabilitation, there will almost always be a good case to be made that less than half of that period should be served in actual custody, especially when it falls within such a formative period of their lives. Appropriate and effective sentencing measures ensure that such individuals, upon release, are subject to a lengthy period of supervision – on parole or probation. This is the most effective way to guarantee that upon release (when they are most vulnerable) they do not relapse into drug related activity. There are obvious dangers – especially to the youthful – if this period under supervision is abbreviated to just 20% of the "head term" imposed. After having been exposed, in prison, to the truly criminal element in society, and then quickly left without supervision, such offenders will be openly susceptible to the predations of those in the drug trade who would use them for profit.

There is also a real need, in the interests of law enforcement, and especially in the case of drug offences, to retain a large measure of flexibility in sentencing practices. This is because the courts can play a critical role in the apprehension and prosecution of the most serious offenders by giving an appropriate "discount" to the "lower level" offenders who might be willing to testify against others who are higher in the chain of distribution. That will, realistically, be impossible to achieve if it is mandatory to apply the "80% rule".

Cases such as these present a quintessential example of the need for a sentencing judge to make a discretionary judgement on a case-by-case basis. To insist that, at every one of the many levels of drug trafficking, an offender must serve 80% of the sentence imposed would be a crude and ineffective innovation. It is likely to be counterproductive in the effort to rehabilitate young offenders, and will limit the ability of the courts to provide incentives to those who are in a position to undermine the efficacy of the more serious trafficking operations.

The Association acknowledges the government's mandate to introduce the other measures contained in the Bill. However, for the reasons above, we urge that serious consideration be given to the removal of Section 4 (referenced in Item 2 of your letter).

Yours faithfully



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