

Criminal Law (Child Exploitation
& Dangerous Drugs)
Submission 007

Your ref: Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill
Our Ref: 339/23: JR, RD

4 February 2013

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

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

Dear Research Director

**CRIMINAL LAW (CHILD EXPLOITATION AND DANGEROUS DRUGS)
AMENDMENT BILL 2012**

Thank you for inviting the Queensland Law Society to provide comments on the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill 2012 (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.

The Society is pleased to note that it was consulted with respect to the amendments to the *Criminal Code*, *Drugs Misuse Act* and *Evidence Act* aspects of the Bill prior to it being introduced into the House. Queensland Law Society has long advocated that good legislation is the product of good consultation. We are grateful to the Government for the opportunity to have contributed our views.

We make the following comments for your consideration.

Amendments to the Commission for Children and Young People and Child Guardian Act 2000 (CCYPCGA) and the Disability Services Act 2006 (DSA)

- 1. Clause 4 – insertion of new ch 11, pt 16
Clause 31 – insertion of new pt 16, div 8**

The Society notes that there are sections throughout the Bill which cause an automatic withdrawal of an application that has not been decided or withdrawn before the commencement. Given these applications are accompanied by a prescribed fee, we consider that all fees should be returned to applicants who are subject to automatic withdrawal by virtue of statutory change.

The specific sections relevant to this issue are sections 516, 517 and 527 of the CCYPCGA and sections 296, 297 and 307 of the DSA.

- 2. Clause 4 – insertion s 539 (disqualification orders for acts done or omissions made before commencement) (CCYPCGA)**

Clause 31 – insertion s 323 (disqualification orders for acts done or omissions made before commencement) (DSA)

These amendments state that a court may make a disqualification order under a section of the CCYPCGA or DSA in relation to a person convicted of *an offence* after the commencement. We consider the current provisions found in s 357 of the CCYPCGA and s 122 of the DSA are far more limited in their scope. In these Acts, the person must be convicted of:

- a disqualifying offence* where an imprisonment order is not imposed for the offence or
- a serious offence* committed in relation to or otherwise involving a child/person with a disability.

The Society suggests that these sections should be clarified to more clearly demonstrate the effect of the legislation. "Offence" at present may be broadly construed so as to mean any offence, where the intention is to refer to those offences stipulated in the sections of the Acts as disqualifying and serious offences.

- 3. Clause 4 – insertion of s 531 (undecided reviews and appeals by new disqualified persons) and s 534 (existing appeal by commissioner against decision of QCAT on review of chapter 8 reviewable decision) (CCYPCGA)**

Clause 31 – insertion s 315 (undecided reviews and appeals by new disqualified persons) and s 318 (existing appeal by chief executive against decision of tribunal on review of part 10 reviewable decision) (DSA)

Section 531 (CCYPCGA) and s 315 (DSA) refer to a person who has applied for a review of a part 10 reviewable decision or appealed before the commencement. Where a person becomes a 'new disqualified person' on commencement, their right to a review or appeal is denied. The court or tribunal is required by the legislation to

dismiss the appeal. Conversely, s 534 (CCYPCGA) and s 318 (DSA) apply where an existing appeal by the commissioner or chief executive involves a new disqualified person. In this case, a decision of the tribunal is not dismissed. Given the similarity of these provisions, the Society considers it both procedurally and substantively unfair to a 'new disqualified person' that they cannot pursue a reviewable decision, particularly where the commissioner or chief executive is expressly allowed.

The Society also considers it particularly peculiar that s 531(2)(b) (CCYPCGA) and s 315(2)(b) (DSA) mandate the dismissal of an application even where it would be contrary to a direction of the Court of Appeal.

Amendments to the *Criminal Code Act 1899* (the Code)

4. **Clause 14 - amendment of s 208 (unlawful sodomy)**
Clause 16 - amendment of s 215 (carnal knowledge with or of children under 16)

Currently under s 208(1)(c)(d) of the Code, a person who sodomises, or attempts to sodomise a person with an impairment of the mind or permits a person with an impairment of the mind to sodomise him or her is liable to 14 years imprisonment. Clause 14 proposes to increase the penalty for the actual commission of these crimes to life imprisonment. Whilst we understand that people with impairments of the mind are in a more vulnerable situation, it is our opinion that life imprisonment for this offence is excessive.

For the reasons stated above, the Society is of the view that a life sentence for the offence set out in clause 16, s 215 of the Code is also excessive. We note that the offence of unlawful carnal knowledge may involve consent. For example, a seventeen year old in a relationship with a fifteen year old may be liable under this offence. Exposure to a maximum penalty of life imprisonment is, in the view of the Society, an inappropriate legislative response to this scenario and could result in a manifestly unjust outcome.

The Society is of the view that a sentence of life imprisonment should only ever be suggested as appropriate in cases where the sodomy or carnal knowledge occurs without consent. Where that is so, the offence of rape has been committed (ss 6 and 349 of the Code). Rape carries a maximum sentence of life imprisonment. For the purposes of a charge of rape, a child under 12 is incapable of providing consent. Maintaining a sexual relationship with a child also carries a maximum sentence of life imprisonment (s 229B of the Code). In the context of the sexual offences created by the Code, nothing of any practical significance will be achieved by increasing the maximum sentence for sodomy or unlawful carnal knowledge.

In the Society's view, further research should be undertaken on the sentences which are currently being handed down and the factual basis for these sentences. This will:

- highlight the range of conduct that is liable to attract sanction; and
- provide detailed empirical evidence as to whether or not the increase of these sentences to life imprisonment is warranted.

5. Clause 18 – amendment of s 218A (using internet etc. to procure children under 16)

The Society considers that this is a broadly worded provision that may capture too wide a range of conduct. All that is required is for an adult with the requisite intent (to procure children under 16) to send an electronic communication. The electronic communication need not be directed to or received by anyone. Therefore, a message on Facebook stating "I would like to have sex with a 15 year old" may be punishable by a custodial sentence of 10 years.

6. Clause 19 – insertion of s 218B (grooming children under 16)

Subsection 7 reverses the onus of proof, is contrary to the fundamental legislative principles stated in the *Legislative Standards Act 1992*, and is also contrary to the established principles of criminal justice. How would a jury be instructed to deal with a complainant's evidence that, "I told him I was 15," in a case where it was suggested that the complainant was lying, but the defendant did not give evidence? Similarly, what direction would be given if the same defendant was profoundly deaf? On the face of the proposed legislation, the jury would have to regard the defendant's belief as proved, when they might otherwise properly have found that it was not proved. In order to provide justice in particular cases the judiciary might be asked to read down the meaning of the word "represented" to mean "represented in a way understood by the accused."

7. Clause 20 – amendment of s 228B (making child exploitation material)

The explanatory notes indicate that the insertion of this section is intended 'to close a loophole highlighted in the case of *R v Rose* [2009] QCA 83'. The Society highlights the reasons of Atkinson J in *Rose* at [43]-[47] and asks the Committee to consider whether the amendment is constitutionally valid.

- 8. Clause 22 – amendment of s 228B (making child exploitation material)**
Clause 23 – amendment of s 228C (distributing child exploitation material)
Clause 24 – amendment of s 228D (possessing child exploitation material)

We note that these clauses propose to increase the relevant penalties from 5-10 years to 14 years. Whilst we understand the proposed penalties are intended to bring Queensland into line with the Commonwealth, we do not support substantial increases to sentences in the absence of cogent research. The Society is concerned that these amendments will only increase the costs of incarceration, without producing reductions in the number of offences committed. The Society calls for the government to publish research to show a strong link between increasing penalties for these offences and a corresponding reduction in the rates of offending.

We observe that the offence of 'possessing child exploitation material' can be properly thought of as falling into a different category from other child exploitation offences. In circumstances where an offender has had no involvement with a child,

and their offending is limited for example to viewing images on a computer, there is good reason to consider that type of offending as wholly different to that which involves, or potentially could involve, a child being directly abused by the offender.

It should also be noted that the definition of "child exploitation material" extends to both drawings and writing, in the creation of which no children are likely to have been harmed.

9. Clause 26 – amendment of s 568 (cases in which several charges may be joined)

The Society notes that the decision of the High Court of Australia in *Phillips v The Queen* [2006] HCA 4 sets out a very conservative approach with respect to the joinder of charges. The Society supports the High Court's position on the issue of joinder. We also note that the proposed amendment may impact the length of trials and may have negative implications for legal aid funding.

Amendments to Drugs Misuse Act 1986

10. Clause 40 – amendment of s 4 (definitions)

The Society does not agree with the proposed definition of a dangerous drug. The proposed amendment creates greater uncertainty for citizens who wish to obey the law. Originally, the *Drugs Misuse Act 1986* prohibited the possession of particular substances. A person wishing to know whether the possession of a particular chemical would be legal merely had to consult the list of regulated substances. Now, such a person is confronted by such nebulous concepts as "derivative" and "similar pharmacological effect". Consulting the legislation will not provide the citizen with an answer as to the lawfulness of their conduct. Consulting a solicitor will not provide an answer as lawyers generally do not have scientific expertise. Even engaging an expert chemist will not provide an answer, as the terms used in the Bill have no agreed scientific meaning. In the Society's view, the judiciary will be left with a near impossible task of interpretation, with the situation made still more difficult when the issue falls to be determined by a jury. Such uncertainty in the bounds of lawful conduct serves to undermine public confidence in the rule of law.

11. Clause 41 – amendment of s 9A (possessing relevant substances or things)

The Society agrees with the proposed amendment and the inclusion of the defence of reasonable excuse. However, we are concerned that a failure to provide a definition or examples of what might constitute a "reasonable" excuse would create a vague and unworkable defence. Does it extend to the chemistry teacher demonstrating distillation? To the same teacher later on holidays who has kept the glassware in the boot of their car? To the student experimenting at home? To the home hobbyist? This is another proposed offence where the legislature would make it illegal to possess something that was previously useful and lawful (e.g. a condenser, or a solution of more than 100 mg of iodine), but has left both the citizen and the police uncertain as to when the item may be used lawfully.

The amendment also reverses the onus of the proof, by requiring the accused person to prove their reasonable excuse. This is contrary to the fundamental legislative principles. It is also unnecessary. For example, a perfectly workable alternative is suggested by s 51, *Weapons Act 1990* which provides that a person must not possess a knife in a public place, unless they have a reasonable excuse. Under that provision it is for the prosecution to prove the absence of a reasonable excuse, and the citizen is entitled to the benefit of any doubt. The same principle should, in the Society's view, apply to the offence in s 9A, *Drugs Misuse Act 1986*.

12. Clause 42 – insertion of s 9D (trafficking in relevant substance or thing)

This provision proposes the creation of a new offence of the carrying on of a business of unlawful trafficking in a relevant substance or thing. We are concerned that this provision may have unintended consequences due to the uncertain definition of what is considered unlawful. We suggest more clarity is required around precisely when it is unlawful to trade in these items. Take the example of a business that sells scientific laboratory equipment but suspects that a lot of its product is being bought for illegally manufacturing amphetamines. Is the business unlawfully trafficking?

The use of the words "for use in connection with the commission of a crime under section 8" appears to be intended to remove the uncertainty, but in the Society's view fails to do so.

The Society also notes that there is no proposed defence, similar to that proposed in Clause 41, that the person has a reasonable excuse for trafficking in the relevant substance or thing.

13. Clause 43 – amendment of s 10 (possessing things)

The Society considers that this provision is too broad and may have unintended consequences. The proposed s 10(4AA) deems that it is immaterial whether the hypodermic syringe or needle was for use, or had been used, in connection with the administration of a dangerous drug. We consider that this provision could criminalise the activities of doctors, nurses, veterinarians and other healthcare professionals as well as diabetics who might carelessly cause a risk of needle-stick injury. We submit that the criminal law generally is not the most appropriate means of regulating this behaviour, and most particularly not the *Drugs Misuse Act 1986*.

Amendments to Evidence Act 1977

14. Clause 53 – amendment of s 54 (proof of identity of a person convicted)

The explanatory notes state that the intention behind the proposed amendments is to 'recognise that police may take identifying particulars from a suspect other than fingerprints, for example, a DNA sample.'

The Society considers that express intention should be provided for in the *Police Powers and Responsibilities Act 2000* for identifying particulars and DNA records to be used in this manner. We note that there is a general power in s 489, *Police Powers and Responsibilities Act 2000* to use the results of DNA analysis for performing any function of the police service. However, there does not appear to be the same power to use DNA samples under chapter 17, part 5, *Police Powers and Responsibilities Act 2000*.

The Society expresses concern that an 'expert' does not appear to be required to be a person who is a member of the police force of Queensland, the Commonwealth or of any state or territory.

Thank you for providing the Society with the opportunity to comment on this Bill. Given the short time frame which we had to consider this Bill, we would appreciate the opportunity to comment on further drafts. Please contact our Policy Solicitor, Ms Raylene D'Cruz on [REDACTED] or [REDACTED] or Policy Solicitor Jennifer Roan on [REDACTED] or [REDACTED] for further information.

Yours faithfully


Annette Bradfield
President