

Quote in reply: 21000339/217

28 June 2012

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 (TWO STRIKE CHILD SEX OFFENDERS) AMENDMENT BILL 2012

Thank you for the opportunity for the Queensland Law Society to provide comments to the Inquiry into the *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012* (the Bill).

The Society acknowledges that the Bill implements a pre-election commitment of the Government, but notes that the text of the Bill has not been the subject of previous consultation. We note that there is a severely truncated opportunity for review of the amending legislation and, as such, 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.

1. The Society's position on mandatory sentencing

The primary objectives of the Bill, as stated in the Explanatory Memorandum, are:

- to amend the *Penalties and Sentences Act 1992* to insert a new mandatory sentencing regime of life imprisonment for certain repeat child sex offenders; and
- to amend the *Corrective Services Act 2006* to prescribe a minimum non-parole period of 20 years imprisonment for an offender sentenced to mandatory life imprisonment under the new mandatory sentence regime.

The Society has long maintained its strong stance against any form of mandatory sentencing. In our view, mandatory sentencing laws are unfair, unworkable and run contrary to Australia's international treaty obligations.

The Society opposes the proposed legislation on the grounds that it unduly fetters judicial discretion. The removal of judicial discretion by the proposed mandatory sentencing scheme will greatly hinder the

courts ability to bring about justice in individual cases. All cases consist of discreet facts and circumstances. There may be any number of contributing factors that lead to the commission of a crime. A mandatory sentencing scheme would be unable to take these factors into account. Mandatory sentencing laws are arbitrary, contravening the principles of proportionality and necessity because they do not allow consideration of either the seriousness of the offence or the circumstances of the offender. They have the potential to lead to serious miscarriages of justice, exacerbated by virtue of the fact that mandatory sentences, by definition, are not reviewable on appeal. It is our view that judges are in a better position to administer justice through judicial reasoning and comprehensive understanding of the offence and the circumstances surrounding its commission. Therefore, the Society maintains that sentencing decisions should rest with highly trained judicial officers.

The empirical evidence against mandatory is well documented. There is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. Furthermore, these schemes have consistently failed to achieve the stated objectives of deterrence and crime reduction in Queensland, New South Wales, other Australian State and Territory and international jurisdictions.

We also note the following compelling reasons for opposing mandatory sentencing:

- To the extent that mandatory sentencing is perceived as a democratic response to the public perceptions of crime, the most appropriate response is to educate the public about sentencing, not to impose an inflexible and unfair sentencing regime. This is demonstrated by Australian and overseas research. A study published by Professor Kate Warner from the University of Tasmania asked jurors (who were fully informed about the facts of the case) to assess the appropriateness of the judge's sentence. More than half the jurors surveyed would have imposed a more lenient sentence than the trial judge imposed. When the jurors were informed of the actual sentence, 90% said that the judge's sentence was (very or fairly) appropriate.¹
- In addition, mandatory sentencing encourages judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust. In some circumstances when an offender is faced with a mandatory penalty, juries have refused to convict. Furthermore, prosecutors have deliberately charged people with lesser offences than the conduct would warrant to avoid the imposition of a mandatory sentence. In effect, this shifts sentencing discretion from an appropriately trained and paid judicial officer to a prosecutor. This process is called "de-mandatorising".
- The inevitable increase in prison population as a result of the mandatory sentencing is one of many additional costs to the community without any commensurate benefit.
- Mandatory sentencing reduces the proportion of pleas of guilty, thus increasing court costs, court delays, prosecution costs, defence costs and the stress upon victims and other witnesses.
- Mandatory sentences could impact disproportionately on the most marginalised members of society which include many Aboriginal & Torres Strait Islander people.

Therefore the Society opposes the introduction of mandatory sentencing regimes.

¹ Warner K, public judgement on sentencing: final result from the Tasmanian Jury Sentencing Study. Trends and issues in crime and criminal justice, Australian Institute of Criminology, February 2011.

2. Clause 7- Insertion of s 161E, *Penalties and Sentences Act 1992*

Due to the short consultation period, we are unable to provide a thorough analysis of the drafting of this Bill. However, we note that proposed clause 161E(2) states:

*"An offender who is convicted of a repeat serious child sex offence is liable to, despite any other penalty imposed by the Criminal Code, imprisonment for life, **which can not be mitigated or varied under any law**, or is liable to an indefinite sentence under part 10."* [Emphasis added]

The Society is concerned with the phrase, "which can not be mitigated or varied under any law". In our view, this clause could be deemed invalid due to inconsistency under s 109, *Commonwealth of Australia Constitution Act*. In accordance with Australian constitutional law principles, where a State law is inconsistent with a valid law of the Commonwealth, the Commonwealth law will prevail to the extent of the inconsistency. Therefore, if a law of the Commonwealth domestically implements rights and obligations arising out of Australia's international treaty obligations with respect to arbitrary detention, this may give rise to invalidity.

The Society also considers that an exception should be provided in proposed s 161E(2) for the court to make the order subject to the person being released sooner under exceptional circumstances parole under the *Corrective Services Act 2006*.

3. Clause 8- Amendment of s 171, *Penalties and Sentences Act 1992*

Clause 8 of the Bill inserts a new section to provide that the first time an indefinite sentence under s 161E(2) must be reviewed is within 6 months after the offender has served 20 years.

The Society recommends that a requirement that the indefinite sentence must be reviewed at subsequent intervals of not more than 2 years from when the last review was made should be provided for. We consider that the provision of continuous review of an indefinite sentence is essential and the current drafting is not clear on subsequent review mechanisms. Although s 172, *Penalties and Sentences Act 1992* allows prisoners on an indefinite sentence to apply to have their sentence reviewed at any time after the first review, the court can only give leave for this to occur if exceptional circumstances apply. In our view, this review provision is inadequate by itself and must be accompanied by regular review.

Section 4(3)(a) of the *Legislative Standards Act 1992* states that legislation should make "rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review." Without sufficient review processes in place, we consider that this fundamental legislative principle may be breached without reasonable justification.

4. Clause 10 - schedule of 'serious sex offences'

We note that proposed Schedule 1A, which lists the offences considered as 'serious sex offences', includes 'owner etc. permitting abuse of children on premises' (s 213, *Criminal Code Act 1899*). Whilst the Society does not in any way condone the actions of a person convicted under s 213, we consider that the nature of the offence is of a different order to the other offences included in the list. The other offences all involve direct assaults on a child. Conduct under s 213 involves offending behaviour which is

more similar in nature to that of accessorial liability, and we consider that the offence can be properly thought of as falling into a different category.

Thank you again for the opportunity to provide these comments. If you require any further information with respect to this submission, please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au or our Senior Policy Solicitor Ms Binari De Saram on (07) 3842 5885 or b.desaram@qls.com.au.

Yours faithfully



Dr John de Groot
President