Criminal Law - Two Srike Child Sex Offenders Submission 015

BAR ASSOCIATION OF QUEENSLAND

28 June 2012

Mr Peter Wellington MP
Deputy Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Deputy Chair,

Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012

Thank you for your invitation to provide written submissions concerning the proposed amendments to the *Penalties and Sentences Act 1992* and *Corrective Services Act 2006* to introduce a new mandatory sentencing regime of life imprisonment, with a 20 year non-parole period, for certain repeat child sex offenders.

The Bar Association of Queensland strongly opposes the introduction of such a regime. It is a form of mandatory sentencing that has, time and time again, been demonstrated to lead to injustice in many cases and otherwise play havoc with the proper administration of the criminal law. It is also quite inimical to the very rationale advanced for it in the Explanatory Notes. There the amendments are said to be "necessary" to:

> *"(D)enounce repeat child sex offenders; provide adequate deterrence for this cohort of offenders; protect one of the most vulnerable groups of the community; and to enhance community confidence in the criminal justice system."*

The proposed mandatory sentencing regime will not operate as a deterrent, it may very well put at further serious risk victims of child sex offences and it will almost certainly erode community confidence in the criminal justice system. We say this for the following reasons:

1. Mandatory sentencing simply does not work. To the point, the experience with such regimes both in Australia and overseas is overwhelmingly to the effect that mandatory sentencing does not reduce crime – whether through deterrence or incapacitation while imprisoned – and may in fact lead to increased crime rates through the criminogenic effect of imprisonment. The proposition that mandatory sentencing deters crime is quite frankly seriously flawed. If this were so, then there would have been a dramatic reduction in the crime of murder being committed in Queensland since 1922. It is a proposition that is otherwise insupportable when regard is had to experience in other jurisdictions;

2. Such a regime will produce a 'one size fits all' approach. That will not only promote inconsistency in sentencing, it will guarantee it. The fact of the matter is that the proposed amendments will result in sentences that are quite

BAR ASSOCIATION OF QUEENSLAND
ABN 78 009 717 739
Ground Floor
Inns of Court
107 North Quay
Brisbane Qld 4000
Tel: 07 3238 5100
Fax: 07 3236 1180
DX: 905
chiefexec@qldbar.asn.au
Constituent Member of the Australian Bar Association

disproportionate to the gravity of the offending. As Mildren J said in *Trenerry v Bradley* (1997) 6 NTLR 175, 17:

> *"Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case."*

3. Indeed, consistency of approach in sentencing is one of the stated purposes of the *Penalties and Sentences Act 1992*. See: s 3(c). That objective will be destroyed in one fell swoop if the amendments pass into legislation. See: s 9(1)(a), (3) to (9). So, too, will the regime set up a direct conflict with the detailed sentencing guidelines under s 9. There we find statutory recognition of the need to sentence child sex offenders in accordance with the justice of the case. These amendments run counter to almost everything there legislated;

4. The feature that an offender has been previously convicted of an offence against a child has since time immemorial been treated as a serious aggravating circumstance and, as such, is reflected in a substantially increased penalty. Further, if there was any doubt about that proposition – which there is not – s 9(8) of the *Penalties and Sentences Act 1992* says that very thing. Every day in the Courts, our Judges and Magistrates sentence offenders in accordance with the requirements of that provision and, should that not occur, the Court of Appeal sits ready to ensure that this occurs;

5. To remove the presently existing judicial discretion is therefore completely unnecessary. To replace the discretion with an arbitrary system will be short-sighted folly;

6. The amendments ignore the feature that the current legislative regime works well in achieving just outcomes. It also ignores the recourse the Attorney General may have to the *Dangerous Prisoners (Sexual Offenders) Act 2003* in order to keep particularly dangerous offenders in detention - or subject to strict supervision - and then allows the Court to keep anyone so detained or supervised under regular review;

7. The amendments would result in a comparable sentence being applied to a repeat child sex offender as would be applied to a person convicted of murder. Although the Association wholeheartedly agrees that offences against children are abhorrent, given the obvious disparity in the nature of the offending, such a legislative approach if ever passed would be bewildering, and not only to lawyers but to the community at large;

8. There will also be a significant disruption to the administration of criminal justice in this State. At a time when the backlog of criminal cases in the Supreme Court is under the spotlight, it is passing strange that there is any real motivation to add to that problem. The proposed regime will. This is because mandatory sentencing regimes are notorious for exacerbating court delays because offenders who might previously have elected to not contest a charge will run it all the way

through to trial and, if necessary, on to appeal in an effort to avoid the mandatory consequences of the legislation. Such an offender will have nothing to gain and a great deal to lose unless he contests every repeat charge. So, too, should any thought of co-operation with the authorities by any such offender be regarded as a thing of the past; there will be no incentive to do so;

9. Such an outcome in terms of delay and lack of co-operation will have far-reaching effects. Victims of child sex offences, and their families, will have to wait years for an outcome where presently such an outcome might be secured within months or even weeks. The same victims will be subjected to cross-examination where in many cases currently that would not occur;

10. The financial strain on the Legal Aid and DPP budgets, not to mention the increased costs to the Police and the courts, through the swollen number (and length) of contests will be incalculable. So, too will the effects be felt in the prison system where more prisoners will need to be housed, and for longer. Current estimates suggest the cost to the community for imprisoning one offender for one year is around $70,000. The Explanatory Notes assert that these amendments will be met out 'from existing agency sources'. The Association wonders how that can be given the well-publicised State Debt and, perhaps more to the point, whether the consequential costs we mention in this paragraph have been properly estimated;

11. The amendments may very well violate Australia's International Law obligations. In this regard, various rights set out in the *UN International Covenant on Civil and Political Rights* as well as the *UN Convention on the Rights of the Child* are seriously undermined;

12. Lastly, and without by any means wishing to be unduly emotive, the Association has grave concern for the welfare of child sex victims if the proposed legislation is passed. For the same reason that the court system will be further clogged with contested proceedings in relation to repeat child sex offences – the offender has nothing to lose and little to gain – some such offenders may become motivated to kill and dispose of their victims in order to make detection of their crimes more difficult. This is admittedly an horrific thought, but the potential for precisely that sort of outcome to be realised in consequence of the legislation cannot be lightly dismissed.

As we are sure you would be aware, the topic of mandatory sentencing has been much written about. Numerous studies here and abroad have renounced such regimes as being ineffective to deter offending and otherwise destructive of court processes. Given the abbreviated time the Association has been given to respond to this proposal, we therefore **enclose** for your attention the following:

- A paper prepared by the Law Council of Australia in September 2001 entitled, "The Mandatory Sentencing Debate". It was prepared in response to mandatory sentencing regimes legislated in the Northern Territory and Western Australia for offences of stealing, house breaking and burglary. The comments contained in that paper are entirely apposite here. In particular, there is a helpful examination of the extent to which amendments such as those currently proposed might very well breach Australia's International obligations under the

UN International Covenant on Civil and Political Rights as well as the *UN Convention on the Rights of the Child.* We commend the paper to you; and

- Submissions made by the Law Institute of Victoria to the Victorian Attorney-General in June 2011 with respect to a proposal to introduce mandatory sentencing in that State. It provides a useful and reasonably comprehensive treatment of the subject and, in particular, the now well-established proposition that mandatory sentencing regimes do not reduce crime and, in fact, have the opposite effect. To the point, the Submissions make that proposition very clear by reference to a number of studies and explain in greater detail a number of the points we have made above e.g., the fallacy that mandatory sentencing acts as a deterrent, the equally fallacious proposition that incapacitation has any reducing effect at all, the criminogenic effect of the same imprisonment and the patent inconsistency in sentencing that would result if such a regime comes into being. Again, we commend these Submissions to you.

We turn now to more specific observations regarding the proposed amendments.

The Proposal in Detail

Under the current proposal, an offender who has previously been convicted of a serious child sex offence is liable to mandatory imprisonment for life if he or she is convicted of a further serious child sex offence. The proposed s.161 D of the *Penalties and Sentences Act 1992* defines a serious child sex offence to be an offence against a provision mentioned in Schedule 1A, or an offence that involved counselling or procuring a commission of an offence mentioned in Schedule 1A, committed in relation to child under sixteen years; and in circumstances in which an offender convicted of the offence would be liable to imprisonment for life.

Those provisions are:

- Under s.208 of the *Code*, an offender is liable to imprisonment for life if the offence is committed in respect of a child under twelve years, or a child, or a person with an impairment of the mind, who to the knowledge of the offender his or her lineal descendant, or under his or her guardianship or care;

- Section 213 makes criminally responsible the owner or occupier of any premises who induces or knowingly permits any child under sixteen years of age to be in or upon the premises for the purpose of an offender to commit the crime of unlawful sodomy on a child under the age of twelve years;

- Section 215, having unlawful carnal knowledge with a child under the age of twelve years;

- Section 219, where a person takes or entices away, or detains a child under the age of twelve years for the purpose of any person committing unlawful sodomy on the child;

- Section 222, concerning incest, which makes it an offence for any person to have carnal knowledge with their offspring or other lineal descendent, sibling, parent, grandparent, uncle, aunt, nephew or niece with the knowledge that the other person bears that relationship to him or her;

- Section 229B, which is maintaining a sexual relationship with a child. Any adult who maintains an unlawful sexual relationship with a child under the prescribed age, sixteen years, commits a crime with a maximum punishment of life imprisonment;

- Section 349, the offence of rape;

- Section 352, sexual assaults. A person who unlawfully and indecently assaults another person is liable to life imprisonment if immediately before, during or immediately after the offence the offender is, or pretends to be, armed with a dangerous or offensive weapon, or is in company with any other person or if the indecent assault includes the person who is assaulted penetrating the offenders vagina, vulva or anus to any extent with a thing or part of the person's body that is not a penis, or the procurement of a person to penetrate the vagina, vulva or anus to any extend with a thing or part of the body that is not a penis.

But the above provisions are not the only offences caught by Schedule 1A. It includes offences that have been repealed by the *Criminal Law Amendment Act 1997*. The proposed legislation also has retrospective effect in that prior convictions for an offence listed in Schedule 1A will trigger the mandatory sentencing consequences.

Reliance on repealed provisions and/or giving a piece of legislation retrospective operation may be properly justified in some contexts as a legitimate exercise of the law-making function of the Parliament. However, where as here the proposed amendments will otherwise abjectly fail to do what they are currently expressed to be intended to do, there can be no proper basis for such draconian provisions. That is especially so when, into the bargain, great injustice will result from the arbitrariness of this approach. We illustrate that proposition with a few examples.

Some Practical Examples

Before doing so, we repeat what we said earlier to the effect that the Association is unalterably of the view that offences against children are singularly repugnant. However, it has long been recognised by the Courts - not only in this State but in other the States and Territories of Australia - that there is a wide variety of offending, and a wide variety of seriousness of such offending.

For example, not infrequently offenders who commit offences against children are intellectually impaired. Their culpability is clearly less than that of an offender who is not so impaired. Longstanding sentencing principles have always recognised that a person who has a significant intellectual impairment is less culpable than others with their full capacities, and the terms of s 9 of the *Penalties and Sentences Act 1992* reflect this. Under the proposed legislation, there will be no differentiation between the intellectually impaired and those offenders who have full cognitive functioning.

Similarly, some offenders suffer from serious psychiatric illnesses at the time of their offending. Like intellectual impairment, such a condition of the mind will not necessarily be of such severity as to excuse the offending, but it is currently a significant mitigating factor that ameliorates what would otherwise be an appropriate sentence. The proposed legislation ignores such conditions.

Further, under the proposed amendments, any person who commits the crime of incest, for example, having been previously convicted of the offence of incest, will be sentenced to mandatory life imprisonment, regardless of the circumstances. In *R v W* [1999] QCA 124, Davies JA observed that "*offences of incest cover a very wide range, much wider than that envisaged by the Learned Sentencing Judge...*". In that case, a brother and sister, aged 46 and 32 years respectively, had consensual sexual intercourse with each other. They had met some time before that, and suspected that they were brother and sister, and notwithstanding that commenced a sexual relationship. They continued that sexual relationship once they became fully aware that they were indeed brother and sister, having been separated when they were very young. The relationship ended, but two years later - on a single occasion - they again had intercourse with each other. Significantly in that case, Davies JA said this:

> *"Where the intercourse which occurs is between mature consenting adults the main community concern is the effect which that may have on children born to the parties. The risk of that occurring may vary from case to case but it may be seriously doubted whether in any such case any community benefit is served by the imposition of a term of imprisonment."*

Fryberg J said this:-

> "*In a case where there is no question of exploitation of one party by another the only function which it seems to me the law of incest can currently perform is the protection of the genetic integrity of the community."*

The correctness of the judicial observations extracted above cannot be seriously doubted. And, yet, if the siblings in that case would be sent to jail for at least 20 years under the proposed regime if they were being dealt with today.

There is also a wide variety of circumstances that might constitute the offence of maintaining a sexual relationship with a child. Although the maximum penalty is currently life imprisonment, sentences imposed reflect the widely varying nature of that type of offending. For instance, a sexual relationship can consist of low level offending, such as kissing, caressing of breasts and the like. At the other end of the spectrum, it can take the form of continued degrading and brutal sexual assaults, including vaginal intercourse, anal intercourse, forcing a child to have sexual acts with other children or other adults, continuing taking indecent pictures of the child and distributing on the internet and so forth. Any objective observer should see that there is a marked difference in the character and severity of the conduct. As such, the worse the conduct, the greater the penalty should be. However, the proposed amendments make no allowance whatsoever for the Court to impose greater sentences on worse conduct. By imposing one penalty - not with reference to the facts but in accordance with a statutory formula - will therefore not only be productive of serious injustice, it will actually defeat the requirement for deterrence.

Continuing the examples, rape by its very definition encompasses different conduct. At common law, rape was constituted by sexual intercourse with a woman without her consent. Now rape as currently enacted includes not just sexual intercourse with the penis but includes penetration of the vulva, vagina or anus of the victim to any extent with a thing that is not a penis, for example a finger, sex toy or other object.

Now while it cannot be gainsaid that all rapes are serious, some are more serious than others. The penile rape of another, often involving ejaculation, carries with it in the case of vaginal intercourse the risk of pregnancy, transmission of sexually transmitted diseases, and especially in the case of anal intercourse, the transmission of HIV. The risk of transmission of sexually transmitted diseases is obviously considerably less with penetration by an object other than a penis and there is of course no risk of pregnancy.

A serial rapist who, having been convicted of attacking and raping vaginally and anally a number of women, commits further offences of the same nature, is clearly worse than an offender who on one previous occasion has inserted his finger into a sleeping woman for a brief second, and then on a later occasion does the same thing. Again, there is no provision for a Court to take into account intellectual impairment or serious psychiatric illness at the time of the offending.

It also needs to be emphasised that for many years the Courts have imposed very heavy penalties for those persons convicted of sexual offences against children, and sexual offences against women, such as rape or sexual assault with circumstances of aggravation. It is not as though the proposed legislation will cure a deficiency in the judicial approach; it merely advances an alternative and totally inflexible regime that will not work.

Further, the Courts have always encouraged early pleas and co-operation by offering discounts to persons who do so. The *Penalties and Sentences Act 1992* reflects this approach, and for good reason; everyone benefits from the early resolution of criminal offences. The High Court in *AB v The Queen* (1999) 198 CLR 111 observed that special credit should be given to persons who confess to crimes that are not already known to the investigating authorities. This sometimes happens in historical cases of sexual offending against children, where for reasons of remorse or otherwise, an offender will come forward and volunteer his offending even though a formal complaint has not been made to the police. Again, there is simply no room for any recognition for this under the proposed sentencing regime.

In a similar vein, there is no incentive for a person who may have, for example, systematically sexually abused children to cooperate with the authorities. Any undertaking under s.13 A *Penalties and Sentences Act 1992* would be of no value whatsoever, because the mandatory sentence of life imprisonment cannot be varied or mitigated.

Lastly, and as earlier stated, the Attorney General has at his disposal the provisions of the *Dangerous Prisoners (Sexual Offenders) Act 2003* in order to keep particularly dangerous offenders in detention, or subject to strict supervision. The advantage of this legislation is that it allows the Court to have the considerable assistance of psychiatric assessment by expert psychiatrists.

There also remains in the armoury of the Attorney General and the Director of Public Prosecutions the *Criminal Law Amendment Act 1945*. Section 18 of that Act allows for an application to be made to the Supreme Court for an enquiry whether the mental condition of an offender in respect of offences of a sexual nature committed upon children under the age of sixteen years is incapable of exercising proper control over his or her sexual instincts. If found to be so incapable, the Court may order the offender be detained in an institution during her Majesty's pleasure.

Conclusion

The Bar Association is in a unique position to assess the likely consequences of the proposed legislation. Its members are, day in day out, involved in the administration of the criminal justice system, both in defending persons charged with sexual offences, and also in prosecuting them.

The Bar Association is resolutely against the proposed legislation for the reasons above.

We are happy to expand on this submission in writing or orally if required.

Yours faithfully,

Roger N. Traves.

Roger N Traves S.C.
President