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Our ref: BDS-ChLC

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

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

Dear Committee Secretary

Youth Justice and Other Legislation Amendment Bill 2019

Thank you for the opportunity to provide comments on the Youth Justice and Other Legislation Amendment Bill 2019 (the **Bill**). The Queensland Law Society (**QLS**) commends the government on its consultation process.

Children and young people, by virtue of their age and vulnerability, are worthy of support, assistance and protection. In this regard, the Society wishes to emphasise the importance of the Charter of youth justice principles as set out in schedule 1 of the *Youth Justice Act 1992* and section 33 of the soon to be commenced *Human Rights Act 2019*, which aims to uphold the rights of children in the criminal process. The Society also notes our policy position on youth justice, which draws specific attention to the human rights framework and principles articulated in the international instruments relevant to youth justice administration.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

Due to the time constraints of our volunteer committee members, an in-depth analysis of the Bill 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 note that the comments made in this submission are preliminary in nature and are not exhaustive and we reserve the right to make further comment on these proposals.

This response has been compiled by the QLS Children's Law and Criminal Law Committees whose members have substantial expertise in this area.

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With respect to the Bill, we highlight two key issues:

- Our strong opposition to the application of clause 4 to children and young people, which states: in determining the appropriate sentence for a child convicted of the manslaughter of a child under 12 years, a court must treat the victim's defencelessness and vulnerability, having regard to the victim's age, as an aggravating factor (clause 4).
- That children and young people who subject to questioning by Queensland Police Service officers have prompt and fulsome access to legal representation, regardless of the nature of their alleged conduct (clause 43).

Further commentary on the Bill follows.

1. Clause 4 - Amendment of s 150 (Sentencing principles)

Clause 4 seeks to amend section 150 (sentencing principles) of the *Youth Justice Act 1992*. Clause 4 provision states

> In determining the appropriate sentence for a child convicted of the manslaughter of a child under 12 years, a court must treat the victim's defencelessness and vulnerability, having regard to the victim's age, as an aggravating factor.

The Society strongly opposes the application of this provision to children and young people.

The Queensland Sentencing Advisory Council's (QSAC) final report on sentencing for criminal offences arising from the death of a child states:

> Under the Council's proposals, the new aggravating factor will apply where the court is sentencing an offender for an offence resulting in the death of a child under the age of 12 years, aligning with the existing age requirement for the making of an SVO declaration and when children are at highest risk of homicide due to abuse or neglect. It will be limited to the defencelessness of the child victim and their vulnerability, given that other specific aggravating features (such as the extent of violence used) are already within the scope of section 9(3), and that children's defencelessness and vulnerability are the essence of what makes these offences more serious.
>
> The new aggravating factor will support courts in setting a higher sentence than might previously have been the case through its former treatment as a general aggravating feature. It will support courts' treatment of these offences as more serious and therefore deserving of more severe punishment. It will also meet the sentencing purposes of deterrence and denunciation — sending a clear message to the community that violence against children of any kind is wrong and will not be tolerated.

We understand that QSAC's final report does not specifically exclude application of this provision to a child who is convicted of the manslaughter of a child under 12 years old. However, the primary conduct contemplated by QSAC's final report involves offending by an adult against a child.

It is important to note that a child who is convicted of this type of offending, might themselves also be the victims of abuse and neglect. As such, children who commit these offences might also be defenceless and vulnerable and therefore worthy of protection. The effect of imposing clause 4 on a child would run contrary to the Charter of youth justice principles contained within schedule 1 of the *Youth Justice Act 1992*.

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We note that the cases of children who commit manslaughter of children under 12 are extremely rare and we expect that this provision will not be utilised. In cases where a child is convicted of what might be classified as the manslaughter of a child under 12 years, the sentencing judge already has a range of serious penalties that he or she has the discretion to impose. Therefore, this provision has no utility.

The Society strongly urges the removal of clause 4 from the Bill.

2. Clause 5 - Insertion of new ss 263A and 263B

Clause 5 seeks to insert new sections 263A and 263B into the *Youth Justice Act 1992*. These provisions do not appear to have the same urgency as the other provisions contained within the Bill. Taking into consideration the significant privacy issues, we would support a deferment of these provisions to allow further consultation and the development of the guidelines. In our view, these provisions should only be implemented once the guidelines and finalised and operational safeguards are in place.

3. Clause 7 - Amendment of sch 1 (Charter of youth justice principles)

Clause 7 seeks to amend schedule 1 of the *Youth Justice Act 1992*. The Society supports this clause and the amendment of the Charter of youth justice principles to include that proceedings should be finalised as soon as practicable and that the youth justice system should give priority to proceedings for children remanded in custody.

4. Clause 10 - Replacement of s 48 (Decisions about bail and related matters)

Clause 10 seeks to replace section 48 of the *Youth Justice Act 1992*. The Society supports proposed section 48(2) and the restatement of the youth justice principle that detention should be a last resort.

In relation to proposed sections 48AA (matters to be considered in making particular decisions about release and bail) and 48AB (promotion of terrorism and references to terrorist acts), the Society's position in relation to bail for children and young people accused of terrorism offences and subject to Commonwealth control orders is outlined in the Society's submission to the Legal Affairs and Community Safety Committee on the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 dated 13 December 2018 (**attached**).

We also suggest that all matters relating to terrorism be confined to one section of the legislation and that references to terrorism be relegated to the end of those sections.

5. Clause 12 - Insertion of new s 48B

Clause 12 seeks to insert new section 48B after section 48A in the *Youth Justice Act 1992*. The Society supports this clause and the requirement for a court or police officer to provide reasons for decisions to keep or remand children in custody.

6. Clause 13 - Replacement of s 49 (Arrested child must be brought promptly before the Childrens Court)

Clause 13 seeks to replace section 49 (arrested child must be brought promptly before the Childrens Court) of the *Youth Justice Act 1992*. The Society supports the policy intention behind clause 25 and agrees that a child must be brought before the Childrens Court as soon as practicable and within 24 hours after the arrest. However, we seek clarification of the term "as soon as practicable" and how this will be implemented in practice. Will a child arrested on Saturday appear before a court on a Sunday?

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7. Clause 16 (insertion of new ss 52A and 52B) and clause 21 (amendment of s 193 (Probation orders—requirements)

The Society supports the clarification that a tracking device cannot be included as part of a grant of bail or as a requirement for a probation order for a child or young person.

8. Clause 20 - Amendment of s 151 (Pre-sentence report)

Clause 20 seeks to replace section 151 (pre-sentence report) of the *Youth Justice Act 1992*. The Society supports this clause but is concerned about the removal of the 15-day timeframe for the provision of a pre-sentence report. In this regard, we propose that the inclusion of an upper time limit be considered, in order to ensure that any delays in the provision of pre-sentence reports.

We note that proposed section 151(1A) states, "before making the order, the court must consider whether a pre-sentence report is the most efficient and effective way to obtain information relevant to the sentencing of the child." This suggests that the court may rely on oral addendums to obtain information relevant to the sentencing of the child. The Society strongly suggests that the use of oral addendums be very carefully reviewed. In our view, oral addendums should only be used if the child's legal representative is made fully aware of what will be said. If this convention is not adhered to, the child's legal representative would be unable to obtain instructions from their client and a child would be unable to contest what is said. If there was a material impact on the sentence imposed, this would have a serious and significant impact on the child's ability to obtain natural justice.

9. Clause 43 - Amendment of s 421 (Questioning of children) [this section has been amended]

Clause 43 seeks to amend section 421 of the *Police Powers and Responsibilities Act 2000* (*PPRA*).

The Society was very supportive of the previously proposed insertion of new section 392A of the PPRA. We maintained that access to legal representation for children and young people is essential. In our view, for the provision to be effective would require the proper funding of the legal assistance sector, Aboriginal and Torres Strait Islander Legal Service and Legal Aid Queensland to meet these service needs. We asserted that access to legal representation should be prompt and before a child has been questioned by the police. We also noted that it would be useful for children and young people to have access to the same lawyer as children and young people develop relationships of trust with their legal practitioners.

The Society is concerned about the abandonment of previously proposed section 392A of the *PPRA*. We understand that this provision has been replaced with the amendment to section 421 of the *PPRA*. New subsection (1A) to section 421 of the *PPRA* is welcome as it provides an additional duty on the Queensland Police Service to notify a lawyer where a child is in custody and sought to be questioned. However, we hold several concerns about the scope of this provision in addressing the matters raised which led to this section being considered.

First, section 414 of the *PPRA* provides that part, including section 421, only applies to indictable offences. Meaning for any summary offences, this protection will not apply.

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Secondly, the use of the term 'legal aid organisation' is problematic. Legal Aid Queensland, are not a 'legal aid organisation'. Under schedule 6 of the *PPRA* 'legal aid organisation' is defined, exhaustively, to refer to an organisation 'declared under a regulation to be an organisation that provides legal assistance to Aboriginal people and Torres Strait Islanders'. The *PPRA* in addressing that only lists ATSILS, no other organisations. Therefore, Legal Aid Queensland should also be include.

Finally, the use of the terms 'attempt to notify' are not defined. Where there is such a requirement, there is little evidence to suggest that this requirement is implemented or enforced. Hence, the regime that was being considered under the section 392A, whereby at least the Queensland Police Service would be obliged to record their attempts at contact. A similar obligation here would be a positive step, for what assistance it may provide.

The Society looks forward to being involved in the law reform process.

If you have any queries regarding the contents of this letter, please do not hesitate to contact the Legal Policy team by phone on (07) [redacted] or by email to [redacted]

Yours faithfully

Bill Potts
President

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13 December 2018

Our ref: BDS-DK:CrLC

Committee Secretary
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Parliament House
George Street
BRISBANE QLD 4000

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

Dear Committee Secretary

Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018

Thank you for your letter dated 21 November 2018 and the opportunity to provide comments on the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 (the **Bill**) and for granting a short extension of time by which to provide our comments. The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

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 proposed amendments. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles, which we have not identified.

The QLS Children's Law and Criminal Law Committees who have substantial expertise and practical experience have compiled this response. With respect to the Bill, we raise three main areas of concern:

- Reversal of the statutory presumption of bail for any adult, child or young person previously convicted of a terrorism offence or who are, or have been, subject to a control order made under the Commonwealth Criminal Code (clauses 4-6, 8-9 regarding adults, and clauses 26- 27 regarding children).
- Presumption against an order for parole being made by the Parole Board Queensland for persons who have demonstrated support for, or links to, terrorism activity unless there are exceptional circumstances (clauses 13-16).
- Presumption against the release of children and young people from detention to supervised release orders after serving 70% of the period of detention, unless a sentencing court makes an order for earlier release after serving between 50% and 70% of the detention period (clause 30).

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1. Introductory comments

The Queensland Law Society supports cogent, evidence-based and proportionate legal responses to the threat of terrorism. We understand that counter-terrorism legislation must strike a balance between protecting the community and preserving fundamental principles of law. Preservation of the rule of law is of utmost importance. Failure to protect long-standing and established criminal law and children's law principles, especially regarding the deprivation of an adult or child's liberty, must not be taken lightly.

The Bill seeks to overturn long-standing principles of law regarding bail and parole. The proposed amendments are broad, susceptible to abuse, and may impinge on the rights and liberties of Queenslanders. QLS remains concerned that the overturning of well-established legal principles that preserve individuals' rights and liberties in the context of counter-terrorism could lead to the adoption of extraordinary measures in other areas of criminal and children's law.

The Society considers that the legislative amendments proposed in the Bill are not justified. There is no data or evidence to support the view that the current counter-terrorism regime is insufficient to deal with terrorist threats. We understand that these proposals form part of a Council of Attorneys General (COAG) agreement and other states have passed legislation to effect this commitment. However, the Society is not in a position to support these reforms.

2. Reversal of the presumption in favour of bail

2.1 Introductory comments regarding the reversal of the statutory presumption of bail

We understand that there are proposed amendments to the *Bail Act 1980*. These include a reversal of the statutory presumption of bail for any adult person previously convicted of a terrorism offence or who are, or have been, subject to a control order made under the Commonwealth Criminal Code. These amendments are largely similar to those proposed in the *Youth Justice Act 1992*, which governs the children's law system in Queensland.

The Society objects to the proposed reversal of the statutory presumption of bail in the *Bail Act 1980* and the *Youth Justice Act 1992*.

First, the proposed reversal does not accord with fundamental legislative principles. Section 4 of the *Legislative Standards Act (1992)* provides the Queensland Government with fundamental principles relating to the creation of legislation that underlie a parliamentary democracy based on the rule of law. Bail is a fundamental part of a democratic society and is an expression of the right to liberty. Any decision regarding the granting of bail to a defendant raises the questions fundamental to our justice system: a person's right to the presumption of innocence and to liberty.[1] Incursions on this right must not be taken lightly. In recognition of this importance, the fundamental legislative principles require that legislation does not reverse the onus of proof in criminal proceedings without adequate justification. Reversal of the legal burden of proof arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.

Secondly, there has been no persuasive data or evidence to justify the reversal of the onus of proof or that the current bail regime is inadequate. Furthermore, under the existing provisions of the *Bail Act 1980*, if a person is a risk of committing terror offences, the court will find that

[1] Collins, K. (2000), Queensland Bail Laws. *Queensland Parliamentary Library: research publications and resource section.*

they are an unacceptable risk of committing offences and they will be remanded in custody. Therefore, the intended consequence of this legislation is to imprison people who the court would otherwise assess to be an acceptable risk with safeguards imposed by conditions. Therefore, there is no evidence to suggest our current bail standards are not sufficient to protect the community from such offenders.

2.2 *Bail Act 1980 provisions*

Clause 8 – Amendment of s 16 (Refusal of bail)

Clause 8 of the Bill seeks to amend section 16 of the *Bail Act 1980*, which deals with the refusal of bail. The proposed amendment requires the court to consider certain factors in determining bail matters. These include:

> (g) any promotion by the defendant of terrorism;
>
> (h) any association the defendant has or has had with—
> (i) a terrorist organisation within the meaning of the Criminal Code (Cwlth), section 102.1(1); or
> (ii) a person who has promoted terrorism.

Section 16(2) of the *Bail Act 1980* deals with the refusal of bail. Section 16(2)(b) of the *Bail Act 1980* states that:

> (2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court or police officer shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of this provision, to such of the following considerations as appear to be relevant—
>
> (b) the character, antecedents, associations, home environment, employment and background of the defendant;

In our view, the existing requirements in section 16(2) of the *Bail Act 1980* has sufficient scope for any consideration of a defendant's associations or links to terrorist activity. Therefore, in our view, clause 8 of the Bill is unnecessary.

The Society also considers that the criteria listed in clause 8 of the Bill are vague, overly broad and may capture conduct and associations that do not amount to terrorist activity. It is also difficult to determine, on a practical level, whether a bail applicant and their legal representative will have access to the broad scope of the evidence being considered by the court. It will be difficult for a person to challenge a bail decision or demonstrate that they do not pose a risk if they are unaware that they are considered to have links, associations or affiliations with terrorism or persons or groups advocating support for terrorist acts. The effect of clause 8 will be to detain adults and young people whom the court would normally order a grant of bail.

Clause 9 – Insertion of new s 16A

Clause 9 of the Bill seeks to insert a new section 16A(1) into the *Bail Act 1980*. Proposed section 16A(1) deals with refusal of bail for defendants convicted of terrorism offences or subject to Commonwealth control orders. Clause 9 states:

> (1) This section applies in relation to a defendant if—

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(a) the defendant—
  (i) has previously been convicted of a terrorism offence; or
  (ii) is or has been the subject of a Commonwealth control order; and
(b) the defendant is an adult.

In our view, section 16 of the *Bail Act 1980* is comprehensive enough to encompass situations contemplated by clause 9 of the Bill. More specifically, we consider that section 16(1)(a)(ii) of the *Bail Act 1980* is broad enough to apply to defendants who have previously been convicted of a terrorism offence or the subject of a Commonwealth control order. Section 16(1)(a)(ii) of the *Bail Act 1980* permits a court or police officer authorised under the *Bail Act 1980* to refuse a grant of bail if the court or police officer is satisfied

(a) that there is an unacceptable risk that the defendant if released on bail—

  (i) would fail to appear and surrender into custody; or
  (ii) would while released on bail—

    (A) commit an offence; or
    (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or

Therefore, the current provisions under the *Bail Act 1980* offer sufficient safeguards to protect the community from the release of potentially dangerous accused persons.

The Society is also concerned about proposed sections 16A(2) and 16A(3). These provisions state:

(2) Despite any other provision of this Act, a court must refuse to grant bail to the defendant unless the court is satisfied exceptional circumstances exist to justify granting bail.

(3) In considering whether exceptional circumstances exist to justify granting bail to the defendant, the court may have regard to any relevant matter.

The Society is concerned about the interference with the court's discretion to grant bail. The power to grant bail will be limited to a court and require an offender to satisfy that there are exceptional circumstances to justify a grant of bail.

2.3 *Youth Justice Act 1992 provisions*

Clause 26 – amendment of s 48 (Decisions about bail and related matters)

Section 48 of the *Youth Justice Act 1992* discusses decisions about bail and related matters. Clause 26 of the Bill seeks to amend section 48 of the *Youth Justice Act 1992*. Clause 26(2) of the Bill seeks to include further factors to section 48(3) of the *Youth Justice Act 1992* in determining bail for a child. These include:

(db) any promotion by the child of terrorism;
(dc) any association the child has or has had with a terrorist organisation, or with a person who has promoted terrorism, that the court or officer is satisfied was entered into by the child for the purpose of supporting the organisation or person—

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(i) in the carrying out of a terrorist act; or
(ii) in promoting terrorism;

In our view, section 48 of the *Youth Justice Act 1992* is comprehensive enough to encompass situations contemplated by clause 26 of the Bill. Section 48(3) of the *Youth Justice Act 1992* is exceptionally broad and mandates that:

> (3) The court or officer must have regard to any of the following matters of which the court or officer is aware—
>
> (a) the nature and seriousness of the offence;
> (b) the child's character, criminal history and other relevant history, associations, home environment, employment and background;
> (e) any other relevant matter.

Therefore, in our view, clause 26 is unnecessary.

Clause 27 – insertion of new s 48A

Clause 27 of the Bill proposes to insert a new section 48A into the *Youth Justice Act 1992*. Proposed section 48A deals with releasing children found guilty of terrorism offences or subject to Commonwealth control orders and states:

> (1) This section applies in relation to a child in custody in connection with a charge of an offence if the child—
>
> (a) has previously been found guilty of a terrorism offence; or
> (b) is or has been the subject of a Commonwealth control order
>
> (2) Despite any other provision of this Act or the *Bail Act 1980*, a court must not release the child from custody unless the court is satisfied exceptional circumstances exist to justify releasing the child.
>
> (3) In considering whether exceptional circumstances exist to justify releasing the child, the court may have regard to any relevant matter.

The Society is concerned with clause 27 and does not support the reversal of the statutory presumption in favour of bail for a child.

First, as seen in relation to our commentary on clause 26 of the Bill, the Society also considers that section 48 of the *Youth Justice Act 1992* is comprehensive enough to encompass situations contemplated by clause 27 of the Bill. Of note is the fact that section 48(3)(e) of the *Youth Justice Act 1992* empowers the court to take into account "any relevant matter". The explanatory notes to the Bill do not provide any justification or evidence to demonstrate that section 48 of the *Youth Justice Act 1992* has been inadequate.

Secondly, the reversal of the onus of proof will have significant adverse impacts on children and young people. Reversing the presumption of innocence for a child aged between 10 and 14 does not accord with section 29 of the *Criminal Code Act 1899,* which recognises the age and immaturity of children and young people. Again, no evidence of increased terrorist activity by children or young people has been provided to justify the reversal of the statutory presumption of bail. As such, this reversal of the onus of proof is likely to result in the imprisonment of children because of their parents' activities.

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Thirdly, issues raised in relation to clause 9 of the Bill and the requirement that "exceptional circumstances" are required to permit a grant of bail are also relevant to clause 27.

3. Creating a presumption against parole

3.1 *Corrective Services Act 2006 provisions*

Various amendments proposed to the *Corrective Services Act* creates a presumption against an order for parole by the Parole Board Queensland (**the Board**). The Society does not support these amendments for the reasons outlined below.

Clause 13 – Insertion of new ss 193B–193E

a) Proposed section 193B(1)

Clause 13 proposes the creation of new sections 193B–193E. The effect of the sections is to create a presumption against an order for parole being made by Parole Board Queensland for persons who fall into the categories specified in proposed section 193B(1). Proposed section 193B(1) states:

> 193B Deciding applications for parole orders made by prisoners with links to terrorism
>
> (1) This section applies in relation to a prisoner's application for a parole order if—
> (a) the prisoner has, at any time, been convicted of a terrorism offence; or
> (b) the prisoner is the subject of a Commonwealth control order; or
> (c) the parole board is satisfied the prisoner has promoted terrorism; or
> (d) a report in relation to the prisoner given by the commissioner under section 193E states there is a reasonable likelihood the prisoner may carry out a terrorist act and any of the following apply—
> (i) the prisoner has been charged with, but not convicted of, a terrorism offence;
> (ii) the prisoner has been the subject of a Commonwealth control order;
> (iii) the parole board is satisfied the prisoner is or has been associated with a terrorist organisation, or with a person who has promoted terrorism.
>
> (2) The parole board must refuse to grant the application under section 193(1) unless the board is satisfied exceptional circumstances exist to justify granting the application.

The Society does not support proposed section 193B for several reasons.

First, we consider that the Parole Board already has broad powers to amend, suspend or cancel parole orders by virtue of section 205 of the *Corrective Services Act 2006*. Section 205 of the *Corrective Services Act 2006* already obligates the Parole Board to take into account certain factors when deciding to amend, suspend or cancel a parole order, if the prisoner poses a serious risk of harm to someone else, or poses an unacceptable risk of committing an offence. Together with the requirement to give the prisoner an information notice and a reasonable opportunity to be heard, section 205 of the *Corrective Services Act 2006* already encompasses not only the objectives that clause 13 of the Bill is attempting to achieve, but affords the prisoner a greater level of fairness.

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Secondly, the requirement for exceptional circumstances to obtain parole as seen in proposed section 193B(2) will mean that most prisoners will have no hope of parole. This poses a danger to the administration of justice, as there is no incentive to co-operate with the authorities or plead guilty to offences. It is a disincentive to rehabilitation. It removes an incentive for good behaviour while in custody and will not be conducive to good order within the prisons. In essence, the proposal is to prevent the release of prisoners who would otherwise be assessed by the Parole Board as an acceptable risk.

Thirdly, the Society is concerned about proposed section 193B(1)(d)(iii) and the application of this provision to prisoners who have mere "associations". As noted in our comments on proposed section 193D(e), this will have the effect of keeping people in prison because of the activities and actions of their relatives.

b) Proposed section 193D

Clause 13 also proposes the addition of proposed section 193D. Proposed section 193D states:

> 193D Parole board may ask commissioner for reports about prisoners' links to terrorism
>
> The parole board may, by written notice given to the commissioner, ask the commissioner to give the board, for use under this division or division 5, a report in relation to any of the following matters—
>
> (a) whether a prisoner has, at any time, been convicted of or charged with a terrorism offence;
> (b) whether a prisoner is or has been the subject of a Commonwealth control order;
> (c) any promotion by a prisoner of terrorism;
> (d) the likelihood of a prisoner carrying out a terrorist act;
> (e) any association a prisoner has or has had with—
> (i) a terrorist organisation; or
> (ii) a person who has promoted terrorism

The Society is concerned with proposed section 193D.

In relation to proposed section 193D(a), the Society is concerned that this provision will apply to people who have previously been merely charged with an offence. That is, the regime will apply even if the person was exonerated. This is particularly relevant in Queensland where the test for charging an individual with an offence is the same as for arrest – reasonable suspicion alone.

Similarly, if a control order was imposed, but later realised to have been unnecessary, the restriction will also apply. Therefore, a person, once charged, regardless of whether the charges proceed or whether the person has been found guilty or innocent will be considered a terror suspect forever. This regime imposes legal consequences upon individuals not because of anything they have been proved to have done, but because they fell under suspicion at some time.

In relation to proposed section 193D(e) (analogous to our comments on proposed section 193B(1)(d)(iii)), this would apply to prisoners who have family "associations". Essentially, the

proposal will have the effect of keeping people in prison because of the activities and actions of their relatives.

Clauses 14 to 16 – Amendment of s 205, 208A, 208B

Clause 14 seeks to amend section 205 of the *Corrective Services Act 2006* by amending proposed section 205(2) to allow the Parole Board to

> (d) suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order poses a risk of carrying out a terrorist act.

In our view, the Parole Board already has the power to suspend or cancel a parole order by virtue of current section 205(2)(iii) of the *Corrective Services Act 2006* which states:

> (2) A parole board may, by written order—
> (a) amend, suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order—
> (iii) poses an unacceptable risk of committing an offence;

Therefore, the Society considers that clause 14 is unnecessary.

Similarly, we consider that clauses 15 and 16 are also unnecessary as adequate powers are contained in sections 208A and 208B of the *Corrective Services Act 2006*, respectively.

3.2 *Youth Justice Act 1992*

Clause 30 – Amendment of s 227 (Release of child after service of period of detention)

Clause 30 of the Bill seeks to amend section 227 of the *Youth Justice Act 1992*. Section 227 of the *Youth Justice Act 1992* states:

> 227 Release of child after service of period of detention
>
> (1) Unless a court makes an order under subsection (2), a child sentenced to serve a period of detention must be released from detention after serving 70% of the period of detention.
>
> (2) A court may order a child to be released from detention after serving 50% or more, and less than 70%, of a period of detention if it considers that there are special circumstances, for example to ensure parity of sentence with that imposed on a person involved in the same or related offence.
>
> (3) If the child is entitled under section 218 to have a period of custody pending the proceeding (the custody period) treated as detention on sentence, the period before the child is released under this section must be reduced by the custody period.
>
> Example—
>
> C is sentenced to 10 weeks detention. C spent 2 weeks on remand before sentence. The chief executive must make a supervised release order releasing the child 5 weeks after sentence, which is 70% of 10 weeks with a further reduction of 2 weeks.

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Clause 30 states:

> (2A) However, a court may not make an order under subsection (2) if—
> (a) the child has, at any time, been found guilty of a terrorism offence; or
> (b) the child is the subject of a Commonwealth control order; or
> (c) the court is satisfied the child has promoted terrorism.

The explanatory notes in relation to clause 30 of the Bill states:

> Section 227 is amended to insert new section (2A) which provides that a court may not make an order that a child be released from detention after serving between 50 percent and 70 percent of a period of detention, if the child has, at any time, been found guilty of a terrorism offence; or is the subject of a Commonwealth control order; or if the court is satisfied the child has promoted terrorism. This amendment creates a non-release period by limiting the operation of section 227. A court sentencing a child for an offence cannot reduce the period of detention to less than 70 percent of the period of detention in those circumstances.

Therefore, clause 30 removes the discretion of the court to release the child if the child has a conviction for a terrorism offence, is the subject of a control order, or has 'promoted terrorism'. This is an undue fetter on the court's power to impose a just sentence based on cogent evidence, and takes away the flexibility in the sentencing and detention of a young person.

The Society opposes the proposal of presumption against release of children from detention to supervised release orders after serving 70% of the period of detention, unless a sentencing court makes an order for earlier release after serving between 50% and 70% of the detention period.

The Society considers that the imposition of a mandatory non-parole period for children is an undue fetter on the Court's power to impose a just sentence.

The view of the Society in relation to mandatory sentencing is well established. In accordance with this view, the Society has been a long-standing advocate for judicial discretion. The reasons for our support for judicial discretion are based on cogent evidence and are clearly detailed in our mandatory sentencing paper.[2] In line with our opposition to mandatory sentencing, we called for a commitment to refrain from the creation of new mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes in our 2015 and 2017 Call to Parties Statements.

It is in line with this position, the Society reemphasises the need to maintain flexibility in the sentencing process when considering sentencing and detention of a young person. It is essential that judicial discretion be maintained for sentencing in all youth criminal matters, including those arising from alleged terrorist activity. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case. A civilised society should put its trust in judicial officers to use their discretion based on individual circumstances.

As noted in our policy position, the public perception of the appropriateness of a sentence changes as additional information about a matter is provided. A study established by Her

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[2] Accessible at: http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper.

Excellency Professor the Honourable Kate Warner AC from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case in which they were involved. The jurors, who were not informed of the sentence imposed by the judge in the case, were asked what sentence they would impose. More than half of the jurors surveyed indicated they would have imposed a more lenient sentence than the trial judge imposed. When subsequently informed of the actual sentence imposed, 90% said that the judge's sentence was (very or fairly) appropriate.

4. Concluding comments

The Society, as a long-standing advocate for fundamental legislative principles and judicial discretion, does not support the manner in which the Bill infringes upon these well-established legal doctrines. Legislation should not reverse the onus of proof in criminal proceedings and pose a potential danger to the administration of justice, without persuasive data or evidence to justify why the current bail and parole regimes are inadequate.

If you have any queries regarding the contents of this letter, please do not hesitate to contact QLS Legal Policy on (07) [redacted] or by email to [redacted].

Yours faithfully

Ken Taylor
President