

21 January 2016

Your ref Youth Justice and Other Legislation Amendment Bill 2015

Our ref 337-16- 2015 YJ

The Research Director  
Legal Affairs and Community Safety Committee  
Parliament House  
Brisbane QLD 4000

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Dear Research Director

### **Youth Justice and Other Legislation Amendment Bill 2015**

Thank you for the opportunity to provide comments on the Youth Justice and Other Legislation Amendment Bill 2015. The Society acknowledges that the Bill implements a pre-election commitment of the Government to repeal non-evidenced based amendments to the *Youth Justice Act 1992*. The Society welcomes the sentiments expressed by the Attorney-General in her introductory speech on the first reading of the Bill on 1 December 2015 and agrees that:

“The government’s commitment to repeal the 2014 retrograde reforms reflects international evidence that increasing the severity of punishment is ineffective in reducing recidivism particularly by children and young people. Repealing these reforms will serve to reduce involvement of children and young people in the justice system rather than lead to their future entrenchment within it.”

The Society commends the introduction of this Bill and looks forward to the second stage of reforms to repeal legislation relating to open proceedings of the Children’s Court and the automatic transfer to adult correctional facilities of 17year olds who have at least six months left to serve in detention. To that end the Society supports repealing the automatic transfer of all 17 year olds to adult prisons in order to bring Queensland in line with all other Australian states and territories and in accordance with the Convention on the Rights of a Child.

This response has been compiled with the assistance of the Queensland Law Society’s Children’s Law Committee. Please note that in the time available to the Society and the commitments of our committee members, this submission is not intended to be an exhaustive review of the bill.

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**Specific comments on the Bill**

**1. Clause 16 Amendment of s150 (Sentencing principles) and Clause 26 – new s208 Detention must be only appropriate sentence**

Clause 16 includes amendments so that it is one of the special conditions for the court that “a detention order should be imposed only as a last resort and for the shortest appropriate period.” Clause 26 inserts a new clause that detention must be the only appropriate sentence and that the Court has the discretion to make a detention order against the child after considering all available sentences, and being satisfied that no other sentence is appropriate in the circumstances. The Society supports the amendments, the principle of detention as a last resort and that young people should spend the shortest period on remand necessary in the circumstances.

The Society considers that this principle does not prohibit a court from ordering a custodial sentence but rather prioritises non-custodial avenues. The amendments recognise the common law position that detention should be as a last resort and doesn't prevent the courts from ordering a custodial sentence where appropriate in the circumstances. For example in *R v Pham and Ly*<sup>1</sup> Lee CJ at CL stated that:

It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their homes.<sup>2</sup>

In Queensland, in the matter of *R v AAQ*,<sup>3</sup> a youth pleaded guilty to three serious offences: one count of rape and two counts of indecent treatment of a child under 16 years of age. The youth was 13 years old when he committed the first two indecent offences and 15 years old for the rape offence. At the time of sentencing the court at first instance and then the Court of Appeal referred to s150, *Youth Justice Act 1992* and specifically noted: “a detention order should be imposed only as a last resort and for the shortest appropriate period.”<sup>4</sup> The Court of Appeal then found that:

In all the circumstances of this case outlined by Gotterson JA in his reasons, the primary judge was entitled to conclude that detention was the only appropriate sentence and that this was the shortest justifiable period of detention.<sup>5</sup>

This Queensland 2012 case demonstrates that the courts must consider this principle, but also have the power to order detention as a last resort where the nature of the offence and circumstances warrant the order. So that it is clear, the Society recommends that the explanatory note be amended to expressly state that the common law position and principle that detention is as a last resort does not prevent the courts from ordering a custodial sentence where appropriate in the circumstances.

<sup>1</sup> *R v Pham and Ly* (1991) 55 A Crim R 128 at 135.

<sup>2</sup> *R v Pham and Ly* (1991) 55 A Crim R 128 at 135.

<sup>3</sup> *R v AAQ* [2012] QCA 335

<sup>4</sup> *R v AAQ* [2012] QCA 335 at para [1].

<sup>5</sup> *R v AAQ* [2012] QCA 335 at para [2].

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The Society is therefore supportive of the amendments in clause 16 and clause 26, particularly as the amendments in clause 16 also bring Queensland in line with other Australian states and territories.

### **Recommendation 1**

That the explanatory note be amended to expressly state that the common law position and principle that detention is as a last resort does not prevent the courts from ordering a custodial sentence where appropriate in the circumstances.

### **2. Clause 4 and Schedule 1 – Amendment of s13 (Police officer’s power of arrest preserved in particular general circumstances)**

The Society is supportive, in principle, of clause 4 and Schedule 1: “that a child should be detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least time that is justified in the circumstances.”

### **3. Clause 8 – Omission of pt5, div 2 (Offence committed while on bail)**

The omission of this clause means that a finding of guilt for a further offence committed while on bail is no longer itself an offence for a child. The Society notes that in the Children’s Court of Queensland case of *R v S; R v L*<sup>6</sup> the Court held that the children could be convicted but not punished for the second offence based on the double punishment provision in s 16 of the Criminal Code (Qld) and the ‘same punishable acts or omissions test’.<sup>7</sup> The Society therefore supports the repeal of part 5, division 2.

### **4. Clause 9 – Amendment of s62 (Childrens Court judge), Clause 14 (Reviews of sentences by Childrens Court judge) and Clause 40 (Amendment of s245 (Court’s power on breach of a community based order other than a boot camp order, conditional release order or boot camp order)**

The Society is supportive of the amendments to vest the Childrens Court Judge with the jurisdiction to review a sentence order of a Childrens Court magistrate (which includes a review application). The availability of sentencing reviews will ensure consistency of sentencing in Childrens Courts throughout the state and expand the jurisdiction to include Magistrates’ decisions in relation to breaches of community based orders. The Society considers this to be an excellent initiative.

With respect to clause 40 it appears that the drafting does not in fact extend the application of sentence reviews to breach matters. This is because most breach matters (ie action taken under s245 or s246) are not sentence orders for the purpose of the Act. The policy expansion to include breach matters is an excellent initiative, however the drafting needs to be revised to ensure it achieves its purpose. The Society notes this could be achieved by either amending the definition of sentence

<sup>6</sup> [2015] QChC 3, [17]-[22].

<sup>7</sup> *R v Gordon; ex parte Attorney-General; Hutchinson & Nobile* 2015

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orders to include those breach matters listed above or by including a section such as s252G.

The Society also notes that sentence reviews apply only to Magistrates and not decisions of justices (who can hear and determine simple summary pleas). The Society considers it would be in the best interests of the child for these decisions to be subject to the same review process.

### **Recommendation 2**

That clauses 40 and 41 be reviewed to ensure the application of sentence reviews extend to breach matters and consider amending the definition of sentence orders to include those breach matters listed above or by including a section such as s252G.

Further that the sentence review process also applies to the decisions of justices (who can hear and determine simple summary pleas.)

### **5. Clause 31 – Omission of pt7, div 10, sdivs 2A and 2B (Boot camp orders)**

The Society is supportive of the amendments which will discontinue the boot camp programs, as these programs were not supported by evidence in relation to their effectiveness. The Society is in favour of sentencing options and programs to reduce recidivism, which are supported by evidence.

### **6. Clause 32 – Amendment of s234 (Court may allow publication of identifying information of first-time offender) and Clause 52 – Amendment of s301 (Prohibition of identifying information about a first-time offender)**

Clauses 32 and 52 amend the *Youth Justice Act* to state that a person must not publish identifying information about a child, however the Courts have a discretionary power to order that identifying information about a child may be published if the court considers it would be in the interests of justice to allow the publication, having regard to certain criteria. The Society supports these amendments in principle as it ensures these principles apply to all children, not just first time offenders. These amendments also importantly removes the category of "first time offenders" and ensures all children and young people do not have identifying information published about them, subject to the Court's discretionary power.

### **7. Clause 55 – Subdivision 5 – Other transitional provisions**

The following proposed sections are retrospective and are intended to apply whether sentencing/review/ an order was made "before or after commencement":

- s382 Childhood finding of guilt;
- s383 Sentencing review;
- s384 Sentencing principles; and

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- s385 Publication of identifying information about a child.

The Society's view with respect to retrospectivity is that it should not apply unless there are safeguards in place and that the rights, duties and liberties of persons are not adversely affected. The Society notes that the retrospectivity in the proposed clauses above are intended to apply to the benefit of children and young people before the justice system. To that end, whilst the Society is always cautious regarding the use of retrospective clauses in legislation, in this case the Society is supportive of the transitional provisions.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Ms Louise Pennisi on (07) [REDACTED]

Yours faithfully



Bill Potts  
President