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Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
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To Whom It May Concern,

***Law Reform Amendment Bill 2011* (Qld)**

The Australian Lawyers Alliance (**"ALA"**) welcomes the opportunity to provide a Submission to the Legal Affairs, Police, Corrective Services and Emergency Services Committee on the *Law Reform Amendment Bill 2011* (Qld)("the Bill").

The purpose of the legislation

The Explanatory Notes describe that the objectives of the *Law Reform Amendment Bill 2011* are to:

> *'introduce* ***a new sentencing regime*** *of minimum standard non-parole periods for serious offences of violence and sexual offences and other substantive and technical amendments to Acts...'*[1].

However, we do not believe this 'new sentencing regime' can be justified as necessary, fair or in accordance with bedrock principles of the criminal justice system, including judicial discretion, procedural fairness and respect for human rights.

Executive summary

[1] *Explanatory Notes,* Law Reform Amendment Bill 2011, at 1.
http://www.legislation.qld.gov.au/Bills/53PDF/2011/LawReformAB11Exp.pdf

We believe these proposed changes will lead to:

- Miscarriages of justice, and adverse consequences especially for those vulnerable in society, including those with mental illness and from Indigenous backgrounds;
- Reduced opportunities for rehabilitation and increases in reoffending rates;
- Increase on financial burden being borne by the taxpayer.

These proposed changes also undermine foundational legal principles of judicial discretion and the necessity of a proper rationale for sentencing.

Outline of the changes

Currently, the *Corrective Services Act 2006* (Qld) provides the parole eligibility date for serious violence offences, at 80% of the prisoner's term of imprisonment; or 15 years.[2] The proposed amendment, proposed s182A will apply to prisoners who are serving a term of imprisonment for a serious offence, and the prisoner will be eligible for parole after serving 65% of the term of imprisonment.

The above change will also lead to subsequent changes in the *Penalties and Sentences Act 1992* (Qld).

We are concerned about this proposed change for a number of reasons.

The nature of the offence

The stated purpose provides that the 'new sentencing regime' will be applied to serious offences of violence and sexual offences. There is a minimum parole eligibility date set for serious violent offences under the current legislation. It is set at 80% of the prisoner's term of imprisonment, or 15 years.[3] A serious violent offence is defined in s161A of the *Penalties and Sentences Act 2006*, and includes those offences where an individual has been sentenced to 10 or more years of imprisonment. Therefore, serious offences of violence

[2] See *Corrective Services Act 2006* (Qld), s182(2)(a),(b)
[3] See *Corrective Services Act 2006* (Qld), s182.

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already have a very high benchmark set, establishing a minimum parole eligibility at 8 years as an absolute minimum available for those charged with 10 years imprisonment.

As a contrast, the proposed legislation suggests creating a new sub-type of offence: a 'serious offence'. At present, the category of 'serious offence' does not exist. A serious offence will essentially be the same as a serious violence offence, but where an individual has been sentenced to 5 to 10 years of imprisonment. This will, essentially, group together offences based on the number of years imprisonment.

Individuals who have been sentenced to 5 years of imprisonment may have committed offences like theft, or serious motor vehicle offences. Some of the offences that these changes will impact upon include: killing an unborn child; carrying or sending dangerous goods in a vehicle; wounding; endangering life of children by exposure; attempted robbery; burglary; and unlawful assembly.[4]

The reason that they will have received a sentence of 5 years, rather than 10 years, will be because of a number of factors, including their culpability, their likelihood to reoffend, background circumstances such as mental illness, whether they were induced into the action. Judges will have exercised their discretion to sentence for up to 10 years after they have gone through the careful exercise of weighing up personal factors alongside detererrence..

Ultimately, there is a significant distinction between offences that carry a less than 10 year imprisonment term, and a 10 year imprisonment term. That distinction is there for a reason.

Removal of any of the flexibility within the criminal justice system, means that the system becomes less able to provide the appropriate charge and sentence for the individual, and undermines these foundational reasons as to why individuals are being charged with an offence in the first place. Ultimately, being too heavy handed with punishing the offender can contribute to upsetting the delicate balance in reducing and preventing crime.

[4] See *Penalties and Sentences Act 1992* (Qld), Schedule 1.

Under existing legislation, no definition exists of 'serious offence'. The proposed legislation suggests defining 'serious offence'[5] and also suggests imposing minimum standards of non-parole for these offences at the same time. This is problematic for a number of reasons:

1. The definition of 'serious offence' is unnecessary and arbitrary, and likely to lead to miscarriages of justice.

2. Establishing non-parole periods for a group of offences will lead to inconsistency.

3. This leaves the *Penalties and Sentences Act 1992* (Qld) open to legislative change for any offence to fall into the category of 'serious offence', through adding the offence to Schedule 1 of the *Penalties and Sentences Act 1992*, thus becoming subject to the minimum standard non-parole provisions. This lays a dangerous legislative framework for the future.

Serious offence

A serious offence will be defined in new amendments to the *Penalties and Sentences Act 1992* (Qld), under s161BA which provides:

> *'An offender is convicted of a serious offence if—*

[5] *'An offender is convicted of a serious offence if—*

> *(a) the offender is* ***convicted on indictment*** *of an offence—*
> *(i)* ***against a provision mentioned in schedule 1****; or*
> *(ii) of counselling or procuring the commission of, or* ***attempting or conspiring to commit, an offence*** *against a provision mentioned in schedule 1;* ***and***
>
> *(b) the offender is* ***sentenced to 5 or more, but less than 10, years imprisonment for the offence****, calculated under section 161C;* ***and***
>
> *(c) the sentencing court* ***does not declare the offender to be convicted of a serious violent offence*** *as part of the sentence under section 161B;* ***and***
>
> *(d) the* ***sentencing court does not state under section 161BB(2) that it has decided not to declare the offender to be convicted of a serious offence***

See *Law Reform Amendment Bill 2011* (Qld), cl 123, at 52. This inserts s161BA into the *Penalties and Sentences Act 1992* (Qld).

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*(a) the offender is **convicted on indictment** of an offence—*
*(i) **against a provision mentioned in schedule 1**; or*
*(ii) of counselling or procuring the commission of, or **attempting or conspiring to commit, an offence** against a provision mentioned in schedule 1; **and***

*(b) the offender is **sentenced to 5 or more, but less than 10, years imprisonment for the offence**, calculated under section 161C; **and***

*(c) the sentencing court **does not declare the offender to be convicted of a serious violent offence** as part of the sentence under section 161B; **and***

*(d) the **sentencing court does not state under section 161BB(2) that it has decided not to declare the offender to be convicted of a serious offence.**[6]*

The provisions mentioned in Schedule 1 currently include s156A(1)(a), s161A(a),s161B(3)(a) and s161C(1)(c)(d), and a number of offences listed in the Criminal Code. The proposed amendments also recommend the insertion of the above section 161BA.

Automatic cancellation of parole release dates

The legislation proposes to insert the words 'serious offence' into s160E, which provides for automatic cancellation of parole release or eligibility dates when a court fixes another parole release date or parole eligibility date for the offender.[7]

It is hard to see how such an intrusion by the legislature into the proper domain of the judiciary is necessary to achieve the policy objective of reducing crime.

B. Mandatory sentencing

The nature of mandatory sentencing

The Australian Lawyers Alliance is strongly opposed to mandatory sentencing in any form. Minimum standard non-parole periods are, in character, effectively, a form of mandatory

[6] *Law Reform Amendment Bill 2011* (Qld), cl 123, at 52. This inserts s161BA into the *Penalties and Sentences Act 1992* (Qld).
[7] See *Penalties and Sentences Act 1992* (Qld, s160E(1)(b)9i) and (2)(b)(i)

sentencing, as it does not allow judges the discretion to alternative minimums of sentencing below the legislated standard.

Vulnerability, fairness and rehabilitation

Mandatory sentencing has the impact that it ultimately, discriminates against the vulnerable in society – especially the poor, mentally ill, and those with an indigenous background, as these groups are more likely to include contextual factors that a judge will look at in exercising their discretion.

As written previously by ALA National President Greg Barns:

> *There are many cases, particularly where, for example, an offender is young, has mental illness, or is Aboriginal, when it is appropriate to set a short non-parole period of imprisonment.*
>
> *This is because **jail for the vulnerable increases the chances they will be further harmed and will be more likely to commit a crime on release. It is also because to truly accord justice, a judge or magistrate has to be able to balance deterrence with rehabilitation**. Mandatory formulas eliminate this capacity.*[8]

The importance of judicial discretion

Allowing judicial discretion in sentencing is a crucial element of our criminal justice system.

Mandatory sentencing is currently causing great frustration for judges who are bound by mandatory sentencing provisions in relation to the *Migration Act 1958* (Cth). The ire and resulting frustration has driven judges to speak in the media about how they feel about being restricted in the sentences they can provide.

The frustration felt by the judiciary is likely to be aired again in the practical implementation of these proposed provisions.

Ultimately, judges are best placed to determine the non-parole period for individuals on a person-by-person basis, rather than a standard piece of legislation that treats every individual as the same. Each individual comes into the criminal justice system with a different

[8] Greg Barns, 'Jail formula locks in a big mistake', *The Courier-Mail,* 3 November2011, http://www.couriermail.com.au/ipad/jail-formula-locks-in-a-big-mistake/story-fn6ck620-1226183962250

background and circumstances, and needs to be acknowledged as such, if there is any hope of fulfilling goals of deterrence and rehabilitation for that individual, and their meaningful participation in society in the future.

Financial burden

The proposed legislation will carry a huge financial burden.

As Greg Barns has written previously:

> *According to the Department of Community Safety, in 2012, it is going to cost about $210 a day to house prisoners in Queensland and there are about 5500 prisoners in jails around the state. This means the daily cost to taxpayers is about $1.15 million. When the prison population increases as a consequence of mandatory minimum terms, then the cost to Queensland will increase from an already high base.*
>
> ***Between 2002 and 2009, spending on jails in Queensland rose 37 per cent. Imagine the rise if mandatory minimum sentences are introduced.***[9]

Less legal certainty

These reforms could also lead to less certainty in sentencing in Queensland. Judges seeking to use their discretion to sentence individuals may instead find offenders guilty of a lesser offence, or police may charge individuals with a lesser offence, as they are aware of the minimum standard non-parole period incurred by higher charges.

Essentially, less legal certainty, means more time and money wasted in Court, when more time and money could be invested in diversionary programs and other programs focus on rehabilitation and prevention.

The future of these reforms

These reforms, while intended to develop a new sentencing regime, are unnecessary, legally troubling, likely to impact on vulnerable groups in society, and likely to have adverse impact on the foundational principles of our criminal justice system, and in particular, preventing and deterring crime in Queensland.

[9] Greg Barns, 'Jail formula locks in a big mistake', *The Courier-Mail,* 3 November2011, http://www.couriermail.com.au/ipad/jail-formula-locks-in-a-big-mistake/story-fn6ck620-1226183962250

Our recommendation

We submit that all of the following proposed changes in the *Law Reform Amendment Bill 2011* be removed:

Part 8; definition of 'serious offence' in Clause 108; Clause 118; Clause 119; Clause 120; Clause 121; Clause 122; Clause 123; Clause 124; Clause 126(1) and (2).

We are happy to elaborate on any of the issues that we have raised.

Yours sincerely,

Greg Barns

National President

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