Police Powers and Responsibilities and Other Legislation Amendment Bill 2023

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Submission by Legal Aid Queensland

10 March 2023

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission regarding the Police Powers and Responsibilities and Other Legislation Amendment Bill 2023 (*'the Bill'*).

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997,* LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

This submission calls upon the experience of our lawyers in the Criminal Law Services Division, which is the largest criminal law legal practice in Queensland providing legal representation across the full range of criminal offences and is informed by their knowledge and experience.

Submission

Expansion of police drug diversion program

LAQ is supportive of increased diversionary options for adults and young people as proposed by the Bill, as a consistent move towards a more humane, just, and health-based response to minor drug offences.

Increases to maximum penalty generally

LAQ does not support broad-brush approaches to increasing maximum penalties. Such increases are often promoted as a basis for providing a 'strong deterrent' to offenders; as is the case in relation to increasing the maximum penalty for s 5 *Drugs Misuse Act 1986* (Qld),[1] and implicitly in relation to the introduction of the circumstance of aggravation for the evasion offence contained in s 754 *Police Powers and Responsibilities Act 2000* (Qld). However, deterrence is just one purpose for which a sentence may be imposed, and the weight to be given to any particular purpose of sentencing depends on the individual case.

[1] Explanatory Memorandum, Police Powers and Responsibilities and Other Legislation Amendment Bill 2023, 6.

An examination of any number of trafficking proceedings reveal that trafficking offences tend to involve circumstances involving the normalisation of drug use, mixing with drug users, and greed. Other factors may also include alcohol and mental impairments, generational offending and generational dysfunction, and drug addiction. For many of these defendants, while general deterrence is a necessary component of the sentence to be imposed, specific deterrence is often best achieved by conviction rather than length of imprisonment, and rehabilitation remains an important purpose.

As the Australian Productivity Commission has recently reported, "*there is evidence that the deterrence associated with conviction is actually higher than from incarceration*"[2] however the deterrent effect of imprisonment is difficult to estimate given the variety of factors, and to truly estimate the crime reduction results would require all possible factors capable of influencing crime or sentences to be held constant or controlled.[3]

Despite that caveat, there are some conclusions that can be drawn from a number of previous studies examining the relationship between sentence severity and deterrence, including:

- the probability of arrest or conviction consistently provides a meaningful level of general deterrence;[4]

  "*increasing arrest rates is likely to have the largest impact, followed by increasing the likelihood of receiving a prison sentence. Increasing the length of stay in prison beyond current levels does not appear to impact on the crime rate after accounting for increases in arrest and imprisonment likelihood. Policy makers should focus more attention on strategies that increase the risk of arrest and less on strategies that increase the severity of punishment.*[5]

- the perception or risk upon which deterrence depends does not change according to punishment levels[6]
- while a doubling of a sentence length may still provide a deterrent effect, the reduction in likelihood of the offender committing the crime is not diminished by the same margin.[7]

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[2] Australian Productivity Commission, *Australia's prison dilemma: a research* paper, (Report, October 2021) 49, citing Bun et al. (2020) 'Crime, deterrence and punishment revisited', *Empirical Economics,* vol 59, no 5, 2303-2333.

[3] Australian Productivity Commission, *Australia's prison dilemma: a research* paper, (Report, October 2021) 50.

[4] Australian Productivity Commission, *Australia's prison dilemma: a research* paper, (Report, October 2021) 50; see also Donald Ritchie, Sentencing Advisory Council '*Does Imprisonment Deter? A Review of the Evidence'* (Report, 2011),

[5] Wai-Yin Wan et al, 'The effect of arrest and imprisonment on crime' (2012) (158) *NSW Bureau of Crime Statistics and Research – Contemporary Issues in Crime and Justice*, 1.

[6] Donald Ritchie, Sentencing Advisory Council '*Does Imprisonment Deter? A Review of the Evidence'* (Report, 2011), 13, citing Gary Klek et al, 'The Missing Link in General Deterrence Research' (2005) 43(3) *Criminology* 623, 653.

[7] Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report (appendices), August 2019) Appendix J, 600 citing Steven N. Durlauf and Daniel S. Nagin, 'Imprisonment and crime: Can both be reduced?" (2011) 10(1) *Criminology & Public Policy* 13.

Increasing the maximum penalty of section 5 of the *Drugs Misuse Act 1986*

For the reasons outlined above, LAQ does not support a broad-brush approach to increasing the maximum penalty for trafficking in dangerous drugs. To do so inevitably increases the tariff for all being sentenced for this offence, including those who are more vulnerable and disadvantaged, who often experience drug addiction themselves, and who don't necessarily seek to profit from the illicit drug market, but rather feed any profits back into their own addiction.

When the *Drugs Misuse Act 1986* (Qld) was first enacted, trafficking in a schedule 1 drug was subject to a mandatory sentence of life imprisonment. Trafficking in a schedule 2 drug was punishable by life imprisonment.

In 1990 those penalties were amended to 25 years imprisonment for a schedule 1 drug, and 20 years for a schedule 2 drug. At the time of those amendments it was said:

> *"the reality is that one cannot fight the drug war with metal signs and paper Acts. What is needed is a police service which has the resources and the manpower to get out and find the Mr Bigs and the people who make their living out of other people's misery."*[8]

Subsequent amendments saw a singular maximum penalty of 25 years imprisonment irrespective of the drug.

LAQ considers there are already sufficient mechanisms in place which allow the Courts to impose sentences which adequately reflect the significant risks and harm that unlawful trafficking in dangerous drugs has on the community. These include:

- the serious violent offences scheme in the *Penalties and Sentences Act 1992* (Qld) means that for those convicted of trafficking in dangerous drugs and who receive a sentence of 10 or more years, they must serve at least 80% of their sentence before becoming eligible for parole. Such an order is discretionary for a sentence between 5 and 10 years.
- The serious and organized crime circumstance of aggravation in the *Penalties and Sentences Act 1992* (Qld) which imposes a mandatory cumulative term of imprisonment for those convicted (unless they have provided cooperation of significant use to a law enforcement agency in the investigation of or in a proceeding about a major criminal offence).

Such provisions have been used to effect, including in proceedings against a trafficker caught with 5kg of methamphetamine in a car park.[9] He received a 13-year sentence in relation to trafficking over a four-year period, after having pleaded guilty to that offence. In addition, he received a cumulative seven-year term, having been convicted following a trial in relation to the circumstance of aggravation of having done so as a participant in a criminal organisation. A co-offender received a sentence of 9 years imprisonment as the base component, with a seven-year

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[8] Queensland, *Parliamentary Debates*, Legislative Assembly, 20 March 1990, 460, T. M. Mackenroth, Minister for Police and Emergency Services.

[9] Vanessa Marsh, 'Queensland ice trafficking mastermind sentenced to 20 years' jail after McDonald's drug bust', *Courier Mail* (online, 13 October 2022) <https://www.couriermail.com.au/truecrimeaustralia/police-courts-qld/queensland-ice-trafficking-mastermind-sentenced-to-20-years-jail-after-mcdonalds-drug-bust/news-story/03fe01d1b29c5cd9b05978c1e269a8ec>

mandatory component to be served concurrently, and no order as to parole.[10] A further co-offender received a sentence of 9 years imprisonment in circumstances where co-operation had been provided.[11]

To increase the maximum penalty by and large, may also impact the effectiveness of provisions such as the circumstance of aggravation, which serves a dual purpose to encourage cooperation with law enforcement agencies.[12]

LAQ considers the existing provisions already allow for the imposition of a sentence which is reflective of the relative commercial nature of the offence where the defendant is a "Mr Big" or a person who makes their living out of other people's misery. To 'raise the tariff' as a whole will unjustifiably effect those involved in trafficking dangerous drugs who, themselves, are vulnerable and disadvantaged, who often experience drug addiction themselves, and who don't necessarily seek to profit from the illicit drug market, but rather feed any profits back into their own addiction.

Introduction of a circumstance of aggravation for the offence of evading police under section 754 of the *Police Powers and Responsibilities Act 2000*

LAQ does not support the introduction of a circumstance of aggravation to the evasion offence. Of particular concern is clause 15(2)(b)(v), which provides for the increased maximum penalty to be applied to persons who have relevant prior convictions. Unlike offences such as Contravention of a domestic violence order, contained in s 177 *Domestic and Family Violence Protection Act 2012* (Qld), which provide for the circumstance of aggravation to apply in circumstances where the previous conviction occurs within 5 years before the commission of the current offence, the proposed circumstance of aggravation does not provide for a like condition.

LAQ submits the provisions as currently drafted are inconsistent with the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), which provides for a rehabilitation period of 5 or 10 years and infringes upon a persons' rights to recognition and equality before the law[13] and not to be tried or punished more than once.[14]

LAQ remains concerned that the proposed circumstance of aggravation will have significant and disproportionate implications in relation to child offenders, including in increased rates of detention, where conditions have been, at times, described as 'cruel, inappropriate, and have served no rehabilitative effect'.[15]

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[10] R v Cutler (Supreme Court of Queensland, Ryan J, 9 March 2020).
[11] *R v TAS* [2021] QCA 49.
[12] Explanatory Memorandum, Serious and Organised Crime Legislation Amendment Bill 2016, 20.
[13] *Human Rights Act 2019* (Qld) s 15.
[14] Ibid, s 34.
[15] *R v TA* [2023] QChC 2, 5.