Queensland Law Society

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Research Director
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By Post and Email to: lacsc@parliament.qld.gov.au

Dear Research Director

**CRIMINAL LAW AMENDMENT BILL (NO. 2) 2012**

Thank you for providing the Society with the opportunity to comment on the *Criminal Law Amendment Bill (No. 2) 2012*.

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 and exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

The Society is pleased to note that it was consulted with respect to the amendments to the *Criminal Code, Drugs Misuse Act*, *Penalties and Sentences Act, Corrective Services Act,* and *Victims of Crime Assistance Act* aspects of the Bill prior to it being introduced into the House. Queensland Law Society has long advocated that good legislation is the product of good consultation. We are grateful to the Government for the opportunity to have contributed our views.

We make the following comments for your consideration.

**1. Clause 5 – Amendment to s29, *Bail Act 1980***

This amendment will mean that breach of a condition of bail to participate in a program is an offence with a maximum penalty of 40 penalty units or two years' imprisonment.

The Society considers that this amendment could result in disproportionately severe outcomes. We agree that treatment and rehabilitation of those convicted of offences is an important goal. However, we consider that failing to participate in a bail program (which can occur for a number of reasons) could result in the unnecessary criminalisation of people who have not yet been found guilty of the offence/s in question. This amendment may also increase the number of people on remand in custody, as well as significantly impact vulnerable groups such as those with drug or mental health issues, who may be more often referred to participate in programs.

## 2. Clause 7 – insertion of new s182A (parole eligibility date for prisoner serving term of imprisonment for drug trafficking offence)

This clause creates a mandatory minimum non-parole period of 80% of the sentence for drug trafficking.

The Society does not support the introduction of the proposed mandatory minimum non-parole period. The Society's long-held position is that sentencing should have at its core a system of judicial discretion exercised within the bounds of precedent. This is the most appropriate means by which justice can be attained on a case by case basis.

We consider that the practical reality of the implementation of a mandatory minimum non-parole period is that, in some cases at least, there will be a mandatory component of sentencing applied. We would object to the application of a mandatory minimum non-parole period constituting a de facto mandatory sentencing regime.

*Public confidence*

The Explanatory Notes to the Bill state the following with regard to introducing the mandatory minimum non-parole period:

> *"In turn, the new scheme should enhance public confidence in the criminal justice system by promoting consistency and transparency in sentencing."*

For years the Society has been concerned that important legislative reforms in this state have been based on a political desire to meet *"public opinion"* in circumstances where that term has been understood by reference to the media's construction of the concept. In the Society's view, the only appropriate means of truly assessing public opinion is by way of qualitative research done to a professional standard.

The Society believes that community members, *when they are properly informed*, are generally satisfied with sentencing outcomes. Much of the criticism of sentencing outcomes comes from people without a proper appreciation of either the facts or the purpose of sentencing. The research does not bear out the suggestion that there is true dissatisfaction with sentences imposed among those aware of all the relevant facts of each case. A study by Professor Kate Warner from the University Tasmania indicates that the perception of sentencing changes as additional information about a matter is provided. The study asked jurors (who were fully informed about the facts of the case) to assess the appropriateness of the judge's sentence. More than half the jurors surveyed would have imposed a more lenient sentence than the trial judge imposed. When the jurors were informed of the actual sentence, 90% said the judge's sentence was (very or fairly)

appropriate.[1] Where public opinion is concerned, the most appropriate response to concerns about criminal justice is education in sentencing and crime rates.

The Society does not favour any attempt to recast sentences in an effort to meet with community expectations, unless one can be satisfied that those community expectations have been determined on an accurate and justifiable basis.

*Consistency and transparency*

As highlighted above, the Explanatory Notes state the scheme sets out to "enhance public confidence in the criminal justice system by promoting consistency and transparency in sentencing". The Society considers that transparency would be better promoted by community education, the publication of sentencing reasons, and responsible media reporting, rather than the imposition of a mandatory minimum.

Furthermore, the Society notes that the aim of consistency must be in procedure and approach, not consistency in result. Mandatory minimum sentences impose a scheme which provides for consistency in results, without sufficient consideration of the individual merits of each case. The Society also considers the courts have a long and well established basis of sentencing by reference to the maximum penalties available and precedent cases. Section 9, *Penalties & Sentences Act 1992* provides guidelines in relation to the sentencing of offenders in Queensland with a non-exhaustive list of subjective and objective factors to be taken into account at the time of sentencing.

Therefore, the Society opposes the introduction of a mandatory minimum non-parole period for drug trafficking offences.

## 3. Clause 16 – insertion of new s469AA, *Criminal Code Act 1899*

This proposed section allows for a thing that was used to record, store or transmit an image of, or related to, the commission of the offence relating to wilful damage to be forfeited to the State. The Society is concerned that, whilst it is not an offence to record, store or transmit the image, a person may lose their property without fair compensation. We consider that this will be a severe punishment financially for some people.

## 4. Amendments to the *Drug Court Act 2000*

The Bill makes arrangements for the cessation of the Drug Court from 30 June 2013. The Society supports the Drug Court as an effective rehabilitative mechanism to address underlying causes for offending behaviour. We are therefore disappointed to see the abolishment of this court and urge the government to retain this significant aspect of the criminal justice system.

[1] Warner K, "Public judgement on sentencing: final result from the Tasmanian Jury Setencing Study." Trends and issues in crime and criminal justice no. 407, Australian Institute of Criminology, February 2011

**5. Clause 38 – amendment of s6, *Drugs Misuse Act 1986 (*Supplying dangerous drugs)**

The Society considers that there is an absence of empirical evidence to demonstrate why these amendments are required. In the Society's view, further research should be undertaken on the sentences which are currently being handed down and the factual basis for these sentences. This will:

- Highlight the range of conduct that is liable to attract sanction; and
- Provide detailed empirical evidence as to whether or not the increase of these sentences is warranted.

**6. Clause 47 – insertion of part 5A, *Penalties and Sentences Act 1992* (graffiti removal orders)**

The Society is opposed to mandatory sentencing regimes. We are therefore concerned with the proposal for mandatory graffiti removal orders to be imposed upon conviction of a graffiti offence. If this order is to be adopted, the Society suggests it should reflect existing requirements for community based orders. For probation orders (s96), community service orders (s106), and intensive correction orders (s117), the *Penalties and Sentences Act 1992* states the court may only make or amend such an order if the offender agrees to the order being made and agrees to comply with the order as made or amended. We are concerned that a community based order should not be mandatory given the conditions imposed on the offender. Any number of circumstances outside the offenders control may make performing an order very difficult. For example, this would greatly impact a person who does not normally reside in Queensland. Alternatively, it may be very difficult for an offender who lives in regional or rural Queensland, especially a young person, who is required to travel significant distances to perform the order. The nature of this order should require further personal circumstances of the offender to be a consideration in sentencing.

We also highlight that there will be significant costs of supervision and coordination of the graffiti removal work. We consider a costs/benefit analysis should be conducted to evaluate the consequences of a mandatory scheme.

**7. Clause 89 – insertion of new Division 7A, *Youth Justice Act 1992***

The Society reiterates comments regarding the mandatory nature of this scheme and costs of supervision of the graffiti removal program for children. We consider that this option of participating in a graffiti removal program should not be mandatory for a court to order. Furthermore, we consider that a program of this nature would be most useful if a child agrees to attend and participate in the program.

We also consider that perhaps a similar section to proposed new s120A, *Penalties and Sentences Act 1992* should be included, to ensure that a court may amend or revoke the graffiti removal order on application if it is satisfied that because of the child's physical or mental capacity, the child is not capable of complying with the order.

Thank you for providing the Society with the opportunity to comment on the Bill. Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dcruz@qls.com.au or Jennifer Roan on (07) 3842 5885 or j.roan@qls.com.au.

Yours faithfully

Annette Bradfield
**President**