

Your Ref:

Quote in reply: Various Committees

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Research Director
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Dear Research Director

CRIMINAL AND OTHER LEGISLATION AMENDMENT BILL 2011

Thank you for providing the Queensland Law Society ("the Society") with the opportunity to provide comments on the *Criminal and Other Legislation Amendment Bill 2011* ("the Bill"). We have divided our comments in relation to the Bill into the following general topic areas:

- Criminal law issues; and
- Retirement village issues; and
- Property law issues.

Criminal law issues

Our comments in relation to criminal law issues have been prepared with the assistance of the Society's Criminal Law Committee. We make comments in relation to the following amendments contained in the Bill:

- *Animal Care and Protection Act 2001*; and
- *Criminal Code Act 1899*; and
- *Drugs Misuse Act 1986*; and
- *Justices Act 1886*.

1. Consultation

The Society has previously been consulted on a confidential basis with regard to some of the amendments to the *Animal Care and Protection Act 2001*, *Criminal Code Act 1899* and the *Drugs Misuse Act 1986*.

Animal Care and Protection Act 2001 amendments

2. Clause 10 - introduction of s 181A (interim prohibition order) Clause 14 - introduction of s 186A (mandatory prohibition order)

An interim prohibition order can be made against a person charged with an animal welfare offence. We note that accused persons could be potentially affected by this decision financially and this may be unfairly detrimental, considering that at this stage of the proceedings the person has only been accused of wrongdoing, not convicted.

We also question why proposed section 181A (4)(b) states that the order can only be made in the person's absence (but the person must be given an opportunity to be heard about whether the order should be made). It is in the interests of open justice and important in maintenance of fair trial rights that the accused be allowed to be present when his/her matters are being decided.

Situations will arise where it is in the interests of justice to set aside or vary a temporary order. Circumstances may change, or new evidence may come to light, before the final determination of the proceedings. There is no mechanism in the Bill that would allow the temporary order to be re-visited. That raises considerable scope for injustice. A procedure for applying to revoke or vary the temporary order should be included in the Bill, perhaps in similar terms to that which operates for temporary protection orders under the *Domestic and Family Violence Protection Act 1989* (sections 13, 36 and 51).

Similarly, the Society is concerned that proposed section 186A, which creates a mandatory prohibition order for conviction of serious animal welfare offence, does not consider the potential financial ramifications of this order. We consider that financial hardship should be one of the considerations that the court can take into account when determining whether it would be unjust to make the prohibition order (under proposed section 186A(4) and (5)).

The mandatory prohibition has the potential to bring financial ruin, quite unjustly, upon graziers, pastoral companies, and other business interests that may not have been directly responsible for the offence. It must be remembered that the *Animal Care and Protection Act 2001* creates a form of vicarious criminal liability. An employer may be deemed to have the intent of a wantonly cruel employee if the employer had not taken reasonable steps to prevent the conduct (section 181 – conduct of representatives). It would be one thing to hold a large pastoral company responsible for management failings that resulted in cruelty by a single employee, but another thing altogether to make it mandatory to put the company out of business by prohibiting it from owning livestock for two years.

The Society observes that this is simply one example of the type of unjust, but unintended, outcome that results when judicial discretion is removed.

Criminal Code Act 1899 amendments

3. Clause 28 – amendment of s 208 (unlawful sodomy) Clause 30 – amendment of s 215 (carnal knowledge with or of children under 16)

Currently under section 208(1)(c)(d) of the Criminal Code, a person who does, or attempts to sodomise a person with an impairment of the mind or permits a person with an impairment of the mind to sodomise him or her is liable to 14 years imprisonment. Clause 28 proposes to increase the penalty for the actual commission of these crimes to life imprisonment. While we understand that people with impairments of the mind are in a more vulnerable situation, it is our opinion that life imprisonment for this offence is excessive. Furthermore, this offence does not take into account other vulnerable groups, for example, those persons with significant physical limitations.

For the reasons stated above, we also consider that a life sentence for clause 30, section 215 (carnal knowledge with or of children under 16) is also excessive. We note that the offence of unlawful carnal knowledge may involve consent. For example, a seventeen year old in a relationship with a fifteen year old may be liable under this offence. Exposure to a maximum penalty of life imprisonment is clearly an inappropriate legislative response to this scenario. This would be a manifestly unjust outcome.

The Society would expect that a sentence of life imprisonment could only ever be suggested as appropriate in cases where the sodomy or carnal knowledge had occurred without consent. Where that was so, the offence of rape would have been committed (sections 6 and 349 of the Code). Rape carries a maximum sentence of life imprisonment. For the purposes of deciding a charge of rape, a child under 12 is incapable of providing consent. Maintaining a sexual relationship with a child also carries a maximum sentence of life imprisonment (section 229B). In the context of the sexual offences created by the Code, nothing of any practical significance would be achieved by increasing the maximum sentence for sodomy or unlawful carnal knowledge.

In our 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 empirical evidence as to whether or not the increase of these sentences to life imprisonment is warranted.

We note that the Sentencing Advisory Council is currently undertaking a research project on the sentencing of child sex offences, including the offences under section 208 and section 215. It would be prudent to wait until the report of the Council is released before altering these provisions. We recommend that there be no changes to the sentences imposed under sections 208(1)(c)(d) and 215 of the Criminal Code.

4. Clause 32 – amendment of s 218A (using internet etc. to procure children under 16)

The Society considers that this is a broadly worded provision that may capture a range of conduct. All that is required is for an adult with intent to send an electronic communication. The electronic communication need not be directed to or received by anyone. Therefore, a “post” placed on a Facebook page stating “I would like to have sex with a 15 year old” or a tweet on Twitter expressing the same sentiment may be punishable by a custodial sentence of 10 years.

5. Clause 33 – section 218B (grooming children under 16)

Subsection 7 reverses the onus of proof, is contrary to the fundamental legislative principles stated in the *Legislative Standards Act*, and also contrary to the established principles of criminal justice. How would a jury be instructed to deal with a complainant’s evidence that, “I told him I was 15,” in a case where it was suggested that the complainant was lying, but the defendant did not give evidence? Similarly, what

direction would be given if the same defendant was profoundly deaf? On the face of the proposed legislation, the jury would have to regard the defendant's belief as proved, when they might otherwise properly have found that it was not proved. In order to provide justice in particular cases the judiciary might be asked to read down the meaning of the word "represented" to mean "represented in a way understood by the accused."

- 6. Clause 35 (section 228B – making child exploitation material)**
- Clause 36 (section 228C – distributing child exploitation material)**
- Clause 37 (section 228D – possessing child exploitation material)**

We note that these clauses propose to increase the penalties from 5-10 years to 14 years. While we understand the penalties are to bring Queensland into line with the Commonwealth, we do not support substantial increases to sentences in the absence of cogent research. The Society is concerned that these amendments will only increase the costs of incarceration, without producing reductions in the number of offences committed. We call upon the Government to publish research to show a strong link between increasing penalties for these offences and a reduction in the rates of offending.

We also consider that there are relevant differences between making and distributing child exploitation material.

7. Clause 39 – section 242 (serious animal cruelty)

RSPCA prosecutions and BLEATS

The Society supports the inclusion of the offence of serious animal cruelty (articulated in clause 39 of the Bill) in the Criminal Code. Cruelty to animals is unacceptable and those found guilty under the law should be dealt with accordingly.

We support the work of the RSPCA in investigating allegations of animal cruelty in the community. We understand that Brisbane Lawyers Educating and Advocating for Tougher Sentences (BLEATS) is recognised by the Queensland courts as being the pro bono legal representatives of the RSPCA. We applaud our members who undertake this important pro bono service and recognise their significant contribution to this area of law. However, the Society has some reservations about the expansion of the RSPCA's role in the prosecution of animal cruelty offences.

It is our firm view that prosecutions are the duty of the Crown, that is, the Office of the Director of Public Prosecutions (DPP) or police prosecutors, including the Brisbane Police Prosecution Corps. We note that these State Government entities are subject to the strict legislative standards set out in the *Public Service Act 2008*, *Public Sector Ethics Act 1994* and the Code of Conduct for Public Service. We also note that RSPCA prosecutions are not subject to the complaints, oversight and disciplinary mechanisms of the DPP or Queensland Police Service such as the Crime and Misconduct Commission and Queensland Ombudsman. Lastly, there is also no compulsion for RSPCA prosecutions to follow the Office of the Director of Public Prosecutions' Guidelines that are designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice.

Therefore, we do not support the expansion of the prosecutorial functions of the RSPCA. We opine that the interests of justice and the public interest would best be served if existing Crown prosecutorial bodies were better resourced to prosecute charges of animal cruelty. This will ensure that the rights of all parties involved will be promoted and respected.

Sentencing double jeopardy and costs

In regard to clause 42, it is our view that the Queensland Attorney-General should indemnify the complainant against costs in the event that sentencing double jeopardy is abolished. This indemnity should include costs associated with briefing barristers.

Unlawful killing

The Society was initially concerned that the inclusion of the phrase “unlawfully kills” might raise a defence in undeserving cases. For example, a farmer who slowly tortured his cow to death might not commit the offence, as the farmer could lawfully kill his cow. Clause 39 of the Bill proposes to address this problem in section 242(2) by making **any** killing of an animal unlawful, unless it is authorised, justified or excused by law. The approach adopted raises more problems than it solves. This is a substantial and far-reaching change in the rights of owners over their animals. It might make it unlawful even for a farmer to humanely kill his cow or for a hobby farmer to kill a chicken or goose for eating. The consequences for the animal husbandry industry could be far-reaching, and it is likely that most of those affected have not been consulted. In essence, while these concepts are understood in the Criminal Code context, they do not easily carry across to matters concerning animal rights.

The other unintended consequence is that the proposed section 242(2) would also make any serious injury to an animal unlawful unless it was authorised, justified or excused by law. Serious injury includes the loss of a distinct organ or part of the body. There is an enormous potential impact on standard animal husbandry practices; for example castration, tail docking, de-horning, and ear-marking.

The potential impacts on agriculture, hunting and fishing in Queensland are unlikely to have been considered, given the context of this amendment in the Bill, and its drafting history.

We suggest that the offence be heard summarily at the defendant’s election, subject to the Magistrate’s discretion in section 552D.

8. Clause 42 – amendment of section 669A (Appeal by Attorney-General)

We understand that this amendment is to bring Queensland in line with other jurisdictions that have legislated to limit the protection against sentencing double jeopardy, as was discussed by the Council of Australian Governments. However, proposed section 669A (1AB) as drafted is inconsistent and much more extensive than the proposed reform agreed by the Council.¹ There is no other jurisdiction which has or proposes to abolish sentencing double jeopardy to the extent suggested in the proposed Queensland amendment.

The Society is concerned that proposed section 669A (1AB) will inappropriately limit the court’s discretion in deciding sentencing matters. We maintain that the well-established legal principle of sentencing double jeopardy is essential to the criminal justice system, and that this proposed provision will interfere with the independence and discretion of the judiciary.

Removing the discretion can remove the court’s power to do justice in a particular case. For example, the proposed section 669A(1AB)(1)(b) would require the Court to ignore any principle that would otherwise require the Court to impose a sentence that is less than the sentence the Court considers should have been imposed at first instance. Where the sentence imposed at first instance was a community based order, the offender may well have completed many hours of community service, counselling, treatment or

¹ COAG Meeting documents, 13 April 2007 found at : http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/double_jeopardy_law_reforms.pdf

supervision. The proposal as drafted would not allow the appellate Court to frame a sentence that reflected the punishment already imposed on, and served by, the offender.

The construction of section 669A(1) of the *Criminal Code Act 1899* was recently tested in the High Court of Australia case, *Lacey v Attorney General of Queensland*.² The majority judgment highlights the traditional importance of double jeopardy as a fundamental checkpoint in appeals:

*“The treatment of Crown appeals against sentence as “exceptional” indicated a judicial concern that criminal statutes should not be construed so as to facilitate the erosion of common law protection against double jeopardy. This was reflective of a wider resistance to the construction of statutes, absent clear language, so as to infringe upon fundamental common law principles, rights and freedoms.”*³

We note that in the case of *Lacey*, the Attorney-General submitted that the Court of Appeal should have an “unfettered discretion” to impose the appropriate sentence.⁴ Once an error has been identified in the sentence, s.669A(1) empowers the Court to “in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.” It is submitted that the proposed amendments are contrary to the power in subsection (1), and the policy aim expressed therein. The proposals would fetter the Court. Indeed they would sometimes require the Court to impose a sentence other than what the Court would itself find just in the circumstances of the case.

The Society is opposed to proposed section 699A(1AA) and (1AB). We acknowledge that sub-section (1AA) is in line with the recent amendments made in other jurisdictions. Section 669A(1AB) is completely out of step and the Society strongly recommends that the Committee does not allow section 669A(1AB) to form part of the proposed amendment to the *Criminal Code 1899*.

Drugs Misuse Act 1986 amendments

9. Clause 45 – amendment of section 4 (Definitions)

We do not support this amendment as it is too broad and may have unintended consequences. We do not agree with the proposed definition of a dangerous drug, to include items “intended to” or “apparently intended to” have a similar effect. In our view, the provision is ambiguous as to whose intent this provision applies. We are concerned that the prosecution might argue that this provision relates to the manufacturer’s or supplier’s intent, as opposed to the defendant’s intent.

The amendment creates greater uncertainty for citizens who wish to obey the law. Originally, the *Drugs Misuse Act 1986* prohibited particular substances. A person wishing to know whether their possession of a particular chemical would be legal merely had to consult the list of regulated substances. Now, such a person is confronted by such nebulous concepts as “derivative” and “similar pharmacological effect”. Consulting the legislation will not provide the citizen with an answer as to the lawfulness of their conduct. Consulting a solicitor will not provide an answer as lawyers generally do not have scientific expertise. Even engaging an expert chemist will not provide an answer, as the terms used in the Bill have no agreed scientific meaning. The judiciary is left with a near impossible task of interpretation, still more difficult when the issue falls to be determined by a jury. Such uncertainty in the bounds of lawful conduct is unhealthy for public confidence in the rule of law.

² *Lacey v Attorney General of Queensland* [2011] HCA 10.

³ *Ibid* at 17.

⁴ [2011] HCA 10

10. Clause 46 – amendment of section 9A (possessing relevant substances or things)

We agree with the proposed amendment and the inclusion of the defence of reasonable excuse. However, we are concerned that a failure to provide a definition or examples of what might constitute a “reasonable” excuse would create a vague and unworkable defence. Does it extend to the chemistry teacher demonstrating distillation? To the same teacher later on holidays who has kept the glassware in the boot of their car? To the student experimenting at home? To the home hobbyist? This is another offence where the legislature has made it illegal to possess something that was previously useful and lawful (eg a condenser, or a solution of more than 100 mg of iodine), but has left both the citizen and the police uncertain as to when the item may be used lawfully.

The amendment also reverses the onus of the proof, by requiring the accused person to prove their reasonable excuse. This is contrary to the fundamental legislative principles. It is also unnecessary. For example, a perfectly workable alternative is suggested by section 51 of the *Weapons Act 1990* which provides that a person must not possess a knife in a public place, unless they have a reasonable excuse. Under that provision it is for the prosecution to prove the absence of a reasonable excuse, and the citizen is entitled to the benefit of any doubt. The same principle should apply to the offence in section 9A of the *Drugs Misuse Act 1986*.

11. Clause 47 – section 9D (trafficking in relevant substance or thing)

This provision proposed to create a new offence of carrying on of a business of unlawful trafficking in a relevant substance or thing. We are concerned that this provision may have unintended consequences due to the uncertain definition of what is considered unlawful. We suggest more clarity is required around when it is unlawful to trade in these items. Take the example of a business that sells scientific laboratory equipment but suspects that a lot of its product is being bought for illegally manufacturing amphetamines. Is the business unlawfully trafficking?

The use of the words “for use in connection with the commission of a crime under section 8” is probably an attempt to remove the uncertainty, but it fails to do so.

The Society also notes that there is no proposed defence, similar to that proposed in Clause 46, that the person has a reasonable excuse for trafficking in the relevant substance or thing.

12. Clause 48 – amendment of section 10 (possessing things)

We consider that this provision is too broad and may have unintended consequences. The new section 10(4AA) deems that it is immaterial whether the hypodermic syringe or needle was for use, or had been used, in connection with the administration of a dangerous drug. We consider that this provision would criminalise the activities of doctors, nurses, veterinarians and other healthcare professionals as well as diabetics who might carelessly cause a risk of needle-stick injury. We submit that the criminal law generally is not the most appropriate means of regulating this behaviour, and especially not the *Drugs Misuse Act*.

13. Clause 51- insertion of section 129A (evidentiary provision- section 4, definition *dangerous drug*, paragraph (c) (ii))

The Society is concerned that the effect of this new provision will be that in many cases it will become irrelevant whether the substance was in fact a dangerous drug.

The deeming provision in proposed section 129A(2) is very broad in that a dangerous drug is proved “if there is evidence”. Read literally, this would mean that the prosecution do not have to prove either the subjective or objective intention of dealing with dangerous drugs beyond a low evidentiary standard. For example, if a witness Sam said, “Jim told me it would get me high,” but the court thought Sam was lying, the effect of section 129A(2) might be to deem the substance to be a dangerous drug, despite the rejection of Sam’s evidence, and even if there was evidence to the contrary

The point would then be proved and there does not appear to be any way for the defendant to refute this. The Society is concerned that this will lead to complex and unnecessary appeal litigation, and difficult instructions to juries.

The Society recommends that this Clause be discarded.

Retirement village issues

Our comments in relation to retirement village issues have been prepared with the assistance of the Society’s Elder Law Committee.

A few of the amendments proposed in the Bill are identical to the amendments proposed in the *Fair Trading and Other Legislation Ament Bill 2011* released for consultation by the Department of Employment, Economic Development and Innovation in December 2010. The Society made detailed submissions to the Department on 10 December 2010.

In relation to:

- Clause 76 of the Bill – Amendment of s28 (Registration of retirement village scheme)
- Clause 78 of the Bill – Amendment of s91 (Capital replacement fund);
- Clause 81 of the Bill – ‘237H When retirement village scheme must not be registered’

The Society repeats its submissions made on 10 December 2010 (**attached**) from page 7 thereof, and also repeats its submissions (on pages 9 and 10 thereof) that a clause be inserted in the Bill to amend the provisions and definition of cooling off period in the *Retirement Villages Act 1999*.

Clause 77 – Amendment of s56 (Interpretation for div 5)

The Society is concerned that the proposed amendment of section 56 may have unintended consequences for residents in circumstances where they have not consented for a relative to reside.

Therefore it is suggested that s70B of the Act be amended as follows (so that the proposed definitions in the Bill for “*termination date*” in Section 56(1)(b) and (c) of the Act do not have unintended consequences):

(a) delete the word ‘and’ after section 70B((b), and insert “and” after section 70B(c); and

(b) insert the following new Section 70B(d):

- “(d) the relative lived in the accommodation unit with the consent in writing of the accommodation unit owner, resident and scheme operator immediately before the residence contract was terminated.”

Clause 80 – Amendment of s 106(2) (Increasing charges for general services – definition of “CPI percentage increase”)

The Society notes that:

- time of publication by the Australian Statistician is arbitrary and dependent on many external factors, and (although perhaps unlikely) the amendment of the definition proposed in the Bill could result in comparison of the CPI for non-corresponding quarter/s for any given financial year;
- paragraph (a) of the existing definition clearly refers to the “June quarter”, however paragraph (b) arguably refers to the “March quarter” (ie the quarter **ending immediately before the end** of a financial year) – which results in comparison of the CPI for the June and March quarters (for a nine month period), rather than comparison of corresponding June quarters for a full financial year;
- comparison of the corresponding March quarters each year (rather than June quarters) would also facilitate more timely preparation and delivery of annual budgets and financial statement under the RV Act; and
- under s 36 of the *Acts Interpretation Act 1954*, “financial year” in the Act means “a period of 1 year beginning on 1 July” (not being otherwise defined in the RV Act).

It is therefore suggested for clarity and practicality that “31st March” be inserted after “quarter ending” in paragraphs (a) and (b) of the existing definition of “CPI percentage increase” in s106(2) (instead of the amendment proposed in the Bill).

Property law issues

Our comments regarding the amendments to the *Land Sales Act 1984* have been prepared with the assistance of the Society’s Property and Development Law Committee.

The Society’s notes that the proposed amendments to the *Land Sales Act 1984* have altered somewhat since they were released for consultation in 2010 in the draft *Fair Trading and Other Legislation Amendment Bill 2011*.

The amendments in the Bill propose that a vendor must provide to a purchaser a registrable instrument of transfer for a proposed lot within a stated period of time up to 5 and a half years after a contract to purchase the proposed lot is made. This replaces the current provisions which require a registrable instrument to be provided within 3 and a half years of entering a sale contract or which can be extended by regulation to not more than 5 and a half years.

The QLS has no objection to removing the need for a regulation to be made to extend timeframes to 5 and a half years as this has become common for larger developments. The QLS does have concern with the proposed new section 27 and has raised concern with this approach previously with the Department.

The reference to ‘unconditionally, given the purchaser a registrable instrument of transfer for the lot’ in proposed section 27(1)(b) has unintended consequences. Reliance on the delivery of a ‘registrable instrument’ leads to an anomalous result when a purchaser refuses to provide settlement funds and consequently a vendor will not provide them with a registrable instrument. If a purchaser continues to withhold funds past the sunset date of 5 and half years they will accrue a right to terminate. Should a vendor and purchaser be engaged in litigation about fulfilling settlement obligations and this litigation

continues beyond five and half years from the contract date the current drafting of the proposed section will provide the purchaser a right to avoid the contract and will frustrate the outcome of the litigation. This is surely not the result intended by the legislation.

The Society has previously proposed that the right for a purchaser to terminate should only arise where the creation of title has not occurred for the lot or the due date for settlement under the contract has not occurred by the sunset date. This approach provides greater certainty.

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Thank you for the opportunity to provide the comments of the Society with respect to the Bill. If you require any further information relating to any aspect of this submission please contact our Policy team.

Yours faithfully

Bruce Doyle
President