

Our ref: 337 - 16

6 March 2014

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

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

Dear Research Director

Youth Justice and other Legislation Amendment Bill 2014 - boot camp orders for vehicle offences

Thank you for the opportunity to provide a supplementary submission on the amendments to the *Youth Justice and other Legislation Amendment Bill 2014*. We understand that these amendments will be moved by the Honourable Attorney-General and Minister for Justice during consideration in detail of the Bill.

The Society commends the government for permitting public consultation on the proposed boot camp orders for vehicle offences flagged by the Attorney-General in his introductory speech. We are supportive of public consultation and consider it one of the key tenets of good law. We note that the Society flagged its concern about this proposal at the public hearing on the Bill on 3 March 2014. Unfortunately, we were not provided with the opportunity to discuss our issues in this public forum as the proposed amendments to the Bill were not before the Committee. We respectfully submit that a further public hearing be conducted so that relevant stakeholders may ventilate their views on this proposal.

We also note the limited time frame for comment, with draft legislation being provided on 4 March 2014 and comments due by 6 March 2014. As there has been only a very brief opportunity to review the amendment to the Bill, an in-depth analysis has not been possible. There may be issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We urge the government to extend the period within which to provide comments and also extend the reporting date of the Committee, to ensure that the Committee has a reasonable opportunity to consider in detail the implications of the draft legislation before it.

With respect to the proposed amendments, we make the following comments on specific clauses in the Bill.

Clause 9B

This clause seeks to insert a new section 176B. This section proposes to introduce a mandatory boot camp order for young people who are recidivist vehicle offenders.

Proposed section 176B(3) states that:

- (3) *Without limiting section 175, the court must make a boot camp (vehicle offences) order for the child.*

The Society maintains its principled objection to mandatory sentencing. In our view, mandatory sentencing laws are unfair, unworkable and run contrary to the fundamental tenets of our justice system. The Society supports judicial discretion for sentencing in all criminal matters, particularly in youth criminal matters, in order to reflect the discrete facts of each case and each individual offender.

The Society also considers that there are difficulties with this proposal. Anecdotal evidence suggests that approximately 100 young people will be affected by these provisions. The mandatory sentencing regime will have a huge impact on these young people. The introduction of the boot camp (vehicle offences) order will result in young people being moved from environments which are known, familiar and secure, such as their homes and their schools, to unfamiliar and foreign surroundings. Also highly problematic is the removal of support networks for these young people, by virtue of the fact that they will be taken out of their home environment – such as access to family, positive school support networks and therapists with whom the child may have a pre-existing relationship. Compounding this concern is the fact that this will be done without the young person's consent and without judicial review.

In regard to consent, we note that this provision contravenes section 226(2)(c) of the *Youth Justice Act 1992*. This section mandates that, 'a child is an eligible child for a boot camp order if the child—consents to participating in a boot camp program.' In our view, mandatory participation in boot camps potentially diminishes the effectiveness of the program and may ultimately contribute little to reducing recidivism. If the young person is being forced to participate, they might not be engaged and therefore not fully participate in the program. As such, the boot camp order may have significantly reduced prospects of achieving its desired outcome.

The Society would be pleased to be involved in consultation with the government regarding the boot camp experience, particularly in relation to information from the trial thus far.

From a practical perspective, it might prove unworkable to continue to force a young person to complete a boot camp (vehicle offences) order. We particularly note that from the point of view of the young person, there might be cogent and persuasive reasons why they should not or can not participate in a boot camp program – for example, psychological, emotional, cultural reasons. These reasons should not be discounted and the well-being of the young person should be considered. In this regard, we note proposed section 176B(2) which states:

- (2) *Before sentencing the child, the court must—*
 - (a) *order the chief executive to prepare a pre-sentence report; and*
 - (b) *have received and considered the report.*

The Society requests clarification whether the court must make a boot camp order if, upon consideration of the pre-sentence report, it does not support the making of the boot camp order. The Queensland Law Society strongly supports the retention of judicial discretion in

these matters. We consider that s176B(3) should provide that "the court may make a boot camp (vehicle offences) order for the child."

We note that the court is not limited to making other sentencing orders (in section 175 of the *Youth Justice Act 1992*) in addition to the mandatory boot camp order. The Society is concerned that more appropriate sentencing options might be underutilised if boot camp orders were made mandatory.

We urge the government reconsider its decision to enact clause 9B.

Clause 9D

This clause purports to insert a new section 178B and deals with the combination of boot camp (vehicle offences) orders and other community based orders. This provision states that community based orders are suspended until the child has performed the boot camp order or the boot camp order has been discharged.

The Society does not support this provision for several reasons. First, it gives primacy to the status of the boot camp (vehicle offences) order over community based orders. Secondly, it will mean that these orders will be served cumulatively and not concurrently. As a result, the length of time of the community based orders will be increased, which might not be the intention of the court. For example, probation orders would arguably run for a longer period than anticipated by the court. Thirdly, there might be a disparity in sentencing for the same conduct, depending on when the young person was found guilty of the offences – that is, before or after the implementation of the amendments.

We provide the following hypothetical example. Young persons A and B committed two motor vehicle offences together and are placed on a community based order handed down prior to the implementation of the amendments. As a result of fingerprints found, young person A is identified after the amendments and found guilty of an offence of 'Unlawful Use of a Motor Vehicle' which occurred about the time of his earlier offences. A is therefore subject to a boot camp (vehicle offences) order and young person A's community based order is suspended until the completion of the latter order. In the case of young person A, the original sentencing court would not have had the ability to contemplate the extension in time of the community based order and also the fact that the order would be served cumulatively. In contrast, young person B's fingerprints are located on the door of a vehicle and she is found guilty of a charge of 'Entering Premises with Intent'. B receives a community based order. This order runs concurrently with her prior order as the court is mindful that it occurred at about the same time as her other offences. Consequently B's order is finalised three months before A's order despite the significant parity in their behaviour. The Society does not consider that this is an appropriate outcome. We hold the view that the effective extension of orders and the possibility of disparate orders is manifestly unjust and functions to undermine the intention of the judiciary.

Clause 10

The Society notes that the wording of the Regulation which will prescribe the areas for the purpose of a boot camp (vehicle offences) order has not been provided and we have had no opportunity to comment on this document.

In line with our previous submissions, we reiterate that it might not be prudent practice to prescribe the areas in which people reside, in this case Townsville, by regulation. Regulations are not subject to the same level of scrutiny and as such, the Society is concerned with this approach.

Clause 11

Proposed section 206A discusses boot camp (vehicle offences) orders.

Proposed section 206A(3) states:

- (3) *For this section, advice from the chief executive contained in the pre-sentence report that the child usually resides in an area prescribed for the purposes of a boot camp (vehicle offences) order is, unless the contrary is proved, sufficient proof that the child usually resides in that area.*

The Society is concerned about this provision and considers that there may be unintended consequences and unjust outcomes as a consequence of its application. For example, a young person might choose to relocate, during the inevitable remand period, to avoid the imposition of a boot camp (vehicle offences) order. This is problematic because young people may choose to relocate to unsafe environments, away from their family, in order to suggest that they no longer "usually reside" in a prescribed area for the purposes of a mandatory boot camp (vehicle offences) order. This might ultimately place young people at a greater risk of homelessness in the future. Compounding this issue is the possibility that well-resourced young people may have better access to alternative placements, assistance to enrol in other schools and the ability to establish networks to suggest where they "usually reside". This may result in penalties being imposed, not only on geographical location, but on the basis of economic and social resources. To avoid the provisions of the legislation it is also possible that matters may be set for trial to cause further delay to provide greater opportunity to establish a young person's usual residence outside the prescribed area which is undesirable from the perspective of State resources and matters resolving within a child's sense of time (see Section 3 of the *Youth Justice Act 1992*).

The Society also notes that this provision may have an inequitable impact on young people who are experiencing homelessness.

Clause 18A

This clause purports to insert a new section 246AA and deals with the court's power on breach of boot camp (vehicle offences) order.

Proposed section 246AA(4) states:

- (4) *If the court varies a boot camp (vehicle offences) order under subsection (1)(b), the court can not vary the details of the boot camp program.*

In our view, this is overly prescriptive and rigid and we consider that the court should have the ability to vary the details of the boot camp program. We query why this is not analogous to community based orders, where courts can impose certain conditions if it is appropriate - given the young person's circumstances or the circumstances of the offence. The Society requests information as to why this would not be a viable option.

Proposed section 246AA(5) states:

- (5) *The onus is on the child to satisfy the court it should permit the child this further opportunity.*

We are concerned with the reversal of the onus of proof in section 246AA(5). This reversal is contrary to the fundamental legislative principles as stated in section 4(3)(d) of the *Legislative Standards Act 1992*. This provision requires that legislation, 'does not reverse the onus of

proof in criminal proceedings without adequate justification'. While the Society notes that the onus of proof is reversed in other provisions of the Act, we do not support these provisions.

Clause 24

Clause 24 proposes insertion of a new section 367 in order to deal with the application of provisions about boot camp (vehicle offences) orders. This provision states:

- (1) *A court may make a boot camp (vehicle offences) order for a recidivist vehicle offender found guilty of a vehicle offence after the commencement.*
- (2) *Subsection (1) applies even if 1 or both of the following happened before the commencement—*
 - (a) *the commission of the vehicle offence;*
 - (b) *the start of the proceeding for the offence.*
- (3) *In this section— vehicle offence see section 206A(3).*

In relation to proposed section 367(2), we note that this provision relates to offences committed before the commencement of the amendments. In line with our stance against retrospective application of legislation, the Society does not support this provision. We note that retrospective provisions run contrary to section 4(3)(g) of the *Legislative Standards Act 1992*, which requires that legislation, 'not adversely affect rights and liberties, or impose obligations, retrospectively'. If the government is minded to proceed, we suggest that boot camp (vehicle offences) orders only be made available for recidivist vehicle offences that were committed after the commencement of the amendments.

Clause 26

Clause 26 states:

recidivist vehicle offender means a child who—

- (a) *is found guilty of a vehicle offence (the relevant vehicle offence); and*
- (b) *has, on or before the day the child is found guilty of the relevant vehicle offence, been found guilty of 2 or more other vehicle offences (the other vehicle offences); and*
- (c) *committed the other vehicle offences within 1 year before or on the day the relevant vehicle offence was committed.*

With regard to clause 26(b), we note that this might include conduct in relation to the same vehicle on the same day. For example, a young person who steals a car, parks the car and then re-enters that same car may be found guilty of two or more vehicle offences. The Society considers that this behaviour would form part of the same course of conduct and should not be the subject of separate charges. Therefore, a young person who uses the same car at different times on the same day should not be charged with several offences. We suggest that this provision be amended accordingly.

Clause 31

Clause 31 proposes the insertion of a new Part 4, Division 2. This clause states:

- (6) *Subsection (1) does not apply to the court when constituted by a judge exercising jurisdiction to hear and determine a charge on indictment.*

The Society understands that this provision preserves the current position in the Childrens Court of Queensland, Supreme Court and Court of Appeal.

If you require clarification of any of the issues raised in this submission, please do not hesitate to contact our policy solicitors. We look forward to receiving a copy of the Committee's report.

Yours faithfully



Ian Brown
President