

Our ref: 337 - 78

12 June 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

Criminal Law Amendment Bill 2014

Thank you for the opportunity to provide a submission on the amendments to the *Criminal Law Amendment Bill 2014* and for granting an extension until 12 June 2014. The Society commends the government for undertaking public consultation on the proposed Bill.

As there has been only a very brief opportunity to review the amendment to the Bill, an in-depth analysis has not been conducted. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We request that the government extend the period by which to provide feedback and also extend the reporting date of the Committee, so that the Committee has a reasonable opportunity to consider the draft legislation and provide more useful and in-depth feedback which will hopefully assist in improving the quality of the legislation being passed. The members of the Society are in a unique position to provide informed feedback based on their extensive experience in practice.

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

1. *Acts Interpretation Act 1954*

Clause 3

Clause 3 of the Bill seeks to amend the *Acts Interpretation Act 1954* to allow various government bodies and tribunals to choose their preferred title. We note that the Explanatory Notes do not provide the reasons for the proposed amendment and we request information on why this change is required.¹ We query whether this public expenditure is needed when a gender neutral option is currently in place. The Society supports the use of gender neutral titles and does not support the proposed change.

¹ Explanatory Notes, page 13.

The proposed amendment seeks to increase the maximum penalty for this offence from 14 years to 20 years. The Society submits that substantial increases to penalties should only be undertaken on the basis of empirical evidence and research. There is, at present, a lack of evidence which establishes a strong link between increasing penalties and a reduction in the rates of offending.

Clause 27 – insertion of new pt. ch 25

Clause 27 proposes to include new section 242 which creates a new offence of serious animal cruelty.⁵ Section 242 makes it an offence to:

"Unlawfully kill, cause serious injury or prolonged suffering to an animal with the intention of inflicting severe pain or suffering on the animal. The new offence is a crime, carrying a maximum penalty of seven years imprisonment. A person is relieved of criminal responsibility if the conduct is authorised, justified or excused under the *Animal Care and Protection Act 2001* or another law, other than section 458 of the Criminal Code. Subsection (3) defines the phrase 'serious injury', borrowing in part from the definition of grievous bodily harm as defined in section 1 of the Criminal Code."⁶

The proposed section 242 is reproduced in the table below.

242 Serious animal cruelty

- (1) A person who, with the intention of inflicting severe pain or suffering, unlawfully kills, or causes serious injury or prolonged suffering to, an animal commits a crime.

Maximum penalty—7 years imprisonment.
- (2) An act or omission that causes the death of, or serious injury or prolonged suffering to, an animal is unlawful unless it is authorised, justified or excused by—
 - (a) the *Animal Care and Protection Act 2001*; or
 - (b) another law, other than section 458 of this Code.
- (3) In this section— serious injury means—
 - (a) the loss of a distinct part or an organ of the body; or
 - (b) a bodily injury of such a nature that, if left untreated, would—
 - (i) endanger, or be likely to endanger, life; or
 - (ii) cause, or be likely to cause, permanent injury to health.

The Society is concerned about the inclusion of this provision and questions the effect that it may have on the professions of farming and the veterinary sciences. The potential impacts on agriculture, hunting and fishing in Queensland will need to be carefully considered. We suggest that further targeted consultation be undertaken to ensure that the defences available

⁵ Explanatory Notes, page 16.

⁶ Explanatory Notes, page 16.

Section 564—

insert—

(2A) Despite subsection (2), a relevant circumstance of aggravation may be relied on for the purposes of sentencing an offender for the offence charged in the indictment despite the relevant circumstance of aggravation not being charged in the indictment for the offence.

(5) In this section—

relevant circumstance of aggravation means a circumstance of aggravation that is a previous conviction of the offender.

The Society does not support this provision. Proper disclosure by the prosecuting body should be made, including the information that is to be relied upon in sentencing the offender. This is integral to the principles of natural justice and procedural fairness. Given the current provisions of the *Penalties and Sentences Act 1992*, criminal history is a factor that is taken into account by the sentencing judge in any event. Therefore we seek clarification as to why this provision is required.

Clause 36 – proposed section 733

The Society does not support the proposal to retrospectively apply this provision. The Society is concerned that the double jeopardy exception will now apply retrospectively. We particularly note that section 4(3)(g) of the *Legislative Standards Act 1992* states that legislation should not "adversely affect rights and liberties, or impose obligations, retrospectively." The Society submits that it is not an appropriate answer to this breach of legislative standards to state that Queensland will otherwise be the only state which does not have a regime operating retrospectively.

An accused may have conducted his or her previous trial in a particular way (such as making a decision to give evidence or not) understanding that the law as it then stood provided that an acquittal prevented a retrial. It would be unconscionable for this to be altered by retrospective application of this provision. In this regard, we note that such an approach would not accord with the principles of natural justice and procedural fairness.

4. Dangerous Prisoners (Sexual Offenders) Act 2003

Clause 40 – replacement of 43AA (contravention of relevant order)

Proposed section 43AA(2) is reproduced in the table below

(2) If a released prisoner commits an offence against subsection (1) by removing or tampering with a stated device for the purpose of preventing the location of the released prisoner to be monitored, the released prisoner commits a crime.

Minimum penalty—1 year's imprisonment served wholly in a corrective services facility.

Maximum penalty—5 years imprisonment.

The Society is concerned with the proposed mandatory minimum penalty of 1 year imprisonment for this new offence. The Society has a longstanding objection to mandatory minimum penalties, which the Bill purports to introduce. The Society considers that maintaining judicial discretion is central to the effective functioning of our justice system.

link is inappropriate. Although availability of good quality 'telepresence' systems is growing, it is not yet common and technological deficiencies will potentially impede the effective administration of justice. The Society considers that there are better ways of addressing the fundamental concern of costs of the justice system than the proposed amendment to the Act.

In our view, it may be more appropriate to require the parties to consider video or audio links and, having regard to such factors as:

- the nature and scope of their evidence;
- the potential impact of using audio or visual links, including how this would affect ability to assess credibility and reliability of the expert;
- the location of the court and the expert; and
- the availability and nature of telecommunication systems available

to either agree to the use of video conferencing for some or all experts or justify why it is inappropriate in that instance. This preserves a greater discretion than a default position. Another more cost-effective and practical solution would be a practice direction for civil and criminal matters as the appropriate way to address this issue. This will allow for a more responsive change to circumstances and technology than amending legislation in a piecemeal fashion.

We also question whether the test of "the interests of justice" (39PB(2)) would be sufficient to comfortably deal with a situation where one party wishes to call an expert who prefers to attend in person, and the other party consents. Simply because the parties consent, and the expert is prepared to come in person, will this be sufficient to satisfy an "interests of justice" test? We request further clarification on how proposed section 39PB(5) will operate.

6. Justices Act 1886

Clause 57 - amendment of s 39 (Power of court to order delivery of certain property)

This provision proposes to include RSPCA inspectors in the definition of public officer. The Society does not support this provision.

In our view, prosecutions are the duty of the Crown, that is, the Office of the Director of Public Prosecutions or police prosecutors, including the 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. 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.

Clause 62 – amendment of s 222 (appeals to a single judge)

The Society is concerned with the proposal to permit the Attorney-General to appeal decisions dealt with by the Magistrates Courts on a summary basis. We do not support the proposal to

(1) This section applies if, under section 206A(1), a court must make a boot camp (vehicle offences) order against a child.

The Society does not support this provision and notes our submission to the Committee dated 6 March 2014 on the *Youth Justice and other Legislation Amendment Bill 2014* - boot camp orders for vehicle offences (**enclosed**). We also note the Society's stance against mandatory sentencing regimes.

Clause 74 - insertion of new s 282BA

Cause 74 proposes to insert a new section 282BA which is reproduced in the table below.

282BA Detention centre employees may provide services at boot camp centres

(1) The chief executive may enter into an arrangement with a boot camp centre provider for a detention centre employee to provide services (the services) to maintain good order and discipline at a boot camp centre.

(2) A detention centre employee may only provide the services prescribed by regulation.

(3) A detention centre employee providing the services is subject to the direction and control of the chief executive to the extent the detention centre employee is providing the services.

The Society does not support this new section and has serious concerns about proposed section 282BA(1) which would allow an employee of a boot camp centre provider to maintain good order and discipline at a boot camp centre. The Explanatory Notes state, that these employees may 'employ a range of practices such as use of force, restraint, separation and personal searches'.⁷

Page 29 of the Explanatory Notes state:

Clear guidelines around the use of practices such as use of force, restraint, separation and personal searches will be prescribed in the *Youth Justice Regulation 2003*, as well as the obligation to record all instances of their use.⁸

Therefore, the guidelines and safeguards concerning the use of force, restraint, separation and personal searches in youth detention centres will be prescribed by regulation, as opposed to legislation.

First, in our view, this proposal should be reconsidered noting the recommendations of the Child Guardian in relation to the use of separation at a Queensland Youth Detention Centre. Secondly, in line with our previous submissions, we do not support the inclusion of detailed material of this nature within Regulations. Regulations, by their nature are not subject to the same level of scrutiny as legislation and as such, the Society is concerned with this approach. Thirdly, if the proposal, as it stands proceeds, we respectfully submit that the proposed amendments to the regulation be released for public comment so that stakeholders can

⁷ Explanatory Notes, page 28.

⁸ Explanatory Notes, page 29.

Amendment to the Youth Justice and Other Legislation Amendment Bill 2014 Submission 005

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.

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.

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:

Criminal Code (Looting in Declared Areas) Submission 004
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Our ref: 339-40, JR/RDC

16 May 2013

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

Criminal Code (Looting in Declared Areas) Amendment Bill 2013

Thank you for providing Queensland Law Society with the opportunity to comment on the *Criminal Code (Looting in Declared Areas) Amendment Bill 2013* (the Bill).

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 an 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.

We make the following comments for your consideration.

Clause 3 – Amendment of s398 (Punishment of stealing)

The Society is opposed to the introduction of new offences where the same conduct is covered under an offence which already exists in legislation. We consider the insertion of the special case 's13A Stealing by looting in a declared area' creates unnecessary duplication.

In his explanatory speech, Mr Carl Judge MP highlighted the new legislation would seek to address concerns arising from offences that occurred during flood and cyclone related disasters in 2011 and 2013. The Society considers that the current offence of stealing by looting¹ appropriately deals with the issue of looting at the time of a natural disaster. The section states:

13 Stealing by looting

If—

- (a) the offence is committed during a natural disaster, civil unrest or an industrial dispute; or
 - (b) the thing stolen is left unattended by the death or incapacity of the person in possession of the property;
- the offender is liable to imprisonment for 10 years.

¹ *Criminal Code* s398(13)

Thank you for providing the Society with the opportunity to comment on the Bill. Please contact our Policy Solicitor, Ms Raylene D'Cruz on [REDACTED] or [REDACTED] or Graduate Policy Solicitor, Ms Jennifer Roan on [REDACTED] or [REDACTED] for further inquiries.

Yours faithfully,



Arnette Bradfield
President