

Your Ref:

Our Ref: Criminal Law Committee: 21000339/218

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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 2012

Thank you for the opportunity for the Queensland Law Society to provide comments to the Inquiry into the *Criminal Law Amendment Bill 2012* (the Bill).

The Society acknowledges that the Bill implements some pre-election commitments of the Government and some later announcements, but notes that the text of the Bill has not been the subject of previous consultation. We note that there is a severely truncated opportunity for review of the amending legislation and, as such, 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.

1. The Society's position on mandatory sentencing

Clause 3 of the Bill proposes to amend s 305, *Criminal Code Act 1899* to introduce a new minimum mandatory non-parole period of 25 years imprisonment for punishment of murder in circumstances where the person killed was a police officer.

The Society has long maintained its strong stance against any form of mandatory sentencing. In our view, mandatory sentencing laws are unfair, unworkable and run contrary to Australia's international treaty obligations.

The Society opposes the proposed legislation on the grounds that it unduly fetters judicial discretion. The removal of judicial discretion by the proposed mandatory sentencing scheme will greatly hinder the courts ability to bring about justice in individual cases. All cases consist of discreet facts and circumstances. There may be any number of contributing factors that lead to the commission of a crime. A mandatory sentencing scheme would be unable to take these factors into account. Mandatory sentencing laws are arbitrary, contravening the principles of proportionality and necessity because they do not allow consideration of either the seriousness of the offence or the circumstances of the offender. They have the

potential to lead to serious miscarriages of justice, exacerbated by virtue of the fact that mandatory sentences, by definition, are not reviewable on appeal. It is our view that judges are in a better position to administer justice through judicial reasoning and comprehensive understanding of the offence and the circumstances surrounding its commission. Therefore, the Society maintains that sentencing decisions should rest with highly trained judicial officers.

The empirical evidence against mandatory is well documented. There is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. Furthermore, these schemes have consistently failed to achieve the stated objectives of deterrence and crime reduction in Queensland, New South Wales, other Australian State and Territory and international jurisdictions.

We also note the following compelling reasons for opposing mandatory sentencing:

- To the extent that mandatory sentencing is perceived as a democratic response to the public perceptions of crime, the most appropriate response is to educate the public about sentencing, not to impose an inflexible and unfair sentencing regime. This is demonstrated by Australian and overseas research. A study published by Professor Kate Warner from the University of Tasmania 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 that the judge's sentence was (very or fairly) appropriate.¹
- In addition, mandatory sentencing encourages judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust. In some circumstances when an offender is faced with a mandatory penalty, juries have refused to convict. Furthermore, prosecutors have deliberately charged people with lesser offences than the conduct would warrant to avoid the imposition of a mandatory sentence. In effect, this shifts sentencing discretion from an appropriately trained and paid judicial officer to a prosecutor. This process is called "de-mandatorising".
- The inevitable increase in prison population as a result of the mandatory sentencing is one of many additional costs to the community without any commensurate benefit.
- Mandatory sentencing reduces the proportion of pleas of guilty, thus increasing court costs, court delays, prosecution costs, defence costs and the stress upon victims and other witnesses.
- Mandatory sentences could impact disproportionately on the most marginalised members of society which include many Aboriginal & Torres Strait Islander people.

Therefore the Society opposes the introduction of mandatory sentencing regimes for all offences.

2. Consideration of the drafting of the Bill

Despite the short consultation period provided, we have briefly analysed some aspects of the draft legislation.

¹ Warner K, public judgement on sentencing: final result from the Tasmanian Jury Sentencing Study. Trends and issues in crime and criminal justice, Australian Institute of Criminology, February 2011.

2.1 Clause 3- Amendment of s 305, *Criminal Code Act 1899*

Proposed s 305(4)(b) deals with the relevant circumstances under which the person being sentenced did the act or made the omission that caused the police officer's death. We consider that proposed s 305(4)(b)(ii), which states the circumstance of the act or omission being made "because the police officer was a police officer", should be removed as it is vague. It appears that this circumstance has been included to cover situations in which a police officer is killed whilst not on duty. However, in our view, this circumstance is sufficiently covered by proposed s 305(4)(b)(iii), which states the circumstance of "because of, or in retaliation for, the actions of the police officer or another police officer in the performance of the officer's duty". The inclusion of the circumstance, "because the police officer was a police officer", is an unnecessary duplication.

Clause 5 of the Bill will function to make the changes to proposed s 305(2) retrospective in part. Section 4(3)(g), *Legislative Standards Act 1992* specifically states that legislation should not "adversely affect rights and liberties, or impose obligations, retrospectively". We consider that the proposition in clause 5 breaches this principle without reasonable justification.

2.2 Clause 4- Amendment of s 340, *Criminal Code Act 1899*

The Society considers that this amendment will have negative consequences for a person sentenced as a child under the *Youth Justice Act 1992*. This is because an assault against a police officer which falls in one of the circumstances which attracts the 14 year penalty will make the offence a 'serious offence' under s 8, *Youth Justice Act 1992*. These matters must be dealt with on indictment and not summarily. In our view, there will be a significant delay in the resolution of these matters, which increases the risk of higher remand in custody rates. We consider that this issue will particularly impact Aboriginal and Torres Strait Islander children and young people.

In light of the over-representation of these young people in the criminal justice system, which has been the focus of research and the 2010 'Commonwealth inquiry into the high levels of involvement of Indigenous juveniles and young adults in the criminal justice system', the Society considers that the likely increases in both remand and imprisonment rates as a result of this amendment should be examined. We consider that provision should be made to ensure that children prosecuted under proposed s 340(1)(b) can still be dealt with summarily under the *Youth Justice Act 1992*. We consider that more appropriate sentencing mechanisms will then be available for children and young people.

The Society notes that, under the heading of 'Maximum penalty', subsection (iii) states that one of the circumstances for which the 14 year penalty will apply is if:

*(iii) the offender is, or pretends to be, armed with a dangerous or offensive weapon or instrument-
14 years imprisonment.*

The phrase "or pretends to be" broadens this provision to include situations where no actual weapon or instrument has been used. For example, the use of the words 'I have a knife' without the actual presence of one could potentially attract prosecution under this section. We consider that it would be inappropriate to subject persons to a serious imprisonment sentence of 14 years on this basis.

The Society also notes that, under the heading of 'Maximum penalty', only subsection (iii) contains the penalty of 14 years. We consider that, in the interest of clear legislative drafting, the penalty of 14 years

should be enunciated in subsections (i) and (ii), or should be placed on the line below so that it is evident that the penalty applies to all three subparagraphs.

2.3 Clause 19- Insertion of s 222, *Penalties and Sentences Act 1992*

Proposed s 222 states:

(1) *On the commencement of this section—*

(a) *the Sentencing Advisory Council is dissolved; and*
(b) *the members of the Sentencing Advisory Council go out of office.*

(2) *No compensation is payable to a member because of subsection (1).*

The Society considers that the denial of compensation by legislation does not appropriately take into account the rights and liberties of individuals as is required under s 4(2), *Legislative Standards Act 1992*. We consider that this denial of compensation is inconsistent with the principles of natural justice.

2.4 Clause 21- Amendment of s 754, *Police Powers and Responsibilities Act 2000*

Proposed new s 754(2) and (2A) will impose a mandatory minimum penalty of 50 penalty units and a mandatory two year disqualification from holding or obtaining a driver licence. We have expressed our opposition to any form of mandatory sentencing in Section 1 of this submission.

In terms of drafting, s 91, *Transport Operations (Road Use Management) Act 1995* deems that the chief executive must be advised of persons disqualified from holding Queensland driver licences. To this end, we would recommend inserting a further section similar to the wording contained in s 450H(2), *Criminal Code 1899* which deals with 'licence disqualification where commission of offence is facilitated by licence or use of vehicle':

"A copy of the order shall be transmitted to the chief executive of the department in which the Transport Operations (Road Use Management) Act 1995 is administered by the officer or clerk having custody of the records of the court wherein the conviction was recorded."

Thank you again for the opportunity to provide these comments. If you require any further information with respect to this submission, please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au or our Senior Policy Solicitor Ms Binari De Saram on (07) 3842 5885 or b.desaram@qls.com.au.

Yours faithfully

Dr John de Groot
President