

Your Ref: Research Director, Scrutiny of Legislation Committee

Our Ref: Criminal Law Section: 21000339/118

10 August 2010

The Research Director
Scrutiny of Legislation Committee
Parliament House
George Street
BRISBANE QLD 4000

By Email and Post: scrutiny@parliament.qld.gov.au

Dear Research Director

QUEENSLAND LAW SOCIETY SUBMISSION RE *PENALTIES AND SENTENCES (SENTENCING ADVISORY COUNCIL) AMENDMENT BILL 2010*

1. Introduction

Thank you for your invitation to submit in respect of the above Bill.

This submission will not refer to the Sentencing Advisory Council but will concentrate on the amendments to Section 9 of the Bill.

2. Amendment of section 9 of the Penalties & Sentences Act (“PSA”)

It is noted that the current section 9(5) of the PSA is to be omitted and replaced by a new section 9(5).

The current section 9(5) of the PSA provides that, “the principles mentioned in subsection (2)(a) do not apply to the sentencing of an offender for any offence of a sexual nature committed in relation to a child under 16 years.”

Section 9(2)(a) of the PSA currently states that in sentencing an offender a court must have regard to principles that:

- a sentence of imprisonment should only be imposed as a last resort; and
- and a sentence that allows the offender to stay in the community is preferable.

The new section 9(5) provides that in sentencing an offender for an offence of a sexual nature committed in relation to a child under 16 years, the principles mentioned in subsection (2)(a) do not apply **and** the offender **must serve an actual term** of imprisonment unless there are exceptional circumstances.

The Explanatory Notes observe that the new section 9(5) is intended to:

“Strengthen...the penalties imposed upon child sexual offenders and will complement the existing legislative measures aimed at the protection of the most vulnerable members of the community and recognises the inherent seriousness of any form of indecent treatment by an adult upon a child...”¹

Further the Explanatory Notes observe that the term “actual term of imprisonment” is defined in the Bill as meaning a term of imprisonment served wholly or partly in a Corrective Services facility.

The Society objects to the new section 9(5) to the extent that the proposed change envisages that a child sex offender **must serve an actual term of imprisonment**. We consider that this unduly fetters the sentencing discretion of judicial officers. There is already a well established body of case law, including clear judgments from the Court of Appeal that, generally speaking, a person committing a sexual offence against a child must serve as part of an imposed sentence some time in jail.

With the removal of a range of child sex offences from the District Court to the Magistrates Court as part of the implementation of the Moynihan Report, we are concerned that the effect of the new section 9(5)(b) will be to cause people to be actually jailed for low range sexual offences against children which currently do not attract an actual term of imprisonment. We have in mind those categories of offences where a child under 16 (say a 15 year old) is the victim of low level sexual offending such as touching through clothes or an indecent act constituted by, say, a sensual kiss.

The Society submits that the current body of comparative sentences, including effective Court of Appeal guideline judgments in relation to child sex offending adequately reflects punishment levels that should be imposed on persons engaging in child sexual offending, having regard to the fact that the circumstances and level of seriousness of child sex offences are highly variable. Upon review of these decisions, one can see that there clearly is no problem which requires legislative intervention. Furthermore, we are concerned that the significant tightening of judicial sentencing discretion in the proposed new section comes unacceptably close to mandatory sentencing.

Accordingly, we request that the proposed new section 9(5)(b) be discontinued on the basis that the current sentencing regime, as reflected in comparable cases, is appropriate particularly having regard to the ability of the Prosecution (whether the Office of the Director of Public Prosecutions or your office as Attorney-General) to appeal against perceived inadequate sentences in this area.

3. Previous convictions

The new section 9(8) proposes that in determining the appropriate sentence for an offender who has one or more previous convictions, the court must treat **each** previous conviction as an aggravating factor.

The Explanatory Notes in respect of this proposal observe:

“Queensland Corrective Services confirm that of the prisoners under sentence as at 30 June 2009, 60.9% of the males and 47.8% of the females had previously served an actual term of imprisonment. Strengthening the penalties imposed upon repeat offenders will signal community expectations with regards to recidivism and reinforce the Government’s position regarding offenders who continue to demonstrate an attitude of disobedience of the law.”

The current law and practice in relation to the significance of previous convictions is outlined in Robertson’s Queensland Sentencing Manual as follows:

¹ See Explanatory Notes page 2.

*“The role of a previous criminal history in the sentencing process was spelt out by the High Court in Veen v The Queen (No 2) (1988) 164CLR465 namely that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but cannot be given such weight as to lead to the imposition of a penalty which is **disproportionate** to the **gravity** of the **instant offence**. To do so would be to impose a **fresh penalty** for **past offences**. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a **continuing attitude of disobedience** of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take into account the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity, or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind (applied by Cooper J with whom Kneipp and Shepherdson JJ agreed) in R v Aston (No 2) [1991] 1 Qd R375.”²*

Further, Robertson observes:

“However, the nature of the previous convictions is relevant in the exercise of the sentencing discretion. Little weight would ordinarily be given to previous convictions of a minor nature or of a substantially different character from the subject offence.”³

The Society seeks clarification on the effect of the new section 9(8). Upon reading, the new section 9(8) appears to be that a sentencer is to treat each previous conviction as an aggravating factor in some sort of cumulative sense. We therefore seek your advice as to whether the new section 9(8) is intended to restate the existing common law on the sentencing significance of previous convictions as reflected in the extracts from Robertson above. If that is all that the section proposes to achieve then the new section 9(8) should be amended as follows:

- the word “**must**” in the second line should be replaced with the word “**may**”; and
- the word “**each**” in the second line should be deleted.

Additionally, the considerations as outlined in subsections (a) and (b) as to the significance of previous convictions should be expanded to reflect what the High Court has stated in Veen, namely, that the antecedent criminal offence should not be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. Further, in the section itself or as an example positioned at the end of the new subsection, it should be specifically declared that it is not the intention to change the existing common law as to the significance of previous convictions in relation to sentence.

If the new section 9(8) is intended to change the existing common law particularly by reference to the words must and each, the Society would express its strong opposition to such a change as being unwarranted having regard to current sentencing Court of Appeal guideline judgments and current sentencing practices.

The motivation behind the change as outlined in the new section 9(8) seems to be reflected in the extract from the Explanatory Notes above, namely, the high rate of recidivism. The fact is that the greater the number of entries on a person’s criminal history sheet especially, where those entries relate to jail sentences, the greater is the length of any sentence for a later offence. In this regard, it has also been

² See Robertson at pages 10052-10053 (Emphasis added).

³ See Robertson at page 10053.

noted in Robertson's work that "subject only to the Penalties & Sentences Act 1992, the sentencing discretion is very wide."⁴

The use of the word "**must**" in the phrase "the court must treat each previous conviction as an aggravating factor" in the new section 9(8) is concerning, particularly having regard to what was said by Lee and Fryberg JJ in Holley.⁵ Here it was held that the word "**may**" in relation to a power indicates that the power may be exercised or not exercised at discretion, where the word "**must**" used in relation to a power indicates that the power is **required** to be exercised.⁶

Rather than using the recidivism statistics as quoted in the Explanatory Notes above to foreshadow an apparent intention to compel judges to impose higher sentences because of previous convictions, it would make much more sense from a policy and expenditure of public funds standpoint to address the root causes of recidivism having regard to the rapidly growing prison population in Queensland. The increased budgetary allocation being given to Corrective Services to provide an ever increasing number of jail places means that that money which could be more profitably spent on productive fields of public policy such as education and health is being diverted into a prison system which is producing an unacceptably high level of reoffending.

The Society is opposed to the proposed new section 9(8) and recommends its removal from the Bill.

4. Serious violent offences

The amendment to section 161B provides that if a person is convicted on indictment of an offence that involved the use, counselling or procuring the use, or conspiring or attempting to use violence against a child under 12 years or that caused the death of a child under 12 years, the Sentencing Court **must** treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violent offence.

It is noted that the use of the word **must** is a departure from the existing wording of section 161B which uses the word **may**.

We repeat the observations as outlined above in relation to the child sex amendment in respect of the use of the words must/may.

⁴ See Ibid 9051.

⁵ 90 A Crim R page 37.

⁶ Ibid page 63 (emphasis added).

It is observed that the Explanatory Notes outline the following observations in relation to this amendment:

*“Amending section 161B to ensure that in the case of an offender convicted of an offence of violence against a young child or an offence that caused the death of a young child the court **must** treat the age of the child as an aggravating factor in deciding whether to declare the offender to be convicted of a serious violence offence.”⁷*

Further the Explanatory Notes observe as follows:

“The amendment will strengthen, when appropriate, the penalties imposed upon offenders convicted of an offence of violence against a young child or an offence that caused the death of a young child, without fettering the judicial discretion in deciding whether to declare the offender to be convicted of a serious violent offence. Maintaining judicial discretion in this process is essential given that there will be cases where the community, despite the tragic consequences of the conduct, would not expect such a severe sanction. The reference to a child under 12 years is consistent with the approach adopted in the Criminal Code where certain offending is aggravated by virtue of the victim being under 12 years and where a child under 12 years is illegally incapable of giving consent. These provisions acknowledge the special vulnerability of young children and the need to legislatively protect them.”⁸

While noting in this extract the Government’s intention not to fetter judicial discretion, it is the Society’s view that using the mandatory “**must**” as opposed to the existing regime of the use of the word “**may**” in section 161B dealing with the Declaration of a conviction of a serious violent offence is inappropriate. If it is, indeed, not intended to fetter judicial discretion, it is the Society’s view that the use of the word must will, to an unacceptable extent, fetter the sentencing discretion.

While the Society supports the intent of the proposed amendment to section 161B so as to penalise violence against a child under 12 (whether actual or contemplated by counselling or conspiracy), the Society firmly opposes the use of the mandatory concept of “must” in this new provision.

If you have any questions regarding the contents of this letter, please do not hesitate to contact Ms Binny De Saram, a Policy Solicitor with our office on (07) 3842 5885 or b.desaram@qls.com.au.

Yours faithfully

Peter Eardley
President

⁷ See Explanatory Notes page 3 (Emphasis added).

⁸ See Explanatory Notes page 4.