

Your Ref: 11.1.11.c: The Research Director

Quote in reply: Criminal Law Committee: 21000339/197

20 January 2011

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

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

Dear Research Director

LAW REFORM AMENDMENT BILL 2011

Thank you for providing the Queensland Law Society ("the Society") with the opportunity to provide comments on the *Law Reform Amendment Bill 2011* ("the Bill").

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:

- *Criminal Code Act 1899*; and
- *Corrective Services Act 2006*; and
- *Penalties and Sentences Act 1992*; and
- *Recording of Evidence Act 1962*.

Criminal Code Act 1899 amendments (dangerous dog law)

1. Clause 35 - Dangerous management of a dog (new section 334A)

We consider that section 289 of the Criminal Code, which deals with the duty of persons in charge of dangerous things, is adequate to deal with deaths caused by dangerous dogs. This provision states:

It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

In our view, an additional specific offence to deal with these incidents is not warranted. The Society is also concerned that the wording of proposed section 334A is broad and does not include important safeguards against unintended consequences. If an additional offence must be enacted then we submit that the following issues must be addressed:

a. *Application to all dogs*

There is no element in the proposed offence identifying that the owner had knowledge that the dog in question had a propensity towards aggressiveness.

We understand that the *Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Act 2011*, which introduced similar dangerous dog criminal laws in Victoria, only applied to dogs that were classified as dangerous, menacing or a restricted breed dog. This demonstrates that the owner was aware of the aggressive nature of the dog and did not take steps to protect the public.

The Queensland *Animal Management (Cats and Dogs) Act 2008* contains similar classifications for declared dangerous dogs, declared menacing dogs and restricted dogs. We recommend that proposed section 334A be amended to reflect a regime closer to that of the Victorian system, where the offence is restricted to dogs that have already displayed signs of hostility. At the very least, the definition for 'manages a dog dangerously' contained in proposed section 334A(4) should include a reference to whether the dog has been declared dangerous, menacing or is a restricted dog.

b. *'Reasonable person' test*

Additionally the Victorian *Crimes and Domestic Animal Acts Amendment (Offences and Penalties) Act 2011* included a reasonable person test, and owners who fell below this standard would be guilty of the offence. A reasonable person test is desirable for this offence, so that the "act or omission" of a person responsible for the dog can be determined against a reasonable community standard of what would have been expected in the situation.

c. *Lack of defences to the offence*

Reasonable justification for the dog's behaviour is not specifically included in proposed section 334A. For example, section 196(1)(a) of the *Animal Management (Cats and Dogs) Act 2008* states:

- (1) *It is a defence to a prosecution for an offence against section 194 or 195 for the defendant to prove—*
- (a) *the dog attacked, or acted in a way that caused fear to, the other person (the complainant) or the animal—*
 - (i) *as a result of the dog being attacked, mistreated, provoked or teased by the complainant or the animal; or*
 - (ii) *to protect the defendant, or a person accompanying the defendant (the accompanying person), or the defendant's or accompanying person's property...*

The Society recommends that the proposed section 334A be amended to specifically include words to this effect, so as to provide persons accused with the ability to clarify the actions of the dog in the circumstances of the incident.

d. *Considerations for 'manages a dog dangerously'*

We note that the Government's community consultation version of proposed section 334A(4) included "breed of the dog" in the considerations for 'managing a dog dangerously', but it is now omitted from the Bill. The breed of dog can be important in determining the foreseeable risk of an attack occurring and the level of vigilance expected of a person responsible for a dog. We recommend that "breed of the dog" be re-incorporated in this definition section.

Another relevant consideration not cited is the past history of the dog. This would include, for example, any abuse and neglect that the dog has experienced, which may be significant in determining causes for the incident. The consideration relating to "the past conduct of the dog, its training and its temperament" is not likely to encompass these factors, so a separate consideration to address this would be appropriate.

Corrective Services Act 2006 and Penalties and Sentences Act 1992 amendments (standard non-parole periods)

**2. Clause 30- parole eligibility date for other serious offence (new section 182A Corrective Services Act 2006)
Clauses 123- 126- Insertion of standard non parole period scheme (Penalties and Sentences Act 1992)**

a. *General comments*

The Explanatory Notes to the Bill state:

"The Bill adopts the scheme as recommended by the Sentencing Advisory Council in its 2011 report, 'Minimum standard non-parole periods' (final report)..."

The Sentencing Advisory Council was not asked to advise the Government on the appropriateness of introducing an SNPP scheme. Rather, the terms of reference appeared to assume the introduction of such a scheme and asked the Council to report on aspects of how it should be implemented. Despite the limited referral, the Sentencing Advisory Council final report discouraged the adoption of standard non-parole periods. In particular, the report states at page 20:

"After closely examining the issues, a majority of the Council does not support the introduction of a SNPP scheme in Queensland. In particular, a majority of the Council is concerned there is limited evidence of the effectiveness of SNPP schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming. It also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment.

The Council is further concerned that there are possible policy tensions between the objectives of a Queensland SNPP scheme and the policy objectives of other Queensland and Commonwealth government initiatives including the National Indigenous Law and Justice Framework 2009–2015 the proposed Queensland Aboriginal and Torres Strait Islander Justice Strategy 2011–2014 and the National Disability Strategy 2010 –2020; the potential of a SNPP to support the objectives of these strategies would appear to be limited."

The Society therefore does not consider that this scheme was recommended by the Council and urges the Committee to consider the value of standard non-paroles in light of the expert advice given. We

stress there is limited evidence that standard non-parole periods have been successful in other jurisdictions where they have been introduced such as in New South Wales.

The Society's long-held position is that the current sentencing regime in Queensland, having at its core a system of judicial discretion exercised within the bounds of precedent, is the most appropriate means by which justice can be attained on a case by case basis.

Notwithstanding the Society's opposition to a scheme of this nature, and in keeping with the Society's position as a significant stakeholder in the criminal justice system, we will nonetheless provide submissions on the proposed legislative regime, despite our fundamental opposition.

b. Inclusion of 17 year olds in the scheme

In its report, the Sentencing Advisory Council advised the Government that standard non-parole periods should only apply to offenders aged 18 years or over at the time of the commission of the offence. The Society is disappointed that the Government has not followed this advice, and the new scheme is proposed to generally apply to all adults and 17 year olds.

Queensland is the only State or Territory in Australia that considers 17 year olds to be adults in the criminal justice system. This is in contravention of Australia's human rights obligations under the Convention on the Rights of the Child. We note that the Attorney General addresses this issue in the second reading speech of the Bill:

"The Bill adopts the scheme recommended by the Sentencing Advisory Council in its 2011 report titled, 'Minimum standard non parole periods' with the exception of its application to 17 year old offenders. In its report the Council recommended that the scheme not apply to 17 year old offenders. However, this would in effect create three different sentencing regimes for persons aged 16 years and under, 17 year olds, and then persons aged 18 years and over.

The Government appreciates that there are quite divergent views on how 17 year olds are dealt with in the justice system but points out that this legislation is not the appropriate forum to resolve that issue either way."

In our view, it is unacceptable for Queensland to continue to violate Australia's international law obligations. Any complexity involved with "three different sentencing regimes" can be appropriately managed as is the case with any type of complexity in the criminal justice system.

Ensuring 17 year olds are not captured by this regime would signify that the Government is genuinely committed to addressing this issue and would mark the first step towards rectifying this situation.

c. Judicial discretion

The Society is satisfied that at least some measure of judicial discretion is preserved by proposed section 161BB(1)-(2) of the *Penalties and Sentences Act 1992* (contained in clause 123 of the Bill). In our view, this is the most important aspect of the scheme as it allows the court to depart from a standard non-parole period if it considers that it would be unjust to impose the standard non-parole period.

d. Trigger points for standard non-parole periods

We consider that if head sentences for offences are increased, this should consequently result in an increase in the trigger points for standard non-parole periods. For example, if a head sentence is

increased from 10 to 14 years, then the corresponding trigger point for the standard non-parole period should come into effect at the 7 year mark as opposed to the 5 year mark. This will maintain the relativity of the trigger point for a standard non-parole at 50% of the head sentence. We are concerned that the proscribed conduct that will attract a standard non-parole period will decrease over time.

3. Amendment of *Recording of Evidence Act 1962*

We agree with the establishment of the Queensland Sentencing Information Service (QGIS) set out in clause 148. We consider that this is a valuable resource for the administration of the criminal justice system. We note that Clause 11E defines who may access QGIS. We suggest that access rights to QGIS be extended to the Queensland Law Society and various educational and research institutions. This will enable the Society to provide more comprehensive responses to government consultations and also allow universities to undertake much needed research in the area of criminal justice.

Thank for you providing the Society with the opportunity to make comments. If you have any questions in regard to the contents of this letter, please contact Ms Binny De Saram, Senior Policy Solicitor on (07) 3842 5885 or b.desaram@qls.com.au or Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au.

Yours faithfully

Annette Bradfield
Deputy President