

8 February 2019

Our ref: BDS-CrLC

Mr Peter Russo, MP
Chair
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Chair

Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

The Society writes in relation to the Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018 (**the Bill**). We apologise for the lateness of this submission but would be grateful if the committee would accept our observations on the Bill.

This response has been compiled with the assistance of members of the QLS Criminal Law Committee whose members have substantial expertise in this area.

The Bill seeks to amend the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA), relying on the High Court decision of *Pollentine v Bleijie* [2014] HCA 30. However, the Society holds significant concerns that aspects of the current Bill may not be constitutionally valid as it goes beyond the scope and structure of the grounds described in *Pollentine*.

1. Constitutional Issues and *Pollentine*

In the High Court decision of *Pollentine v Bleijie*¹, the Court did uphold the constitutional validity of section 18 of the *Criminal Law Amendment Act 1945* and deemed the provision did not infringe the principle identified in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

In this regard, the High Court dealt with a number of matters relating to that legislation. With respect to the key issue of whether the legislation was an impermissible delegation of the sentencing task of the Court, and therefore inconsistent with the institutional integrity of the Court, it said at paragraphs 43 to 45 of the unanimous judgment:

Impermissible delegation of the sentencing task?

[43] The plaintiffs submitted that an order for indefinite detention made under s 18 "delegates to the Executive the power to determine the period in which an offender will be deprived of his or her liberty". In oral argument, this was described as "outsourcing"

¹ *Pollentine v Bleijie* [2014] HCA 30

Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

sentencing to the Executive. There is, so the plaintiffs submitted, a radical difference between a sentence of life imprisonment (even where subject to release by the Executive on parole or licence) and an order for detention during Her Majesty's pleasure. The duration of the former kind of sentence is, they submitted, fixed by the sentencing court; the duration of the latter order is wholly determined by the Executive.

[44] The delegation submission must be rejected for two related reasons: one concerning how a direction for indeterminate detention is made; the other about how detention is terminated. First, a sentencing court must decide, according to the ordinary processes of the criminal law, applying ordinary principles of statutory construction and judicial decision making, whether s 18 may be engaged in the case of the offender concerned. The court dealing with that offender, if satisfied that s 18 is engaged, then may, but need not, direct indefinite detention in addition to or instead of fixing a determinate sentence. The court is not bound to direct detention terminable only by executive decision. A direction for indefinite detention will serve purposes of punishment and community protection. According to what happens to the offender during the detention, the direction may serve some reformatory purpose. None of these features of the matter points in any way to repugnancy to or incompatibility with the institutional integrity of the court that makes the direction of State courts more generally.

[45] Second, once it is recognised that release is not at the unconfined discretion of the Executive, but dependent upon demonstration by medical opinion of the abatement of the risk of reoffending, the notion that a court has delegated the fixing of the extent of punishment loses most, if not all, of its force. The continuation of detention depends upon danger to the community, not upon retribution for what the offender has done. And because an inquiry under s 18(1)(a) is into whether the offender's "mental condition is such that he is incapable of exercising proper control", there is an evident similarity between a court's power to order indeterminate detention on this account and the powers courts have long had not only to decide whether an offender is fit to stand trial or was criminally responsible for an alleged crime but also, on proof of unfitness or insanity, to direct the indeterminate detention of that offender.

In short compass, the two key features the Court required for validity on implementing a protective arrangement is that:

- the court must not be bound or compelled by legislation to do make the order; and
- the over-riding condition for determination of release must be the 'danger to the community' based on medical opinion on the reduction of risk of reoffending.

There are a number of aspects where this Bill goes beyond those considerations and significant constitutional concerns are raised. These, at least, include the following:

- Clause 5 removes from the Court a key element of its discretion and makes a nullity of the considerations in section 13(4)(h) and 13(4)(j) of the DPSOA. This skewing of the mandatory considerations of the Court runs the risk of binding or compelling the Court to make a Division 3 order in an impermissibly fettered way
- Clause 6 removes from the Court the power to fix a period for a Division 3 order and further reduces the Court's discretion. When taken with Clause 5, this measure further relegates the Court's decision-making process toward an impermissible bound compulsion

Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

- Proposed section 19C provides the Governor-in-Council and not the Court the discretion about whether a pre-commencement fixed term order should become an ongoing order. This has the effect of retrospectively constraining the orders of the Court and contributing to a potential impermissible fettering of the Court's discretion through subsequent treatment of the order inconsistent with the Court's original decision
- Proposed section 19D sets criteria for the determination by Governor-in-Council for the threshold question of whether a person remains a danger to the community on the basis of medical opinion. This does not appear to be an unbound discretion, however, the drafting is not clear whether the prime consideration is the factors in proposed 19D(2)(a) which are largely concerned with past conduct or the prospective risk of reoffending opinion evidence of the psychiatrists in proposed s19D(2)(b). The nature of the proposed 19D(2)(a) factors are further made punitive if they must be read down in accordance with the amendments proposed by clause 5 as the Court must interpret them. The introduction of so many punitive factors to be considered by the Governor-in-Council in making its decision casts some significant doubt whether this construction sits within the *Pollentine* framework of requiring the over-riding condition for determination of release to be the 'danger to the community' based on medical opinion on the reduction of risk of reoffending
- Proposed section 43AL in making, by operation of the law alone, an indeterminate supervision order relies upon an earlier conviction or Division 3 order of the Court but gives the Court no discretion of any kind with respect to this form of punishment. This appears inconsistent with the construction in *Pollentine* as an impermissible delegation of the sentencing task to the Executive Government
- Proposed section 43AM(3) operates in favour of the Attorney-General and not the Governor-in-Council and consequently questions arise about whether this is empowering that office with judicial functions in breach of the separation of powers and also denying the role of the Court in the task of sentencing
- Proposed section 43AQ sets out the test the Attorney-General must use in making a determination about the continuation of aspects of an indeterminate supervision order. While this decision is informed by medical opinion relating to the risk of reoffending, the exercise of discretion is not limited to the danger to the community but stated as the 'public interest'. This has the potential for this decision to be centred on continuation of the primacy of punitive considerations and not consistent with the framework in *Pollentine*.

2. Other Good Law Issues

Clause 4 - Insertion of new s 3A

Clause 4 seeks to insert new section 3A into DPSOA to state:

3A Safety and protection of community paramount in decisions under this Act

An entity making a decision under this Act must give paramount consideration to the safety and protection of the community.

The Society opines that the job of balancing competing interests of community safety and the liberty of an individual appropriately lies with the court. In our view, we do not think that it is

Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

necessary to mandate that paramount consideration be given to the safety and protection of the community.

Clause 5 - Amendment of s 13 (Division 3 orders)

Clause 5 of the Bill seeks to amend section 13 DPSOA by inserting a new provision that states:

- (4A) Also, in deciding whether there is an unacceptable risk as mentioned in subsection (2), the court must not have regard to—
 - (a) the means of managing the risk; or
 - (b) the likely impact of a division 3 order on the prisoner.
- (4B) The court may be satisfied a prisoner is a serious danger to the community as mentioned in subsection (1) even if the likelihood that the prisoner will commit a serious sexual offence is less than more than likely than not.

The Society does not support the removal of “the means of managing the risk” or “the likely impact of a division 3 order on the prisoner” from being considered by a court. These concepts are important considerations that should inform the making of division 3 orders. It is essential to consider these matters to ensure the objects of the DPSOA are achieved. To remove these considerations is at odds with the proper administration of justice.

The drafting in proposed 4B of “... is less than more than likely than not” is not sufficiently clear or precise for legislation of this nature.

Clause 6 - Omission of s 13A (Fixing of period of supervision order)

Clause 6 of the Bill seeks to omit section 13A DPSOA. Section 13A DPSOA states:

13A Fixing of period of supervision order

- (1) If the court makes a supervision order, the order must state the period for which it is to have effect.
- (2) In fixing the period, the court must not have regard to whether or not the prisoner may become the subject of—
 - (a) an application for a further supervision order; or
 - (b) a further supervision order.
- (3) The period can not end before 5 years after the making of the order or the end of the prisoner’s period of imprisonment, whichever is the later.

The Society does not support the removal of 13A DPSOA. The Society considers that the current legislative requirement to fix the period of supervision orders must be maintained. To remove this requirement would remove an important safeguard, preventing the indefinite detention of individuals. The provision also sets out the mechanism by which further supervision orders may be made, following appropriate judicial consideration on whether an application for a further supervision order should be granted.

Clause 7 - Insertion of new s 14A

Clause 6 of the Bill seeks to insert a new section 14A effect of supervision order in the DPOSA. Proposed section 14A states:

14A Effect of supervision order

Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

A supervision order has effect in accordance with its terms—

- (a) on the order being made or on the prisoner's release day, whichever is the later; and
- (b) until the Governor in Council decides under section 19B(4) that the supervision order no longer applies to the released prisoner.

The effect of this section is to convert automatically all existing judge made supervision orders to indefinite orders that can only be extinguished by the Governor in Council. The Society does not support proposed section 14A. In our view, granting the Executive the power to determine when a fixed-term judicial supervision order may be extinguished, might not be constitutionally valid or accord with the principle identified in *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

The legislative provisions discussed in *Pollentine v Bleijie*² do not confer upon the Executive the power to compel courts to make certain orders. However, proposed section 14A provides the Executive with the power to automatically convert all existing judge made supervision orders to indefinite orders that can only be extinguished by the Governor in Council.

Clause 8 - Replacement of pt 2, div 4A (Extending supervised release)

Clause 8 of the Bill seeks to replace part 2, division 4A which deals with reviews of supervision orders.

Proposed section 19B - Review of supervision order made after the commencement

The Society is concerned about the financial and administrative burden that would be created by proposed section 19B(2). The proposed section states that it applies to all supervision order and requires the Governor in Council to review the released prisoner's supervision order within five years after the order is made by the court. In our view, it is more appropriate to allow supervision orders to come to an end, unless an application to extend a supervision order has been made.

Proposed section 19D - Provision about reviews under ss 19B and 19C

Proposed section 19D states

19D Provision about reviews under ss 19B and 19C

- (1) This section applies to a review of a released prisoner's supervision order under section 19B or 19C.
- (2) In deciding whether a released prisoner is a serious danger to the community, the Governor in Council must have regard to—
 - (a) the matters mentioned in section 13(4)(aa) to (j); and
 - (b) any report produced for the review under section 19E.
- (3) Notice of the outcome of a review under section 19B or 19C must be given to the released prisoner.

The Society is concerned by the lack of clarity provided in the Bill about the process and methodology to be used by the Governor in Council in conducting reviews. It is unclear what

² *Pollentine v Bleijie* [2014] HCA 30.

Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

types of reports will be adduced and whether the person subject to the supervision order will have the opportunity to be heard. If a hearing takes place, we would strongly recommend that the person subject to the supervision order will have the opportunity to test the evidence and be legally represented. Failure to provide such safeguards does not accord with the rules of natural justice and procedural fairness.

Clause 10 - Insertion of new pt 4B

Clause 10 of the Bill seeks to insert proposed new part 4B which provides for indeterminate supervision orders to be imposed on repeat offenders.

Proposed section 43AJ – definitions

Proposed section 43AJ states that a, “repeat offender means an offender who is convicted of two or more serious sexual offences committed by the offender when the offender was an adult.”³ The Society is exceptionally concerned by the broad definition of the term repeat offender and the unintended consequences that might occur by application of the definition provided in the Bill. For example, a repeat offender might include an individual who has been convicted of two serious sexual offences within the same proceeding.

Proposed section 43AL - Repeat offender is subject to indeterminate supervision order

Proposed section 43AL deems that repeat offenders are subject to indeterminate supervision orders. The proposed indeterminate supervision orders carry a number of obligations, including the requirement:

- to wear a device for monitoring the repeat offender's location;
- to not, without reasonable excuse, be within 200m of a school;
- not to live within 1km of a place, where children are regularly present;
- report to a corrective services officer once every month; and
- not leave or stay out of Queensland without the permission of a corrective services officer.⁴

These obligations are onerous and the Bill is unclear on whether these requirements will come to an end or whether an individual will be subject to these obligations for the rest of their lives.

3. QLS opposition to mandatory sentencing

In addition, the Society does not support the mandatory imposition of these obligations under proposed section 43AL for all repeat offenders.

The view of the Society in relation to mandatory sentencing is well-established. In accordance with this view, the Society has been a long-standing advocate for judicial discretion. The reasons for our support for judicial discretion are based on cogent evidence and are clearly detailed in our mandatory sentencing policy paper.⁵ In line with our opposition to mandatory sentencing, we called for a commitment to refrain from the creation of new mandatory sentencing regimes and to take steps to repeal current mandatory sentencing regimes in our 2015 and 2017 Call to Parties Statements.

³ Proposed section 43AJ of the Bill.

⁴ Proposed section 43AL of the Bill.

⁵ Accessible at:

http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper.

Protecting Queenslanders from Violent and Child Sex Offenders Amendment Bill 2018

It is in line with this position that the Society re-emphasises the need to maintain flexibility in the sentencing process when sentencing an offender for an offence arising from the death of a child. This requires the preservation of judicial discretion in sentencing for these offences.

Mandatory sentencing regimes undermine sentencing guidelines as set out in section 9 of the *Penalties and Sentences Act 1992*. The *Penalties and Sentences Act 1992* states that sentences may be imposed on an offender to an extent or in a way that is just in all the circumstances. In circumstances where judicial discretion is fettered by the mandating of a sentence, the court is unable to impose a sentence that is just in all the circumstances and is transparent.

It is essential that judicial discretion be maintained for sentencing in all criminal matters, including those arising from the death of a child. A mandatory sentence, by definition, prevents a court from fashioning a sentence appropriate to the facts of the case.

As noted in our policy position, the public perception of the appropriateness of a sentence changes as additional information about a matter is provided. A study published by Her Excellency Professor the Honourable Kate Warner AC from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case in which they were involved. The jurors, who were not informed of the sentence imposed by the judge in the case, were asked what sentence they would impose. More than half of the jurors surveyed indicated they would have imposed a more lenient sentence than the trial judge imposed. When subsequently informed of the actual sentence imposed, 90% said the judge's sentence was (very or fairly) appropriate.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy Manager, Binny De Saram by phone on [REDACTED] or by email to [REDACTED]

Yours faithfully

[REDACTED]
Bill Potts
President