

3 September 2010

C62, 71.9
JM; rp

The Honourable Stephen Wade MLC
Shadow Attorney-General
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Mr Shadow Attorney

Criminal Law (Sentencing)(Mandatory Imprisonment of Child Sex Offenders) Amendment Bill 2010

I refer to your letter of 5 August 2010 seeking comment on the Private Members' Bill. The Society's Criminal Law Committee has considered the Bill and provides comment as follows:-

As a fundamental matter of principle the Committee is opposed to mandatory sentencing. There are many reasons for that including:-

- It interferes with the court's sentencing powers and discretions.
- There is not any sound justification for mandatory sentencing as a matter of policy.
- Lack of evidence to support mandatory sentencing as an effective tool in the reduction of crime or the reduction of the risk of recidivism.
- That the evidence tends to indicate that mandatory sentencing operates contrary to the perceived benefits.
- Mandatory sentencing has the real potential for less guilty pleas and more trials.
- That in the absence of adequate prison conditions, treatment facilities, rehabilitation and education programs, significantly extending the duration of a sentence of imprisonment gives rise to the risk of increasing difficulties in the management of an offender.
- Cost to the State by virtue of significant costs for housing, treatment and management of prisoners and parolees.

There are a number of significant drafting and conceptual difficulties in the Bill. Some of them are identified as follows:-

1. Section 20D(1) refers to "a prescribed sexual offence ... with which a person is first charged" as the offence which engages the mandatory sentence of imprisonment. This will in many cases not be the offence the subject of a sentence. An offender cannot be sentenced for an offence for which they have not been found guilty

2. The selection in Section 20D(1)(8)(i) of 10 years for the mandatory minimum period of imprisonment is arbitrary.
3. That mandatory minimum of 10 years imprisonment will apply in respect of the Section 48, 50, 56, 66 and 68 offences referred to in the table set out in the Hansard. There are material differences in the subjective seriousness of those offences which serve to distinguish the gravity of those offences in many cases but which would not be distinguished if there was the same mandatory minimum term of imprisonment.
4. Section 20D(1)(b) requires that the mandatory term of imprisonment is to constitute the "mandatory minimum non parole period for the offence". The Bill will fix the non-parole period by operation of the law. This misconceives the process of sentencing. That process requires the determination of the sentence of imprisonment and then a second stage of the sentencing process requires that the court then determine the non parole period. The Bill would require an approach to sentencing which is unworkable, impracticable, and contrary to many provisions of the Sentencing Act. Those provisions are concerned with the fixing of a sentence of imprisonment and the fixing of a non parole period.
5. Section 20D(1)(c) enables the Director of Public Prosecutions to agree to a suspension of a mandatory sentence of imprisonment or its reduction or its mitigation or its substitution. This will place the Director of Public Prosecutions in an impossible position. It will give rise to potential for unwarranted attacks whenever such an agreement was given. It is unworkable. The Director of Public Prosecutions should not have such a power in any event. The DPP cannot have any role to play in determining a sentence.
6. Section 20D(2) purports to preserve the power of the court to apply Section 18A of the *Criminal Law (Sentencing) Act* to fix one penalty for a number of offences. That power reflects a number of sentencing principles including and in particular the concept of totality. Mandatory imprisonment has no regard to totality. It is therefore inconsistent with principle on the one hand to require mandatory imprisonment and on the other hand to enable a single sentence for a number of offences. That would also render mandatory imprisonment unworkable.

In conclusion, the Committee considers that the rationale for such mandatory imprisonment has not been demonstrated. The suggestion that there is dissatisfaction by accepting guilty pleas for lesser offences is not an appropriate rationale. This may be the basis for the inclusion of reference to the offence "first charged". As indicated above, that is unworkable. Of course a guilty plea can be entered and accepted on a proper basis and in accordance with a number of protocols for the acceptance of such a proposal. What the Bill does not cover is the finding of guilt following a trial in respect of a lesser offence. Such a situation occurs in a number of cases and that verdict and determination is then for the offence for which the offender is to be sentenced. The Bill would be inconsistent with such a verdict.

It is suggested the Bill only applies to offenders who committed the offence when they were over the age of 18. There is not any such qualification in the Bill. Prima facie the Bill applies to young offenders and Section 3A of the *Criminal Law (Sentencing) Act* will make it so apply.

There is not any sufficient rationale directed to current sentencing practices not reflecting the severity and nature of sexual offences against children. None of the instances quoted are recent and most of them are from many years ago when sentencing practices were quite different. Referring to sentences imposed in 2001, 1991, 1996 and 1987 does not provide a sufficient rationale for the Bill. Those

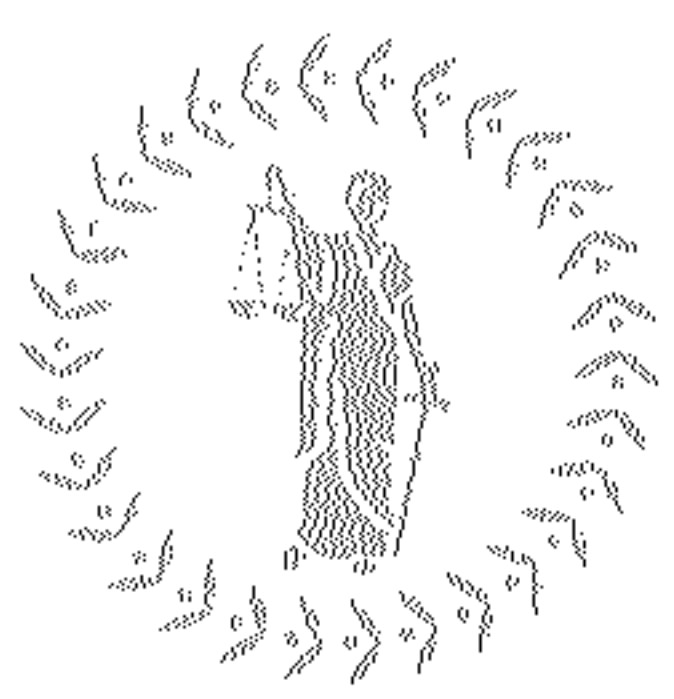
examples are few in number. There are no examples given of sentencing in recent times. Harsher penalties are being imposed for sexual offences as a result of legislative changes in the past few years and by virtue of the court sentencing standards and greater attention to sentencing practices. There is not any evidence provided to support the view that sentences are out of proportion to the gravity of the offences. This is still further indicated by virtue of the lack of successful appeals against sentences by offenders and the lack of appeals by the DPP on the basis that the sentence is manifestly inadequate.

I trust this is of assistance.

Yours sincerely



Jan Martin
EXECUTIVE DIRECTOR



3 September 2010

C62, 71.5

JM; rp

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Dear Mr Shadow Attorney

Graffiti Control (Miscellaneous) Amendment Bill 2010

I refer to your letter of 4 August 2010 seeking comment on the Private Members' Bill. The Society's Criminal Law Committee has considered the Bill and provides comment as follows:-

The Bill seeks to deal with policy considerations concerning graffiti control. As such the Committee does not have any submission to make. However, there are a number of aspects of the Bill which concern the recording of offender details and the statistics. The requirement for a Register of offenders and its inspection by authorised persons is not readily apparent. The police will already have this sort of information. That sort of intelligence or information is to be used by the police for policing purposes. It is unclear what is the policy, need or requirement for the Register.

The proposed amendments to the *Criminal Law Consolidation Act 1935* also concern information recording as to statistics. It is not clear what need there is for that. Statistics can be gathered by the Office for Crimes Statistics.

There may or may not be suitable programs in existence in respect of graffiti removal etc. The difficulty with this sort of approach is that if programs do exist (and that is by no means clear) then this is an aspect of sentencing. Therefore the provision should be located in the *Criminal Law (Sentencing Act)*. It should not be an amendment to the *Criminal Law Consolidation Act*.

The provision for mandatory payment of compensation has a particular policy consideration behind it. More work needs to be done to identify the rationale for such a policy. Payment of compensation is an aspect of sentencing and so this should be included in the Sentencing Act.

The provision also seeks to impose a further punishment by way of driver's licence disqualification wholly unrelated to the nature of the offence. This is not appropriate. A driver's licence disqualification is irrelevant to the crime. It is not appropriate to impose penalties or punishment unrelated to the nature of the offence as a matter of good policy. The mandatory driver's licence disqualification approach is unsound and unprincipled. Persons might be disqualified from holding or obtaining a driver's licence even if they have not committed the offence arising out of the use of a motor vehicle or even if they do not hold a driver's licence or do not drive.

Furthermore, the consequences of driver's licence disqualification gives rise to a further imposition upon a person who has a driver's licence who must then re-apply for a license and start all over again. This adds to the lack of proportionality in such an approach.

There does not appear to be any sufficient rationale for many of the proposals in this Bill.

The Bill proposes a licensing system for the sale of spray cans. As a method of control, there is not any evidence or analysis to support the introduction of such a system. The imposition upon the business community is disproportionate to the nature and need for management of the conduct. It is unlikely to have much effect on the control of graffiti in any event.

A number of provisions in the Bill require production of identification and the recording of that information when purchasing such items. This is intrusive. Purchasing items such as spray cans should not require the recording of personal identification details on a register. The balance between the invasion of privacy and confidentiality and the management of the risk of graffiti offences is not efficacious. Insofar as these provisions seek to break the perceived link between the purchase of a spray can and the type of person that commits a graffiti offence, then there is not any evidence to demonstrate or support such a conclusion. Rather, this will merely serve to impose upon ordinary members of the community and unnecessarily interfere with their ordinary day to day activities of purchasing items for a proper and lawful purpose. One can well therefore foresee that every supermarket, every stationery supplier, every other supplier will have to maintain such databases. This will increase cost to the whole community. There are not any safeguards for the integrity, sanity, use and confidentiality of such databases. Of course such items may be obtained from many other sources other than by retail yet will not subject to any such controls. Such a regime is discriminatory, arbitrary, intrusive and disproportionate.

Section 8A empowers the police to search and obtain information without the usual and traditional requirements to have a reasonable cause to suspect. It involves investing a significant and intrusive power on the police to stop and search people in vehicles without cause. That is objectionable. It may give rise to difficulties. Such a power is disproportionate.

The Committee does not support the Bill.

Yours sincerely



Jan Martin
EXECUTIVE DIRECTOR