



15 August 2011

C62, 78.7
RB;rp

The Honourable Bob Such MP
Member for Fisher
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Mr Such

Criminal Law (Sentencing) (No Conviction on Election to be Prosecuted) Amendment Bill 2011

I refer to your letter of 5 July 2011 and thank you for referring the above Bill to the Society for consideration.

The Bill has been considered by the Society's Criminal Law Committee. We provide the following comments.

It seems that the proposed amendment undermines one of the principal objects, if not the principal object, of the *Expiation of Offences Act 1996*. By that legislation Parliament has manifested an intention to reduce the number of matters coming before the courts. It does so by providing for the expiation of minor offences – without the need for criminal proceedings to be commenced.

One effect of the proposed amendment would be that more people would elect to be prosecuted. This is counter-productive to the attempt at minimising the number of people in the courts. Being granted an immunity from the recording of a conviction may be sufficient for people to take their chances before a Magistrate.

More importantly, however, it inappropriately fetters the sentencing discretion of the Court by creating a class of offences in respect of which a conviction may not be recorded. As far as we are aware this has never been done before (at least not in South Australia or in the Commonwealth). This runs counter to well-established sentencing principles that a conviction should be recorded unless there are special circumstances for not doing so. Furthermore, where the expiable offence, instead of expiation, is the subject of prosecution, then given the nature of such offences, the principle is that a conviction will be recorded. This further highlights the element of discrimination in favour of persons that elect to be prosecuted for an expiable offence.

The effect of the amendment will be that people who elect to be prosecuted will be treated differently to others in the criminal justice system in several ways. Their prior record, the nature of the offence, the circumstances of the offence and of the offender will have no bearing on the important issue of whether a conviction should be recorded. Courts take the person as they find him/her, warts and all. If, upon election and the finding of guilt, it transpires that the person has a lengthy criminal record (falling short

of the need for imprisonment), then surely that person does not deserve an **immunity** from having a conviction recorded. Whether, having regard to all the circumstances, the person should have a conviction recorded will be assessed in the usual manner by the Court.

Another factor tending against the appropriateness of immunity is that no regard will be had to a defendant who pleads not guilty. The admission of guilt is usually an important consideration in determining whether to extend the leniency of a no-conviction order. Those people who elect to be prosecuted and plead not guilty to an expiable offence should not be in a better position than the defendant who is charged with a minor non-expiable offence and pleads guilty (but who is at jeopardy of the recording of a conviction). Not only does a guilty plea manifest contrition but it also saves valuable court resources.

The expiation system was designed to keep people out of court. It is a beneficial system for all parties. Indeed, it represents a favourable outcome for the citizen. Those that do not wish to have the offences expiated should not then be in a better position just because the option of expiation was offered. There is much to be said for the proposition that once people elect go to court then they should not be dealt with any differently to anybody else in the court system.

I trust these comments are of assistance. Please do not hesitate to contact me, should you wish to discuss any aspect of this submission.

Yours sincerely



Ralph Bönig
PRESIDENT