28 October 2019

The Hon Vickie Chapman MP
Attorney-General
PO Box 464
ADELAIDE SA 5000

By email: agd@agd.gov.sa.au

Dear Ms Attorney

**Sentencing (Suspended and Community Based Custodial Sentences) Amendment Act 2019**

1. I refer to the Sentencing (Suspended and Community Based Custodial Sentences) Amendment Act 2019 assented to on 23 May 2019 (“the Amendment Act”).

2. The Society provided a submission to you on 25 February 2019 in relation to the Sentencing (Suspended and Community-Based Custodial Sentences) Amendment Bill 2019. A copy of this submission is enclosed for your reference.

3. One of the key changes contained in the Amendment Act, was the amendment of section 96 of the Sentencing Act 2017 (SA) (“the Sentencing Act”) to preclude suspended sentences for adults convicted of a “serious sexual offence”. The amendment includes a list of prescribed offences, which are considered a serious sexual offence for the purpose of this provision. These include rape, persistent sexual abuse of a child and sexual servitude. In addition, a number of offences under the Criminal Law Consolidation Act 1935 (SA) (“CLCA”) are also considered serious sexual offences for the purpose of this provision, where the maximum penalty prescribed for the offence is imprisonment for at least five years. These offences include unlawful sexual intercourse, indecent assault and gross indecency.

4. Furthermore, the legislative changes introduced by the Amendment Act also limit the availability of Intensive Correction Orders (ICOs) for certain categories of offending and limit the circumstances where under the current regime an ICO might be appropriate.

5. The Society notes the stated intention of the Bill was to address community concerns about the ability of a court to permit offenders convicted of sexual offences to serve their sentence of imprisonment on home detention and address the differences in the ‘precluding’ offences for home detention, suspended sentences, and intensive correction orders.¹

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¹ Sentencing (Suspended and Community-Based Custodial Sentences) Amendment Bill Second Reading Speech, the Hon Vickie Chapman MP, February 13 2019.
6. In its submission of 25 February 2019, the Society noted its concerns with respect to the proposed provisions and considered they would impose blanket, mandatory terms of imprisonment on people who come within these narrow categories, with no scope to consider individual circumstances.

7. Since the commencement of the Amendment Act on 23 May 2019, the Society has been contacted by a number of criminal law practitioners who have expressed their concerns with respect to the operation of the new provisions. In particular, as a consequence of the Amendment Act, a number of matters have resulted in a defendant being sentenced to imprisonment (or a good behaviour bond) where the judge and prosecution consider that a suspended sentence would be the more appropriate penalty.

8. The Society has been provided with a number of examples of where this has occurred under the new regime. For your information, three recent examples are set out below which demonstrate the unintended consequences of the Amendment Act.

Case A

9. This case involved a charge of rape. The defendant believed the victim was consenting and the offence occurred in a situation where a large amount of alcohol was consumed. During discussions with the DPP, it was agreed the DPP would support a suspended sentence. The victim also supported a suspended sentence. On that basis, the defendant agreed to plead guilty to the charge and was committed to the District Court on a guilty plea basis.

10. However, two days before the defendant was due to be arraigned the Amendment Act came into effect. Notwithstanding the victim and Prosecutor did not wish for the defendant to go to jail, due to the new legislation a sitting judge would have no option but to sentence the defendant to an immediate term of imprisonment.

11. Consequently, the defence made an application to set aside the guilty plea and plead not guilty for a trial to be heard in 2020.

12. This case not only demonstrates how the legislation operates in a way that undermines judicial discretion, it is likely to also operate in a way that encourages defendants who may have previously plead guilty, to now plead not guilty. If this regime continues, it is likely to result in more matters proceeding to trial, which will in turn place more pressure on the criminal justice system in this State.

Case B

13. This case involved an indecent assault. The defendant plead guilty on the basis that the defendant considered the complainant was consenting to his behaviour. The defendant had no prior convictions, sound employment and a supportive family. The prosecution did not oppose a bond.

14. During sentencing, the Magistrate indicated that but for the new legislation he would have suspended any term of imprisonment, however, under the new sentencing regime he had no option but to impose a custodial sentence. The defendant received a period of 7 months imprisonment.

15. As demonstrated in the case above, as a result of the Amendment Act, persons who otherwise would not be subject to immediate custodial sentences are being incarcerated due to lack of judicial discretion in imposing a suspended sentence.
Case C

16. In this case the defendant plead guilty to one count of indecent assault on 14 May 2019 and the matter was adjourned for sentencing submissions on 11 June 2019. In the meantime, the Amendment Act commenced on 23 May 2019.

17. Due to the circumstances of the case, the prosecution had actively supported a suspended sentence and received authority from the Deputy Director to do so.

18. However, as a consequence of the Amendment Act the Magistrate was unable to impose a suspended sentence on the defendant. In order to avoid imposing a sentence of imprisonment, the Magistrate found she had no option other than to convict the defendant and impose a two-year good behaviour bond with supervision. This type of offence would have ordinarily attracted a more serious penalty such as a suspended sentence to reflect the gravity of the offence.

19. Case C demonstrates a further unintended consequence of the legislation as a result of the curtailing of judicial discretion. This legislation imposes a regime of mandatory sentencing, where courts no longer have the scope to consider individual circumstances, the seriousness of an offence, and to exercise discretion as to how a term of imprisonment will be served.

20. A judge is best placed to determine the punishment fitting of a crime based on the facts before them. No two offenders and no two offences are exactly the same. To achieve the purposes of sentencing under the Sentencing Act a court must consider details about the offender and the offence, including both aggravating and mitigating factors. Inevitable injustices result when mandatory sentencing is applied and the undesirable consequences of this regime can already be observed.

Mandatory sentencing

21. In Australia, the typical approach to legislating criminal offences is to provide a maximum penalty that may be imposed upon conviction, based on the parliament’s assessment of the relative severity of the offence. This approach provides courts a broad discretion to impose a sentence up to, and including, the maximum penalty based on a range of considerations, including the impact of the offence upon the victim and the circumstances of the offending and the accused. In sentencing an offender, the court must consider whether a particular case meets the threshold for imposing a term of incarceration, taking into account and balancing the purposes and principles of sentencing.

22. Mandatory sentences are legislative interventions by government which set a minimum or a mandatory sentence for a certain offence. In this case, it has removed sentencing options such as suspended sentences, intensive correction orders and home detention. Mandatory sentencing amounts to an interference by the government with respect to judicial discretion and raises serious concerns about the rule of law, in particular, the separation of powers.

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2 See Sections 3-4 of the Sentencing Act 2017 (SA).
4 Ibid.
5 Ibid.
23. Mandatory sentences such as those introduced by the Amendment Act, limit judicial discretion, in particular, the ability to take into account any mitigating circumstances. As Barwick CJ submitted in *Palling and Corfield*, it is undesirable to deprive the court of its discretion:

> Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime.\(^7\)

24. The Law Council of Australia has expressed serious concerns with respect to the use of mandatory sentencing, in particular, that mandatory sentencing potentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime. In the Society’s view, this has already been observed with respect to the Amendment Act.

25. Not only does the one size fits all approach to sentencing lead to unjust, harsh and disproportionate sentences and is inconsistent with Australia’s obligations under international law\(^8\), it often results in short to medium incarceration of offenders without regard for rehabilitation. As such, it fails to address the underlying causes of criminal behaviour and is contrary to the rehabilitation objectives of the Sentencing Act.

26. The Australian Law Reform Commission has also considered the issue, finding that that prisoners serving short sentences are less likely to be able to access programs or training, and in that regard, the time in prison does little to address offending behaviour, or to develop skills that might later promote desistance from offending.\(^9\) Furthermore, short terms of imprisonment were considered to be non-cost effective and the money spent incarcerating prisoners serving short sentences would be better spent implementing programs and supports in the community.\(^10\)

27. Short term imprisonment can have a number of consequences for offenders which are ultimately not in the community’s best interest, such as loss of employment, homelessness post-release, removal of children, and stigmatisation. The cost of imprisonment and the potential cost and impact upon society post imprisonment, calls into question the effectiveness of a mandatory sentencing regime.

28. The Hon Anthony Mason AC has also raised concerns with respect to consequences of mandatory sentencing and its failure to address the underlying causes of criminal behaviour:

> A regime of harsh penalties brings other unwanted consequences in its train. The massive increase in prison population comes at a high cost to the Budget...I am not alone in thinking

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\(^6\) [1970] HCA 53.
\(^7\) *Palling v Corfield* [1970] HCA 53.
\(^8\) See Articles 9 and 14 of the International Covenant on Civil and Political Rights.
\(^9\) Australian Law Reform Commission (2017). Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84).
\(^10\) Ibid.
that effort put into rehabilitation, rather than retribution and deterrence, is more likely to be cost effective and lead to a better world.\footnote{Mason, Anthony. "Mandatory Sentencing: Implications For Judicial Independence" [2001] AUJIHRights 15; (2001) 7(2) Australian Journal of Human Rights 21.}

29. The effects of mandatory sentencing have already been observed since the commencement of the Amendment Act in May 2019. For example, short incarceration sentences such as the 7-month sentence observed in case B above, which previously would have resulted in suspended sentence. Mandatory sentencing comes at a high cost at the community, without convincing empirical evidence to suggest that it deters crime. As a consequence of the Amendment Act, persons who would not previously be subject to immediate custodial sentences are being incarcerated at a significant cost to South Australians.

**Concluding remarks**

30. Sexual offences are considered to be one of the most serious classes of offences and this is reflected by the significance of the maximum penalties as set by the Parliament. The Society understands the seriousness of a sexual offence may (and in very many cases does) militate against a suspended sentence, however, the courts are best placed to exercise that discretion in individual circumstances.

31. The Society notes the Bill was introduced at the time the high profile Deboo appeal\footnote{R v Deboo [2019] SASCFCC 74.} was before the Court of Criminal Appeal. The case involved historical sexual offending against two brothers and was the subject of a campaign by The Advertiser. While the Society understands the public concern around the Deboo matter, the rushed legislation has led to a number of unintended consequences.

32. In a Discussion Paper on Mandatory Sentencing by the Law Council of Australia, it was suggested the primary assurance that a responsive government and parliament can give to the community is that it will be ‘tough on crime’ in a way that is effective and just. However, mandatory sentencing schemes, in contrast, produce unjust results with significant economic and social cost without a corresponding benefit in crime reduction.\footnote{Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014. Accessible at: https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf}

33. The Society considers that there were sufficient safeguards in place prior to the introduction of the Amendment Act, which enabled the court to take into account relevant aggravating and mitigating factors, as well as having regard to sentencing purposes when imposing a penalty. In addition, both the Director of Public Prosecutions and the Attorney-General have the ability to appeal penalties which they consider to be inadequate in the circumstances. The power to appeal provides the ultimate safeguard and allows for the correction of potential error or inadequacy with respect to sentences imposed.

34. Therefore, the changes to the Sentencing Act, which operate to further erode judicial discretion in this State appear to have no sound basis.

35. Judges see the realities of crime every day, they are trained to adjudicate such matters objectively. The greater the discretion and sentencing tools provided to them, the more likely punishments...
imposed will be apposite to the crime (by way of individualised justice) and meet community expectations. If the current regime remains, it is likely to continue to result in cases where the punishment does not fit the crime having regard to all relevant circumstances.

36. The Society’s concerns are shared by the South Australian Bar Association, who, the Society notes, have already written to you on this issue. It is hoped in light of the concerns raised by the legal profession, that you will consider the implications of the Amendment Act, and the possibility of rectifying these issues by restoring judicial discretion in sentencing in these matters.

The Society would be pleased to meet with you to discuss the impact of these legislative changes further.

Yours sincerely

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cc: South Australian Bar Association