20 March 2020

The Hon Vickie Chapman MP
Attorney-General
GPO Box 464
ADELAIDE SA 5001

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

Dear Ms Attorney

Statutes Amendment (Sentencing) Bill 2020

1. I refer to your letter of 10 February 2020 in relation to the Statutes Amendment (Sentencing) Bill 2020 (“the Bill”) which proposes amendments to the Sentencing Act 2017 and the Criminal Procedure Act 1921, following the 2019 review of the sentencing discount regime by the Honourable Brian Martin AO QC.

2. The Society has considered the Bill and provides comments in relation to the proposed reforms as informed by its Criminal Law Committee.

Reduction of sentences for guilty plea in Magistrates Court

3. It appears that section 39 of the Sentencing Act with respect to summary and minor indictable pleas remain largely unchanged. However, the Society notes the addition of an option to extend the period for which a defendant may plead guilty and receive a 40% discount, by four weeks. While an extension of time is welcomed, there is some uncertainty as to the requirement that the court must be satisfied that “exceptional circumstances” exist for doing so. The same provision is also contained in the proposed section 40(3a).

4. The Society would appreciate further detail and guidance as to how the term exceptional circumstances is intended to be interpreted. It is noted that the term is used in section 54(2)(a) of the Sentencing Act with respect to the sentencing of serious repeat offenders. The court has generally set a high bar with respect to exceptional circumstances under this section of the Sentencing Act. There are concerns as to how the proposed amendment may be interpreted and applied. The Society strongly suggests that a term such as “good reason” or something similar, is more appropriate.

5. Furthermore, the Society queries as to whether the seven day period prescribed in clause 8(1) of the Bill for a defendant to make an application under the proposed section 39(2a) is sufficient. It suggests that a greater time period is allowed for a defendant to make an application.

Reduction of sentences for guilty pleas in other cases
6. The Society notes a major change proposed by the Bill is the reduction of the current sentencing discounts for “serious indictable offences”. A serious indictable offence means an offence that is –

6.1 A serious offence of violence within the meaning of section 83D(1) of the Criminal Law Consolidation Act 1935; or

6.2 A serious sexual offence within the meaning of section 52(1) of the Sentencing Act for which the maximum penalty prescribed is, or includes, imprisonment for at least 5 years; or

6.3 Any other offence prescribed by the regulations for the purposes of this definition.

7. The changes proposed to the current sentencing discounts are as follows:

<table>
<thead>
<tr>
<th>Reduction</th>
<th>Period for Guilty Plea</th>
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<tbody>
<tr>
<td>Up to 35% (previously 40%)</td>
<td>Not more than 4 weeks after first court appearance.</td>
</tr>
<tr>
<td>Up to 25% (previously 30%)</td>
<td>More than 4 weeks after court appearance, but on or before the committal appearance.</td>
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<tr>
<td>Up to 15% (previously 20%)</td>
<td>From the day after the committal appearance to before committal for trial.</td>
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<tr>
<td>Up to 10% (previously 15%)</td>
<td>From committal for trial to immediately after arraignment appearance in the Supreme or District Court.</td>
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<tr>
<td>Up to 5% (previously 10%)</td>
<td>From immediately after the arraignment appearance to the commencement of the trial.</td>
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8. Mr Martin considers that the proposed reductions bring the system closer to achieving the appropriate balance between encouraging early pleas and ensuring offenders are adequately punished.

9. The Society conveyed to Mr Martin during the consultation for Review in November 2018, that the current sentencing discount scheme was operating well and had been extremely effective in encouraging defendants to plead guilty at an earlier stage. Even with respect to charges such as murder, where defendants were previously unlikely to plead guilty at an early stage.

10. Furthermore, the Society is advised by its Criminal Law Committee that the 30% discount up to the committal hearing, was a significant factor encouraging early pleas at a stage where lawyers were able to access the committal brief and give advice on the charge.

11. The Society considers that the benefits resulting from the current discount scheme under section 40 of the Sentencing Act (i.e. providing an incentive to resolve matters earlier) is likely to be eroded if the discounts are reduced. It is also likely to increase the numbers of matters being contested.

12. There are also already significant disincentives to entering a guilty plea now for even minor offences (i.e. indecent assault) which now carry mandatory imprisonment. The reduction in the discount regime is likely to further disincentivise people to plead guilty. For example, this is particularly relevant in relation to the offence of indecent assault, which is often a very useful tool in resolving child sex offences and spares a child complainant from the trial process.
13. One of the Society’s most significant concerns regarding the amendments is the current delays with respect to disclosure to the defence. Members are still reporting difficulties with late disclosure, which is impacting on their ability to take instructions and provide advice within the tight timeframes offered in the current regime. As was raised by the Society during Mr Martin’s review of both the current sentencing discount regime and major indicatable reforms, there is a risk that in reducing the applicable discounts, defendants are more likely to try their luck and take the matter to trial. This is particularly so for more serious offences, where long waiting periods for trial will have the greatest impact on victims. The Society remains concerned with respect to the delays caused by the major indictable reforms in this regard.

14. Further, the Society notes that one of the few recommendations from the Martin report that was not adopted in the Bill is Recommendation 5(a). Recommendation 5(a) provides that if the maximum percentages were lowered for cases of more serious crimes, the court could be empowered to increase the percentage reduction by up to 5% over the percentage otherwise available, if satisfied that the additional reduction is appropriate by reason of rare and exceptional circumstances attaching to the offender and/or the offending.

15. There has been no explanation for the omission of this recommendation. The Society strongly urges you to adopt Recommendation 5(a) and ensure that a discretion remains for the court to increase the percentage reduction where there is good reason to do so.

16. Ultimately, the seriousness of offences is reflected in the significant maximum penalties (and in many cases automatic served imprisonment) that apply to such offences. The impact on victims and the wider community is appropriately reflected in the overall head sentence. The Society questions the need to further distinguish between these offences and other types of offending.

17. Finally, the court is required under section 40(5)(a) to have regard to whether the reduction of the defendant’s sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice. In the Society’s view, measures that curtail the discretion of the judiciary are a backwards step. Judges should have as many avenues available to them as possible in sentencing and should be able to assess each matter on a case by case basis.

**General comments**

18. The Society notes that proposed sections 39(4) and 40(5) provide that the court must have regard to the extent of the defendant’s remorse for the offence, having regard in particular as to whether:

18.1 The defendant has provided evidence that the defendant has accepted responsibility for the defendant’s actions; and

18.2 The defendant has acknowledged any injury, loss or damage caused by the defendant’s actions, or voluntarily made reparation for any such injury, loss or damage, or both.

19. There were concerns expressed by the Criminal Law Committee that the requirement in paragraph 18.1 appears to place an obligation on the defendant to give evidence as to their remorse. This normally this would be a matter for submissions (and in some instances a letter of apology etc).

20. In addition, the proposed amendments to section 39(4) and 40(5) also include that the court must have regard to whether at any stage in the proceedings for the offence the defendant disputed the factual basis of the plea, and the dispute was not resolved in favour of the defendant. The Criminal
Law Committee is concerned as to how this provision will be interpreted. It is suggested that the provision should be confined to situations where a matter goes to a disputed facts hearing, as opposed to disputes at any stage of the proceedings.

Yours sincerely

[Signature]

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