

17 January 2018

Your ref: Criminal Law Committee

Our ref (BDS/CLC)

Queensland Sentencing Advisory Council (QSAC)
GPO Box 2360
Brisbane QLD 4001

By email: info@sentencingcouncil.qld.gov.au, [REDACTED]

Dear Advisory Council

QSAC reference: the penalties imposed on sentence for criminal offences arising from the death of a child

Thank you for meeting with representatives of our Criminal Law Committee and for the opportunity to provide comments on the terms of reference on the review of the penalties imposed on sentence for criminal offences arising from the death of a child. Queensland Law Society appreciates being consulted on this important issue.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We lead a profession of nearly 10,000 members throughout Queensland. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession. This response has been compiled with the assistance of the Criminal Law Committee who have considerable expertise in this area.

The Society the QLS has maintained a consistently strong stance against any form of mandatory sentencing. These views are detailed in our mandatory sentencing policy paper which can be accessed at the following link - http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper.

We consider that it is essential that judicial discretion be maintained for sentencing in criminal matters. 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 Professor Kate Warner 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

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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.

In line with our policy position, the Society called for a commitment to refrain from the creation of new mandatory sentencing regimes and to take steps to repeal the current mandatory sentencing regimes in our 2015 and 2017 Call to Parties Statements. As such, the Society would be strongly opposed to the introduction of mandatory sentencing for criminal offences arising from the death of a child.

In our view, the government should carefully consider the implementation of a community education program to inform the public of sentencing decisions. The Society considers that educating the public is the most appropriate method of managing the public perception that sentences for filicide are inadequate. The research suggests that if the community had access to comprehensive evidence on criminal justice sentencing and trends and were properly informed, they would be generally satisfied with sentencing outcomes. As such, the Society supports increased research and education to ensure public awareness and understanding of sentencing decision processes.

The Queensland Law Society would be pleased to provide further comment or be consulted throughout the policy development and legislative process. If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Advocacy Manager, Ms Binny De Saram [REDACTED]

Yours faithfully

[REDACTED]
Ken Taylor
President

Mandatory sentencing laws policy position

Queensland Law Society (QLS) has long maintained a strong stance against any form of mandatory sentencing. QLS supports the fundamental principles of Australia's legal system, including principles of procedural fairness, judicial precedent, the rule of law, and the separation of powers. We promote these concepts as central to the protection of a citizen's right to justice and equality before the law. In our view, mandatory sentencing laws are unfair and unworkable and run contrary to these fundamental tenets.

We join with other Australian legal professional bodies, including the Law Council of Australia and the Bar Association of Queensland, in voicing concern with mandatory sentencing laws.

QLS supports judicial discretion for sentencing of criminal matters in order to reflect the discrete facts of each case.

- Mandatory sentencing is an undue fetter on judicial discretion.
- Mandatory sentencing regimes undermine sentencing guidelines as set out in section 9 of the *Penalties and Sentences Act 1992* (the Act). The Act states that sentences may be imposed on an offender to an extent or in a way that is just in all the circumstances.¹ In the youth justice system, mandatory sentencing applied to children undermines the principles of the *Youth Justice Act 1992*, and the sentencing principles outlined in section 150.
- Mandatory sentencing laws are arbitrary and contravene the principles of proportionality and necessity.
- Mandatory sentencing laws have the potential to lead to serious miscarriages of justice, exacerbated by the fact that mandatory sentences, by definition, are not reviewable on appeal.
- Removing judicial discretion hinders the court's ability to bring about justice in individual cases. The Northern Territory experience of mandatory sentencing in property law offences offer the following examples of injustice where the facts of offending become irrelevant:
 - A 23 year old Indigenous woman, who was a first offender, was sentenced to 14 days' imprisonment for unlawful entry and stealing a can of beer. She was employed at the time. The magistrate observed that, but for the mandatory requirement, a non-custodial order would have been made.²
 - A 16 year old with one prior conviction received a 28 day prison sentencing for stealing a bottle of spring water.³
 - A 17 year old first offender received a 14 day prison sentence for stealing orange juice and lollies.⁴
 - A 15 year old Indigenous youth was sentenced to 20 days' imprisonment for stealing less than \$100 worth of stationery from his school. He died in custody while serving his sentence.⁵
 - A 21 year old broke into a smoko room on Christmas day and stole biscuits and cordial to the value of \$23. He received one years' imprisonment because he had two previous convictions for property offences.⁶

¹ s 9(1)(a), *Penalties and Sentences Act 1992*

² Mason, A. "Mandatory Sentencing: Implications for judicial independence", 2001, *AJHR* 21; Warner, K. "Mandatory sentencing and the role of the academic", 2007, *Criminal Law forum*, 18(3-4), 344

³ *Ibid*

⁴ *Ibid*

⁵ *Ibid*

⁶ ABC 7.30 Report, Call to review mandatory sentencing laws, 22 December 1999

- Sentencing decisions should rest with highly trained judicial officers. Judges are in the best position to administer justice through judicial reasoning and comprehensive understanding of the offence and the circumstances surrounding its commission.
- Judicial discretion is an essential characteristic of the court and forms part of the court's independence and impartiality.
- Mandatory sentencing laws that diminish judicial discretion and the independence of the court are inconsistent with Article 14 of the International Covenant on Civil and Political Rights. This provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Mandatory sentencing does not encourage transparent sentencing processes.

- Mandatory sentencing encourages judges, prosecutors and juries to circumvent mandatory sentencing when they consider the result unjust. In some circumstances when an offender is faced with a mandatory penalty, juries have refused to convict.⁷ Prosecutors have deliberately charged people with lesser offences than the conduct would warrant to avoid the imposition of a mandatory sentence. In effect mandatory sentencing shifts sentencing discretion from an appropriately trained and paid judicial officer to a prosecutor. Prosecutorial discretion is unregulated and less transparent than judicial sentencing processes.

QLS is concerned that mandatory sentencing laws can disproportionately affect minorities.

- Mandatory sentences can impact disproportionately on the most marginalised members of society. Those groups who are over-represented in receiving criminal charges such as homeless people, young people, children in residential care, substance-addicted individuals, Aboriginal and Torres Strait Islander people or people with mental illness or intellectual disability, are often impacted most heavily by mandatory sentencing.⁸ This inevitably reinforces over-representation of these groups in the corrective system.

QLS supports a fiscally sustainable justice system.

- Mandatory sentencing reduces the proportion of pleas of guilty, thus increasing court costs and court delays. The criminal justice system has, in recent years, undergone significant reform on issues including jurisdiction. These reforms fundamentally targeted the cost of administration of justice. Mandatory sentencing regimes undermine these reforms by artificially increasing the number of persons proceeding to trial and those electing to be tried by trial and jury, when available. State resources must cater for an increase in prosecution costs, defence costs (often publicly funded by Legal Aid Queensland), police resources, judicial administration and the costs of a trial. There is also a social cost involved in subjecting victims of crime and witnesses to delay and the stress of cross-examination and a criminal trial.
- The inevitable increase in prison populations as a result of mandatory sentencing is one of many additional costs to the community without commensurate benefit.
- The cost of imprisoning a person convicted of people smuggling for the mandatory minimum term of three years is in excess of \$170,000 per person.⁹ This figure does not include the cost of a trial.

⁷ Tony, M. "Sentencing Matters", 1996, cited in Australian Institute of Criminology, "No 138. Mandatory Sentencing", 1999

⁸ Kumaraswamy, Dato' Param "Mandatory sentencing: the individual and social costs" Australian Journal of Human Rights, Dec 2011, 7(2); Ward, A. "Mandatory sentencing and the emergence of regional systems for the protection of human rights", Dec 2011, Australian Journal of Human Rights, 7(2)

⁹ Senate Legal and Constitutional Affairs Legislation Committee, Report on Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, (2012) vii [2.30] as cited in Trotter, A. and Garozzo, M. "Mandatory sentencing for people smuggling", 2012, Melbourne University Law Review, 36, 553-617, 612

- The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence.¹⁰ Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of re-offending and often results in a greater rate of recidivism.¹¹
- Other jurisdictions which have followed the route of penalty increases, such as Texas in the United States, have faced tipping points where they have looked to justice reinvestment strategies to reduce spiralling incarceration costs.

QLS supports greater public education to increase public confidence in sentencing decisions.

- QLS supports increased research and education to ensure public awareness and understanding of sentencing decision processes. Current research suggests the following:
 - "The public at large is often misinformed about trends in crime and criminal justice and this lack of accurate knowledge is associated with lack of confidence in sentencing."¹²
 - Increasing criminal penalties is unlikely to result in a change to public perception.¹³ International and Australian research consistently shows that the public consider the sentences imposed in criminal matters to be too lenient.¹⁴
 - The perception of sentencing changes as additional information about a matter is provided. A study published by Professor Kate Warner from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case they were involved in. 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.
- The community has limited or no access to comprehensive evidence on criminal justice sentencing and trends. Public education on these matters is paramount when seeking to enhance community confidence in the criminal justice system. The Queensland Sentencing Advisory Council, prior to its dissolution, was charged with functions that included:
 - To provide information to the community to enhance knowledge and understanding of matters relating to sentencing
 - To publish information relating to sentencing
 - To research matters relating to sentencing and publish the results of the research.

Government support for these educative functions is essential in order to promote public awareness and community understanding of sentencing processes.

For more information

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¹⁰ Sentencing Advisory Council "Does Imprisonment Deter? A Review of the Evidence", April 2011, Melbourne, p.2

¹¹ Ibid

¹² Jones, C. & Weatherburn, D. "Public Confidence in the NSW Criminal Justice System: A Survey of the NSW Public", 2010, p. 507

¹³ Roberts L., Spiranovic, C., & Indermaur, D. "A country not divided: A comparison of public punitiveness and confidence in sentencing across Australia", 2011, Australian and New Zealand Journal of Criminology, 44(3) 370-386 at 381

¹⁴ For example, Jones, C., & Weatherburn D. "Public Confidence in the NSW Criminal Justice System: A Survey of the NSW Public", 2010, Australian and New Zealand Journal of Criminology, 43: p.506-525; Robert, J., Crutcher, N., & Verbrugge, P. "Public attitudes to sentencing in Canada: Exploring recent findings", 2007, Canadian Journal of Criminology and Criminal Justice, 49(1), 75-107