

25 November 2021

Dr Adam Tomison
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By email: DoJ.DG@justice.wa.gov.au

Dear Dr Tomison

CRIMINAL LAW AMENDMENT (HOME BURGLARY AND OTHER OFFENCES) ACT 2015 (WA) STATUTORY REVIEW (ISSUES PAPER)

Thank you for your letter dated 13 October 2021 and enclosed Issues Paper. The Law Society is a strong opponent to mandatory sentencing in any form and was strongly opposed to this legislation when it was first enacted. I enclose correspondence from my predecessor setting out the Society's position at the time, which remains unchanged.

Generally, the amendments in the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015 (WA)* are not good law as they deter pleas of guilty, waste Court resources, increase the burden on the prison system and do not deliver any measurable benefit to the community.

It is the Law Society's position that the legislation should be repealed.

In response to the questions in the Issues Paper, please see below. The answers do not differ for juvenile offenders.

1. Do you think the Amendment Act is achieving its objectives? Why or why not?

The Law Society does not support the objective of incarcerating offenders who commit home burglaries for longer periods. Irrespective of its objective, the Act is not achieving positive outcomes for Western Australia. It is a drain on public resources, leading to over incarceration, and occupying the time of police, courts, prosecutors, and Legal Aid which could be better employed in other criminal matters. The Act is also antithetical to several articles in the International Covenant on Civil and Political Rights,¹ and the Convention on the Rights of the Child.²

**2. Do you think mandatory sentencing works as an effective deterrent to potential home burglary offenders? Why or why not?
Does your answer differ for juvenile potential home burglary offenders?**

No. The Law Society has consistently and repeatedly stated its opposition to mandatory sentencing, for any offence. The Law Society has published a [position paper](#) on this topic. Regarding the principles of general and specific deterrence, it is presupposed that the actor is an entirely rational agent with free choice able to fully

¹ Articles 9, 14

² Articles, 3,37,40

assess all of the options and consequences, which is simply not the case with the majority of offenders, and human beings generally.³ Studies have shown that threat of imprisonment or harsh sentences do not produce a deterrent effect.⁴

3. Can you identify any unintended consequences that have been caused by the Amendment Act?

The following issues have been identified by the Society:

- Inability to effectively give any discount for co-operation with prosecution authorities;
- A need to artificially structure sentences to avoid unjust results (you can't give '12 months cumulative' for another home burglary – it has to be 2 years or a partly concurrent term which has an adverse effect on parole eligibility date or make the sentence for a minor offence which should be concurrent cumulative instead);
- Potential unjust results for 'backcapture' offences where an accused is only charged after being sentenced for subsequent offences;
- The inability to exercise judicial discretion where offenders are diagnosed with Foetal Alcohol Spectrum Disorder and other recognised psychiatric illnesses which would lower the need for general and specific deterrence.

4. Do you think mandatory sentencing is an appropriate punishment for home burglary offenders? Why or why not?

Does your answer differ for juvenile offenders? Why or why not?

No. The Law Society does not consider mandatory minimum sentences are appropriate for any offence. Our position does not change for juvenile offenders.

5. What alternatives do you suggest, if any, to mandatory sentencing of adult repeat home burglary offenders?

Does your answer differ for juvenile repeat home burglary offenders? Why or why not?

There should be no need for alternatives – the Courts will impose imprisonment when other sentencing options have failed for an offender. They should not be required to impose imprisonment where the facts of the particular case allow for a more merciful disposition. The discretion is effectively vested in the prosecution, rather than the Courts.

6. Do you think mandatory sentencing for home burglary offenders disproportionately affects Aboriginal people? Why or why not?

Does your answer differ for juvenile home burglary offenders? Why or why not?

The Law Society contends that it is undeniable that mandatory sentencing for home burglary offenders disproportionately affects Aboriginal people. A statistical analysis should bear this out. In particular Foetal Alcohol Spectrum Disorder disproportionately affects indigenous people and with no discretion available for the judiciary in these matters, the result is that the factors set out by the Court of Appeal in the *State of Western Australia v Churnside* [2016] WASCA 146 cannot be adequately taken into account. The answer is no different for juvenile offenders.

³ See David Hume, *Treatise of Human Nature* (1739–40)

⁴ Sentencing Advisory Council of Victoria, 'Does Imprisonment Deter? A Review of the Evidence', Sentencing Matters, April 2011

- 7. Do you think mandatory sentencing for offences committed during an aggravated home burglary is an appropriate punishment for offenders? Why or why not?**

Does your answer differ for juvenile offenders? Why or why not?

No. This limits judicial discretion and deters pleas of guilty.

- 8. Selected offences committed during an aggravated home burglary are assigned a mandatory sentence of 75% of their maximum statutory penalty, except for murder, manslaughter or attempt to unlawfully kill, which carry a mandatory minimum sentence of 15 years.**

Do you consider these mandatory minimums to be appropriate for aggravated home burglary offenders? Why or why not?

Does your answer differ for juvenile aggravated home burglary offenders? Why or why not?

The Law Society does not consider that any mandatory minimum for any offence is appropriate.

- 9. Do you think the method of counting prior convictions (the counting rules) introduced by the Amendment Act is an appropriate way to deal with repeat home burglary offenders? Why or why not?**

Does your answer differ for juvenile repeat home burglary offenders? Why or why not?

No. The counting rules are unduly convoluted. If you are going to have such a regime (and it can be accepted that you could have such a regime that results in a different maximum penalty, as in the *Road Traffic Act 1974 (WA) (RTA)*, then the RTA method is easiest: For how many offences has the accused been convicted before (or *in the X years before*) committing this offence?

- 10. Do you think the Amendment Act's changes to counting rules for repeat home burglary offenders are an appropriate punishment for people who commit multiple home burglaries on one occasion or during one day? Does your answer differ for repeat home burglary offenders who commit multiple home burglaries over a longer period of time? Why or why not?**

Does your answer differ for juvenile repeat home burglary offenders? Why or why not?

The Law Society does not consider this appropriate as it creates an artificial distinction. If there is to be a distinction, the relevant criterion should be whether the accused had been charged with the other offences. It makes no sense that one accused who commits burglaries at 9:00pm and 11:00pm should face a different sentencing regime to an accused who commits burglaries at 11:00pm and 1:00am.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely



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President

16 February 2015

The Hon Michael Mischin MLC
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Dear Attorney General

**MANDATORY SENTENCING - CRIMINAL LAW AMENDMENT (HOME
BURGLARY AND OTHER OFFENCES) BILL 2014**

Thank you for your letter dated 28 July 2014 regarding mandatory sentencing and the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (Bill)*.

The Law Society of Western Australia appreciates the advice in your letter but remains steadfast in its opposition to mandatory sentencing.

The Bill is justified by reference to increased public concern over the nature of the offences it targets and public demand for stronger sentencing. While the Society is fully cognisant of the need for government to be 'in touch' with the desires of the general public, in the Society's view, government is still obliged to act in accordance with the best evidence and should also seek to lead and educate the general public on such issues. Current research demonstrates that when fully informed of the circumstances of a case, and of the offender, 90% of respondents view the sentences imposed by judges as appropriate.¹

Having regard to the concerns expressed by the Minister for Police in her Second Reading speech about serious violent and sexual offences committed in the course of home burglaries, the Society sought information about the number of such offences before Western Australian Courts. While all offences of this nature are very serious, they represent a very small portion of the overall work of the District Court or of overall offending in Western Australia. Such offending does not constitute such a volume or proportion of overall offending to cause justified heightened concern in the general community.

Further, if the Government is concerned, as the Minister of Police states, that sentences are being detrimentally impacted by now inappropriate guideline judgements or precedents, this can be remedied by increasing maximum sentences without the introduction of mandatory sentences.

¹ K Warner, J Davis, M Waler, R Bradfield & R Vermey "Public Judgement on Sentencing: Final results of the Tasmanian Jury Study", *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011, p. 3. See also: Honourable JJ Spigelman, AC, Chief Justice of New South Wales, *Sentencing Guidelines Judgments*, Address to the National Conference of District and County Court Judges, 24 June, 1999.

The Australian Law Reform Commission, in its 2006 report *Same Crime, Same Time Sentencing of Federal Offenders*² identified the key purposes of sentencing as including:

- Retribution;
- Deterrence;
- Rehabilitation;
- Incapacitation;
- Denunciation; and
- Restoration.

No one sentencing objective takes precedence over all others. The sentencing process in every Australian jurisdiction has been underwritten by the fundamental principle of proportionality. As noted in the Law Council of Australia's *Policy Discussion Paper on Mandatory Sentencing*:³

"It is questionable whether the Australians want unjust and disproportionate sentences, particularly where mandatory sentencing applies to vulnerable members of the community such as juveniles.. As the High Court of Australia has observed... there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. The task of the sentence is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all".

The Bill would force the court to treat differently situated people identically, which is likely to have a discriminatory effect, in particular on Aboriginal people, already considerably over-represented in our prisons, young people and those suffering from mental impairment or cognitive defect.⁴

The Society remains concerned that the Bill will severely curtail the capacity of Courts to impose punishments to appropriately reflect both the gravity of the crimes committed and the criminal culpability of the individual offender.

² Australian Law Reform Commission, *Same Crime, Same Time Sentencing of Federal Offenders Report*, April 2006, p 133 at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC103.pdf>

³ Law Council of Australia *Policy Discussion on Mandatory Sentencing* n. 1, citing *Markarian v The Queen* (2005) 228 CLR 357

http://www.lawcouncil.asn.au/lawcouncil/images/LCAPDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf

⁴ Morgan, N, 'Capturing crims or capturing votes? The aims and effects of mandatories' (1999)

22(1) *University of New South Wales Law Journal* 267, p272. and Nini Loh & Anna Ferrante, *Aboriginal Involvement in the Western Australian Criminal Justice System: A Statistical Review, 2001*, Crime Research Centre, University of Western Australia, February 2003, at p 19 (http://www.law.uwa.edu.au/data/assets/pdf_file/0018/118530/Aboriginal_Involvement_in_the_WA_Criminal_Justice_System-A_Statistical_Review-2001.pdf).

Finally, you referred to the long history of courts accepting the jurisdiction of Parliament to legislate in respect of criminal sentences. This power has never been doubted. However, it is the way in which this power is now being used and expanded that is of concern. The Society urges the Government to desist from continuing to expand the application of mandatory sentencing in Western Australia.

Yours sincerely



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