

16 February 2015

The Hon Michael Mischin MLC
Attorney General
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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.p](http://www.lawcouncil.asn.au/lawcouncil/images/LCAPDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf)
[df](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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