ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-10120

Mr K de Kerloy
President
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Dear Mr de Kerloy

MANDATORY SENTENCING

Thank you for your letter dated 9 April 2014 regarding mandatory sentencing and the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014 (INA). I apologise for the delay in responding.

I have noted the Law Society's comments on this Bill and the reasons for its opposition to mandated minimum terms of imprisonment. In relation to those concerns, I make the following comments.

As you may be aware, the above Bill was introduced into the WA Parliament on 12 March 2014 to implement a 2013 election commitment.

Attached, for your ease of reference, is a copy of the Second Reading Speech delivered by the Hon Liza Harvey MLA, Minister for Police which refers to the proposed mandatory sentencing provisions.

As explained in the Second Reading speech, it is clear that that home burglaries, particularly in circumstances of aggravation and in the course of which violence may be committed, are of major concern to the community. There is an obvious public perception that burglars, particularly recidivists and those who harm occupants of the homes they invade, are not being sufficiently punished by the courts.

In particular, as the Minister states, "it is arguable that the punishments imposed by the courts for home burglaries, and for offences committed in the course of home burglaries, are limited by longstanding court-established sentencing tariffs and precedents, and Court of Appeal judgments, and are out of step with community expectations."

In these circumstances, it is clear that the Western Australian community expects Parliament to amend the relevant sentencing laws. This is not only a proper exercise of Parliament's legislative function to respond to community concerns, but also one of its duties.

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Neither I nor the State Government is proposing in this Bill or elsewhere minimum mandatory terms of imprisonment for all offences. However, the Government is of the view that the proposed legislation reflects for the specified offences not only the community's expectations but also the appropriate circumstances, criteria and penalties which should be the subject of mandatory sentences.

Your letter asserts that "mandatory minimum sentencing obligations interfere with the idea of a judiciary independent of prosecuting authorities and executive government because [such mandatory sentencing] restricts the ability of the judiciary to determine a just penalty that fits the individual circumstance of the offender and the crime." This assertion raises issues about "just" penalties and judicial independence.

As you will appreciate, the Courts do not and should not have a monopoly over deciding what is 'just' and 'unjust'. Other governmental institutions, including the Parliament, as well as the public, are also entitled to determine what constitutes and provides for justice and a just outcome. The history of law reform is replete with instances where judicial decisions and lines of authority have been overturned to achieve what the community – and its Parliament – has regarded as a more just result, or to realign court-evolved law to community expectations.

In relation to judicial independence and sentencing, including sentences imposed on individual offenders, you will be aware that common law jurisdictions have for many centuries accepted that Parliament has power to legislate with respect to criminal sentences, and in this sense to limit judicial discretion in sentencing. In this context, Professor Ashworth, a pre-eminent criminal law scholar, in his book *Sentencing and Criminal Justice* (Cambridge University Press, 4th ed, 2005) at pp.52-53, observed:

> *If one looks at the history, then one finds that wide judicial discretion has only been a characteristic feature of English sentencing for the last hundred years or so. In the first half of the nineteenth century, there were two factors that considerably restricted judicial discretion. There were maximum and minimum sentences for many offences, and several statutes provided a multiplicity of different offences with different graded maxima. For much of the nineteenth century, judges were left with less discretion than their twentieth and twenty-first century counterparts, and any claim that a wide sentencing discretion 'belongs' to the judiciary is without historical foundation. It gains its plausibility only from the legislature's abandonment of minimum sentences in the late nineteenth and early twentieth century, and from the trend at one time to replace the plethora of narrowly defined offences, each with its separate maximum sentence, with a small number of 'broad band' offences with fairly high statutory maxima….*
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> *That belief, widely shared in the judiciary, is a belief that judicial discretion supervised by the Court of Appeal is more likely to produce fair sentencing outcomes than greater statutory restrictions. This is an arguable proposition.... But it is not the same as the principle of judicial independence, nor does it provide a basis for any principle that the legislature may not properly do more than set maximum sentences and introduce new forms of sentence.*

In *Magaming v The Queen* [2013] HCA 40, the High Court considered the constitutional validity of a mandatory minimum sentence of five years with a minimum non-parole period of three years in relation to an offence under s.233C of the *Migration Act 1958* (Cth). In the context of the circumstances of that case, in sentencing the appellant the Chief Judge of the District Court remarked that normal sentencing principles would have resulted in a sentence substantially less than the mandatory minimum. Even so, the High Court held that the Commonwealth Parliament had constitutional power to enact such mandatory sentences and that the mandatory sentences did not breach the Commonwealth *Constitution's* Chapter

III requirements regarding judicial power and judicial independence. For example, the majority indicated at paragraph 27 that:

> *It may be that, as Barwick CJ said in Palling v Garfield: 'It is both unusual and in general ... 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.' Whether or not that is so, as Barwick CJ also said, '[i]f Parliament chooses to deny the court such a discretion, and to impose ... a duty [to impose specific punishment] ... the court must obey the statute in this respect assuming its validity in other respects'.*

Also, at paragraphs 45-49 the majority stated:

> *Shorn of the disapproving epithets, the appellant's submission amounted to the proposition that the Parliament cannot, consistent with Ch III of the Constitution, prescribe a mandatory minimum penalty for an aggravated offence if no mandatory minimum penalty is prescribed for the simple offence. How or why that should be so was not explained.*
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> *The larger proposition which the appellant advanced was that the legislative prescription of a mandatory minimum penalty for an offence under s 233C distorted 'the judicial sentencing function' and that the distortion was 'not reasonably proportionate to the end of general deterrence' which the law sought to serve. The proposition came very close to, perhaps even entailed, the still larger proposition that legislative prescription of a mandatory minimum penalty is necessarily inconsistent with Ch III.*
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> *As the appellant rightly submitted, adjudging and punishing criminal guilt is an exclusively judicial function. In very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge-made principles. Sentencing an offender must always be undertaken according to law.*
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> *In Markarian v The Queen, the plurality observed that '[l]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks.' The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.*
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> *The appellant may be right to have submitted, as he did, that, even at 1901, mandatory minimum custodial sentences were 'rare and exceptional'. But as the appellant's submission implicitly recognised, mandatory sentences (including, at 1901, sentence of death and, since, sentence of life imprisonment) were then, and are now, known forms of legislative prescription of penalty for crime. Legislative prescription of a mandatory minimum term of imprisonment for an offence was not, and is not, on that account alone inconsistent with Ch III.*

Your letter also asserts that "Mandatory sentencing obligations are discriminatory". It is difficult to perceive how, using the concept of discrimination in its normal sense, a mandatory sentencing regime which applies to all and treats all persons who are similarly situated (i.e. who have committed the same offence or offences) equally, can be considered

discriminatory. I am not aware of any Australian anti-discrimination legislation which specifies mandatory minimum punishments to be a ground of discrimination.

In addition, you refer to a concern about "the severity of the punishment under this [proposed] mandatory sentencing regime" and you balance that severity against several other matters including increased workloads and police work. As with all other matters, the State Government is aware of the possible consequences, both practical and economic, of proposed reforms and of the need to arrive at an appropriate and sensible balance between conflicting views, outcomes and consequences. In the context of the above Bill, the Government has taken those matters into consideration and drafted the legislation accordingly.

Another matter to which you refer in your letter is the view that "research has shown that mandatory sentencing does not have a deterrent effect." Even if one accepts that proposition, deterrence is not the only objective of the criminal law. Mandatory sentencing is not devoid of other attributes of the criminal law, including the protection of the public, especially from the recidivist offenders who are referred to in the attached Second Reading Speech. The predictability of the consequences of law-breaking and the certainty of the result are important features of any justice system, and those considerations alone are a virtue of mandated minimum terms.

From a non-legal perceptive, your letter refers to "the average cost of keeping someone in prison". Again, financial consequences, especially to the 'taxpayer' are important and need to be balanced against the demands for money to be spent by the government in other areas. However, as indicated above, and in the attached Second Reading Speech, this Bill implements the public's demand for stronger penalties and many members of the public are taxpayers.

Thank you for taking the time to convey the Society's views to me and I trust that the above indicates the State Government's position in relation to this Bill to you and the Law Society.

Yours sincerely

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

Att: *Second Reading Speech* 28 JUL 2014

cc: Hon Liza Harvey MLA
MINISTER FOR POLICE (Together with Law Society's letter of 9 April2014)