

5 February 2013

Hon Michael Mischin MLC
Attorney General
Level 10, Dumas House
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Dear Attorney General

FIVE KEY CRIMINAL JUSTICE ISSUES

The Law Society of Western Australia acknowledges that law and order is appropriately a fundamental priority of the current government, as it should be for any government. However, the Law Society has concerns with a number of the government's policies and budgetary allocations. With the State Government election to be held in March 2013, the Society wishes to bring to your attention five key criminal justice issues.

1. Mandatory Sentencing

The existence of an independent, impartial and competent judiciary is an essential component of the rule of law. On that basis, the judiciary should be independent of the Executive and the Legislature.

Accordingly, legislation should not limit judicial discretion to such an extent that the judiciary is effectively compelled to act as a rubber stamp for the Executive. The judiciary should always have sufficient discretion to ensure that they can act as justice requires in the case before them.

The Law Society is opposed to mandatory sentencing as it places a fetter on judicial discretion, interfering with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime.

Mandatory sentencing ignores the reality that the factual circumstances of offending may vary greatly in terms of seriousness. It also ignores the fact that judicial officers are well equipped to assess the seriousness of an offence and sentence the offender accordingly. The Law Society's view is that an appeal is the appropriate avenue for reviewing the adequacy of sentences.

Mandatory sentencing also has the effect of placing discretion into the hands of the prosecuting agencies and police to determine whether or not a mandatory provision is charged. This undermines the principles of transparent and equal justice for all, and places an unfair onus on law enforcement officers.

A further consequence is that mandatory sentencing works unduly harshly on unique offenders such as the mentally incapacitated and children. The idea of mandatory sentencing is in part based on the principle of deterrence. A deterrent sentence is not usually appropriate when dealing with a person acting under a mental illness or intellectual disability.

The Law Council of Australia has noted that objections to mandatory sentencing include the following:¹

- discretion is removed from the courts;
- the laws have the affect of targeting vulnerable and disadvantaged groups;
- penalties are sometimes disproportionately harsh;
- there are significant economic costs associated with large increases in prison and detention centre populations;
- the laws do not effectively deter criminal activity;
- the Joint Standing Committee on Treaties was critical of mandatory sentencing in a 1998 report, noting in particular that it restricted the courts' capacity to ensure that punishment is proportionate to the seriousness of the offence and noting further that minimum sentences contravened the Convention on the Rights of the Child (CROC) in the case of juveniles;
- the National Inquiry into Children in the Legal Process, jointly published by the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission in 1997, criticised our Western Australian laws because, in contravention of the International Covenant on Civil and Political Rights and CROC, the laws violated the principle of proportionality in sentencing, were not consistent with detention being a sentence of "last resort" and the sentences were not reviewable by a higher court; and
- various other studies have criticised the laws for in effect targeting jurisdictions with a high Indigenous population, for being economically unjustifiable and for appearing to underpin populist or cynical political opportunism.

2. Limits on Discounts for Pleas of Guilty –Sentencing Act 1995

The 2012 amendments to the *Sentencing Act 1995* deleted section 8(2) which recognised a plea of guilty as a mitigating factor and introduced section 9AA under the provisions of which:

- (2) *If a person pleads guilty to a charge for an offence, the court may reduce the head sentence for the offence in order to recognise the benefits to the State, and to any victim of or witness to the offence, resulting from the plea.*
- (3) *The earlier in the proceedings the plea is made, the greater the reduction in the sentence may be.*

¹ Law Council of Australia, *The Mandatory Sentencing Debate*, September 2001.

- (4) *If the head sentence for an offence is or includes a fixed term, the court must not reduce the fixed term under subsection (2) —*
- (a) *by more than 25%; or*
 - (b) *by 25%, unless the offender pleaded guilty, or indicated that he or she would plead guilty, at the first reasonable opportunity.*

The Law Society is opposed to this statutory limitation on the discount that can be given for a plea of guilty.

A plea of guilty by an offender can aid in closure to victims and allow them to focus on healing and obtaining appropriate counselling and other associated treatments, especially in cases of sexual assault. The Act now discourages the types of pleas much supported by those who need not re-live their trauma in a court setting. Fewer pleas of guilty will also add considerable costs to the courts and prosecuting authorities, including ancillary agencies such as victim support services.

Placing a limit on the discount removes judicial discretion to give higher discounts in unique cases where, for example, prosecutions are not strong but an alleged offender accepts responsibility.

It is contrary to common law sentencing principles to dictate a mandatory sentencing discount and not permit a judicial officer to analyse the significance of the plea and the weight that should be given in the sentencing process.

The Law Society is concerned that a statutory limitation on discounts risks creating an environment whereby victims and witnesses, who might otherwise be spared intrusive and traumatic court proceedings by a plea of guilty, however late, will still be forced to face them.

The common law accepts that sentencing is not a rigid or mathematic exercise. The sentencing factors vary enormously from case to case. This requires a high degree of discretion in sentencing in the interests of justice. The effect of limiting that discretion by reference to a set figure risks unjust results.

The Judicial Commission of New South Wales has considered levels of discount in sentencing regimes. As part of its assessment of sentencing principles, the Commission reported that:

"It is not helpful to speak of a level of discount as being generally available": R v Ehrlich [2012] NSWCCA 38 per Basten JA at [11]; Adams J agreeing at [36].

Gleeson CJ states in *R v Gallagher* (1991) 23 NSWLR 220 at 230:

"... what is involved is not a rigid or mathematical exercise, to be governed by 'tariffs' derived from other and different cases": R v Ehrlich [2012] NSWCCA 38.

Beazley JA states in *R v Z* [2006] NSWCCA 342 at [88]:

“... the focus should not be so much upon the precise numerical value of the discount but rather upon the question whether, after all relevant matters have been taken into account, the sentence imposed is appropriate”.

The Law Society supports these conclusions and urges the government to remove the statutory cap on the discount for pleas of guilty.

3. The Right to Silence

The Law Society strongly opposes any curtailment of the right to silence. The right to silence has for centuries been regarded as a fundamental principle of our criminal justice system,² which protects the vulnerable and less informed. It is not to be amended without very strong reason.

It serves a number of different purposes. It reinforces the presumption of innocence; it recognises the power imbalance that often exists between the police and the suspect, setting a limit on police powers; it respects the privacy and integrity of the suspect; and it reduces the risk of a vulnerable and impressionable innocent suspect providing the police with a false confession, resulting in a wrongful conviction.³

The critical question for the jury to determine is always whether the prosecution has proved its case beyond reasonable doubt and should not be why the defendant has exercised his or her right to silence.

In New South Wales, the *Evidence Act 1995* (NSW) is to be amended to allow juries and the judiciary to draw an adverse inference against an accused person who refuses to mention a fact in answer to police questions, but later relies on that fact in court.

The Law Society considers that amendment as an erosion of the right to silence and opposes any similar amendment for application in the Western Australian jurisdiction for the reasons canvassed above.

In addition, the Law Society notes that the amendment to the right to silence in New South Wales was combined with a guarantee that the accused will have an opportunity to consult an Australian legal practitioner about the effect of failing or refusing to mention a fact that is subsequently relied upon by the defence at trial.

Western Australia is a vast State. Unfortunately many people currently find it difficult to access legal representation and advice, particularly in remote and regional areas. In the event that a similar amendment was passed in Western

² See, for example, *Petty v Maiden* (1991) 173 CLR 95 per Mason CJ, Deane, Toohey and McHugh JJ.

³ The New South Wales Bar Association submission to the Department of the Attorney General and Justice, “The Right to Silence”, 28 September 2012.

Australia, there would be practical difficulties in being able to guarantee an accused person in all areas of the State access to legal representation.

4. Increased Resources for Forensic and Scientific Services

In our members' experience, poor resourcing of forensic and scientific services has routinely resulted in the very late disclosure of important forensic evidence before trial.

In some instances this has caused trials to be adjourned at late notice, resulting in unnecessary expense to the community and additional time in custody for accused people whilst they wait for trial.

Lawyers should be given timely access to relevant information and evidence about their client in order to enable them to provide effective legal assistance to their clients.

The advancement of science and technology will hopefully assist the community of Western Australia to receive just outcomes in criminal matters. In order for evidence to be disclosed quickly, the forensic services must be adequately funded to cope with the increasing demand.

The early disclosure of forensic evidence is likely to result in matters being resolved quickly by way of pleas of guilty or appropriate negotiation. This may justify an increase to resourcing for these services.

The Law Society notes that in May 2012, the Western Australian Government committed additional funding of \$29.6 million over the forward estimates period to meet the continued increased demand for forensic services. The funding was committed to enable WA Police to meet the rising costs of forensic laboratory services. This funding increase is commendable, but it cannot be assumed that the issue is now resolved. The delays must continue to be monitored. There should be a commitment to appropriate funding for these agencies to avoid the delays experienced.

5. Preventative Detention and Regulation

The Law Society acknowledges that in order to secure the right to life or human security for some members of the community, the right to liberty of others must sometimes be curtailed.

However, the Law Society urges restraint on the use of preventative detention and pre-emptive statutory regulation of behaviour such as prohibitive behaviour orders.

It is the Law Society's view that if they must be used, preventative detention and pre-emptive regulation should only be used as a last resort, where less intrusive executive measures are not a feasible alternative. The highest possible degree of fairness should be afforded to the individual in question, with appropriate rights of review available.

This is because preventative detention can undermine and displace the safeguards inherent in the criminal justice system, such as the right to a fair trial, the benefit of rules of evidence, the presumption of innocence and the requirement that guilt be established beyond reasonable doubt. The Society is opposed to laws which have those effects.

The Law Society notes that preventative detention legislation at the national level⁴ in the anti-terrorism context is extremely broad and authorises the imprisonment and restriction of freedom of people in relation to whom there might be insufficient evidence to prosecute for a criminal offence. It can also effectively renders some individuals at constant risk of having their liberty curtailed. Very limited rights to review and legal representation are available. The Law Society strongly opposes these laws.

In the weeks before the State election, the Law Society seeks your commitment to continue to keep these principles and concerns at the forefront of your pronouncements on law and order issues.

If you require any further information on these matters please contact the Law Society.

Yours sincerely



Craig Slater
President

cc The Premier, the Hon C Barnett MLA
The Leader of the Opposition, the Hon Mark McGowan MLA
The Shadow Attorney General, the Hon John Quigley MLA
The Hon Giz Watson MLC

⁴ The *Anti-Terrorism (No 2) Act 2005* (Cth) introduced a system of control orders and preventative detention orders into the *Criminal Code* (Division 104 and 105 respectively). Under these Divisions, a person's liberty can be controlled or restricted *without* the person being charged or convicted of or even suspected of committing a criminal offence.