



LAW COUNCIL
— OF —
AUSTRALIA

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BY: *G. E. Gould*

1 August 2002

Ms Gillian Gold
Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Gold

INQUIRY INTO CRIME IN THE COMMUNITY; VICTIMS, OFFENDERS, AND FEAR OF CRIME

Unfortunately the Law Council is not able to make a formal written submission addressing each of the Terms of Reference relevant to this current inquiry.

The Law Council notes however Item (g) of the Terms of Reference under which the Committee proposes to examine the effectiveness of sentencing in its Inquiry and Report. The Law Council submits that the issue of mandatory sentencing is an important part of that broader debate.

You will be aware from our previous submissions to your Committee and our public statements that the Law Council is opposed to mandatory sentencing on the basis that:

- Mandatory sentencing laws exclude the exercise of judicial discretion;
- Such laws are ill-conceived as a means of addressing the crime rate;
- Such laws tend to target Indigenous persons;
- Such laws have resulted in unjust sentences; and
- Such laws contravene Australia's international obligations under at least two treaties.

A broader discussion of the issues and the Law Council's position is set out in the Position Paper prepared by the Law Council in September 2001 entitled "*The Mandatory Sentencing Debate*". A copy of that Paper is enclosed for your attention.

Also enclosed are copies of the following documents:

THE NATIONAL COUNCIL OF LAWYERS
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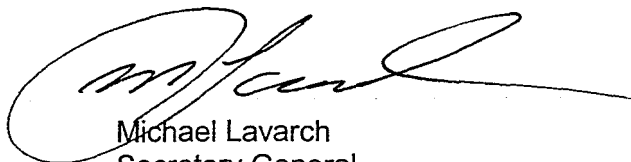
- Letter from the Law Society of Western Australia to Ms Pauline Moore, Legal and Constitutional Reference Committee, Australian Senate dated 24 January 2000.
- The original submission prepared by the Law Society of Western Australia on the Mandatory Sentencing Provisions of Section 401 of the Criminal Code of Western Australia.
- Letter from The Law Society of Western Australia to Ms Pauline Moore, Legal and Constitutional Committee, Australian Senate dated 8 August 2001.

I also draw your attention to the oral submissions provided by The Law Society of Western Australia which are documented in the Official Committee Hansard for the Senate Legal and Constitutional References Committee dated Friday 25 January 2002, Perth.

The Law Council endorses the comments of The Law Society of Western Australia on mandatory sentencing which are recorded on the public record and set out in the enclosed documents.

I would be grateful if, in the context of your current inquiry into the effectiveness of sentencing, your Committee can take the Law Council's views into account.

Yours sincerely,



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Secretary General

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Law Society of Western Australia Criminal Law Committee
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24 January 2000

By Facsimile: 02 6277 5794

Ms Pauline Moore
Secretary
Legal and Constitutional Reference Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Moore

Inquiry Into Mandatory Sentencing Legislation

Please find attached, the Society's submission on the inquiry into mandatory sentencing, which has now been endorsed by Council. Council has resolved that:

- While the Law Society of Western Australia opposes and will continue to oppose the use by the Commonwealth of the external affairs power to give powers to the Commonwealth in areas that are traditionally the province of the States and Territories, the Society supports the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (Commonwealth)*.

I understand that public hearings may be held in regard to this matter. Could you please advise if one is intended for Western Australia? The Society would also be pleased to know if submissions on mandatory sentencing have been made by any other Western Australian interest groups.

Yours sincerely

ALISON GAINES
Executive Director

cc: Mr Jon Pirlor

Among the whole population's juveniles who were sentenced, seventeen were children aged between 11 and 13 years.

It is quite often asserted (particularly in the political arena) that this State's mandatory sentencing has only had marginal impact upon sentencing outcomes – because those who fall within its terms would most likely have received custodial sentences in any event. In the light of the statistics mentioned in the preceding paragraph, and in particular the high number of very young offenders to whom the legislation has applied, this is not a proposition this Society would accept without significant greater independent analysis.

We would encourage the Inquiry to seek its own particulars from the Department of Justice about the implementation of the three strikes laws for juveniles and adults.

Lastly, we note that the amending legislation requires that the three strikes provision be reviewed after four years of operation. It is timely that the Senate make further inquiries that may encourage a prudent review of the amendment to Section 401 and, hopefully, its ultimate abolition.

Thank you for giving us the opportunity to comment. The Society is willing also to make verbal submissions to the Inquiry, if and when it visits Perth.

Yours faithfully



Ken Martin QC
President

CC: The Hon J A McGinty MLA, Attorney General for Western Australia
John Tippet, President Northern Territory Law Society
Anne Trimmer, President Law Council of Australia
Chair, LCA Advisory Committee on Indigenous Legal Issues
Clare Thompson, Women Lawyers of WA (Inc)
John Prior, Criminal Lawyers Association

MANDATORY SENTENCING PROVISIONS FOR BURGLARY -
SECTION 401 OF THE CRIMINAL CODE OF WESTERN AUSTRALIA
AND THE EFFECT ON JUVENILE OFFENDERS

Pursuant to Section 401(4) of the Criminal Code of Western Australia a person who commits an offence as defined under sub-section 401(1) or (2) ie, enters the place of another person without consent with intent to commit an offence in that place or actually commits an offence, if the place is a place ordinarily used for human habitation, if the person is a "repeat offender" at the time the Court sentencing the person shall sentence the offender to at least twelve months imprisonment.

Pursuant to Section 401(5) such terms of imprisonment cannot be suspended.

Section 400(1) sets out definitions as to the meaning of "place" and what constitutes a "person entering a place".

Section 400(3) defines a "repeat offender" as the following:

an offender who:

- (a) committed and was convicted of a relevant offence committed in respect of a place ordinarily used for human habitation; and
- (b) subsequent to that conviction again committed and was convicted of a relevant offence committed in respect of such a place.

The section 401(4) sets out what is a "relevant offence" and what is defined as a conviction.

Mandatory Sentencing Provisions for Burglary
Section 401 of the Criminal Code of Western Australia
and the Effect on Juvenile Offenders

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Sections 400 and 401 of the Criminal Code were amended to provide the above by the Criminal Code Amendment Act No. 60 of 1996. The Sections came into operation on 14 November, 1996.

The practical effect of these sections are persons who are convicted of a third offence which may be broadly be described as burglary of a home would be liable to a minimum penalty of twelve months imprisonment for such an offence. The Court has no discretion whatsoever once a conviction which meets the definitions set out in Sections 400 and 401.

The fact that a mandatory sentence of a minimum of twelve months imprisonment is imposed is of concern because the factual circumstances that can arise to giving a conviction for an offence under Section 401(1) or (2) can be many and varied. Also the individual offender's personal antecedents can be of infinite varieties.

Pursuant to the Sentencing Act 1995 of Western Australia a sentence of imprisonment is a sentence of last resort. Section 6(4) of the Sentencing Act states that a Court must not impose a sentence of imprisonment on an offender unless it decides that:

- (a) the seriousness of the offence is such that only imprisonment can be justified; or
- (b) the protection of the community requires it.

The effect of Section 401(4) of the Criminal Code of Western Australia is that the general principles of sentencing both at Common Law and found in the Sentencing Act 1995 are overridden by the mandatory minimum penalty of twelve months imprisonment. In this respect the normal discretion available to the Sentencing Authority is fettered as the only possible sentence for a third offence as defined in Section 401 is twelve months imprisonment with a minimum of at least twelve months.

Mandatory Sentencing Provisions for Burglary
Section 401 of the Criminal Code of Western Australia
and the Effect on Juvenile Offenders

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In dealing with juveniles, Section 401(4)(b) of the Criminal Code of Western Australia attempts to circumvent the provisions of Section 46(5a) of the Young Offenders Act 1994, of Western Australia and requires the Sentencing Court for a young offender who has been convicted of a third offence as defined above to serve either a minimum term of twelve months imprisonment or twelve months in detention. The law applies to all persons over the age of 10 years pursuant to Section 29 of the Criminal Code of Western Australia.

As a result of a number of decisions of the Supreme Court of Western Australia the definition of a "repeat offender" when dealing with juvenile offenders under the age of eighteen has been limited so that the circumstances on which a juvenile is imprisoned or sentenced to twelve months detention for a third conviction has been limited. See: G (a child) -v- R. SCL 970579, P (a child) -v- R. SCL 970580 and R. -v- MacKay SCL 970689.

Nevertheless there are examples where juvenile offenders under the age of eighteen who have strictly met the definition of a repeat offender have been imprisoned or sentenced to a period of detention for a period of twelve months.

This is particularly concerning when it is clear at law that the sentencing discretion should be exercised in a more liberal way when dealing with offenders under the age of eighteen. A mandatory period of a minimum of twelve months imprisonment or detention is a substantial period of imprisonment or detention for a juvenile offender.

The provision of a minimum of 12 months imprisonment or detention for a juvenile third striker does not sit well with the objectives of the Young Offenders Act as set out in Section 6.

Pursuant to Section 7(c) of the Young Offenders Act a juvenile who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult. The imposition of a mandatory minimum

Mandatory Sentencing Provisions for Burglary
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sentence of 12 months detention pursuant to Section 401(4) of the Criminal Code contravenes this section. This is because a young offender pursuant to Section 121 of the Young Offenders Act must serve 50% of a sentence before they become eligible for early release under a Supervised Release Order. Pursuant to Section 93(1) of the Sentencing Act, adults who are sentenced to 12 months to 6 years imprisonment who are ordered eligible for parole are eligible for release upon serving one third of the term. The effect of this is a juvenile sentenced to 12 months detention will serve 6 months, whilst an adult sentenced to the same term of imprisonment will only serve 4 months in prison.

In the case of adults, once a further third of a sentence is served successfully by an offender on parole, the remaining third of the sentence is effectively discharged pursuant to Section 22 of the Sentencing Administration Act 1995. Juveniles having served 50% of a sentence in custody remain on Supervised Release for the remaining 50% of their sentence, pursuant to Section 134 of the Young Offenders Act.

A mandatory minimum of 12 months in custody for juveniles pursuant to Section 401(4) is in direct contradiction to the general principles of juvenile sentencing espoused in Section 7(h) of the Young Offenders Act.

In Western Australia the only facilities for detaining juveniles sentenced pursuant to Section 401(4) of the Criminal Code are in Perth. As a result juvenile offenders living in country communities are particularly prejudiced when sentenced under this mandatory sentence provision. Visiting access by families is either not possible or severely limited. This is of particular concern when recognising the size of the State of Western Australia.

The general principles of sentencing juveniles recognised in Section 46(3) of the Young Offenders Act are circumvented when a mandatory penalty of a 12 month term of detention or imprisonment is imposed. Opportunities for rehabilitation of

Mandatory Sentencing Provisions for Burglary
Section 401 of the Criminal Code of Western Australia
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juvenile offenders are significantly fettered when such a mandatory minimum term applies.

There are examples in existence in Western Australia where the Children's Court President has articulated in sentencing remarks that a non-custodial disposition would have occurred had not the provisions of Section 401(4) of the Criminal Code fettered such sentencing option.

John Prior
On behalf of the Criminal Law Committee
Law Society of Western Australia

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In addition to extending the legislation to include the Privacy Commission and the statutory review of Commonwealth forensic procedures, I have written to

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There are examples in existence in Western Australia where the Children's Court President has articulated in sentencing remarks that a non-custodial disposition would have occurred had not the provisions of Section 401(4) of the Criminal Code fettered such sentencing option:

John Prior
On behalf of the Criminal Law Committee
Law Society of Western Australia



**The Law Society
of Western Australia**

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8 August 2001

BY FACSIMILE: (02) 6277 5794

Ms Pauline Moore
Secretary
Legal and Constitutional Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Moore

INQUIRY INTO THE PROVISIONS OF THE HUMAN RIGHTS (MANDATORY SENTENCING FOR PROPERTY OFFENCES) BILL 2000

I refer to your letter of 26 June 2001, enclosing a copy of the above Bill.

The Society has written to you in the past and provided both written and oral evidence to the Senate Legal and Constitutional Reference Committee Inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill of 1999*.

The Society's position on mandatory sentencing is clear and emphatic. We do not support mandatory sentencing. This is because it inhibits judicial independence by inhibiting the appropriate exercise of discretion by the judge as the circumstances of each case will require.

On 24 January 2000, the Society advised you of its position in relation to Commonwealth legislation to override State legislation. Our resolution, which remains unaltered, was:

- While the Law Society of Western Australia opposes and will continue to oppose the use by the Commonwealth of the external affairs power to give powers to the Commonwealth in areas that are traditionally the province of the States and Territories, the Society supports the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (Commonwealth)*.

The Society has recently been provided with some statistics by the Department of Justice in relation to juvenile sentences imposed under the three strikes provision of Section 401 of the *Criminal Code* (copy attached). We are very concerned to find that 128 sentence events have occurred in the four years between November 1996 to November 2000 and that Aboriginal juveniles represent 83% of these sentences.

Legal and Constitutional Committee

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8 August 2001

Among the whole population's juveniles who were sentenced, seventeen were children aged between 11 and 13 years.

It is quite often asserted (particularly in the political arena) that this State's mandatory sentencing has only had marginal impact upon sentencing outcomes – because those who fall within its terms would most likely have received custodial sentences in any event. In the light of the statistics mentioned in the preceding paragraph, and in particular the high number of very young offenders to whom the legislation has applied, this is not a proposition this Society would accept without significant greater independent analysis.

We would encourage the Inquiry to seek its own particulars from the Department of Justice about the implementation of the three strikes laws for juveniles and adults.

Lastly, we note that the amending legislation requires that the three strikes provision be reviewed after four years of operation. It is timely that the Senate make further inquiries that may encourage a prudent review of the amendment to Section 401 and, hopefully, its ultimate abolition.

Thank you for giving us the opportunity to comment. The Society is willing also to make verbal submissions to the Inquiry, if and when it visits Perth.

Yours faithfully



Ken Martin QC
President

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