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Crimes Amendment (Ramming of Police Vehicles) Bill 2017

1. Liberty Victoria is committed to the defence and advancement of human rights and civil liberties. We seek to promote Australia's compliance with the rights recognised by international law and the Victorian *Charter of Human Rights and Responsibilities.* We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. More information on our organisation and activities can be found at: https://libertyvictoria.org.au/.

2. Liberty Victoria is opposed to the *Crimes Amendment (Ramming of Police Vehicles) Bill 2017* ("the Bill"). We note that the Bill has been introduced by the Coalition Opposition.

3. There is simply no need for the Bill. It forms part of the law and order auction leading up to the next State election.

4. The offence of "ramming" a police vehicle would already constitute criminal damage contrary to s 197 of the *Crimes Act 1958*, with a maximum penalty of 10 years' imprisonment (the same as that proposed by the Bill), and in some circumstances may

also constitute reckless conduct endangering life or serious injury contrary to ss 22 and 23 of the *Crimes Act 1958.*There is no material cited by the proponents of the Bill that current sentencing practices for this kind of offence are inadequate. The practical experience of those practising in the criminal law is that if an offender intentionally drives a vehicle into a police vehicle in order to ram it, that would result in imprisonment.

5. As with our submissions on the new offences of "home invasion" and "carjacking" under the C*rimes Amendment (Carjacking and Home Invasion) Act 2016*, this reform is unnecessary. The current regime of offences is more than adequate to deal with this kind of offending.

6. Further, the *mens rea* of the proposed new offence is ambiguous - does proposed s.247M(3) of the *Crimes Act 1958* mean that a person can be found guilty of an offence of ramming a police vehicle even as a passenger or outside the vehicle without intending that the police vehicle be rammed? Is recklessness or negligence sufficient?

7. Further, for reasons explained in our previous submissions, Liberty Victoria is opposed to mandatory and/or prescriptive sentencing (in the case of this Bill, a mandatory minimum non-parole period of 2 years' imprisonment unless a "special reason" is established).

8. The research clearly demonstrates that when fully informed of the circumstances, the community does not regard current sentencing practices as inadequate (with a limited exception for some categories of sexual offending against children).

9. As Liberty Victoria has previously argued[1], the problem with mandatory sentencing is that it removes the discretion from the judicial officer to impose a sentence that is appropriate having regard to the circumstances of the particular instance of the offence. It is contrary to the fundamental sentencing principle that the punishment should be proportionate to the seriousness of the offence having regard to the circumstances of the offender.

[1] See Liberty Victoria submission to the SAC Sentencing Guidance Reference, https://libertyvictoria.org.au/content/sentencing-guidance-reference

10. The central problem caused by mandatory sentences was eloquently described by Mildren J in *Trenerry v Bradley*:[2]

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

11. Liberty Victoria shares the Law Council of Australia's concerns that mandatory sentencing regimes[3]:

    a. Undermine the fundamental principles underpinning the independence of the judiciary and the rule of law;

    b. Are inconsistent with Australia's international obligations, particularly Australia's obligations with respect to the prohibition against arbitrary detention as contained in Article 9 of the International Covenant on Civil and Political Rights (ICCPR); and the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR;

    c. Increases economic costs to the community through higher incarceration rates;

    d. Disproportionately affect vulnerable groups within the community, including Indigenous Australians and persons with a mental illness or intellectual disability;

    e. Potentially result in unjust, harsh and disproportionate sentences where the punishment does not fit the crime;

    f. Fails to deter crime;

    g. Increases the likelihood of recidivism because prisoners are placed in a learning environment for crime whereby inhibiting rehabilitation prospects;

[2] (1997) 6 NTLR 175, 187

[3] Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014

h. Wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole; and

i. Displaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing.

12. Such concerns have been echoed by the Law Institute of Victoria's comprehensive submission on mandatory sentencing in 2011, which noted inter alia[4]:

> The overwhelming evidence from Australia and overseas… demonstrates that mandatory sentencing does not reduce crime through deterrence nor incapacitation, and may lead to increased crime rates in the long run, as imprisonment has been shown to have a criminogenic effect.

13. In addition, when faced with a mandatory minimum periods of imprisonment (whether with regard to the head sentence or non-parole period), accused persons are much less likely to plead guilty to offences. Accordingly, mandatory sentencing reforms (including the removal of the CCO as a sentencing option) are bound to see an increase in contested committals and trials which places further pressure on a Court system that is already strained and suffering from serious delays. Those delays also have a huge impact on complainants and their families and friends.

14. Further, under such regimes it will fall upon prosecutors and informants to determine whether to proceed on offences that attract a mandatory minimum term (and/or where an offender cannot receive a CCO). Mandatory sentencing reforms transfer the burden of decision-making from the judiciary to the executive, where there is less transparency and greater room for arbitrary and inconsistent decision-making without recourse to judicial review or consideration by an appellate court.

15. Judicial officers need more, not fewer, sentencing options. That enables judges and magistrates to do justice in the individual case. There are already proper protections to ensure that inadequate sentences can be appealed against if necessary and the

[4] https://www.liv.asn.au/getattachment/22c3c2c9-45a5-45c4-96e6-f0affdfe2ff8/mandatory-minimum-sentencing.aspx at 31 October 2016.

Court of Appeal has recently provided significant guidance as to when it is inappropriate to sentence an offender to a CCO.

16. Further, the "special reasons" exception is very limited in practice. In *DPP v Hudgson* [2016] VSCA 254, the Court of Appeal (Weinberg, Whelan and Priest JJA) held that with regard to the "special reasons" exception to mandatory minimum sentences in s 10A of the Sentencing Act 1991 at [111] - [112]:

> It was plainly the intention of Parliament that the burden imposed upon an offender who sought to escape the operation of s 10 [providing for mandatory minimum sentences for gross violence offences] should be a heavy one, and not capable of being lightly discharged.
>
> We accept the Director's submission that the word 'compelling' connotes powerful circumstances of a kind wholly outside what might be described as 'run of the mill' factors, typically present in offending of this kind.

17. The Court observed of the matters relied upon by the offender (including delay, parity issues, and post-traumatic stress disorder) at [114]:

> …the various matters upon which the respondent relied as giving rise to 'substantial and compelling circumstances', and which her Honour found to meet that description, fall well short, in our view, of doing so. There is nothing 'compelling' about them in the sense required. Nor can it be said that they are 'rare', or 'unforeseen' in cases of this type.

18. In *Hudgson* the Court of Appeal allowed the Crown appeal, set aside the combined sentence of imprisonment with a CCO, and imposed the mandatory minimum non-parole period for a gross-violence offence (4 years' imprisonment). The judgment will plainly have a significant effect on the County Court and Magistrates' Court of Victoria when it comes to the operation and effect of the "special reasons" exception to mandatory sentences.

19. The reality is that this Bill reflects a further step towards the entrenchment of mandatory sentencing in Victoria. It should be opposed.

20. If you have any questions regarding this comment, please do not hesitate to contact the Liberty office on 9670 6422.