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3 May 2010

The Hon Rob Hulls MLA
Attorney-General
Parliament House
Spring St
Melbourne, 3000.

Dear Attorney,

Justice Legislation Amendment Bill 2010

Although there has been no call for public submissions on the above legislation, which is currently before Parliament, Liberty has prepared the following submission because it considers the Bill to raise matters of considerable importance to its areas of concern.

Liberty regrets the absence of public consultation on the Bill and urges the Government to reconsider its position on this.

Liberty Submission

The *Justice Legislation Amendment Bill* 2010 ("the Bill") introduces many significant reforms to the Victorian criminal justice system. While Liberty Victoria supports many measures contained in the Bill, there are some areas of concern.

This submission will address eight aspects of the Bill:

1. The extension of the home detention regime;
2. The procedure for breaches of Combined Custody and Treatment Orders;
3. The provisions concerning undertakings by children to assist Police;
4. The expansion of alternative arrangements for the giving of evidence by complainants and witnesses;
5. The repeal of the sunset clause regarding the sentencing indication procedure;
6. The expansion of the summary case conference procedure;
7. The provision of a new Court of Appeal leave to appeal procedure; and
8. The provision for aggregate sentences as a sentencing option in the County and Supreme Courts.

1. *Home Detention*

Liberty supports home detention as a preferable sentencing option to custodial imprisonment in so far as it permits suitable persons to be able to rehabilitated while still contributing productively to the community and to support their families. Moreover, it is notable that home detention prevents offenders from being subjected the deleterious influences and effects of prison life.[1]

While in some cases home detention will be a much more suitable form of sentence than a term of immediate custodial imprisonment, it must be emphasised that it still involves far-reaching interference with the freedom of the subject. Liberty observes that a sentence of imprisonment, even if served in the community through home detention, is a very serious sanction. It is important that when sentencing a person to home detention the sentencing court appreciates that, on the sentencing hierarchy, home detention is a sentence of imprisonment which should only be ordered if a lesser sentence on the sentencing hierarchy is not appropriate.[2]

Given the comparative advantages of home detention to both an offender and also the community, Liberty is concerned that some offenders are excluded from home detention for having committed offences that may not necessarily indicate a particularly high degree of moral culpability.[3] Such exclusion is irrespective of when the offence was committed and includes prior convictions for a relevant offence. While such offences can be very serious in some cases, in other cases offenders have acted in a manner out of character and have been reckless rather than malicious or vindictive. Liberty submits that it would be preferable for Courts to have discretion when sentencing such persons as to whether home detention is appropriate rather than having an inflexible approach regardless of the circumstances of a given offence.[4]

An inflexible approach to eligibility for home detention can create significant anomalies. For example, under the home detention regime as provided for by the Bill a person who has been convicted of dozens of house burglaries in the past (with intent to steal) and has committed another such burglary and falls to be sentenced will be eligible for home detention, whilst a person who has acted recklessly and, as a first offence, has made a threat to inflict serious injury will not be eligible. It is submitted that such examples reflect that greater flexibility is needed in the system in order to for Courts to ascertain, through evidence if necessary, whether a person is actually suitable for home detention.

Liberty is also concerned that the broad discretions conferred on the Secretary to the Department of Justice under the regime[5] may result in offenders being subjected to different regimes based on different exercises of discretion by the executive.

Liberty also shares the concern of the Scrutiny of Acts and Regulations Committee in Alert Digest No 4 of 2010 that the Bill may engage the right against retrospective

[1] See the observations of Maxwell P in *DPP v Tokava* [2006] VSCA 156 at [23]-[24].

[2] *Sentencing Act* 1991, s.5(3).

[3] Including recklessly causing serious injury, and making threats to kill/ inflict serious injury, for example (see cl.14, s.26N of the Bill).

[4] Especially given that a sentencing Court can "veto" home detention in any event for any offender (see cl.6 of the Bill).

[5] See cl.14, s.26U of the Bill.

penalties as protected by s.27(2) of the *Charter of Human Rights and Responsibilities Act* 2006 ("the Charter").[6] A person should not be precluded from home detention pursuant to cl.23 of the Bill in circumstances where they would have been eligible for home detention at the time a given offence was committed.

2. Breaches of Combined Custody and Treatment Orders

Liberty generally supports the measures of the Bill that simplify and expedite proceedings for purported breaches of sentencing orders. To that end, the Bill presents an important opportunity for further reform of Combined Custody and Treatment Orders (CCTOs). Such orders require a person sentenced to serve a period of immediate custodial imprisonment, followed by a period of intensive supervision in the community. The Sentencing Advisory Council has noted that such orders have been have been extensively criticised, and the Council has recommended that the CCTO be abolished.[7] This submission will proceed from the basis that CCTOs will not be abolished, but may be reformed.

Pursuant to the *Sentencing Act* 1991, if a person is found to breach a CCTO, that person required to serve in prison the "whole part" of the sentence that was to be served in the community unless they can establish "exceptional circumstances". This is to be contrasted with other sentencing orders such as Intensive Corrections Orders ("ICOs") where a person who breaches such an order is only required to serve the unexpired portion of the sentence at the time of breach. It is submitted that there should be consistency between such sentencing orders, and the Legislature should take this opportunity for reform.

For example, under a CCTO a person may have served a six month sentence of imprisonment, and then served a further six months in the community under strict supervision. If that person fails to comply with a condition of the CCTO on the last day of the community-based part of the order, that would mean that the whole period that is required to be served in the community (six months) would be required to be served in prison unless exceptional circumstances could be established.[8] It is submitted that such consequences may be unjust and disproportionate in circumstances where breaches of CCTO conditions are relatively minor.

It is further submitted that the Court should have the discretion only to restore part of the community component of a CCTO (just as the Court may, in light of exceptional circumstances, only restore part of a suspended sentence).[9]

3. Undertakings by Children

Liberty submits that the measures in the Bill relating to children giving undertakings in criminal matters should not be enacted.[10]

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[6] Page 28.

[7] Sentencing Advisory Council, Summary of Final Report of Suspended Sentences, 2008, p.5.

[8] For a discussion of "exceptional circumstances", see *R v Ioannou* (2007) 17 VR 563.

[9] See s.31(5) of the *Sentencing Act* 1991.

[10] Cl.30-35.

There is a serious issue as to whether accused who are children should be asked or expected to give undertakings to police to assist investigations at all, let alone be re-sentenced should they breach such undertakings.

Liberty submits that children will often not have sufficient maturity to understand the significance of giving undertakings to assist police, and may be exposed to undue influence from adults or other children that would adversely affect their capacity to comply with such undertakings. The children who give such undertakings will commonly already be in very vulnerable familial/social circumstances.

There is no reason why a sentencing Court, at present, may not take into account a child's assistance to investigating officials when considering factors mitigating sentence. Such assistance will commonly be relevant to ascertaining the child's prospects of rehabilitation and the need for specific deterrence which form core sentencing principles. It is respectfully submitted that children should not be placed at risk of, in effect, higher sentences if they do not provide undertakings of future assistance to police.

4. Alternative Arrangements for Giving Evidence

It is unquestionable that Courts have a vital role in protecting witnesses from offensive, derogatory or irrelevant questioning. Liberty submits that care must be taken to ensure that the measures taken to protect witnesses do not adversely affect the capacity of an accused and his or her legal representatives to effectively cross-examine witnesses.

Cross-examination of a person giving evidence by alternative arrangements such as video-link is notoriously difficult. There is often a delay in the transmission, the audio quality can be variable, and it is often more difficult for juries and/or judicial officers to assess properly the demeanour and credibility of the witness. What was once the exception with regard to the making of such alternative arrangements (complainants in serious sexual offences) may now become the rule as the category of relevant offences is broadened by the Bill to include summary offences including using obscene/indecent and threatening language.[11]

Whilst it is very important to protect vulnerable witnesses, such considerations must be balanced against the right of an accused to a fair trial (including the right to face one's accuser). Judicial officers have a vital role in protecting witnesses through disallowing irrelevant and offensive questioning, and to ensure that a witness is not intimidated. It is submitted that the categories of relevant offences should not be expanded to include such summary offences as provided for by the Bill. It is further submitted that the provision of such alternative arrangements should be discretionary rather than mandatory.

5. Sentencing Indication Procedure

The sentencing indication procedure can be very useful to an accused in order to give him or her relative certainty of sentencing outcome. However, it must be acknowledged that sentencing indications can provide a powerful incentive for an accused person to plead guilty in some instances when the person and his or her legal representative may have real reservations about the merit of individual charges or summaries of fact.

[11] Cl.66 of the Bill.

If an accused is on the cusp of immediate imprisonment because of alleged offending, but then that person receives a sentencing indication that they will not receive immediate imprisonment if they plead guilty, there is a real risk that a person will not contest a matter for fear of going to prison, even when they have a complete defence or the prosecution witnesses do not seem credible.

6. Case Conference Procedure

Pursuant to summary case conference procedure as expanded upon by the Bill[12], informants can provide an accused person with incomplete "preliminary" briefs of evidence. Before an accused person is entitled to take the matter to contest-mention, or indeed receive a full brief of evidence (including witness statements) the procedure requires that a summary case conference be held between a prosecutor and the accused in order to try to resolve the matter. Accordingly, this will usually be before the complete prosecution case has been presented against an accused.

Liberty submits that there is a real issue as to whether this procedure places, in effect, an unfair burden on the accused and threatens the golden thread of the criminal law that the prosecution should prove every element of an offence beyond reasonable doubt.

If a brief of evidence is to be provided by an informant, it should be complete. Accused persons should not be expected to flag a possible defence at case conference, which can place the informant on notice in order to obtain further evidence to bolster the prosecution case. An accused should be entitled to a full and complete brief of evidence prior to undertaking any negotiations to attempt to resolve the matter.

Further, a criminal lawyer should not be expected to take instructions from his or her client before knowing the full case against that person. Such a situation can lead to ethical issues if the lawyer is in effect is required (for the purpose of the case conference) to ask an accused person about the circumstances of an alleged offence prior to the police providing a full and complete brief of evidence so the lawyer can make a full assessment of the strength of the case against his or her client. Additionally, such a procedure may result in delay and loss of evidence if informants do not obtain statements and other evidence until a later stage in the criminal justice process.

In addition, Liberty understands that at present Victoria Legal Aid ("VLA") does not provide funding for members of Counsel to conduct summary case conferences, so in-house VLA lawyers are expected to carry the burden of this procedure in addition to their other extensive responsibilities. This is symptomatic of a crisis in VLA funding.

It is submitted that the Bill should be amended so that an accused person is entitled to require an informant to provide a full brief of evidence prior to any case conference. It is submitted that such conferences should be voluntary, and should not be a necessary step before matters are adjourned to contest mention, where a Magistrate may provide direction to assist resolve the matter.

[12] Cl.58.

7. Court of Appeal Leave to Appeal Procedure

Pursuant to s.280 of the *Criminal Procedure Act* 2009, the Victorian Parliament has enacted a more stringent test with regard to applications to the Court of Appeal for leave to appeal against sentence. For applicants, it is now no longer sufficient to have an arguable case that there was a sentencing error, and an application may be refused if there is no reasonable prospect that the Court of Appeal would impose a less severe sentence than the sentence first imposed.

The Bill would extend that test to all matters pending before the Court of Appeal, even in circumstances where the applications had been filed prior to when the *Criminal Procedure Act* 2009 had come into effect.[13] Liberty is concerned about the retrospective operation of that reform, and that applicants may be refused leave to appeal because of a new standard for leave that was not in effect at the time the application was filed. There is a real issue about the fairness of this approach. While a person can appeal against a refusal by the Court to grant leave in any event, Liberty understands that Victoria Legal Aid normally does not fund appeals against sentence unless leave is granted.

It is further submitted that the Court of Appeal has a vital role in correcting sentencing error. Even in circumstances where a different sentence might not be imposed by the Court of Appeal, Liberty submits that there are cases of judicial error that require appellate scrutiny and should be immediately corrected in order to ensure that such errors do not become entrenched sentencing practices. The jurisdiction of the Court of Appeal, in providing oversight to inferior courts, should not be contingent upon whether a given accused is likely to receive a lesser sentence on appeal. Such an approach only places other accused at higher risk of being subject to erroneous sentencing practices.

8. Aggregate Sentences

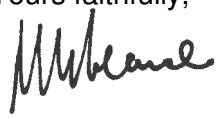
The imposition of aggregate sentences may lead to improper sentencing outcomes.[14] While the imposition of an aggregate sentence may perhaps be an appropriate sentencing option in the Magistrates' Court of Victoria in some cases, in indictable matters it is important that sentences are properly constructed with regard to well-established principles of concurrency and cumulation between counts (including with regard to summary offences heard at the same time as the indictable offences). Aggregate sentences often obscure the sentencing exercise, because it is not revealed how the aggregate figure has been arrived at. Considerations of efficiency should not come at the cost of transparency in criminal sentencing, particularly in intermediate and higher Courts. It is submitted that the Bill be amended so that the only Court that is empowered to impose aggregate sentences is the Magistrates' Court of Victoria.

[13] Cl.76(1).

[14] For the reasons advanced in *DPP v Felton* (2007) 16 VR 214 per Buchanan JA at [2] and Kellam AJA at [46-8].

Please direct any inquiries concerning this submission to Michael Stanton on 9225 7853 or at Michael.stanton@vicbar.com.au.

Yours faithfully,



Michael Pearce SC
President

cc. Chair, Scrutiny of Acts and Regulations Committee

The Hon Robert Clark, MLA, Shadow Attorney-General