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23 February 2016

**LIBERTY VICTORIA SUBMISSION ON THE
*CRIMES LEGISLATION AMENDMENT BILL 2016***

1. Liberty Victoria is opposed to the mandatory minimum sentence provisions in the *Sentencing Act 1991* (Vic), and accordingly is also opposed to the expansion of those provisions to alleged offences against custodial officers through the *Crimes Legislation Amendment Bill 2016* (Vic) ("the Bill").
2. In November 2015, the Attorney-General ("AG") gave a reference to the Sentencing Advisory Council ("SAC") to advise on "Sentencing Guidance". The SAC has been specifically asked to advise the AG on the most effective legislative mechanism to provide sentencing guidance to the courts in a way that promotes consistency of approach in sentencing offenders and promotes public confidence in the criminal justice system.
3. In light of the AG reference, this Bill is premature. Why would the AG pre-empt the report and recommendations of the SAC given it will be giving careful consideration to different sentencing mechanisms, including mandatory minimum sentences?
4. Liberty Victoria's submission to the SAC can be found here:
<https://libertyvictoria.org.au/LVSubmission-Sentencing-Guidance-Reference20160208>
5. There is no evidence relied upon by the Government that establishes that current sentencing practices for this type of offending are inadequate. Accordingly this Bill seems more about being seen to act (especially in light of the alleged Metropolitan Remand Centre riots) than actually addressing a problem with sentencing standards. The practical

experience of those who work in the criminal law is that assaults against police, emergency workers and custodial officers are taken incredibly seriously by the Courts.

6. A prescribed mandatory minimum non-parole period necessarily results in a mandatory head sentence of imprisonment (which must be longer than the non-parole period by at least 6 months pursuant to s.11(3) of the *Sentencing Act 1991*). While there are exceptions for “special reasons”, most judicial officers who apply the law properly through a rules-based methodology regard such provisions as a significant fetter.
7. Further, the Bill would expand the current category of persons who, pursuant to s.10AA(4) of the *Sentencing Act 1991*, must receive at least 6 months’ imprisonment for the offence of intentionally or recklessly causing injury (unless there are special reasons).
8. Section 15 of the *Sentencing Act 1991* defines “injury” as a physical injury, or harm to mental health. “Physical injury” includes unconsciousness, disfigurement, substantial pain, infection with a disease and an impairment of bodily function.
9. Accordingly, this Bill would see a person who intentionally or recklessly causes substantial pain to a custodial officer (but no permanent injury) being imprisoned for a minimum 6 month period unless they can establish a “special reason”.
10. Custodial officers should be safe in their workplaces. Often they will be dealing with people who are at their most vulnerable, dealing with drug addiction and withdrawal, mental health issues and significant trauma. There will be some categories of assaults against custodial officers for which all the sentencing purposes can be achieved without having to resort to a sentence of imprisonment (which is supposed to be a last resort).
11. The Court of Appeal guideline judgment of *Boulton v The Queen* [2014] VSCA 342 demonstrates just how powerful and flexible a community correction order (“CCO”) can be in practice. Notably, the Court of Appeal held at [131]:

It follows from what we have said that a CCO may be suitable even in cases of relatively serious offences which might previously have attracted a medium term of imprisonment (such as, for example, aggravated burglary, intentionally causing serious injury, some forms of sexual offences involving minors, some kinds of rape and some categories of homicide).

12. It is incongruous for relatively minor recklessly and intentionally causing injury matters to be excluded from that sentencing option, even where the victim is a police officer, emergency worker or a custodial officer.

13. Liberty Victoria opposes any further fettering of judicial discretion in sentencing. For the reasons we mention in our submission to the SAC, this kind of prescriptive model leads to, amongst other things:
 - a. More accused persons taking matters to trial or contested hearing (because of the disincentive to plead guilty caused by the mandatory minimum sentence and/or the risk that a judicial officer will not find "special reasons"). This results in significant public expense and protracted proceedings for complainants and a considerable burden to police informants and witnesses;
 - b. Increased plea bargaining where the key decisions are made by prosecuting authorities as to whether to proceed with such charges, which depends on potentially subjective and variable decision making by members of the executive which are not amendable to judicial review; and
 - c. A model of prescriptive sentencing which will be continually "ratcheted up" over time with longer standard periods of imprisonment, or (as this Bill demonstrates) broader categories of offences. The kind of model is very susceptible to politicised decision making as part of "law and order auction" campaigning.
14. While the AG seems to regard the "special reasons" exception as preserving judicial discretion, this Bill just further entrenches a system where over time the exceptions can be whittled away and the test made more difficult to satisfy.
15. Lastly, the Court of Appeal has the power to give guideline judgments and make statements of sentencing principle that are binding on Victorian courts. Were it necessary, the Crown can always seek guidance from the Court of Appeal with regard to the seriousness of offences against custodial officers, and if current sentencing practices are inadequate it can seek to have them increased.
16. Further, the Crown can (and does) appeal against inadequate sentences imposed in the Magistrates' Court of Victoria and the County Court of Victoria – no reason has been given as to why that is insufficient to ensure that assaults against police and custodial officers result in offenders receiving sentences that give due weight to denunciation and general deterrence.
17. Liberty Victoria is not opposed to the provisions in the Bill relating to the replaying of recorded evidence in sexual offence matters on appeal from the Children's Court to the County Court, noting that an accused person can still seek leave to cross-examine a

complainant if necessary in the interests of justice pursuant to s.385 of the *Criminal Procedure Act 2009* (Vic).

18. If we can provide any further information or assistance, please do not hesitate to contact George Georgiou SC, President of Liberty Victoria, or Michael Stanton, Vice-President of Liberty Victoria.

Yours sincerely

A handwritten signature in black ink, appearing to read 'George A Georgiou', followed by a period.

George A Georgiou SC
President
Liberty Victoria